

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1244
(and consolidated cases)

STATE OF NORTH CAROLINA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Action of
The United States Environmental Protection Agency

JOINT BRIEF OF INDUSTRY INTERVENOR-RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to Circuit Rule 28(a)(1) on behalf of intervenor-respondents Utility Air Regulatory Group, Alabama Power Company, Midwest Generation, LLC, and National Mining Association.

A. Parties and *Amici*¹

The requirement in Circuit Rule 28(a)(1)(A) to identify parties, intervenors, and *amici* who appeared before the district court is inapplicable because this matter involves direct review in this Court of agency action. All parties, intervenors, and *amici* appearing in this Court are listed in the Joint Brief of SO₂ Petitioners.

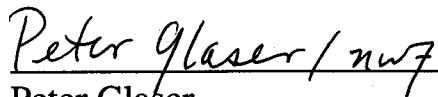
¹ Pursuant to Circuit Rules 26.1 and 28(a)(1)(A), this certificate is being filed together with a disclosure statement for each of the intervenor-respondents on whose behalf the certificate is filed.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for Respondent Environmental Protection Agency.

C. Related Cases

The case on review has not previously been before this Court or any other court. Certain issues in this matter are related to issues raised in *Sierra Club v. EPA*, No. 06-1221 and consolidated case, pending in this Court.

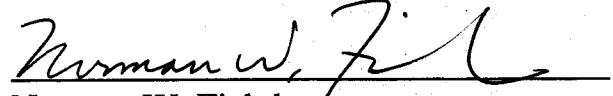


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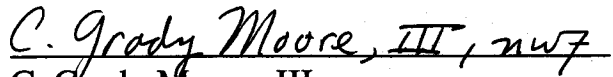
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-1, counsel for Alabama Power Company, certifies that Alabama Power Company is a wholly-owned subsidiary of The Southern Company, a publicly-held company which owns all of the common stock of Alabama Power Company. No other publicly-held company has a 10% or greater ownership interest in Alabama Power Company. Alabama Power Company is an electric utility that owns and operates power plants and other facilities that generate, transmit, and distribute electricity.

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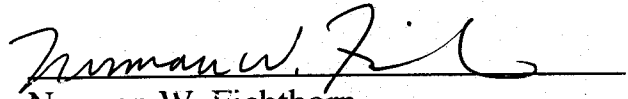
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**RULE 26.1 DISCLOSURE STATEMENT
OF UTILITY AIR REGULATORY GROUP**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 28(a)(1)(A), Intervenor-Respondent Utility Air Regulatory Group (“UARG”) files the following statement:

UARG is a not-for-profit association of individual electric generating companies and national trade associations that participate collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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A handwritten signature in black ink, appearing to read "Norman W. Fichthorn", written over a horizontal line.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

GLOSSARY v

INTRODUCTION 1

PART I. NORTH CAROLINA ISSUES..... 1

 STATEMENT OF ISSUES 1

 SUMMARY OF ARGUMENT..... 3

 ARGUMENT..... 4

 I. EPA Properly Declined To Expand CAIR Further To
 Address Asserted Interference with North Carolina's
 Maintenance of the Ozone NAAQS..... 4

 II. EPA Properly Determined Not To Apply CAIR for
 Downwind Areas Projected To Attain by the Time
 Highly Cost-Effective Controls Will Become Available..... 7

 III. Given the "Significant Contribution" Test, North
 Carolina's Challenges to CAIR's Compliance Schedule,
 Compliance Supplement Pool, and Interstate Trading Are
 Meritless 10

 CONCLUSION..... 13

PART II. FUEL FACTOR ISSUES 13

 STATEMENT OF ISSUES 13

 SUMMARY OF ARGUMENT..... 13

 ARGUMENT..... 14

 I. EPA Did Not Act Arbitrarily, Capriciously or in Excess of
 Statutory Authority by Utilizing Fuel Factors 14

A. Without Fuel Factors, CAIR Would Create an Economic Windfall for Some States at the Expense of Others..... 14

B. EPA's Reliance on Equitable Considerations Was Reasonable and Consistent with the Statute 18

C. EPA's Choice of Allocation Methodology Was Within Its Discretion..... 22

D. The Use of Fuel Factors Does Not Affect Air Quality..... 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Adelphia Commc'ns Corp. v. FCC</i> , 88 F.3d 1250 (D.C. Cir. 1996).....	19
<i>American Trucking Ass'ns, Inc. v. EPA</i> , 283 F.3d 355 (D.C. Cir. 2002)	23
<i>City of Chicago v. Fed. Power Comm'n</i> , 385 F.2d 629 (D.C. Cir. 1967)	22
<i>Greenbaum v. EPA</i> , 370 F.3d 527 (6 th Cir. 2004).....	6
* <i>Michigan v. EPA</i> , 213 F.3d 663 (D.C. Cir. 2000).....	4, 8, 14, 18, 19, 22
<i>Niagara Mohawk Power Corp. v. Fed. Power Comm'n</i> , 379 F.2d 153 (D.C. Cir. 1967)	19
<u>STATUTES:</u>	
Clean Air Act ("CAA"), 42 U.S.C. §§7401, <i>et seq.</i> (2000 & Supp. IV 2004)	
CAA §107(d)(3)(E)(iv), 42 U.S.C. §7407(d)(3)(E)(iv).....	5, 6
CAA §110(a)(1), 42 U.S.C. §7410(a)(1).....	5
CAA §110(a)(2)(D), 42 U.S.C. §7410(a)(2)(D).....	18
*CAA §110(a)(2)(D)(i), 42 U.S.C. §7410(a)(2)(D)(i) ...	3, 4, 5, 6, 8, 9, 10, 11
CAA §175A, 42 U.S.C. §7505a.....	5, 6
<u>FEDERAL REGISTER:</u>	
63 Fed. Reg. 57,356 (Oct. 27, 1998).....	5, 14
63 Fed. Reg. 57,378.....	8

* Authorities upon which we chiefly rely are marked with asterisks.

63 Fed. Reg. 57,379.....	5
63 Fed. Reg. 57,404.....	20
63 Fed. Reg. 57,410.....	15
69 Fed. Reg. 4,566 (Jan. 30, 2004)	22
69 Fed. Reg. 4,612	22
70 Fed. Reg. 25,162 (May 12, 2005)	1
70 Fed. Reg. 25,172-73	14
70 Fed. Reg. 25,174.....	12
70 Fed. Reg. 25,175.....	8, 10, 12, 21
70 Fed. Reg. 25,178.....	11
70 Fed. Reg. 25,193.....	5, 6
70 Fed. Reg. 25,196.....	25
70 Fed. Reg. 25,221-22	12
70 Fed. Reg. 25,221-25	11
70 Fed. Reg. 25,241.....	8, 9
70 Fed. Reg. 72,277 (Dec. 2, 2005)	15, 16
70 Fed. Reg. 72,278.....	15, 16, 17, 18
71 Fed. Reg. 25,315 (Apr. 28, 2006)	23, 24
71 Fed. Reg. 25,328 (Apr. 28, 2006)	1
71 Fed. Reg. 25,336.....	12
71 Fed. Reg. 25,337.....	4, 7

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CSP	Compliance Supplement Pool
EPA	Environmental Protection Agency
JA	Joint Appendix
NAAQS	National ambient air quality standards
NOPR	Notice of proposed rulemaking
NO _x	Nitrogen oxides
PM _{2.5}	Fine particulate matter (particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers)
ppb	Parts per billion
SIP	State implementation plan
SO ₂	Sulfur dioxide
TSD	Technical Support Document
UARG	Utility Air Regulatory Group

INTRODUCTION

Intervenor-respondents Utility Air Regulatory Group (“UARG”), Midwest Generation, LLC, National Mining Association, and Alabama Power Company submit this brief addressing issues in: (1) Petitioner North Carolina’s brief; and (2) Petitioners Entergy Corporation and FPL Group’s brief concerning fuel factors. This brief is in two parts, reflecting the distinct nature of these two sets of issues.¹

This brief adopts the jurisdictional statement, statement of the case, and standard-of-review statement in respondent Environmental Protection Agency’s brief (“EPA Br.”). Pertinent statutes and regulations are set forth in addenda to petitioners’ briefs.

I. NORTH CAROLINA ISSUES²

STATEMENT OF ISSUES

1. Whether it was unlawful for EPA to determine in the Clean Air Interstate Rule (“CAIR”)³ that no state’s emissions interfere with North Carolina’s maintenance of the ozone NAAQS, where (a) EPA reasonably determined that

¹ UARG and Alabama Power Company take no position on the fuel factor issues.

² Without separately addressing issues 14-15 listed by EPA (concerning North Carolina’s challenge to the “contribution” threshold for the particulate matter national ambient air quality standards (“NAAQS”), *see* EPA Br. 4-5), this brief adopts EPA’s standing and merits arguments on those issues, *id.* at 37, 169-73.

³ 70 Fed. Reg. 25,162 (May 12, 2005); 71 Fed. Reg. 25,328 (Apr. 28, 2006).

interference with maintenance occurs only where one state's emissions will cause another state to revert to nonattainment and (b) EPA's modeling showed no area in North Carolina reverting to nonattainment.

2. Whether it was unlawful for EPA to decide not to impose CAIR's emission reduction requirements for significant contribution to nonattainment in areas it projected would reach attainment—in the absence of CAIR—by the timeframe when emission controls to address that significant contribution would become available.

3. Whether it was unlawful for EPA to establish 2009 and 2010 as first-phase compliance dates for highly cost-effective controls under CAIR where EPA determined that those were the earliest dates controls could feasibly be implemented and where the timeframe for feasible implementation is an essential element of EPA's significant-contribution finding.

4. Whether it was unlawful for EPA to create a limited Compliance Supplement Pool ("CSP") of 2009 nitrogen oxide ("NO_x") emission allowances as an integral part of EPA's determination that it was feasible, and therefore consistent with its significant-contribution finding, to accelerate CAIR's NO_x compliance deadline from 2010 to 2009.

5. Whether it was unlawful for EPA to allow interstate allowance trading throughout the CAIR region where such trading was an integral component of

EPA's determination of highly cost-effective controls and, thus, its significant-contribution finding.⁴

SUMMARY OF ARGUMENT

In CAIR, EPA properly gave effect to the “interference with maintenance” clause of §110(a)(2)(D)(i) of the Clean Air Act (“CAA” or “Act”), 42 U.S.C. §7410(a)(2)(D)(i), by determining that a state’s emissions interfere with NAAQS maintenance in another state if those emissions would cause the other state to revert to nonattainment. Because the rulemaking record did not indicate North Carolina would revert to ozone nonattainment—but rather projected it would attain by 2010 and easily maintain attainment by 2015—EPA properly found no basis for further expanding CAIR’s ozone-control requirements to address interference with maintenance in North Carolina.

EPA’s finding of significant contribution to nonattainment only where current nonattainment was projected to continue to 2010 was reasonable and consistent with the Act because that is when the highly cost-effective controls that are an inextricable part of EPA’s significant-contribution determination would be available.

North Carolina’s arguments provide no basis for overturning EPA’s decision to set a 2015 deadline for CAIR’s full (Phase 2) emission reduction requirements;

⁴ Issues 3-5 are addressed collectively in Argument III of this Part of the brief.

to provide a limited CSP to permit acceleration of Phase 1 NO_x compliance from 2010 to 2009; or to authorize CAIR-region-wide trading. Each of these features of CAIR is tied to the significant-contribution determination that forms CAIR's legal foundation and that is based on the EPA interpretation of §110(a)(2)(D)(i) previously affirmed by this Court. Removing or changing any of these elements of CAIR would require reexamining and revising CAIR's emission limitations.

ARGUMENT

I. EPA Properly Declined To Expand CAIR Further To Address Asserted Interference with North Carolina's Maintenance of the Ozone NAAQS.

Section 110(a)(2)(D)(i) of the CAA requires state implementation plans ("SIPs") under the Act to prohibit a state's emissions to the extent they will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to" NAAQS. 42 U.S.C. §7410(a)(2)(D)(i). EPA understood the "interfere-with-maintenance" clause to address downwind nonattainment areas that will reach attainment but would later "return[] to nonattainment" absent additional upwind-state controls. 71 Fed. Reg. 25,337 n.11. As EPA observed in its NO_x SIP Call rulemaking under §110(a)(2)(D)(i),⁵ the Act's "maintenance" language refers to the fact that "[o]nce a nonattainment area has attained the NAAQS, it is required to maintain [attainment of] that standard."

⁵ See *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (generally affirming NO_x SIP Call rule).

63 Fed. Reg. 57,356, 57,379/3 (Oct. 27, 1998) (citing CAA §§107(d)(3)(E)(iv), 110(a)(1), 42 U.S.C. §§7407(d)(3)(E)(iv), 7410(a)(1)). For example, to have EPA redesignate a nonattainment area to attainment (thereby making it a “maintenance” area), a state must submit under CAA §175A a “maintenance” plan designed to prevent the area’s reversion to nonattainment. 42 U.S.C. §§7407(d)(3)(E)(iv), 7505a; 63 Fed. Reg. 57,379/3 (citing §175A).

North Carolina claims it was unlawful for EPA not to expand CAIR’s ozone-related controls to address purported interference with its maintenance of the ozone NAAQS. North Carolina’s argument fails because, as discussed below, (1) it was reasonable and consistent with the Act to apply the maintenance clause to address only upwind-state emissions that would cause a downwind-state nonattainment area that is modeled as reaching attainment to revert subsequently to nonattainment, and (2) EPA’s analysis disclosed no such area in North Carolina.

EPA permissibly interpreted §110(a)(2)(D)(i)’s maintenance clause as requiring upwind-state emission controls only where, absent such controls, an area projected to reach attainment would later “fall back into nonattainment.” 70 Fed. Reg. 25,193 n.45 (citing NO_x SIP Call rule preamble); *see* Corrected Response to Significant Public Comments on the Proposed Clean Air Interstate Rule, EPA-HQ-OAR-2003-0053-2172, at 63-64 (April 2005), JA3040-41. EPA accordingly rejected any construction of the maintenance clause “as providing broad authority

to regulate an upwind state just because that state's emissions have some impact on downwind receptors." *Id.* at 63, JA3040; 70 Fed. Reg. 25,193/1 (rejecting notion that §110(a)(2)(D)(i) "requires an upwind state to eliminate all emissions that may have some impact" on downwind areas that must maintain attainment status).

EPA's interpretation comports with the Act's treatment of maintenance areas. As noted above, CAA provisions (§§107(d)(3)(E)(iv) and 175A) that address "maintenance" do so in the context of nonattainment areas that reach NAAQS attainment and thereafter must avoid reverting to nonattainment. *See Greenbaum v. EPA*, 370 F.3d 527, 531, 535 (6th Cir. 2004). By construing §110(a)(2)(D)(i)'s maintenance clause to apply where needed to prevent upwind-state emissions from causing "rever[sion] to nonattainment," 70 Fed. Reg. 25,193/1, EPA acted consistently with the CAA provisions that establish requirements for NAAQS maintenance.

Examining the record information, EPA found that, with the CAIR ozone controls as promulgated—and even without CAIR at all (*i.e.*, in EPA's "base case")—North Carolina's current ozone nonattainment counties would attain by 2010 and maintain attainment in 2015:

[I]n 2015, these counties (Mecklenburg, Rowan, and Wake) are projected to be attaining by comfortable margins. CAIR Modeling TSD App. E Table E-1 [JA2101] (projected levels of 75.0 [parts per billion (ppb)], 74.1 ppb, and 70.8 ppb respectively in the 2015 CAIR case, which are all below the levels (3-5 ppb [below the 85.0-ppb nonattainment threshold]) EPA considered to raise maintenance

concerns in...CAIR. ...Projected levels in the 2015 base case, *i.e.*, without CAIR and without further local controls, are likewise comfortably below the levels which could raise [a] likely possibility of returning to nonattainment.^{6]}

71 Fed. Reg. 25,337 n.11. North Carolina does not dispute the factual basis for EPA's attainment projections.

Thus, EPA's modeling showed that even without CAIR at all, no threat existed to maintenance in North Carolina. And CAIR resolved any conceivable remaining basis for concern: With CAIR *as promulgated*, North Carolina's projected ozone levels would remain safely below the point at which "maintenance" might be "interfere[d] with."

In short, EPA had no obligation (and no basis) to expand CAIR's scope further in order to address any interference with maintenance in North Carolina.

II. EPA Properly Determined Not To Apply CAIR for Downwind Areas Projected To Attain by the Time Highly Cost-Effective Controls Will Become Available.

North Carolina claims EPA must expand CAIR to impose upwind-state controls to address significant contribution to "current" nonattainment in areas that

⁶ The counties' 2015 base-case levels are 76.6, 75.7, and 71.5 ppb, respectively, JA2101, all far under the 85.0-ppb nonattainment threshold *and* "comfortably below" EPA's 3-to-5-ppb margin beneath that threshold, 71 Fed. Reg. 25,337 n.11.

EPA projects will reach attainment by the time those controls would become available.⁷ North Carolina's argument is meritless.

As EPA explains, *see* EPA Br. 146-50, its determination of significant contribution to nonattainment only with respect to those areas that are both currently reporting nonattainment air quality and projected to remain in nonattainment at the future time when feasible upwind-state controls will be available, *see, e.g.*, 70 Fed. Reg. 25,241/1-3, follows the NO_x SIP Call approach upheld by this Court, *see Michigan*, 213 F.3d at 674-80. *Michigan* affirmed, as consistent with the Act, EPA's determination under §110(a)(2)(D)(i) that "after reduction of all [of the upwind state's emissions] that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.'" *Id.* at 677; 63 Fed. Reg. 57,378/1 ("the amount of...emissions...that can be eliminated through application of highly cost-effective control[s]" is the "significant contribution" amount). Likewise, EPA based CAIR's control requirements on its determination—unchallenged by North Carolina—that the "significant contribution" provision requires "emissions reductions in amounts that would result from application of highly cost-effective controls." 70 Fed. Reg. 25,175/2.

⁷ Again, North Carolina does not contest EPA's attainment projections.

It follows from this judicially affirmed construction of §110(a)(2)(D)(i) that the “significantly contributing” amount of emissions can be determined only with reference to a given time in the future. *See also* EPA Br. 149 (North Carolina “ignore[s] the future tense aspect of the word ‘will,’” in §110(a)(2)(D)(i)’s phrase “will contribute significantly...”). This principle is illustrated by its negative: If EPA were to determine *today* whether and to what extent significant contribution exists *today*, it would have to find that no such contribution exists because it is wholly infeasible—and thus plainly not “cost-effective” (let alone “highly cost-effective”)—for sources to meet a requirement to install controls instantaneously. Determinations of “significant contribution” are meaningful only with reference to some future date that affords a period in which to *achieve* “highly cost-effective” compliance. Thus, the emissions “contribution” that is “significant” is that amount of emissions that can be reduced in a highly cost-effective way between the time the significant-contribution regulation takes effect and the regulation’s subsequent emission-control compliance date.

Consequently, North Carolina’s call for emission controls to address “current” significant contribution to “current” nonattainment is nonsensical.⁸ Given the nature of the significant-contribution test, there can be no *current*

⁸ Especially so given EPA’s use of *past* data (from 2001-2003, “the most recent period of available ambient [air quality] data”) to define “current” nonattainment. 70 Fed. Reg. 25,241/3.

significant contribution because control requirements imposed today cannot be achieved today, and certainly cannot be achieved today in a highly cost-effective way. Moreover, as EPA notes, North Carolina's argument would produce the "bizarre" result of basing control requirements on a coupling of "model[ed]... *future* pollutant patterns" with nonattainment that exists currently but will no longer exist in the future period that is modeled. EPA Br. 149 (emphasis added).

Accordingly, there is no basis for North Carolina's argument that control requirements are compelled to address significant contribution to nonattainment irrespective of projections that nonattainment would no longer exist at the time those requirements would have to be met.

III. Given the "Significant Contribution" Test, North Carolina's Challenges to CAIR's Compliance Schedule, Compliance Supplement Pool, and Interstate Trading Are Meritless.

As discussed in Argument II *supra*, a determination of what degree of emission control is "highly cost-effective" is intrinsic to §110(a)(2)(D)(i) significant-contribution findings. *See* 70 Fed. Reg. 25,175/2 ("feasibility issues" intrinsic to "determining the appropriate level of controls"). In making that determination, EPA must conclude that the controls it would impose to eliminate the significant contribution can be implemented in a highly cost-effective way by a given future date. If it is infeasible to implement the controls by the date selected,

those requirements are *a fortiori* not highly cost-effective and, thus, unauthorized by §110(a)(2)(D)(i).

North Carolina claims EPA must accelerate the full complement of CAIR's emission reduction requirements. But it presents no record information refuting EPA's fundamental determination that the full reductions cannot feasibly be implemented sooner than CAIR's 2015 compliance date. *See* 70 Fed. Reg. 25,221/1-25,225/1 (describing reasons for EPA's determination, given record information, that accelerating compliance would be infeasible). As the record shows, EPA's feasibility-and-timing analysis was part and parcel of its determination of what control requirements are highly cost-effective and therefore authorized under the Act to eliminate significant contribution. *See, e.g., id.* at 25,178/1 (the significant-contribution test "incorporates feasibility considerations in determining the implementation period for the upwind emissions controls"; "the pace of reductions...[is]...determined by the time within which they may feasibly be achieved"). Accelerating the 2015 date, whether to try to match certain NAAQS attainment dates or for other reasons, therefore would necessitate "a new determination of the level and timing of required emission reductions," EPA Br.

151; the sooner the compliance deadline, the fewer the emission reductions that could be judged “highly cost-effective,” *see id.* at 155.⁹

North Carolina’s challenge to the CSP and its ill-defined objections to CAIR’s interstate trading¹⁰ fail for similar reasons. The CSP, representing less than one-seventh of one year’s annual CAIR NO_x allowances, was an integral element in EPA’s determination that it was feasible (and highly cost-effective) to advance its proposed 2010 NO_x compliance date by one year. *See* 70 Fed. Reg. 25,221/3-25,222/2. Thus, vacating the CSP, as North Carolina requests, would require revisiting and, most likely, scaling back CAIR’s “significant contribution” requirements. *See* EPA Br. 151. Likewise, CAIR’s interstate-trading feature is inextricably tied to the significant contribution determination on which the entire rule rests; its elimination or modification would compel reexamination and revision of CAIR’s emission-reduction requirements to keep them highly cost-effective. *See, e.g.*, 71 Fed. Reg. 25,336/2 (“availability of trading...[is] part of the basis for EPA’s findings that reductions are highly cost effective, and hence are an element of the finding that emissions contribute significantly to nonattainment”).

⁹ No basis exists to suggest that EPA based CAIR solely on cost or feasibility. *See Amici States’ Br.* 4, 15-16. As in the NO_x SIP Call rule, EPA used air-quality data to determine the states subject to control requirements. *See, e.g.*, 70 Fed. Reg. 25,174/2-25,175/2.

¹⁰ North Carolina (at 33-34) disavows any argument that “trading is *per se* unlawful” but urges remand for adoption of unspecified measures to avoid “more than *de minimis* budget overages.”

CONCLUSION

For the foregoing reasons, the Court should deny (or, regarding the contribution-threshold issue, dismiss for lack of standing) North Carolina's petition for review.

II. FUEL FACTOR ISSUES

STATEMENT OF ISSUES

Did EPA act arbitrarily and capriciously or in excess of statutory authority by allocating nitrogen oxide ("NO_x") budgets to prevent Louisiana, Florida and other similarly situated states from obtaining an economic windfall?

SUMMARY OF ARGUMENT

EPA's use of fuel factors as part of its NO_x budget allocation methodology was well within its discretion. The Fuel Factor Petitioners' ("Petitioners") preferred budget allocation methodology—which does not use fuel factors—results in an economic windfall of potentially hundreds of millions of dollars per year for certain states at the expense of others, with no air quality gain. EPA properly determined that such a windfall was inequitable and incompatible with a program designed to cost-effectively reduce upwind states' "significant contribution" to downwind nonattainment.

EPA's consideration of regional equity in designing a cost-effective CAIR program is consistent both with this Court's decision in *Michigan* in the NO_x SIP Call case and general principles of administrative law. EPA's decision to use fuel factors also reflects a methodological determination that should be upheld because it is reasonable and supported by the record. Finally, Petitioners failed to show any detrimental air quality effect from the use of fuel factors; there is none.

ARGUMENT

I. EPA Did Not Act Arbitrarily, Capriciously or in Excess of Statutory Authority by Utilizing Fuel Factors.

A. Without Fuel Factors, CAIR Would Create an Economic Windfall for Some States at the Expense of Others.

In allocating NO_x budgets among CAIR states, EPA followed the same general approach it used in the NO_x SIP Call,¹¹ as approved by this Court in *Michigan*. Having identified through air quality modeling those states that make a "significant contribution" to downwind nonattainment, EPA determined that this contribution could be eliminated through the regional installation of "highly cost-effective" NO_x controls. EPA's allocation of NO_x budgets and its NO_x cap-and-trade program were designed to achieve that objective.¹²

¹¹ 63 Fed. Reg. 57,356 (Oct. 27, 1998).

¹² 70 Fed. Reg. at 25,172-73.

In CAIR, EPA modified the budget allocation methodology used in the NO_x SIP Call by using fuel factors, which forms the basis of Petitioners' challenge. In the NO_x SIP Call, EPA apportioned state budgets by each state's share of total regional heat-input into affected electric generating units.¹³ In CAIR, EPA determined that this approach produced an economic windfall for states that rely primarily on natural gas for electric generation, and whose generators will not be required by CAIR to make significant NO_x reductions. Under the cap-and-trade system, generators will make NO_x reductions where it is most cost-effective—predominately at coal rather than gas units.¹⁴ Despite the modest emission reductions CAIR imposes on the gas states, the straight heat-input approach allocates a substantial number of excess credits to the gas states that their generators can sell.

The straight heat-input approach further leaves states that rely primarily on coal for electric generation without sufficient credits to operate their own generation, even after these states make the significant CAIR required NO_x reductions.¹⁵ Thus, the coal states would be forced to purchase potentially

¹³ 63 Fed. Reg. at 57,410/3.

¹⁴ 70 Fed. Reg. at 72,277 & Table 1.

¹⁵ *Id.* at 72,277-78, Tables 2-3.

hundreds of millions of dollars of credits from the gas states annually—creating a large transfer of wealth without air quality justification.¹⁶

Fuel factors mitigate this inequity. The fuel factor approach “generally provides additional allowances to States with large amounts of coal-fired units that are making the investments in emission controls measures and technologies. Conversely the simple heat input approach provides more allowances to States with larger amounts of gas-fired units that are not making reductions.”¹⁷

The fuel factor approach still leaves the gas states in an economically advantageous position vis-à-vis coal states. While fuel factors reduce allowances to gas states, gas units still get the allowances they need to operate *without installing control equipment*, and they generally will receive NO_x allowances exceeding their projected emissions.¹⁸

Conversely, using fuel factors, the mostly Midwest coal-fired utilities will still need to purchase allowances even *after installing the pollution controls that*

¹⁶ As shown in the table below, under the straight heat-input methodology, the gas states would have 142,000 excess allowances to sell in 2009 alone. The second quarter 2007 average allowance price for NO_x allowances was almost \$900. *Air Daily*, Argus, July 2, 2007.

¹⁷ 70 Fed. Reg. at 72,277/2.

¹⁸ *Id.* at 72,277-78, Tables 1-3.

*are supposed to meet CAIR requirements.*¹⁹ Thus, even with fuel factors, gas states generally will be net sellers of allowances. Petitioners' advocacy, therefore, is really an attempt to increase the size of the windfall they receive under CAIR. The inequities of Petitioners' preferred approach (at the very least) support EPA's decision to adopt a different approach.

Specific examples demonstrate that EPA's use of fuel factors was not arbitrary and capricious. As EPA notes, using Petitioners' preferred methodology, Florida would have a NO_x budget of 116,000 tons in 2009 despite projected emissions of only 69,000 tons, leaving Florida with a 47,000 ton surplus. Louisiana would have a budget of 50,000 tons but only 35,000 tons of projected emissions. In 2015, Florida would have 36,000 surplus tons; Louisiana 10,000 tons. Under EPA's methodology, both states still end up with a windfall in 2009—only a less substantial one. Florida will still have a projected surplus of 30,000 tons and Louisiana a projected 1,000 ton surplus. In 2015, Florida will still have a projected surplus of 22,000 tons, while Louisiana is projected to exceed its budget by 2,000 tons. The following chart shows the projected 2009 impact (in thousand

¹⁹ *Id.* at 72,278, Table 3.

tons) of fuel factors on the States who receive fewer NO_x allowances as compared to the unadjusted heat-input approach.²⁰

State	Projected 2009 emissions	Budget Under Petitioners' Preferred Methodology	Budget Under EPA's Methodology	Surplus Under Petitioners' Preferred Methodology	Surplus Under EPA's Methodology
LA	35	50	36	15	1
NY	36	61	46	25	10
TX	166	231	181	65	15
MS	31	21	18	(10)	(13)
FL	69	116	99	47	30

B. EPA's Reliance on Equitable Considerations Was Reasonable and Consistent with the Statute.

Petitioners insist EPA may only consider air quality factors in allocating NO_x budgets.²¹ But EPA's use of equitable considerations was appropriate and fits comfortably within the cost-benefit analysis that the Court endorsed under CAA §110(a)(2)(D) in *Michigan*. *Michigan* determined that the word "significant" in the phrase "significant contribution" expressed Congress' intent that EPA balance

²⁰ Derived from Table 3, *id.*

²¹ Pet'rs Brief 22.

costs and benefits in determining required state controls, and that EPA may consider “costs” beyond simple dollar per ton control costs, including “non-health tradeoffs.”²² The Court’s discussion is framed in traditional cost-benefit terms, where the benefits of the regulation are weighed against the societal costs of achieving those benefits.²³ The equitable considerations underlying the fuel adjustment factors are societal costs that EPA properly weighed in determining how to eliminate states’ “significant contributions” to downwind nonattainment.

EPA was well within its authority in relying on equity as part of its consideration of a cost-effective solution to the regional NO_x transport problem. As this Court has said, where an agency is granted broad discretion by Congress:

The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law.²⁴

Indeed, equitable considerations are unavoidable in controlling interstate pollution. For instance, ozone nonattainment in the District of Columbia could be mitigated by banning automobiles in the city—or by shuttering industrial

²² *Michigan*, 213 F.3d at 679.

²³ *Id.* at 674-79.

²⁴ *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 160 (D.C. Cir. 1967); *Adelphia Commc’ns Corp. v. FCC*, 88 F.3d 1250, 1257 (D.C. Cir. 1996).

operations in upwind states. Short of these extremes, a cost-effective combination of regional and local controls requires consideration of regional equity.

As EPA explained in the NO_x SIP Call, in a section entitled “Equity Considerations,” “further justification for today’s action is provided by overall considerations of fairness related to the control regimes required of the downwind and upwind areas, including the extent of the controls required or implemented by those areas.”²⁵ EPA explained that equity dictated its determination that the installation of “highly cost-effective” controls could eliminate an upwind state’s “significant contribution” to downwind nonattainment. As EPA stated, given the upwind states’ non-trivial contribution to downwind nonattainment, and the downwind states’ long history of increasingly stringent local controls, “[i]n EPA’s judgment, it is fair to require the upwind sources to reduce at least the portion of their emissions for which highly cost-effective controls are available.”²⁶

Similarly in CAIR, EPA explained that “[w]e are striving in this proposal to set up a reasonable balance of regional and local controls *to provide a cost effective and equitable governmental approach* to attainment with the NAAQS for fine

²⁵ 63 Fed. Reg. at 57,404/2.

²⁶ *Id.*

particles and ozone.”²⁷ EPA stated that “*we broadly incorporate the fairness concept and relative-cost-of-control (regional costs compared to local costs) concept that we generally considered in the NO_x SIP Call.*”²⁸

Equity is unavoidable not just in apportioning emission reduction requirements between upwind and downwind areas but within the upwind emitting area itself. Determining that emission reduction requirements should be apportioned within the upwind emitting area based on a cost-effectiveness test begs the question, cost-effective to whom? As EPA explained in CAIR, “in determining the appropriate level of controls, we considered feasibility issues—as we did in the NO_x SIP Call—specifically, ‘the applicability, performance, and reliability of different types of pollution control technologies for different types of sources; * * * and other implementation costs of a regulatory program *for any particular group of sources.*’”²⁹

Indeed, it is strange that Petitioners question the use of equity since the CAIR proposal, which did not include fuel factors, and which Petitioners supported, proposed “an emissions reductions program for SO₂ and NO_x that

²⁷ 70 Fed. Reg. at 25,175/3 (quoting NOPR, emphasis supplied).

²⁸ *Id.* (emphasis supplied).

²⁹ 70 Fed. Reg. at 25,175/2 (quoting NOPR, emphasis supplied).

complements State efforts to attain the PM_{2.5} and ozone [NAAQS] in the most cost-effective, *equitable* and practical manner possible.”³⁰

Of course, an agency may not substitute its own sense of equity for that of Congress and may rely on equitable principles only if Congress has provided it with discretion to do so. That is the case here, where, as the *Michigan* Court found, the phrase “significant contribution” confers extremely broad discretion on EPA in determining a cost-effective solution to regional air pollutant transport.³¹ In exercising this discretion, EPA properly considered equity. As this Court has said, “...when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion.”³² In sum, EPA properly exercised its broad discretion by applying equitable principles to prevent CAIR from being transformed into an economic windfall for selected states.

C. EPA’s Choice of Allocation Methodology Was Within Its Discretion.

Petitioners’ fuel factors challenges are thinly veiled disputes with EPA’s methodology. But that argument carries with it a substantial burden. Between

³⁰ 69 Fed. Reg. 4,566, 4,612/3 (Jan. 30, 2004) (emphasis supplied).

³¹ *Michigan*, 213 F.3d at 680-681.

³² *City of Chicago v. Fed. Power Comm’n*, 385 F.2d 629, 642 (D.C. Cir. 1967).

alternatives the methodology EPA chooses is within its expert discretion. As this Court said in *American Trucking Ass'ns, Inc. v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) (citation omitted), “[o]ur task is the limited one of ascertaining that the choices made by the [EPA] Administrator were reasonable and supported by the record. That the evidence in the record may also support other conclusions, even those that are inconsistent with the Administrator’s, does not prevent us from concluding that [her] decisions were rational and supported by the record.”

In the Notice of Reconsideration, EPA put forth two analyses that it had “conducted to evaluate the potential impact of using the adjusted heat-input method versus the simple heat input method on State annual NO_x budgets: one regionwide analysis and a second State-by-State analysis.”³³ Petitioners then had the opportunity to comment on the proposed alternatives and EPA rationally chose the approach using adjusted heat-input. It may be that Petitioners’ preferred approach is rational, but so is EPA’s. Having considered Petitioners’ position and adequately explained its reasoning, EPA acted within its discretion in choosing to use fuel factors.

³³ 71 Fed. Reg. at 25,315/2.

D. The Use of Fuel Factors Does Not Affect Air Quality.

Petitioners argue that the use of fuel factors is invalid because their use will impair air quality as compared with the straight heat-input methodology.³⁴ This argument is based on a fundamental misunderstanding of CAIR. Petitioners are correct that the use of fuel factors decreases the NO_x budgets of states with primarily gas-fired electric generating resources, and increases the NO_x budgets of states with primarily coal-fired resources, as compared with the straight heat-input methodology. But Petitioners are wrong that the fuel factors will therefore result in larger NO_x emission reductions in the primarily gas-fired states at the periphery of the CAIR region, while allowing fewer NO_x emission reductions in the primarily coal-fired states at the center of the CAIR region.

As EPA showed, because of the cap-and-trade system, the NO_x budgets do not control where emission reductions will occur. NO_x will be reduced where it is most cost-effective to do so, in the primarily coal-fired states in the center of the CAIR region. This result will occur regardless of the NO_x budget allocation methodology.³⁵ Thus, whether Louisiana is allocated five allowances and Ohio 5000 or vice versa, Ohio will make substantially more NO_x reductions than

³⁴ Pet'rs Brief 21-26.

³⁵ 71 Fed. Reg. at 25,315/2-3.

Louisiana, because Ohio has a higher proportion of coal-fired units than Louisiana. That is the whole purpose of the cap-and-trade system. As EPA stated in response to comments, EPA based its conclusion on its experience with the NO_x SIP Call, and on the same modeling underpinning that earlier rule.³⁶

States do retain discretion to require specific NO_x reductions rather than adopt the CAIR cap-and-trade program, but EPA found this to be unlikely given the NO_x SIP Call experience, and the program's much lower compliance cost.³⁷ But even if one or more states opted out of the cap-and-trade program, Petitioners failed to demonstrate that the fuel factors would harm air quality. The only evidence of air quality harm that Petitioners could muster is a citation to EPA air quality modeling in Entergy's comments. As EPA showed, Entergy misunderstood the modeling it cited; that modeling did not show air-quality harm from use of the fuel factors.³⁸

CONCLUSION

For the foregoing reasons, the Court should deny the fuel-factor petitions for review.

³⁶ EPA-HQ-OAR-2003-0053-2359 at 66-67, 77, JA6609-10, 6620-21.

³⁷ 70 Fed. Reg. at 25,196/3.

³⁸ EPA Brief 120-21.

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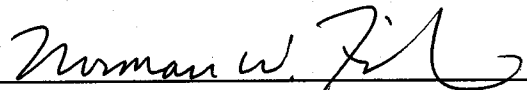
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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), that the foregoing final Joint Brief of Industry Intervenor-Respondents contains 4,999 words, as counted by a word processing system (Microsoft Office Word 2003) that includes headings, footnotes, and quotations in the count, and therefore is within the 5,000-word limit for this brief established by the Court's Order of December 21, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2007, two copies of the foregoing final Joint Brief of Industry Intervenor-Respondents were served by first-class mail, postage prepaid, on each of the following:

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