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State of Louisiana

DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

October 5, 2011

VIA FEDERAL EXPRESS

Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Room 3000, Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Request for Reconsideration and Stay of EPA's Final Rule entitled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States" signed July 6, 2011 (Docket No. EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson:

The Louisiana Department of Environmental Quality ("LDEQ") hereby requests that the United States Environmental Protection Agency ("EPA") reconsider EPA's final rule entitled *Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States,* signed July 6, 2011; Final Rule, published at 76 Fed. Reg. 48,208 on August 8, 2011. This rule is known, and will be referred to herein, as the "Cross-State Air Pollution Rule" ("CSAPR" or the "Rule"). Additionally, the LDEQ requests that the EPA stay the effectiveness of CSAPR, especially as it applies to Louisiana, pending completion of the reconsideration proceeding.

As the primary agency in Louisiana concerned with environmental protection and regulation, the LDEQ was created in 1984 pursuant to the provisions of La. R. S. 36:231(A) and La. R.S. 30:2011(A)(1), and was vested with jurisdiction "over all matters affecting regulation of the environment of the state, including, but not limited to . . . the regulation of air quality, ..." The LDEQ continuously strives to protect the environment through a comprehensive scheme of environmental protection in order to promote and protect the health, safety and welfare of the people of Louisiana, while considering sound policies regarding employment and economic development.

Pursuant to the Clean Air Act ("CAA"), Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), where it is impracticable to raise an objection to a rule during the period for public comment or if the grounds for such an objection arise after the public comment period

(but within the time specified for judicial review), and if such objection is of central relevance to the outcome of the rule, the EPA administrator "**shall** convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." (Emphasis added).

As described more fully below, the LDEQ is requesting reconsideration of key aspects of CSAPR. The grounds for LDEQ's objections to these aspects of the final Rule arose after the close of the public comment period and are of central relevance to the outcome of the final Rule. Based on the objections set forth in this request, it would be both reasonable and appropriate, as well as required by law, for EPA to convene a reconsideration proceeding and stay the effectiveness of CSAPR pending completion of the reconsideration.

I. SUMMARY OF OBJECTIONS

The LDEQ objects to key aspects of CSAPR. Provisions of the final Rule to which the LDEQ objects and that are the subject of this reconsideration request, were not addressed by EPA in the proposed rule, published at 75 Fed. Reg. 45,210. The proposed rule is referred to herein as the "Transport Rule." Because these provisions were not addressed in the proposal or at any time prior to final promulgation, the grounds for the LDEQ's objections arose after the close of the public comment period, and reconsideration by EPA with an accompanying stay is appropriate. 42 U.S.C. § 7607(d)(7)(B). Moreover, as demonstrated below, these objections are of central relevance to the outcome of the Rule.

Specifically, the LDEQ objects to its inability to comment on CSAPR's oxides of nitrogen ("NO_X") emissions budget for Louisiana. EPA decreased the Louisiana NO_X budget from the proposed rule to the adopted rule from a 21,220 ton NO_X emissions budget to a 13,432 ton NO_X emissions budget. This results in a 42% reduction in the actual 2010 NO_X emissions from electric generating units ("EGUs") in Louisiana by the 2012 ozone season.[1] Additionally, efforts to achieve compliance with CSAPR requirements in light of this emissions budget reduction will be problematic. With the 2012 ozone season starting in May, CSAPR does not give sufficient time for emissions reductions in Louisiana.

Also, the EPA failed to provide final Integrated Planning Model ("IPM") modeling results for comment. As a result of this failure, the LDEQ had no opportunity to review and comment on this aspect of the Rule. Additionally, EPA failed to adequately provide notice or an opportunity to review and comment on the calculation of the NO_X baseline used to determine the Louisiana NO_X budget. The LDEQ believes NO_X emissions reductions as a result of the EPA's Clean Air Interstate Rule ("CAIR") controls were counted twice due to the change in the method of calculation from the proposed rule to the final Rule, when EPA states that CAIR reductions were not accounted for in the modeling.

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[1] Transport Rule Reductions from 2010 Levels to 2012 Budgets 06-16-2011, Ozone Season NOx Table, Docket Id. EPA-HQ-OAR-2009-0491, Document Id. EPA-HQ-OAR-2009-0491-4302.

Finally, Louisiana compared projected emissions levels to current emissions inventory and found data to show that NO_X reductions were already below the indicated level required to cure the "significant contribution and interference with maintenance" determination. As such, EPA should convene a reconsideration proceeding in order to re-run the Comprehensive Air Quality Model ("CAMx") to determine whether Louisiana emissions have a significant impact on Houston nonattainment or maintenance.

II. BACKGROUND

CSAPR essentially represents the EPA's response to a court decision finding that EPA's prior regulatory program addressing interstate transport of pollutants failed to meet the requirements of the CAA. CSAPR replaces CAIR, found at 70 Fed. Reg. 25,162 and promulgated on May 12, 2005. CAIR required 29 states to adopt and submit revisions to their State Implementation Plans ("SIPs") to eliminate sulfur dioxide ("SO_2") and NO_X. emissions that contributed significantly to downwind nonattainment of the $PM_{2.5}$ and ozone National Ambient Air Quality Standard ("NAAQS") promulgated in 1997.

In July 2008, the Court of Appeal, D.C. Circuit, found that EPA lacked statutory authority for CAIR. *North Carolina v. EPA*, 531 F.3d 896, at 907-08 (D.C. Cir. 2008). The court identified several deficiencies in CAIR and originally vacated CAIR in its entirety. However, at EPA's request, the court granted a rehearing and remanded CAIR to EPA for further action in accordance with the court's ruling, but "without vacatur." As such, CAIR was allowed to remain in effect until replaced by a new rule. *Id.* at 1177-78.

On August 2, 2010, to replace CAIR, EPA proposed the Transport Rule (*Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone*, 75 Fed. Reg. 45,210) to identify and limit NO_X and SO_2 emissions within 32 states in the eastern, mid-western, and southern United States that affect the ability of downwind states to attain and maintain compliance with the 1997 and 2006 $PM_{2.5}$ NAAQS and the 1997 ozone NAAQS.

EPA supplemented the Transport Rule record by publishing and requesting comments in three Notices of Data Availability ("NODA"):

- Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone. 75 Fed. Reg. 53,613 (September 1, 2010);
- Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone: Revisions to Emission Inventories. 75 Fed. Reg. 66,055 (October 27, 2010); and
- Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone: Request for Comment on Alternative Allocations, Calculation of Assurance Provision Allowance Surrender

Requirements, New-Unit Allocations in Indian Country, and Allocations by States. 76 Fed. Reg. 1,109 (January 7, 2011).

The LDEQ participated in the Transport Rule rulemaking proceedings by submitting comments on the proposed rule and the NODAs. Although the LDEQ requested the opportunity to review EPA's final Rule prior to publication, EPA failed to honor this request.

The EPA promulgated CSAPR on August 8, 2011 (76 Fed. Reg. 48,208), setting statewide standards in furtherance of § 110(a)(2)(D)(i)(1) (providing a "budget" for the emissions of SO_2 and NO_X within each state) and simultaneously imposing on states a specific federal implementation plan ("FIP") for achieving them. The FIP distributes allocations to each individual EGU within a state for emissions of SO_2 and NO_X. CSAPR's first control period begins January 1, 2012, for SO_2 and annual NO_X reductions; and May 1, 2012, for ozone-season NO_X reductions.

III. FAILURE TO PROVIDE NOTICE AND OPPORTUNITY TO COMMENT

LDEQ objects to CSAPR because it was denied the opportunity to submit comments on key aspects of the Rule. The Administrative Procedure Act ("APA"), 5 U.S.C. § 101 *et seq.*, establishes important procedural requirements regarding agency rulemaking. Section 553 of the APA provides that, " [a]fter notice . . ., the agency **shall** give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . " 5 U.S.C. § 553 (emphasis added). Courts have held that "[i]n order to allow for *useful criticism*, it is especially important for the agency to identify and make available *technical studies and data* that it employed in reaching the decisions to propose particular rules." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (emphasis added). *See also Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Under the APA, agency decisions are required to be supported by a public record that is sufficiently transparent to permit the public to understand the basis of the decision and to allow courts to review the decision for compliance with law. 5 U.S.C. § 553. *See United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) in which the court opined, "unless the scientific data relied upon by the agency are spread upon the public records, criticism of the methodology used or the meaning to be inferred from the data is rendered impossible."

Section 307(d)(3) of the CAA likewise requires EPA to provide adequate notice of, and the opportunity to comment on, the elements of its rulemakings. When an agency "relies on studies or data after the comment period has ended, no meaningful commentary on such data is possible." *Doe v. Rumsfeld,* 341 F.Supp. 2d 1, 13 (D.C. Cir. 2004).

The EPA must provide a reasonable opportunity for public examination, evaluation and comment on a rule and any underlying, supporting information, assumptions or conclusions. If the party's failure to submit comment is because of EPA's failure to provide an **opportunity** for

the public comment, the remedy is generally to vacate the regulation, rather than provide for "reconsideration." In *State Of New Jersey, Department of Environmental Protection, v. EPA*, 626 F.2d 1038 (No. 78-1392, DC Cir. 1980), and *Kennecott Corp. v. E.P.A.*, 684 F.2d 1007 (90-2036, cons. D.C. Cir. 1982), the court vacated EPA regulations because the agency failed to make key elements of the regulation docket sufficiently available for public examination and comment. The court vacated the regulations even though the EPA had explicitly provided an opportunity for public comment and "reconsideration" **after the initial rulemaking**. The court held in the *Kennecott* case: "That EPA allowed petitions for reconsideration is not an adequate substitute for an opportunity for notice and comment prior to promulgation." *Id* at 1018.

The LDEQ submits as a basis for its reconsideration request, substantive arguments addressing key elements of CSAPR upon which the LDEQ was provided no adequate opportunity to review and comment prior to the final promulgation of the Rule. The LDEQ intends to file timely a petition for judicial review of CSAPR with the D.C. Circuit. Indeed, for the reasons cited herein, and under the governing legal precedent set forth above, CSAPR should be vacated by the court on these grounds alone.

Nevertheless, the LDEQ presents these arguments for *vacatur* by the court as objections to the EPA as a basis for its reconsideration request. Having been provided no opportunity to review and comment because the provisions of the Rule to which the LDEQ objects arose after promulgation of the final Rule, makes the objections particularly ripe for reconsideration by EPA. Moreover, said objections are of central relevance because the objections and the grounds therefor provide substantial support for the argument that the regulation should be revised by the EPA through its own agency action. A reconsideration by the EPA, and an accompanying stay of CSAPR during reconsideration, will allow CAIR and the SIPs in place to continue to apply to regulate and control EGUs within the states. As demonstrated below, the current Louisiana SIP has effectively implemented CAIR and is sufficient to achieve the CAA mandated regulatory air quality goals.

Finally, EPA's inclusion in the Rule of aspects to which the LDEQ objects is arbitrary and capricious to the extent that those new requirements in the final Rule are not logical outgrowths of the proposed rule. The D.C. Circuit has stated that, "[g]iven the strictures of the notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (stating that "[t]he test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule"). A "final rule is a 'logical outgrowth' of a proposed rule only 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." *Id.* at 998. That the LDEQ could have anticipated the changes in CSAPR to which it objects is not only unreasonable, it is illogical. Consequently, it is LDEQ's position that the final Rule is arbitrary and capricious and must be set aside upon judicial review unless the EPA, through timely agency action, initiates a reconsideration of, and simultaneously stays, the Rule.

IV. SPECIFIC GROUNDS FOR OBJECTIONS

The LDEQ presents the following specific grounds as a basis for its objections to CSAPR. In view of these grounds, the LDEQ submits, and as discussed herein, the final adoption of CSPAR is impermissible as a matter of law because it was adopted in violation of the procedural requirements of the APA, 5 U.S.C. § 101 *et seq.*, and the CAA, 42 U.S.C. § 7607.

A. LDEQ was not allowed to comment on CSAPR's NO_X emissions budget for Louisiana; as a result, compliance with CSAPR requirements will be problematic.

In the Transport Rule proposal, the NO_X emissions budget for Louisiana was **21,220** tons for the ozone season (75 Fed. Reg. 45210 at 45291)[2]. While this level constituted a significant reduction in emissions, it presented an attainable standard for achievement through a combination of limited load-shifting, fuel-switching, credit purchases, etc. Nevertheless, the LDEQ, the Louisiana Public Service Commission ("LPSC") and the regulated EGUs submitted comments to the EPA concerning certain aspects of the proposed regulation. However, the regulation as adopted and promulgated by the EPA decreased the Louisiana ozone season NO_X budget even further to **13,432** tons (76 Fed. Reg. 48208 at 48263)[3]. EPA did not properly propose and accept public comment on the 13,432 ton NO_X budget. Accordingly, the LDEQ, LPSC, regulated EGUs, and the citizens of this state had no opportunity to provide comment on the impact the budget would have on Louisiana. Moreover, as discussed below, at this level of NO_X reductions, compliance with CSAPR's requirements becomes problematic, if not impossible, for achievement by the 2012 ozone season.

EPA decreased the Louisiana NO_X budget from the proposed rule to the adopted Rule from a 21,220 ton NO_X emissions budget to a 13,432 ton NO_X emissions budget. This results in a 42% reduction in the actual 2010 NO_X emissions from EGUs in Louisiana by the 2012 ozone season.[4] Discussions with members of EPA's Clean Air Markets Division ("CAMD") staff reveal that the EPA **assumes** this reduction can be achieved by simply reducing electric generation within Louisiana and importing electricity from "cleaner" facilities during the ozone season. However, as noted in the comments submitted by the LPSC in response to the previous draft of the Rule, there are significant transmission constraints which limit the amount of electricity that can be imported into certain areas of Louisiana. Since the publication of the regulation, the LDEQ, LPSC and regulated industry have had additional communications with EPA concerning multiple issues, including transmission constraints, in which it was detailed why

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[2] Table IV. E-2-Ozone Season NOx State Emissions Budgets for Electric Generating Units Before Accounting For Variability.

[3] Table IV. D-4-Ozone Season NOx State Emissions Budgets for Electric Generating Units Before Accounting For Variability.

[4] Transport Rule Reductions from 2010 Levels to 2012 Budgets 06-16-2011, Ozone Season NOx Table, Docket Id. EPA-HQ-OAR-2009-0491, Document Id. EPA-HQ-OAR-2009-0491-4302.

electricity cannot simply be imported into Louisiana to satisfy the electricity demands of its citizens. These communications suggest that EPA has not fully considered the impact of its Rule. The LPSC is also submitting a request for reconsideration of the Rule with the EPA, and for stay, based on specific facts and circumstances in Louisiana demonstrating the fallacy of the EPA's assumption concerning transmission constraints.

Furthermore, the regulated industry cannot simply "purchase NO_X credits" in order to generate the electricity within Louisiana. Facilities have the unlimited ability to transfer credits **intrastate**. However, the variability provisions in the Rule limit the purchase of NO_X credits from outside of Louisiana in order to satisfy the shortfall in NO_X allowances needed to generate the electricity within the state (76 Fed. Reg. 48210 at 48276). The only way the EGUs can produce the electricity within the state of Louisiana while meeting the maximum allowable budget is to reduce existing NO_X emissions. Utilities in Louisiana made a good faith effort to reduce actual NO_X emissions by installing enhanced controls at a number of generating units in anticipation of the implementation of CAIR. They have continued to run those controls during the revision to CAIR in accordance with the remand by the D.C. Circuit. They will be obligated to continue to operate them without CAIR in accordance with Louisiana Administrative Code Title 33, Part III, Section 905 ("LAC 33:III.905"), which requires the operation and maintenance of any emissions control devices installed. Section 905 has been approved as part of Louisiana's SIP. (54 Fed. Reg. 09795).

CSAPR further assumes that all emissions reductions necessary to comply with the "highly cost effective emissions reduction" standard can come by simple fuel switching or utilizing already installed control technology (e.g., Selective Catalytic Reduction ("SCR")) that would not otherwise be utilized. However, the EPA determined there are no such emissions reductions available within Louisiana. (76 Fed. Reg. 48208 at 48263). The EPA analysis identified zero emissions reductions within Louisiana that qualified as "highly cost effective emissions reduction" and set the state budget as the "baseline" determined by the IPM run.

As previously noted, CAMD staff erroneously concluded that Louisiana could comply by importing electricity from cleaner sources. As a result, the only way the regulated EGUs within Louisiana can generate the necessary electricity, while complying with the state budget, is to install substantial new emissions control technology such as SCR, Selective Non-Catalytic Reduction ("SNCR"), and additional low-NO_X burners. However, as discussed below, given the 2012 deadline for compliance there is insufficient time for the regulated EGUs to receive all necessary approvals from state regulatory agencies, to design, order, install, test and operate any such technology (even assuming that the necessary technological improvements are obtainable from the industry suppliers).

Many of the EGUs subject to CSAPR are regulated by the LPSC. LPSC's review and approval is required before major capital improvements to a facility, such as installation of

appropriate control devices, can be made[5]. Other EGUs not regulated by the LPSC, such as the City of Lafayette[6] and the Louisiana Electric Power Authority, are public entities that must acquire the necessary funding through bond approval or other public processes. In any event, there is also an LDEQ permitting process required prior to the necessary construction and implementation of proposed emissions control technology required to reduce NO_X emissions to comply with the state budget. While some construction activity may constitute an "emissions reduction project" that qualifies for an Authorization to Construct (see LAC 33:III.511), many may have collateral increases in other pollutants (e.g., ammonia) that will require modifications to Title V permits. Such permit modifications typically require at least 3-6 months to complete.

In order to reduce NO_X emissions in Louisiana down to the levels reflected in the state ozone season budget mandated by EPA, significant reductions must be achieved. It is unlikely that this level of reductions can be achieved without the installation of highly efficient NO_X control technology on many units in Louisiana. With only months, not years, available to engineer, design, purchase, permit and construct these controls, it is extremely unlikely that a sufficient number of highly efficient NO_X control projects will be completed in time (for example SCR controls). At this point, only those less efficient NO_X controls, which can be installed in shorter timeframes, such as SNCR, low NO_X burners, or overfire air, could possibly be installed in time for compliance. And, with so many utilities seeking this equipment from vendors, it is questionable whether these could even be installed prior to the May, 2012 timeline.

In addition, with surrounding states subject to CSAPR and in a similar situation as Louisiana, i.e., needing drastic NO_X reductions, alternate power supply options will be limited as utilities in these states will be undergoing unit outages to install controls and at the same time competing for any available power purchase options that exits. Considering the foregoing, it is highly unlikely the regulated EGU's in Louisiana can achieve emissions reductions necessary to comply with CSAPR within the deadline imposed. Given the nature and magnitude of the changes in the final Rule, especially the massive reduction in the state NO_X budget (which could not have been reasonably anticipated by the LDEQ), a reconsideration proceeding must be convened. The LDEQ, as well as the citizens of Louisiana, were precluded from submitting comments on this **specific** issue during the comment period because it arose after the period for public comment. Moreover, the grounds for this objection are of central relevance because it directly impacts the ability of the regulated EGUs and the State of Louisiana to comply with the regulation. The LDEQ's submission of these grounds as a basis for its objection provides substantial support for the argument that the regulation should be revised.

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[5] LPSC General Order dated April 8, 2009 (In re: Implementation, Ratemaking Treatment, and Incentive Issues of Environmental Legislation and Environmental Costs) Attachment "A" Environmental Adjustment Clause and Environmental Certification Rule, Page 9. Section 3.1.

[6] The "Lafayette Public Utility Authority" is the legal entity that has overall responsibility for fixing the Lafayette Utility System rates, issuing bonds for system upgrades and such. The authority for LPUA to issue bonds is found in the Lafayette City-Parish Consolidated Government Code of Ordinances, Part II, Chapter 94, Article IV, Division 2, Sections 94-233(a)(12)-(15).

Indeed, if Louisiana's EGUs are unable to import power and cannot generate the electricity due to the restricted NO_X budget, there will be a shortfall in electricity available to Louisiana. As a result of the problems with compliance discussed above, Louisiana faces the very real possibility of "brownouts" and rolling blackouts due to the unavailability of electricity beginning with the 2012 ozone season.

The EPA should reopen CSAPR to accept comment on the ability of the regulated EGUs and the State of Louisiana to comply with the proposed NO_X budget and provide a reasonable schedule for implementation of NO_X emissions reductions.

B. CSAPR failed to provide final IPM modeling resulting in LDEQ's inability to review and comment. Additionally, EPA failed to adequately provide notice or an opportunity to review and comment on the calculation of the NO_X baseline used to determine the Louisiana NO_X budget.

As a result of EPA's failure to publish the final IPM modeling prior to adoption of the Rule, the LDEQ had neither the opportunity to comment on the inputs nor was it provided the justification for the EPA's use of its modeling inputs. For the proposed rule, EPA used IPM Base Case v3.02 EISA and its Base Case v.4.10 for the September 1, 2010 Notice of Data Availability ("NODA"). For the final Rule, EPA used Base Case v4.10_FTransport, which analyzed provisions considered for inclusion in the final CSAPR as a result of comments EPA received on the Transport Rule proposal as well as the NODA announced on September 1, 2010.[7] This analysis, and the results generated by EPA therefrom, is flawed for the reasons set forth below.

In the proposed rule, EPA used 2005 emissions inventory data in the IPM to obtain projected emissions for 2012. The results were used in the CAMx modeling to determine the contribution to nonattainment or interference of maintenance in a downwind state. EPA also ran the IPM to project uncontrolled emissions for 2014. EPA then subtracted the highly cost effective emissions reductions from the 2014 uncontrolled emissions to determine the state's final emissions budget. In the final Rule, EPA determined Louisiana's highly cost effective reductions to be zero. Therefore, Louisiana's final budget was the IPM-modeled "baseline." Determining Louisiana's budget on the IPM-modeled baseline (13,432 tons) results in a significant NO_X emissions budget shortfall for the state, and one that is virtually unattainable prior to the 2012 ozone season without significant adverse impact to the citizens of Louisiana and with no significant impact on Louisiana's downwind states as determined by EPA.

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[7] There were three versions of the IPM used for this rulemaking. The first was contained in the proposal and can be found at: http://www.epa.gov/airmarkets/progsregs/epa-ipm/proposedTR.html.
The second was included in the NODA published September 1, 2010 and can be found at: http://www.epa.gov/airmarkets/progsregs/epa-ipm/BaseCasev410.html.
The third was part of the final rulemaking and can be found at: http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html.

Significantly, the final IPM modeling results (which were not published prior to the final rulemaking) **assumed** that 42 EGUs would not produce power in 2012-2014. The majority of the NO_X emissions shortfalls in the IPM-modeled budget are the result of EGUs projected to have zero fuel usage and zero NO_X emissions in 2012 and 2014. All 42 of these units are categorized as oil/gas steam boilers. Based on historical heat input and emissions data available in EPA's spreadsheet, "*Final CSAPR Unit Level Allocations under the FIP and Underlying Data*," it is apparent that these units have operated through 2010 and the LDEQ has received no indication that they will not continue to operate through 2012 and 2014. This issue is of central relevance to the regulation because it significantly reduces the state's emissions budget and allocations. EPA did not conduct a survey of the 42 units that the IPM model results showed with zero emissions or that had "early retirement" as retrofit control. Many of these units are actually producing electricity, which is verifiable through the LDEQ's emissions inventory submittal for 2008, 2009 and 2010. Because EPA has "zeroed-out" these facilities, they have "short changed" the state on the emissions budget as well as the allocations allowed. Indeed, the EPA can and should note the extreme impacts of the record setting heat across the southern United States during the 2011 ozone season and the maximized use of EGUs in the State of Louisiana to maintain electric reliability. It strains credulity to assume that 42 EGUs could simply be idled in the state, particularly given the false assumption that Louisiana could have imported its necessary power from the grid to achieve its reliability. LDEQ adopts the LPSC petition for reconsideration and for stay in support of this argument.

Additionally, the EPA did not adequately provide notice or an opportunity to review and comment on the calculation of the NO_X baseline used to determine the Louisiana NO_X budget. In the Transport Rule proposal, EPA used the 2005 emissions inventory from NO_X sources in Louisiana as the data input for the IPM. In the case of Louisiana, the IPM predicted ozone season NO_X emissions of approximately 15,000 tons. The EPA then used the output from the IPM as input for further analysis and consideration. In particular, the EPA adjusted the output to reflect actual emissions and heat input. However, reported NO_X emissions were adjusted to account for unusually low utilization of EGUs in 2009. [8] This resulted in a proposed emissions budget for Louisiana of 21,220 tons. [9] The LDEQ believes that the methodology used to establish the baseline emissions in the Transport Rule proposal, while not without problems, reflects real world emissions more accurately than the methodology used in the regulation as adopted.

When EPA promulgated the final regulation, instead of adjusting the IPM output, the EPA adjusted the IPM inputs. The final IPM output became the "baseline" for the analysis of NO_X emissions reductions as determined by the analysis of the cost curves. (76 Fed. Reg. 48208 at 48263). In most cases, the end result was essentially unchanged as lower IPM outputs for the state budgets also resulted in lower emissions reductions provided by the results of the cost curve analysis. The EPA discussed these results at 76 Fed. Reg. 48210 at 48251.

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[8] TSD State Budgets, Unit Allocations, and Unit Emissions Rates, July 2010.

[9] TableIV.E-2-Ozone-Season NO_X State Emissions Budgets for Electric Generating Units Before Accounting for Variability.

> EPA notes that the cost curves presented here differ somewhat from the cost curves presented in the proposal. The NO_X emissions modeled at a $500/ton cost threshold for the final rule are lower than they were at proposal. In addition, the emission reductions they represent from the updated base case are not as pronounced as was found in modeling for the proposed rule. It is worth emphasizing that the lower emission reductions observed at $500/ton in this final rulemaking are due to a lower starting point in updated base case EGU NO_X emission levels (and thus do not reflect higher NO_X emissions remaining after the reductions made at the $500/ton threshold). While the base case 2012 nationwide annual EGU NO_X emissions were approximately 3 million tons in the proposal, they were only 2.1 million tons in the final rule. This approximately 33 percent reduction in base case EGU NO_X emissions in the final rule modeling relative to the proposal is due to a combination of modeling updates, including lower natural gas prices, reduced electricity demand, newly-modeled consent decrees and state rules, and updated NO_X rates to reflect 2009 emissions data. All of these factors resulted in substantially lower base case Transport Rule NO_X emissions in the final rule modeling.

In other words, overall state budgets did not change appreciably between proposed and adopted regulation despite the change in the method of calculation. That is, lower "baseline" combined with a lower reduction produced a similar final result.

However, in the case of Louisiana, the LDEQ believes this change in the method of calculation counted NO_X emissions reductions as result of CAIR controls twice. As a result, the calculated baseline for Louisiana was lowered from 21,220 tons to only 13,432 tons before variability. Nevertheless, the cost curve for Louisiana remained the same, resulting in zero NO_X reductions. The end result was that the final budget for Louisiana was reduced to 65% of the proposed budget without any opportunity for review or comment on the change in the method of calculation. Accordingly, the EPA must reconsider the Rule to address this lack of opportunity for comment from the LDEQ over the significant and totally unwarranted reduction in Louisiana's NO_X baseline through a completely unanticipated change in modeling from the proposed to the final Rule.

C. Changes made to the emissions inventory projection between the proposed rule and the final Rule demand that the calculation of Louisiana's significant contribution to, or interference with, monitors in Houston should be re-run.

EPA made changes to the model inputs from the proposed to the final projected 2012 and 2014 emissions inventory for Louisiana. The EPA's 2014 remedy results demonstrated emissions levels below which Louisiana no longer significantly affected monitors located in the Houston nonattainment area. Moreover, Louisiana has data to show that NO_X reductions were already below the indicated level required to cure the "significant contribution and interference with maintenance" determination. As a result, Louisiana has not had an opportunity to comment that

it should not be included as a "significant contributor" to any of its linked monitors, and therefore should not be included in the Rule.

Section 110(a)(2)(D)(i)(I) of the CAA requires that states "prohibit emissions that contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any primary or secondary NAAQS." Thus, the CAA authorizes CSAPR only if interstate transport of Louisiana emissions are "significantly impacting" the ability of another state to comply with the 1997 National Ambient Air Quality Standard for ozone ("1997 Ozone NAAQS") or are interfering with the ability of another state to "maintain attainment."

Louisiana is included in CSAPR due to modeling outputs that indicate that Louisiana is a "state that shows significant contribution or interference with maintenance" with monitors located in Texas. However, CAMx modeling for significant contribution to nonattainment and maintenance monitors should have been performed with point source emissions inventories that are more current than 2005.

When LDEQ compared these emissions levels to current Louisiana emissions inventories, the comparison results showed that Louisiana's total current NO_X emissions were less than the 2014 remedy totals. The following table shows actual Louisiana NO_X emissions from the emissions inventory compared to the available CSAPR inventories.

	CSAPR			**LA Emissions Inventory**		
Year	**2005**	**2012**	**2014**	**2008**	**2009**	**2010**
Total Point NO_X*	227,757	185,785	182,042	184,059	163,821	170,224

*total point is EGU plus non EGU sources

As demonstrated above, Louisiana's total point source emissions are already well below the levels required by the Rule in both 2012 and 2014. These reductions provide clear evidence that Louisiana has achieved emissions reductions for both EGU and non-EGU sources greater than that anticipated by the Rule. Since Louisiana has achieved the emissions reductions from both EGU and non-EGU sources, further inclusion in the Rule will require Louisiana EGUs to make additional emissions reductions that are unnecessary to satisfy the regulatory goal. Louisiana has submitted the 2008 and 2009 emissions inventories to the National Emissions Inventory ("NEI"), and will submit the 2010 emissions inventory to the NEI by December 31, 2011. These numbers are certified by the reporting facilities and should not be ignored in this reconsideration.

Based upon current emissions inventory, EPA should convene a reconsideration proceeding for CSAPR in order to re-run CAMx to determine whether Louisiana's emissions have a significant impact on Houston's nonattainment or maintenance.

V. LEGAL STANDARD FOR RECONSIDERATION

The law is clear. EPA is required to convene a proceeding to reconsider a rule upon a demonstration made by a petitioner/requestor **through an objection that**: (1) was impracticable to raise during the public comment period; or (2) the grounds therefor arose after the period for public comment (but within 60 days after publication of the final rulemaking notice in the Federal Register); and (3) is of central relevance to the outcome of the rule.

Section 307(d)(7)(B) of the CAA, 42 U.S.C. § 7607(d)(7)(B), addresses issues properly raised in a judicial review and the basis for a reconsideration request as follows:

> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

As shown from this CAA provision, unlike judicial review of a final EPA rule, the reconsideration proceeding does not involve consideration of issues that were actually raised, or could have been raised, prior to the promulgation of the final rule. All issues raised in the judicial review must first be presented to the EPA for review during the public comment period. Additional public comment after the close of the public comment period and after the promulgation of the regulation can be submitted, **if a demonstration is made to EPA that "grounds ... arose after the period for public comment"** *Id.* (emphasis added).

If grounds to object to the EPA regulations arise after the public comment period, the objection must first be submitted to the EPA for review and "reconsideration" of the regulation in light of the new "grounds." Failure to request reconsideration by EPA results in the inability to submit the new grounds to a reviewing court.

These principals are well established in jurisprudence. As opined by the Court of Appeal, D.C. Circuit:

> [T]he procedural requirements of the Clean Air Act do not permit [petitioners] to raise this objection for the first time on appeal." *API v. Costle*, 665 F.2d 1176,

> 1190-91 (D.C. Cir. 1981). Under section 307(d)(7)(B) of the Act, a reviewing court may only consider "an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). The petitioner is only excused from raising an objection where it is "impracticable ... or if the ground for such objection arose after the period for public comment." Yet even then the petitioner must first seek a proceeding for reconsideration. *Id.* Only then may petitioner seek judicial review. This court "enforces this provision 'strictly.' " *MEMA v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998) (citation omitted).

Appalachian Power Co. v. Environmental Protection Agency, 249 F.3d 1032 (D.C. Cir. 2001) at 1055.

Moreover, in addition to this first procedural criterion for reconsideration, the issue/objection must be one of "central relevance" to the outcome of the rule. EPA has explained this concept. In its view, "an objection is of central relevance to the outcome of the rule only if it provides substantial support for the argument that the regulation should be revised." *See EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,* 75 Fed. Reg. 49556 (August 13, 2010), and other reconsideration petition denials cited therein.

VI. REQUEST FOR STAY

In addition to convening a proceeding for reconsideration of CSAPR, EPA should stay the Rule's effective date as well as its compliance obligation deadlines with respect to EGUs within Louisiana and the total Louisiana budget. Both the APA and the CAA contain provisions relative to a stay of a rule's effectiveness. Under the APA, "[w]hen an agency finds that **justice so requires**, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. §705 (emphasis added). And under the CAA, [t]he effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months." 42 U.S.C. §7607(d)(7)(B).

Notably, Section 705 of the APA authorizes agencies to issue stays even when a showing of irreparable harm is not made. A showing of irreparable harm appears relevant only when a request is made to a court for a stay of an agency rule, as opposed to a request to EPA. Section 705 provides:

> When an agency finds that **justice so requires**, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to **prevent irreparable injury**, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added). Accordingly, there is no need to show irreparable harm to support an administrative stay; EPA has applied the "justice so requires" APA standard for administrative stays in CAA cases. *See, e.g., Ohio: Approval and Promulgation of Implementation Plans*, 46 Fed. Reg. 8,581, 8,582 n.1 (Jan. 27, 1981).

"Justice so requires" a stay of the effectiveness of CSAPR in Louisiana because the LDEQ has articulated several problems with respect to the calculation of and limitations resulting from the Louisiana NO_X budget. The potential impact of the Rule on Louisiana and its citizens, including the possibility of "brownouts" and rolling blackouts, warrants a stay of the total Louisiana NO_X budget and the effectiveness of the Rule on Louisiana's EGUs.

Furthermore, Louisiana has demonstrated that current actual NO_X emissions from sources within Louisiana are already below the level of NO_X emissions anticipated to result from the implementation of CSAPR in Louisiana. In other words, although implementation of CSAPR would impose unreasonable restrictions on regulated EGUs in Louisiana, the "goal" of this "stage" of regulation pursuant to CAA § 110(a)(2)(D)(i)(I) has already been achieved in Louisiana even before the implementation of CSAPR. The EPA stated that "each state has the option of replacing these federal rules with state rules to achieve the required amount of emissions reductions from sources selected by the state." (76 Fed. Reg. 48208 at 48209) Theoretically, Louisiana could submit a SIP to make these reductions federally enforceable in lieu of the EGU restrictions. However, it would be impossible to do so in time for the 2012 ozone season.

Finally, one of the fundamental precepts of CSAPR is its role as a replacement for CAIR (which is terminated by the Rule). As part of the calculation process for the NO_X budget, the EPA assumed that sources previously subject to CAIR would be free to halt the operation of NO_X control devices and thereby increase NO_X emissions with the termination of CAIR. However, as noted above, LAC 33:III.905 **requires** the operation and maintenance of any control device that has been installed. EGUs (and other sources) in Louisiana that have installed SCR or other control devices cannot simply turn them off. Consequently, there will be no increase in NO_X emissions in Louisiana from the termination of CAIR even if CSAPR is stayed in Louisiana.

A careful review and consideration of the objections set forth in this reconsideration request clearly reveals that "**justice so requires**" the EPA Administrator to stay the effectiveness of CSAPR pending completion of the reconsideration proceeding.

VII. CONCLUSION AND SUMMARY OF RELIEF SOUGHT

Through this request, the LDEQ unmistakably satisfies the standard for reconsideration. As demonstrated herein, provisions in the final Rule that are the subject of this request were not addressed by EPA in its rulemaking proposal. Absent said publication in the proposal, the

grounds for LDEQ's objection did not arise until after the public comment period. The LDEQ was not afforded its statutory right to notice and comment on the elements of the Rule at issue herein. Under the circumstances, reconsideration could not be more appropriate. Moreover, "justice so requires" the granting of a stay as it applies to Louisiana.

For the foregoing reasons, the LDEQ respectfully requests that, pursuant to 42 U.S.C. § 7607(d)(7)(B), the Administrator convene a proceeding for reconsideration of the final Rule and afford the interested public the same procedural rights as would have been afforded had the information been available at the time CSAPR was proposed—rights due the public under the provisions of 42 U.S.C. §7607(d)(3) - (5). Specifically, the EPA should reopen CSAPR to accept comment on the ability of the regulated EGUs and the State of Louisiana to comply with the proposed NO_X budget and provide a reasonable schedule for implementation of NO_X emissions reductions. Further, the EPA must reconsider CSAPR in order to address the lack of opportunity for comment from the LDEQ over the significant and totally unwarranted reduction in Louisiana's NO_X baseline. Moreover, based upon current emissions inventory, the EPA should convene a reconsideration proceeding for CSAPR in order to re-run CAMx to determine whether Louisiana's emissions have a significant impact on Houston's nonattainment or maintenance.

The LDEQ further requests that in order to meet the most fundamental aspects of requirements for legal due process, and valid administrative rulemaking, the Administrator should stay the effectiveness of the final Rule during the pendency of the reconsideration for the maximum time allowed by law.

Sincerely,

Peggy M. Hatch
Secretary