ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1425 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY et al.,

Respondents.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTIONS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' REPLY BRIEF

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LIST OF ABBREVIATIONS

APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
GHG	Greenhouse Gas(es)
NAAQS	National Ambient Air Quality Standards
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan

SUMMARY OF ARGUMENT

When the U.S. Environmental Protection Agency ("EPA" or "Agency") approved the State of Texas' prevention of significant deterioration ("PSD") state implementation plan ("SIP") in 1992, it interpreted the Clean Air Act ("CAA" or "Act") as allowing states whose SIPs did not include provisions for newly-regulated pollutants to continue issuing PSD permits until completion of a timely SIP revision or conclusion of the statutorily-prescribed opportunity for revision. Pet. Br. 11 (citing Memorandum from Darryl D. Tyler, Director, Control Programs Development Division, to Regional Air Directors 3 (Aug. 5, 1987) ("Tyler Memorandum")), J.A. __. Apart from the rules under review, EPA's practice today is consistent with this interpretation. At the same time that EPA retroactively disapproved Texas' PSD SIP submission for failure to regulate greenhouse gas ("GHG") emissions, the Agency itself issued a PSD permit that omitted GHG limitations. *See* Pet. Br. 11, 46-47, 54. These uncontested facts discredit EPA's claims that its retroactive disapprovals of Texas' PSD SIP submission were necessary to correct an "error" in its 1992 approval decision or to ensure that valid PSD permits could be issued in Texas.

Further, the Court has jurisdiction. Courts routinely decide states' challenges to EPA decisions disapproving their SIP submissions, and EPA cites no contrary authority. Instead, it misreads this Court's recent decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 107, 149 (D.C. Cir. 2012) ("*CRR*"), which expressly stated it was not ruling on the merits of other GHG cases, including these cases. Nor does

EPA's decision to supplant Texas as the sole PSD permitting authority in the State benefit Texas or regulated sources, particularly because EPA's actions effectively ground permitting in the State to a halt.

Moreover, in rushing to impose GHG regulations on Texas, EPA unlawfully used the CAA's error correction provision (§ 110(k)(6)) to "correct" retroactively an 18-year-old SIP approval, and then used that action as grounds to impose a federal implementation plan ("FIP"). Rather than correct the putative error, EPA imposed on Texas and its sources an entirely new regulation that did not exist in 1992: GHG regulation under PSD pursuant to the thresholds and other provisions of EPA's *2010* GHG Tailoring Rule—provisions found nowhere in the CAA or PSD rules as they existed in 1992. EPA's actions thus were unauthorized and unlawful.

Finally, any suggestion that Texas frustrated EPA's attempts to implement the CAA is false. Texas met every deadline EPA set in the implementation process and did nothing more than insist on its procedural rights. EPA may have preferred that Texas rewrite its Constitution to allow for automatic PSD updating or waive its statutory rights to allow for immediate imposition of a FIP, but Texas was within its rights not to do so. Given the Supreme Court's admonition that EPA "has significant latitude as to the manner, timing, [and] content" of its GHG regulations, *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007), EPA, not Texas and regulated parties, must bear the consequences of the Agency's decision to favor *ad hocery* over procedural regularity.

ARGUMENT

A. The Court Has Jurisdiction

1. All Petitioners Have Standing To Challenge The Final Rule And Interim Final Rule

EPA's argument that Petitioners lack standing to challenge the rules under review is meritless. Courts regularly adjudicate states' challenges to EPA's actions disapproving their SIP submissions. Moreover, EPA's decision to issue and defend the lawfulness of a PSD permit that did not include GHG emission limitations discredits the Agency's argument that a favorable decision would not have a substantial probability of redressing Petitioners' injuries because no PSD permits that did not include GHG emission limitations could issue. The Court should, therefore, exercise jurisdiction.

Courts regularly adjudicate states' petitions for review challenging EPA actions disapproving, in whole or in part, their SIP submissions. *See, e.g.*, *Texas v. EPA*, No. 10-60614, 2012 WL 3264558 (5th Cir. August 13, 2012).[1] Many concern situations where EPA argued that "a construction moratorium" or "ban" caused by operation of the CAA was at issue. *See, e.g.*, *Arizona v. Thomas*, 829 F.2d 834, 836 (9th Cir. 1987);

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[1] *See also BCCA Appeal Grp. v. EPA*, No. 10-60459, 2012 WL 2299504 (5th Cir. June 15, 2012); *Luminant Generation Co. LLC v. EPA*, 675 F.3d 917 (5th Cir. 2012); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *New Mexico Envtl. Imp. Div. v. Thomas*, 789 F.2d 825 (10th Cir. 1986). Courts of appeal likewise adjudicate state petitioners' challenges to SIP calls, *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), and FIPs, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012).

Michigan v. EPA, 805 F.2d 176, 179 (6th Cir. 1986). Indeed, a state's standing to challenge EPA's decision disapproving its SIP submission is sufficiently uncontroversial that Petitioners are not aware of any decision to the contrary, and EPA has not identified one.

Because EPA's actions usurp Texas' permitting authority, Texas readily satisfies the three elements of Article III standing: injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Texas has "the primary responsibility" for "air pollution control" within its borders. 42 U.S.C. §§ 7401(a)(3), 7407(a). The CAA requires Texas to include the PSD program in its SIP, *see* 42 U.S.C. § 7461, and provides that EPA must approve any submission that is consistent with the Act's minimum requirements, *see* 42 U.S.C. § 7410(k)(3). By disapproving Texas' PSD SIP and supplanting Texas as the sole PSD permitting authority in the State, EPA injured Texas' interests and statutory right in implementing its own air quality program under state law and managing its own air quality resources.[2] *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (finding standing based on a state's quasi-sovereign interests in creating and enforcing its laws and the economic well-being of its citizens).[3] As in other cases where the complainant is the

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[2] Texas issued Petitioner Chase Power a PSD permit fully authorizing construction of its facility during the pendency of the Interim Final Rule and, thus, Chase Power's interests are directly tied to Texas' permitting authority.

[3] *See also Massachusetts*, 549 U.S. 520 (states have a quasi-sovereign interest in managing their air quality resources); *Bowen v. Pub. Agencies Opposed To Social Sec. Entrapment*, 477

object of government action, "there is ordinarily little question…that a judgment preventing…the action will redress it." *Lujan*, 504 U.S. at 561-62. A decision vacating EPA's actions will reinstate Texas as the sole PSD permitting authority in the State, redressing its injuries.[4]

EPA's claim that its actions "benefit[ed] both Texas and Industry Petitioners" because otherwise "GHG-emitting sources in Texas could not obtain valid PSD permits under the State's SIP," EPA Br. 24, is both irrelevant and incredible. It is irrelevant because Texas' interests are those of a sovereign, not of a regulated entity. An EPA action that displaces Texas as the sole permitting authority in its territory inherently injures the State; a decision vacating that disapproval would redress that injury by reinstating Texas as the sole permitting authority. EPA's claim is incredible because in May 2011, EPA itself issued a PSD permit to the Avenal Energy Project that did not include GHG emission limits. *See* Pet. Br. 11, 54; *see also* 76 Fed. Reg.

U.S. 41 (1986) (state's "preservation of its own sovereignty, and a diminishment of that sovereignty by alleged [federal] interference" is cognizable for Article III standing purposes); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., as Circuit Justice) (state irreparably injured when it is prevented from effectuating its statutes); *Alaska v. DOT*, 868 F.2d 441 (D.C. Cir. 1989) (state had standing to challenge DOT rules that infringed on its interests in enforcing state law); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (finding standing where state "alleges that it has suffered an injury in fact because the [federal government's] interpretation of [the statute in question] undermines its ability to enforce its legal code").

[4] Although industry petitioners have standing, that standing need not be independently determined given that Texas has standing. *See Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993).

55,799 (Sept. 9, 2011). EPA has not withdrawn that permit and is defending its lawfulness. *See Sierra Club v. EPA*, No. 11-73342 (9th Cir. filed Nov. 3, 2011). Petitioners' opening brief explained this conflict; EPA chose not to contest it.

Setting aside why EPA would take contrary positions in these cases, the Avenal permit demonstrates there is a "substantial probability" that a favorable decision will redress Petitioners' injuries. *See North Carolina v. EPA*, 531 F.3d 896, 915 (D.C. Cir. 2008). If the Court issues a favorable decision, Texas could issue PSD permits (like the Avenal permit) that have no GHG limits and industry petitioners, including Chase Power, could begin construction in reliance on those permits.

Finally, EPA's reliance on *CRR* is misplaced. *See* EPA Br. 24-27. In relevant part, *CRR* adjudicated a newly-ripe challenge to EPA's 1978-1980 PSD rules, which the Court found interpreted CAA § 165 as requiring PSD to be triggered by any pollutant subject to regulation under the Act, whether or not that pollutant was subject to a NAAQS. *CRR*, 684 F.3d at 129-44. The *CRR* Court affirmed the 1978-1980 Rules.[5] It then held that litigants lacked standing to challenge EPA's Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010), because, in light of its decision affirming the 1978-1980 Rules, excluding GHGs from the PSD program was unavailable relief to redress the petitioners' claimed injuries. *CRR*, 684 F.3d at 144-47. Importantly, however, the *CRR* Court expressly refused "to rule on the merits of" this action and

[5] Petitioners in *CRR* have filed petitions for rehearing *en banc* and the Court has ordered EPA to respond.

Utility Air Regulatory Group v. EPA, No. 11-1037 (D.C. Cir. filed Feb. 11, 2011), which it held "have nothing to do with the rules under review." *CRR*, 684 F.3d at 116-17, 149.

Thus, *CRR* observes the distinction between the PSD program's substantive requirements and its procedural framework for state implementation. In an analogous context, this Court recently explained that "EPA is the first mover in regulating" but that once EPA sets standards requiring provisions to be included in a SIP, "responsibility under the Act shifts from the federal government to the states." *Homer City*, 2012 WL 3570721, *17 (quotation omitted). EPA must respect the SIP-revision process for incorporating newly-regulated pollutants into state PSD programs.

2. Challenges To The Interim Final Rule Are Not Moot

As Petitioners explained, Pet. Br. 50-55, challenges to the Interim Final Rule are not moot because Texas issued several PSD permits, including to Petitioner Chase Power, during its pendency. Additionally, the challenges are justiciable because EPA's action is likely to recur the next time EPA promulgates new CAA requirements or reinterprets the Act. Pet. Br. 55-57.

EPA's rejoinders are meritless.

First, the Agency raises a mootness argument that is identical to its standing argument. EPA Br. 28-29 & n.5. That argument is incorrect for the reasons discussed above.

Second, EPA argues Petitioners' challenges to the Interim Final Rule are moot because EPA never issued any permits under the Interim Final Rule FIP. *Id.* at 28. But Texas' issuance of the Chase Power PSD permit is dispositive of mootness. Under *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011), "the question of the validity of the PSD permits issued under the [allegedly] noncompliant SIP…raise[s] sufficient current controversy to save this litigation from mootness…." EPA did not contest this reading of *Sierra Club*. *See* Pet Br. 51.

Third, EPA's re-promulgation of the Interim Final Rule through notice-and-comment procedures does not moot Petitioners' challenge. *See* EPA Br. 29-30. EPA's primary authority, *NRDC v. NRC*, 680 F.2d 810, 814-15 (D.C. Cir. 1982), considered a situation where the petitioner contested only the "initial adoption of the rule without notice and comment," not the substance of the rule. The Court relied on this fact to distinguish *Dow Chemical Co. v. EPA*, 605 F.2d 673 (3d Cir. 1979), which it tacitly acknowledged presented a live controversy because the petitioner raised a "challenge to the validity of the substance of the rule." *NRDC*, 680 F.2d at 815 n.9. Texas and Chase Power are, of course, challenging the substance of the Interim Final Rule.

Fourth, EPA concedes the Interim Final Rule evades review but argues it is not capable of repetition. *See* EPA Br. 30-31. But EPA's claim that there were "unusual factors that led EPA to issue an interim rule here," id. at 31, is equivalent to the claim that EPA does not expect to act the same way in the future. It is, therefore,

tantamount to a voluntary cessation claim and should not be credited by the Court, given the ongoing controversy over the Chase Power permit. *See Initiative and Referendum Inst. v. USPS*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (mootness in cases of voluntary cessation is inappropriate unless "events have completely or irrevocably eradicated the effects of the alleged violation") (quotations omitted). EPA's alternate claim, that this situation will not recur because there are "several mechanisms besides an automatically updating SIP that would be sufficient to meet the CAA's PSD requirements," EPA Br. 30, conflicts with its argument that "good cause" to evade notice-and-comment requirements exists whenever a PSD SIP does not include a regulated pollutant, *see, e.g.*, *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) (mootness dismissal inappropriate where there is a "clear policy" that might again be applied against plaintiff).

B. Texas' SIP Met All Relevant CAA Requirements

EPA's decision approving Texas' SIP was legally required because Texas' PSD SIP submission met all the relevant criteria established by the CAA and its regulations when EPA approved it in 1992. *See* EPA Br. 34 (explaining that EPA must approve SIP submissions "in light of the CAA requirements that would have been applicable to the SIP *at the time*" of submission). EPA's rejoinder disregards the text of the CAA, its regulations, and its own practice in issuing PSD permits.

First, EPA argues that the Court's 2012 decision in *CRR* demonstrates that EPA's 1992 decision to approve the SIP was erroneous. But as discussed above, *CRR*

holds only that CAA § 165's PSD program must be triggered by any pollutant that is subject to regulation under the Act. *CRR* does not answer the questions of how and when a state must revise a SIP to include newly-regulated pollutants, what emission limits must be included in PSD permits that issue under a SIP that has not yet been revised, or whether EPA erred by approving Texas' PSD SIP submission, which included all pollutants that were subject to regulation at that time. *Cf. United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010) (holding that the CAA permitting provisions are not self-executing).

Moreover, EPA's *CRR* argument misses the point. If any PSD SIP that did not include GHGs was insufficient, then all PSD SIPs must automatically update. But EPA rejected that position as a regulator of permitting authorities by stating that approvable SIPs need not automatically update to include new pollutants, *see* EPA Br. 55, and as a permitting authority by issuing the Avenal permit without GHG emission limitations, *see* 76 Fed. Reg. 55,799. Thus, any alleged deficiency in Texas' PSD SIP submission could not have arisen from the plain language of CAA § 165, as interpreted by *CRR*.

Second, EPA mistakenly asserts the Court should defer to its retroactive reinterpretation of its regulations. *See* EPA Br. 54 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). But deference to an agency's interpretation of its regulations is "unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment," such as "might occur when the

agency's interpretation conflicts with a prior interpretation,…or when it appears that the interpretation is nothing more than a convenient litigating position." *Christopher v. Smithkline Beecham Corp.*, No. 11–204, (U.S. June 18, 2012), slip op. at 10, J.A. __. This is just such a case. EPA's contemporaneous interpretation of its regulations was that states with approved SIPs could continue to issue PSD permits without emission limits for newly regulated pollutants until the time for an orderly SIP revision passed. *See* Tyler Memorandum at 3-4, J.A. __. Petitioners made this point in their opening brief. Pet. Br. 11. EPA did not contest it.

Furthermore, EPA's position is "nothing more than a convenient litigating position." *See Christopher*, slip op. at 10, J.A. __. EPA does not identify any support for its position in the Interim Final Rule, and none of the passages EPA cites from the Final Rule refer to EPA's regulatory provisions for approvable SIPs. *See* EPA Br. 54 (citing 76 Fed. Reg. at 25,183/3, 25,198/1, 26,194/3, J.A. __). Only one passage even identifies a regulation, 76 Fed. Reg. at 25,183/3, J.A. __, but that regulation is a Part 52 provision for areas where EPA—not a state—operates the PSD program. It is inappropriate for the Court to "defer" to a regulatory interpretation where the rules under review do not identify which regulation purportedly is being interpreted.

In its brief, EPA identifies only one regulatory provision, 40 C.F.R. § 51.166(b)(1) (1992)—in a "see also" citation without explanation. EPA Br. 54. But the only arguably-relevant term in 40 C.F.R. § 51.166(b)(1)'s 1992 definition of "major stationary source" was "subject to regulation," which the Final Rule interprets as

beginning "to include GHGs *on January 2, 2011*." 76 Fed. Reg. at 25,182/1-2, J.A. __ (emphasis added). Thus, under EPA's interpretation in the Final Rule, that provision did not authorize disapproval of Texas' PSD SIP submission in 1992.

Third, EPA argues "[t]he law was likewise clear when EPA approved Texas' PSD SIP in 1992 [that] the State's PSD program would need to address any pollutants that became subject to regulation." EPA Br. 54 (citing 76 Fed. Reg. at 25,183 n.11, J.A. __). But EPA's use of the term "became" misrepresents the record. What EPA *actually* stated was that, for approval, Texas' PSD SIP must include "any air pollutant subject to regulation under the Act." 76 Fed. Reg. at 25,183 n.11 (emphasis omitted); *see also id.* at 25,182/2 (interpreting PSD as applying "to any air pollutant *that is* subject to regulation) (emphasis added), J.A. __. It is uncontested that Texas' PSD SIP submission included all such pollutants in 1992. EPA's position in 1992 was that "fundamental" changes, like the inclusion of new pollutants, "would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166, and subsequent SIP revisions." *See* 54 Fed. Reg. 52,823, 52,824/3 (Dec. 22, 1989), J.A. __.

Fourth, EPA's allegation that Texas' PSD SIP submission was inadequate because it did not detail "the method and timing for applying PSD to such pollutants" is meritless. EPA Br. 55. EPA cites *no authority whatsoever* in the CAA's text or in the Agency's regulations that requires a state to commit to subsequent SIP revisions to include newly-regulated pollutants. Absent such authority, EPA cannot disapprove a

SIP submission on that basis. *See* CAA § 110(k)(3). EPA mentions that Texas' PSD SIP provides for annual review to ensure compliance with pollution increments, *see* EPA Br. 55, but EPA's regulations expressly required approvable SIPs to periodically be reviewed and revised for this purpose. *See* 40 C.F.R. § 51.166(a)(3) (1992). EPA did not include a parallel requirement for newly-regulated PSD pollutants, and the Agency cannot create one retroactively and pretend it was there all along.

Fifth, EPA's claim that Texas' PSD SIP submission failed to include "assurances that the State…will have adequate personnel, funding, and authority…to carry out such implementation plan" contradicts the plain language of CAA § 110(a)(2)(E)(i). *See* EPA Br. 56. That provision requires only that a state provide assurances to carry out "such implementation plan," and EPA does not dispute that Texas' PSD SIP included assurances to carry out its SIP. EPA's real complaint is that Texas' SIP does not include assurances relating to revisions or pollutants that were *not included* in the plan but that, twenty years later, EPA argues should have been.

C. EPA's Reliance On CAA § 110(k)(6) Is Unlawful

In response to Petitioners' argument that EPA's interpretation of CAA § 110(k)(6) would "transform [§] 110(k)(6) into a source of unlimited revisory power that could be used to override any SIP any time EPA purports to find fault with it or shifts its policy direction," Pet. Br. 20, EPA responds that it "has recognized limiting principles in the language of [§] 7410(k)(6) and has abided by those principles here," EPA Br. 34. The two limiting principles, both of which Petitioners agree constrain

EPA's authority under § 110(k)(6), are (1) that authority must be exercised "in light of the CAA requirements that would have been applicable to the SIP *at the time*, as opposed to a wholly new CAA requirement," *id.* at 34-35, and (2) that EPA's "power to revise is limited to altering its own 'action' in approving or disapproving a SIP" and does not extend to cases "where the problem at hand can be fixed only through revision of the substance of a SIP," *id.* at 35, 44. Assuming *arguendo* that Texas' 1992 SIP submission were deficient, *but see supra* Part B; Pet. Br. 41-44, EPA violated both principles when it partially disapproved Texas' 1992 PSD program and, based on the retroactive disapproval, promulgated a FIP imposing a federal PSD program for GHG emissions based on EPA's 2010 Tailoring Rule.

1. EPA's Actions Did Not Correct The Purported Error

EPA claims it should have partially disapproved the Texas PSD SIP in 1992 because that SIP failed either to: (a) "automatically update" to incorporate newly-regulated pollutants; or (b) provide "assurances" that Texas would revise the SIP to incorporate newly-regulated pollutants. EPA Br. 16-17 (quotation omitted). EPA corrected this "error" by partially disapproving the 1992 SIP, proposing a GHG FIP, and promulgating that FIP.

EPA's action violated the Agency's own "limiting principles" and must be set aside. Because, as EPA says, § 110(k)(6) correction is unavailable "where the problem…can be fixed only through [SIP] revision" and because curing the "automatic updating" problem required SIP revision, EPA lacked authority to correct

its 1992 approval by transforming it into a partial disapproval. Without a lawful SIP disapproval, EPA lacked authority to propose and promulgate a FIP. *See* 42 U.S.C. § 7602(y) (authorizing a FIP only "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]"); *Homer City*, 2012 WL 3570721, at *46.

Even if the 1992 approval could have been "corrected" under § 110(k)(6), EPA would be authorized only to cure the deficiency that existed *in 1992* and not any deficiency arising from EPA's promulgation of the Tailoring Rule 18 years later. Assuming *arguendo* that "automatic updating" for "regulated" pollutants was a PSD SIP requirement in 1992, PSD-program "regulated pollutants," as understood in 1992, were only those pollutants that would trigger PSD permitting requirements when emitted in amounts exceeding the statutory 100- or 250-ton-per-year major-source thresholds (or, for source modifications, even lower "significance" thresholds). Because GHGs, unlike every other PSD "regulated" pollutant, are not a PSD "regulated" pollutant if emitted below carbon-dioxide-equivalent levels of 100,000 or 75,000 tons per year, *see* 75 Fed. Reg. at 31,606 (EPA's Tailoring Rule amendments to PSD requirements for SIPs), an "automatic updating" provision in a 1992 SIP would simply not cover GHGs or any other pollutant that was given a different meaning than past PSD-regulated pollutants. In other words, no automatic-updating deficiency in a SIP in 1992 could create a "gap," 42 U.S.C § 7602(y), that would be so large that

it could be "fill[ed]" with wholly unique and distinctive permitting requirements created in 2010 regulatory amendments.[6]

EPA is not empowered to "correct" something by publishing for the first time a novel regulation 18 years after the purported error was committed.[7] EPA's actions challenged here far exceeded the limited scope of authority granted by § 110(k)(6). As EPA recognizes, corrections (1) may not impose "a wholly new CAA requirement," EPA Br. 35, and (2) cannot be used "where the problem…can be fixed only through revision of the substance of a SIP," *id.* at 44. EPA's actions here violated both principles. In sum, neither § 110(k)(6) nor any other CAA provision authorizes EPA

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[6] Had Texas' 1992 SIP been written to update automatically to include new pollutants, then *under EPA's interpretation* the SIP still would have been deficient as to GHGs. On the same day EPA published the Interim Final Rule, it published a "Narrowing Rule" that revised its previous approvals of 24 states' PSD SIPs that *did* include automatic-updating language. 75 Fed. Reg. 82,536 (Dec. 30, 2010). That EPA rule employed § 110(k)(6) to "narrow" EPA's previous approvals of those SIPs to reflect the 2010 Tailoring Rule's unique thresholds for GHGs confirms that it was *the 2010 Tailoring Rule*—not, as EPA would have it here, any purported SIP deficiency existing in 1992—that drove EPA's SIP actions with respect to PSD requirements for GHGs.

[7] EPA's attempt, EPA Br. 45-51, to counter Petitioners' argument regarding *Concerned Citizens of Bridesburg v.* EPA, 836 F.2d 777 (3d Cir. 1987), fails. In enacting § 110(k)(6) in 1990, Congress did nothing more than make explicit on the face of the CAA what the Third Circuit held in *Bridesburg*: that EPA possessed inherent, but necessarily limited, "error correction" authority under the CAA. Pet. Br. 29. EPA acknowledges that § 110(k)(6) was enacted "against the backdrop of the *Bridesburg* case," 76 Fed. Reg. at 25,180/2-3, and claims that the Third Circuit's "reading of the CAA has been *unequivocally superseded* by the enactment of § 7410(k)(6) in 1990." EPA Br. 47 (emphasis added). But Congress expressly indicated its intent to overrule judicial precedent in the CAA Amendments. *See, e.g.*, S. Rep. 101-228, at 372 (1989) (amendments to CAA § 307 expressly "overrule[] *West Penn Power Co. v. EPA*, 860 F.2d 581 (3d Cir. 1988)"), J.A. __.

to retroactively disapprove the 1992 SIP and promulgate a FIP implementing a 2010 PSD requirement.

2. EPA Was Required To Give Texas Time To Revise Its SIP Before EPA Could Even Arguably Promulgate The FIP

Because § 110(k)(6) did not authorize EPA to override Texas' PSD SIP, EPA had to allow Texas three years to revise its SIP as provided in 40 C.F.R. § 51.166(a)(6).[8] EPA's failure to do so contradicts the Court's admonition that CAA § 110 "prohibits EPA from using the SIP process to force States to adopt specific control measures." *Homer City*, 2012 WL 3570721, at *42.

In its GHG SIP call, EPA gave Texas and 12 other states up to one year to submit PSD SIP revisions to address GHGs. 75 Fed. Reg. 77,698, 77,711 (Dec. 13, 2010). But EPA superseded the SIP call for Texas just days later and "invoked its [asserted] authority" under § 110(k)(6) to determine that "its 1992 approval of Texas' PSD SIP 'was in error.'" EPA Br. 15 (citing 75 Fed. Reg. 82,430 (Dec. 30, 2010)). Thus, EPA originally told Texas it had until December 1, 2011, to revise its SIP, but reversed course days later and imposed a FIP immediately, without first giving Texas any opportunity to revise its SIP and without providing notice and opportunity for comment.

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[8] Several Petitioners separately challenged the GHG SIP call to explain why EPA was required to act pursuant to CAA § 110(a) and 40 C.F.R. § 51.166(a)(6)(vi), rather than through CAA § 110(k)(5). *See UARG*, No. 11-1037 (and consolidated cases). Nothing herein should be construed as suggesting that EPA was authorized to require a SIP revision earlier than June 3, 2013.

Notably, none of the other SIP call states were subjected to § 110(k)(6) "corrections" and accompanying FIPs, even though under EPA's theory their SIPs were also approved in error. This is because those states acquiesced to EPA's urging to "choose" SIP-submittal dates in the near future (in most cases only nine days after the SIP call's publication) and forfeit their right under CAA § 110(k)(5) to a "reasonable deadline (not to exceed 18 months…)" to submit a SIP revision. *See* EPA Br. 12. Texas refused to forfeit that right, however, so EPA "invoked its [purported] authority under CAA § 110(k)(6)" "[t]o provide the necessary supplement to Texas' permitting authority by…January 2, 2011," when the PSD program would first apply to GHGs. *Id* at 15. EPA's actions were not motivated by a decades-old "error," but by a policy goal of imposing its new GHG regulations on Texas as quickly as possible.

EPA's actions imposing the FIP on Texas are inconsistent with the fundamental principle underlying CAA § 110: that states must have the first opportunity to implement new SIP requirements like the Tailoring Rule. EPA argues that the time limitations applicable to SIP approval and disapproval do not apply to § 110(k)(6) actions. *See* EPA Br. 43. But "the text and context of the statute, and the precedents of the Supreme Court and this Court, establish the States' first-implementer role under Section 110." *Homer City*, 2012 WL 3570721, *21. Therefore, CAA § 110 "prohibits EPA from using the SIP process to force States to adopt specific control measures," *id.* at *16, and requires states to be afforded "a reasonable

time to implement…requirement[s]…within the State." *Id.* at *17. Failing to provide an adequate opportunity for a state to revise its SIP before imposing a FIP—as EPA did here—"is incompatible with the basic text and structure of the CAA." *Id.* at *20.

EPA's failure to provide Texas with an adequate opportunity to revise its SIP violates the principle, enforced by this Court, of state primacy in implementing CAA requirements pursuant to § 110 of the Act.

3. States Generally Must Be Afforded Adequate Opportunity To Correct Deficiencies In Partially Disapproved SIPs

EPA incorrectly asserts that it had no choice but to issue the FIP once it partially disapproved Texas' SIP. *See* EPA Br. 42. When EPA *partially* disapproves a SIP, whether under §§ 110(k)(6) or 110(k)(3), the CAA contemplates that the state will be afforded the opportunity to correct the deficiency before EPA may promulgate a FIP. EPA's failure to provide Texas with that opportunity further underscores why the Agency's reliance on CAA § 110(k)(6) was unlawful.

Under EPA's interpretation of § 110(k)(6), it was allowed to retroactively convert its 1992 decision approving Texas' PSD SIP submission into a partial disapproval. But any decision partially approving or disapproving a submission is governed by CAA § 110(k)(3), which contemplates that the state must be afforded the opportunity to have "the entire plan revision" approved through correction of the partial disapproval:

> If a portion of the plan revision meets all the applicable requirements of this [Act], the [EPA] Administrator *may approve the plan revision* in part and

> disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this [Act] until the Administrator approves *the entire plan revision* as complying with the applicable requirements of this [Act].

(Emphases added.) In turn, § 110(c)(1) precludes a FIP when "the state corrects the deficiency…." *See Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 675 (9th Cir. 2012) (a "FIP can be avoided if an existing plan is in place that meets the Act's requirements because § 110(c)(1) has a grace period in which states can bring their plans into compliance before the FIP is enacted.").

Thus, partial disapproval may become full disapproval if the SIP's defect remains uncorrected, but the state must be given an opportunity to cure identified defects in its partially disapproved SIP *before* EPA may promulgate a FIP. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984) (holding that EPA cannot partially approve a SIP and then put in place a substitute regulation, in the form of a FIP, without giving "the state a chance to submit a substitute regulation" and noting that "[i]n partially approving the state's proposed [SIP] the EPA did not give the state half a loaf; it converted the proposal into something completely unpalatable to the state"); *see also Luminant Generation Co. LLC v. EPA*, No. 10-60934, 2012 WL 3065315, *16 (5th Cir. July 30, 2012) ("EPA may approve or disapprove a provision in a SIP, but may not require a state to add any provision to its proposal.") (citations omitted).

If the state fails to submit a SIP revision to correct the deficiency that gave rise to EPA's partial disapproval, then EPA must fully disapprove that SIP revision—and

only then may it promulgate a FIP. In other words, EPA has authority to impose a FIP immediately only after it has fully disapproved a SIP revision. Indeed, in promulgating its FIP here, EPA itself noted that § 110(c)(1) provides the SIP-correction opportunity: "If EPA disapproves a required SIP or SIP revision, then EPA must promulgate a FIP at any time within 2 years after the disapproval, *unless the state corrects the deficiency within that period of time by submitting a SIP revision* that EPA approves." 76 Fed. Reg. at 25,179/3 (emphasis added), J.A. __.

If EPA does proceed with a FIP after it has fully disapproved a SIP, the only role of the FIP is to "fill…[the] gap"—*i.e.*, "correct…the inadequacy"—in the SIP that was the cause of EPA's SIP disapproval. 42 U.S.C. § 7602(y). It is critically important that EPA follow the statutory procedures here, especially given EPA's discretion to approve or disapprove SIPs and SIP revisions. *See Bethlehem Steel*, 742 F.2d at 1036 ("the broad deference that reviewing courts must give the EPA's application of [§ 110] criteria…, makes it particularly important that the agency follow the correct statutory procedures."). For instance, the Fifth Circuit recently found that EPA action partially disapproving a SIP on the grounds that it failed to satisfy CAA § 110(*l*)[9] (prohibiting approval of a SIP revision "if the revision would interfere with any applicable requirement" of the Act) is proper only where "EPA's administrative

[9] EPA claims § 110(*l*) supports its action. *See* EPA Br. 45. But EPA never cited § 110(*l*) as support in the Interim Final or Final Rules, and its brief cites no record support for this *post hoc* rationalization, which should be disregarded. *See, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

decision-making process has been consistently formal and deliberative prior to and during its promulgation of final rules under the Act," including "providing consistent policy guidance to assist states in formulating their SIPs," "reiterat[ing] its policies and reasoning during the notice-and-comment rulemaking periods, in its proposed SIP approvals and disapprovals, and in its final approvals and disapprovals." *Luminant*, 2012 WL 3065315 at *8, 12. EPA's process here lacked that essential consistent formal and deliberative quality, and thus merits no deference. *See infra* at 25-26, Pet. Br. 14-17, 43-49.

4. The Plain Language Of CAA § 110(k)(6) Precludes EPA's Actions

For reasons explained in Petitioners' Opening Brief, EPA's arguments that the plain language of § 110(k)(6) authorized its actions are meritless. Pet. Br. 35-39. As explained below, EPA's constructions of the terms "revise" and "as appropriate" in § 110(k)(6) are particularly untenable.

a. To "Revise" Means To "Correct Errors"

EPA argues that the term "revise" should be construed to have its "ordinary meaning: to 'change' or 'modify.'" EPA Br. 38 (quoting *Webster's II New Riverside University Dictionary* 1006 (1988)). EPA ignores, however, other common definitions for "revise," including to "rewrite," "make amendments to," and "correct." *Webster's Third New International Dictionary of the English Language Unabridged* 1944 (1993); William C. Barton, *Legal Thesaurus: Regular Edition* 454 (1981). These other definitions are more apt, given the title of § 110(k)(6): "Corrections." In fact, § 110(k)(6) is

commonly known as the "error correction provision," indicating the title has infused the provision with a certain understanding that the narrow set of dictionary meanings EPA selects do not reflect. *See* EPA Br. 38. EPA even calls the two rules at issue here the "Error Correction Rules." *See, e.g.*, EPA Br. 15, 19, 24; 75 Fed. Reg. 82,430 (Dec. 30, 2010); 76 Fed. Reg. at 25,178, J.A. __.

b. EPA May Correct An Error Only "As Appropriate"

Congress' use of the term "as appropriate" in § 110(k)(6) indicates Congress meant for EPA to tailor the remedy to the error: the Administrator "may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate…." The Agency's action did not correct the purported error but instead incorporated brand new regulations into the SIP that did not exist in 1992. EPA's corrections of the purported 1992 error are akin to "try[ing] to kill a fly with a sledgehammer," are inappropriate, and exceed its authority under § 110(k)(6). *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 831 (7th Cir. 1993).

D. EPA Waived Any Claim To Inherent Authority

Petitioners' opening brief explained that EPA lacks inherent authority to retroactively disapprove Texas' PSD SIP submission. *See* Pet. Br. 39-41. EPA addresses this issue only in a conclusory footnote. *See* EPA Br. 53 n.11. But under *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50 n.37 (D.C. Cir. 2011), an appellee waives an argument by raising it only in a conclusory footnote. Thus, EPA waived any claim to inherent authority.

E. EPA Lacked Good Cause To Disregard Notice-And-Comment Rulemaking Requirements

EPA disregarded notice-and-comment rulemaking requirements on the pretext that doing so was in the public interest or that legislative rulemaking was impracticable. *See* Pet. Br. 46-49. In fact, EPA knew about the purported deficiencies in Texas' PSD SIP submission for nearly twenty years before rescinding Texas' permitting authority on the last day the *Federal Register* was published in 2010. Pet Br. 45-49. EPA's response fails to excuse the Agency's purposeful evasion of Administrative Procedure Act- ("APA") and CAA-required rulemaking procedures.

First, EPA's claim that notice-and-comment rulemaking was impracticable because it "had less than 90 days to address this problem due to circumstances outside its control" is false. EPA Br. 59. The administrative record conclusively demonstrates that EPA knew that any newly-regulated pollutants could only be included in Texas' SIP through a SIP revision, because this situation occurred in 1989 when PM_{10} was regulated. Pet Br. 10-11. EPA approved of this method of including new pollutants into the PSD program before it later chose to disregard procedural regularities in GHG implementation. No number of revisionist claims that EPA "had no basis to assume that invocation of its error correction authority would be 'appropriate' until…October 4, 2010" can reasonably contest these facts. EPA Br. 59.

Second, EPA argues that good cause existed to act without notice-and-comment rulemaking in "the public interest" because failing to act "would profoundly

harm the State's economy and population by potentially delaying" PSD permit issuance. EPA Br. 58. Given EPA's uncontested historic interpretation allowing states with approved SIPs to issue permits without emission limits for newly-regulated pollutants, *see* Tyler Memorandum at 3-4, J.A. __, and EPA's decision to issue the Avenal permit without GHG emission limitations *but not to issue PSD permits in Texas at all*, EPA's proffered rationale could not be more arbitrary. Furthermore, assuming—incorrectly—that there would be a lapse in PSD permitting authority in Texas, the lapse would have been only for the amount of time it took EPA to properly promulgate a rule. This could have been done expeditiously (and given the limited nature of this rule in a very short period of time, only slightly longer than the 30-day notice period required).

EPA's "good cause" exception argument faces another insurmountable obstacle: the exception does not apply to emergency situations that EPA itself caused through its lack of diligence. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (good cause exception is inapplicable "when an alleged 'emergency' arises" from "an agency's own delay").[10] Even under EPA's view of events, which contradicts the administrative record, Pet Br. 46-49, EPA refused to even attempt to solicit public comment and

[10] *See also United States v. Webster*, 750 F.2d 307, 327 (5th Cir.1984), *cert. den'd*, 471 U.S. 1106 (1985) (police officers cannot manufacture exigent circumstances to justify a warrantless search under the Fourth Amendment).

comply with the CAA and APA to remedy the purported "emergency" that would occur in three months. Instead, the Assistant Administrator represented to the Court that EPA could not impose a FIP on Texas until December 2011 "at the earliest." Att. 1 to Decl. of Regina McCarthy (Oct. 28, 2010), J.A. __. But three weeks later, EPA submitted a rule to OMB explaining that it planned "additional actions to ensure that GHG sources in Texas can be issued permits as of January 2, 2011." EPA-HQ-OAR-2010-0107-0127, J.A. __. EPA then laid in wait until December 30, 2010, when it published the Interim Final Rule.

While EPA may not have any obligation to "disclose…internal, deliberative discussions," EPA Br. 58 n.13, "[i]f the admonition to construe the good-cause exception of [5 U.S.C.] § 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where" reconciliation of EPA's action and the statute is possible, *New Jersey v. EPA*, 626 F.2d at 1047. In light of these facts, the Court should vacate EPA's attempt to dispense with legislative rulemaking procedures.

CONCLUSION

For the foregoing reasons, the Court should vacate the Interim Final Rule and Final Rule.

Dated: September 21, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Petitioners' Reply Brief contains 6,910 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limited set by the Court. I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Dated: September 21, 2012

/s/ Mark W. DeLaquil
Mark W. DeLaquil

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioners' Reply Brief was filed electronically with the Court by using the CM/ECF system on the 21st day of September 2012. Participants in the case who are registered CM/ECF users will be served through the CM/ECF system. Two (2) copies of the foregoing Petitioners' Reply Brief will also be served on all parties by U.S. mail, first-class, postage-prepaid.

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