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U.S. Environmental Protection Agency
EPA Docket Center
Office of Air and Radiation Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard (Docket ID No. EPA-HQ-OAR-2021-0668)

On behalf of the Attorneys General for the Commonwealth of Kentucky and the States of Alabama, Arkansas, Indiana, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming, we respectfully submit the following comments in response to the Environmental Protection Agency's (EPA or Agency) Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard (Proposed FIP).[1] The Proposed FIP is arbitrary, capricious, and not in accordance with current law for the following reasons: (1) the Proposed FIP arbitrarily picks winners and losers, establishing an unprecedented regulation of seven industries, many of which likely cannot comply with the Proposed FIP in a cost-effective manner; (2) the Proposed FIP "over-controls" States, resulting in greater emissions reductions than necessary to meet the national ambient air quality standards (NAAQS); and (3) EPA abruptly shifts compliance standards for reasons other than environmental protection and does so after States have relied on those standards. Therefore, EPA should abandon the Proposed FIP.

[1] *Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, 87 Fed. Reg. 20,036 (proposed Apr. 6, 2022) [hereinafter Proposed FIP].

I. Introduction

In the 1970s, poor air quality was a significant problem for millions of Americans.[2] From New York to Los Angeles and from Cleveland to Birmingham, dangerous levels of smog, soot, and other particles clogged our air and our lungs.[3] In response, Congress passed the Clean Air Act of 1970, and EPA became operational soon thereafter.[4]

The Clean Air Act seeks "to encourage and assist the development and operation of regional air pollution prevention and control programs," including programs addressing interstate and intrastate air pollution.[5] Accordingly, the Clean Air Act directs EPA to establish NAAQS for certain pollutants.[6] In 1971, EPA set some of its first NAAQS.[7]

But today is not 1971. The United States now has some of the cleanest air of any industrialized nation. In fact, over the past forty years, total emissions for the six pollutants measured by the NAAQS have dropped by 71%.[8] Our levels of fine air pollution, which reduce visibility and cause air to appear hazy, are approximately five times below the global average.[9] They are six times lower than levels in China.[10] And they are 20% lower than those of France, Germany, and Great Britain.[11] Likewise, between 2000 and 2019, average concentrations of fine particle pollution fell by 44% in the United States, while the average concentrations of large particle pollution fell by 46%.[12] Nitrogen oxide (NOx) emissions have also fallen, with emissions down by almost 70% since 1990.[13]

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[2] *DOCUMERICA: The Environmental Protection Agency's Program to Photographically Document Subjects of Environmental Concern, 1972–1977*, NATIONAL ARCHIVES, https://catalog.archives.gov/id/542493

[3] *Id.*

[4] 42 U.S.C. § 7401 *et seq*. EPA became operational in December 1970. *See Public Papers of the Presidents: Richard Nixon,* 1970, 578–86; *see also Richard Nixon, Reorganization Plan No. 3 of 1970*, EPA.GOV (July 9, 1970), https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html.

[5] 42 U.S.C. § 7401.

[6] *Id.*

[7] *Id.*

[8] *National Ambient Air Quality Standards for Particulate Matter and Ozone*, HARV.: ENV'T & ENERGY L. PROGRAM (July 15, 2020), https://eelp.law.harvard.edu/2020/07/national-ambient-air-quality-standards-for-pm-and-ozone/.

[9] EPA Press Office, *EPA Finalizes NAAQS for Particulate Matter*, EPA (Dec. 7, 2020), https://www.epa.gov/newsreleases/epa-finalizes-NAAQS-particulate-matter (EPA NAAQS Press Release).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Volume of nitrogen oxides (NOx) emissions in the United States from 1970 to 2021*, STATISTICA (May 30, 2022), https://www.statista.com/statistics/501284/volume-of-nitrogen-oxides-emissions-us/#:~:text=Approximately%207.6%20million%20tons%20of,almost%2070%20percent%20since%201990.

Nonetheless, EPA has continued to increase standards as part of the Clean Air Act's requirement that the EPA reassess the NAAQS every five years.[14] The Act requires individual States to comply with these ever-increasing standards by targeting emissions affecting their own States,[15] and, due to the Act's "Good Neighbor" provision, emissions that will "'contribute significantly to nonattainment' of a NAAQS in a downwind State."[16] To fulfill the latter objective, the provision requires States to submit "state implementation plans" (SIPs) that outline efforts to address emissions from upwind States that "contribute significantly" to "nonattainment" of NAAQS in downwind States.[17] If a State fails to submit a SIP or if EPA determines a SIP inadequate, the Act directs EPA to establish a federal implementation plan (FIP) for that State.[18]

The Good Neighbor provision of the Act raises the question: what does it mean to "contribute significantly" to "nonattainment" in downwind States? In 2011, EPA issued the Cross-State Air Pollution Rule (Transport Rule or Rule)[19] to address this question. Generally speaking, the current version of the Transport Rule provides that upwind States "contribute significantly" to the nonattainment of downwind States when their pollution produces 1% or more of a NAAQS in a downwind State and if such pollution could be eliminated in a cost-effective manner according to EPA.[20]

As evidenced by EPA's historic actions under the Good-Neighbor provision and recent court rulings interpreting the provision's scope, EPA is granted *limited* authority to regulate States' upwind emissions in *narrow* circumstances.[21] But EPA

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[14] 42 U.S.C. § 7409(d).
[15] *See id.*
[16] *EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118, 123 (D.C. Cir. 2015) (*EME Homer II*) (quoting 42 U.S.C. § 7410(a)(2)(D)(i)).
[17] 42 U.S.C.§ 7410(a), (a)(2)(D)(i)(I).
[18] *Id.*
[19] Others refer to the Cross-State Air Pollution Rule as "CSAPR."
[20] *Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 86 Fed. Reg. 23054, 23065 (Apr. 30, 2021), https://www.federalregister.gov/documents/2021/04/30/2021-05705/revised-cross-state-air-pollution-rule-update-for-the-2008-ozone-naaqs; *U.S. Supreme Court Rules the EPA Has Authority Under Good Neighbor Provision of Clean Air Act to Establish Rules Limiting Emissions and Curtailing Air Pollution Emitted in Upwind States*, REMY MOOSE MANLY, https://www.rmmenvirolaw.com/u-s-supreme-court-rules-the-epa-has-authority-under-good-neighbor-provision-of-clean-air-act-to-establish-rules-limiting-emissions-and-curtailing-air-pollution-emitted-in-upwind-states/.
[21] *See* NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27,1998) (final rule); 62 Fed. Reg. 60,318 (Nov. 7, 1997) (proposed rule); *Michigan v. EPA,* 213 F.3d 663, 679 (D.C. Cir. 2000), *cert. denied,* 121 S. Ct. 1225 (2001); Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25,162 (May 12, 2005) (final rule); 69 Fed. Reg. 4,566 (Jan. 30, 2004) (proposed rule); *North Carolina v. EPA,* 531 F.3d 896, 907–08 (D.C. Cir. 2008); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); 2011 Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final rule); 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed rule); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 11 (D.C. Cir. 2012), *rev'd and remanded*, 572 U.S. 489, (2014); *EME Homer I*, 572 U.S. at 521–24; *EME Homer II*, 795 F.3d at 124–32 (D.C. Cir. 2015).

exceeds its mandate here in its promulgation of regulations under the proposed Transport Rule. It does so in a number of ways.

For over a decade, the Transport Rule impacted only emissions from electric-generating units (EGUs).[22] This meant that a State's compliance, whether from a SIP or from a FIP, required only an adjustment from EGUs. Other industries with stationery power sources (iron and steel mills, paper plants, etc.)[23] were unaffected. That is no longer the case.[24] The Proposed FIP would be the first in EPA history to regulate NOx emissions from industries other than EGUs. EPA's proffered regulation of these industries is arbitrary, capricious, and not in accordance with current law. The same is true for the rest of the Proposed FIP, which demands much greater emission reduction than necessary and which abruptly shifts compliance standards, after States had relied on them, for reasons other than environmental protection.

II. Analysis

A. The Proposed FIP arbitrarily regulates seven industries and imposes attainment requirements that many cannot achieve in a cost-effective manner.

The Administrative Procedure Act mandates that courts shall set aside any agency action that is arbitrary, capricious, or otherwise not in accordance with current law.[25] The Proposed FIP is all three. The Proposed FIP unjustifiably targets seven industries for regulation and creates standards that many of those industries likely cannot achieve in a cost-effective manner.

Generally, "agency action is arbitrary and capricious when the agency . . . fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[26] Likewise, an agency may not regulate similarly situated parties differently or make an "inadverten[t] or . . . unexplained change of course" without a proper justification

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[22] *Cross-State Air Pollution Rule (CSAPR) - Regulatory Actions and Litigation*, EPA, https://www.epa.gov/csapr/cross-state-air-pollution-rule-csapr-regulatory-actions-and-litigation. EGUs are power sources that deliver their power to an electric grid for commercial sale.

[23] EPA refers to these as non-electric generating units or "non-EGUs."

[24] Proposed FIP at 20043. For the first time, the Proposed FIP would also apply the Transport Rule to certain western States (*e.g.*, Utah and Wyoming).

[25] 5 U.S.C. § 706(2).

[26] *Ergon-W. Va., Inc. v. EPA*, 980 F.3d 403, 422 (4th Cir. 2020) (citing *Roe v. Dep't of Def.*, 947 F.3d 207, 220 (4th Cir. 2020)).

for doing so.[27] Indeed, nearly all agency decision-making must be documented and explained.[28]

Particularly relevant here, federal law prohibits EPA from picking winners and losers absent proper documentation and explanation.[29] In its ten-year existence, the Transport Rule has never applied to an industry other than EGUs. Until now. The Proposed FIP applies the Transport Rule to seven new industries and offers no justifiable reason for this extension.

The Proposed FIP "would require emissions limitations for the following industries: Furnaces in Glass and Glass Product Manufacturing; boilers and furnaces in Iron and Steel Mills and Ferroalloy Manufacturing; kilns in Cement and Cement Product Manufacturing; reciprocating internal combustion engines in Pipeline Transportation of Natural Gas; and high emitting equipment and large boilers in Basic Chemical Manufacturing, Petroleum and Coal Products Manufacturing, and Pulp, Paper, and Paperboard Mill."[30] EPA targeted those industries based on the data in its February 28, 2022 "Non-EGU Screening Assessment Memorandum."[31] That memorandum states that EPA targeted the seven industries because they "emit >100 tpy [tons per year] of NOx."[32] EPA purposefully excluded what it termed "well-controlled sources" that emit > 100 tpy.[33] The Agency justified this exclusion because "uncontrolled sources" can "be better controlled at a reasonable cost."[34]

EPA's approach might make sense if it actually defined "well-controlled sources" and supported its definition with evidence. But EPA does neither. The Non-EGU Memorandum mentions the term "well-controlled sources" just once and offers no support for the suggestion that EPA cannot meaningfully regulate "well-controlled" sources at a reasonable cost. In fact, the only time the memorandum assesses emissions from sources other than the seven targeted industries is in Figure

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[27] *Vigil v. Leavitt*, 381 F.3d 826, 845 (9th Cir. 2004) (referencing *Sierra Club v. EPA*, 294 F.3d 155, 163 (D.C. Cir. 2002)); *Ergon-W. Va., Inc.*, 980 F.3d at 421 (finding EPA's decision arbitrary and capricious, in part, because EPA scored similarly situated companies differently and offered no applicable explanation).

[28] *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) ("Reasoned decisionmaking . . . calls for an explanation for agency action."); *Ergon-W. Va., Inc. v. EPA*, 896 F.3d 600, 611–12 (4th Cir. 2018) (finding EPA's decision arbitrary and capricious, in part, because EPA failed to conduct any related analysis); *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1143 (9th Cir. 2015) (finding EPA's decision arbitrary and capricious, in part, because EPA failed to identify what metrics it utilized).

[29] *Id.*

[30] Proposed FIP at 20050.

[31] Proposed FIP at 20043, 20082 and 20096; *see Screening Assessment of Potential Emissions Reductions, Air Quality Impacts, and Costs from Non-EGU Emissions Units for 2026*, EPA (Feb. 28, 2022), https://www.epa.gov/system/files/documents/2022-03/nonegu-reductions-ppb-impacts-2015-o3-transport-fip-final-memo.pdf [hereinafter Non-EGU Memorandum].

[32] *Non-EGU Memorandum* at 2–3.

[33] *Id.*

[34] *Id.*

1, a chart that shows around 20,000 tons of NOx emissions attributable to sources other than the seven targeted industries.[35] The twenty thousand tons of NOx emissions produced by these other industries constitute more than 20% of the emissions generated by the seven targeted industries.[36] Yet, other than stating that these non-targeted businesses are already "well-controlled," EPA offers no analysis as to why they avoided regulation when other industries did not. EPA's approach is tantamount to saying "trust us," which, absent explanation, federal courts have found arbitrary and capricious.[37]

EPA's regulation of the seven non-EGUs generates even more concern when compared to the analysis conducted by experts at the Midwest Ozone Group.[38] That analysis shows that, in at least two geographic areas, certain vehicles contribute around three times as many NOx emissions as *all* non-EGUs.[39] The evaluation goes on to demonstrate how NOx emissions produced by these vehicles could be reduced by 90% for less than 2% added cost.[40] The Proposed FIP does not assess—or even mention—such vehicles.[41]

Furthermore, many of the industries that EPA targets in the Proposed FIP likely cannot comply in a cost-effective manner. Among others, the Proposed FIP targets "boilers and furnaces in Iron and Steel Mills and Ferroalloy Manufacturing."[42] The steel industry, for instance, operates three types of furnaces: blast furnaces, basic oxygen furnaces, and electric arc furnaces.[43] EPA treats all three the same, proposing "selective catalytic reduction" as the means to reduce NOx emissions for each.[44] But blast furnaces, basic oxygen furnaces, and electric arc furnaces are not the same.

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[35] *Id.* at 4.
[36] *Id.*
[37] *Ergon-W. Va., Inc.*, 980 F.3d at 422 (citing *Roe*, 947 F.3d at 220); *Vigil*, 381 F.3d at 845 (referencing *Sierra Club*, 294 F.3d at 163); *Ergon-W. Va., Inc.*, 980 F.3d at 421 (finding EPA's decision arbitrary and capricious, in part, because the EPA scored similarly situated companies differently and offered no applicable explanation).
[38] *See Letter from Kathy G. Beckett, Legal Counsel, Midwest Ozone Group, to Michael Regan, Administrator, EPA* (May 16, 2022), https://www.midwestozonegroup.com/midwest-ozone-group-comments-on-control-of-air-pollution-from-new-motor-vehicles-heavy-duty-engine-and-vehicle-standards-proposed-rule/.
[39] *Id.* at 4–5.
[40] *Id.* at 6.
[41] *See generally* Proposed FIP.
[42] Proposed FIP at 20050.
[43] *Id.* at 20145.
[44] *Id.*

Electric arc furnaces are half as energy intensive as blast furnaces and basic oxygen furnaces[45] and produce 79% fewer CO_2 emissions than blast furnaces.[46] The range of NOx emissions per ton of steel produced is narrow for electric arc furnaces; they emit around 0.5 – 0.6 lb. of NOx/ton.[47] By contrast, the range for basic oxygen furnaces is broad, with some basic oxygen furnaces emitting up to 1 lb. of NOx/ton.[48]

Despite these differences, EPA proposes selective catalytic reduction (SCR) for both electric arc furnaces and basic oxygen furnaces.[49] The Proposed FIP assumes that installation of SCR technology will result in similar NOx reductions for both.[50] But an SCR on an already efficient electric arc furnace is not likely to result in NOx reduction similar to a less efficient basic oxygen furnace, and EPA has offered no evidence to suggest otherwise.[51]

More importantly, even if an SCR would result in the same reduction for electric arc furnaces as for other types of furnaces, SCRs are not technically feasible, and therefore not cost-effective, for electric arc furnaces. Earlier research from EPA admits as much: "[t]here is no information that NOx emissions controls have been installed on EAF's [electric arc furnaces] or that suitable controls are available."[52] This is because SCRs require consistent temperature and flow rates that do not exist in electric arc furnaces.[53] In sum, the Proposed FIP is not technically feasible for

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[45] ENERGETICS, INC., ENERGY AND ENVIRONMENTAL PROFILE OF THE U.S. IRON AND STEEL INDUSTRY 13, (2000).

[46] *EVRAZ Canadian Steel: Low Carbon Footprint* 2, EVRAZ (Nov. 2016), http://d3n8a8pro7vhmx.cloudfront.net/erinweir/mailings/195/attachments/original/Cleaner_Steel_November_2016.pdf.

[47] EPA, ALTERNATIVE CONTROL TECHNIQUES DOCUMENT – NO_x EMISSIONS FROM IRON AND STEEL MILLS 4-13, (1994).

[48] *Id.*

[49] Proposed FIP at 20145. SCR is a reference to an array of technologies that attach to exhaust streams and convert NOx emissions to less harmful gases. *See* Dr. Holger Sinzenich, *How Does Selective Catalytic Reduction Work?*, MTU (May 19, 2014), https://www.mtu-solutions.com/na/en/stories/technology/research-development/how-does-selective-catalytic-reduction-work.html. The Proposed FIP also contemplates selective noncatalytic reduction for basic oxygen furnaces. *See* Proposed FIP at 20145.

[50] Proposed FIP at 20145 (assuming 25% reductions due to SCRs on electric arc furnaces and assuming 25-50% reductions due to a combination of SCRs and SNCRs).

[51] *See Non-EGU Memorandum* at 2–3 (discussing why the Proposed FIP does not target "well-controlled" industries, in part, because those industries were unlikely to yield the same emissions reductions as lesser-controlled industries).

[52] *See* ENERGETICS, INC., *supra* note 45, at 5–23.

[53] *Selective Catalytic Reduction* at B-128–129, EPA, https://www3.epa.gov/ttnchie1/mkb/documents/B_15a.pdf; *Electric Arc Furnaces*, http://nifft.ac.in/WriteReadData/Electric%20arc%20furnace.pdf (noting that electric arc furnaces can be started and stopped to fit demand, while other kinds of furnaces remain constantly in operation).

electric arc furnaces, rendering arbitrary and capricious the Proposed FIP's demands of the steel industry generally and electric arc furnaces specifically.[54]

B. The Proposed FIP results in over-control of States' emissions.

The Proposed FIP requires States to reduce emissions by more than the amount necessary to achieve NAAQS attainment.[55] Consequently, the plan exceeds EPA's authority under the Clean Air Act and represents impermissible over-control of emissions.

1. The Proposed FIP and States' interest in pushing back on EPA over-control.

As the homes of many industries vital to the American economy, the undersigned States have significant interest in ensuring that EPA applies the Transport Rule appropriately. This means EPA may require upwind States to regulate emissions as much as their emissions amounts "will contribute significantly to downwind States' 'nonattainment . . . or interfere with maintenance,' of . . . EPA-promulgated air quality standards."[56] But the key limiting words here are "contribute *significantly* to downwind States' *nonattainment*."[57] This limit has teeth. In other words, "the [Proposed FIP] violates the [Clean Air Act] when it requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked."[58]

EPA issued the Proposed FIP to ensure that 26 States fulfill their Good Neighbor obligations by not significantly contributing to downwind States' attainment and maintenance of the 2015 NAAQS.[59] The Proposed FIP represents EPA's most recent effort to enforce the Good Neighbor requirements, which EPA has done previously through State plans and other rules such as the NOx SIP Call (1998), the Clean Air Interstate Rule of 2005, and the Cross-State Air Pollution Rule of

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[54] The Proposed FIP offers no alternative to SCRs in Table VII.C.–3, and EPA has offered no legitimate explanation for how electric arc furnaces can achieve cost-effective compliance in the absence of technical feasibility. *See* Proposed FIP at 20145.

[55] *See Federal Implementation Plan Addressing Ozone Transport for the 2015 Ozone Ambient Air Quality Standards: Informational Webinar,* EPA (Mar. 2022) at 6–7, https://www.epa.gov/system/files/documents/2022-03/2015-ozone-transport-proposed-rule-overview.pdf [hereinafter *2022 CSPAR Powerpoint Presentation*].

[56] *EME Homer I*, 572 U.S. at 495 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)) (cleaned up); *see EME Homer II*, 795 F.3d at 124–25.

[57] *Id.* (emphasis added).

[58] *EME Homer II*, 795 F.3d at 124 (quoting *EME Homer I*, 572 U.S. at 521) (cleaned up).

[59] *See 2015 Ozone Proposed Good Neighbor Rule Fact Sheet*, EPA (2022), https://www.epa.gov/system/files/documents/2022-03/fact-sheet_2015-ozone-proposed-good-neighbor-rule.pdf [hereinafter *2022 CSPAR Fact Sheet*].

2011.[60] But the Proposed FIP goes much farther in its scope than these previous efforts.

The Proposed FIP completely overhauls the Transport Rule's current approach to EGUs, which covers coal-fired power plants and certain oil and gas plants. These changes include requiring dynamic adjustments of States' emissions budgets beginning with the 2025 ozone season and imposing backstop daily emissions rates for most EGUs and ozone-season emissions budgets on EGUs beginning in 2023 and on non-EGUs beginning in 2026.[61] Under the EGU program, in particular, beginning in the 2023 season, caps will be established on EGU NOx emissions in 25 of the 26 States.[62] Additional decreases in NOx emissions from EGUs would also be required in 23 States, beginning with the 2026 ozone season.[63] EGUs, in turn, will be forced to install SCR controls, or equivalent controls, by the start of the 2027 ozone season.[64] But from the outset, these regulations look redundant, given that about 60% of existing coal-fired units in affected States already have SCRs.[65]

From a state-by-state perspective, EPA identified 36 nonattainment and maintenance problems in downwind areas, with Kentucky assessed as contributing above one percent of the NAAQS or 0.70 parts per billion (ppb) to downwind air in its linked downwind location.[66] Based on EPA's finding here, Kentucky is proposed to be included in EPA's list of the 23 States subject to non-EGU unit-specific emissions limitations beginning in 2026.[67] What this means is that the Proposed FIP will impose draconian emissions cuts on Kentucky. By 2026, Kentucky will be forced to reduce its non-EGU NOx emissions to 2,291 tons, constituting a reduction of 19% from its 2019 levels.[68] In addition, commensurate with the requisite installation of new SCRs on all coal-fired EGUs, as well as SCR installation on larger oil/gas steam EGUs that operate often, EPA proposes that Kentucky reduce its EGU NOx emissions with SCR by 2,944 tons in the coal steam industry, by 188 tons in the oil/gas steam industry, and by 3,132 tons in the all-steam industry.[69] These reductions are alarmingly steep, given Kentucky's already relatively low levels of NOx emissions. Indeed, even as the economy continues to stagnate and inflation rises, EPA is

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[60] *See EME Homer I*, 572 U.S. at 499–503 (discussing EPA's previous efforts to regulate under the Good-Neighbor provision); *see also* NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (final rule); 62 Fed. Reg. 60,318 (Nov. 7, 1997) (proposed rule); Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005) (final rule); 69 Fed. Reg. 4,566 (Jan. 30, 2004) (proposed rule); 2011 Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final rule); 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed rule).
[61] *2022 CSPAR Powerpoint Presentation* at 16.
[62] *Id.* at 7.
[63] *Id.*
[64] *Id.*
[65] Moreover, it is our understanding that all of Kentucky's coal plants currently have SCRs in place.
[66] *Id.* at 6.
[67] *Id.* at 7
[68] *Id.* at 9.
[69] *Id.* at 10.

demanding by 2023 a 15% emissions decrease in Kentucky from current levels.[70] And by 2026—a mere four years from now—based on the predicted SCR retrofit, EPA proposes an even greater relative reduction of roughly 43% from Kentucky's current levels of NOx emissions.[71]

Ultimately, the Proposed FIP will be the death knell for certain industries already suffering in the current economy. For example, the plan is estimated to cause 18 gigawatts of coal-fired generation and 4 gigawatts of gas and oil-fired capacity to retire by 2030. This continued rush by EPA to retire EGUs in Kentucky and across the country will further stress the nation's power grid, exacerbating the reliability, affordability, and resilience of the electricity supplied to homes and industries. Meanwhile, non-EGUs will be forced to develop or invest in expensive control equipment. This will severely impact the manufacturing industry's ability to compete and will drive away valuable American manufacturing jobs to countries whose air pollution track records fall far short of the United States.

2. The Proposed FIP defies Supreme Court and D.C. Circuit precedent barring EPA's over-control.

Aside from imposing unsustainable obligations on States with its Good Neighbor obligations, the Proposed FIP's new restrictions exceed EPA's statutory authority as interpreted by *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) (*EME Homer I*) and *EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118 (D.C. Cir. 2015) (*EME Homer II*) and will result in over-control of emissions. Some background is in order to understand exactly why this is the case.

In *EME Homer I,* the Supreme Court held that the "over-control problem" that resulted in the D.C. Circuit's initial invalidation of EPA's earlier Transport Rule did not require "wholesale invalidation" of the Rule.[72] But the Court agreed with the D.C. Circuit to the extent that EPA imposes "unnecessary" emissions reductions when it "requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked."[73] Given the fear of over-control then, the Court directed that if "any upwind State concludes it has been forced to regulate emissions . . . beyond the point necessary to bring all downwind States into attainment, that State may bring a particularized, as-applied challenge to the Transport Rule."[74]

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[70] *Id.* at 12.
[71] *Id.* at 14. According to EPA, the estimated EGU NOx emissions reductions in 2026 relative to 2021 "reflect the difference between the proposed rule's 2026 illustrative budgets for EGUs and current 2021 adjusted emissions for those EGUs (*e.g.*, 2021 reported emissions adjusted to account for the removal of units known to have since retired or the additions of emission from underconstruction [of] new fossil plants." *Id.*
[72] 572 U.S. at 522.
[73] *Id.* at 521–22.
[74] *Id.* at 523–24.

On remand, the D.C. Circuit subsequently assessed the many as-applied over-control challenges brought by States against EPA's 2014 emissions budgets. Upon review, a unanimous panel remanded the budgets for EPA to reassess its proposed emissions budgets for 2014 SO2 and 2014 ozone-season NOx covering 15 States.[75] When rejecting the budgets under the particularized States' challenges, the D.C. Circuit outlined the standard to determine when EPA has over-regulated or "over-controlled" in its emissions requirements. Repeating the standard set by the Supreme Court, the D.C. Circuit explained that EPA will have "overstepped its authority, under the Good-Neighbor provision" if it "requires 'an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked.'"[76] Put another way, EPA will be overstepping its statutory authority when the given downwind locations "would achieve attainment even if less stringent emissions limits were imposed on the upwind States linked to those locations."[77]

As they pertain to Kentucky's emissions rates, the Proposed FIP fails the standards set by *EME Homer I* and *II*, and will result in over-control, because Kentucky's linked downwind location "would still attain its NAAQS if . . . [Kentucky] were subject to less stringent emissions limits."[78] The central problem—relevant to *all* States that fall under the Proposed FIP—is that EPA is not focusing discretely on imposing emissions limits in the "amount necessary to achieve attainment" in downwind States.[79] Rather, EPA is proposing a regulatory scheme that, according to its own Rule, seeks to further "environmental justice considerations,"[80] "maintain

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[75] *EME Homer II*, 795 F.3d 128–32.

[76] *Id.* at 127 (quoting *EME Homer I*, 572 U.S. at 521).

[77] *Id.* The D.C. Circuit provided the following example to explain when EPA would be overstepping its statutory authority under the Clean Air Act:

> [A]ssume that a downwind location would meet its NAAQS if the upwind States to which it is linked implemented emissions reduction technologies available at a cost of $100/ton. Once those technologies are in place, the downwind location will be in attainment. If the upwind States also implemented emissions reduction technologies available at a cost of $200/ton, the emissions reductions that flow from those technologies would not help the downwind location reach attainment because it already reached attainment when technologies available at a cost of $100/ton were implemented.

Id.

[78] *See id.*

[79] *See id.* at 124 (quoting *Homer I*, 572 U.S. at 533).

[80] 87 Fed. Reg. 20047, 20053, 20060, 20153. In the current Transport Rule, EPA defines "environmental justice" as: "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." EPA, in turn, elaborates that "fair treatment" "mean[s] that no group of people should bear a disproportionate burden of environmental

environmental rigor,"[81] and "promote more consistent operation and optimization of emissions controls."[82] Moreover, the proposed questions EPA outlines to inform its regulatory actions set subjective and imprecise standards to regulate upwind States' emissions, which conflict with the limited scope of EPA's authority.[83] For example, EPA outlines its three analytical considerations as:

> (1) Are there *potential* environmental justice concerns associated with environmental stressors affected by the regulatory action for population groups of concern in the baseline?
>
> (2) Are there *potential* environmental justice concerns associated with environmental stressors affected by the regulatory action for population groups of concern for the regulatory option(s) under consideration?
>
> (3) For the regulatory option(s) under consideration, are *potential* environmental justice concerns created or mitigated compared to the baseline?[84]

Therefore, rather than analyzing whether particular proposed reductions were directed specifically at "amounts" of emissions that "contribute significantly" to "nonattainment" of NAAQS in the linked downwind locations,[85] EPA chooses to regulate based on seemingly intangible objectives. Along with the above, these nebulous goalposts include EPA's forecasted "monetized health benefits," and "annualized monetized climate benefits"—objectives it also claims to be in the greater public interest.[86] Unfortunately, goalposts like these ignore one particularly important public interest: the upwind States' industrial-based economies and the connection those economies have to the long-term prosperity and growth of the American populace. Accordingly, all the regulated upwind States lack transparent gauges to know what emissions standards are "necessary" to avoid contributing to the nonattainment of NAAQS in downwind locations.

For instance, for ozone-season NOx, there is no reliable record data showing that Kentucky's linked downwind location would not comply with its NAAQS between 2023 and 2025 absent any Good-Neighbor obligations placed on Kentucky.[87] This means that rather than focusing exclusively on achieving downwind attainment, EPA is proposing drastic reductions on Kentucky's EGU and non-EGU emissions to a level

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harms and risks, including those resulting from the negative environmental consequences of industrial, governmental and commercial operations or programs and policies." *Id.* at 20153.

[81] *2022 CSPAR Powerpoint Presentation* at 16.

[82] *Id.*

[83] *See* 87 Fed. Reg. 20153.

[84] *Id.* (emphasis added).

[85] *EME Homer I,* 572 U.S. at 489 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)).

[86] *2022 CSPAR Powerpoint Presentation* at 17.

[87] *See EME Homer II*, 795 F.3d at 128.

that is 43% less than current standards,[88] which EPA explains will help "net at least $9.3 billion and could be as high as $18 billion" in "monetized health benefits" by 2026, as well as "$1.5 billion" in "annualized monetized climate benefits," at a total cost for regulated States of only "$1.1 billion."[89] And annually, according to EPA, the "net monetized health benefits (not including monetized climate benefits) after accounting for the costs of compliance . . . would be $15 billion."[90]

But these projected benefits are speculative. Worse, EPA estimates total costs to regulated States as $1.1 billion without soliciting actual input from the affected upwind States, whose economies will be impacted on multi-generational levels that result in costs that far exceed EPA's estimates. More so, EPA fails to explain sufficiently why it is requiring some States to reduce downwind pollution to levels far below the applicable NAAQS. Nor does EPA assess whether more modest reduction proposals would result in attainment in downwind locations.[91] EPA's omission of its specific analysis for each downwind location is problematic under *EME Homer I* and *II*. In particular, for Kentucky, if lower cost controls—rather than reductions to 2,291 tons in non-EGU NOx emissions, 2,944 tons in EGU NOx emissions in the coal steam industry, 188 tons in the oil/gas steam industry, and 3,132 tons in the all-steam industry[92]—would yield downwind NAAQS attainment in Kentucky's linked location, then EPA's current proposed reductions on the Commonwealth "cannot be necessary to . . . the achievement of attainment" in that linked location.[93] In other words, "requiring [Kentucky] to implement higher cost controls does not produce benefits that are 'incidental' to attainment elsewhere; it produces benefits that are 'unnecessary to downwind attainment *anywhere*.'"[94]

Ultimately, EPA's emissions reductions imposed on Kentucky and other States require them to reduce pollutants far beyond the point necessary to achieve downwind attainment in its linked location. Therefore, not only does the Proposed FIP violate the Supreme Court's directive in *EME Homer I* and the D.C. Circuit's directive in *EME Homer II*, but it also far exceeds EPA's statutory authority under the Clean Air Act's Good-Neighbor provision.

C. Not allowing States to use the 1 ppb standard is arbitrary and capricious.

Courts generally grant some deference to agency decision-making.[95] But that deference is not unlimited. As already explained, an agency cannot act in a manner

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[88] 2022 CSPAR Powerpoint Presentation at 14.
[89] *Id.* at 17.
[90] *Id.*
[91] *See EME Homer II*, 795 F.3d at 127–29.
[92] 2022 CSPAR Powerpoint Presentation at 9–10.
[93] *See EME Homer II*, 795 F.3d at 131.
[94] *Id.* (quoting *EME Homer I*, 572 U.S. at 522).
[95] *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

that is inconsistent with the authorizing statute or that is arbitrary and capricious.[96] Indeed, the agency must "articulate . . . a rational connection between the facts found and the choice made."[97] And when the "new policy rests upon factual findings that contradict those which underlay its prior policy, or when its prior policy has engendered serious reliance interests," the Administrative Procedure Act requires an agency to provide "a more detailed justification" than it otherwise would.[98] Ignoring factual findings or reliance interests makes the agency action arbitrary and capricious.[99] EPA ignores both with its Proposed FIP.

In August 2018, EPA issued a memo (August 2018 Memo) discussing the appropriate screening thresholds for States to use when addressing the Good Neighbor provision of the 2015 ozone NAAQS.[100] In the memo, EPA explains that it is considering various screening thresholds because determining an appropriate threshold "is a critical component of designing and applying" the second step of EPA's framework to address upwind state obligations, and "conclusions made with respect to one NAAQS are not by default applicable to another NAAQS."[101] After finding that "the amount of upwind collective contribution captured using a 1 ppb threshold is generally comparable to the amount captured using a threshold equivalent to 1 percent of the NAAQS," EPA noted that "it may be reasonable and appropriate for states to use a 1 ppb contribution threshold, as an alternative to a 1 percent threshold."[102]

States will no longer be allowed to choose their standard and instead will be required to use the 1% threshold if the Proposed FIP becomes final. This decision contradicts EPA's own factual findings. One of EPA's reasons for requiring the 1% threshold is that, while EPA may have previously recognized some "similarity" in the amount of upwind contribution captured between the 1% standard and the 1 ppb standard, the 1 ppb threshold loses more upwind contribution than the 1% threshold.[103] The August 2018 Memo acknowledged this, explaining that the difference between the two standards was about a 7% loss at that time.[104] In the Proposed FIP, EPA reports that "in EPA's updated modeling, the amount lost [by using the 1 ppb threshold] is roughly 5 percent" more than by using the 1 percent threshold.[105] That means the difference between the two standards *decreased* from

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[96] 5 U.S.C. 706(2)(A).
[97] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[98] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[99] *Id*.
[100] Memorandum from Peter Tsirigotis to Regional Air Division Directors (Aug. 31, 2018), https://www.epa.gov/sites/default/files/2018-09/documents/contrib_thresholds_transport_sip_subm_2015_ozone_memo_08_31_18.pdf [hereinafter August 2018 Memo].
[101] *Id*. at 2.
[102] *Id*. at 4.
[103] Proposed FIP at 20074.
[104] August 2018 Memo at 4.
[105] Proposed FIP at 20074.

when EPA allowed the use of both standards to the requirement of a single standard in the Proposed FIP. EPA fails to articulate any rational connection between this fact and its choice to demand the 1% standard now—when environmental protection does not necessitate EPA to do so—versus earlier, when the difference between the two standards was higher.

Indeed, the Proposed FIP cites "substantial programmatic and policy difficulties in attempting to implement [the two threshold] approach" as a reason for the change rather than evidence that requiring States to use exclusively the 1% threshold is necessary for compliance with the Good Neighbor provision in the Clean Air Act. This belies that the Agency reached its decision through a "logical and rational process"[106] rather than because of policy differences between administrations. This disregard for the facts and failure to provide a reasoned explanation makes the decision requiring States to use only the 1% threshold arbitrary and capricious.[107]

The Proposed FIP is also arbitrary and capricious because EPA failed to take into account the reliance interests of the States. After EPA published the August 2018 Memo allowing States to choose between the two thresholds, States began relying on that flexibility when making submissions for compliance under the Good Neighbor provisions. On January 11, 2019, Kentucky submitted a SIP revision that, in part, addressed the Good Neighbor provisions.[108] The Commonwealth used the 1 ppb threshold in its submission and determined Kentucky would not be linked as a significant contributor to its four nonattainment receptors.[109] As a result, the Commonwealth concluded that further controls were not required to address contributions to those receptors.[110]

The Proposed FIP ignores States' reliance on the August 2018 Memo, despite the fact that EPA is fully aware of such reliance. In fact, the plan says only that EPA "may determine to rescind" the memo in the future.[111] EPA's decision not to rescind

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[106] *Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal citation omitted)).

[107] *See State Farm*, 463 U.S. at 43 (noting that "normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency").

[108] *See Air Plan Disapproval; Kentucky; Interstate Transport Requirements for the 2015 8-hour Ozone National Ambient Air Quality Standards*, 87 Fed. Reg. 9498, 9503 (proposed Feb. 22, 2022).

[109] *Id*. at 9504.

[110] *Id*. Similarly, on August 17, 2018, Texas timely submitted its SIP relying on the flexibility described in EPA's guidance available at the time. Texas used EPA's 1% threshold to determine downwind monitors for further evaluation as potential significant contribution linkages. Nevertheless, EPA refused to abide by the flexibility provided by its guidance and proposed disapproval for the submissions of Texas and other States.

[111] Proposed FIP at 20074.

the memo while requiring States to use the 1% threshold is not only counterintuitive, but it is also indicative of a lack of a "logical and rational process."

The significant deference given to agencies when they engage in rulemaking is intended to give the people with expertise and technical knowledge flexibility to appropriately and practicably carry out the policy decisions of Congress. It is not so agencies can make policy themselves. That power belongs to Congress alone.[112] EPA cannot ignore scientific and factual evidence available to it in order to enact a policy it thinks would be better than the one Congress has instituted. When an agency ignores the scientific evidence available to it and fails to engage in a logical and rational process, its actions are arbitrary and capricious.

III. Conclusion

For the reasons set forth above, the Attorneys General for the Commonwealth of Kentucky and the States of Alabama, Arkansas, Indiana, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming respectfully request that EPA abandon the Proposed FIP. We look forward to your response.

Respectfully submitted,

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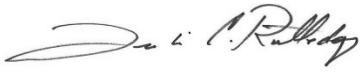

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[112] U.S. CONST. Art. 1, § 1.

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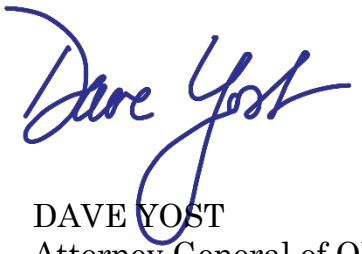

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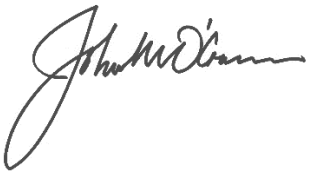

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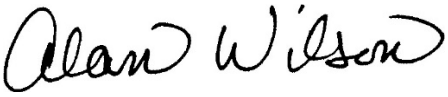

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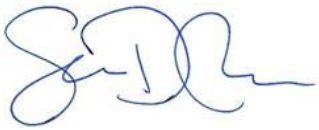

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