

RECORD NOS. 12-5310(L); 12-5311

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT****NATIONAL MINING ASSOCIATION, et al.,***Plaintiffs – Appellees,***COMMONWEALTH OF KENTUCKY and
CITY OF PIKEVILLE, KENTUCKY,***Intervenors for Plaintiffs – Appellees,***v.****BOB PERCIASEPE, Acting Administrator of the
United States Environmental Protections Agency, et al.,***Defendants – Appellants,***SIERRA CLUB, et al.,***Intervenors for Defendants – Appellants.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
LEAD CASE NO. 10-cv-01220 (Hon. Reggie B. Walton)**

**BRIEF OF THE STATES OF ALABAMA, ALASKA, FLORIDA,
KANSAS, MICHIGAN, MONTANA, NEBRASKA, OHIO,
OKLAHOMA, SOUTH CAROLINA, and VIRGINIA
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES**(A) Parties and *Amici*.**

Except for the following, all parties, intervenors, and *amici* appearing before the district court and this court are listed in the Brief for Appellant, Shelby County, Alabama:

The State of Alabama did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Alaska did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Florida did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Kansas did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Michigan did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Montana did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Nebraska did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Ohio did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Oklahoma did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of South Carolina did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

The State of Virginia did not participate in the district court below, but will participate as *Amicus Curiae* for Appellees before this Court.

(B) Rulings Under Review.

References to the rulings at issue appear in the Proof Brief for Appellees.

(C) Related Cases.

A list of related cases appears in the Proof Brief for Appellees.

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GLOSSARY

APA	Administrative Protection Act
CAA	Clean Air Act
CWA	Clean Water Act
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
GDP	Gross Domestic Product
OVEC	Ohio Valley Environmental Coalition
SIP	State Implementation Plan
SMCRA	Surface Mining Control and Reclamation Act
State Parties' Br.	Proof Brief of State Intervenors-Appellees in this appeal (filed on July 15, 2013) (Case No. 12-5310, Document No. 1446684)

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Proof Brief of Appellees.

INTEREST OF AMICI CURIAE AND INTRODUCTION

The *amici curiae* are States that have the primary regulatory authority under a variety of cooperative state-federal environmental programs. And they share a concern over the Environmental Protection Agency's ("EPA") recent inclination to usurp state programs under federal environmental laws. Some of the *amici* are challenging the EPA's cross-state air pollution rule, which was issued without appropriate consultation with state regulators. Some of the *amici* have also filed public comments and lawsuits to challenge other similar abuses by the EPA.

The *amici* States agree with the appellees that the guidance document at issue in this case is a final agency action that exceeds the EPA's authority under the relevant statutes.¹ *See* State Parties' Br. 12-39. Surface mining is governed by a complex set of federal and state provisions under a cooperative federalism approach that carves out "distinct roles" for the federal and state governments. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). Both of the statutes at issue in this case, the Clean Water Act (CWA) and the Surface Mining Control and Reclamation Act (SMCRA), emphasize the important and primary role the States play in protecting their waters and in regulating mining activities. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 9 (D.C. Cir. 1999); 33 U.S.C. § 1251(b) (CWA); 30 U.S.C. § 1201(f)

¹ The *amici* also agree with the appellees' arguments about the other agency actions in this case.

(SMCRA). Although the EPA has some role under the CWA and a very limited role under the SMCRA, these statutes are “primarily the states’ handiwork.” *Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (discussing CWA).

The *amici* States make three points to place this particular dispute in its broader context. First, the *amici* explain that the EPA’s guidance memorandum is in substantial tension with principles that generally govern the cooperative implementation of environmental laws. Second, the *amici* explain that the guidance memorandum undermines the States’ longstanding interests in permitting and regulating surface mining, which compelled Congress to preserve state autonomy in this area. Finally, the *amici* examine similar state-federal programs, such as in the administration of the Clean Air Act, in which the EPA has similarly attempted to undermine the States’ role in environmental regulation.

The upshot is that the EPA’s guidance document exceeds the EPA’s statutory authority, contravenes the Administrative Procedures Act, and violates principles of cooperative federalism of great concern to the *amici* States. For these reasons, and for those expressed by the appellees, the district court correctly determined that the EPA exceeded its statutory authority by imposing a de facto rule through a memorandum. Accordingly, the *amici* States respectfully ask this Court to affirm the district court’s decision.

ARGUMENT

I. The EPA's memorandum conflicts with cooperative principles that have traditionally guided the implementation of environmental laws.

The EPA's actions conflict with traditional principles of cooperative federalism. This conflict is evidenced by the way the guidance memorandum came about, how it treats some States differently than others, and how it so dramatically diverges from the EPA's statutory authority.

The EPA's memorandum was birthed in litigation. In 2005, the U.S. Army Corps of Engineers issued four permits "allowing the filling of West Virginia stream waters in conjunction with area surface coal mining operations." *See Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 186 (4th Cir. 2009) ("OVEC"). "All together, the four challenged permits authorize[d] the creation of 23 valley fills and 23 sediment ponds, and they impact[ed] 68,841 linear feet of intermittent and ephemeral streams, or just over 13 miles." *Id.* at 187. "For each of the four permits, the Corps prepared Environmental Assessments that concluded that the permitted activity would not result in significant environmental impacts given planned mitigation measures." *Id.* A number of environmental groups sued the Corps, and the valley fills were put on hold. *Id.* at 186.

A federal district court held that the permits failed to account for certain environmental considerations. The district court focused its analysis on the insect population of the valley streams. *See Ohio Valley Env'tl. Coal. v. U.S. Army Corps*

of Engineers, 479 F. Supp. 2d 607, 637-38 (S.D.W. Va. 2007). Specifically, there was some data indicating that the valley fill would shift the insect population toward more pollution-tolerant bugs by increasing sediment in the water and thus the water's "conductivity"—the principal difference being the reduction of "mayflies."² *Id.* at 637 & 638 n.41; *see also OVEC*, 556 F.3d at 203. The Fourth Circuit ultimately rejected the district court's judgment and found the permits to be valid. *Id.* at 186. The Fourth Circuit explained that, under the plaintiffs' view of federal law, the Corps' environmental assessment would be so far-reaching that the West Virginia Department of Environmental Protection's own "regulation of the fill process becomes at best duplicative, and, at worst, meaningless." *Id.* at 196.

The EPA's memorandum is a transparent attempt to impose substantially the same permitting requirements as the district court erroneously did in *OVEC*. The guidance memorandum was developed from an *ad hoc* series of letters that the EPA sent to the Corps about the permits at issue in the *OVEC* decision, shortly before and after that decision was rendered. Doc. 107 ¶¶ 79-80. Even though West Virginia's regulators participated in the *OVEC* case, neither the affected States nor the general public were consulted until after the interim guidance was already

² A mayfly is a "slender fragile-winged short-lived" insect akin to a dragonfly. *Mayfly*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

posted on the EPA's website.³ See Doc. 107 ¶ 82; Brief of West Virginia Department of Commerce and Department of Environmental Protection, *OVEC*, 2007 WL 4919580. Of course, it is not dispositive that “the regulation was prompted by litigation.” *Smiley v. Citibank*, 517 U.S. 735, 741 (1996). But, if cooperative federalism means anything, state regulators should have at least as much input on a proposal as private plaintiffs do.

The EPA's guidance memorandum is also in substantial tension with “our historic tradition that all the States enjoy equal sovereignty,” which “remains highly pertinent in assessing subsequent disparate treatment of States.” *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2621, 2624 (2013) (internal quotation mark omitted). The guidance memorandum imposes extra scrutiny on permit applications from six States in Appalachia (West Virginia, Kentucky, Ohio, Tennessee, Virginia, and Pennsylvania) and leaves the programs of all other States technically unaffected. Although Congress recognized in the environmental laws that conditions vary from State to State, Congress accommodated that variance by giving States discretion to choose different ways to meet broad national standards. See 30 U.S.C. § 1201(f) (“[B]ecause of the diversity . . . , the primary governmental responsibility . . . for surface mining and reclamation operations subject to this chapter should rest with the States.”); 33 U.S.C. § 1251(b) (“protect[ing] the

³ There was an 8-month comment period before the guidance was officially made final.

primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources”). Congress did not envision that federal regulators would themselves impose more stringent requirements on some States than on others.

Finally, this guidance memorandum was issued in a regulatory area—SMCRA permitting—that is uniquely and exclusively within state control. The EPA has never before played a significant role in SMCRA permitting. When a state program applies for approval under SMCRA, the EPA administrator must advise the Secretary of Interior on the state program’s methods of addressing air and water quality standards. *See* 30 U.S.C. § 1253(b)(1) & (2). But that is the full extent of the EPA’s role. After a state surface-mining program is approved by the Secretary of the Interior, “federal law and regulations, while continuing to provide the ‘blueprint’ against which to evaluate the State’s program, ‘drop out’ as operative provisions.” *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001). Instead, States with approved programs “assume *exclusive jurisdiction* over the regulation of surface coal mining and reclamation operations” within their borders. *See* 30 U.S.C. § 1253(a) (emphasis added).

In short, this guidance memorandum is contrary to the cooperative principles that have traditionally guided the implementation of environmental laws. SMCRA

permitting is within the States' "exclusive jurisdiction." *Id.* State regulators were not meaningfully consulted. The concerns of private litigants were, apparently, elevated. And States are being treated differently based on an unexplained set of criteria that has never been subjected to rigorous notice and comment.

II. The EPA's guidance memorandum undermines state interests.

The extraction of coal mainly occurs in certain States in Appalachia, the Midwest, and the West. These States "have power to preserve and regulate the exploitation of [this] important resource." *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). And they have much to gain from how this activity is regulated and permitted. The Appalachian region is home to the oldest mines in America, and produces a third of the country's coal. The coal industry in West Virginia generates 53,190 jobs directly, and another 58,000 jobs indirectly, with an average annual salary of \$90,475. *See* NAT'L MINING ASS'N, THE ECONOMIC CONTRIBUTIONS OF U.S. MINING IN 2010, at Detail-49 (Sept. 2012) ("Economic Contributions").⁴ The coal industry in Kentucky generates 89,350 total jobs (37,470 direct) with an average annual salary of \$87,677. *Id.* at Detail-18. Mining contributes substantially to state GDP and the tax base as well; the top five coal-producing

⁴ available at http://www.nma.org/pdf/economic_contributions.pdf (last visited July 22, 2013).

States take in, on average,⁵ more than \$1.1 billion in local and state taxes per year from coal production. *Id.* at Detail-18, 39, 47, 49 & 51.

For these reasons, any decision by the EPA to wrest regulatory authority away from the States significantly changes the legal regime and has a real impact on state programs and employees. The States have invested in their own bureaucracies and commissions to protect their environments and economies. *See Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (describing the States as “the prime bulwark in the effort to abate water pollution” (internal quotation marks omitted)). Although currently unaffected by the EPA’s action, the *amici* States outside of Appalachia have real concerns that the EPA will soon impose the same or similar requirements on them. The four examples below illustrate ways in which States have been regulating surface mining and reclamation long before Congress enacted SMCRA or CWA. Each of these States, like West Virginia and Kentucky, has established “primacy” under SMCRA. *See* 30 U.S.C. § 1253(a) (describing process to achieve regulatory primacy). And each has important interests in preserving their autonomy.

1. *Alabama.* Alabama has a long history of coal-mining regulation dating back to 1891. The Alabama Legislature created a commission of examiners, consisting of the inspector of mines and two mining engineers, to examine and

⁵ West Virginia: \$2.007 billion; Kentucky: \$1.304 billion; Pennsylvania: \$897 million; Virginia: \$798 million; Wyoming: \$538 million.

give certificates of fitness and service to mining companies. *See* Ala. Acts 1890-91, No. 602, § 7. The role of the commission was eventually absorbed by the Alabama Department of Industrial Relations and continued to evolve until the Legislature enacted the “Alabama Surface Mining Act of 1969.” That act provided for reclamation and revegetation of land affected by surface mining and required the issuance of permits for surface mining operations. *See* Ala. Acts 1969, No. 399, §§ 1-18. In 1975, the Legislature strengthened the regulation of surface mining through the Alabama Surface Mining Reclamation Act of 1975. *See* Ala. Acts 1975, No. 551, §§ 1-28. Section 4 of that Act created the Surface Mining Reclamation Commission and made it independent of the Department of Industrial Relations, with members being appointed directly by the governor. *Id.* § 4. After the passage of SMCRA in 1977, the Alabama Legislature passed the Alabama Surface Mining Control and Reclamation Act of 1981. Ala. Acts 1981, No. 81-435, §§ 1-40. This Act changed the commission’s name to the “Surface Mining Commission” and delegated to it the power to implement and enforce the federal act. *Id.*

Alabama’s Surface Mining Commission currently employs 29 people and has an annual budget of roughly \$4 million. In addition to permits from the Commission, coal operators must obtain permits from the Mining and Natural Resource Section of the Alabama Department of Environmental Management. For

its part, the coal industry in Alabama generates 31,820 jobs and more than \$3.7 billion in GDP each year. Coalminers live an upper-middle class life, making an average of \$105,784 a year compared to the state average of \$44,981. *See Economic Contributions, supra*, at Detail-1. Alabama takes in \$467 million annually in state and local taxes from coal mining operations. *Id.*

2. *Montana.* Before SMCRA, Montana already had one of the most comprehensive mine reclamation programs in the country, requiring topsoil salvage and replacement, specified final graded slopes, burial of toxic materials, and revegetation. The Montana Strip and Underground Mine Reclamation Act was passed by the Legislature in March 1973, *see* MONT. CODE ANN. § 82-4-201 *et seq.*, and was administered by the Montana Department of State Lands. Following the passage of SMCRA, Montana moved quickly to make the necessary changes in its state act and rules so that it could fully administer the federal legislation. The Legislature passed Senate Bill 515 in 1979, *see* 1979 Mont. Laws 550, which made the necessary changes to comply with SMCRA. *See generally* Hamlet Barry, *The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects?*, 27 ROCKY MTN. MIN. L. INST. 5 (1982). Surface mining is currently regulated by the Montana Department of Environmental Quality, which is also responsible the restoration of lands disturbed

by mining. See MONTANA DEP'T OF ENVTL. QUALITY, A GUIDE TO ABANDONED MINE RECLAMATION.⁶

Mining fuels Montana's economy. Coal mining alone sustains 5,670 jobs and contributes \$589 million to state GDP every year. See Economic Contributions, *supra*, at Detail-27. The state has alchemized vast deposits of base metals such as lead into gold for the state treasury and silver for thousands of families. See generally MONTANA BUREAU OF MINES AND GEOLOGY, 2012 MONTANA MINING REPORT (2012).⁷ Mining as a whole creates 20,630 jobs, with an average salary of \$78,688. See Economic Contributions, *supra*, at Detail-27. It adds over \$2.6 billion to the state economy. *Id.* And it fills state and local tax coffers with an additional \$257 million a year. *Id.*

3. *Oklahoma.* Oklahoma also has a long history of involvement in mining regulation. The Oklahoma Office of the Chief Mine Inspector was created before statehood, and his duties were later absorbed into the Oklahoma Department of Mines. See OKLA. MINING COMM'N DEP'T OF MINES, ANNUAL REPORT 2011, at 1-3.⁸ In 1967, the Oklahoma Legislature passed the state's first reclamation law. *Id.* at 2. That law was replaced in July 1971 with the Mining Lands Reclamation Act, which requires better reclamation in general and includes all mining. *Id.* After

⁶ available at <http://deq.mt.gov/AbandonedMines/bluebook.mcp.x> (last visited July 22, 2013).

⁷ available at <http://www.mbm.g.mtech.edu/pdf/2012Mining-exploration-report.pdf> (last visited July 22, 2013)

⁸ available at <http://www.ok.gov/mines/documents/AnnualReport2011.pdf> (last visited July 22, 2013)

Congress enacted SMCRA, the State of Oklahoma revised its statutes in the Coal Reclamation Act of 1978 to “equal the enforcement ability of the federal government.” *Id.* Currently, the Department will issue a permit for mining operations only when the mine operator submits an acceptable application and posts an adequate bond to cover reclamation costs. *Id.* Department inspectors monitor mining practices, reclamation, and health and safety procedures on a regular basis. *Id.*

Mining is also an important part of Oklahoma’s economy. Coal mining generates 4,670 jobs and more than \$463 million in GDP each year. Economic Contributions, *supra*, at Detail-37. Coalminers earn an average of \$92,698 a year compared to the average state salary of \$44,486. *Id.* Oklahoma is also rich in other ways—with deposits of natural resources from arenite to zinc. OKLA. MINING COMM’N DEP’T OF MINES, *supra*, at 2. The entire mining sector in the state sustains 19,180 jobs with an average salary 27% higher than the overall state average. Economic Contributions, *supra*, at Detail-37. Mining contributes over \$1.8 billion to the state economy, \$126 million of which the state and local governments capture in tax revenue. *See id.*

4. *Virginia.* For several years prior to SMCRA’s enactment, the Commonwealth of Virginia administered and enforced state programs regulating the use of land for surface coal mining. In 1966, the Virginia General Assembly

adopted the Virginia Coal Surface Mining Law which required state approval of mining plans and posting of reclamation bonds as a condition of the issuance of permits for surface mining. In 1972, the Virginia General Assembly amended the law to strengthen inspection and enforcement action by the Division of Mined Land Reclamation. VA. CODE ANN. tit. 45, ch. 15. The Board of Conservation and Economic Development on May 12, 1977, adopted the Virginia Reclamation Manual, to become effective on September 1, 1977, as to all surface mining operations initiated after that date. Between the date of the adoption of the Manual and its effective date of September 1, 1977, President Jimmy Carter signed SMCRA into law on August 3, 1977, effectively superseding the Manual. Thereafter, Virginia conformed its statutes to SMCRA and was awarded primacy to issue state surface coal mining permits pursuant to SMCRA. The Division of Mined Land Reclamation within the Department of Mines, Minerals and Energy received a delegation of authority to issue National Pollutant Discharge Elimination System permits pursuant to Section 402 of the Clean Water Act in 1983.

In terms of total economic impact (direct and indirect), coal mining in Virginia generated 45,210 jobs and contributed \$6.3 billion to Virginia's GDP in 2010, with the average income in coal mining reported at \$122,954 compared to the state average of \$57,761 for all industries. *See Economic Contributions, supra,*

at Detail-47. Virginia takes in approximately \$798 million annually in state and local taxes from coal mining operations. *Id.*

III. The challenged action in this case is part of a recent pattern of circumventing “cooperative federalism” at the EPA.

Finally, to place this case in context, the Court should be aware that the EPA’s guidance memorandum is consistent with a broader trend: whether in the areas of water, air, or mining, the EPA has been ignoring principles of cooperative federalism with increasing frequency. The *amici* States are therefore concerned about the precedent that would be set if EPA could set water quality standards and impose state-specific permitting requirements without notice-and-comment rulemaking.

The following are three recent examples where the EPA has ignored principles of cooperative federalism and usurped reserved state authority under environmental laws. The parallels with EPA’s action here are self-evident.

1. The Cross-State Air Pollution Rule. In line with the CWA and SMCRA, the Clean Air Act (“CAA”) makes “air pollution prevention . . . the primary responsibility of States and local governments.” 42 U.S.C. §§ 7401(a)(3); *see also Virginia v. EPA*, 108 F.3d 1397, 1407-08 (D.C. Cir. 1997). The CAA gives States primary responsibility to develop state implementation plans (“SIPs”) to meet EPA-defined air-quality objectives. The EPA may issue a federal implementation

plan (“FIP”) only if a State fails to submit an approvable SIP containing all the required elements. One of the clean air act’s objectives is to “prohibit[] . . . any source . . . within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State” of national air quality standards. *Id.* § 7410(a)(2)(D)(i)(I). In 2010, the EPA published a proposed cross-state air pollution rule that announced the agency’s intent to issue a FIP to mandate how States must satisfy this federal requirement.

Because the EPA’s FIP-first approach violated the fundamental structure of the CAA, this Court vacated the rule. *See EME Homer City Generation, LP v. EPA*, 696 F.3d 7 (2012). “[B]y preemptively issuing FIPs,” the EPA “punishe[d] the States for failing to meet a standard that EPA had not yet announced and the States did not yet know.” *Id.* at 28. This Court affirmed the commonsense proposition that, “when EPA defines States’ [CAA] obligations, it must give the States the first opportunity to implement the new requirements.” *Id.* at 28.

2. *Belated Denial of Texas’s SIP.* The Fifth Circuit has recently vacated two *ultra vires* actions of the EPA that exhibit a disregard for cooperative federalism. They are both from Texas.

In 2010, EPA formally disapproved of a revision to Texas’s SIP, sixteen years after the EPA was required to take action by the CAA. *See Texas v. EPA*, 690

F.3d 670, 674 (5th Cir. 2012). The “untimely disapproval unraveled approximately 140 permits issued by Texas under the revision’s terms.” *Id.* The EPA disapproved the revision, not because it violated some provision of federal law, but because the EPA was “not satisfied with the language Texas” chose to express the requirement. *Id.* at 679. Specifically, the EPA “favor[ed] negatively worded regulations over affirmatively worded regulations.” *Id.* The Fifth Circuit rightly held that rejecting a state plan based, “in essence, on the Agency’s preference for a different drafting style, instead of the standards Congress provided in the CAA . . . disturbs the cooperative federalism that the CAA envisions.” *Id.* at 679. “A state’s broad responsibility regarding the means to achieve better air quality would be hollow indeed if the state were not even responsible for its own sentence structure.” *Id.* (internal quotation marks omitted).

Also in 2010, the EPA denied a separate provision of Texas’s SIP more than two years after the statutory deadline had passed. *See Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012).⁹ Again, “the EPA failed to identify a single provision of the Act that Texas’s program violated, let alone explain its reasons for reaching its conclusion.” *Id.* at 924. This time, however, instead of imposing an arbitrary drafting style on state regulators, the EPA “utilized Texas law as its benchmark” and “stated no less than five times that it was disapproving the permit

⁹Another case between the same parties, *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), concerns different elements of Texas’s SIP. These cases are otherwise unrelated.

because it ‘does not meet the requirements of the Texas Minor NSR Standard Permits Program.’ *Id.* The Fifth Circuit explained that the EPA had “overstepped the bounds of its narrow statutory role” by attempting to “enforce state standards” at odds with the State itself. *Id.* at 926. It was particularly arbitrary that the EPA took this view “in the context of a cooperative federalism regime that affords sweeping discretion to the states to develop implementation plans.” *Id.* at 932.

3. *Start-up, Shutdown.* In February of 2013, the EPA proposed to “call” the SIPs of 36 States and dictate revisions to certain provisions that do not impose hard-and-fast numerical limits on power plants and other sources of air pollution when those sources are starting up, shutting down, or malfunctioning. *See* State Implementation Plans: Response to Petition for Rulemaking; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, 78 Fed. Reg. 12,460 (Feb. 22, 2013). The problem is that the EPA does not have authority to “call” a State’s SIP without any finding that the SIP is “substantially inadequate” to attain and maintain national air quality standards. This limitation is clear and unambiguous: “so long as the ultimate effect of a State’s choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79

(1975) (emphasis added). If a SIP or SIP revision meets the requirements in the CAA, EPA must approve it. 42 U.S.C. § 7410(k)(3). This 36-state-SIP-call is yet another example of the EPA improperly imposing its own specific rules on the States, instead of developing national standards that the States can meet in whatever way is best for them.

* * *

The EPA has exceeded its authority, again. “EPA is a federal agency—a creature of statute,” and may exercise “only those authorities conferred upon it by Congress.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). The CWA and SMCRA give on-the-ground authority to States, and carve out a very limited role for the EPA. The guidance memorandum at issue in this case is arbitrary and capricious and violates the APA.

CONCLUSION

The District Court should be **AFFIRMED**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief is in compliance with the type-volume limitations of the Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains **4,117** words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, as counted using the word-count function on the 2007 version of Microsoft Word.

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Dated: July 22, 2013

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(application for admission pending)

CERTIFICATE OF FILING AND SERVICE

I certify that on July 22, 2013, I filed this Brief of the States of Alabama, et al. as *Amici Curiae* in Support of Appellees electronically using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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