Appeal Nos. 08-16961, 11-11549 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA ENVIRONMENTAL COUNCIL, et al.,
Cross-Petitioners,

v.

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

ALABAMA POWER COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AND ITS ADMINISTRATOR,
Respondents.

Petitions for Review of Final Action of the Environmental Protection Agency

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BRIEF FOR RESPONDENTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, to the best of undersigned counsel's knowledge, undersigned counsel hereby certifies that the certificate of interested persons submitted by Alabama Power Company ("Alabama Power") on or about June 20, 2011, with its brief is complete.

Dated: 09/09/2011

___/s/ Andrew J. Doyle_____
ANDREW J. DOYLE, Attorney
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STATEMENT REGARDING ORAL ARGUMENT

Respondents believe that oral argument would aid the Court's decisional process and therefore request it.

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STATEMENT OF JURISDICTION

Respondents agree that this Court has jurisdiction pursuant to Section 307(b)(1) of the Clean Air Act ("CAA"[1/]), 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

1. Did the United States Environmental Protection Agency ("EPA" or "Agency"), on remand from this Court, follow lawful procedures to reconsider its initial approval of the State of Alabama's request to relax the visible emissions portion of its federally enforceable plan to implement the CAA?

2. Did EPA, on remand, articulate and apply a reasonable interpretation of Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), which provides that EPA "shall not approve a revision" to a state's implementation plan if EPA determines that it "would interfere" with air quality?

3. Did EPA, on remand, exercise its discretion reasonably based on the highly technical record before it?

STATEMENT OF THE CASE

I. INTRODUCTION

Before the Court is a decision by the Environmental Protection Agency not to allow the State of Alabama**,** through its Department of Environmental Management ("ADEM"), to relax air quality rules concerning "visible emissions."

[1/] For a glossary of abbreviations used in this brief, see our addendum, tab A.

Visible emissions are those that can be seen coming out of a smokestack or other emission point; such emissions are measured by their "opacity." Opacity, as this Court has explained, "is a measure of the light-blocking property of a plant's emissions, which is important in the Clean Air Act regulatory scheme as an indicator of the amount of visible particulate pollution being discharged by a source." Sierra Club v. Tenn. Valley Auth. ("TVA"), 430 F.3d 1337, 1341 (11th Cir. 2005); see also Sierra Club v. TVA, 592 F. Supp. 2d 1357, 1362 (N.D. Ala. 2009) ("Opacity serves as a surrogate for determining continuous compliance with particulate matter standards."); 40 C.F.R. § 60.2. Particulate matter pollution contains microscopic solids or liquid droplets that are so small that they can get deep into the lungs and cause serious health problems. National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144, 61,146, 61,152 (Oct. 17, 2006).

For over a decade, the visible emissions portion of Alabama's CAA State Implementation Plan ("SIP") has prohibited sources from emitting at levels beyond 20-percent opacity, as determined by averaging opacity measurements over a six-minute period. Ala. Admin. Code r. 335-3-4-.01(1)(a) (1996).[2/] Exceptions exist,

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[2/] For the full text of this longstanding rule, see the addendum to Alabama Power's brief, pp. 1-3.

including an allowance for emitting up to 40-percent opacity for one six-minute period every hour. Id. at 335-3-4-.01(1)(b). Through a request submitted to EPA in 2003 and supplemented in 2008, ADEM sought to broaden this exception, to allow sources to discharge visible emissions up to full – i.e., 100 percent – opacity for well over two consecutive hours on any given day. "[N]o light passes through a plume with 100% opacity." TVA, 430 F.3d at 1341.

This case is in its second iteration. In late 2008, Alabama Environmental Council, Sierra Club, National Resources Defense Council, and Our Children's Earth Foundation ("Citizens") sought the Court's review of an initial decision by EPA to approve the State's request. Approval and Promulgation of Implementation Plans: Alabama: Approval of Revisions to the Visible Emissions Rule, 73 Fed. Reg. 60,957 (Oct. 15, 2008).[3/] Citizens also, on two occasions, petitioned EPA to reconsider its approval.

In 2009, EPA granted Citizens' second reconsideration petition and moved this Court for a voluntary remand. The Court granted the motion over the objection of Alabama Power Company ("Alabama Power" or "APC"), as well as intervening parties aligned with it, ADEM and TVA.

[3/] For EPA's initial decision, see Alabama Power's record excerpts, tab 1.

On remand, EPA published a notice of alternative proposals, provided the public with an opportunity to comment, invited the submission of data, and reached a final decision. Approval and Promulgation of Implementation Plans: Alabama: Proposed Approval of Revisions to the Visible Emissions Rule and Alternative Proposed Disapproval of Revisions to the Visible Emissions Rule, 74 Fed. Reg. 50,930 (Oct. 2, 2009); Approval and Promulgation of Implementation Plans: Alabama: Final Disapproval of Revisions to the Visible Emissions Rule, 76 Fed. Reg. 18,870 (Apr. 6, 2011).[4/] After reconsideration, it was EPA's judgment to disapprove the SIP revision.

Contrary to the assertions of Alabama Power, ADEM, and TVA, the notice-and-comment procedures EPA followed on remand were entirely lawful. They were authorized by: (i) the Court's Order granting EPA's motion for a voluntary remand, which expressly permitted EPA "to conduct reconsideration proceedings"; (ii) the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551(5) and 553(b), (c) and (e), which not only grant an interested person the right to petition an agency for reconsideration, but require the agency to use notice-and-comment procedures in determining whether to repeal the prior action; (iii) Section 110(k)(6) of the CAA, 42 U.S.C. § 7410(k)(6), which provides EPA with

[4/] For EPA's final decision, see Alabama Power's record excerpts, tab 2.

broad authority to correct an erroneous prior approval of a SIP revision and to make the correction "in the same manner as the approval"; and (iv) the inherent authority of an agency to reconsider its own decision, "since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980); accord Gun South, Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989). The CAA did not require EPA to issue a "SIP call" through the procedures set forth in Section 110(k)(5) of the CAA, 42 U.S.C. § 7410(k)(5), under the circumstances of this case.

Moreover, the substantive basis for EPA's final decision on remand was reasonable. As the Supreme Court has explained, agency decisions are "not instantly carved in stone." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. ("Brand X"), 545 U.S. 967, 981 (2005) (citations omitted). "On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to changed factual circumstances, or a change in administrations." Id. at 981 (citation omitted). Consistent with those principles, EPA re-examined Section 110(*l*) of the CAA, which prohibits the approval of a SIP revision that "would interfere with any . . . applicable [CAA] requirement" such as air quality standards for particulate matter ("PM"). 42 U.S.C. § 7410(*l*). EPA explained in detail why, under an

interpretation more in line with Congress' intent to protect air quality through the CAA, the State's request fell short of the mark. Assessing the technical evidence, EPA found that the revision "allows extended periods of much higher opacity," 76 Fed. Reg. at 18,886; that "it is likely that the increased opacity allowed . . . would result in increased PM emissions," id. at 18,888; and that the increased opacity allowed is "great enough that, absent a convincing demonstration otherwise, . . . the revised rule hinders (i.e. 'would interfere' with) efforts to attain and maintain compliance" with PM air quality standards. Id. The record supports those findings.

II. STATUTORY AND REGULATORY BACKGROUND

The central objective of the CAA is "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1). It "sets out a two-stage process for achieving this goal." Sierra Club v. Georgia Power Co., 443 F.3d 1346, 1348 (11th Cir. 2006). EPA first establishes national ambient air quality standards ("NAAQS") for various pollutants, including particles with an aerodynamic diameter of 2.5 micrometers or less ("$PM_{2.5}$"). 42 U.S.C. §§ 7408, 7409; 40 C.F.R. § 50.7(a). In the second stage, each State must submit a state implementation plan ("SIP") for review and approval by EPA, setting forth the State's plan for attaining and then maintaining compliance with the standard that

EPA has set. 42 U.S.C. § 7410. "To gain EPA approval, the SIP must 'include enforceable emission limitations and other control measures, means or techniques . . . as may be necessary or appropriate to meet the applicable [CAA] requirements[.]'" Georgia Power, 443 F.3d at 1348 (quoting 42 U.S.C. § 7410(a)(2)).

Once a SIP is in place, "[i]f a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval." TVA, 430 F.3d at 1346 (citations omitted); see also 40 C.F.R. § 51.105 ("Revisions of a plan . . . will not be considered part of an applicable plan until such revisions have been approved by the Administrator . . . ."). EPA's review is governed by Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), which is "anti-backsliding" in nature. Kentucky Res. Council, Inc. v. EPA, 467 F.3d 986, 989 (6th Cir. 2006). Section 110(*l*) provides that "the Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the CAA]." 42 U.S.C. § 7410(*l*).

If the State's request accords with Section 110(*l*)'s goal of preventing backsliding, and if it involves an area that has not been designated as attaining the NAAQS, EPA must also determine whether the State's request meets the

requirements of Section 193 of the CAA, which provides that "[n]o control requirement in effect . . . before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified . . . in any manner unless the modification insures equivalent or greater emissions reductions of such air pollutant." 42 U.S.C. § 7515.

The CAA also provides EPA specific and express authority for correcting errors made by the Agency in the course of reviewing and approving a SIP or SIP revision. Section 110(k)(6) states that "[w]henever" EPA determines that its prior approval "was in error," "the Administrator may in the same manner as the approval, . . . revise such action as appropriate without requiring any further submission from the State." 42 U.S.C. § 7410(k)(6). The provision further states that "[s]uch determination and the basis thereof shall be provided to the State and public." Id.

Section 110(k)(5) of the CAA provides that "[w]henever" EPA finds that a SIP is "substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any requirement of the [CAA], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5). Once EPA issues such a "SIP call," a number of procedures ensue, including the requirement that the State submit a revised plan to EPA. Id.

The Alabama SIP is codified at 40 C.F.R. § 52.69, and "[i]t incorporates by references certain provisions of ADEM's Air Pollution Control Program regulations set out at Ala. Admin. Code r. 335-3-1 et seq.[.]" TVA, 430 F.3d at 1341. With respect to the NAAQS for $PM_{2.5}$, all or part of four counties in Alabama are designated under Section 107(d) of the CAA, 42 U.S.C. § 7407(d), as "nonattainment," that is, as areas that fail to meet annual or 24-hour air quality standards for that pollutant. 40 C.F.R. § 81.301 (2010).

III. FACTUAL AND PROCEDURAL BACKGROUND

"Opacity is one of the most basic emission limitations imposed on sources of particulate air pollution," TVA, 430 F.3d at 1341, including large coal-fired power plants operated by Alabama Power and TVA. 76 Fed. Reg. at 18,873. Since 1972, when EPA first approved it, Alabama's SIP has prohibited sources from emitting particulate of an opacity greater than 20 percent. 37 Fed. Reg. 10,842 (May 31, 1972); supra p.2 & n.2.[5/] There have been exceptions approved by EPA, including, as relevant here, one that "allows any source to emit a plume of opacity of up to 40% for one six-minute period per hour[.]" TVA, 430 F.3d at 1341 (citing Ala.

[5/] At that time, opacity was measured by a three-minute average. For the visible emissions rules as they existed in 1972, see our addendum, tab B.

Admin. Code r. 335-3-4-.01(1)(b) (1996)).[6]

For at least a decade prior to 2003, ADEM had a practice of purporting to allow sources with continuous opacity monitoring systems ("COMS")[7] to exceed the 20-percent opacity limit "for up to two percent of the operating hours of the plant in each quarter, measured in six-minute intervals and excluding times during which an exception applies." TVA, 430 F.3d at 1342. Through that practice, ADEM sought to "excuse thousands of opacity violations." Id. at 1348. In TVA, this Court invalidated ADEM's practice, on the ground that EPA "ha[d] yet to accept or reject it as a proposed SIP revision." Id. at 1349.[8]

After the TVA litigation began, in 2003, ADEM submitted a request to EPA for approval to revise the visible emissions portion of the Alabama SIP. TVA, 430 F.3d at 1349; Administrative Record ("AR") Doc. #2, cover letter p.1. ADEM sought to codify its prior (invalid) practice of allowing sources with COMS to emit

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[6] EPA first approved that exception in 1993. Approval of State Implementation Plans: Alabama: Approval of the Visible Emission Regulations, 58 Fed. Reg. 25,566 (Apr. 27, 1993). EPA also at that time approved a revision to measure opacity by a six-minute average.

[7] "COMS data can be credible evidence of opacity." 72 Fed. Reg. at 18,430.

[8] TVA involved opacity violations at Plant Colbert, a large coal-fired power plant in northwest Alabama. After the Court's decision in TVA, improvements made to the plant's pollution control equipment "had a significant positive effect on improving opacity performance." 592 F. Supp. 2d at 1367.

"up to 100 percent opacity for up to two percent of the quarterly operating time that they are otherwise subject to the 20 percent opacity limit." Approval and Promulgation of Implementation Plans: Alabama: Proposed Approval of Revisions to the Visible Emissions Rule, 72 Fed. Reg. 18,428, 18,431 (Apr. 12, 2007) (emphasis added).[9] In a technical analysis, ADEM acknowledged that increased PM emissions were "possible," but asserted that no violation of the NAAQS was expected. AR Doc. #2, air quality analysis p. 5.

In April 2007, EPA concluded that ADEM's request was "not approvable as submitted." 72 Fed. Reg. at 18,430. EPA found that the revision "would allow a source to emit at a higher allowable average opacity percent level (as measured by COMS in six-minute increments) on a quarterly basis as well as allowing higher short term excursions than the current approved SIP allows." 72 Fed. Reg. at 18,430. EPA stated that it could approve the request if ADEM supplemented it to ensure that opacity levels, "averaged" over a quarter of a year, would be at least as stringent as existing law. 72 Fed. Reg. at 18,430-31.

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[9] With or without ADEM's requested revision, the Alabama SIP "allow[s] for opacity of 100 percent for periods of startup, shutdown, load change and rate change (or other short intermittent periods upon terms approved by ADEM's Director and included in a State-issued permit)." 74 Fed. Reg. at 50,933. Prior to ADEM's request, however, the visible emissions rule "did not otherwise allow for opacity of 100 percent . . . ." Id.

EPA notified and provided the public with an opportunity to comment on its proposal to approve ADEM's request, conditioned upon ADEM submitting additional information. 72 Fed. Reg. at 18,434. Citizens provided comments, urging the Agency to disapprove. AR Doc. #21 (attachments omitted). Comments urging approval were submitted by ADEM, TVA, and the Utility Air Regulatory Group ("UARG"), an organization that "participat[es] on behalf of its members collectively in EPA rulemakings . . . that affect the interests of electric generators . . . ." AR Doc. #23, cover letter (attachments omitted);[10/] see also AR Index at 5-7 (listing comments).[11/]

In August 2008, ADEM supplemented its request . AR Doc. #1, cover letter (attachments omitted). ADEM sought to allow sources operating COMS to exceed the 20 percent opacity level – emitting as much as 100 percent opacity – for up to 2.4 continuous hours each day, provided that the "average" opacity of all six-minute periods during a calendar day did not exceed 22 percent and the source did not exceed 20 percent opacity for more than two percent of its operating time during a calendar quarter. 73 Fed. Reg. at 60,959-60.

[10/] Alabama Power is a member of UARG, as explained in EPA's July 11, 2011 opposition to UARG's June 28, 2011 motion for leave to file an amicus brief. The Court's Order of Aug. 1, 2011, carried that motion with the case.

[11/] For the AR Index, see Alabama Power's record excerpts, tab 3.

In October 2008, EPA approved ADEM's revision request. EPA focused on allowable "average" opacity levels and found no clear evidence as to whether the SIP revision would result in increased emissions of particulate matter. 73 Fed. Reg. at 60,959. EPA acknowledged that there is a "general relationship between opacity and PM," id. at 60,961, and that the "modeling presented by commenters show[ed] the possibility of an impact on the NAAQS under a worst-case scenario," id. at 60,962. Nevertheless, because "EPA lack[ed] the data necessary to determine quantitatively what impact, if any, the revisions . . . would or could have on . . . PM emissions," id., it stated that the State's request "satisf[ied] the requirements of CAA section 110(*l*)." Id. at 60,961.[12/]

In December 2008, Citizens filed a petition for judicial review of EPA's decision (Appeal No. 08-16961). Alabama Power, ADEM, and TVA intervened in support of EPA's approval. In addition, in December 2008, Citizens petitioned EPA to reconsider its approval, which the Agency denied. 74 Fed. Reg. at 50,932.

[12/] EPA's approval became effective in November 2008, 73 Fed. Reg. at 60,957, and sources were allowed to emit in accordance with the revised Alabama SIP beginning in May 2009. 73 Fed. Reg. at 60,958-59 (quoting "[t]he text of the new paragraphs added to AAC Chapter 335-3-4-.01," which provide that the revision took effect "6 months after EPA approval"); 74 Fed. Reg. at 50,932 ("By its terms, the Alabama state rule change became effective . . . on May 14, 2009."). For the full text of the revised visible emissions portion of the Alabama SIP that was in effect from May 2009 until the effective date of EPA's disapproval in May 2011, see the addendum to Alabama Power's brief, pp. 4-6.

In February 2009, Citizens again petitioned EPA to reconsider. AR Doc. #73 (attachments omitted). "The second petition . . . identified additional substantive and procedural concerns not included in the first petition." 76 Fed. Reg. at 18,871 & nn. 3-4. See also 74 Fed. Reg. at 50,932 (summarizing issues raised by Citizens). In April 2009, a month before sources could operate in accordance with the revised visible emissions rules, EPA granted Citizens' petition. AR Doc. #39. EPA stated that it "anticipate[d] initiating a new rulemaking process to provide an additional public comment opportunity." Id.

Shortly after granting Citizens' petition, EPA moved this Court for a voluntary remand. EPA asserted that Citizens' petition raised "legal, technical and policy issues that warrant additional review [by EPA]," and that it "would like the opportunity to reconsider its interpretation and implementation of the statute." Mot. for Voluntary Remand (Apr. 9, 2009), at 3.[13/] EPA noted that "its prior action may have been in error or inadequately explained," and it attached its decision granting Citizens' petition. Id. Alabama Power, ADEM, and TVA opposed EPA's motion. Alabama Power argued that "there is no authority or procedure in the CAA or elsewhere for EPA to 'reconsider' a final SIP provision," and that "EPA

[13/] For EPA's motion for voluntary remand and memoranda filed in conjunction with it, see our addendum, tab C.

cannot alter or repeal an approved SIP provision . . . except through the statute's SIP Call procedures[.]" APC's Opp'n to Mot. for Voluntary Remand (Apr. 17, 2009), at 8-10. ADEM and TVA asserted that reconsideration was "unauthorized by law." ADEM's Opp'n to Mot. for Voluntary Remand (Apr. 20, 2009), at 3; TVA's Resp. to Mot. for Vol. Remand (Apr. 22, 2009), at 2. In reply, EPA reiterated that, as it stated when granting Citizens' petition for reconsideration, it intended to reconsider "through a public rulemaking process that includes both notice and an opportunity for comment." Reply in Supp. of Mot. for Voluntary Remand (Apr. 30, 2009), at 14.

In September 2009, the Court (Tjoflat, Edmondson, and Wilson, JJ.) granted EPA's motion. The Order stated:

> The "Motion for Voluntary Remand," construed as a motion for limited remand to permit the EPA to conduct reconsideration proceedings and to stay this Court's proceedings pending resolution of reconsideration is GRANTED. Appeal Number 08-16961 is hereby REMANDED to the EPA on a limited basis for purposes of reconsidering the final rule under review, and proceedings in this Court shall remain STAYED pending completion of such reconsideration.

Order at 3.[14/]

[14/] For the full text of the Order, see our addendum, tab D.

In October 2009, in a notice published in the Federal Register, EPA proposed "to either affirm the previous rulemaking (which approved the revisions) or, alternatively, amend its previous rulemaking (i.e., disapproving the revisions)." 74 Fed. Reg. at 50,930. EPA sought "public comment on the issues raised in [Citizens'] petition for reconsideration as well as the actions proposed[.]" Id.

EPA further urged the public to comment and provide data regarding "the relationship between opacity and particulate matter mass emissions." Id. More specifically, EPA sought "public comment on the nature of the relationship between opacity and PM mass emissions over both the short and long term and when the opacity and PM mass emissions may have a predictable relationship to one another (e.g., when an opacity level of a certain amount would predict a PM mass emission of another certain amount)." Id. at 50,934. EPA provided a detailed list of technical data that could assist its analysis of the impacts of a SIP revision on air quality, emphasizing the desirability of source-specific opacity and PM emissions data from the 19 facilities affected by the revision. Id.

In December 2009, Citizens and other interested persons submitted comments in support of reversal. AR Doc. #64, cover letter and comments (attachments omitted); AR Doc. #65. ADEM, Alabama Power, TVA, and UARG

submitted comments in support of affirmance. AR Index at pp. 9-11.[15/] Neither ADEM nor any other commenter submitted source-specific data concerning the relationship between opacity and PM emissions from a facility, as EPA had urged. 76 Fed. Reg. at 18,880.

IV. EPA'S FINAL DECISION ON REMAND

Reconsideration proceedings concluded in April 2011, when EPA disapproved ADEM's request to revise the visible emissions portion of the Alabama SIP.

In the first part of its decision, EPA articulated its interpretation of Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), which, as EPA stated, "applies to every SIP revision submitted by a state." 76 Fed. Reg. at 18,873. "In evaluating whether a given SIP revision would interfere with attainment or maintenance [of NAAQS]," the Agency began, "EPA generally considers whether the SIP revision will allow for an increase in actual emissions into the air over what is allowed under the existing EPA-approved SIP." Id. If no such increase is allowed, or if there is only a "small possibility" that the revision might worsen air quality,

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[15/] Five months after the close of the comment period, in May 2010, Alabama Power lodged additional comments. EPA did not consider those comments because they were untimely, as explained in EPA's July 5, 2011 opposition to Alabama Power's June 20, 2011 motion to supplement the administrative record. The Court's Order of Aug. 1, 2011 carried that motion with the case.

approval may occur. 76 Fed. Reg. at 18,875. Approval may not occur, however, if evidence indicates that the revision would likely allow an increase in emissions of pollutants in an area designated as nonattainment, and if the State has failed to offer any "offsetting emission reductions or an attainment demonstration addressing the rule changes at issue." 76 Fed. Reg. at 18,873.

In addition, EPA elaborated that if the record points in the direction of interference with air quality but also lacks sufficient information to resolve potentially probative uncertainties, Section 110(*l*) precludes approval unless the State provides "a contemporaneous attainment demonstration" or the record provides "some other basis for concluding that a SIP revision will not interfere with attainment." 76 Fed. Reg. at 18,875-76. "[U]ncertainty alone," EPA stressed, "is not a sufficient basis for approving a SIP revision." Id.

In the decision's second part, EPA examined the SIP revision and assessed evidence of its possible interference with air quality. EPA found the revision to be a relaxation of its longstanding predecessor provision; it "would allow for increase of maximum opacity from 40 percent to 100 percent and would allow such increases for up to 2.4 hours at a time, instead of for only six minutes per hour." 76 Fed. Reg. at 18,888. See also id. at 18,873-74, 18,883, 18,886, 18,889.

EPA also found that allowing sources to discharge visible emissions at much higher opacity and for extended periods of time would, more likely than not, lead to increased emissions of pollutants in nonattainment areas compared to levels allowed by the pre-2008 version of the Alabama SIP. EPA discussed "many circumstances where increased opacity levels are associated with increased mass [PM] levels." 76 Fed. Reg. at 18,876. EPA concluded that "significant increases in opacity to its highest measurable level at the same source are likely to result in additional PM emissions from that source." 76 Fed. Reg. at 18,880.

EPA elaborated that "increases in opacity can be indicative of changes in emissions control device performance or source operation, which in turn can lead to increases in mass emissions." 76 Fed. Reg. at 18,872. EPA cited examples, including data from a commenter showing "routine source operation with opacity of about five percent," id., and a factual finding by a district court, on remand from this Court's decision in TVA, that a unit at a large coal-fired power plant in northwest Alabama "was projected to operate below 5 percent opacity even with a partially malfunctioning control device and below 10 percent 'under extreme conditions that are unlikely to ever occur.'" 76 Fed. Reg. at 18,872 n.6 (quoting 592 F. Supp. 2d at 1367). In light of those examples, EPA expressed concern about malfunctioning associated with opacity levels far in excess of 10 percent

and, indeed, up to 100 percent under the proposed relaxation of Alabama's visible emissions rules. As EPA explained, "[o]ne of the primary purposes of opacity limits is to ensure that PM control devices are operating within normal parameters." 76 Fed. Reg. at 18,874.

Acknowledging its prior focus on "average" opacity levels, EPA explained why, upon reconsideration, such averages are not useful in assessing the likelihood of interference with air quality. As EPA pointed out, "a control device could temporarily shutdown or malfunction, potentially resulting in 100 percent opacity, for an hour or two and the source could still be in compliance with the 22 percent average daily limit [set forth in the SIP revision]. By contrast, an opacity limit that requires consistent compliance at 20 percent, and allows only one excursion of six minutes per hour to 40 percent opacity will limit larger and longer excursions." 76 Fed. Reg. at 18,874. EPA also noted that the only time the Agency had ever used an "averaging" approach was the prior approval. Id. at 18,874 n.14.

In further support of its finding that the SIP revision would interfere with air quality, EPA reviewed the status of Alabama's air quality control areas with respect to the NAAQS for particulate matter. "Historically," EPA noted, "Alabama has had areas with attainment problems for the various PM NAAQS." 76 Fed. Reg. at 18,872. As of the date of EPA's decision, the Birmingham area

"remain[ed] designated as nonattainment for both the 2006 24-hour and 1997 annual $PM_{2.5}$ NAAQS." Id. at 18,873. Likewise, Alabama's other PM nonattainment area, across the border from Chattanooga, Tennessee, "remain[ed] designated nonattainment for 1997 annual $PM_{2.5}$ NAAQS." Id. at 18,873. EPA found that at least five of the 19 sources affected by the SIP revision were located in or near Birmingham or Chattanooga. Id.

In the third part of the decision, EPA outlined uncertainties and omissions in the record and explained why they did not alter the finding that the revision would interfere with air quality. EPA noted that neither ADEM nor any commenter had provided any source-specific data concerning the relationship between opacity and PM emissions, as EPA had urged. 76 Fed. Reg. at 18,880. Therefore, as EPA explained, there remained "uncertainty in the precise relationship between the opacity of a stack emission stream and the mass of PM in the same emission stream at the affected sources." Id. at 18,872. Although commenters submitted select data and modeling results, EPA found that information to be too incomplete and inconclusive to rebut the evidence of interference. No commenter, for example, "show[ed] that a source's PM emissions would not be elevated if it was permitted to have an opacity at up to 100 percent for up to 2.4 hours a day." Id. at 18,889. Further, "the State did not make a showing that emissions from [sources affected

by the revision] would not interfere with maintenance of the NAAQS in attainment areas and with attainment of the NAAQS in nearby nonattainment areas." Id. at 18,871-72 n.5. In addition, EPA noted that "ADEM did not submit a full attainment demonstration specifically addressing this rule and did not propose any offsetting reductions to compensate for emission increases in nonattainment areas." Id. at 18,884.

In the fourth and final part of its decision, EPA responded to comments provided by ADEM, Alabama Power, TVA, UARG, and other interested persons urging approval. 76 Fed. Reg. at 18,877. While acknowledging comments to the effect that "ambient PM levels have been improving," EPA stressed the importance of maintaining those improvements. Id. at 18,882. "Indeed," EPA continued, "this is among the reasons why reviewing SIP revisions . . . is such an important exercise." Id.

EPA disagreed with commenters' assertions that modeling showed "no problem with the NAAQs even under unrealistic, worse-case conditions." 76 Fed. Reg. at 18,882. Identifying a number of information gaps associated with the models, EPA found their results to be "insufficient and too inaccurate." Id. at 18,875. See also AR Doc. #10 (EPA scientists' detailed analysis of modeling submitted by ADEM, Alabama Power, and other commenters).

EPA also considered data purportedly showing that Alabama Power's facilities had not been "bundling" emissions of high opacity for lengthy periods of time following EPA's initial approval in late 2008. 76 Fed. at 18,883. EPA found no assurance that the data constituted a "representative random sampling of the long-term effects of the rule." Id. at n.20. EPA further declined to assign probative value to the data, explaining that the proper focal point is "on the differences between the two versions of the . . . rules in terms of what they would allow and not on the choices individual facilities may have made to date in terms of opacity and PM emissions." Id. at 18,884. In addition, EPA pointed out that Alabama Power "did not . . .submit data to establish what the PM mass emissions were during periods of elevated opacity at these sources." Id.

In light of its disapproval of ADEM's request to relax the visible emissions portion of the Alabama SIP under Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), EPA did not reach the question of whether ADEM's request accorded with Section 193 of the CAA, 42 U.S.C. § 7515. 76 Fed. Reg. at 18,871-72 & n.5, 18,873 n.10.

At the same time that it filed a petition for review in this Court (Appeal No. 11-11549), Alabama Power moved for a stay of EPA's disapproval pending appeal. In May 2011, the Court (Tjoflat, Barkett, and Martin, JJ.) denied the motion, writing that Alabama Power had "not shown entitlement to such relief."

Order at 2.[16] In support of that conclusion, the Court cited Nken v. Holder, in which the Supreme Court stressed the importance of "whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits" and "whether the applicant will be irreparably injured absent a stay." 129 S. Ct. 1749, 1760-61 (2009) (citations omitted).[17]

STANDARD OF REVIEW

Where, as here, jurisdiction is invoked under Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), courts "ask whether the Agency's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 496-97 (2004); see also Sierra Club v. Johnson, 436 F.3d 1269, 1273 (11th Cir. 2006). This standard of review is "exceedingly deferential" to the agency. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1359-60 (11th Cir. 2008) (citation omitted).

Challenges to an agency's interpretation of a statute that Congress has entrusted the agency to administer are governed by the familiar framework of Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). Under Chevron, the

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[16] For the full text of the Order, see our addendum, tab E.

[17] In the same Order, the Court consolidated Citizens' and Alabama Power's petitions for review and established a briefing schedule.

first question is "whether Congress has directly spoken to the precise question at issue." Id. at 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Under that second step, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Brand X, 545 U.S. at 980 (citing Chevron, 467 U.S. at 843-44 & n.11).[18/]

Where many aspects of the agency's decision are technical, as they are in EPA's final decision on remand, "a reviewing court must generally be at its most deferential." Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983).

SUMMARY OF ARGUMENT

On remand from this Court for the specific purpose of reconsidering its initial approval of Alabama's SIP revision, EPA followed lawful procedures,

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[18/] Chevron deference applies with equal force to EPA's interpretation of a SIP. Sierra Club v. Adm'r, U.S. EPA, 496 F.3d 1186, 1186 (11th Cir. 2007) ("[T]hat the Georgia Rule is a state regulation is not an obstacle to according Chevron deference . . . .") (citation omitted).

permissibly interpreted the Clean Air Act, and reasonably exercised its discretion.

In reconsidering ADEM's request to relax the visible emissions portion of its CAA State Implementation Plan, EPA provided the public with notice and an opportunity to comment. Those procedures were authorized by an Order issued by this Court during the first iteration of the case, which expressly permitted EPA "to conduct reconsideration proceedings." Further, memoranda leading up to that Order were clear that EPA intended to reconsider its prior SIP revision approval in accordance with the rulemaking provisions of the Administrative Procedure Act ("APA").

The rulemaking provisions of the APA authorized EPA to reconsider through normal notice-and-comment procedures. Under 5 U.S.C. § 553(e), Citizens had a right to, and did, petition EPA to reconsider its initial decision to approve Alabama's requested SIP revision. Having been persuaded to reconsider, EPA lawfully followed notice-and-comment procedures required by 5 U.S.C. §§ 551(5) and 553(b)-(c) before reversing its initial approval decision.

Section 110(k)(6) of the CAA, 42 U.S.C. § 7410(k)(6), provided additional authority for EPA to reconsider through normal notice-and-comment procedures. That provision provides EPA with broad authority to correct any prior approval of a SIP revision that EPA determines to have been "in error." Id. In addition, the

provision allows EPA to make a correction "in the same manner as the approval." Id. Because EPA could, and did, follow notice-and-comment procedures to approve, EPA could, and did, follow notice-and-comment procedures in determining to disapprove.

EPA also had inherent authority to reconsider its own decision. As this Court stated in Gun South, agencies have "implied authority . . . to reconsider and rectify errors" even if a statute or regulation does not expressly provide such authority. 877 F.2d at 862. Because the Clean Air Act authorized EPA to take a rulemaking action on the State's request, the Clean Air Act also authorized EPA to reconsider that action through a subsequent rulemaking action.

The "SIP call" provision of the CAA, 42 U.S.C. § 7410(k)(5), did not require EPA to use different or more extensive procedures on remand. That provision provides EPA with additional authority to require corrections to inadequate SIPs, but does not supplant EPA's authority to revisit a prior SIP approval when the Agency determines it erred. The Court's decisions in Georgia Power, 443 F.3d at 1346 (11th Cir. 2006), and Sierra Club v. TVA, 430 F.3d 1337, 1341 (11th Cir. 2005), did not require EPA to issue a SIP call under the circumstances of this case. In Georgia Power, the Court did not address the full scope of EPA's authority to reconsider an approved SIP revision. In TVA, the

Court stressed the important attributes of notice-and-comment procedures – procedures that EPA followed here.

The substance of EPA's decision on remand was reasonable. Under Chevron, courts must defer to an agency's reasonable construction of an ambiguous statute. Just so here with respect to EPA's interpretation of Section 110(*l*) of the Clean Air Act, 42 U.S.C. § 7410(*l*), which provides that EPA should disapprove a SIP revision where evidence shows that it would, more likely than not, lead to increased emissions of a pollutant, compared to levels allowed by the existing SIP, in one or more areas designated as failing to meet air quality standards for that pollutant and therefore interfere with air quality. This interpretation fits with the text of Section 110(*l*), which provides EPA with broad authority, and it is faithful to Congress' protective "anti-backsliding" objective.

EPA's technical findings are unassailable under the applicable standard of review, which is extremely deferential to the agency. The record amply supports EPA's findings that discharging visible emissions for extended periods of time at much higher opacity levels in accordance with ADEM's SIP revision would interfere with applicable air quality requirements for particulate matter. The key differences between the pre-2008 visible emissions rules and ADEM's revision of them are that the latter allows for up to 100, as opposed to 40, percent opacity, and

that the latter also allows very high levels of opacity on any given day to continue for up to 2.4 consecutive hours, as opposed to only one six-minute period per hour. EPA reasonably found the revision to be a significant relaxation of pre-2008 law and impermissible under the CAA. Further, the record provides a rational technical basis for EPA to conclude that, although lacking data to precisely quantify the relationship between opacity and PM emissions, the known relationship between opacity and particulate matter establishes that the revision would interfere with air quality. The data presented by ADEM, Alabama Power, and others did not refute this relationship, did not address technical uncertainties identified by EPA, and did not otherwise compel a different result.

ARGUMENT

On remand from this Court, EPA disapproved the State of Alabama's request to relax the visible emissions portion of its Clean Air Act implementation plan so as to allow sources to discharge visible emissions to a point where no light can pass for substantial consecutive periods of time every day. In reaching that decision, EPA did not act arbitrarily, capriciously, or otherwise contrary to law.

I. EPA, ON REMAND FROM THIS COURT, FOLLOWED LAWFUL PROCEDURES TO RECONSIDER ITS INITIAL APPROVAL OF ALABAMA'S REQUEST TO RELAX ITS CLEAN AIR ACT IMPLEMENTATION PLAN

The principal challenge to EPA's decision on remand regards the notice-and-comment procedures EPA used to reconsider its initial approval of ADEM's request. None of the challenges has merit. EPA acted lawfully.

A. EPA SOUGHT AND RECEIVED AUTHORIZATION FROM THE COURT TO RECONSIDER ITS APPROVAL

During the first iteration of this case, EPA received authorization from this Court to reconsider its initial approval and to do so through notice-and-comment procedures. The Court's Order granting EPA's motion for voluntary remand permitted EPA "to reconsider[] the final rule under review" and "to conduct reconsideration proceedings" as the Agency had requested. Supra p.15.

The scope of authorization EPA received from the Court is further evident from memoranda filed by the parties. In its motion, EPA requested permission "to reconsider its interpretation and implementation of the statute," Mot. for Voluntary Remand, at 3, and attached a copy of EPA's decision to grant Citizens' petition for reconsideration, which clearly stated that the Agency "anticipate[d] initiating a new rulemaking process to provide an additional public comment opportunity." AR Doc. #39. Opposing EPA's motion, Alabama Power argued (as it does here) that "there is no authority or procedure in the CAA or elsewhere for EPA to 'reconsider' a final SIP provision," and further that "EPA cannot alter or repeal an approved SIP provision . . . except through the statute's SIP Call procedures[.]" APC's Opp'n to Mot. for Voluntary Remand, at 8-10. In reply, EPA defended its authority to reconsider and reiterated, unequivocally, that it intended to follow notice-and-comment procedures on any remand the Court granted. Reply in Supp. of Mot. for Voluntary Remand, at 1, 14.

Context and logic underscore that EPA obtained authorization from this Court to proceed as it did on remand. If instead of moving for a voluntary remand EPA had defended its approval decision on the merits, any number of litigation results could have ensued. If the Court found reversible error, EPA's decision could have been remanded for a better explanation. 5 U.S.C. § 706; see, e.g.,

Sierra Club v. Leavitt, 368 F.3d 1300 (11th Cir. 2004) (vacating and remanding an EPA order found to be inadequately explained). In that scenario, EPA would unquestionably have the authority to reconsider the State's request because of the Court's exercise of its remedial authority.

Stated differently, Citizens could have obtained equivalent or broader relief if they had prevailed on the merits. EPA should not have to await an adverse judgment from the Court to correct its own error. See Natural Gas Clearinghouse v. FERC, 965 F.2d 1066, 1073 (D.C. Cir. 1992) ("[A]n agency, like a court, can undo what is wrongfully done by virtue of its [prior] order.") (citation and quotation mark omitted); Cleveland Nat'l Air Show, Inc. v. United States Dep't of Transp., 430 F.3d 757, 765 (6th Cir. 2005) ("A government agency, like a judge, may correct a mistake, and no principle of administrative law consigns the agency to repeating the mistake into perpetuity.").

B. THE ADMINISTRATIVE PROCEDURE ACT AUTHORIZED EPA TO RECONSIDER ITS PRIOR APPROVAL USING NORMAL NOTICE-AND-COMMENT PROCEDURES

The rulemaking provisions of the Administrative Procedure Act also authorized EPA to reconsider its approval decision, and to do so through notice-and-comment procedures. Under the APA, "[e]ach agency shall give an interested person the right to petition for the . . . repeal of a rule." 5 U.S.C. § 553(e). "Rule,"

in turn, is defined to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). Moreover, in terms of procedure, "the APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule." Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982) (construing 5 U.S.C. §§ 551(5) and 553(b)-(c)), aff'd sub nom., Process Gas Consumers Grp. v. Consumer Energy Council of America, 463 U.S. 1216 (1983) (per curiam).

In this case, Citizens petitioned EPA for repeal of a rule, i.e., the Agency's approval of the SIP revision, on two occasions. Supra pp.13-14. Although EPA denied the first petition, it was persuaded to grant the second petition. In accordance with the APA, EPA provided notice and an opportunity to comment before it reversed course and repealed its approval.

Alabama Power and ADEM contend that the rulemaking provisions of the APA do not apply here (APC Br. at 44-45; ADEM Br. at 30-31). The plain terms of the APA belie their assertion; the rulemaking provisions expressly apply to a wide range of agency action and rulemaking, including the repeal of a rule. See 5 U.S.C. § 553(a) (stating that "[t]his section applies, according to the provisions thereof, except" in narrow prescribed circumstances); id. § 551(5) (defining

"rulemaking" to include "repeal"). Thus, as a matter of law, the notice-and-comment requirements of the APA applied to EPA's initial review of a State's request to revise its SIP,[19/] as well as EPA's review of an interested person's petition to repeal that approval.

Alabama Power's and ADEM's assertion is also refuted by the plain terms of the CAA. Section 307(b)(1) of the CAA, which serves as the jurisdictional basis for petitions for review of any EPA approval or disapproval of a State's request to revise its SIP, also contains the following statement:

> The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

42 U.S.C. § 7607(b)(1) (emphasis added). Section 307(b)(1)'s broad reference to a petition for reconsideration demonstrates that Congress did not intend to eliminate an interested person's right to petition for reconsideration under 5 U.S.C. § 553(e), except to the extent Congress provided otherwise in the CAA.

[19/] See, e.g., Hall v. EPA, 273 F.3d 1146, 1161 (9th Cir. 2001) ("The EPA's approval of the [SIP] revisions is an informal rulemaking subject to the [APA's] notice-and-comment requirements[.]").

No provision of the CAA eliminates an interested person's right to petition EPA to reconsider its approval of a SIP revision, and no provision of the CAA alters the requirement of the APA that EPA use normal notice-and-comment procedures to conduct reconsideration proceedings. Although the CAA explicitly exempts or removes a number of categories of EPA action from specific portions of the APA, no such exemption exists with respect to the category of action EPA took in this case. Section 107(d)(2)(B), for example, provides that EPA's "[p]romulgation or announcement of a designation [of air quality] under paragraph (1), (4) or (5) shall not be subject to the provisions of [5 U.S.C. §§] 553 through 557 . . . ." 42 U.S.C. § 7407(d)(2)(B). In this case, EPA did not promulgate or announce an air quality designation.

Another example is Section 307(d)(1), which states that "[t]he provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." 42 U.S.C. § 7607(d)(1). Section 307(d)(1) then enumerates no fewer than 22 specific categories of EPA action that are exempt from the identified provisions of the APA. None of those describes the action EPA took in this case, contrary to ADEM's contention (ADEM Br. at 31). The category ADEM points to pertains only to "the promulgation or revision of an implementation plan by the

Administrator under [42 U.S.C.] section 7410(c)," 42 U.S.C. § 7607(d)(1)(B), which, in turn, pertains only to a "Federal implementation plan," 42 U.S.C. § 7410(c)(1), or "FIP." Here, EPA reviewed a revision to a state implementation plan, or SIP. EPA did not promulgate or revise a FIP, and thus Section 307(d)(1)(B) does not apply.[20/]

The detailed specificity of Sections 107(d)(2)(B) and 307(d)(1) makes it especially fitting to apply the rule that, "where Congress knows how to say something but chooses not to, its silence is controlling." Delgado v. U.S. Att'y Gen., 487 F.3d 855, 862 (11th Cir. 2007) (quotation marks and citation omitted). Because no provision of the CAA displaced them, the rulemaking provisions of the APA apply, and they authorized EPA to act on Citizens' reconsideration petition through normal notice-and-comment procedures.

[20/] It does not support Alabama Power's argument that Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), imposes a deadline on an interested person's ability to seek reconsideration. As it concedes, "this reconsideration process does not apply to EPA action on SIP revisions." APC Br. at 43-44 n.14. There is no deadline in the APA governing an interested person's ability to petition an agency for repeal of a rule. See 5 U.S.C. § 553(e). Contra APC Br. at 45 n.16. Regardless, there is no plausible argument that Citizens acted in a untimely manner. Citizens sought and persuaded the Agency to grant reconsideration even before the relaxed visible emissions rules took effect. Supra pp.13-14 & n.12; see also Citizens Br. at 8-9 ("[O]n January 9, 2009, the agency . . . added 20 new documents to the electronic rulemaking docket. . . . Citizens determined that they had new grounds for reconsideration of EPA's October 2008 action.").

C. SECTION 110(k)(6) AUTHORIZED EPA TO FOLLOW STANDARD NOTICE-AND-COMMENT PROCEDURES

Section 110(k)(6) of the CAA, 42 U.S.C. § 7410(k)(6), also provided authority for EPA to reconsider its approval decision, and to do so through normal notice-and-comment procedures.

Section 110(k)(6) broadly permits EPA to determine whether any prior approval of a SIP revision was "in error," and if so, to revise the prior approval "as appropriate," in "the same manner as the approval," and "without requiring any further submission from the State." 42 U.S.C. § 7410(k)(6). Although neither the CAA nor its legislative history defines "error,"[21/] its ordinary meaning is "1) an act, assertion, or belief that unintentionally deviates from what is correct, right or true; 2) the state of having false knowledge . . . 4) a mistake." Webster's II New Riverside University Dictionary 442 (Houghton Mifflin Co. 1988). Similarly, the Oxford American College Dictionary 467 (2d ed. 2007) defines "error" as "a

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[21/] The law review article cited by Alabama Power (APC Br. at 43 n.13) does not constitute legislative history even if it was written by a member of Congress and his staff. EPA has looked for but found no legislative history of Section 110(k)(6) defining the term "error." See Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule, 75 Fed. Reg. 82,536, 82,543-44 (Dec. 30, 2010). Even if "contrary indications in the statute's legislative history" existed, however, legislative history may not be used "to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994).

mistake" or "the state or condition of being wrong in conduct or judgment." In short, the ordinary definition of "error" is broad, and it includes any incorrect action or judgment.

Alabama Power argues that Section 110(k)(6) is "only available to correct minor clerical or technical errors . . . ." APC Br. at 43. However, the words "clerical" or "technical" do not appear anywhere in the statutory text. Instead, Congress' use of the broad term "error" demonstrates that it did not intend such a cramped and narrow reading. See, e.g., Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC, 548 F.3d 986, 991 (11th Cir. 2008) (declining to adopt an "extremely cramped and narrow reading of the ordinary and plain meaning of the relevant [statutory] language").

The circumstances and timing of Section 110(k)(6)'s enactment further refute Alabama Power's assertion. This provision was part of the 1990 amendments to the CAA, enacted shortly after Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777 (3rd Cir. 1987), was decided. In Bridesburg, the court stated that EPA's authority to reconsider an approval of a SIP revision was limited to correcting typographical errors. 836 F.2d at 785-86. Congress' subsequent passage of Section 110(k)(6), and its use of the broad term "error," overturned Bridesburg and removed any plausible question about EPA's authority to

reconsider an approval of a SIP revision.[22/]

Under any reasonable reading of Section 110(k)(6), EPA's decision to reverse its prior determination would qualify as an error correction. EPA stated:

> After consideration of all the issues raised by [Citizens] . . . , as well as comments received on the October 2, 2009, proposed rulemaking from many industry groups, individual companies, state agencies, and other non-governmental organizations, EPA has concluded that disapproving the [State's] 2003 and 2008 Submittals results in the interpretation of the CAA that is most consistent with the plain text and legislative history of the CAA, as well as the air quality goals set forth in the CAA.

76 Fed. Reg. at 18,872. Similar illustrations of EPA's intent to correct its judgment abound. See also id. at 18,874 ("After reconsideration, . . . EPA's position is that both of the findings that provided the foundation for its initial approval of the SIP revision were not strong enough to support approval under the CAA."); id. at 18,875 ("[T]he approach of the prior notice, which focused solely on maintaining an overall average daily (and quarterly) opacity does not provide an adequate framework for assessing the impact of the Submittals on emissions and air quality . . . . "); id. at 18,879 ("In amending its previous action, EPA is placing greater weight on the technical aspects of the SIP Submittals that are known to

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[22/] ADEM's reliance on Bridesburg and similar decisions predating the 1990 amendments to the CAA is thus misplaced (ADEM Br. at 33-38).

have the potential for adverse impacts . . . .This change . . . represent[s] . . . an analytical reconsideration of what decision is most supported by the CAA, given the facts at issue in this rulemaking."); id. ("In reversing its prior approval, EPA has concluded that disapproval is necessary . . . .").

Accordingly, Section 110(k)(6) provided additional authority for EPA to disapprove the State's request "in the same manner as the approval," 42 U.S.C. § 7410(k)(6), that is, through normal notice-and-comment procedures. See 76 Fed. Reg. at 18,878 n.18 ("[T]he process [EPA] has used for reconsidering and disapproving this SIP revision is entirely consistent with the process required under section 110(k)(6).").

D. EPA HAD INHERENT AUTHORITY TO RECONSIDER

In addition, EPA acted within its inherent authority to reconsider its initial approval of the State's request to revise the visible emissions portion of the Alabama SIP. As one appellate court concisely explained: "Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) (citation omitted).

This Court agrees. In Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989), the question was whether a particular agency had the authority to suspend

permits while it reconsidered their issuance. However, neither a statute nor a regulation explicitly authorized the reconsideration. Id. at 862. Nevertheless, the Court answered the question in the affirmative, in part based on case law recognizing an agency's "implied authority . . . to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration." Id. (citations omitted).

Other circuits agree. For example, in New Jersey v. EPA, the D.C. Circuit observed that "[a]n agency can normally change its position and reverse a decision." 517 F.3d 574, 582 (D.C. Cir. 2008) (citations omitted). In Dun & Bradstreet Corp. Found. v. U.S. Postal Serv., the Second Circuit stated: "It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review." 946 F.2d 189, 193 (2d Cir. 1991) (citation omitted).[23/]

In an attempt to distinguish case law recognizing an agency's inherent reconsideration authority, Alabama Power asserts that "EPA is not seeking to 'correct' any mistake here – it is seeking to substantively change an approved SIP

[23/] See also, e.g., Belville Mining Co. v. United States, 999 F.2d 989, 998 (6th Cir. 1993); Iowa Power & Light Co. v. United States, 712 F.2d 1292, 1297 (8th Cir. 1983).

based on an interpretative change . . . ." APC Br. at 46. Alabama Power is wrong. EPA took action to correct its own judgment. Supra pp.39-40. Moreover, unless a statutory provision unambiguously provides to the contrary, see, e.g., New Jersey, 517 F.3d at 581-83 (holding that Section 112(c)(9) of the CAA, 42 U.S.C. § 7412(c)(9), specifically prohibited EPA from correcting a prior error in a decision to list a hazardous air pollutant for regulation, except through that provision's rigorous de-listing procedures), an agency may exercise its inherent authority and reconsider a prior action based on any principled basis for doing so. In Gun South, for example, an agency sought reconsideration based on a policy initiative to improve the agency's administration of the relevant statute. 877 F.2d at 859.

As the Supreme Court stated in American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967), an agency "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." (Emphasis added.) "[T]his kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency." Id.; see also Brand X, 545 U.S. at 981; supra p.5. The same reasoning applies here and confirms EPA's inherent authority to reconsider.

E. NOTHING IN THE CLEAN AIR ACT REQUIRED EPA TO USE PROCEDURES OTHER THAN NORMAL NOTICE-AND-COMMENT

The notice-and-comment reconsideration procedures EPA followed on remand were authorized by the Court's Order granting EPA's motion for a voluntary remand, supra pp.30-32; the rulemaking provisions of the APA, 5 U.S.C. § 553, supra pp.32-36; Section 110(k)(6) of the CAA, 42 U.S.C. § 7410(k)(6), supra pp.37-40; and EPA's inherent authority, supra pp.40-42. The CAA did not require EPA to issue a SIP call and procedures associated with it, contrary to the arguments of Alabama Power, ADEM, TVA, and UARG.

The SIP call provision of the CAA provides that "[w]henever the Administrator finds that "the applicable implementation plan for any area is substantially inadequate . . . to . . . comply with any requirement of [the CAA], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5). If EPA invokes the SIP call provision, "[t]his begins an extensive regulatory process that includes the publication of a proposed plan in the Federal Register for notice and comment before final approval by the agency." Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1207 (D.C. Cir. 1998).

The SIP call provision, by its terms – particularly through the use of the term "[w]henever" – authorizes, but does not require, EPA to make a finding that a SIP is substantially inadequate. Instead, EPA has discretion to determine whether and when to invoke the SIP call process, and when to proceed through other available processes. Cf. New York Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 330-31 (2d Cir. 2003) (opening phrase "Whenever the Administrator makes a determination" in Section 502(i)(1) of the CAA, 42 U.S.C. § 7661a(i)(1), grants EPA "discretion whether to make a determination"); Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("whenever" in Section 115(a) of the CAA, 42 U.S.C. § 7415(a), "impl[ied] a degree of discretion" in whether EPA had to make a finding).

Congress had good reason to provide EPA with discretion to issue a SIP call. Section 110(k)(5), 42 U.S.C. § 7410(k)(5), is particularly well suited to ensure that SIPs are revised from time to time to comply with evolving requirements of the CAA. For example, in Massachusetts v. EPA, 549 U.S. 497 (2007), the Supreme Court held that greenhouse gases fall within the CAA's definition of "air pollutant." After that groundbreaking decision, EPA issued a SIP call as part of its efforts to have States update their implementation plans in light of that new understanding of the CAA. Action to Ensure Authority to Issue Permits under the

Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010). Here, by contrast, no national or regional initiative by EPA occurred. ADEM for its own reasons sought EPA's approval to revise the Alabama SIP. As this Court observed in TVA: "ADEM stated only that it was proposing that SIP revision to 'codify [its] practices' and to 'provide certainty to the regulated community as to what is expect with respect to opacity performance as measured by a COMS.'" 430 F.3d at 1349. See also 76 Fed. Reg. at 18,871 ("ADEM chose to revise its rules and submit the SIP revision."). EPA did not reach out to a State and require a SIP revision. 76 Fed. Reg. at 18,879 ("EPA's disapproval will result in a rule coming back into effect that was in effect for years. Alabama will not be required to submit a revised SIP revision.").

EPA's authority to issue a SIP call did not displace the separate authority it exercised in this case. In the SIP call provision, Congress said nothing about EPA's ability to seek and obtain judicial authorization to reconsider an approval of a SIP revision that has been challenged in a lawsuit. Supra pp.30-32. Congress also retained an interested person's right under the rulemaking provisions of the APA to petition EPA to reconsider an approval of a SIP revision. Supra pp.32-36. The SIP call provision does not in any way nullify those statutory provisions.

Moreover, in Section 110(k)(5), Congress neither explicitly nor implicitly limited EPA's ability to reconsider an approval of a SIP revision; Congress instead remained silent about the matter. But in the very next provision of the CAA, Congress affirmatively provided EPA with authority to rectify an erroneous approval "as appropriate" and "in the same manner as the approval." 42 U.S.C. § 7410(k)(6); supra pp.37-40. Thus, while complementary, EPA's authority to reconsider an approved SIP revision and to issue a SIP call are not mutually exclusive.

No precedent in this Circuit supports the argument of Alabama Power and other parties that EPA was required to issue a SIP call to reverse its initial erroneous approval of the relaxed visible emissions rules. In Georgia Power, this Court held that an EPA guidance document did not have the effect of revising a Georgia SIP rule that EPA had long since approved through notice-and-comment procedures. 443 F.3d at 1353-54. The Court agreed with EPA; the document itself stated that it neither changed nor invalidated the longstanding SIP rule. Id. at 1354 n.12. The Court went on to hypothesize that if EPA had a new policy that warranted a revision in the Georgia SIP, it should issue a SIP call. Id. at 1355.

Georgia Power is inapposite because the Court had no occasion to, and did not, examine the full scope of EPA's authority to reconsider an approved SIP

revision. Furthermore, there can be no suggestion here that EPA attempted to revise a SIP through a guidance document or other summary method, as hypothesized in Georgia Power.

Nor does the Court's decision in TVA support the challengers' arguments. There, the Court held that ADEM "attempt[ed] to unilaterally revise the opacity limitation without submitting the revision to the rigors of the SIP amendment process," 430 F.3d at 1348, rigors that include notice-and-comment procedures. 42 U.S.C. § 7410(*l*) (requiring a State, before it submits a request to EPA to approve a revision to its SIP, to provide "reasonable notice and public hearing"). The Court observed that ADEM "attempted to avoid entirely EPA oversight of the SIP process," and it described the notice-and-comment procedures as "important protections against uninformed and arbitrary rulemaking." 430 F.3d at 1349. The Court went on to quote from Pennzoil Co. v. FERC, 645 F.2d 360, 371 (5th Cir. 1981), which states: "The purpose of the Administrative Procedure Act . . . notice and comment requirement is that the agency educate itself before adopting a final order. This assures fairness and mature consideration of rules having a substantial impact on those regulated." 430 F.3d at 1349.

Far from supporting Alabama Power, TVA confirms that the procedures EPA followed on remand were lawful. EPA employed notice-and-comment

procedures during both its initial review and its reconsideration of the State's request to relax the visible emissions portion of the Alabama SIP. In contrast to ADEM's practice before 2003, supra p.10, EPA not only satisfied the "rigors of the SIP amendment process," 430 F.3d at 1348, but provided "important protections against uninformed and arbitrary rulemaking," id. at 1349.

ADEM and UARG characterize the procedures EPA followed on remand as "unilateral[]." ADEM Br. at 28; UARG Br. at 2. While "unilateral[]" accurately describes ADEM's course of action prior to 2003, TVA, 430 F.3d at 1348, EPA's course of action here was not unilateral. All interested persons, including ADEM and UARG, were provided the opportunity to participate in the reconsideration process. 76 Fed. Reg. at 18,879 ("By reopening the rulemaking for additional public comment, and setting forth the legal, technical, and policy bases for that [sic] alternative outcomes in the reconsideration process, EPA sought to ensure that the public had an opportunity to comment and review the possible options.").

Moreover, EPA's use of notice-and-comment procedures refutes the contention of Alabama Power, ADEM, and others that EPA disrespected the State's "statutory role as primary implementers of the NAAQS," Whitman v. American Trucking Ass'ns, 531 U.S. 457, 470 (2001), or the plan of "cooperative federalism," New York v. United States, 505 U.S. 144, 167-68 (1992), that

Congress put in place in the CAA. Rather, EPA provided "those with interests affected by rules the chance to participate . . . [in order to] ensure fair treatment for persons to be affected by regulations[.]" Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 678 (6th Cir. 2005) (citation omitted), quoted in TVA, 430 F.3d at 1349. The CAA required nothing more.

II. EPA, ON REMAND, ARTICULATED AND APPLIED A REASONABLE INTERPRETATION OF SECTION 110(*l*) OF THE CLEAN AIR ACT, 42 U.S.C. § 7410(*l*)

Alabama Power and UARG assert that the substance of EPA's decision reflects a misinterpretation of Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), which states that EPA "shall not approve" a SIP revision that "would interfere" with air quality requirements of the CAA, including the $PM_{2.5}$ NAAQS. 42 U.S.C. § 7410(*l*). Their assertion fails. EPA articulated and applied a reasonable interpretation of the CAA.

A. SECTION 110(*l*) IS AMBIGUOUS AND STEP TWO OF CHEVRON GOVERNS JUDICIAL REVIEW OF EPA'S INTERPRETATION

The second step of Chevron, 467 U.S. at 843, governs the Court's review of EPA's interpretation of Section 110(*l*). Under that step, "a court must give effect to an agency's reasonable interpretation of an ambiguous statute." Sierra Club v. Johnson, 541 F.3d 1257, 1265 n.3 (11th Cir. 2008). A statute is ambiguous if, after

application of the traditional tools of statutory construction, it is "capable of being understood in two or more possible senses or ways." Chickasaw Nation v. United States, 534 U.S. 84, 90 (2001) (citation omitted).

Section 110(*l*) of the CAA, 42 U.S.C. § 7410(*l*), is ambiguous. As the Sixth Circuit cogently explained, "[a] court searching for the meaning of 'interfere' [in Section 110(*l*)] or for a clearly preferred mechanism for determining that which interferes wades into ambiguity, the only solution to which is the deferential Chevron step two." Kentucky Res. Council, Inc. v. EPA, 467 F.3d 986, 995 (6th Cir. 2006). The Fifth Circuit agrees. Galveston-Houston Ass'n for Smog Prevention v. EPA, No. 06-61030, 2008 WL 3471872, at **7 (5th Cir. Aug. 13, 2008) (unpublished).

B. EPA'S INTERPRETATION OF SECTION 110(*l*) IS PERMISSIBLE AND ENTITLED TO DEFERENCE UNDER STEP TWO OF CHEVRON

The interpretation of the CAA EPA articulated and applied on remand constitutes a "reasonable way[] to interpret the statute" or is at least "within the ballpark of reasonableness." Friends of the Everglades ("Friends") v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1219, 1221 (11th Cir. 2009) (citations omitted), cert. denied, 131 S. Ct. 643, 645 (2010). As such, it is permissible and entitled to deference under step two of Chevron, 467 U.S. at 843.

EPA explained its interpretation of Section 110(*l*) at length in its decision on remand, 76 Fed. Reg. at 18,873-74, and in more detail in response to comments, 76 Fed. Reg. at 18,887-89. Supra pp.17-18. In short, under its interpretation, the first question EPA considers is "whether the SIP revision will allow for an increase in actual emissions into the air over what is [currently] allowed." 76 Fed. Reg. at 18,873. If the State's submission or other record information establishes that "the status quo air quality is preserved," then the Agency may approve the revision. Id. However, where, as here, evidence indicates that the revision would likely result in an increase in emissions of pollutants above levels allowed by the existing SIP in one or more areas designated as nonattainment, EPA construes Section 110(*l*) to preclude approval unless the record contains "either a contemporaneous attainment demonstration or some other basis for concluding that a SIP revision will not interfere with attainment." 76 Fed. Reg. at 18,875-76. Approval may not occur based only on uncertainties. Id.

EPA's gap-filling interpretation accords with the statutory text, which on its face addresses only one circumstance in which EPA "shall not approve" a SIP revision. 42 U.S.C. § 7410(*l*) (emphasis added). Nowhere did Congress command EPA to approve a SIP revision under any circumstance; in fact, the phrase "shall approve" does not appear. Moreover, EPA's interpretation is grounded in the

statutory phrase "would interfere," which is broad and ambiguous. See Brand X, 545 U.S. at 980 ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."). Thus, there is no merit in Alabama Power's argument that EPA's interpretation is "contrary to the plain language of the statute." APC Br. at 49.

EPA's interpretation also reasonably gives effect to the precautionary and "anti-backsliding" purposes of Section 110(*l*). As the Agency reasonably concluded, "Congress would not have wanted EPA to approve SIP revisions where EPA lacked not only an attainment demonstration but also any basis for concluding that the SIP revision would not interfere with attainment or maintenance of the NAAQS." 76 Fed. Reg. at 18,875. This approach, in EPA's rational judgment, better ensures "public health protection in the face of uncertainty about the impacts of a SIP revision." Id. at 18,889; see also Train v. NRDC, 421 U.S. 60, 90, 93 (1975) (stating that EPA should disapprove a SIP revision if "the plan as so revised would no longer insure timely attainment of the national standards," or if it "cause[d] a plan to fail to insure maintenance of those standards").[24/]

[24/] Although Train preceded CAA amendments in 1977 and 1990, the later of which added Section 110(*l*) to the CAA, the guidance it provides still holds "[t]o

(continued...)

Alabama Power and UARG assert that the interpretation EPA articulated and applied on remand was new. The assertion is both inaccurate and irrelevant. EPA explained how its current interpretation aligns with the Agency's pre-2008 one. 76 Fed. Reg. at 18,873-74 (discussing action EPA took in 2005 with respect to North Carolina and Ohio). As EPA concluded, the interpretation it applied when initially approving Alabama's proposed SIP revision was a "departure from this [historic] approach." 76 Fed. Reg. at 18,874 n.12. See also id. at 18,875 ("After reconsideration, EPA has concluded that its traditional, and more precautionary, approach to interpreting section 110(*l*) is appropriate."). Regardless, under step two of Chevron, it does not matter whether the current interpretation "is a dramatic shift in EPA policy." Friends, 570 F.3d at 1219. Instead, "[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute." Id.

Contrary to Alabama Power's and UARG's contention (APC Br. at 47-50; UARG Br. at 19-22), it is entirely appropriate and logical for EPA to assess evidence under the familiar preponderance-of-evidence standard. See, e.g., 76 Fed. Reg. at 18,876 ("EPA concludes that the opacity limits in the Submittals are likely

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[24/](...continued)
the extent consistent with the new statutory scheme." Hall v. EPA, 273 F.3d 1146, 1159 (9th Cir. 2001). See also S. Rep. No. 101-228, at 11 (1989) ("The responsibility for the widespread failure to meet the ambient standards rests with the both States (and local governments) and EPA.").

overall to allow increased PM emissions."); id. at 18,880 ("[S]ome periods of greater opacity . . . are likely in at least some circumstances to be accompanied by greater PM emissions."); id. at 18,883 ("EPA concludes that this likelihood of increased emissions renders the Submittals unapprovable under section 110(*l*)."); id. at 18,885 ("[T]o make a determination that NAAQS will not be adversely impacted, EPA must at least be able to reach the conclusion that this is most likely the case."). Kelley v. EPA, 25 F.3d 1088 (D.C. Cir. 1994), is instructive. There, the court examined Section 107(a) of the Comprehensive, Environmental Response, Compensation, and Liability Act ("CERCLA"), which addresses the civil liability of "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of . . . ." 42 U.S.C. § 9607(a)(2). Although CERCLA does not address how agencies or courts are to assess evidence of "disposal," the court found it reasonable to imply a preponderance-of-evidence standard: "After all, that is the evidentiary standard of proof in a federal civil proceeding." Kelley, 25 F.3d at 1090 (citing 9 Wigmore on Evidence § 2498, at 419 (Chadbourn rev. 1981)). Applying the same standard to EPA's review of a SIP revision is unremarkable. It was eminently reasonable for EPA to interpret Section 110(*l*) as allowing disapproval based on findings that a SIP revision would, more likely than not,

interfere with air quality requirements of the CAA.

Similarly, there is no support for Alabama Power's and UARG's assertion that EPA's interpretation attempts to substitute "could interfere" for "would interfere." As EPA explained, "EPA does not substitute [those] words . . . . For any given source at any given time, it is accurate to say that increased opacity could be accompanied by increased PM emissions. However, in evaluating what would be allowed under the [State's] Submittals . . . , EPA concludes it is likely that the increased opacity . . . would result in increased PM emissions." 76 Fed. Reg. at 18,888. Consequently, as EPA found, "the revised rule hinders (i.e., 'would interfere' with) efforts to attain and maintain compliance with the PM NAAQS." Id.

Alabama Power's and UARG's challenge is not supported by the Sixth Circuit's decision in Kentucky Resources. There, the court upheld EPA's approval of a SIP revision based on a finding that the State had proffered offsetting emission reductions adequate to maintain the status quo of air quality. 467 F.3d at 994-96. In doing so, the court sustained as reasonable an interpretation of Section 110(*l*) that "allows the agency to approve a SIP revision unless the agency finds it will make the air quality worse." 467 F.3d at 995. The court rejected the petitioners' more restrictive reading of statute, observing that "Congress did not intend that the

EPA reject each and every SIP revision that presents some remote possibility for interference." Id. at 994.

Here, EPA interpreted Section 110(*l*) in accordance with Kentucky Resources. In its decision on remand, EPA made clear that approval of a SIP revision may occur where a record reveals nothing more than a "small possibility . . . that [the revision] might worsen air quality." 76 Fed. Reg. at 18,876. EPA similarly does not require States to prove to an "absolute certainty" that no interference would occur. Id. at 18,885.

Instead of supporting the arguments of Alabama Power and UARG, Kentucky Resources underscores the reasonableness of EPA's decision on remand. Unlike Kentucky, Alabama did not proffer emissions reductions to offset the increased emissions of air pollutants that EPA found were allowable under the requested SIP revision. Supra pp.21-22. Moreover, by sustaining EPA's interpretation under step two of Chevron, Kentucky Resources confirms the breadth of authority Congress delegated to EPA to interpret Section 110(*l*) in reasonable fashion. As the Supreme Court stressed in Brand X, "[f]illing [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts." 545 U.S. at 980. Just so here.

C. EPA'S DECISION ON REMAND DOES NOT HAVE RETROACTIVE EFFECT

UARG asserts that EPA applied its interpretation of Section 110(*l*) in an unlawful "retroactive" manner (UARG Br. at 22-24). Even apart from "the question of whether an amicus can properly inject into a case at the appellate level issues which have never been raised by the parties," Stephens v. Zant, 716 F.2d 276, 277 (5th Cir. 1983),[25/] UARG's assertion is baseless.

An administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Ass'n of Accredited Cosmetology Sch. v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (citations omitted). In its decision on remand, EPA reinstated the unaltered version of the visible emission portion of the Alabama SIP, i.e., the visible emissions rules as they existed prior to 2008. The reinstatement took effect after publication of EPA's decision; from the effective date of May 6, 2011, forward, sources in Alabama may discharge visible emissions only in accordance

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[25/] As previously noted (supra p.12 n.10), UARG has lodged an amicus brief, and EPA opposes its filing.

with the unaltered visible emissions rules. 76 Fed. Reg. at 18,870.[26/]

Because EPA's decision on remand has legal consequences only for the future, nothing associated with it, including EPA's interpretation of Section 110(*l*) of the CAA, has any retroactive effect.

III. EPA, ON REMAND, REASONABLY EXERCISED ITS DISCRETION BASED ON THE HIGHLY TECHNICAL RECORD BEFORE IT

Alabama Power and UARG challenge the technical findings EPA made in support of disapproval. EPA rendered findings throughout its decision on remand, 76 Fed. Reg. at 18,871-74; explained them in more detail in response to comments, id. at 18,879-89; and examined data in a technical support document, AR Doc. #10. Supra pp.18-23. EPA disapproved the revision, in essence, because "while there are uncertainties – such as precisely when PM mass emissions would increase or by what precise amount – EPA expects that it is likely in at least some circumstances to result in increase in PM mass emissions." 76 Fed. Reg. at 18,888. Further, "available evidence indicates that some of the affected sources would have increases in PM emissions, and that these emissions would occur in locations where such increased emissions would interfere with attainment and maintenance

[26/] EPA had allowed the revised visible emissions rules to remain in effect pending the outcome of reconsideration proceedings. 74 Fed. Reg. at 50,934 ("The October 15, 2008 final action remains in effect at this time.").

of the NAAQS." Id. at 18,885.

The challenge to EPA's findings is baseless under the applicable standard of review, which is "exceedingly deferential." Van Antwerp, 526 F.3d at 1359-60; supra p.24. Indeed, because of the technical nature of the subject matter, the Supreme Court has instructed that review be "at its most deferential." Baltimore Gas, 462 U.S. at 103; supra p.25.

A. THE RECORD SUPPORTS EPA'S FINDING THAT THE REVISION WOULD LIKELY RESULT IN GREATER EMISSIONS OF PARTICULATE MATTER

The record supports EPA's findings that approving ADEM's request to revise the visible emissions portion of the Alabama SIP would likely result in greater emissions of particulate matter.

EPA reasonably found that, as a general matter, greater opacity indicates greater emissions of particulate matter: "[A]n increase in opacity can be a good indication that PM emissions at the stack also are increasing." 76 Fed. Reg. at 18,881. Agency scientists elaborated in a technical support document that "[a] given opacity level is associated with a range of particulate matter (PM) mass emissions, which depends upon many factors, including fuels combusted, industry type, boiler type, PM particle composition and size, controls used to reduce pollutants, etc." AR Doc. #10, at p.1. Similarly, in its initial approval decision,

EPA found: "There is a general relationship between opacity and PM, which generally develops over longer periods of time." 73 Fed. Reg. at 60,961. Even UARG acknowledged in its comments that "an increase in opacity can be a good indication that PM emissions at the stack also are increasing[.]" AR Doc. #62, UARG comment p. 3. Thus, in finding increased PM emissions likely to result from sources emitting in conformance with the requested SIP revision, EPA reasonably considered and assigned weight to the general relationship between opacity and PM.

EPA also reasonably considered and assigned weight to the role of opacity as an indicator of well-maintained and operated pollution control equipment. Before ADEM's request, sources generally could not exceed the 20-percent opacity limit set forth at Ala. Admin. Code r. 335-3-4-.01(1)(a) (1996), except that sources could emit up to 40 percent for no more than six minutes per hour. Under the SIP revision, however, sources generally could exceed the 20-percent limit up to full (i.e., 100 percent) opacity and for up to 2.4 consecutive hours per day (i.e., 148 consecutive minutes in row). As EPA rationally found, "larger and longer exceedances of an opacity limit . . ., which may indicate problems with a control device or other significant changes in emissions, are more significant than shorter and smaller exceedances." 76 Fed. Reg. at 18,874. See also id. at 18,887 ("[T]he

revisions allow facilities to emit up to 100 percent opacity for extended periods of time – which is hard to square with the need to assure good source operation."); TVA, 592 F. Supp. 2d at 1364 ("Often, a sudden increase in the opacity reading displayed by the COMS is the plant's first indication that there has been a malfunction or upset condition requiring action.").

Alabama Power asserts that "bundling," i.e., emitting in excess of the otherwise applicable 20-percent opacity limit for up to 148 consecutive minutes on any given day, is "unlikely to occur." APC Br. at 53. UARG similarly contends that bundling is a "theoretical possibility." UARG Br. at 26. However, it was reasonable for EPA to be more persuaded by what the revision would authorize than a source's prediction about how it and others will elect to operate under the revision. 76 Fed. Reg. at 18,884. After all, ADEM proposed the revision to "codify [its] practices" of excusing thousands of opacity violations and to "provide certainty to the regulatory community." TVA, 430 F.3d at 1349. Because the SIP revision on its face allows bundling of exceedances, such that up to 2.4 hours of greater than 20 percent opacity – even up to 100 percent opacity – would no longer necessarily violate the Alabama SIP, EPA reasonably found that reaffirming its initial approval would "undermine the purpose and effectiveness of the opacity standard." 76 Fed. Reg. at 18,883.

Moreover, EPA was not compelled to approve ADEM's revision based on an "average" opacity limit. Such a limit would not alter a source's ability, on any given day, to discharge at or near full opacity for over two consecutive hours. It simply "allows sources to 'average out' periods of very high opacity with periods of lower opacity." 76 Fed. Reg. at 18,874 n.14. That a limit on average opacity may lead the same source to emit at "13.3 % for the remainder of the day," as Alabama Power asserts (APC Br. at 54), would not alter what occurred earlier in the day as a result of a prolonged, gross exceedance of the 20-percent opacity limit. Nor would it significantly constrain the plant. According to Alabama Power's own data, its units operate at 10 percent or less opacity for nearly 90 percent of their operating time. 76 Fed. Reg. at 18,872 n.6. Indeed, opacity levels of 13 percent can indicate malfunctioning air quality equipment, as evidenced by a district court's factual finding that "even under extreme conditions that are unlikely to ever occur, the opacity at full load would still be less than 10 %" for one of TVA's coal-fired units in Alabama. TVA, 592 F. Supp. 2d at 1367; see also 76 Fed. Reg. at 18,872 & n.6.

Similarly, EPA was not compelled to approve based on the revision's limit on opacity averaged over a quarter of a year. As EPA explained, "'allowable average quarterly opacity' is not a traditional measurement used by states or EPA

for monitoring opacity or for opacity standard-setting purposes." 76 Fed. Reg. at 18,874 n.14. Quarterly averages also do not relate well to the $PM_{2.5}$ NAAQS that EPA established in 2007, which are based on emissions over a 24-hour period.

Alabama Power inaccurately characterizes the revision as "only provid[ing] enough flexibility to allow operators to investigate and address unavoidable operational problems . . . ." APC Br. at 55. As EPA found, "a source that is well-controlled, well-maintained, and well-operated could achieve opacity levels well below 20 percent." 76 Fed. Reg. at 18,885. Indeed, as noted above, Alabama Power's own data supports the point.

In addition, the visible emissions portion of the Alabama SIP has long since provided exemptions from the 20-percent opacity limit "for startup, shutdown, load change and rate change," as well as "other short intermittent periods upon terms approved by ADEM's Director and included in a State-issued permit." 76 Fed. Reg. at 18,874 n. 13. EPA's decision on remand did not affect any of those exemptions. Id.; supra p.11 n.9. Further, because EPA's disapproval reinstated the pre-2008 version of the Alabama SIP, sources may also continue to "emit a plume of opacity of up to 40% for one six-minute period per hour[.]" TVA, 430 F.3d at 1341 (citing Ala. Admin. Code r. 335-3-4-.01(1)(b) (1996)). Cf. TVA, 592 F. Supp. 2d at 1371 ("There is virtually no likelihood that avoidable non-exempt

exceedances [of the 20-percent opacity standard set forth in the Alabama SIP] will occur in the next several years at [TVA Plant] Colbert Units 1-4 or 5 as they are currently configured and operated."). Thus, even if notions of "flexibility" were relevant under Section 110(*l*), which they are not, the record did not require EPA to approve the revision.

B. THE RECORD SUPPORTS EPA'S FINDING THAT GREATER EMISSIONS OF PARTICULATE MATTER WOULD LIKELY OCCUR IN NONATTAINMENT AREAS

EPA's finding that relaxing the visible emissions portion of the Alabama SIP would interfere with air quality requirements of the CAA is supported by the fact that at least five affected sources are located in or near areas in Alabama that are designated nonattainment with respect to the $PM_{2.5}$ NAAQS. Under 40 C.F.R. § 81.301, Jefferson County, Shelby County, and part of Walker County, all of which are proximate to Birmingham, as well as part of Jackson County, which is just across the border from Chattanooga, Tennessee, have all been designated "nonattainment" with respect to the annual NAAQS for $PM_{2.5}$ that EPA established in 1997. In addition, under 40 C.F.R. § 81.301, Jefferson County, Shelby County, and part of Walker County are designated nonattainment with respect to the 24-hour NAAQS for $PM_{2.5}$ that EPA established in 2006.

Contrary to Alabama Power's argument (APC Br. at 52), EPA did not ignore recent data from the Birmingham and Chattanooga areas showing that the NAAQS for $PM_{2.5}$ are being attained. See Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Alabama, Georgia, and Tennessee: Chattanooga; Determination of Attaining Data for the 1997 Annual Fine Particulate Standard, 76 Fed. Reg. 31,239 (May 31, 2011); Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Alabama: Birmingham; Determination of Attaining Data for the 2006 24-Hour Fine Particulate Standard, 75 Fed. Reg. 57,186 (Sept. 20, 2010). Although EPA did not explicitly reference that data in its decision on remand, it did acknowledge, consider, and address the notion that "ambient PM levels have been improving." 76 Fed. Reg. at 18,882; supra p.22.

Moreover, Alabama Power overstates the significance of EPA's "clean data" determinations. The only consequence of a clean data determination is that, as to the pollutant at issue, it suspends a State's obligation to submit certain plans for achieving the NAAQS. Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586, 20,604 (Apr. 25, 2007). Even then, the suspension remains in place only "so long as the area is in fact attaining the standard." Id. If later data show that the area is no longer attaining relevant standards, the State's obligation is "back in

effect." Id.

A clean data determination also does not alter the fact that the area is designated nonattainment. An area remains designated nonattainment unless and until the State meets all of the requirements set forth in Section 107(d)(3)(E) of the CAA, 42 U.S.C. § 7407(d)(3)(E), including the requirement for a long term maintenance plan. 72 Fed. Reg. at 20,604-05; Sierra Club v. EPA, 99 F.3d 1551, 1557-58 (10th Cir. 1996). Moreover, "[b]efore designating any area as in compliance, the EPA must make five determinations," Sierra Club v. EPA, 375 F.3d 537, 538 (7th Cir. 2004), including that "the improvement in air quality is due to permanent and enforceable reductions in emissions . . . ." 42 U.S.C. § 7407(d)(3)(E)(iii). With respect to Birmingham and Chattanooga, ADEM has not met the Section 107(d)(3)(E) requirements, and EPA has not made the Section 107(d)(3)(E) determinations.

But even assuming, arguendo, that Birmingham and Chattanooga had been attainment areas at the time of EPA's decision on remand, the present state of the record did not compel EPA to approve ADEM's request. In assessing evidence of interference with air quality, EPA considered attainment areas in addition to nonattainment areas. As EPA found, "the State did not make a showing that emissions from [sources affected by the revision] would not interfere with

maintenance of the NAAQS in attainment areas . . . ." 76 Fed. Reg. at 18,871-72 n.5. Although an increase in pollutants in an attainment area may not necessarily interfere with maintenance of the NAAQS, id., in light of the magnitude of opacity levels and extended periods of high levels of opacity allowed under ADEM's requested revision, the record is at best uncertain as to the approvability of ADEM's request. Under EPA's permissible construction of Section 110(*l*), "uncertainty alone is not a sufficient basis for approving a SIP revision." Id. at 18,875-76. Therefore, even in the hypothetical circumstance that Alabama contained only attainment areas, Alabama Power's argument would not prevail.

C. EPA REASONABLY DECLINED TO ASSIGN CONTROLLING WEIGHT TO UNCERTAINTIES

In its decision on remand, EPA outlined a number of uncertainties and omissions in the record, including data quantifying "precisely when . . . changes in opacity would cause the interference, particularly for a variety of source types." 76 Fed. Reg. at 18,875; supra pp. 21-22. EPA reasonably declined to find that the uncertainties about interference outweighed the evidence favoring disapproval.

From the beginning of the reconsideration proceedings, EPA informed ADEM, Alabama Power, and other interested persons that "[t]he relationship between opacity and PM mass emissions is a key component to evaluating" the SIP

revision. 74 Fed. Reg. at 50,934. EPA sought, first and foremost, "[s]ource-specific data from Alabama facilities affected by the 2003/2008 Submittals." Id. Alternatively, EPA urged interested persons to submit data of the kind set forth in a highly detailed list. See id. After the close of the comment period, even after it had been extended, EPA did not receive any substantially probative new information. 76 Fed. Reg. at 18,874 (noting the absence of "useful source-specific data regarding the relationship between opacity and PM mass emissions at the affected facilities"); id. at 18,872 (noting the "general lack of opacity and corresponding PM emissions data received to date").

Alabama Power asserts that it, ADEM, and TVA "each submitted source-specific modeling data analyzing potential impact to the PM NAAQS," and that EPA "ignore[d]" that data. APC Br. at 56-57. Alabama Power is wrong. As the record demonstrates, EPA carefully examined the submissions. AR Doc. #10. EPA, in fact, enumerated no fewer than eight technical "uncertainties or weaknesses" associated with them. AR Doc. #10, at p. 2. For example, EPA found that "no commenter . . . provided [a] cumulative PM impact assessment from all emission sources in an area," and that "no commenter . . . identified each source or source type, provided PM emissions data from each source or source type, or ascertained the impact of changing the opacity limits of the SIP on each source or

source type." AR Doc. #10, at pp. 3-4. There is no basis to second-guess EPA's technical determination that the data and the modeling results derived from it were fundamentally incomplete. As EPA rationally concluded, "[m]odeling based on a subset of sources, but not all sources or source types affected by the rule, yields an incomplete assessment of the impact of the rule revision." AR Doc. #10, at p. 4.[27/]

Alabama Power, citing its own data, asserts that EPA failed to "adequately address" what Alabama Power believes to be evidence of "improvement" in air quality since 2009. APC Br. at 57-58. Once again, Alabama Power is wrong. The data are not comprehensive, representative, or probative with respect to long term effects. 76 Fed. Reg. at 18,883 n.20. Accord APC Br. at 57 (cryptically referencing data from "10 COMS it operates to record data from 16 units" and acknowledging that it modeled only "Plant Greene County, which is in the middle of the state"). Moreover, as EPA cogently explained, Alabama Power "did not . . . submit data to establish what the PM mass emissions were during periods of elevated opacity at these sources." 76 Fed. Reg. at 18,884. There was nothing about Alabama Power's comments and submissions that compelled EPA to

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[27/] Alabama Power asserts that EPA offered "[n]o credible modeling" to rebut the modeling provided by ADEM, Alabama Power, and TVA. APC Br. at 57. EPA, however, does not bear the burden of production or persuasion under Section 110(*l*). EPA's role is to determine whether the revision "would interfere" with air quality requirements of the CAA. 42 U.S.C. § 7410(*l*).

discount the evidence of interference. EPA expressed a reasonable concern that Alabama Power's data reflected only "the choices individual facilities may have made to date." Id.

IV. IN NO EVENT SHOULD THE COURT REVIEW THE MERITS OF EPA'S SUPERSEDED APPROVAL DECISION

As explained above, this Court should deny Alabama Power's petition for review because EPA did not act arbitrarily, capricious, or contrary to law in disapproving ADEM's request to revise the visible emissions portion of the Alabama SIP. The Court's review should end there; no purpose would be served by reviewing EPA's initial approval decision, which EPA reversed after the Court granted its motion for voluntary remand in Appeal No. 08-16961. Citizens' petition for review of that initial approval decision thus should be dismissed as moot. See Friends, 570 F.3d at 1216 ("To decide questions that do not matter to the disposition of a case is to separate Lady Justice's scales from her sword. That we will not do.") (citation omitted).

If, for the sake of argument only, the Court determines that EPA reversibly erred on remand, there still would be no need for judicial review of EPA's initial approval decision. In that scenario, the Court should remand the State's request to revise the Alabama SIP to EPA for proceedings consistent with the Court's

opinion.

In no event should the Court reinstate EPA's initial decision. Only Citizens petitioned for review of that action, and they agree that it is no longer "the appropriate subject of judicial review." Citizens Br. at 16. Cf. Fed. R. App. P. 42(b) ("An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."). Further, the Court already awarded relief with respect to Citizens' petition for review, when it granted EPA's motion for voluntary remand. Supra pp.14-15, 30-31.

Moreover, because EPA no longer supports its prior decision and has superseded its rationale, the Court can reach a comprehensive decision based on its review of EPA's most recent and controlling decision. See generally Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (reviewing court may not generally supply a reasoned basis for agency action that the agency itself has not given); Blackston v. Shook & Fletcher Insultaion Co., 764 F.2d 1480, 1481 (11th Cir. 1985) (appellate courts generally best serve the law by deciding "each case on the narrow ground that leads to a decision").

In addition, there are other issues associated with the State's request that EPA did not need to reach on remand, including whether it should be approved or

disapproved under Section 193 of the CAA, 42 U.S.C. § 7515. See 76 Fed. Reg. at 18,871-72 & n.5, 18,873 n.10; supra pp.7-8, 23. If EPA reversibly erred, remanding EPA's disapproval decision would allow EPA to address those outstanding issues, as well as the Court's opinion, in the first instance.

CONCLUSION

For the forgoing reasons, the Court should deny Alabama Power's petition for review (Appeal. No. 11-11549) and dismiss as moot Citizens' petition for review (Appeal No. 08-16961).

Respectfully submitted,

Dated: September 9, 2011

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CERTIFICATE OF COMPLIANCE

1. This brief contains 16,302 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore complies with the type-volume requirements of Fed. R. App. P. 28.1(e)(2)(B)(i), which provides that "[t]he appellee's principal and response brief is acceptable if . . . it contains no more than 16,500 words." See also Court's Order of May 12, 2011 ("[B]riefing in the consolidated petitions shall be governed by Fed. R. App. P. 28.1 (Cross Appeals).").

2. This brief has been prepared in proportionally-spaced typeface using Word Perfect X3 in 14-point Times-Roman font.

Dated: 09/09/2011

___/s/ Andrew J. Doyle_____
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INDEX TO ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2011, I caused a true and correct copy of the forgoing **BRIEF FOR RESPONDENTS** to be served by first class U.S. mail, postage pre-paid, on the following counsel of record for the parties:

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Further, on this date, I caused a courtesy copy of the same document to be transmitted to counsel of record via email.

Dated: 09/09/2011

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