



PRO-BUSINESS • PRO-TEXAS
FOR OVER 75 YEARS

September 6, 2011

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

Gina McCarthy, Assistant Administrator
U.S. Environmental Protection Agency
Office of Air and Radiation
Ariel Rios Building, Mail Code 6101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Request for Reconsideration and Stay; Federal Implementation Plans: Interstate
Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals (Docket
No. EPA-HQ-OAR-2009-0491)

Administrator Jackson and Assistant Administrator McCarthy:

The Texas Association of Business (TAB) requests that the Environmental Protection Agency (EPA) reconsider the final rule entitled “Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals” as published in the Federal Register on August 8, 2011 (76 *FedReg* 48208) and delay the effective date of the rule beyond October 7, 2011. Founded in 1922, the Texas Association of Business is a broad-based, bipartisan organization representing more than 3,000 Texas employers and over 200 local chambers of commerce. While TAB represents some of the largest multi-national corporations, many members are small businesses in almost every community of the state.

The final transport rule, as adopted, will have severe negative effects, not only on our members who are in the business of providing electric power, but also on every business that depends on affordable and dependable electric service. The adoption of this final rule is based on a significantly flawed analysis of procedural requirements, legal authority and technical justification. The scope of impact to Texas businesses and citizens and the failure to provide adequate opportunities for due process and public participation in the rulemaking make the reconsideration of the rule and a stay of its enforcement essential.

The final transport rule is the result of EPA’s reconsideration of the previous Clean Air Interstate Rule (CAIR) adopted in 2005 and later remanded to the agency by the D.C. Circuit Court of Appeals in its 2008 decision in *North Carolina v. EPA*. In that decision overturning the previous

attempt to adopt a rule to address interstate transport of pollutants and the contribution of states to nonattainment in other states, the court clearly identified the burden on EPA of addressing each individual state's contributions to other states and established an unambiguous standard for any new rule to replace CAIR. As will be more fully explained below, this final transport rule, now six years after the promulgation of the original CAIR, is not consistent with the court's clear directive and fails to adhere to the specific criteria the court established for a transport rule under Section 110(a)(2)(D)(i)(I) of the Clean Air Act, related to the provisions required in a State Implementation Plan (SIP) to address the contribution of one state to nonattainment in another state.

The rule as originally proposed on August 2, 2010 (75 *FedReg* 45210) would have required only modest emission reductions from sources in Texas and only during the ozone season. That proposal was based squarely on the analysis and resulting lack of evidence that emissions from Texas were resulting in any significant contribution to air quality nonattainment in areas in downwind states. In the final rule that was adopted, however, Texas is not only included in the annual emission reduction program, but also required to make far more significant reductions in emissions. The effect of this final rule on Texas will be dramatically different than what was proposed. An essentially new rule with a completely different effect was adopted without providing constructive notice to potentially affected parties and the opportunity for comment on the technical merits of the rule and the analysis supporting it. In fact, the technical justification of the rule is based on such a significant number of mistaken assumptions and factual errors that reconsideration on that basis alone would be justified, notwithstanding the procedural shortcomings of effective notice and opportunity for comment. Furthermore, EPA's assumptions concerning the legal basis for a Federal Implementation Plan (FIP) to implement the rule and the schedules for compliance are inconsistent with well-founded provisions of the federal Clean Air Act and must also be reviewed.

The Final Rule was adopted without constructive notice to affected parties and the opportunity to comment as required by law.

The Administrative Procedures Act requires a notice of proposed rulemaking and the opportunity to comment. Title III of the Clean Air Act, in Section 307(d) mirrors these requirements of due process, but also provides more specific requirements, including that the statement of basis and purpose for the rule must contain (1) the factual data on which the proposed rule is based, (2) the methodology used in obtaining and analyzing the data and (3) the legal interpretations and policy decisions on which the rule is based. Also, and particularly pertinent to this final action, is the requirement in Section 307(d)(4)(B)(i) that the docket be promptly updated to include any information which becomes available after the proposed rule has been published and which EPA determines is relevant to the rulemaking.

A final rule may differ from a proposal, but only within certain bounds and then only after certain provisions are made for notice to affected parties that provide the parties not only an understanding of how the final rule may differ, but also on what basis the final action is justified. This final transport rule fails this test. No affected party in Texas could have reasonably predicted the direction and scope of the final rule and the basis for the final rule's effect on

Texas. Any basis for including Texas was abandoned between proposal and adoption and the presumed justification for the final rule cannot be logically derived from any evidence presented in the proposal. The justification for including Texas as contemplated in the final rule is based on an analysis that defies both logic and simple fact.

In the proposed rule, EPA reached the conclusion that sources at electric generators in Texas were not contributing to nonattainment or interfering with maintenance of the PM_{2.5} NAAQS in any downwind state. In fact, EPA determined that Texas' maximum contribution to nonattainment downwind was 0.13 µg/m³ for the annual standard and 0.21 µg/m³ for the 24-hour standard when the threshold for inclusion of any state as a significant contributor was 0.15 and 0.35 µg/m³, respectively. Then, despite the straightforward demonstration that sources in Texas were not having a downwind effect that justified further consideration, EPA went to some length to build a case under which comments on whether Texas should be covered by the more significant provisions of the rule would be solicited. With no supporting analysis or clear technical justification, comments regarding the inclusion of Texas were then solicited by way of one sentence in a proposal of some 276 pages.

Although EPA did request comment as to whether Texas should be included in the annual program under the final rule, the basis for the request was completely speculative and had little, if any, application to actual circumstances in Texas. EPA suggested, indeed quite strongly, that increases in emissions were somehow possible due to the interconnected nature of the nation's energy grid and fuel supplies. This assumption, however, ignores the fact that Texas' electric grid is far more self-contained than other states. In addition, the use of lignite coal in Texas is not driven by a simple market decision based on the relative costs of different types or grades of coal. Lignite-fueled generation facilities are co-located at the mines. The major cost driver, therefore, is the cost effectiveness of using fuel mined at the actual point of use balanced against whatever limitations may be imposed on the use of lignite by the requirement to meet emission limitations enforced by the state. It is simply not credible to assume that the use of lignite in Texas will increase as a result of changing simple cost differentials between lignite and a lower sulfur coal. It is even less rational to assume that electric generators in Texas are free to make those market choices solely on the basis of cost alone without consideration of air quality effects and ongoing attainment of air quality standards in Texas.

In the proposed transport rule, EPA solicited comment on including Texas in the annual program, but only after stating in the proposed rule that its own analysis indicated that "...Texas SO₂ emissions *would* increase Texas's contribution to an amount that would exceed the 0.15 µg/m³ threshold for annual PM_{2.5}." (emphasis added) In other words, EPA did not ask commenters to offer opinions or provide evidence as to whether the suggested rationale of changes in coal prices would lead to increases in emissions. Instead, EPA told commenters that their analysis had already reached that conclusion. Then EPA asked whether a state should be included in the rule if that state had been determined to be likely to impact attainment in another state. The fact that EPA received comment supporting the inclusion of Texas can hardly come as a surprise when commenters were led to the conclusion by EPA's own statement.

It is now obvious that EPA's premise on which comments regarding Texas were solicited was false. That this premise was without any foundation is clearly shown by the fact that it was abandoned entirely in the final rule and a completely different rationale substituted for including Texas – a rationale that was never subject to the opportunity for review and comment by affected parties in Texas, because it was never revealed until the final rule was executed. Because the basis for soliciting comments had no merit, the comments received in response to the solicitation are equally without merit, both technically and legally. These comments in no way establish a basis for including Texas in the rule in a manner that was not clearly contemplated in the proposal.

A more realistic assessment of the potential for emission increases in Texas as a function of coal prices would have quickly eliminated the one opportunity EPA manufactured for soliciting comments regarding Texas. Without a reasonable basis for comments regarding Texas, any consideration of including Texas in the final rule would have required a new or supplemental notice and additional opportunity for review and comment. Just such an opportunity was afforded to other states EPA has proposed to add to those originally covered in the proposed rule, but not Texas. Texas alone is included in the final rule based on comments received in response to a scenario now known to be groundless. Until the final rule was actually released, Texas was never presented a proposed emission budget or any valid analysis of how such a budget was arrived at or how it presumably could be complied with.

Under EPA's completely new analysis, revealed only in the final rule, Texas's modeled contribution to downwind states increased by some 38 percent. In addition, receptors which were not even identified at proposal are now presumed to be in nonattainment due to Texas' contribution. Such a dramatic change in outcome of EPA's analysis raises serious questions about the validity of the underlying methodology and analytical tools and demands that the provisions of the Clean Air Act regarding notice of a proposed rule and the updating of the docket to include all new information that is being used in developing a final rule be strictly complied with.

EPA's final rule solves a problem that does not exist and its analysis of downwind emission impacts is not credible.

EPA's justification for including Texas in the final transport rule is now based on an assumption that emissions from Texas will cause one monitor in Granite City, Illinois to fail to comply with the PM_{2.5} NAAQS. The monitor in question, however, is currently monitoring attainment. The problem this rule will address was manufactured by a computer program, not by power plants in Texas. Quite simply, there is no nonattainment to correct and Texas cannot be significantly contributing to a condition of nonattainment that does not exist.

EPA has offered that its modeling demonstrates that the monitor will be in nonattainment due to emission increases that could occur in Texas. However, EPA's assumptions about emissions from Texas significantly overstate the actual budget for emissions and would be plausible only if one assumes that over 15 years of progressive and significant (if not unprecedented) emission reductions in Texas will suddenly and inexplicably be reversed in essentially four months or less.

EPA's analysis also assumes that emissions from Texas will somehow travel well over 500 miles to one monitor in Illinois and cause that monitor that is currently in attainment to record levels in excess of the NAAQS. Such an assessment simply lacks credibility. It certainly is sufficiently counter-intuitive to demand a rigorous and clear technical demonstration that is made public well before any final adoption and subject to the opportunity to review and critique it.

The analysis is further suspect given that the source of any potential nonattainment at the subject monitor in Granite City is already well recognized by EPA. In fact, modeling conducted in conjunction with an assessment of the local emissions inventory and reported by EPA in 2010 clearly identifies a steel mill in the Granite City area as the source of contributions that are primarily responsible for the excess emissions resulting in exceedances of design values at the monitor in question. The obvious role of this local source is further substantiated by the fact that operating records of the mill between 2005 and 2009 show conclusively that mean PM_{2.5} values measured at the monitor before 2009 ranged from 15.2 to 18.2 µg/m³. When the plant reduced production in 2009, however, monitored PM_{2.5} values fell to 11.3 µg/m³, well below the attainment design value. In addition, the plant in question is reported to be operating under a compliance agreement with the Illinois EPA that specifically requires reductions in emissions, yet these reductions are not factored into EPA's basis for projecting design values at the Granite City monitor. In its final rule then, EPA felt compelled to look over 500 miles away to Texas to find the solution to a hypothetical problem while ignoring the obvious answer to be found virtually next door.

EPA failed to provide an emission budget for Texas at proposal and its assumption of Texas' emission budget in the final rule is in error.

In the proposed transport rule EPA did not include or even suggest an emission budget for Texas. That omission should have surprised no one who read the rule to assess its impact, since Texas was not included in the rule under the annual emission reduction program. Having a proposed budget, however, is critical to any assessment of (1) the impact the rule will have on any one state, (2) that state's significant downwind contribution and (3) the technical justification of the proposed budget. There can be no doubt that EPA recognizes the significance of the emission budget in the deliberative rulemaking process. That recognition is certainly reflected in EPA's issuance of supplemental notices of proposed rulemaking for those states which EPA now proposes to include in the annual program under a final transport rule – every state, that is, except Texas.

The failure to provide an emission budget for Texas at proposal is again understandable – Texas was not proposed to be subject to the rule in a way that required it. To now segregate Texas, however, as the only state to be added to the annual program without benefit of any opportunity to review that budget and provide comment as to its merit is inexplicable, inconsistent with long-standing practice and again, not proper under any reasonable reading of the due process requirements imposed on EPA under both general law and the Clean Air Act procedural requirements.

The budget for Texas now included in the final rule is also unjustified under any defensible analysis of emissions in Texas or any anticipated changes in Texas' emissions inventory and reflects an unreasonable policy decision. First, EPA has decided that emission reductions from CAIR implemented after 2005 will be discounted in the calculation of an emission base for each state. The D.C. Court in overturning CAIR decided to remand the rule to EPA, but ultimately did so without vacating the rule. It is simply not rational or reasonable policy to establish an emission limit that ignores real and enforceable reductions that have been made by electric generators, regardless of whether those reductions derive from CAIR or any other directive. In addition, EPA failed to include quantifiable and enforceable reductions from facilities in Texas that, if properly accounted for, would reduce Texas' emission inventory and the calculation of any emission budget. In one example, the failure to include in EPA's base case the Lower Colorado River Authority's Fayette project scrubbers, which were installed under an agreement with the State of Texas rather than to satisfy CAIR requirements, results in an overstatement of Texas' emission budget by some 20,000 tons per year. Given the very narrow margin ($0.03 \mu\text{g}/\text{m}^3$) by which Texas is presumed to be contributing to nonattainment at the one monitor in Illinois, an accurate and logical assessment of the real emissions in Texas is critical. Again, if EPA had provided a proposed budget and the analysis on which it was based, including modeling inputs and assumptions, at the appropriate time, affected parties in Texas could have provided useful information that would have (and now should be) utilized to review that proposal.

The reductions required of Texas under the final transport rule exceed EPA's authority to reduce a state's significant contribution under the Clean Air Act.

Even if one could ignore the technical and procedural failures in the promulgation of the transport rule, the emission reductions proposed to be enforced on Texas exceed what EPA can lawfully require. Even more troubling is the fact that under the final rule other states will not be required to make reductions equal to the contributions that EPA has shown they are making to states downwind, contributions far in excess of what Texas is assumed to contribute. Section 110 of the Clean Air Act requires that an implementation plan for each state contain provisions that will prohibit emissions in that state which will contribute significantly to nonattainment of a NAAQS or interfere with attainment in another state. EPA has the authority to reduce one state's contribution to another state to the extent that contribution exceeds a threshold of significance, but no more. If EPA's assessment that Texas' downwind contribution of $0.03 \mu\text{g}/\text{m}^3$ above a threshold of $0.15 \mu\text{g}/\text{m}^3$ could be technically justified (by some process yet not identified), the reductions legally enforceable against Texas sources would be far less than the amount contained in the final rule, which amount is equal to 25 percent of the total reductions expected nationally.

EPA's proposed budget for Texas is also inconsistent with the very decision by the D.C. Circuit Court which remanded CAIR to EPA and initiated this most recent iteration of the transport rule. The court stated quite clearly that a proper rule to address interstate transport of an air pollutant must measure each state's downwind contribution and eliminate that contribution on the basis of each individual state. The court rejected the specific methodology that EPA has resurrected yet again in this final transport rule – the use of arbitrary, uniform cost standards to determine whether reductions are reasonable. We must assume that the current rule would be found equally

lacking in that it would allow some states to continue to make downwind contribution to nonattainment in other states significantly greater than the contribution Texas will be held responsible for. In fact, the greatest disparity in relative contributions is for the state within which the Granite City monitor actually resides (Illinois) or the immediate neighboring states of Indiana and Missouri. These three states, even after making the reductions required under the final rule, will still contribute to downwind nonattainment by a factor of 2.3 times (Indiana), 4.8 times (Illinois) and 5.1 times (Missouri) as much as what Texas will contribute.

In this rule EPA has determined that Texas should make far greater reductions than other states solely on the basis of an analysis that those reductions in Texas can be achieved more cheaply. And while we find many valid objections to the underlying cost analysis, it is not necessary to go there – EPA lacks the authority to discriminate between states in allocating the burden of compliance. Both the Clean Air Act and the D.C. Circuit Court make that clear.

EPA's imposition of a Federal Implementation Plan (FIP) is premature and usurps the authority of Texas granted to the states under the Clean Air Act.

Each state shares not only an equal responsibility for its own contributions downwind but also an equal authority to make decisions as to where to place the burden of compliance within their respective jurisdictions. EPA's imposition of a FIP as the vehicle for enforcement of reductions of downwind transport ignores the state's authority to address attainment of a NAAQS within the state before a finding can be made that a state is responsible for a significant contribution to a downwind state. The FIP also is inconsistent with the fundamental principle embodied in the Clean Air Act of the federal-state complementary relationship under which the state retains substantial responsibility for the decisions concerning how to apportion reductions within the state's economy. This final transport rule provides Texas (as well as the other affected states) little, if any, of the discretion which the state should be afforded to address any significant out-of-state contribution through a State Implementation Plan (SIP). A FIP is only in order when a state defaults to EPA by failing to make a required SIP submittal to EPA or after EPA disapproves a SIP submittal. Neither of these conditions that would then make a FIP eligible for promulgation has been satisfied. Further, EPA has provided no suggestion as to why a SIP would be inappropriate to address interstate transport, beyond the arbitrary and essentially impossible implementation schedule, and that schedule clearly ignores the time frames and process that the Clean Air Act provides for states to develop implementation plans and control measures.

The final rule and FIP further usurp the authority of Texas by appearing to offer some flexibility in how operating sources in Texas can comply when, in fact, none of the options described in the rule, or offered by EPA in public communications following execution of the rule, are practicable or reasonable. As a result, the rule denies the state the opportunity to develop a plan that places responsibility and accountability with state decision makers as to how the state's businesses and economy will be affected if emission reductions are necessary to meet federal air quality standards. In essence, EPA has established a target for emission reductions to satisfy a prescribed condition of air quality and then dictated exactly which facilities will make what reductions to achieve that condition. That arbitrary approach suggests strongly the assumption by EPA that the state could not possibly be in a position to suggest better alternatives that would be

less damaging to the state's economy. If the goal of the rule is to eliminate significant downwind contributions of air pollution, it is quite illogical to assume that emissions from coal-fueled electric generators will impact the one lone monitor in Granite City, Illinois or public health in that city any differently than would the same emissions from some other source. The only conclusion that can be reached from the approach EPA has taken to by-pass the process established in the Clean Air Act that vests authority with the states is that EPA is compelled to enforce a policy decision regarding the operation of coal-fueled generation units. While Texas or another state is free to reach the same decision after evaluating the options for required emission reductions, the first opportunity to address that question lies with the states under the SIP process and within the SIP time frame - not with EPA, not through a FIP and not in only a very few months.

The emission budget imposed on Texas is based on factual errors and cannot be complied with except in ways that are unacceptable to the state's economy and public safety.

EPA mistakenly assumes that certain plants in Texas that burn lignite can simply replace that lignite with lower sulfur coal from Wyoming's Powder River Basin (PRB) to comply with the rule. These plants are designed to burn lignite with a lower heat value. To burn or significantly increase the use of PRB coal they would have to be retro-fitted with new or modified boilers and other facility changes would be required. These changes and the prerequisite engineering, design, permitting and construction would require many months, if not years, to complete. In addition, it is generally believed within the industry that there is insufficient production of compliant PRB coal to meet the demand that this rule would produce through fuel switching requirements. The rule ignores the real world conditions that would have to be satisfied to expand new mining operations and ensure adequate rail infrastructure and transportation to every facility that would be increasing the use of PRB coal. The offer of a compliance option that takes years to implement to satisfy a rule that is effective in a few short months is no genuine offer at all.

EPA also suggests that dispatching of electric service to sources elsewhere on the grid, including certain gas-fired units can alleviate the loss of generation from coal-fueled plants that will either shut down or reduce operating times under this rule. It is well-known that in Texas, unlike most other states, the electric grid is almost self-contained within the state. It is simply not feasible to call on capacity from other states to be provided in Texas for the large majority of our service area. The inactive gas-fueled plants EPA assumes can simply be turned back on to fill in the gap in capacity do not represent a reasonable solution. While some are functional and can be reactivated, the effect on the marginal electric costs passed on to customers will be exorbitant.

Curiously, EPA has not recognized or asked the pertinent question as to why these plants are inactive. The answer is generally that they were too inefficient to operate economically and their air quality impacts due to older technology and locations in urban areas forced their retirement to comply with state ozone control plans. There is no small irony in the consideration of re-starting plants that were retired due to demands for ozone NAAQS attainment in Texas in order to reduce downwind effects of a tiny fraction of a μg of $\text{PM}_{2.5}$ at a monitor over 500 miles away that is in attainment. EPA's inventory of gas-fueled plants that are available to take up the slack also include at least one that has been decommissioned and is no longer permitted and another that

has been completely demolished. There is clearly no scenario under which these plants will be available to meet any demands created by a reduction in electric production at coal-fueled units. There has also been no response from EPA in defense of the final rule as to how to fill this significant gap in the analysis of compliance options under the rule.

In its assumption concerning the ability of Texas generators to meet electric demand while complying with the final rule, EPA also projects that emission reductions can be readily achieved by simply increasing the efficiency of existing flue gas desulfurization units at certain plants. EPA bases this assumption on design values for efficiency for these scrubber units that are theoretical. They are not representative of real world operating conditions and the recorded operating efficiencies that have been observed in practice and reported routinely to EPA for years. These differences are not insignificant. While EPA assumes operating efficiencies of up to 95% removal, these units actually demonstrate removal efficiencies from 65% to 75%. That difference between theory and fact means that reductions EPA believes to be readily available are not.

In another example, EPA's inaccurate assessment of scrubber efficiency is compounded by including non-existent scrubbers in their inventory of pollution control units that are believed to be capable of further emission reductions. Just as with the physical and regulatory changes that would be required for fuel switching, the improvement in removal efficiency at existing scrubbers (and certainly the construction of non-existent scrubbers) will take far longer than the very brief period available before this rule will become effective. Again, the errors contained in EPA's analysis are both significant and troubling and lead to a compliance alternative that is an alternative on paper but not in reality.

EPA is also mistaken in its assumptions about the prospect for certain NO_x emission reductions in Texas. While acknowledging that the installation of selective catalytic reduction (SCR) units could provide significant emission reductions in some cases, but would require several years to engineer, permit and construct, EPA assumes that Texas can still achieve an additional 8% reduction in NO_x emissions after January 1, 2012 on an expedited schedule. The plants that EPA assumes can make these reductions, however, have already installed the control equipment. These reductions EPA believes can be made in the future are already being made, are reflected in Texas' current emission inventory and do not represent opportunities for further emission reductions. Again, reductions in emissions EPA suggests are readily available are not available within a time frame where compliance with the rule is feasible. The real option that remains is closing or reducing operations at plants whose output cannot be spared given the current demands on Texas' electric supply system.

Another alternative offered by EPA is the trading of allowances by those facilities that cannot or choose not to make the reductions required. But again, this offer does not have the value or utility suggested. It appears obvious that there will be insufficient allowances available to cover the generation in Texas that must continue to ensure electric service reliability. That continuation of critical service is also likely to come at a significant cost due to market penalties. Also, even where allowances may be available, the acceleration of the effective date for assurance

provisions in the final rule from 2014 to 2012, the many uncertainties with the new program, the incentives for banking of credits for compliance in future years and the requirement that all allowances be accounted for before a unit can emit all suggest that the trading options offered by EPA are substantially less valid and far more uncertain than assumed.

Inaccuracies concerning the use of Wyoming coal, gas plants that are not operational or don't exist, the air quality impacts of using old gas plants that do exist, operating efficiencies of scrubbers, limited availability of the Texas electric grid, options for installation of non-SCR pollution controls, and uncertain credit trading markets – the list of errors, mistaken assumptions and serious questions in EPA's analysis of compliance options for Texas is simply too long and the implications of these errors on the final outcome of the transport rule too significant to ignore. Each of these errors in assumption or analysis effectively removes from consideration an option offered by EPA for compliance with an emission budget that has itself already been shown to have serious technical flaws. Any one of these errors alone would be a basis for reconsideration of the rule. Taken together, the basis for reconsideration becomes overwhelming.

These shortcomings in EPA's analysis of compliance options demonstrate that Texas has no actual discretion in complying with the final rule on January 1, 2012. To ensure that emissions do not exceed the established budget, generators in Texas must cease operations at a particular plant or plants or reduce production. Either way, the margins in our electric market in Texas that are critical to address seasonal high demands for power, respond to unforeseen emergencies and support new business opportunities will be reduced below levels that are safe, prudent or reasonable.

EPA's analysis of costs and benefits is inadequate and incomplete and ignores critical factors that will increase public health risks.

The common rebuttal to criticisms of the procedural and technical flaws in the final rule has been that public health benefits to accrue from the rule will exceed the costs of compliance. On the one hand, even if that were true, it does not justify the failure to adhere to legal authority, procedural standards for due process or the requirements for a valid technical justification that apply to such a rulemaking. In addition, it is entirely unreasonable to assume that the determination of alleged public health benefits to accrue from this rule is any more accurate or valid than the technical analysis upon which the costs are based. Given the many inadequacies in both the Texas emission budget and the technical justification for compliance options in Texas, no confidence in the cost figures attached to the final rule can be justified, nor can the cost/benefit ratio be regarded as having any validity. No argument that the rule is cost effective can be legitimately made until it is reconsidered and these errors addressed.

EPA also completely ignores obvious negative public health impacts in its assessment. The failure to consider the air quality effects of re-activating older, inefficient gas plants in urban areas has already been mentioned. Also not considered, however, are the potential effects of other "options" such as the increased production of PRB coal in Wyoming and the transportation of that coal to Texas (or other states). Nowhere in the rule is found even the question of how much coal would reasonably be expected to be needed, what new mining areas would be opened

to meet that demand or what additional rail and other transportation infrastructure would be needed to move coal to the market. Absent also is any discussion of what the air quality or other environmental effects would be of the additional mining activity in Wyoming or the transportation of the coal through the intervening states, including Texas. And again, just as was the case with Texas, EPA did not provide those potentially affected states any constructive notice of the potential effects of the rule or the likelihood that EPA would even adopt a rule that would include compliance options that would affect them.

More significant, however, is the failure to consider the very real public health effects of what is ultimately the only compliance option available to Texas on January 1, 2012 – the reduction of electric production from lignite-fueled power plants. This rule will, without question, increase the cost of electrical power in Texas. It will dangerously reduce the reliability margins that protect the citizens of this state from losses of power at critical times. There are sufficient examples, and some all too recent, of weather extremes in Texas and the potential impact of reduced service reserves. Those examples are compelling evidence that the potential harm to citizens, particularly those of limited means, who will be affected by a loss of service during weather extremes is beyond question.

This issue is far more critical than suggested in the rule for the simple reason that EPA, in yet another mistaken assumption, has based its assessment of the electric capacity in Texas on incorrect figures. EPA's assessment of the reliability of the Texas grid assumes that over 90,000 MW of power will be available in 2014 with coal plants providing approximately 18,500 MW of that total. The Electric Reliability Council of Texas, who is responsible for operation and regulation of most of the grid in Texas, reported in May of 2011 that Texas in 2014 would have less than 76,000 MW available, of which coal would provide almost 20,000 MW. The list of errors contributing to this incorrect assessment is long, but the result can be stated briefly – EPA has overstated the amount of power that they assume Texas will have access to by some 14,000 MW and underestimated the contribution made by coal-fueled plants by 1,500 MW. And it bears repeating that this error could have been addressed if parties in Texas had been afforded an opportunity to comment on an estimate of capacity before reading it in a support document to the final rule for the first time.

It is also essential, however, that the indirect effects of increased costs of utility service not be ignored. Low income utility customers, regardless of programs in place to provide assistance with paying bills, will be increasingly forced to make almost impossible decisions between paying for electricity and paying for other expenses that have a direct effect on the health and welfare of themselves and their families. It is disingenuous to assume that the highly speculative, and frankly poorly demonstrated, health benefits that are presumed to result from reducing a downwind contribution that exceeds the significance threshold by a minute $0.03 \mu\text{g}/\text{m}^3$ some 500 miles away in Illinois are more significant, more justifiable or more necessary than preserving the ability of people in Texas to pay their utility bills and still provide basic nutrition and health care for their families.

The final transport rule should be stayed and the effective date delayed to avoid unacceptable results to Texas citizens and businesses that can and should be avoided.

The above discussion outlines many compelling reasons why the final transport rule should be reconsidered in order that it be properly promulgated and justified. Many of the unintended consequences of the rule, however, can be avoided only by staying the effective date and enforcement of the rule pending its reconsideration. It is only equitable that the enforcement be suspended given the clear demonstration of significant cost impacts to Texas that will result unnecessarily and the risks to public health, safety and security that cannot be justified under a rulemaking whose presumed benefits and rationale must be questioned and reexamined. Because the compliance date is so near and the “easy” options for compliance truly nonexistent, only a stay of the rule will provide Texas and its businesses and citizens the due process that should be afforded under any regulatory action of this magnitude.

Sincerely,



Stephen Minick
Vice President for Government Affairs

cc: Cass R. Sunstein, Administrator
Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20500

Meg Victor
Clean Air Markets Division
Office of Atmospheric Programs
Mail Code 6204J
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Sonja Rodman
U.S. EPA Office of General Counsel
Mail Code 2344A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460