ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 11-1364

(related to Case Nos. 11-1302, 11-1315. 11-1323,
11-1329, 11-1338, 11-1340, 11-1350, and 11-1357)

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

THE STATE OF LOUISIANA,
THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
AND THE LOUISIANA PUBLIC SERVICE COMMISSION

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
LISA P. JACKSON, ADMINISTRATOR

Respondents.

On Petition for Review from a Final Order of the
United States Environmental Protection Agency

PETITIONERS' MOTION FOR A STAY, OR, IN THE ALTERNATIVE, FOR EXPEDITED REVIEW

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I. INTRODUCTION

On October 5, 2011, the State of Louisiana, through separate filings by the Louisiana Department of Environmental Quality ("LDEQ"), and the Louisiana Public Service Commission ("LPSC") (collectively "State" or "Louisiana"), challenged the United States Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule" ("CSAPR"), published in the Federal Register at 76 Fed. Reg. 48,208 on August 8, 2011.

On October 5, 2011, the LDEQ and LPSC submitted requests for reconsideration and stay of CSAPR with the EPA. Louisiana moves this Court for a stay of CSAPR, or, in the alternative, an expedited review of CSAPR because EPA has failed to act upon the agencies' requests for stay. For the reasons that follow, this motion should be granted.

II. BACKGROUND

The Clean Air Act ("CAA") requires that the EPA promulgate certain primary or secondary national ambient air quality standards ("NAAQS") and ensure that each state meets these NAAQS within a specified time period.[1] Under the CAA, each state must devise a state implementation plan ("SIP") that, *inter*

[1] 42 U.S.C. §§ 7408(a)(l)(A) and (B); 42 U.S.C. § 7410(a)(1).

alia, "prohibit[s] . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . national primary or secondary ambient air quality standard."[2] In order to implement this "good neighbor" provision, the EPA issued the Clean Air Interstate Rule ("CAIR") in 2005 requiring certain states to adopt and submit revisions to their SIPs to eliminate sulfur dioxide ("SO_2") and nitrogen oxides ("NOx") emissions that significantly contributed to non-attainment or interfered with maintenance by a downwind state of the NAAQS.[3] Louisiana timely submitted its SIP, which was, in due course, approved by EPA and implemented by Louisiana.

In July 2008, in *North Carolina v. EPA*,[4] the D.C. Circuit held that the EPA did not have the statutory authority to issue CAIR for multiple reasons, including the fact that the EPA did not attempt to measure and eliminate each state's specific contribution in an "isolated, state-by-state" manner.[5] On rehearing, the Court then remanded the rule to the EPA, without *vacatur*, which allowed the CAIR rules to

[2] 42 U.S.C. § 7410(a)(2)(D)(i)(I).
[3] Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).
[4] 531 F.3d 896, 907-08 (D.C. Cir. 2008).
[5] *Id.* at 907-908.

remain in place until the EPA issued a new rule on cross state pollution to replace CAIR.[6]

On August 2, 2010, the EPA then published the Clean Air Transport Rule ("CATR")[7] as its proposed new rule and proposed to limit SO_2 and NOx emissions from Electric Generation Units ("EGUs") in 32 states based on EPA's finding that the emissions from the EGUs contribute significantly to the non-attainment or interfere with maintenance by a downwind state of at least one of three NAAQS.[8]

On August 8, 2011, the EPA published CSAPR as its final rule, which applies to 27 states in the eastern United States, including Louisiana. CSAPR identified Louisiana as significantly contributing to non-attainment or interfering with the maintenance by Texas of the NAAQS for ozone at five monitors in the Houston, Texas, area based on modeling projections for 2012.[9] In order to remedy this alleged "contribution" to the nonattainment of the Houston area, CSAPR requires Louisiana EGUs to reduce ozone season NOx emissions by a startling 42% from its 2010 actual emissions level.[10] This requirement for Louisiana is the

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[6] *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).
[7] Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210 (Aug. 2, 2010) (hereinafter referred to as "CATR, 75 Fed. Reg. at _____."
[8] CATR, 75 Fed. Reg. at 45,210.
[9] CSAPR, 76 Fed. Reg. at 48,246, Table V.D-8 and Table V.D-9.
[10] *See* Affidavit of Dr. David E. Dismukes, Exhibit A, at ¶ 47 (hereinafter referred to as "Dismukes Affidavit, Ex. A, at ¶___").

largest percent reduction in ozone season NOx budget of any state under CSAPR.[11] Amazingly, CSAPR also implements a Federal Implementation Plan ("FIP") requiring compliance with this unreasonable seasonal NOx emission budget beginning May 1, 2012.[12]

III. THIS COURT SHOULD GRANT A STAY PENDING REVIEW.

This Court considers four factors when determining whether sufficient grounds exist to warrant a stay pending judicial review: (1) the likelihood that the moving party will prevail on the merits; (2) the probability of irreparable injury to the moving party absent relief; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest.[13] All four factors favor granting Louisiana's motion for a stay pending judicial review, or, in the alternative, expedited review of CSAPR.

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[11] *Id.*

[12] CSAPR, 76 Fed. Reg. at 48,211. On October 6, 2011, the EPA announced proposed revisions to CSAPR that will revise, *inter alia*, the specific emissions budget for Louisiana and amend the effective date of the penalty assurance provisions. http://www.epa.gov/crossstaterule/pdfs/NPRMNoticeDisclaimer.pdf. EPA now admits, less than 90 days before the effective date, that CSAPR's modeling has "errors." Petitioners submit those admitted errors are not the only ones which must be addressed. Unless EPA proposes to correct all errors raised by Petitioners, including their objection to inclusion in CSAPR, all of Petitioners' objections remain before the Court and support the requested stay.

[13] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

A. There is Strong Likelihood that Louisiana Will Prevail on the Merits.

The CAA provides this Court with jurisdiction to review CSAPR and to reverse any agency action found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . or in excess of statutory jurisdiction, authority, or limitations . . . or without observance of procedure required by law.[14] For the reasons that follow, there is a substantial likelihood that Louisiana will prevail on the merits in proving that CSAPR is unlawful.

1. CSAPR is an *ultra vires* agency action.

The CAA provides a clear definition of the primary role of states in regulating pollutants.[15] Congress has clearly recognized that states are in a superior position compared to the EPA to make a determination of the method and process to be used within their borders to meet the applicable standards.[16]

According to the procedures set forth in the CAA, the states are required to submit to the EPA a SIP for the "implementation, maintenance and enforcement" of the standards for each air quality region, and the EPA is required to determine whether each SIP will adequately meet the standards.[17] Once this determination

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[14] 42 U.S.C. § 7607(d)(9).
[15] 42 U.S.C. § 7401(a)(3).
[16] *See, e.g., Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86-87, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Union Elec. Co. v. EPA*, 427 U.S. 246, 269, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976).
[17] 42 U.S.C. § 7410(a)(1).

has been made, the EPA is permitted to promulgate a FIP **only** if (1) a state has failed to make a required submission or the Administrator finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria prescribed by the Administrator, or (2) the Administrator disapproves of a SIP in whole or in part.[18]

Nevertheless, CSAPR gives no opportunity for the states to implement state-specific plans prior to the effective date of the FIP, January 1, 2012.[19] Rather, CSAPR allows a state to provide notice of its intent to develop a SIP but that SIP will only be effective, if approved by the EPA, beginning in 2013.[20] This provision of CSAPR is contrary to the CAA.

By issuing CSAPR and its FIP, the EPA has usurped the authority granted to the states in the CAA to implement an emission reduction plan. Petitioners support and incorporate by reference the argument and authorities of EME Homer City Generation, L.P. on the invalidity of the EPA's attempt to usurp the rights of the states, including Louisiana, under the CAA to determine the manner in which to meet the otherwise valid emission reduction requirements set by the EPA.[21]

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[18] 42 U.S.C. § 7410(c)(1).
[19] CSAPR, 76 Fed. Reg. at 48,329.
[20] *Id.*

[21] *See* "Petitioner's Motion for Stay, Or, In the Alternative, Expedited Review" filed August 25, 2011 (Doc. No. 1325939), pp. 9-15, EME Homer City Generation, L.P. v. EPA, Case No. 11-1302, United States Court of Appeals, D.C. Circuit.

2. EPA exceeded its authority under CAA by including Louisiana in CSAPR.

The CAA requires that upwind states follow a "good neighbor" standard and prevent pollution produced in the upwind state from causing negatively affecting attainment in a downwind state.[22] However, such upwind states are only required to reduce their actual, specific contribution on the downwind states rather than share the burden of compliance with other states that also impact the downwind state. Clearly, *North Carolina* stands for the proposition that the EPA must base its regulatory action on actual cause and effect data for the affected states and may not rely on broad assumptions or generalities. Such cause and effect data for Louisiana is wholly lacking.

In CSAPR, the EPA "found" that Louisiana and nine other states "significantly contributed" to the projected non-attainment of the 8-hour ozone NAAQS in the Houston, Texas area.[23] Further, the EPA found that Louisiana and five other states were deemed to "interfere with maintenance" by Texas of the 8-hour ozone NAAQS in the Houston area.[24] As a result of these conclusions, Louisiana EGUs are required under CSAPR's FIP to reduce ozone season NOx

[22] 42 U.S.C. § 7410(a)(2)(D)(i)(I).
[23] CSAPR, 76 Fed. Reg. at 48,246, Table V.D-8.
[24] CSAPR, 76 Fed. Reg. at 48,246, Table V.D-9.

statewide by approximately 42% from the actual 2010 emissions beginning with May 1, 2012.[25]

Factual data implies that Louisiana's inclusion in CSAPR is misguided. While Louisiana cannot know how accurate data and assumptions will affect EPA's modeling and subsequent findings, we do know that Louisiana has already achieved total NOx emissions reductions that are greater than CSAPR's remedy totals.[26]

As the Louisiana agency charged with responsibility for air quality within the state, the LDEQ was intimately involved in the development and implementation of Louisiana's EPA-approved SIP under CAIR. Pursuant to the SIP, LDEQ received emission data from the sources regarding Louisiana's ozone season NOx emissions from 2005 through the current time. The declaration of Sanford L. Phillips, LDEQ Assistant Secretary for the Office of Environmental Services shows that Louisiana reduced its NOx emissions from 227,757 tons in 2005 to 170,224 tons in 2010.[27] Yet, EPA disregarded actual 2010 emissions data, and relied instead upon projections of 2005 data to project emissions for 2010 and beyond.[28] Relying on these inaccurate projections, the EPA then set Louisiana's compliance levels. It is reasonable to conclude that outdated data produced

[25] *See* Dismukes Affidavit, Ex. A, at ¶ 47.
[26] Declaration of Sanford L. Phillips, Exhibit B, at ¶¶ 11-13.
[27] *Id.* at ¶¶ 10-11.
[28] CSAPR, 76 Fed. Reg. at 48,225.

inaccurate projections, resulting in unsupportable compliance determinations. The fact is that Louisiana's actual 2010 Louisiana NOx emissions are *less than* the CSAPR emissions compliance targets for 2012 and beyond.[29] Stated differently, had EPA used the actual 2010 emissions from Louisiana sources, EPA may have found no linkage to non-attainment of the NAAQS standards at the Texas monitors and would not, indeed could not, have included Louisiana in CSAPR.[30]

3. CSAPR is an invalid agency action because it was issued without the required notice and comment period.

The EPA released CATR as the revised interstate air transport rule on August 2, 2010, in response to the remand of CAIR by the D.C. Circuit. CATR set a Louisiana total annual NOx allowance budget of some 21,220 tons.[31] When CSAPR was promulgated, however, the EPA had made dramatic changes in both the distribution of allowances between EGUs and the total NOx allowance budget for Louisiana.[32] Louisiana had no reason to believe that EPA would so dramatically change the allocation of allowances between EGUs and the proposed

[29] Declaration of Sanford L. Phillips, Exhibit B, at ¶¶ 10-13.

[30] Refusal to use actual 2010 emissions data ignores Louisiana's regulatory mandate that installed air pollution control facilities must be diligently used and maintained. La. Admin. Code Tit. 33, Part III, § 905. This is a clear example of its arbitrary approach in CSAPR.

[31] CATR, 75 Fed. Reg. at 45,296, Table IV.F-3; *see also* 75 Fed. Reg. at 45,312-13.

[32] CSAPR, 76 Fed. Reg. at 48,211.

total NOx budget for Louisiana and could not have foreseen the dramatic change in methodology and results between the CATR and CSAPR.

The notice requirements for agency rulemaking ". . . are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[33] Thus, discrepancies between proposed rules and final rules are carefully scrutinized to ensure that the notice and procedural requirements of the CAA are not circumvented by an agency action, although "logical outgrowths" are permitted.[34] A rule is deemed a logical outgrowth "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[35]

The changes contained in CSAPR could not have been anticipated and the differences from CATR are much more than mere discrepancies and are certainly not "logical outgrowths" of the proposed rule. Louisiana did not receive notice of

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[33] *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *International Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C. Cir. 2005) (internal citations omitted)).

[34] *Environmental Integrity Project*, 425 F.3d at 996 (citing *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991)).

[35] *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (internal citations omitted).

the provisions discussed below until the final rule was issued, and after the period for public comment was closed.[36] As a result, it was impossible for Louisiana to comment on the specific provisions discussed herein that were proposed and simultaneously established for the first time in CSAPR. Consequently, CSAPR must be stayed for failure of the EPA to allow for review and comment of the rule.[37]

4. CSAPR is arbitrary and capricious because the underlying data and assumptions are false, which renders the entire rule fatally flawed.

In addition to the other grounds for invalidity of CSAPR discussed above, there are three other fatal defects in the rule that cannot survive scrutiny, namely:

a. The EPA model assumes unconstrained transmission into and within Louisiana, ignores Louisiana specific transmission constraints, and includes incorrect data and false and unsupported assumptions for Louisiana EGUs.

b. The EPA model ignores the reliability requirements on Louisiana utilities that require operation of older EGUs used to ensure system reliability.

c. CSAPR's compliance timeline is unreasonable and unachievable.

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[36] The requirements under CSAPR were even acknowledged by both the EPA and the Office of Management and Budgeting as fundamentally different from those contained in CATR. CSAPR, 76 Fed. Reg. at 48,216; and Summary of Working Comments on Draft Language under EO 12866 Interagency Review, Document EPAHQ-OAR-2009-0491-4133 at 11 (posted July 11, 2011).

[37] *International Union, United Mine Workers of America*, 407 F.3d at 1259-60; *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000); *Environmental Integrity Project*, 425 F.3d at 996.

Each of these defects will be addressed separately below.

a. The EPA model assumes unconstrained transmission into and within Louisiana, ignores Louisiana specific transmission constraints, and includes incorrect data and false and unsupported assumptions for Louisiana EGUs.

The CSAPR emissions budget for Louisiana is based upon modeling assumptions that fail to capture the reality of significant transmission constraints throughout Louisiana, especially in South Louisiana, and include false and unsupported assumptions regarding Louisiana EGUs. These modeling assumptions are flatly incorrect and have no basis in reality. First, significant areas of Louisiana are severely transmission-constrained, forcing utilities, during periods of peak electricity demand, to run older, less efficient EGUs as the only means of supplying electricity to both businesses and the citizens living or working in those areas.[38] The assumptions used by the EPA to develop the baseline level of emissions from Louisiana EGUs did not take these critical reliability-related transmission and generation factors into account.[39] Based on unjustified assumptions, and without consideration of the specific characteristics of Louisiana,[40] the EPA concluded that Louisiana could achieve the required amount

[38] Dismukes Affidavit, Ex. A, at § III, ¶ 70.
[39] Dismukes Affidavit, Ex. A, at §§ III and IV, ¶ 70.
[40] For example, CSAPR ignores the impacts of certain power generators in the state that, by federal mandate, have the right to sell power into the grid and the corresponding requirement on host utilities to purchase such power. *See* Dismukes Affidavit, Ex. A, ¶¶ 37-40.

of generation to meet peak electricity demand in the state by importing power from other areas of the country, adding more efficient generation, or installing controls to existing generation.[41]

Further, the EPA assumes that Louisiana can meet its generation requirements by building several new natural gas-fired EGUs over the next several years without providing any information on where those units will be built, who will build those units, what the costs will be and whether such units can be designed, engineered, permitted and constructed within the estimated CSAPR timeline.[42] These assumptions,[43] though fundamental to CSAPR, are unsupported in the record and factually unrealistic. There is virtually no hard data in the underlying assumptions of CSAPR pertaining to the actual planned construction and operation of such units.[44] In short, EPA's new unit assumptions have no basis in fact whatsoever and are *per se* arbitrary.

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[41] *See* Dismukes Affidavit, Ex. A, at §§ III and IV, ¶ 70.
[42] Dismukes Affidavit, Ex. A, at ¶¶ 25-29, 70.
[43] Moreover, the EPA model assumes that the new units will operate at levels drastically inconsistent with the past practices of Louisiana's utility-owned combined cycle units over the past 3 years. Dismukes Affidavit, Ex. A, at ¶¶ 33, 70.
[44] *Id.* at ¶¶ 25-42, 70.

b. The EPA model ignores the reliability requirements on Louisiana utilities that require operation of older EGUs used to ensure system reliability.

The devastating impact on Louisiana's power systems is perhaps the single most important deficiency in CSAPR. Faulty modeling and the impossible May 1, 2012 compliance deadline leave Louisiana utilities with no realistic compliance alternative other than the systematic reduction and shut-down of generators, i.e., "brownouts" and "rolling black-outs," conditions which will exist at least during the 2012 and 2013 summer seasons.[45]

Power shortfalls on the scale envisioned by Louisiana's utilities and major industries indicate that CSAPR could result in significant power outages, which, in turn, will significantly impact critical energy infrastructure on a level potentially equivalent to that experienced during 2005 when Hurricanes Katrina and Rita interrupted refineries and the processing and transmission of natural gas from Louisiana to other parts of the country.[46] These impacts will reach far beyond Louisiana's industries and citizens to other parts of the United States.

But the immediate victims will be the citizens of Louisiana, who will have to suffer through prolonged periods of oppressive heat and humidity – possibly at the

[45] Dismukes Affidavit, Ex. A, at ¶¶ 12, 13, 19, 24, 47, 50-52, 55, 70.
[46] *Id.* at ¶¶ 51-52.

record levels recorded during the summer of 2011.[47] Such extreme heat during the same period that brownouts and rolling black-outs are initiated by utilities as the only means to achieve the otherwise unachievable NOx budget will likely combine to increase the number of heat-related injuries and deaths for Louisiana citizens. The capriciousness of such a rule can hardly be understated when the alleged basis for the rule, i.e., the effect on the Texas area monitors, simply does not exist.

c. CSAPR's compliance timeline is unreasonable and unachievable.

The unprecedented short time frame for compliance with CSAPR has left utilities and non-utility generators scrambling to determine the best means of compliance with this rule while avoiding violations of other state and federal regulations, and at the least cost to their shareholders and ratepayers. Even the electric reliability organizations whose mandate under the Federal Power Act is to propose and enforce electric reliability in the regions affecting Louisiana, as well as other federal agencies like the Federal Energy Regulatory Commission ("FERC"), have expressed concern about the impacts on this country's power grid under CSAPR.[48] Several Louisiana utilities have advised the LPSC that they

[47] National Oceanic and Atmospheric Administration (United States Department of Commerce): Quality Controlled Local Climatological Data for Baton Rouge Regional Airport (13970) and Shreveport Downtown Airport (53905) for May, 2011 to September, 2011.

[48] *See, e.g.*, Testimony of FERC Chairman Jon Wellinghoff Before the House Subcommittee on Energy and Power of the Committee on Energy and Commerce,

cannot comply with the rule under the current time frame allowed and that power curtailments are likely.[49]

While EPA suggests four purely hypothetical methods for achieving necessary emission reductions, they are not viable options for Louisiana.[50] As conclusively demonstrated by Dr. Dismukes, these options may be hypothetically available but are not in reality possible under the deadlines of the CSAPR FIP.[51]

In short, CSAPR is fundamentally and fatally flawed and Louisiana will likely prevail on the merits of its petition for judicial review in having CSAPR vacated or rescinded.

B. Louisiana Will Suffer Irreparable Injury if Relief is Withheld.

If Louisiana's EGUs cannot reduce NOx emissions, as they have reported that they cannot by May 1, 2012, they have forecast systematic reduction and shut-down of generators. If they are also unable to import power and transmit it to the consumers, there will be a shortfall in electricity available in Louisiana, with brownouts and rolling black-outs the inevitable result.[52] During that time,

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United States House of Representatives (Sept. 14, 2011), at p. 7; Dismukes Affidavit, Ex. A, Attachment 3, at pp. 21, 46-59.

[49] Dismukes Affidavit, Ex. A, at § IV. Further compounding Louisiana's situation is the EPA's new interstate trading restrictions (CSAPR, 76 Fed. Reg. at 48,332-48,343) that limit allowance trading. Dismukes Affidavit, Ex. A, at ¶¶ 56-58.

[50] http://www.epa.gov/crossstaterule/pdfs/CSAPRFactsheet.pdf.

[51] Dismukes Affidavit, Ex. A, at ¶¶ 59-65; Attachment 3, at p. 149, lines 8-9, 11-12; p. 150, lines 1-4; p. 152, lines 4-7.

[52] Dismukes Affidavit, Ex. A at ¶¶ 12-13, 19, 24, 47, 50-52, 55, 70.

Louisiana's citizens will have to endure unreliable power to run air conditioners, water well pumps, and other health and safety systems. Some will undoubtedly become sick and some will die. Louisiana's energy infrastructure, which supplies oil and gas to the rest of the nation, will likely suffer interruptions affecting its ability to be the supplier the nation expects.

Absent a stay, Louisiana and its citizens will be irreparably injured by EPA's abrogation of its rights under the CAA and deprived of its right to implement any needed changes which are warranted by a correct application of facts and with due consideration for an orderly timeframe for compliance.[53] That injury directly impacts Louisiana and its citizens, including its regulated electric generators, who have been deprived of their right to participate in the SIP process,[54] and are being subjected to a potentially crippling, *ultra vires* federal mandate. Under these circumstances, this Court should issue a stay notwithstanding the failure to act by the EPA.[55] This Court granted a stay of the NOx SIP call based on similar

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[53] *Cf. Bond v. United States,* 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011) ("[s]tates are not the sole intended beneficiaries of federalism"); *see New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (a state's interest "is infringed by the very fact that the State is prevented from engaging in" its regulatory process); *California State Bd. of Optometry v. FTC,* No. 89-1190, 1989 WL 111595, at *1 (D.C. Cir. 8/15/1989) ("'[A]ny time a state is enjoined from effectuation statutes enacted by representatives of the people, it suffers . . . irreparable injury.'").

[54] 42 U.S.C. §§ 7401(a)(3), 7401(c), 7410(a)(1) and 7410(l).

[55] *American Public Gas Ass'n v. Federal Power Commission*, 543 F.2d 356, 358 (D.C. Cir. 1976).

concerns – under circumstances where the claimed intrusion into state authority was far less severe.[56] Louisiana submits that this Court should likewise stay the implementation and effective date of CSAPR.

C. A Stay of the Final Rule Will Not Result in Substantial Harm to Other Parties.

A stay of CSAPR pending judicial review will not cause substantial harm to other parties since existing EPA and state rules remain in effect. Additionally, Louisiana has demonstrated that current actual NOx emissions from sources within Louisiana are already below the level of NOx emissions anticipated to result from the implementation of CSAPR in Louisiana. In other words, Louisiana has already achieved the overall emissions reductions anticipated by CSAPR and therefore a stay of CSAPR as to Louisiana will not result in an adverse impact to Houston ambient air.

D. The Public Interest Strongly Favors Granting the Motion to Stay the Final Rule.

For the reasons discussed above, the public interest clearly favors granting the stay. Failure to grant the stay will result in devastating and irreparable injury, both to Louisiana, its residents and economy, and to the nation's infrastructure. CSAPR's lack of viable compliance alternatives in the face of an impossible May 1, 2012 compliance deadline will create a "perfect storm" when Louisiana's

[56] *Michigan v. EPA,* 213 F.3d 663 (D.C. Cir. 2000).

energy grid will be the least reliable, necessarily threatening the health and safety of Louisiana citizens and national security during these critical summer months.

IV. IN THE ALTERNATIVE, EXPEDITED REVIEW SHOULD BE GRANTED.

At a minimum, this motion demonstrates that expedited review is warranted. A motion for expedited consideration "must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge."[57] This standard is less stringent than the standard for a motion to stay.[58] Additionally, the Court "may expedite cases in which the public generally . . . [has] an unusual interest in prompt disposition."[59] In a typical case, expedited review is an alternative to a stay.[60] Louisiana requests that, if a stay is not granted, the Court impose an expedited briefing schedule so that it can resolve this case before CSAPR's initial compliance date of January 1, 2012.

V. CONCLUSION

This Court should grant a stay pending review of CSAPR or, at a minimum, expedited review to allow for a decision before CSAPR takes effect.

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[57] Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit, as amended through April 14, 2011 ("D.C. Cir. Handbook"), at p. 33.

[58] *Chamber of Commerce of U.S. v. SEC*, No. 04-1300, 2004 WL 2348157, at *1 (D.C. Cir. 10/18/2004).

[59] D.C. Cir. Handbook at p. 33.

[60] *See*, *e.g.*, *Portland Cement Ass'n, Inc. v. EPA*, No. 10-1359 (D.C. Cir. 1/19/2011).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the Court's electronic notification system on this 10th day of October, 2011 and served by mail to:

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