

Case No. 23-3216

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

COMMONWEALTH OF KENTUCKY

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and
MICHAEL S. REGAN, Administrator, United States Environmental Protection
Agency

Respondents

Petition for Review of a Final Agency Action of the
United States Environmental Protection Agency

**MOTION OF THE COMMONWEALTH
OF KENTUCKY FOR A STAY PENDING REVIEW**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
BACKGROUND.....	2
I. Statutory and regulatory background.....	2
II. Kentucky’s ozone interstate transport SIPs	3
A. Kentucky’s SIP for the 2008 ozone NAAQS.....	3
B. Kentucky’s SIP for the 2015 ozone NAAQS	3
C. EPA Region 4’s determinations regarding Kentucky’s SIP	6
D. EPA rushes to impose a FIP.....	8
E. EPA’s final disapproval of Kentucky’s SIP	9
ARGUMENT	9
I. Kentucky is likely to prevail on the merits.	11
A. EPA failed to follow the CAA.	11
B. EPA’s bait-and-switch is arbitrary and capricious.	14
II. Kentucky is suffering irreparable harm.....	19
III. The remaining factors favor a stay.....	20
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	23
ADDENDUM.....	24

TABLE OF AUTHORITIES

Cases

<i>Breeze Smoke, LLC v. U.S. Food & Drug Admin.</i> , 18 F.4th 499 (6th Cir. 2021).....	10, 15
<i>Commonwealth v. Biden</i> , 57 F.4th 545 (6th Cir. 2023).....	20, 21
<i>DHS v. Regents of the Univ. of Cal.</i> , 140 S. Ct. 1891 (2020)	16
<i>Encino Motorcars, LLC v. Navarro</i> , 579 U.S. 211 (2016).....	17, 18
<i>Env't Integrity Project v. EPA</i> , 425 F.3d 992 (D.C. Cir. 2005)	15
<i>EPA v. EME Homer City Generation, L.P.</i> , 572 U.S. 489 (2014).....	2
<i>FCC v. Prometheus Radio Project</i> , 141 S. Ct. 1150 (2021)	14
<i>Kentucky v. Biden</i> , 23 F.4th 585 (6th Cir. 2022).....	19, 20
<i>Michigan v. EPA</i> , 268 F.3d 1075 (D.C. Cir. 2001)	2, 19
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	9, 10, 20
<i>Sierra Club v. EPA</i> , 356 F.3d 296 (D.C. Cir. 2004)	16, 17
<i>Sierra Club v. EPA</i> , 60 F.4th 1008 (6th Cir. 2023)	2
<i>Texas v. EPA</i> , 829 F.3d 405 (5th Cir. 2016).....	3, 13, 19, 20
<i>Train v. Nat. Res. Def. Council, Inc.</i> , 421 U.S. 60 (1975).....	13, 14

Statutes

42 U.S.C. § 7401	13
42 U.S.C. § 7407	2, 13, 16
42 U.S.C. § 7410	<i>passim</i>
5 U.S.C. § 706.....	11

Regulations

2008 NAAQS, 73 Fed. Reg. 16,436 (Mar. 27, 2008)	3
2015 NAAQS, 80 Fed. Reg. 65,292 (Oct. 26, 2015)	3
2018 Ky. SIP Approval, 83 Fed. Reg. 17,123 (Apr. 18, 2018)	3, 8
Air Plan Disapprovals, 88 Fed. Reg. 9,336 (Feb. 13, 2023)	<i>passim</i>
Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; 1-Hour Ozone Attainment Plans, Rate-of-Progress Plans, Contingency Measures, Transportation Control Measures, VMT Offset, and 1990 Base Year Inventory, 68 Fed. Reg. 19,106 (Apr. 17, 2003)	13, 16
Approval and Promulgation of Air Quality State Implementation Plans; California; San Joaquin Valley; Moderate Area Plan for the 2006 PM _{2.5} , 81 Fed. Reg. 59,876 (Aug. 31, 2016).....	16
Approval and Promulgation of Implementation Plans, 78 Fed. Reg. 14,681 (Mar. 7, 2013)	3
Determination of Attainment of the 1-Hour Ozone Standard; Determination Regarding Applicability of Certain Clean Air Act Requirements; Approval and Promulgation of Ozone Attainment Plan; San Francisco Bay Area, CA, 69 Fed. Reg. 21,717 (Apr. 22, 2004)	13, 16
Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20,036 (Apr. 6, 2022)	8
Proposed Ky. SIP Disapproval, 87 Fed. Reg. 9,498 (Feb. 22, 2022)	<i>passim</i>

Other Authorities

EPA, <i>Federal Implementation Plan Addressing Ozone Transport for the 2015 Ozone Ambient Air Quality Standards: Informational Webinar</i> (Mar. 2022)	8
Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards (Mar. 15, 2023)	10
Final Kentucky Infrastructure State Implementation Plan, Energy and Environment Cabinet (Jan. 11, 2019)	4, 6, 12, 20
Memorandum from Peter Tsigotis, Director, Office of Air Quality Planning and Standards, <i>Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards</i> (Aug. 31, 2018)	5, 17, 18
Memorandum from Peter Tsigotis, Director, Office of Air Quality Planning and Standards, <i>Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)</i> (Mar. 27, 2018)	4, 12, 15

INTRODUCTION

The Clean Air Act (CAA) creates separate lanes for EPA and the States. Relevant here, EPA sets national air-quality standards for certain pollutants. But it is the States that determine how to meet those standards within their borders. They do so by creating state implementation plans (SIPs). EPA plays only a ministerial role in reviewing SIPs for compliance with the CAA.

In this case, EPA disapproved Kentucky's SIP. That disapproval was unlawful for many reasons. EPA acted on Kentucky's SIP years after the deadline for doing so. It ignored the cooperative-federalism framework at the heart of the CAA. And EPA deprived Kentucky of fair notice by relying on data created after the deadline for acting on Kentucky's SIP. To state the obvious, there was no way that Kentucky in 2018 could have predicted data that EPA did not release until 2020. EPA also disregarded Kentucky's reliance on an EPA memorandum instructing States about the standards to use when preparing SIPs.

Not only was EPA's disapproval of Kentucky's SIP unlawful, but it also is causing irreparable harm to Kentucky. For starters, EPA's disregard for the CAA's cooperative-federalism framework harms Kentucky's sovereignty. Beyond that, before Kentucky could comment on the disapproval of its SIP, EPA rushed out a federal implementation plan (FIP). That FIP will further harm Kentucky's sovereignty while simultaneously causing electrical-grid instability and higher electric prices in Kentucky. A stay

of EPA's denial of Kentucky's SIP while this matter is briefed and decided is amply warranted.

BACKGROUND

I. Statutory and regulatory background

The CAA is “an experiment in cooperative federalism.” *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Congress enacted it to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” *Sierra Club v. EPA*, 60 F.4th 1008, 1012 (6th Cir. 2023) (citation omitted). Under the CAA’s cooperative-federalism framework, EPA establishes and revises the National Ambient Air Quality Standards (NAAQS) for certain pollutants, like ozone. *Id.* Meanwhile, “[e]ach state has ‘the primary responsibility’ for ensuring that its ambient air meet the NAAQS for the identified pollutants.” *Id.* at 1013 (quoting 42 U.S.C. § 7407(a)).

Part of that responsibility entails developing SIPs to implement the NAAQS and demonstrate “compliance with the Act’s requirements.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 507 (2014). Among those requirements is the Act’s “good neighbor” provision, which generally requires “upwind States to reduce emissions to account for pollution exported beyond their borders.” *Id.* at 499. More specifically, a SIP must “contain adequate provisions” to prohibit in-state emissions from “contribut[ing] significantly to nonattainment in, or interfer[ing] with maintenance by, any other State” in its own NAAQS compliance. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

The States are the frontline actors in developing their SIPs. EPA, by comparison, plays a lesser role. It has only “the ministerial function of reviewing SIPs for consistency with the Act’s requirements.” *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (citation omitted).

II. Kentucky’s ozone interstate transport SIPs

A. Kentucky’s SIP for the 2008 ozone NAAQS

In 2008, EPA revised the NAAQS for ozone downward from 80 parts per billion (ppb) to 75 ppb, triggering Kentucky’s obligation to revise its SIP. 2008 NAAQS, 73 Fed. Reg. 16,436, 16,437 (Mar. 27, 2008). EPA partially disapproved Kentucky’s initial SIP as not complying with the CAA’s “good neighbor” provision. Approval and Promulgation of Implementation Plans, 78 Fed. Reg. 14,681, 14,681 (Mar. 7, 2013). But after Kentucky worked with the agency to amend its SIP, EPA approved it. 2018 Ky. SIP Approval, 83 Fed. Reg. 17,123 (proposed Apr. 18, 2018).

B. Kentucky’s SIP for the 2015 ozone NAAQS

EPA lowered the ozone NAAQS again in 2015 from 75 to 70 ppb, triggering an obligation for SIP revisions addressing interstate transport. 2015 NAAQS, 80 Fed. Reg. 65,292, 65,443 (Oct. 26, 2015). Rather than try to promulgate nationally applicable regulations addressing “good neighbor” obligations under the new ozone NAAQS, EPA issued a guidance memorandum. EPA explained that States could “us[e] EPA’s analytical approach” from its prior FIPs, “somewhat different analytical approaches within [the Agency’s typical four-step framework for assessing good-neighbor compliance],”

or “alternative frameworks.” Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, *Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)* at 3 (Mar. 27, 2018), <https://perma.cc/Y8YF-CQMB> (March 2018 Memorandum). EPA presented this information “for purposes of assisting [S]tates in developing SIPs” for the new standard. *Id.* at 3. EPA’s memorandum “recommend[ed] that [S]tates reach out to EPA Regional offices and work together to accomplish the goal of developing, submitting, and reviewing approvable SIPs,” *id.* at 6, which Kentucky did, Kennedy Decl. ¶¶12–15, Exhibit 2.

Kentucky submitted its SIP on January 11, 2019. Final Kentucky Infrastructure State Implementation Plan, Energy and Environment Cabinet (Jan. 11, 2019), <https://perma.cc/MES8-LSVJ> (Ky. SIP). This triggered an 18-month deadline for EPA to “act on [Kentucky’s] submission.” 42 U.S.C. § 7410(k)(1)(B), (k)(2) (providing six months for a completeness finding and then 12 months to approve or disapprove). Kentucky’s SIP explained that it meets the “good neighbor” provision because the plan contains “adequate provisions to prevent sources and other types of emissions activities within the Commonwealth from significantly contributing to nonattainment, or interfering with the maintenance, of downwind states with respect to the 2015 8-hour ozone NAAQS.” Proposed Ky. SIP Disapproval, 87 Fed. Reg. 9,498, 9503 (proposed Feb. 22, 2022).

In reaching this conclusion, Kentucky followed EPA’s guidance. First, it adopted EPA’s general framework for evaluating compliance with the “good neighbor” provision. *Id.* at 9502–04. Kentucky identified monitoring sites projected to have problems attaining and/or maintaining the NAAQS in 2023 in part because of emissions produced within the Commonwealth. *Id.* at 9503–04. To identify these sites, Kentucky “relied on the results of EPA’s modeling of . . . 2023, contained in the March 2018 [M]emorandum.” *Id.* at 9503. “The March 2018 modeling indicate[d] that the Commonwealth was linked to four nonattainment receptors [two in Connecticut and two in Wisconsin] and one maintenance monitor above 1% of the NAAQS.” *Id.* at 9,504.

Kentucky next assessed whether its contribution to the downwind sites was significant enough for them to be “linked.” *Id.* To make this assessment, Kentucky relied on EPA’s suggestion to use a contribution threshold of 1 ppb from an August 2018 memorandum published to guide the States in preparing their SIPs. *Id.*; *see also* Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, *Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards* (Aug. 31, 2018), <https://perma.cc/G8EN-RN8Q> (August 2018 Memorandum). “Based on the March 2018 modeling and application of a 1 ppb alternative contribution threshold, the Commonwealth found that it would not be linked as a significant contributor to the four nonattainment receptors in Connecticut and Wisconsin[.]” Proposed Ky. SIP Disapproval, 87 Fed. Reg. at 9,504. Kentucky thus concluded that its

SIP “contains adequate provisions to prevent” emissions in the Commonwealth “from contributing significantly to nonattainment” at these sites. *Id.*

Applying the 1 ppb threshold EPA suggested, “Kentucky remained linked to” one downwind maintenance receptor in Harford County, Maryland. *Id.* But Kentucky distinguished between nonattainment areas and maintenance areas because the latter “are already in attainment.” Ky. SIP at 45. And “[u]pwind states should not be required to apply the same degree of reductions that are required for nonattainment areas.” *Id.* Thus, the Commonwealth concluded that no further reductions were needed other than on-the-books and on-the-way measures. *Id.* at 46. Indeed, Kentucky noted it had significantly reduced its emission of NO_x (an ozone precursor). *Id.* at 30, 45. And Kentucky’s SIP outlined “coal-fired unit retirements, shutdowns, and repowering . . . as well as on-the-way reductions from natural gas conversions and retirements.” Proposed Ky. SIP Disapproval, 87 Fed. Reg. at 9505. So Kentucky concluded that it needed to take no further steps.

C. EPA Region 4’s determinations regarding Kentucky’s SIP

Almost two years after its statutory deadline to act on Kentucky’s SIP, on February 22, 2022, EPA’s Region 4 proposed to disapprove it for noncompliance with the “good neighbor” provision. *See id.* at 9,498. Region 4 explained that it evaluated Kentucky’s SIP using “updated air quality modeling to project design values and contributions for 2023” that were not available when the Commonwealth made its submission in 2019. *Id.* at 9507. With this new modeling came newly impacted monitor sites—like

Bucks County, Pennsylvania—that Kentucky could not have possibly considered. *Id.* The new modeling also showed that Kentucky was no longer linked to the sites that it analyzed in its SIP. *Compare* Proposed Ky. SIP Disapproval, 87 Fed. Reg. at 9,504 (discussing how Kentucky’s SIP addressed sites in Maryland and Wisconsin), *with id.* at 9,507 (only discussing sites in Pennsylvania and Connecticut).

Region 4 then used its “most recently available modeling” to identify linked sites using “a threshold of 1 percent of the NAAQS”—or .7 ppb—and rejected the 1 ppb threshold that EPA had suggested in its August 2018 memorandum. *Id.* at 9509. EPA “acknowledge[d] that the August 2018 memorandum generally recognized that a 1 ppb threshold may be appropriate for states to use.” *Id.* But even though EPA suggested this standard, it faulted Kentucky for “not provid[ing] a technical analysis to sufficiently justify use of an alternative 1 ppb threshold at the linked, downwind monitors.” *Id.* And Region 4 disagreed that on-the-books and on-the-way reductions were sufficient to address cross-state emissions. *Id.* at 9511–12. It also rejected arguments for a weighted approach to emissions reductions, *id.* at 9515, as well as “Kentucky’s claims that local emissions reductions from the jurisdiction where the downwind receptor is located must first be implemented and accounted for before imposing obligations on upwind states under the interstate transport provision,” *id.* at 9513. Because of this new data, unavailable when Kentucky submitted its SIP, Region 4 ultimately concluded that Kentucky’s SIP fell short on its “good neighbor” obligation. *Id.* at 9,515.

D. EPA rushes to impose a FIP

The CAA requires that when a SIP is found inadequate, EPA “shall require the State to revise the plan as necessary to correct such inadequacies.” 42 U.S.C. § 7410(k)(5). In fact, that is exactly what happened with Kentucky’s SIP for the 2008 ozone NAAQs. 2018 Ky. SIP Approval, 83 Fed. Reg. at 17,123–25. But here, EPA had no appetite for cooperative federalism. Instead, less than two months after proposing to disapprove Kentucky’s SIP—and before the comment deadline expired on the disapproval—EPA unveiled its FIP. Federal Implementation Plan Addressing Regional Ozone Transport, 87 Fed. Reg. 20,036 (proposed Apr. 6, 2022).

The Proposed FIP is aggressive—to put it mildly. It imposes emissions reductions on several new industrial stationary sources (referred to as “non-Electric Generating Units” (non-EGUs)). *Id.* at 20,050. It also overhauls EPA’s approach to EGUs.¹ *See id.* at 20,110–12, 20,115–17. Kentucky led 14 States in submitting a comment opposing the proposed FIP. They explained that EPA had offered “no justifiable reason” for applying the rule to the industries that it selected and that complying with the FIP’s

¹ *See* EPA, *Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standards: Informational Webinar*, 7, 16 (Mar. 2022), <https://perma.cc/YV7E-4QUM> (requiring, for example, dynamic adjustments of States’ emissions budgets beginning with the 2025 ozone season and forcing EGUs to install selective catalytic reduction controls or equivalent controls by the start of the 2027 ozone season).

emissions limitations would require “draconian emissions cuts” that would stress power grids. State Comment Letter 5, 9, Exhibit 8 (June 21, 2022).

E. EPA’s final disapproval of Kentucky’s SIP

Earlier this year, EPA published a final rule that included its disapproval of Kentucky’s SIP revision. Air Plan Disapprovals, 88 Fed. Reg. 9,336, 9,356 (Feb. 13, 2023) (Ky. SIP Disapproval). EPA asserted that “the contents of each individual state’s submission were evaluated on their own merits.” *Id.* at 9,354. As EPA explained, individual “states may be able to establish alternative approaches to addressing their interstate transport obligations for the 2015 ozone NAAQS that vary from a nationally uniform framework” and that each such SIP would be judged “in light of the facts and circumstances of each particular state’s submission.” *Id.* at 9,340. As to Kentucky’s SIP in particular, EPA’s final disapproval references and relies on Region 4’s determinations for disapproval. *See id.* at 9,356 (citing 87 Fed. Reg. at 9503–15). Indeed, EPA Headquarters did not conduct a new technical analysis expanding on Region 4’s work.

Kentucky (No. 23-3216) and its Energy and Environment Cabinet (No. 23-3225) petitioned for review of EPA’s disapproval of Kentucky’s SIP. This motion to stay follows.

ARGUMENT

Courts evaluate four factors when assessing whether a litigant is entitled to a stay, with the first two being “the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). Those factors are: (1) whether the party seeking a stay “has made a strong showing”

that it is “likely to succeed on the merits”; (2) whether the party “will be irreparably injured absent a stay”; (3) whether a stay will “substantially injure” other parties; and (4) whether a stay is in “the public interest.” *Id.* (citation omitted).

Each factor supports staying EPA’s disapproval of Kentucky’s SIP. On the merits, EPA ignored several parts of the CAA, including its requirement for cooperative federalism. EPA also acted arbitrarily and capriciously in disapproving Kentucky’s SIP based on data unavailable when Kentucky had to submit its SIP. And EPA disapproved Kentucky’s SIP even though Kentucky prepared it like EPA had instructed. EPA’s rush to impose a FIP violates Kentucky’s sovereignty and will irreparably harm Kentucky by causing electrical-grid instability and higher electric prices. EPA has no interest in acting unlawfully, and so the public interest decidedly favors a stay.

EPA opposes this motion. Kentucky did not request a stay from EPA because doing so would have been impractical. EPA’s haste to impose its FIP upon Kentucky—publishing the proposed FIP before Kentucky could even dispute EPA’s reasons for denying the SIP—shows that seeking a stay from the agency would have been impractical. *See Breeze Smoke, LLC v. U.S. Food & Drug Admin.*, 18 F.4th 499, 503 (6th Cir. 2021) (finding impracticability met when harm would occur before agency could evaluate stay request). In fact, the FIP is due to be published in the Federal Register any day now, and it instructs regulated entities to take action immediately. Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards at 347 (Mar. 15, 2023), <https://perma.cc/3FUU-RBA3> (Pre-publication FIP) (noting the 2022

proposed FIP provided notice to regulated entities “that they should begin engineering and financial planning”).

For the reasons that follow, the Court should stay EPA’s disapproval of Kentucky’s SIP pending review.

I. Kentucky is likely to prevail on the merits.

In disapproving Kentucky’s SIP, EPA violated the Administrative Procedure Act (APA) in two ways. First, EPA acted “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C). EPA disapproved Kentucky’s SIP only by ignoring the CAA’s statutory deadline, its cooperative-federalism structure, and the agency’s limited role. And second, EPA’s SIP disapproval is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at § 706(2)(A). EPA acted arbitrarily and capriciously by disapproving Kentucky’s SIP based on data unavailable to the Commonwealth when it submitted the SIP. And EPA did so despite the Commonwealth having used a method suggested by EPA itself.

A. EPA failed to follow the CAA.

EPA violated the CAA in two ways when it disapproved Kentucky’s SIP. First, it delayed acting until far beyond the statutory deadline, disapproving Kentucky’s SIP based on data that did not exist until after EPA’s deadline. Second, EPA abandoned its ministerial role to exercise discretion not committed to it by the CAA.

Start with the statutory deadline. Kentucky submitted its SIP on January 11, 2019. Ky. SIP at 1. Under the CAA, EPA had 18 months to approve or disapprove

Kentucky's SIP. 42 U.S.C. § 7410(k). In other words, EPA needed to act by July 11, 2020, which it did not do. EPA first published its proposed disapproval of Kentucky's SIP on February 22, 2022. *See* 87 Fed. Reg. at 9,498. And EPA's failure to meet its statutory deadline is important because it disapproved Kentucky's SIP based on data that *did not exist* when the Commonwealth submitted its SIP. *Id.* at 9507. If this method stands, EPA can deny whichever state plans it wants by simply waiting long enough for new, previously unavailable data to arrive.

The EPA has no authority to pull such a bait-and-switch. In March 2018, the EPA shared with Kentucky its "latest analysis for purposes of assisting" Kentucky in developing its SIP. March 2018 Memorandum at 3. That memorandum showed Kentucky which sites its emissions would be linked to. *Id.* at C-2. And EPA encouraged Kentucky to rely on this data; it presented the data "for purposes of assisting [S]tates in developing SIPs." *Id.* at 3. Kentucky took EPA at its word and analyzed this data to determine what to do. Ky. SIP at 18. Yet when EPA finally acted, it completely disregarded the data it provided earlier.

EPA's justification is not reassuring. It claims that "[i]t can hardly be the case that the EPA is prohibited from taking rulemaking action using the best information available to it at the time it takes such action." Ky. SIP Disapproval, 88 Fed. Reg. at 9,366. This misses the point. EPA is not just acting on a blank slate. It is disapproving Kentucky's plan that the CAA required Kentucky to submit years earlier—a plan EPA invited Kentucky to base on EPA-provided data. EPA's conduct here evaluates

Kentucky's plan "based on information that was not available at the time of submittal," thus "creat[ing] a moving target that would be impossible to meet." Determination of Attainment of the 1-Hour Ozone Standard, 69 Fed. Reg. 21,717, 21,727 (Apr. 22, 2004); *see also* Approval and Promulgation of Air Quality Implementation Plans, 68 Fed. Reg. 19,106, 19,120 (Apr. 17, 2003) (noting that EPA "has not required changes to submitted SIPs [due to] changes in factors and methodologies that occur after the SIP is submitted"). EPA cannot seriously claim that the CAA empowers it to delay acting until it creates new data allowing it to automatically disapprove Kentucky's SIP. That makes a mockery of the CAA's statutory deadline.

Next, in disapproving Kentucky's SIP, EPA stepped beyond its ministerial role, arrogating to itself power left to the States. The Act states that "air pollution prevention" is "the primary responsibility of States." 42 U.S.C. § 7401(a)(3); *see also id.* at § 7407(a) (giving each State "the primary responsibility for assuring air quality"). In contrast, EPA exercises only a "ministerial function" with respect to SIPs. *See Texas*, 829 F.3d at 428. The Act is clear when it limits EPA's discretion: EPA "shall approve" any SIP that meets the "applicable requirements" of the CAA. 42 U.S.C. § 7410(k)(3). For this reason, the Supreme Court has recognized that the CAA "relegate[s]" EPA to "a secondary role" after "setting the national ambient air standards." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Yet EPA imagines the CAA differently. When issuing its final disapproval of Kentucky's SIP, EPA said that it "does not, however, agree with the comments"

characterization of the EPA’s role in the [S]tate-Federal relationship as being ‘secondary’ such that the EPA must defer to state choices.” Ky. SIP Disapproval, 88 Fed. Reg. at 9,367. But that is exactly what the statute commands—it was Congress that gave EPA its “secondary role.” *Train*, 421 U.S. at 79. By failing to remain in its ministerial role, EPA transgressed the CAA’s limits.

The Fifth Circuit very recently found a similar CAA violation in staying EPA’s denial of Texas’s and Louisiana’s SIPs. There, EPA “invert[ed] the CAA” in a way that “reflects a misapprehension by the EPA of its authorized role in the SIP-approval process.” Order at 16, Exhibit 7, *Texas v. EPA*, No. 23-60069, Dkt. 269-1 at 16 (May 1, 2023) (citation omitted). Put differently, “EPA’s lack of deference to the States inverts the agency’s ministerial function in this system of cooperative federalism.” *Id.* at 17 (cleaned up).

B. EPA’s bait-and-switch is arbitrary and capricious.

EPA’s SIP disapproval is also arbitrary and capricious. Agencies must “reasonably consider[] the relevant issues and reasonably explain[]” whatever actions they take. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (citations omitted). EPA’s disapproval of Kentucky’s SIP is arbitrary and capricious in at least two ways.

First, EPA based its disapproval on data that *did not exist* when Kentucky submitted its SIP. Remember, Kentucky submitted its SIP in January 2019, and so the CAA required EPA to approve or disapprove Kentucky’s SIP by July 2020. 42 U.S.C. § 7410(k). But EPA delayed acting for almost two years past this deadline. And when it

finally acted, EPA did not use the modeling data it published to help States develop their SIPs. March 2018 Memorandum at 1–2. Instead, it used data that became available *only after* its deadline expired. Ky. SIP Disapproval, 88 Fed. Reg. at 9,366 (referencing data that became available in November 2020).

Among other problems, this violates the fair-notice doctrine, which requires agencies to “provide ‘fair notice’ of requirements.” *Breeze Smoke*, 18 F.4th at 503 (citation omitted). Before Kentucky submitted its SIP, EPA focused the States on modeling that it published to help them meet their CAA obligations. March 2018 Memorandum at 1–3. And Kentucky relied on this data when compiling its SIP. EPA then pulled a “surprise switcheroo” by assessing Kentucky’s SIP against data unavailable until almost two years after Kentucky submitted its plan. *See Env’t Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). As the Fifth Circuit recently summarized in staying two SIP denials on this basis, “[a]gencies have wide discretion to deploy their expertise, but they cannot move the administrative goalpost in so doing.” Order at 20, *Texas v. EPA*, No. 23-60069 (May 1, 2023).

EPA claims that it “can hardly be the case” that the CAA “prohibit[s]” it from “using the best information available to it” even if that data was “not available to [S]tates during development of the SIP submissions or to the EPA during the period statutorily allotted for the EPA to take final action.” Ky. SIP Disapproval, 88 Fed. Reg. at 9,365–66. But even if true, EPA must take account of Kentucky’s “serious reliance interests” before changing which modeling it uses to assess Kentucky’s SIP. *See DHS v. Regents of*

the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (citation omitted). EPA cannot encourage Kentucky to rely on the data it provided, only to delay acting past the statutory deadline and then pull the rug out on a sovereign State. Aside from being arbitrary and capricious, this ignores the CAA's text and structure, which place States in the driver's seat. If EPA can simply ignore its statutory obligation until the data the States used to create their SIPs is out-of-date, EPA can effectively side-step any State plan despite the States' "primary" role. 42 U.S.C. § 7407(a).

Disapproving a SIP based on entirely new data is also contrary to longstanding EPA policy. This "longstanding policy" only requires States "to use the most current emission estimate models available at the time of SIP development." Approval and Promulgation of Air Quality State Implementation Plans, 81 Fed. Reg. 59,876, 59,878 n.15. EPA has previously "not required changes to submitted SIPs [due to] changes in factors and methodologies that occur after the SIP is submitted." 68 Fed. Reg. at 19,120. And that is because evaluating a SIP "based on information that was not available at the time of submittal would create a moving target that would be impossible to meet." Determination of Attainment of the 1-Hour Ozone Standard, 69 Fed. Reg. at 21,727. And that policy makes good sense. Previously, an environmental group sued EPA, claiming that a SIP action was "arbitrary and capricious because the plans relied on an outdated emissions model." *Sierra Club v. EPA*, 356 F.3d 296, 308 (D.C. Cir. 2004) (Garland, J.). The D.C. Circuit disagreed. It reasoned that "[t]o require states to revise completed plans every time a new model is announced would lead to significant costs

and potentially endless delays in the approval processes.” *Id.* at 308. EPA did not reasonably explain why it changed its longstanding policy in denying Kentucky’s SIP. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).

Second, EPA failed to account for Kentucky’s reliance on EPA’s August 2018 memorandum instructing States that they did not need to use the 1% standard EPA now claims is required. As part of its SIP, Kentucky determined the downwind sites to which it contributed enough to be “linked.” To do this, Kentucky used the 1 ppb contribution threshold that EPA suggested. Proposed Ky. SIP Disapproval, 87 Fed. Reg. at 9,504.

EPA’s August 2018 memorandum claimed to “make recommendations about what thresholds may be appropriate for use” in SIPs. August 2018 Memorandum at 1. The memorandum found that the 1% and 1 ppb thresholds were “generally comparable, overall,” resulting in only a 7% difference “across all receptors.” *Id.* at 4. While the memorandum said it “does not impose binding, enforceable requirements on any party,” it provided this disclaimer because “State air agencies retain the discretion to develop good neighbor SIP revisions that differ from this guidance.” *Id.* at 1. So in fact, the memorandum’s disclaimer simply recognized that the CAA gives States the primary role of determining how to meet national standards.

EPA’s disapproval flips the CAA’s cooperative-federalism structure on its head. As EPA noted, the Commonwealth “found that it would not be linked as a significant contributor to the four nonattainment receptors” when it used the “March 2018

modeling and application of a 1 ppb alternative contribution threshold.” Proposed Ky. SIP Disapproval, 87 Fed. Reg. at 9,504. Yet when it disapproved the SIP, EPA said that the Commonwealth “did not provide a technical analysis to sufficiently justify use of an alternative 1 ppb threshold at the linked, downwind monitors.” *Id.* at 9,509.

Yet again, EPA penalizes Kentucky for doing what EPA said States could do: use a 1 ppb threshold. If EPA itself suggested that using a 1 ppb threshold was adequate, why would Kentucky need to “provide a technical analysis” on the back end agreeing with EPA’s recommendation? EPA’s about-face is especially problematic in the context of the CAA, which relegates EPA to a secondary role. EPA offers no reason why Kentucky contributing fewer than 1 ppb of ozone violates its good-neighbor obligation. EPA’s own memorandum indicated that the difference between the standards was marginal. August 2018 Memorandum at 4 (finding standards “generally comparable” with only a 7% difference). And it is well-established that agencies act arbitrarily if they depart from even non-binding guidance when that guidance induced reliance. *Encino Motorcars*, 579 U.S. at 217, 222 (reliance on opinion letters about field operations handbook).

In sum, EPA has “transform[ed] [its] statutory role from that of a ‘ministerial’ overseer to one of a freewheeling dictatorial regulator.” Order at 22, *Texas v. EPA*, No. 23-60069 (citations omitted). EPA should not be permitted to do so in violation of both the CAA and the APA.

II. Kentucky is suffering irreparable harm.

Kentucky faces two irreparable harms from EPA unlawfully disapproving its SIP. First, EPA is intruding on Kentucky's sovereignty. States "have sovereign interests to sue when they believe that the federal government has intruded upon areas traditionally within [S]tates' control." *Kentucky v. Biden*, 23 F.4th 585, 598 (6th Cir. 2022) (*Kentucky*); *see also* Horne Decl. ¶¶9–10, Exhibit 1. And as noted, the CAA gives States, not EPA, the primary role. Kennedy Decl. ¶¶17–20, Exhibit 2 (noting CAA's preference for state regulation). The SIP denial is an impermissible federal intrusion on Kentucky's sovereign interests, "disrupt[ing] the system of cooperative federalism enshrined in the Clean Air Act." *Texas*, 829 F.3d at 433 (citing *Michigan*, 268 F.3d at 1083). So a stay will protect Kentucky's sovereignty from unlawful infringement while the Court decides this case on the merits.

Second, imposition of the FIP will impose steep compliance costs and will harm Kentucky's economy. Kennedy Decl. ¶¶28–31 (discussing Kentucky's "immediate permitting burdens"); Brock Decl. ¶14, Exhibit 6 (noting 500 jobs threatened). By reducing the availability of electricity, EPA will subject consumers to higher prices. Purvis Decl. ¶¶33–34, Exhibit 4 (discussing increased rates); Barry Decl. ¶8 (noting costs "disproportionately borne" by retail customers). Plus, implementation of the FIP seriously strains and destabilizes Kentucky's power grid. Fuentes Decl. ¶¶5, 8, Exhibit 3; Purvis Decl. ¶¶38, 54 (noting how FIP harms grid reliability). "[P]lant closures, the threat of grid instability and potential brownouts alone constitute irreparable injury[.]" *Texas*, 829

F.3d at 434; *see also Kentucky*, 23 F.4th at 599 (“[S]tates have a recognized quasi-sovereign interest in the health and ‘economic well-being’ of their populaces.” (citations omitted)). And with the government’s sovereign immunity, these substantial costs “are unrecoverable” and “qualify as irreparable harm.” *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (*Biden*). So Kentucky stands to suffer an injury to its sovereignty and to its economy.

III. The remaining factors favor a stay.

The final two stay factors require the Court to “assess[] the harm to the opposing party and weigh[] the public interest.” *Nken*, 556 U.S. at 435. For stays of government action, these factors merge. *Id.* Here, both considerations decidedly favor staying EPA’s disapproval of Kentucky’s SIP.

EPA faces no harm if its disapproval of Kentucky’s SIP is stayed pending review. If time really were of the essence, EPA would not have taken nearly five years to disapprove Kentucky’s SIP and impose a FIP. *See Kentucky*, 23 F.4th at 610 (finding that “[t]he government’s actions undercut its representations of great urgency”). Plus, Kentucky’s SIP demonstrated that its emissions do not significantly contribute to nonattainment in downwind States or interfere with maintenance of the 2015 ozone NAAQS. *Ky. SIP* at 19. Even if there were deficiencies in Kentucky’s SIP proposal (there are not), the CAA gives EPA two years to work with Kentucky to correct its SIP before a FIP must be issued. That’s exactly what happened the last time EPA disapproved Kentucky’s SIP. So EPA’s rush to promulgate the FIP shortly after denying Kentucky’s SIP

is as unnecessary as it is lawless.

As to the final stay factor, the “public interest lies in a correct application’ of the law.” *Biden*, 57 F.4th at 556 (citation omitted). As discussed above, EPA’s disapproval of Kentucky’s SIP was both unlawful and arbitrary and capricious. EPA cannot now claim the public will be harmed by a stay when it delayed almost two years beyond its statutory deadline. And practically, Kentucky’s interest in preserving its power grid and its ability to deliver ready access to affordable electricity outweighs any countervailing interest.

CONCLUSION

The Court should stay the disapproval of Kentucky’s SIP pending review.

Respectfully submitted by,

s/ Matthew F. Kuhn

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(A) because it contains 5,196 words, excluding the parts of the response exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Garamond, in 14-point font using Microsoft Word.

s/ Matthew F. Kubn

CERTIFICATE OF SERVICE

I certify that on May 23, 2023, I electronically filed this response with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kubn

ADDENDUM

- Exhibit 1 Declaration of John G. Horne II, Director of the Office of Rate Intervention (May 22, 2023)
- Exhibit 2 Declaration of Michael Kennedy, Director for Kentucky's Division for Air Quality (May 23, 2023)
- Exhibit 3 Declaration of Cristobal Fuentes, Chief Executive Officer of North American Stainless (May 18, 2023)
- Exhibit 4 Declaration of Jerry Purvis, Vice President of Environmental Affairs for East Kentucky Power Cooperative, Inc. (May 19, 2023)
- Exhibit 5 Declaration of Nathaniel Berry, Chief Operating Officer of Big Rivers Electric Corporation (May 19, 2023)
- Exhibit 6 Declaration of Jeffrey D. Brock, Vice President of Business Development for Alliance Coal, LLC (May 23, 2023)
- Exhibit 7 Order, *Texas v. EPA*, No. 23-60069 (5th Cir. Apr. 30, 2023)
- Exhibit 8 State Comment Letter (June 21, 2022)

EXHIBIT 1

Declaration of John G. Horne, II, Director of
the Office of Rate Intervention (May 22, 2023)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

COMMONWEALTH OF KENTUCKY

Petitioner,

v.

Case No. 23-3216

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Respondents.

**DECLARATION OF JOHN G. HORNE, II IN SUPPORT OF PETITIONER
COMMONWEALTH OF KENTUCKY'S MOTION TO STAY**

I, John G. Horne, II hereby declare as follows:

1. I am the Executive Director of the Office of Rate Intervention within the Office of the Kentucky Attorney General. I have served in that role since [December 17, 2019]. The Office of Rate Intervention is responsible for representing the interests of Kentucky consumers before governmental rate-making agencies, including in utility cases (electric, water, telecommunications, and natural gas) before the Public Service Commission.
2. Before serving as Executive Director of the Office of Rate Intervention, I served as General Counsel for the Kentucky Energy and Environment Cabinet ("Cabinet"). I was General Counsel for the Cabinet from [January 2016] to [December 2019]. The Cabinet is charged with supervising the administration

and enforcement of Kentucky's environmental statutes and regulations. *See* Ky. Rev. Stat. 224.10-100, *et seq.*

3. As General Counsel, I assisted the Division for Air Quality in ensuring that the Cabinet lawfully implemented the Clean Air Act in Kentucky, including assisting with the development of State Implementation Plans (SIPs) to administer the Commonwealth's air quality programs to ensure compliance with National Ambient Air Quality Standards (NAAQS).
4. Based on my current position in the Attorney General's office and my past experience as General Counsel for the Cabinet, I have personal knowledge and experience to understand the steps that the Commonwealth will be required to undertake in order to respond to the "*Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards*," 88 Fed. Reg. 9336 (February 13, 2023) ("Final Rule"), recently promulgated by the U.S. Environmental Protection Agency (EPA).
5. I am submitting this declaration because it is my understanding that EPA's disapproval of the Kentucky SIP for addressing regional ozone transport under the 2015 NAAQS will allow EPA to implement the Federal Implementation Plan (FIP) that EPA proposed in April 2022 and released in final prepublication form on March 15, 2023. *See* 87 Fed. Reg. 20,036 (Apr. 6, 2022). As further explained in this declaration, I am concerned that the implementation of EPA's FIP will result in imminent harm to the reliability of the electric grid, raise electricity rates,

and infringe upon state sovereignty in violation of both the Constitution and the cooperative federalism approach required by the Clean Air Act.

6. EPA admits its FIP will hasten the unnecessary and premature retirement of 14 GW of coal-fired generation. Louisville Gas & Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”) recently filed a Certificate of Public Necessity docket before the Kentucky Public Service Commission.¹ In that case, LG&E and KU announced their plan to retire three coal-fired power plants totaling 1,194 MW of generation due, at least in large part, to the adoption of the FIP to be imposed because of EPA’s denial of Kentucky’s SIP.²
7. Kentucky residents are harmed by the premature retirement of these plants through higher rates. When a generating unit is prematurely shuttered, ratepayers are forced to pay for both the stranded cost of the retired asset and the cost of replacement generation.
8. Additionally, Kentucky’s residents are harmed by the threat to the reliability of the electric grid caused by the Final Rule driving premature plant retirements because of the imposition of the FIP. The reliability of America’s electric grid is a very real concern in the wake of accelerated retirements of dispatchable fossil

¹ *Electronic Joint Application of Kentucky Utilities Company and Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Site Compatibility Certificates and Approval of a Demand Side Management Plan*, Case No. 2022-00402 (“CPCN Application”), available at <https://perma.cc/NBX7-PRHA>.

² CPCN Application, Case No. 2022-00402, Direct Testimony of Stuart Wilson at 4 (“The primary motivator of the Resource Assessment is the Good Neighbor Plan . . .”), available at <https://perma.cc/U9ZB-B8JU>.

fuel generation. Various stakeholders, including industry organizations and regional transmission operators, have issued warnings related to grid reliability. Midcontinent Independent System Operator raised concerns about grid reliability in April of 2022.³ The North America Electric Reliability Corp issued assessments in July⁴ and December⁵ of last year raising further reliability concerns. The New York Independent System Operators' September 2022 report raised similar issues.⁶ Jim Matheson, CEO of National Rural Electric Cooperative Association, published an article that same month warning that grid reliability must be a top priority as the nation reduces carbon emissions.⁷ And PJM Interconnection LLC recently issued a report discussing the risks from an "asymmetrical pace within the energy transition."⁸ EPA states this rule will retire 14 GW of coal-fired generation (roughly 13% of current coal-fired generation), which includes approximately 1,200 MW from two of Kentucky's largest utilities. The FIP will also cause 4 GW of gas and oil fire capacity to retire. Denying Kentucky's SIP and imposing EPA's FIP will only serve to further strain the reliability of the grid and cause increased prices for what generation remains available. This will impede Kentucky's economic engine. Kentucky

³ <https://perma.cc/DP6S-H45C> (projecting "the need for increased, non-firm imports and potentially emergency resource to meet the 2022 summer peak demand").

⁴ <https://perma.cc/9CF3-CB8Y>.

⁵ <https://perma.cc/SX34-BNUJ>.

⁶ <https://perma.cc/6RYP-23DK>.

⁷ Article on NRECA web site dated September 21, 2022, available at <https://perma.cc/9TJ9-SLTL>.

⁸ <https://perma.cc/3WJP-Q6E3>.

manufacturers and industry require substantial amounts of energy to produce the goods and materials needed to support the nation's economy.

9. The Clean Air Act Section 110 requires EPA to approve SIPs that meet statutory requirements rather than impose a FIP. 42 U.S.C. § 7410(k)(3). By effectively denying Kentucky that responsibility by denying its SIP and immediately imposing a FIP, EPA undermines Kentucky's state sovereignty and abrogates the cooperative federalism required under the Clean Air Act. In doing so, EPA exceeds the limited authority delegated to it by Congress.
10. Indeed, the process undertaken by EPA illegally renders Kentucky's SIP submittal a nullity. EPA's actions are disingenuous. By issuing a FIP containing specific compliance measures and foreclosing the States' ability to choose compliance measures, EPA has effectively demonstrated that it is more interested in the secondary effects of the dictated compliance measures than achieving compliance with the relevant NAAQS. In other words, EPA has signaled to Kentucky and other states that only SIPs mirroring the FIP will be compliant with transport provisions for the 2015 ozone NAAQS, eliminating the discretion Congress intended for states in crafting their plans.
11. Beyond the substantive impacts to Kentucky's citizens and economy, the Commonwealth will bear an administrative burden as well. Kentucky will be required to expend state tax dollars on the analysis and implementation necessary to effectuate the Final Rule. Absent relief from this Court, resources of the

Commonwealth's taxpayers will be commandeered to enforce federal laws, which will have the effect of higher utility rates for Kentucky ratepayers with less reliability from the electric grid. Each of these problems with EPA's Final Rule and plans to impose the FIP causes Kentucky immediate harm to its sovereign interest as well as harms to regulated sources and Kentucky citizens.

I declare under penalty of perjury that the foregoing is correct. Executed on this 22nd day of May, at Frankfort, Kentucky



John G. Horne, II

EXHIBIT 2

Declaration of Michael Kennedy, Director for Kentucky's Division of
Air Quality (May 23, 2023)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

COMMONWEALTH OF KENTUCKY

Petitioner,

v.

Case No. 23-3216

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Respondents.

**DECLARATION OF MICHAEL KENNEDY IN SUPPORT OF
PETITIONER COMMONWEALTH OF KENTUCKY'S MOTION TO STAY**

I, Michael Kennedy hereby declare as follows:

1. My name is Michael Kennedy and I currently serve as Director for Kentucky's Division for Air Quality ("KDAQ") within Kentucky's Energy and Environment Cabinet ("Cabinet"). I have served in that role since April 1, 2022. Before becoming Director for KDAQ, I served as Environmental Engineering Branch Manager, and I have been with the Cabinet since December 16, 2009. I also have a bachelor's degree in biosystems and agricultural engineering from the University of Kentucky. I am over the age of 18 and am competent to testify concerning the matters in this declaration based on my personal knowledge, my experience with the Cabinet, and information provided to me by KDAQ personnel.

I. Kentucky's Division for Air Quality

2. KDAQ's mission is to protect human health and the environment by: achieving and maintaining acceptable air quality through operations of a comprehensive air monitoring network; creating effective partnerships with air pollution sources and the public; timely dissemination of accurate and useful information; the judicious use of program resources; and maintenance of a reasonable and effective compliance assurance program.
3. KDAQ is responsible for ensuring that Kentucky's air meets public health and welfare standards established under the federal Clean Air Act ("CAA"). To fulfill this responsibility, KDAQ must attain the U.S. Environmental Protection Agency's ("EPA") National Ambient Air Quality Standards ("NAAQS") within the boundaries of the Commonwealth. Among other things, KDAQ enacts rules pertaining to air quality standards, develops State Implementation Plans ("SIPs") to meet the federal standards, works to obtain EPA approval of SIP elements, administers incentive programs to reduce emissions, issues pre-construction and operating permits to stationary sources, and ensures compliance with state and federal air quality rules.
4. The Cabinet is vested with authority to promulgate and implement administrative regulations related to air quality. *See* Ky. Rev. Stat. § 224.20-110. KDAQ accordingly develops rules required by the CAA or as deemed necessary

for protecting human health and the environment in the Commonwealth. *See, e.g.*, 401 KAR Chapters 50–58.

5. The Cabinet and KDAQ is responsible for preparing and developing plans for the prevention, abatement, and control of air pollution in Kentucky, complying with the requirements of federal air pollution laws, and enforcing Kentucky air pollution laws. I also am responsible for managing KDAQ staff and programs.
6. I am providing this declaration in support of the Commonwealth of Kentucky's motion to stay the rule issued by the EPA on February 13, 2023, titled "Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 9336 (Feb. 13, 2023) ("Final Rule").

II. EPA's Rulemaking

7. The Cabinet submitted comments (attached as **Exhibit 1**) on EPA's proposed rule titled "Air Plan Disapproval; Kentucky; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards," 87 Fed. Reg. 9498 (February 22, 2022), which proposed to disapprove Kentucky's interstate transport SIP. The Cabinet also submitted comments (attached as **Exhibit 2**) on EPA's related proposed rule titled "Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard," 87 Fed. Reg. 20,036 (April 6, 2022), which proposed to impose a Federal Implementation Plan ("FIP") for Kentucky and 26 other states.

III. The CAA's "Good Neighbor" Provision

8. The CAA requires Kentucky to submit a SIP to EPA within 3 years after the promulgation of new or revised NAAQS. 42 U.S.C. § 7410(a)(1).
9. The CAA further requires that States include in their SIPs "adequate provisions" prohibiting "any source or other type of emissions activity 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 with respect to any" primary or secondary NAAQS. *Id.* § 7410(a)(2)(D)(i). When necessary, upwind states must reduce emissions within their borders to account for emissions that travel outside the state that will "contribute significantly" to nonattainment, or "interfere with maintenance," of NAAQS in downwind states. *See id.* This is known as the "Good Neighbor" provision.
10. Thus, Kentucky's SIP responding to new NAAQS must assess the impact of sources within the Commonwealth on downwind out-of-state nonattainment and maintenance areas and, where necessary, ensure appropriate regulation of Kentucky's significant contributions.

IV. Kentucky's Proposed SIP for the 2015 Ozone NAAQS

11. On October 26, 2015, EPA revised the NAAQS for ozone, lowering the primary and secondary standards from 75 parts per billion (ppb) to 70 ppb. *See* 80 Fed. Reg. 65,292 (Oct. 26, 2015). This triggered Kentucky's obligation to prepare a SIP to ensure compliance with the new NAAQS.

12. KDAQ provided EPA Region 4 staff with a pre-draft copy to develop a proposed SIP that assessed the impact of emissions from Kentucky on the attainment or maintenance of EPA's 2015 ozone NAAQS in downwind states. Also, EPA Region 4 staff reviewed and provided comments on the SIP during the KDAQ public comment period beginning August 23, 2018 until September 21, 2018. The purpose of this coordination was to maximize the likelihood that Kentucky's proposed SIP would be fully approvable by EPA. Kentucky's proposed SIP was the culmination of extensive analysis, public comment, plan development, and consultation with other states and EPA.
13. In preparing its proposed SIP, Kentucky relied on two guidance memoranda provided by EPA on analyzing downwind impacts: "Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I),"¹ ("March 2018 Memo"), and "Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards,"² ("August 2018 Memo"). As part of SIP development, KDAQ staff also coordinated with the regional air planning organizations, Southeastern Air Pollution Control Agencies ("SESARM"), and

¹ <https://perma.cc/Y8YF-CQMB>.

² <https://perma.cc/G8EN-RN8Q>.

The Association of Air Pollution Control Agencies (“AAPCA”) to discuss each state’s understanding of the Good Neighbor Provisions’ requirements. KDAQ consulted with Midwest Ozone Group and Alpine Geophysics to discuss modeling, including Kentucky emission inputs and Kentucky’s modeled impacts to nonattainment and maintenance monitors.

14. Kentucky’s proposed SIP applied EPA’s recommended four-step analytical framework to assess contributions under the “Good Neighbor” provision. Kentucky used modeling data provided by EPA to identify linked downwind monitors at step 1. And utilizing guidance from EPA, Kentucky determined that the application of the alternative threshold of 1 ppb (as opposed to 1% of the NAAQS, 0.70 ppb) for determining the significant contribution to downwind states’ nonattainment was appropriate at step 2 of that analysis. Based on that threshold, Kentucky determined that its emissions do not significantly contribute to nonattainment at any of the monitors to which it is linked. Kentucky also identified several state rules in effect between the date of the baseline air modeling and the submission of the proposed SIP that result in emission reduction. Therefore, Kentucky was not required to identify and adopt emissions reductions under Steps 3 and 4 of the analytical framework, because it determined that its proposed SIP contained adequate provisions to prevent sources and other types of emissions activities within the state from contributing significantly to nonattainment in any other state.

15. Kentucky submitted its proposed SIP to EPA on January 11, 2019. The EPA did not respond to, act upon, or otherwise engage with Kentucky on its SIP submission for years. The EPA did not note any deficiencies in the submission and did not otherwise provide comment on Kentucky's analysis of significant contribution. The EPA reviewed preliminary drafts of the SIP submittal and provided comments. EPA uses the term "Key Comments" for comments that must be addressed in the SIP before it could be approved. The preliminary draft included Kentucky's use of the 1ppb threshold and EPA did not have Key Comments, or provide comments related to using the 1 ppb threshold. The preliminary draft was revised to conform with EPA's comments. EPA also commented on the SIP during KDAQ's public comment period, providing a General Comment on Kentucky's use of the 1 ppb threshold. EPA's comment merely suggested that Kentucky refer to the August 2018 memorandum as part of its rationale for comparing its contribution to a 1 ppb threshold. This draft was also revised to conform with EPA's comments.

V. Problems with the EPA's Final Rule

16. More than three years later, in February 2022, the EPA proposed to deny the Commonwealth's proposed SIP for noncompliance with the CAA's "Good Neighbor" provision. Shortly thereafter, EPA proposed to impose a FIP on Kentucky and several other states. The Cabinet submitted comments on both

proposals. As noted in its comment letters, KDAQ has several concerns with EPA's rulemakings.

A. The EPA Failed to Follow the CAA's Cooperative Federalism Mandate

17. EPA's conduct in denying Kentucky's proposed SIP and immediately imposing the FIP is inconsistent with the CAA's cooperative federalism mandate, which gives States, not EPA, primary responsibility for regulating air quality within their borders. Indeed, EPA may impose a FIP only if a State fails to submit a SIP that meets the requirements of the CAA. *See* 42 U.S.C. § 7410(c).
18. As detailed in the Cabinet's comment letter regarding EPA's proposal to deny Kentucky's SIP submission, EPA ignored numerous statutory deadlines to provide Kentucky feedback about its proposal. That delay "prevented Kentucky from addressing deficiencies or submitting SIP revisions." Ex. 1 at 1. Years passed between Kentucky's submission and EPA's proposal to deny the SIP submission and impose the FIP. Rather than working with Kentucky to resolve any concerns with the proposed SIP, it seems EPA dedicated its resources to developing and issuing the FIP.
19. By proposing a FIP instead of working with Kentucky to perfect the proposed SIP, EPA demonstrated its preference for promulgating a FIP instead of helping Kentucky develop an approvable SIP. Kentucky made substantial investments in

time and personnel resources on the proposed SIP and stood ready to work with EPA to address any issues.

20. Again, the CAA is structured to prefer state regulation of air quality with limited federal oversight. But EPA shelved Kentucky's plan, preventing the Commonwealth from addressing alleged deficiencies while the agency developed a FIP that it could impose immediately after disapproving Kentucky's proposed SIP. EPA's disapproval of Kentucky's SIP deprived Kentucky and KDAQ of the ability to fashion an interstate transport program that considers Kentucky and the region's unique circumstances, determines the appropriate sources that may need additional pollution controls, assess and determine the acceptability of the costs of implementation, and adequately consider the needs of Kentucky's citizens and economy. EPA's actions fundamentally undermine Congress's intention that Kentucky should have primary responsibility for developing and administering its air quality program. As such, EPA's Final Rule harms Kentucky's sovereign interests.

B. The EPA Departed From its Prior Guidance

21. EPA's August 2018 Memo, which is intended to assist States in preparing their SIPs, states that "for the 2015 ozone NAAQS, 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." Kentucky relied on that guidance and used the 1 ppb threshold for screening

purposes in step 2 of the analytical framework for assessing compliance with the CAA's "Good Neighbor" provision.

22. Without providing an explanation for its reversal, EPA's denial of Kentucky's proposed SIP faults the Commonwealth for using the 1 ppb threshold approved in the August 2018 Memo. EPA's disapproval of Kentucky's proposed SIP based on the Commonwealth's selection of a 1 ppb contribution threshold for measuring significant contribution to downwind states is inconsistent with the EPA's prior guidance. EPA thus creates a moving target in what should be a well-defined regulatory process.

C. The EPA's Final Rule Uses New Modeling

23. At the time Kentucky was preparing its proposed SIP, EPA provided updated modeling information with its March 2018 Memo for states to consider in developing their SIPs. Kentucky used the information provided in the March 2018 Memo and associated modeling to evaluate the impacts that Kentucky's emissions may have on downwind monitors.
24. EPA, however, denied Kentucky's proposed SIP as noncompliant with the "Good Neighbor" provision based on a second version of newly modeled data that was only made available to Kentucky well past the statutory deadline to submit a SIP for the 2015 ozone NAAQS. Indeed, this modeling was available only after EPA was statutorily required to act on Kentucky's SIP submission (but had failed to do so). This new modeling is significant because "the monitors

previously linked as being impacted by Kentucky have changed with the newly available data.” Exhibit 1 at 2. And “Kentucky was not afforded the opportunity to evaluate the potential impact of emissions” for these newly identified areas before submitting its proposed SIP, nor was it given the opportunity to revise its proposed SIP in light of this new modeling. *Id.*

V. The Final Rule Harms Kentucky and Regulated Sources

25. The Final Rule and the consequential imposition of the forthcoming FIP harms Kentucky and the regulated sources within its borders. Although the FIP is based on an assessment of statewide emissions of all relevant pollutants, it will require emission controls only for NO_x emissions, with the most onerous emissions targets impacting coal-fired electricity generating plants within the Commonwealth.³

26. I stand behind the conclusion of Kentucky’s proposed SIP that no emissions from the Commonwealth significantly contribute to nonattainment or maintenance problems in downwind states. But to the extent emissions controls are needed, EPA has deprived Kentucky of its rights under the CAA to identify and regulate in-state sources as needed to mitigate significant contribute. In particular, EPA appears to have targeted coal-fired energy production in the

³ In total, 24 coal-fired units across 8 facilities will be impacted.

Commonwealth. And EPA did so without sufficiently considering alternative mitigation strategies.

27. While EPA is proposing to allow for emissions trading as a compliance mechanism, this is unworkable. The budgets assigned to Electric Generating Units (“EGUs”) in Kentucky are quite stringent (over 40% reduction based on 2021 data). EPA specifically stated in the final rule that these budgets will be dynamic, and adjusted regularly. This makes it highly unlikely that allowances will be available for trading purposes. Also, the FIP budget requires 1000 tons per ozone season be reduced from units that are controlled and currently emit below the 0.14 lbs/mmbtu daily backdrop limit.

28. EPA’s forthcoming FIP imposes a May 1, 2026, compliance deadline when additional complex and costly controls are required under the FIP for sources within Kentucky. KDAQ must permit these new controls through its permitting process for the affected facilities. The permitting process must start as soon as the FIP becomes final and effective to meet the compliance deadline because it may take several years for some sources to install required controls after KDAQ permits them.

29. KDAQ must permit numerous facilities in the state that are subject to the forthcoming FIP control requirements. KDAQ estimates 197 units will be impacted by the FIP, including EGUs (both coal-fired and non-coal-fired), industrial boilers, steel mill units, cement units, glass units, and engines at natural

gas transportation facilities. EPA incorrectly projected only 77 units to be impacted by the FIP. Additionally, under the forthcoming FIP, the following categories of sources will require permitting decisions: natural gas pipeline engines; cement kilns; iron, steel, and ferroalloy manufacturing boilers; glass manufacturing furnaces; large boilers used in chemical manufacturing, petroleum, and coal manufacturing; and large boilers used in pulp, paper, and paperboard mills manufacturing. KDAQ is currently in the process of identifying which industrial sources will be required to install controls and obtain permits.

30. The forthcoming FIP's compliance deadlines impose immediate permitting burdens on KDAQ. The permitting process is lengthy and resource intensive. It involves staff review and development of draft permits, public notice, potential public hearings, and likely extensive public input. KDAQ will then review and respond to the submitted comments on the proposed permit changes, in some circumstances adjusting the permits. Groups that usually oppose coal-fired power plants, and now other emissions sources, are likely to comment and formally object to the proposed permits.

31. These permitting burdens will put a significant strain on KDAQ's staff and will coincide with KDAQ's other critical work involving the same key personnel. The Permit Review Branch reviews applications for modifications, new facilities, and renewals and subsequently issues construction and operating permits. An onslaught of applications to modify permits for the Ozone Transport FIP would

divert attention from new and expanding facilities in Kentucky, negatively impacting economic growth and public protection. Many of the new facilities in Kentucky are building electric vehicles, which will directly reduce NO_x and VOC emissions in the nonattainment areas that Kentucky is modeled to impact. The Program Planning and Administrative Branch is responsible for reviewing and commenting on proposed federal regulations and develops SIPs. KDAQ provides valuable comments to EPA on how regulations will impact Kentucky air quality and economic activity. Diverting resources away from these important projects undermines Kentucky's interest in protecting public health.

32. Each of these problems with EPA's Final Rule and its plans to impose a FIP causes Kentucky immediate harm to its sovereign interests and harms regulated sources in the Commonwealth. Because the compliance deadlines are rapidly approaching, Kentucky and its regulated entities must begin planning for compliance and implementation immediately.
33. Staying the Final Rule during the pendency of this litigation, however, will cause no harm. A stay will maintain the status quo while EPA and KDAQ can collaborate on an approvable SIP. And while the forthcoming FIP was designed to accomplish emissions reductions prior to the 2023 ozone season, the program cannot be effectively implemented in Kentucky that quickly. Past control projects for emissions have required years of design, permitting, construction and sequencing of shut-downs to provide power to the utility customers.

Assuming expeditious resolution of this litigation, a stay during its pendency should not significantly affect the implementation of the FIP for later ozone seasons.

34. Moreover, KDAQ has already implemented several programs that have reduced ozone and other emissions, and which will continue to do so. For example, Kentucky emissions from EGUs have decreased from 63,057 tons of NO_x in 2003 to 12,367 tons of NO_x in 2022. These reductions have been achieved through several regulations including: the Acid Rain Program, CAIR, CSAPR, MATS, Regional Haze, and SIPs. With these other programs in place, air quality within Kentucky and in downwind states is already improved and will continue to improve. Thus, KDAQ is taking adequate steps to address public health in Kentucky, while there is no need for regulated sources to move forward with complying with EPA's flawed Final Rule pending judicial review.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 23rd day of May, 2023, at 300 Sower Boulevard, Frankfort, Kentucky 40601.

A handwritten signature in black ink that reads "Michael Kennedy". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Michael Kennedy

Exhibit 1



ANDY BESHEAR
GOVERNOR

REBECCA W. GOODMAN
SECRETARY

**ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION**

ANTHONY R. HATTON
COMMISSIONER

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601
TELEPHONE: 502-564-2150
TELEFAX: 502-564-4245

April 25, 2022

Daniel Blackman, Regional Administrator
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street SW
Atlanta, GA 30303

Re: Comments relating to *Air Plan Disapproval; Kentucky; Interstate Transport Requirements for the 2015 8-hour Ozone National Ambient Air Quality Standard*; Docket ID: EPA-R04-OAR-2021-0841

Dear Mr. Blackman,

On behalf of the Commonwealth of Kentucky and the Energy and Environment Cabinet, the Division for Air Quality (Division) respectfully submits the following comments relating to the United States Environmental Protection Agency's (EPA) proposed action in the February 22, 2022 Federal Register, soliciting comments on the proposed *Air Plan Disapproval; Kentucky; Interstate Transport Requirements for the 2015 8-hour Ozone National Ambient Air Quality Standard*.¹

The Division disagrees with EPA's proposed disapproval of the Interstate Transport portion of Kentucky's Infrastructure State Implementation Plan (I-SIP), submitted to EPA for approval on January 11, 2019. In the spirit of consistency, the Division believes that a more appropriate method to correct inadequacies identified by EPA would have been to issue a call for plan revisions, which is provided for under 42 U.S.C. § 7410(k)(5). EPA's proposed disapproval relies, in part, on newly available modeling and data that EPA is applying nationally. Issuing a call for plan revisions would allow EPA to incorporate and rely upon this modeling and data consistently and efficiently, while providing states the opportunity to review the data and incorporate it into their analysis. A call for plan revisions could have reduced, or eliminated, the need for EPA to issue the proposed federal implementation plan (FIP) for Kentucky, published on April 6, 2022.²

¹ 87 Fed. Reg. 9,498 (Feb. 22, 2022).

² 87 Fed. Reg. 20,036 (Apr. 6, 2022).

Mr. Daniel Blackman
April 25, 2022
Page 2

The Division appreciates EPA's consideration of the attached comments. If you have questions or comments, please contact me at, Michael.Kennedy@ky.gov, at your convenience.

Sincerely,

 Recoverable Signature

X *Michael Kennedy*

Signed by: Michael Kennedy

Michael Kennedy, P.E., Director
Kentucky Division for Air Quality

Kentucky Comments regarding the February 22, 2022 proposed EPA action to disapprove the Interstate Transport requirements for Kentucky's 2015 8-hour Ozone NAAQS I-SIP submittal

Lack of Timeliness of EPA Action

Kentucky disagrees with EPA's proposed disapproval of its State Implementation Plan (SIP) regarding the interstate transport requirements for the 2015 8-hour ozone national ambient air quality standards (NAAQS) because EPA's inaction prohibited Kentucky from addressing any deficiencies identified or submitting a revised SIP for approval. Kentucky's final 2015 8-hour Ozone NAAQS Infrastructure SIP (I-SIP) was transmitted to EPA on January 9, 2019, and included the interstate transport requirements. EPA did not make a completeness determination within 60 days, and the SIP was deemed complete by operation of law under 42 U.S.C. § 7410(k)(1)(B) six months later, on July 9, 2019. Once a completeness determination occurs by operation of law, EPA has 12 months to take action on the SIP submittal.¹ EPA was required to act on Kentucky's entire I-SIP by July 9, 2020. EPA approved the majority of the SIP requirements on July 1, 2020,² and approved sections addressing Clean Air Act (CAA) sections 110(a)(2)(C), 110(a)(2)(D)(i) Prong 3, 110(a)(2)(J), and 110(a)(2)(K) via a second approval on October 2, 2020.³ However, EPA took no action on the requirements for Interstate Transport, specifically prongs 1 and 2, until February 22, 2022, over 12 months past the statutorily required date for action.

EPA's delayed disapproval of Kentucky's I-SIP regarding prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(1) prevented Kentucky from addressing deficiencies or submitting SIP revisions. Kentucky would appreciate the opportunity to address these identified deficiencies through a revised SIP submission, which may eliminate the need for a Federal Implementation Plan.

EPA's Use of Revised Modeling Data Not Available to States prior to Deadline for 2015 Infrastructure Submittal

At the time of Kentucky's final 2015 Ozone I-SIP submittal, there were several guidance documents from EPA as well as modeling data available to review and use for the Interstate Transport demonstration. Specifically, two memos from EPA's Office of Air Quality Planning and Standards (OAQPS), dated March 27, 2018, and August 31, 2018, were available. Additionally, EPA provided updated modeling information with the March 27, 2018 memo for states to consider in developing their Interstate Transport SIPs. Kentucky used the information provided in EPA's March 27, 2018 memo and associated modeling, and the recommended 1 part per billion (ppb) threshold from the August 31, 2018 memo to evaluate the impacts that Kentucky emissions may have on downwind monitors. The result, using Step 2 of EPA's framework, was that one maintenance monitor, located in Harford, MD, was identified to be evaluated for potential impact downwind.

In the current action, EPA has proposed disapproval of Kentucky's Interstate Transport requirements of the I-SIP submittal based on a second version of newly modeled data that was

¹ 42 U.S.C. § 7410(k)(2).

² 85 Fed. Reg. 33,021 (June 1, 2020).

³ 85 Fed. Reg. 54,507 (Sept. 2, 2020).

Kentucky Comments regarding the February 22, 2022 proposed EPA action to disapprove the Interstate Transport requirements for Kentucky's 2015 8-hour Ozone NAAQS I-SIP submittal

not made available to Kentucky until well past the statutory deadline for Kentucky's I-SIP submittal and EPA's action regarding that submittal. Specifically, EPA states, "EPA must act on SIP submittals using the information available at the time it takes such action."⁴ In the spirit of cooperative federalism, Kentucky would appreciate and expect the opportunity to submit a revised SIP in accordance with the revised data and modeling, rather than having the SIP disapproved after the fact.

Identification of newly impacted monitors without opportunity for States to review and develop an appropriate SIP submittal

EPA is taking action to disapprove the remaining Interstate Transport portion of Kentucky's SIP submittal using newly updated data, specifically the 2016v2 platform, which was not available at the time of Kentucky's I-SIP submittal. Additionally, the monitors previously linked as being impacted by Kentucky have changed with the newly available data. Kentucky was not afforded the opportunity to evaluate the potential linkages or provide additional information regarding these potential linkages. Specifically, using the 2016v2 platform, EPA has identified the Bucks County, PA monitor and the New Haven, CT monitor as linked to Kentucky in using the newly updated data. The Bucks County, MD monitor was not listed as either a nonattainment or maintenance monitor in the modeling data provided with the March 2018 memo. As such, Kentucky was not afforded the opportunity to evaluate the potential impact of emissions for either area prior to submitting the 2015 Ozone I-SIP. An opportunity to submit a revised SIP would provide Kentucky with the ability to review the 2016v2 platform, as well as the data and modeling associated with the platform.

Change in the interpretation of requirements for an Infrastructure SIP

Since the requirement for submitting an Infrastructure SIP for each NAAQS was implemented, Kentucky has provided a document demonstrating that the state has the authority, regulations, and required programs in place to address all requirements of CAA section 110(a). Beginning with the 2008 Ozone NAAQS, EPA significantly changed their perspective regarding the purpose of the I-SIP, requiring an in-depth technical demonstration, with extensive modeling, data analysis, and demonstration of whether or not potential upwind emissions are contributing to downwind problems. In this proposed action, EPA specifies that if a state must make emission reductions to prevent emissions from impacting a downwind monitor, the state must submit a separate SIP revision that makes those emission reductions permanent and enforceable.⁵ Kentucky maintains that the purpose of the I-SIP is to verify that the state has the authority, regulations, and programs in place to address the requirements of the CAA, not to determine if, and how much, an upwind source may be impacting a downwind monitor. If an upwind state impacts a downwind state and EPA is called upon to determine the reductions necessary, then EPA's authority comes from a different section of the CAA, specifically section 126.

⁴ 87 Fed. Reg. 9498, 9502 (Feb. 22, 2022).

⁵ 87 Fed. Reg. at 9515.

Kentucky Comments regarding the February 22, 2022 proposed EPA action to disapprove the Interstate Transport requirements for Kentucky's 2015 8-hour Ozone NAAQS I-SIP submittal

EPA Reversal on use of 1% Contribution Threshold

In assisting states in the development of Interstate Transport SIP requirements for the 2015 Ozone 8-hour NAAQS, EPA published several memos containing guidance and recommendations. Specifically, the August 31, 2018 memo, “Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan submissions for the 2015 Ozone National Ambient Air Quality Standards” (August 2018 memo) provided additional information for states in the potential use of 1 ppb as the screening threshold for determining downwind monitors impacts by upwind emissions.

In the August 2018 memo, EPA states, “The data in the tables below indicate that, for the 2015 ozone NAAQS, 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. Overall, using a 1 ppb threshold captures 70 percent, which is a similar and only slightly lower amount of contribution.”⁶ Due to the close correlation between the use of a 1% threshold and a 1 ppb threshold, Kentucky chose to use the 1 ppb threshold for screening purposes in Step 2 of the framework, following EPA’s published guidance. EPA has not provided any new information for rejecting the use of the 1 ppb threshold. Rather, the proposed rule states, “EPA’s experience since the issuance of that [August 2018] memorandum has revealed substantial programmatic and policy difficulties in attempting to implement this approach.”⁷

Kentucky’s use of 1 ppb as the threshold indicated that the state was linked to a maintenance monitor in Harford, MD, and the evaluation of Kentucky’s possible contribution to this monitor was the focus of the SIP submittal. Kentucky had no opportunity to provide any evaluation or information regarding the two newly identified downwind monitors.

Many states that submitted a 2015 Ozone Transport SIP to EPA for approval did use the 1 ppb threshold. Given the reliance on the August 2018 memo, it would have been appropriate for EPA to, via a SIP Call, rescind the memo and request that states submit revised SIPs that did not use the 1 ppb threshold.

In this proposed action, EPA is relying on the 1% threshold to evaluate a state’s contribution to a nonattainment or maintenance monitor. , EPA identifies the need for consistency in its evaluation across all of its Interstate Transport requirements, for all NAAQS. Kentucky believes retraction of the August 2018 memo and issuance of a call for plan revisions under 42 U.S.C. § 7410(k)(5) would further promote consistency across states’ evaluations of their SIPs,

⁶ Peter Tsigotis, Analysis of Contribution Thresholds for Use in CAA section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, EPA OAAQPS Memorandum, August 31, 2018.

⁷ 87 Fed. Reg. at 9551

Exhibit 2



ANDY BESHEAR
GOVERNOR

REBECCA W. GOODMAN
SECRETARY

ENERGY AND ENVIRONMENT CABINET

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June 21, 2022

U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No: EPA-HQ-OAR-2021-0668

Submitted via the Federal eRulemaking Portal: [https:// www.regulations.gov/](https://www.regulations.gov/)


Re: Comments on EPA's Proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard; 87 Fed. Reg. 20,036 (Apr. 6, 2022)

Dear Sir/Madam:

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet) respectfully submits the following comments in response to EPA's proposed action in the April 6, 2022 Federal Register, soliciting comments on the proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard. After careful review and consideration, the Cabinet finds that the proposed rulemaking is rushed and based on inaccurate air quality modeling. Additionally, the Cabinet finds it is more appropriate to implement local controls to reduce NOx emissions prior to imposing reductions on emissions from other states.

The Cabinet appreciates the opportunity to comment on this proposed rule and requests EPA's consideration of our comments. If you have any questions regarding the comments provided, please contact Mr. Michael Kennedy, Director, Division for Quality at (502) 782-6997 or Michael.Kennedy@ky.gov.

Sincerely,


Rebecca W. Goodman
Secretary

Enclosure

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

(1) Environmental Justice considerations and the impact to Kentucky citizens

EPA is not following its own policy in evaluating this proposed rule regarding environmental justice. “The 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 further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or **programs and policies** [emphasis added].”¹ In regards to the proposed rule, “For the proposed rule, we employ two types of analytics to respond to the above three questions: Proximity analyses and exposure analyses.”² In other words, EPA only evaluated environmental justice concerns in regards to exposure of the potential populations to any environmental harm, and only in regard to those that are within the local area of the emission sources. State, local, and tribal agencies already evaluate the potential harm to local communities as part of their mission; protecting human health and the environment is part of the regulatory process in issuing air quality permit. EPA’s claim of “evaluating” sources of emissions for local impacts to satisfy the environmental justice requirements of its own policy is disappointing.

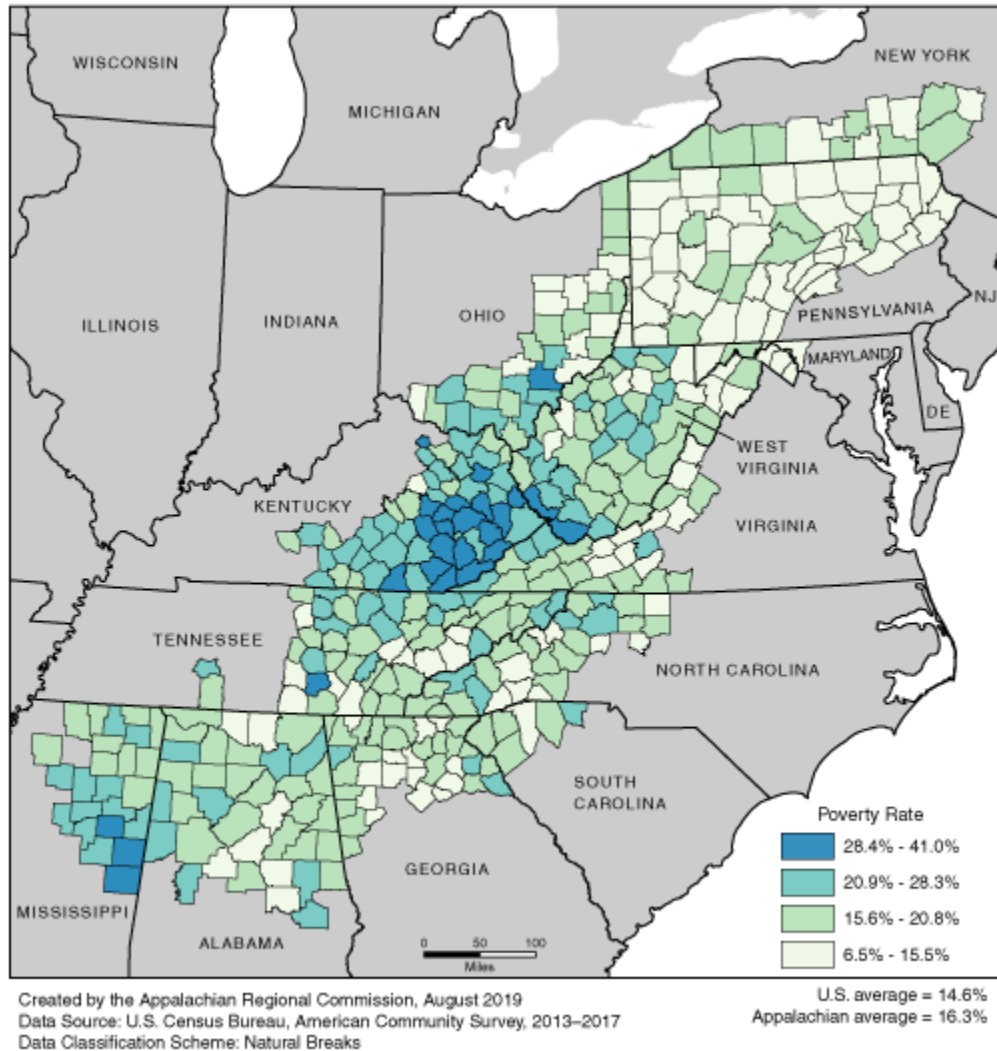
However, in its ill-conceived effort to address downwind ozone, EPA fails to consider the “fair treatment” of citizens in upwind states due to the implementation of this proposed “Good Neighbor” rule. In proposing this NOx reduction program, EPA only considers the potential health benefits in downwind states, turning a blind eye to the impact of the cost of implementation in the upwind states, including Kentucky. Kentucky citizens and communities that are already struggling to provide the most basic needs for families will bear the burden of higher energy prices if this proposed rule is implemented. These areas are some of the most distressed and disadvantage communities in Kentucky, the Appalachian Region, and the nation.

¹ 87 Fed. Reg. 20,153

² Ibid

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

Figure 1 – Poverty Rates in Appalachia, 2013 – 2017



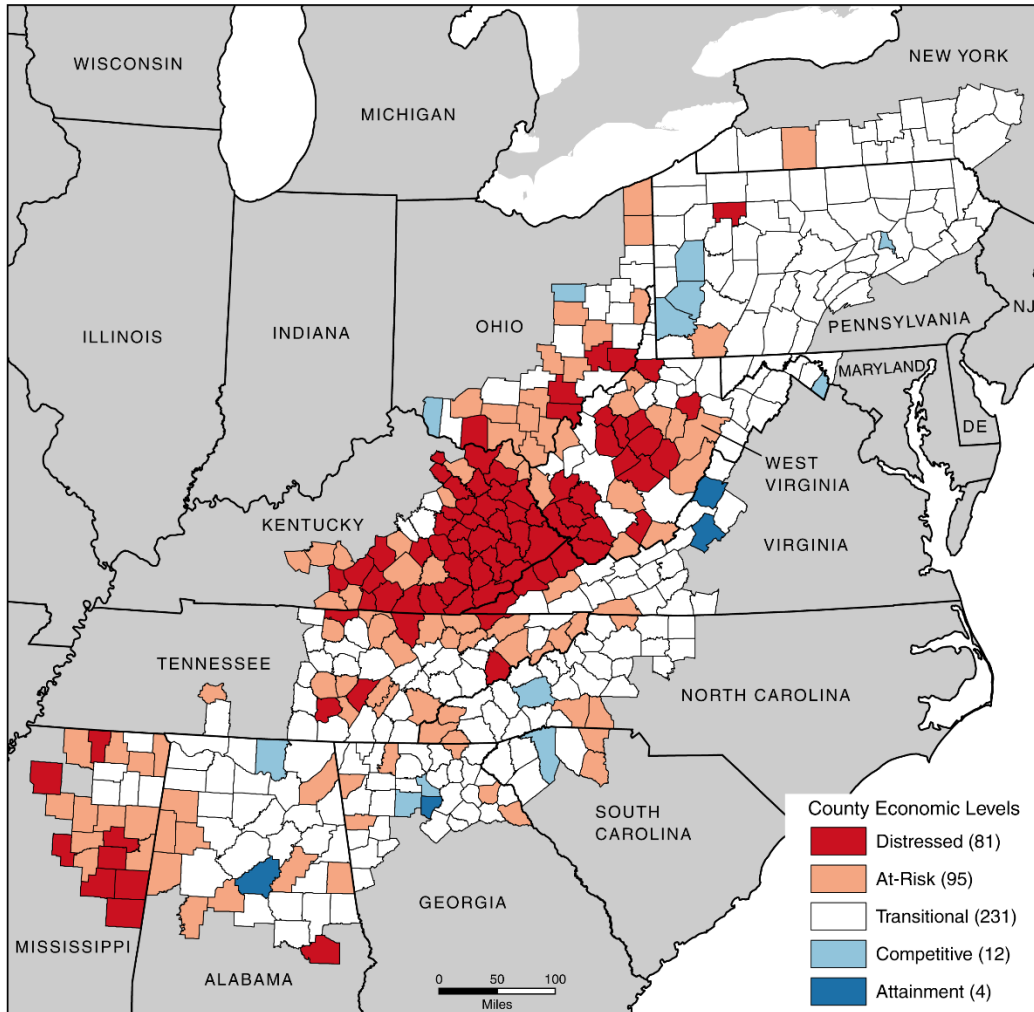
Source: <https://www.arc.gov/map/poverty-rates-in-appalachia-2013-2017/>

The poverty level for this area of Kentucky is nearly **183% of the U.S. average poverty level**. In fact, for 2019, the per capita market income for Appalachian Kentucky was \$21,329 – just 45% of the U.S. average.³

³ <https://data.arc.gov/reports/>

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

Figure 2 – Economic Status in Appalachia, Fiscal Year 2022



Created by the Appalachian Regional Commission, June 2021; Revised November 15, 2021

Data Sources:

Unemployment data: U.S. Bureau of Labor Statistics, LAUS, 2017–2019

Income data: U.S. Bureau of Economic Analysis, LAPI, 2019

Poverty data: U.S. Census Bureau, American Community Survey, 2015–2019

Effective October 1, 2021
through September 30, 2022

Source: <https://www.arc.gov/map/county-economic-status-in-appalachia-fy-2022/>

According to the Appalachian Regional Commission, “Distressed” counties are the most economically depressed counties. They rank in the worst 10 percent of the nation’s counties. “At-Risk” counties are those at risk of becoming economically distressed. They rank between the worst 10 percent and 25 percent of the nation’s counties. For Eastern Kentucky, Distressed and At-Risk counties account for 51 of the 54 counties in the Kentucky portion of the Appalachian Region. These disadvantaged communities simply cannot afford an increase in electricity rates, which will occur with the implementation of this proposed rule. Citizens in Kentucky will be

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

forced to choose between their most basic needs - food, medicine, health care, or electricity - with no hope for relief in the immediate future. EPA is forcing those that live in these distressed and at-risk areas into impossible circumstances, and blatantly ignoring its own definition of “fair treatment” in regards to this rule.

Many of Kentucky’s electricity providers are cooperatives. These cooperatives are non-profit companies owned by its rate payers. There is no large, for-profit corporation behind these electricity providers to support the cost for required additional controls. In fact, for one area of Kentucky serviced by a cooperative, EPA’s implementation of this rule will cause rate payers to essentially pay for a system for a “third” time. They paid for it when it was originally constructed; they paid for it when state-of-the-art emission controls were voluntarily installed; and, without the necessary allowance allocations for the units to provide electricity during ozone season, the rate payers will pay for power to be provided from an outside supplier, instead of receiving power from the facility that they own.

In order to recover the cost of billions of dollars spent for state of the art emission controls to comply with the proposed rule, utilities and industries will have to raise prices. Kentucky’s citizens simply cannot afford increased costs for electricity and goods. EPA’s lack of consideration of the impact of this rule to citizens residing in upwind states, especially those in distressed communities, is contrary to the very idea of environmental justice. Reducing needed allocations for utilities, imposing additional controls on both utilities and industry, and raising the electricity rates of citizens already burdened for no demonstrated downwind environmental benefit is unconscionable. EPA is creating energy inequity for citizens that reside in states with subject EGUs. With this proposed rule, EPA is harming the very citizens it vows to protect.

(2) Inclusion of Kentucky as subject to the proposed Federal Implementation Plan

Kentucky’s final 2015 8-hour Ozone National Ambient Air Quality Standard (NAAQS) Infrastructure State Implementation Plan (I-SIP) was transmitted to EPA on January 9, 2019, and included the interstate transport requirements. EPA did not take action on the submittal until February 2022, well past the statutory deadline to make a determination. As noted in Kentucky’s April 25, 2022 comments to EPA, Kentucky does not agree with the proposed SIP disapproval.⁴ Upon availability of new modeling information (“2016v2”) and EPA’s decision to not allow the use of a 1 part per billion (ppb) threshold for contribution to downwind monitors, EPA should have issued a SIP Call to allow Kentucky, and other impacted states, the opportunity to address changes when new modeling became available.

Regarding the proposed rule for a Federal Implementation Plan (FIP), EPA proposes to find that NO_x emissions from Kentucky sources significantly contribute to downwind nonattainment or

⁴ Letter from Michael Kennedy to Daniel Blackman, April 25, 2022, Docket ID No. EPA-R04-OAR-2021-0841

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

interfere with maintenance of downwind monitors for the 2015 ozone National Ambient Air Quality Standard (NAAQS).⁵ Kentucky does not agree with EPA's finding that NOx emissions from Kentucky sources interfere with attainment or maintenance of downwind receptors.

(3) Availability and time allotted for review and comment of Proposed Rule

Unlike previous transport rules, this proposed rule contains a significant change with the addition of new industries potentially subject to NOx reductions and considerable costs for compliance. Given the sheer volume (over 200 documents and spreadsheets) of information to be reviewed, 75 days is not adequate to both review the documentation and provide meaningful comments. Local, state, and tribal agencies, as well as the regulated community and especially citizens, do not have the same resources available as a federal agency like EPA, and need significantly more time than 75 days to be able to provide adequate and meaningful comments. In addition, there are instances in the proposed rule where EPA asks for comment or input on adding additional sources, additional requirements, alternative control mechanisms, etc. The current comment period is not adequate to provide meaningful comment on EPA's proposed FIP for EGU and non-EGU sources, nor is it adequate to evaluate other possible sources of NOx emissions and potential impacts. The proposed consent decree schedule effectively expedites EPA's normal process for proposing a rule of such significance.

While Kentucky appreciates EPA providing the signed rule in March 2022, prior to publication in the Federal Register, significant parts of the supporting documentation and data that form the basis of the proposed rule, were not made available in the docket until after publication of the proposed rule in the Federal Register. Kentucky strongly recommends that EPA either extend the time to provide comments, or re-propose the rule at a later date.

EPA has stated that it is "committed to implementing the good neighbor provision as expeditiously as practicable and by the applicable attainment dates for downwind areas. If finalized as proposed, the rule would result in substantial reductions of summertime ozone concentrations and would provide important environmental and public health benefits. EPA believes that granting the prior requests by extending the comment period to June 21, 2022, enhances the public's ability to provide meaningful feedback on the proposed rule while allowing the Agency to proceed with timely development of the final rule, and that providing an extension to the comment period beyond the previously extended June 21, 2022, date would delay that development."⁶ In accordance with the Clean Air Act (CAA), EPA has two years to implement a FIP after issuing SIP disapprovals or findings of failure to submit. However, EPA was not timely in reviewing and acting on state SIP submittals for the 2015 ozone transport provisions. As a result, EPA is effectively punishing states and sources by rushing

⁵ 87 Fed. Reg. 20,038

⁶ Letter from Joseph Goffman to Senator Shelly Moore Capito, June 3, 2022

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

implementation of a FIP prior to the beginning of the 2023 ozone season. Assuming that EPA meets the proposed consent decree timelines and finalizes SIP disapprovals and findings of failure to submit by December 2022, EPA has until December 2024 to finalize and implement a FIP. It is inappropriate for EPA to rush the implementation of the proposed FIP. Considering the sweeping impact of this proposed rule, over multiple sources and sectors, and numerous states, Kentucky strongly recommends that EPA extend the comment period.

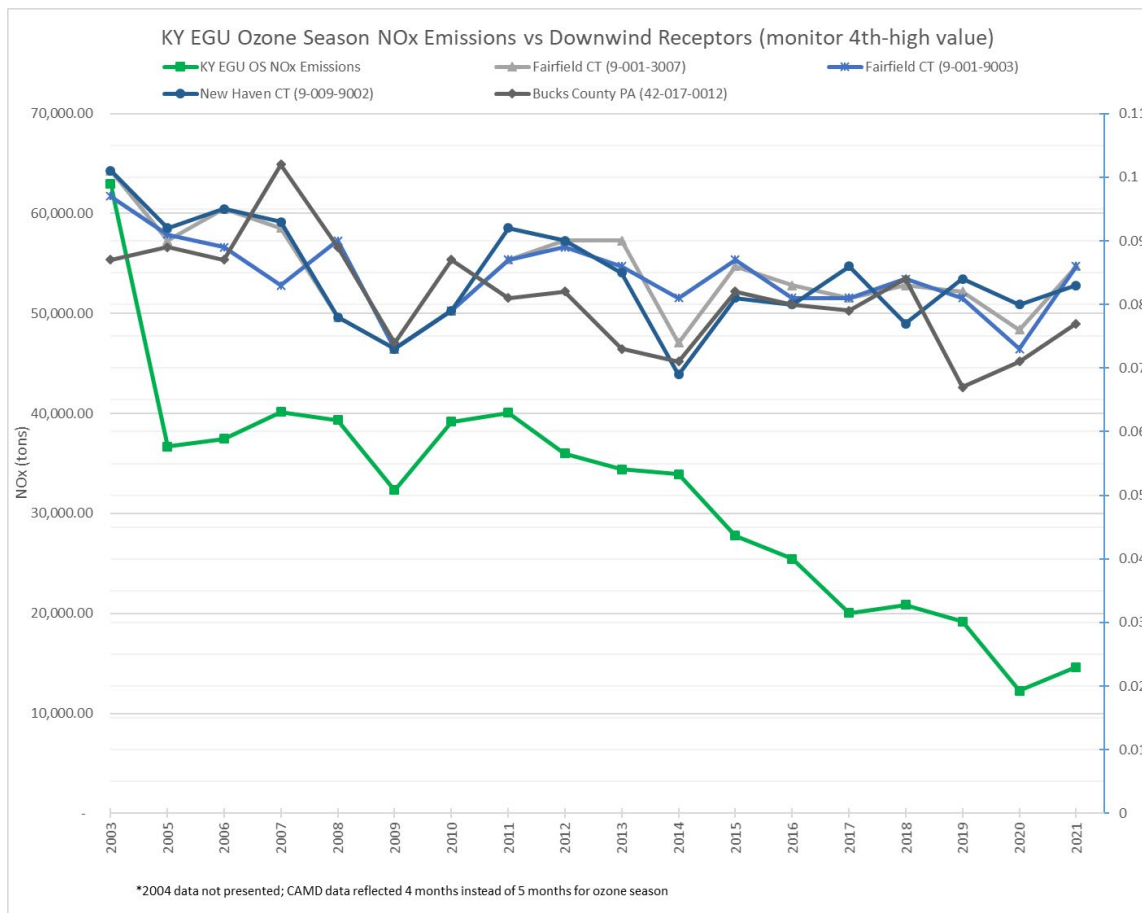
(4) Adequacy of models for predicting impacts to downwind monitors from upwind emissions

For over 25 years, EPA has relied on modeling to develop ozone season interstate transport rules as a way to help downwind states achieve attainment and maintenance of the ozone standards. Kentucky utilities have been included in these rules, with significant reductions in NO_x emissions from EGUs imposed every year. EPA's use of their IPM model makes assumptions about the operation of EGUs in Kentucky, frequently in error. Many times, IPM has included units that are retired and have no emissions, or it has inappropriately retired units that have no plans to do so. Still, Kentucky utilities have continued to meet the ozone season NO_x budgets imposed by EPA. Specific to this proposed rule, EPA's IPM model base case indicates that 1,017 MW of Kentucky capacity will be idled for 2023. There are no plans by any Kentucky utility to idle any of the units identified by the IPM model.

Even as Kentucky EGUs have met their increasing emission reduction obligations, downwind monitors have not reached attainment. A comparison of Kentucky EGU ozone season NO_x emissions and the four downwind monitors identified in the proposed rule, as impacted by greater than 1% of the 2015 ozone NAAQS from Kentucky sources, are shown below. EGU Ozone Season NO_x emissions were obtained from EPA's Air Markets Division database. Monitoring site ozone 3-year design values and 4th highest ozone season readings were obtained from EPA's Air Quality System (AQS).

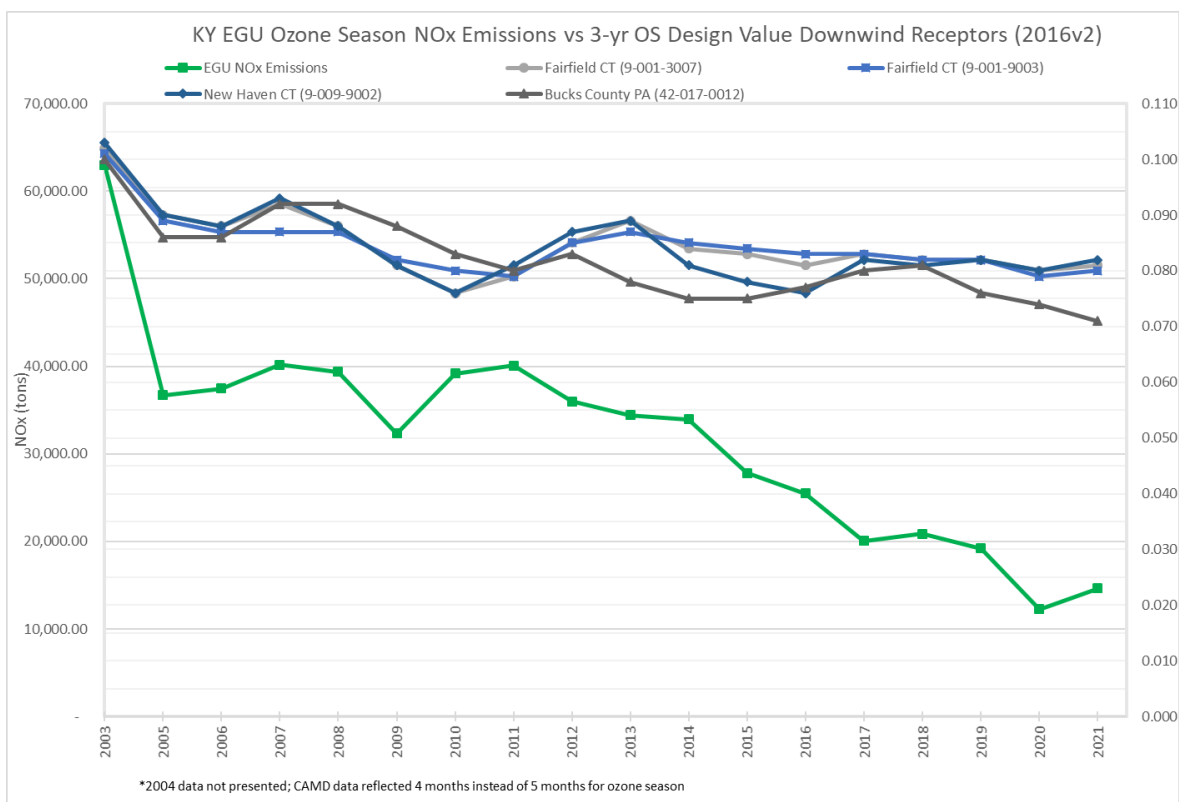
Kentucky Comments regarding the April 6, 2022 proposed rule, Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard [EPA-HQ-OAR-2021-0668]

Figure 1 – Comparison of KY EGU Ozone Season NOx Emissions (tons) vs Downwind Monitor Ozone Season 4th high reading (ppm)



**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

Figure 2 – Comparison of KY EGU Ozone Season NO_x Emissions (tons) vs Downwind Monitor Ozone Season 3-year Design Value (ppm)



Since 2003, Kentucky EGUs have reduced ozone season NO_x emissions by over 76%. In that same time period, none of the downwind monitors linked to Kentucky in the proposed rule have achieved attainment or maintenance status. Furthermore, beginning in 2014, those monitors' design values have remained relatively flat, while Kentucky EGU NO_x emissions continued to decrease over 56%. While EPA's modeling continues to identify contributions from Kentucky that exceed EPA's threshold of 1% of the ozone NAAQS, the emissions data and downwind air monitoring values indicate that Kentucky EGU ozone season NO_x emissions have very little, to no, impact on the measured concentrations and design values at the linked downwind monitors.

EPA provided the *Air Quality Modeling Technical Support Document, Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standards Proposed Rulemaking* (Modeling TSD) as a support document for the proposed rule, explaining the evaluation of the modeling platform predictions compared to actual observed values for the 2016 ozone season. Specifically, in evaluating the ability of the model to replicate the 2016 observed monitored values, EPA states, "the model performance statistics indicate that

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

the MDA8 ozone concentrations predicted by the 2016v2 CAMx modeling platform closely reflect the corresponding MDA8 observed ozone concentrations in each region of the 12 km U.S. modeling domain. The acceptability of model performance was judged by considering the 2016v2 CAMx performance results in light of the range of performance found in recent regional ozone model applications.”⁷ EPA then goes on to state, “The model performance results, as described in this document, demonstrate that the predictions from the 2016v2 modeling platform correspond closely to observed concentrations in terms of the magnitude, temporal fluctuations, and geographic differences for MDA8 ozone concentrations.”⁸

In reviewing the model performance statistics provided in the Modeling TSD, the mean error in predicting the maximum daily 8-hour average ozone concentration for every region was over 6 ppb. Considering that the 2015 ozone NAAQS is 70 ppb, and that EPA applied a 1% contribution threshold (0.7 ppb) to identify upwind states as significantly contributing to downwind states’ ozone problems, a mean error of 6 ppb for the model does not “correspond closely” enough to the observed values at the monitors. Further, requiring the implementation of reductions in ozone season NOx emissions in those upwind states, at the cost of billions of dollars and based on this model, is unacceptable.

The use of modeling results for screening purposes, to determine where additional data collection and evaluation may be needed, is a common practice in many areas, and in general, makes sense. However, using modeling results to implement sweeping emissions controls, costing billions of dollars, potentially resulting in electric grid instability, potential loss of jobs, and significant negative economic impacts, is irresponsible.

Kentucky recommends that EPA re-evaluate the use of their model for determining projected future year ozone design values and upwind state contributions to linked downwind monitors. Kentucky also recommends that EPA re-evaluate the use of a 1% contribution threshold as “significant” to downwind monitors. Given the substantial reductions in ozone season NOx emissions in Kentucky EGUs, very little, if any, improvement is demonstrated at downwind monitors. For this proposed rule, EPA states explicitly that only one monitor will come into attainment by 2023, and only four total by 2026 as a result of this proposed FIP.⁹

Additionally, Kentucky strongly recommends EPA look more closely at local sources and local control of ozone season NOx emissions, as well as the impact of NOx emissions from on-road mobile emissions sources, as those are the major contributors of NOx emissions to monitors that struggle with attainment and maintenance.

⁷ U.S. EPA Office of Air Quality Planning and Standards, *Air Quality Modeling Technical Support Document, Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standards Proposed Rulemaking*, 36

⁸ *Ibid*, 37

⁹ US EPA, Office of Air and Radiation, Ozone Transport Policy Analysis Proposed Rule TSD, February 2022, 47

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

(5) Identification of newly impacted monitors without opportunity for States to review and develop an appropriate SIP submittal

EPA is proposing a transport FIP using newly updated modeling data, specifically the 2016v2 platform, which was not previously made available via the Notice of Data Availability (NODA) process and publication in the Federal Register. On April 30, 2021, based on the 2016v1 modeling platform, EPA published the final Revised Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS, identifying two nonattainment receptors and one maintenance receptor as linked to Kentucky. Kentucky was not afforded the opportunity to evaluate the potential linkages or provide additional information regarding these potential linkages concerning the 2008 ozone NAAQS. Less than 12 months later, EPA published the proposed rule addressing transport for the 2015 ozone NAAQS. In this proposed rule, EPA has identified two new receptors (New Haven, CT and Bucks County, PA) as being impacted by Kentucky emissions, but not impacting the previously identified maintenance receptor (Madison, CT). EPA identified these changes to linked downwind receptors using the 2016v2 modeling platform. However, Kentucky was not afforded the opportunity to evaluate the potential impact of emissions for the new areas prior to EPA's proposal of a FIP.

In view of the change in linked downwind receptors and the addition of states that are now linked as contributing, Kentucky recommends that EPA formally publish the 2016v2 modeling using the NODA process and provide states with adequate time to review the inputs to the modeling and provide corrections prior to EPA performing modeling. Additionally, in the spirit of cooperative federalism, Kentucky should be afforded the opportunity to submit a revised SIP based on a review of the 2016v2 platform, as well as the documents, data, and modeling associated with the new platform. EPA should not finalize a proposed FIP until modeling has been corrected and updated, and states have had an opportunity to both review, and use the model to develop and submit a revised transport SIP.

(6) EPA's use of revised modeling data not available to states prior to the deadline for the 2015 ozone Infrastructure SIP submittal

At the time of Kentucky's final 2015 ozone I-SIP submittal, there were several guidance documents from EPA, as well as modeling data, available to review and use for the Interstate Transport demonstration. Specifically, two memos from EPA's Office of Air Quality Planning and Standards (OAQPS), dated March 27, 2018,¹⁰ and August 31, 2018,¹¹ were available. EPA provided updated modeling information with the March 27, 2018 memo for states to consider in developing their Interstate Transport SIPs. Kentucky used the information provided in EPA's

¹⁰ Peter Tsigotis, Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I), EPA OAQPS Memorandum, March 27, 2018

¹¹ Peter Tsigotis, Analysis of Contribution Thresholds for Use in CAA section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, EPA OAQPS Memorandum, August 31, 2018

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

March 27, 2018 memo, associated modeling, and the recommended 1 ppb contribution threshold from the August 31, 2018 memo to evaluate the impacts of Kentucky emissions on downwind monitors. The result, using Step 2 of EPA's framework, was that one maintenance monitor, located in Harford County, MD, was identified to be evaluated for potential impact downwind.

In this proposed rule, EPA is taking actions based on the 2016v2 modeled data that was not made available to states until well past the statutory deadline for both I-SIP submittals, and EPA's deadline for taking action on those submittals. Based on the 2016v2 model, some of the downwind monitors linked to Kentucky have changed. Kentucky was not afforded any opportunity to review or develop a SIP addressing the two new monitors allegedly impacted by Kentucky's emissions. In the spirit of cooperative federalism, Kentucky would appreciate and expect the opportunity to submit a revised SIP utilizing the 2016v2 platform and modeling, rather than having a FIP immediately imposed.

(7) Errors in the modeling and assumptions for the 2016v2 platform

In addition to not formally notifying state, local, and tribal agencies, as well as the regulated community and citizens, of the revised model availability through the NODA process, EPA did not correct the errors in the 2016v2 model that were identified and submitted through informal comments received by December 21, 2021. Multiple parties submitted comments and information identifying errors in EPA's assumptions, many about EGU data specifically. EPA did not incorporate those corrections in the model prior to developing a FIP, and instead used the erroneous data as the basis for the proposed rule.

The Midwest Ozone Group provided detailed information and discussion regarding EPA's use of erroneous top ten "high ozone days" in their comments regarding EPA's disapproval of Kentucky's 2015 ozone transport SIP. Specifically, EPA's top ten "high ozone days" from the 2016 base year included days from 2016 that were specifically excluded for determining design values for three Connecticut monitors due to an EPA approved exceptional event demonstration. These are the same three downwind Connecticut monitors now linked to Kentucky upwind emissions. These excluded days should not have been included in the modeling if they were excluded for Connecticut in determining ozone season design values and violations. The resulting projected future year concentrations based on the inclusion of these days likely overestimate any upwind contribution from Kentucky, as well as whether or not Kentucky continues to be linked to those downwind monitors.¹²

Additionally, these same three Connecticut monitors are located directly on the Connecticut coastline in the Long Island Sound. EPA is aware of issues with the land-water interface in the

¹² Letter from Kathy G. Beckett to Daniel Blackman, April 25, 2022, *Re: Air Plan Disapproval; Kentucky; Interstate Transport Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standards*; Docket ID No. EPA-R04-OAR-2021-0841, 40-46

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

modeling raised by various Metropolitan Jurisdictional Organizations over the past few years. The continued use of this modeling, with the inclusion of these errors, is very concerning to Kentucky. These issues, and others, are detailed in comments submitted by the Midwest Ozone Group in response to EPA's disapproval of Kentucky's transport provisions in the 2015 Ozone I-SIP.¹³

In projecting emissions for non-EGU sources in the 2016v2 modeling platform, EPA included facilities that were not operating. EPA used 2019 emissions where available, but also used previous years' emissions information when necessary and projected those emissions to future years. "A draft set of projected 'ptnonipm' emissions were reviewed and compared to recent emissions data from 2017 through 2019. In cases where the recent and projected emissions were substantially different, the 2023 emissions were instead taken from a recent year of emissions and were then projected from 2023 to later future years."¹⁴ Specifically, EPA identifies a Kentucky source, "AK Steel Corp," and the use of 2018 emissions projected to future years in the modeling platform 2016v2.¹⁵ In fact, this facility has not operated since 2019.

Kentucky recommends that EPA withdraw the proposed rule, correct the emission inventories used in the modeling and provide a corrected emissions inventory to states for review. Once the inventories are correct, EPA should perform new photochemical modeling using the identified corrections, and provide notification of the availability of the revised modeling using the NODA process. Once the new modeling is complete and the state, local, and tribal agencies, including the regulated community have had the opportunity to review, EPA should finalize the modeling.

(8) Use of the Air Quality Assessment Tool instead of revised modeling

EPA has established photochemical air quality modeling as the basis for determining downwind ozone impacts from upwind NOx emissions. Photochemical modeling has been applied in every ozone transport rule that EPA has developed since the NOx Budget Trading program began in 1998. The timing for this proposed FIP to address interstate transport requirements for the 2015 ozone standard is the outcome of a proposed consent decree.¹⁶ As such, it appears that EPA used numerous shortcuts to evaluate the data in order to meet the timeline rather than developing a sound and fair transport rule. In discussing the impact of costs at various thresholds, EPA specifically states, "Air quality modeling would be the optimal way to estimate the air quality impacts at each cost threshold level from EGUs and non-EGUs emissions reductions. However,

¹³ Ibid

¹⁴ US EPA, Office of Air and Radiation, *Technical Support Document (TSD): Preparation of Emissions Inventories for the 2016v2 North American Emissions Modeling Platform*, February 2022, 181

¹⁵ Ibid, 182

¹⁶ See Consent Decree, *Downwinders at Risk et al. v. Regan* (No. 21-cv-03551, N.D. Cal.)

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

due to time and resource limitations EPA was unable to use photochemical air quality modeling for all but a few emissions scenarios.”¹⁷

Additionally, “EPA recognizes that AQAT is not the equivalent of photochemical air quality modeling but in the Agency’s view is adequate to this purpose.”¹⁸ Again, in comparing different scenarios, EPA recognizes that they have not evaluated the information as they should, “The results of this comparison, which are relatively similar, demonstrate that, considering the time and resource constraints faced by the EPA, the AQAT provides reasonable estimates of air quality concentrations for each receptor, and can provide reasonable inputs for the multi-factor assessment and over-control assessment.”¹⁹

Although EPA has used this assessment tool in the prior CSAPR rules, those prior rules did not include such a significant reduction in NO_x emissions from non-EGU sources or contain required controls that could lead to early retirement of needed EGUs. Given the potential cost and significant impact of the proposed rule on both EGU and non-EGU industries, assessments that are “adequate” and “reasonable” do not provide sufficient technical and scientific certainty to justify such a monumental undertaking. Kentucky recommends that EPA withdraw the rule and consider other methods for determining upwind states’ contributions to downwind issues, timing for EGU controls and emission reductions, and potentially impacted non-EGU industries.

(9) Identification of non-EGU Sources

In selecting non-EGU sources to evaluate, EPA reviewed emissions from industries in the upwind states that were linked as contributing to downwind receptors in the projected year of 2023. Based on the inventory of facilities in the upwind states, EPA developed an analytical framework and screening assessment to assist in determining the industries, emissions, and costs for controlling emissions from non-EGU sources beginning in 2026. In using these tools, EPA did not follow its own 4-step framework in determining contributions from upwind states to downwind receptors.

Using the projected 2023 inventory from the 2016v2 modeling, EPA used a threshold of NO_x emissions greater than or equal to 100 tons per year (tpy), to identify industries that are estimated “to have the greatest ppb impact on downwind air quality.”²⁰ From there, EPA “determined which of the most impactful industries and emissions units had the most emissions reductions that would make meaningful air quality improvements at the downwind receptors at a marginal

¹⁷ US EPA, Office of Air and Radiation, *Ozone Transport Policy Analysis Proposed Rule TSD*, February 2022, 32

¹⁸ *Ibid*

¹⁹ *Ibid*, 58

²⁰ EPA Technical Memorandum, *Screening Assessment of Potential Emissions Reductions, Air Quality Impacts, and Costs from Non-EGU Emission Units for 2026*, February 28, 2022, 2

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

cost threshold we determined using underlying control device efficiency and cost information.”²¹ EPA further separated the industries into Tier 1 and Tier 2, with Tier 2 being further reduced to only “impactful boilers.” The selection of these industries as having an impact on downwind receptors is not based on actual data. EPA has not provided data regarding the contribution of these upwind industries to downwind receptors. Without determining the contribution from upwind non-EGUs to downwind receptor issues of nonattainment or maintenance, EPA is over-controlling the emissions of upwind states. The U.S. Supreme Court specifically detailed that EPA does not have the authority to require states to reduce emissions beyond the amount needed to bring downwind states into attainment.²²

EPA identifies NO_x reductions for Kentucky only for the natural gas pipeline transportation industry.²³ However, Kentucky has multiple sources, including non-EGU boilers, glass manufacturers, and iron/steel facilities that will be negatively impacted by this proposal. No information is provided by EPA regarding reductions of NO_x emissions from these other Kentucky facilities in the cost analysis, nor does EPA acknowledge any reductions in NO_x emissions from these other industries.

Further, if EPA’s model has adequately identified the Kentucky non-EGU sources, there should be no need for EPA to request information on additional sources for possible inclusion in the proposed rule, as that would be over-controlling upwind states, although EPA states that the rule as proposed constitutes a full remedy. Kentucky does not agree with EPA’s selection of industries and emission units for non-EGU NO_x reductions. Without a specific list of sources, it is impossible for Kentucky to identify which non-EGU sources are subject to the proposed rule. The data for non-EGU sources is limited and the reductions are not likely to make an impact to downwind monitors. Kentucky recommends EPA remove the inclusion of upwind non-EGU sources from the rule.

(10) Identification of NO_x control strategies for non-EGUs

EPA provided a significant volume of background and supporting information regarding potential control equipment for the non-EGU industries covered by the proposed rule. However, prior to issuing the proposed rule, EPA did not request additional information regarding NO_x emissions, actual operations, and potential control strategies from those industries, instead relying on state regulations and permits for control scenarios, without verifying that they were successful or installed. EPA also relied on existing supporting documentation, many of which are decades old and based on data collected for the 1998 NO_x SIP Call.

²¹ Ibid

²² *EPA v. EME Homer City Generation L.P.*, 572 U.S. 489, 134 S. Ct. 1584 (2014)

²³ Ibid, 12

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

Specific to Selective Catalytic Reduction (SCR) controls, EPA made assumptions about the availability of vendors that could provide the equipment. At the time that SCRs were first installed as NO_x controls, some decades ago, there were plenty of vendors available. However, SCR specific technology is old and the majority of sources requiring SCRs installed them long ago. Given EPA's selection of SCR as a control strategy for multiple industries in the proposed rule, and the potential number of subject units, EPA has significantly underestimated the availability of equipment and vendors. The lack of available vendors and equipment will hinder facilities in complying with the extremely short deadlines that EPA proposes in this rule.

Additionally, EPA has selected NO_x control scenarios for non-EGUs that are not appropriate or technically feasible. As an example, EPA has identified SCRs as a NO_x control technology for the Iron and Steel Mills and Ferroalloy Manufacturing industry. EPA bases the proposed NO_x emission limits for individual units and operations in the steel industry using very little available data and mostly assumptions. Specific to electric arc furnaces (EAFs), EPA has not evaluated or considered the actual day-to-day operation process, which is generally a batch-type process, and is not suited for SCR controls. A review of the RACT/BACT/LAER Clearinghouse found that there are no examples for SCR used to control NO_x emissions from EAFs. The proposal to add SCR as a control device for EAFs is not based on technical or engineering data. Kentucky recommends that EPA provide sound technical information for this, and all proposed non-EGU NO_x controls, prior to imposing unattainable emission standards on industries across the nation.

(11) Identification of NO_x control costs for non-EGUs

To develop potential control strategies and costs, EPA used the Control Strategy Tool (CoST). As stated by EPA, CoST was not created to be used for unit-specific/engineering analysis, but for "illustrative control strategy analyses."²⁴ However, EPA used CoST to develop estimates for annual control costs for non-EGUs and provides those estimates in the screening assessment. Tables 4 and 4a in the "Screening Assessment Memo" detail the ozone season reductions and annual total costs, as well as average annual cost per ton for impacted states and industries.²⁵ While intended to show a potential cost for installing controls in the industries identified in the proposed rule, there will be some facilities and units where the cost to install the proposed controls will greatly exceed EPA's illustrative analyses.

As an example specific to Kentucky, Table 4a lists an ozone season reduction of 2,291 tons of NO_x at an annual cost of \$28,700,000, and an average annual cost of \$5,213 per ton NO_x reduced.²⁶ While the per ton amount may be considered by EPA to be a reasonable cost, the underlying, but silent implication is that facilities will have to run these controls year-round

²⁴ Ibid, 7

²⁵ Ibid, 12-14

²⁶ Ibid

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

rather than only during ozone season. Considering this cost from an ozone season perspective, which is the sole purpose of the proposed rule, the calculated cost per ton EPA provides is not reflective of ozone season reductions. EPA is proposing to require these non-EGU facilities to install controls to reduce ozone season NO_x emissions, not annual NO_x emissions. However, EPA is well aware that facilities will operate the controls year-round, as these required controls do not lend themselves to readily be shut down at the end of ozone season and then restarted at the beginning of the next ozone season. Therefore, EPA has misrepresented the cost associated for non-EGU NO_x controls. Using the above values, a reduction of 2,291 tons of NO_x during ozone season will cost Kentucky non-EGUs \$28,700,000 dollars annually, or **\$12,527 per ton** of ozone season NO_x reduced. The ozone season per ton cost for non-EGUs is significantly higher than the estimated \$11,000 per ton costs for EGUs. This cost is unacceptable and potentially detrimental to many industries.

Kentucky finds that the cost for non-EGU entities to reduce ozone season NO_x emissions exceeds any appropriate cost threshold, especially considering a reduction of only 2,291 tons of ozone season NO_x from Kentucky industries. Kentucky strongly recommends that EPA withdraw the proposed rule and eliminate any and all requirements pertaining to reduction of ozone season NO_x emissions from non-EGUs. Or, as has been previously suggested in these comments, limit the review of NO_x emitting sources to local sources closer to the monitor in question, rather than using modeled information and assessment tools.

(12) Effect of Cumulative Rulemakings

A significant number of both EGU and non-EGU sources in Kentucky will be impacted by the proposed rule. Any proposed regulation that requires the control or capture of carbon/Greenhouse Gas (GHG) emissions has the potential to increase NO_x emissions. This was identified by EPA in the proposed Clean Power Plan.

On June 10, 2021, EPA announced the decision to reconsider the December 2020 decision to retain the 2012 fine particulate matter (PM) NAAQS.²⁷ Tightening the PM NAAQS will likely require facilities to add more control equipment to maintain or reduce particulate matter emissions, in order for states to attain or maintain a more stringent PM NAAQS. This is additional costs incurred for facilities, on top of any costs to comply with the proposed rule.

EPA recently issued a draft “white paper” that discusses GHG emissions from natural gas units.²⁸ While Kentucky supports the reduction of GHG emissions, potential increases in NO_x emissions from GHG controls will present problems for facilities that are subject to the strict

²⁷ <https://www.epa.gov/newsreleases/epa-reexamine-health-standards-harmful-soot-previous-administration-left-unchanged>

²⁸ U.S. EPA, Office of Air and Radiation, *Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Combustion Turbine Electric Generating Units*, April 21, 2022

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

limits of this proposed FIP. Cumulative impacts from EPA rules may force EGUs to shut down units that are necessary for grid stability and reliability. In addition, potential changes to the EPA's Effluent Guidelines and the Coal Combustion Residuals rulemakings will have additional impacts to the electricity sector.

Kentucky recommends that EPA re-evaluate the timing and necessity in the promulgation of multiple rules that impact the same facilities in the same time frames, as well as the potential cost and benefits of overlapping rules.

(13) Changes to air quality permitting implemented by the proposed rule

The CAA clearly delineates between SIP requirements for meeting the NAAQS in Title I of the CAA and Air Quality Permitting requirements in Title V of the CAA. However, in this proposed rule, EPA disregards the permitting programs implemented by states, as well as its own rulemaking processes for New Source Performance Standards and the associated Emission Guidelines for existing sources, as well as other source and pollutant emission standards. By subjecting specific EGUs and non-EGUs industries, equipment, and processes to the proposed “daily backstop” emission rates during ozone season, EPA circumvents the permitting programs and regulations implemented by states to determine applicable permitted emission standards.

The New Source Performance Standards (NSPS) essentially function as a “technological floor,” ensuring that any new or modified source in a particular source category achieves minimum standards. Conversely, Best Achievable Control Technology (BACT) is defined as an:

“emissions limitation, based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major source or major modification which [the permitting agency], on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.”²⁹

All New Source Review (NSR) permit applications must include proposed emission limits based on the results of any BACT or Lowest Achievable Emissions Rate analysis conducted. The permit applicant must implement the most stringent BACT, or demonstrate the best alternative. The permitting agency must find and agree, that the technical considerations, or energy, environmental, or economic impacts justify a conclusion that the best technology would be a better alternative.

²⁹ See 40 C.F.R. § 52.21(b)(12), CAA § 169(3), 42 U.S.C.A. §7479(3)

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

States use Prevention of Significant Deterioration (PSD) and NSR permitting programs to evaluate the construction of new facilities and potential impacts to ambient air quality. These programs are rigorous and are designed to ensure that emissions from new facilities use BACT in order to prevent negative impacts to ambient air quality. In this proposed rule, EPA is effectively setting new BACT standards without providing demonstrated, sound, technical and engineering information for the application of control technologies. Additionally, EPA is eliminating states' use of case-by-case analysis, which allows for consideration of energy, environmental, and economic impacts and other costs in evaluating controls. The emission limits for non-EGU processes in the proposed rule are essentially changes to existing permitting regulations, as any future units will be also subject to the same restrictions. Kentucky recommends that EPA remove the proposed operational emission limits from the rule.

(14) EPA is creating energy policy through rulemaking

In the proposed rule, EPA is requiring installation of specific controls on EGUs for the 2027 ozone season. From the Regulatory Impact Analysis (RIA) for the proposed rule, "In addition, beginning in the 2027 ozone season, coal facilities greater than 100 MW lacking SCR controls and certain oil/gas steam facilities greater than 100 MW that lack existing SCR controls located in these 23 states must meet daily emission rate limits, effectively forcing affected units to install new SCR controls, find other means of compliance, or retire."³⁰ Here, EPA plainly states coal-fired EGUs that cannot comply with the prescribed control device requirements, or find another means for complying with the daily emission rate of the proposed rule, must shut down. By imposing these limits, EPA is dictating which EGUs will continue to operate and which ones will be shuttered.

For Kentucky, EPA is prescribing change that significantly impacts the ability of its EGUs to provide steady, reliable electricity to its citizens and industry. As proposed in the rule, approximately 3,600 MW in Kentucky will need to be replaced or install controls. Many of these units are nearing retirement, making the options for compliance limited, of which EPA is aware. Most likely, the proposed rule will leave these assets stranded. Without immediate replacement, this creates a significant gap in the supply-demand balance for electricity and will stress the grid, especially during the summer peak demand times. One regional operator for Kentucky has already indicated a shortage in capacity for 2022. The potential loss of additional capacity and generation will only cause the shortage to expand and grow in severity.

EPA's assumption regarding generation shifting is flawed and the ability to replace potential generation lost simply cannot meet EPA's proposed timeline. Several units in Kentucky that

³⁰ *Regulatory Impact Analysis for Proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, ES-7 – 8.

**Kentucky Comments regarding the April 6, 2022 proposed rule,
Federal Implementation Plan Addressing Regional Ozone Transport
for the 2015 Ozone National Ambient Air Quality Standard
[EPA-HQ-OAR-2021-0668]**

would be used for generation shifting have existing permitted emission limits. In order for those units to be used in generation shifting, and given the short notice for doing so, those units would have to operate in violation of their Kentucky Title V permit. Allocations to existing units have been reduced for future years based on EPA's flawed assumptions for generation shifting. In order to overcome the capacity shortage, Kentucky EGUs would have to construct new units, which cannot be accomplished in EPA's proposed timeline. EPA has not given adequate consideration to the implication of generation shifting and the regulatory requirements necessary to allow those units to operate in that capacity.

This proposed rule jeopardizes the reliability of the electricity grid. EPA's extremely short timelines for installing controls or replacing generation from its "third-party global engineering consulting firm" report are not applicable to Kentucky and many other states. A review of the top two boilers in the nation, and application of those assumptions to all EGUs, is irresponsible. In its haste to propose a rule, EPA failed to perform a thorough engineering analysis to determine the best path forward for all states and citizens.

(15) Economic impact to the "Group 3 States" subject to proposed rule

EPA's requirement for control devices on non-EGU processes and equipment ensures that any new unit constructed in one of the 23 "Group 3 States" is also subject to the restrictions. This additional requirement puts those states at a significant economic disadvantage. With this proposed rule, EPA is effectively making economic policy for states, choosing which states will enjoy increased economic growth and potential high paying jobs, and ensuring that the "Group 3" states will not.

By including the implementation of daily backstop emission rates for both EGUs and non-EGUs in the proposed rule, EPA is restricting economic development and potential job growth in Kentucky. Facilities that would be subject to the emissions controls and daily backstop rates proposed in this rule would be unlikely to consider Kentucky a viable location, instead potentially choosing to locate in a state that is not subject to the proposed rule.

This proposed rule punishes manufacturing states like Kentucky. Low cost electricity is an incentive for industries looking to expand and has provided Kentucky with over \$11 billion in investments and new jobs, including two new electric vehicle battery plants. In a time when more emphasis is being placed on American independence from reliance on other countries for goods, this rule inhibits the ability of manufacturing states to be competitive in attracting new businesses. Given the implication of potential, similar future rules, that may include other states, companies may not even choose to locate in a non-FIP state, but choose a different country for their business.

EXHIBIT 3

Declaration of Cristobal Fuentes, Chief Executive Officer of North
American Stainless (May 18, 2023)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

COMMONWEALTH OF KENTUCKY

Petitioner,

v.

Case No. 23-3216

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Respondents.

**DECLARATION OF NORTH AMERICAN STAINLESS IN SUPPORT OF
PETITIONER COMMONWEALTH OF KENTUCKY'S MOTION TO STAY**

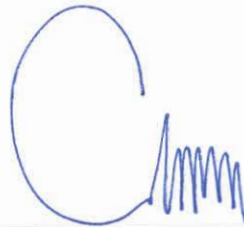
I, Cristobal Fuentes hereby declare as follows:

1. I am the President and Chief Executive Officer of North American Stainless (“NAS”), have been employed by NAS for thirty-one years; I hold the degree of Masters of Metallurgical Engineering from the Madrid Industrial Engineering School and my experience in industry qualifies me to make this declaration.
2. NAS is the largest fully integrated manufacturer of commodity-grade stainless steels in the Western Hemisphere and competes in international markets with other stainless steel manufacturers world-wide; NAS is a wholly-owned subsidiary of Acerinox, S.A., a Spanish corporate entity, shares of which are publicly traded on the Madrid Stock Exchange.

3. Acerinox chose to locate NAS in Kentucky in the early 1990s due in large part to its readily available and competitively priced electrical energy supply, which is among the very most important of all costs of manufacturing stainless steels; electricity is consumed in melting the steel in electric arc furnaces as well as all phases of rolling, forming, gauging thickness and cutting stainless steel for sale to industrial customers who build myriad products using stainless steel due to its ability to remain inert and withstand attack by hostile elements such as corrosion, chemical reactivity and other adverse conditions. A steady supply of stainless steels is absolutely necessary to the functioning of the world's economy and to the security of the United States of America, both physically as well as economically.
4. This declaration addresses the impact on NAS of the denial of Kentucky's State Implementation Plan ("SIP") and the imposition of the Federal Implementation Plan ("FIP") contested herein by Kentucky and against the United States Environmental Protection Agency ("EPA") and is offered in support of the petition of the Commonwealth of Kentucky to stay EPA's actions pending the outcome of this litigation.
5. EPA's actions will substantially and fundamentally increase the costs to NAS of doing business in the form of increased costs and reduced reliability of supply of electricity.

6. As the largest customer on the system, NAS will incur increased costs of production and distribution of electricity from its exclusive, franchised and regulated provider, Kentucky Utilities (“KU”), as demonstrated by its case currently before the Kentucky Public Service Commission (“KPSC”) Case No. 2022-00402, which seeks to restructure electrical generating capacity to comply with the “Good Neighbor” plan.
7. Increased costs resulting from EPA’s actions will reduce NAS’s competitiveness in the marketplace as it competes with subsidized imports.
8. Of greater importance is that NAS’s electric arc furnaces must power without significant interruptions. Any disruption outside the controlled parameters of curtailable power has severe consequences both operationally and financially. Reliability of the power supply and grid distribution is a primary concern for NAS.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 18th day of May in Carroll County, Kentucky.



Cristobal Fuentes
President & Chief Executive Officer
North American Stainless

EXHIBIT 4

Declaration of Jerry Purvis, Vice President of Environmental
Affairs for East Kentucky Power Cooperative Inc. (May 19, 2023)

DECLARATION OF HARM

Comes now the Affiant, Jerry Purvis, in his capacity as Vice President of Environmental Affairs for East Kentucky Power Cooperative, Inc. ("EKPC"), and after being duly sworn, does hereby swear and affirm as follows:

1. My name is Jerry Purvis. I am the Vice President of Environmental Affairs for EKPC. Prior to being involved in the environmental area, I worked in various capacities in EKPC's electric production team for 29 years.
2. This Declaration of Harm is based upon my personal knowledge and experience, formed after reasonable inquiry and due diligence.

EKPC and its Service Areas

3. EKPC is a generation and transmission rural electric cooperative corporation with its headquarters near Winchester, Kentucky.
4. EKPC is owned, operated, and governed by sixteen owner-members, all of whom are rural electric cooperative corporations that use the energy and services EKPC provides.
5. These owner-member cooperatives supply the energy provided by EKPC to approximately 1.1 million customers located in 520,000 homes, farms, and businesses across 87 counties in Kentucky.
6. EKPC's purpose is to generate electricity and transmit it to 16 owner-member cooperatives that distribute it to retail, end use consumers.
7. The end users of electricity in EKPC's service territory live in rural areas with some of the lowest economic demographics in the United States. Having grown up and worked in some of these areas, I am aware that many families, literally, are faced with a regular choice between food, electricity and medicine.

8. Of the eastern Kentucky counties that EKPC's owner-member cooperatives serve, 40 counties experience persistent poverty, as reported by the USDA.
9. Baseload electric generation resources power the region, and Kentucky as a whole, and sustain the grid with reliable access to energy. A balanced generation mix is essential to maintaining a safe and reliable grid.
10. As a rural electric cooperative, EKPC's principal source of capital is the Rural Utilities Service, an agency within the United States Department of Agriculture.
11. EKPC is bound by its mission to ensure it can provide reliable power to its end users in all circumstances, even in the face of challenging weather events.
12. Coal-fired generation assets continue to be important safety nets during these times – as they provide proven, dependable and available power generation.
13. EKPC and its 16 owner-member cooperatives have invested over \$1.6 Billion dollars of a \$3.5 Billion dollar asset company to protect human health and the environment to reduce environmental impacts at its fossil generation facilities.
14. For instance, EKPC previously installed state-of-the art emissions control technology to control NO_x, SO₂, and PM emissions at its Spurlock and Cooper Stations near Maysville and Somerset, Kentucky, respectively.
15. Those efforts extend to significantly lower SO_x (95%), NO_x (78%), PM (over 98%), and CO₂ (5.5%) since 2005.
16. Since 2015, EKPC has devoted substantial resources to ensure compliance with stringent Mercury Air Toxics ("MATS") requirements.
17. Many of the units in EKPC's coal-fired fleet have qualified for low emitting electric generating unit ("EGU") status for HCl.

18. Despite these investments in best available control technology, the Environmental Protection Agency's ("EPA") Federal Implementation Plan ("FIP") for the 2015 Ozone National Ambient Air Quality Standard ("NAAQS") (the "Final Rule" or the "FIP") will irreparably harm and cause injury to EKPC's fleet, EKPC's investments, EKPC's owner-members and the 1.1 million Kentuckians they serve.

Immediate Impacts of the FIP on EKPC

19. Prior to the Kentucky ozone state implementation plan ("SIP") denial in January 2023, EKPC worked with Kentucky Energy and Environment Cabinet ("EEC") as part of the Commonwealth's outreach efforts to stakeholders.
20. Kentucky submitted its SIP to EPA on January 11, 2019.
21. EPA subsequently denied the SIP, basing its disapproval on what it claimed was new information and modeling that was not available when the plan was submitted in 2019.
22. This information was not made available to Kentucky or EKPC.
23. Neither Kentucky nor EKPC was given the opportunity to review either the EPA's new information or the modeling used by EPA to disapprove the SIP, nor was Kentucky given an opportunity to revise its SIP based on the new information and modeling.
24. EKPC, utilities in the state, and Kentucky relied on EPA's guidance in submitting the SIP.
25. Now, EPA leaves Kentucky and its stakeholders in a quandary facing economic development, electrification of infrastructure while federal regulations diminish our abilities to generate safe, reliable and affordable service to Kentuckians.
26. EPA released the pre-publication Final Rule on March 15, 2023. EPA has stated that the FIP will take effect this summer of 2023. The Final Rule will substantially impact the operations of EKPC coal-fired and gas-fired units immediately.

27. The Final Rule applies during the high electricity load summer season, which coincides with the ozone season (May-September) each year.
28. The Final Rule effectively diminishes the fossil fleet capacity by ratcheting down EPA's NOx allocations to the states, which flow down to utilities, such as EKPC.
29. These allocations are not sufficient to allow EKPC to respond to increased electricity demand projected in Kentucky during a peak summer season.
30. The Final Rule also sets an aggressive time frame that is difficult for the power sector and our system, in particular, to implement quickly. New state and unit-level NOx allocations begin in ozone season 2023 leaving virtually no time for regional transmission organizations (RTOs) and generators to plan and execute for new 2023 summer time operational constraints and dispatch changes. The lack of adequate time to react to the new requirements of the Final Rule places the reliability of the bulk power grid in jeopardy.
31. Moreover, utilities must make immediate decisions about whether or not to sell, trade, or use allocations to bolster power supply, and possibly reset power supply obligations with RTOs for 2023.
32. While 2023, 2024 and 2025 NOx allocations are known, the Final Rule leaves little time to develop power supply planning models and environmental compliance plans to transition, invest, permit, build, and retire as prudent utilities.
33. The Final Rule's environmental compliance costs will create a significant risk of energy reliability and economic hardship for Kentucky citizens.
34. The Final Rule's requirements are likely to raise rates to the end user due to the increased costs of NOx allocation pricing, premature asset retirements, environmental controls projects, and the likely potential of unhedged power purchases.

35. It is my opinion the Final Rule will also have negative financial repercussions on states, the nationwide utility sector – including EKPC, end users, small businesses, EGUs and non-EGUs.
36. The Final Rule does not incorporate any meaningful flexibility to address more stringent unit budgets for 2023 or future projected retirements.
37. During the 2023 year, the Final Rule provides no mechanism to address demand increases or generation needs due to severe weather events.
38. Likewise, there is no reliability “safety valve” to address reliability concerns, which generators, including EKPC, urged EPA to incorporate in public comments.
39. Utilities, including EKPC, must immediately (in 2023) decide whether to undertake NOx control upgrade projects for specific units for which the Rule dictates the installation of controls by 2026-2027.
40. EKPC’s Cooper Unit 1 must conduct an expensive NOx control upgrade project or retire. EKPC is forced to make a decision concerning this unit almost immediately to meet the Final Rule’s time frames.
41. RTOs and power generators have no time to devise a diligent plan for 2023 and for the overall Rule’s glide path to ensure compliance while securing grid reliability and public safety.
42. Each of these immediate impacts from the Final Rule are harmful to EKPC, its owner-members and the end-use retail customers they serve throughout the Commonwealth of Kentucky.

Future Impacts Beyond 2023

43. Customer demand for power is projected to increase, both nationally and within EKPC's service area.
44. For instance, the National Renewable Energy Laboratory, which is affiliated with the United States Department of Energy, models nationwide increases in future electricity demand due to the growing United States population and economy.
45. I am aware that Kentucky had a record year in 2021 for economic investment and job creation with 264 private-sector new-location and expansion projects committed to invest over \$11.2 billion and create over 18,100 full-time jobs.
46. EKPC's economic development team projects continued economic growth in Kentucky, which will increase the need for electricity.
47. The Final Rule, however, reduces the flexibility necessary to operate to meet this demand, especially for smaller generation fleets such as EKPC's units.
48. Previously, EKPC could rely on banked surplus NOx allowances to react to increased demands. However, generator allowance banks will be "recalibrated" annually beginning in 2024. The recalibration removes allowances from banks, which minimizes the allowance head room to safely operate and generate power in 2024, 2025 and beyond.
49. EKPC's owner members and cooperatives find themselves sacrificing hard-earned allowances from NOx overcontrol but receive no benefit from those efforts and even receive fewer allocations under this FIP. This means that prudent decisions to reduce NOx emissions in prior years are actually being punished by the Final Rule.
50. The Final Rule also creates uncertainty for EKPC and other utilities because the Rule does not present the unit-specific allocations for 2026, 2027, 2028, 2029 and beyond but

provides a new calculus of rebalancing, ratcheting downward based on each year's operating heat input and declining States allocations.

51. There is vagueness associated with the new allocation process. The lack of allocation budget specificity combined with the dwindling number of state-wide allocations will assuredly create confusion and controversies in future years. Fewer allowances must be allocated across a statewide fleet without regard to the unique operating profiles of individual units.
52. EKPC's coal fleet is projected to have even fewer unit-level allocations beginning in 2030. The Final Rule provides for the removal of pre-set budget floors and will apply dynamic budgeting to squeeze any remaining gap between operation, based on heat input, and allowance allocations.
53. Concurrently, the Final Rule will recalibrate banks tighter such that EKPC and other generators may only keep a maximum of 10.5% based on an EPA calculation of a preset percentage of the sum of the state emissions budgets for each control period.
54. The Final Rule does not give utilities adequate time to build replacement generation for retiring coal-fired assets, which is crucial to maintain reliability.

Conclusion

55. To summarize, EPA's rejection of the SIP collaboratively developed by EKPC, EEC and others and the EPA's adoption of the Final Rule in the SIP's place, has imposed a severe injury to EKPC's RUS-funded investments.
56. The FIP also unnecessarily disrupts the process for enforcing environmental regulations through state agencies, which has proven itself to result in massive reductions in SO_x, NO_x and PM over the past two decades.

57. The EPA’s reliance upon data and modeling not available to EEC and EKPC is incompatible with past precedent and upends the existing process for enforcing the Clean Air Act.

58. All this irreparably and immediately harms EKPC, its owner-members and their end-use retail customers.

59. Further, the Affiant sayeth naught.

Subscribed, sworn to and acknowledged by me, Jerry Purvis, in my capacity as Vice President of Environmental Affairs for East Kentucky Power Cooperative, Inc. on this ___ day of May, 2023.

Jerry Purvis

Jerry Purvis, Vice President of Environmental Affairs of East Kentucky Power Cooperative, Inc.

COMMONWEALTH OF KENTUCKY)
COUNTY OF CLARK)

This will certify that the foregoing Declaration of Harm was subscribed, sworn to and acknowledged before me, the NOTARY PUBLIC, by Jerry Purvis, in his capacity as Vice President of Environmental Affairs for East Kentucky Power Cooperative, Inc. on this 19 day of May, 2023

Lisa G. Stanfield
NOTARY PUBLIC

Commission No. 11141

Commission Expires: 8/15/2024

8/15/24



EXHIBIT 5

Declaration of Nathaniel Berry, Chief Operating Officer
of Big Rivers Electric Corporation (May 19, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY

Petitioner,

v.

Case No. 23-3216

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Respondents.

**DECLARATION OF BIG RIVERS ELECTRIC CORPORATION IN
SUPPORT OF PETITIONER
COMMONWEALTH OF KENTUCKY’S MOTION TO STAY**

I, Nathaniel Berry hereby declare as follows:

1. I am the Chief Operating Officer of Big Rivers Electric Corporation (“Big Rivers” and I have been employed by Big Rivers since 2017.
2. Big Rivers is a Kentucky not for profit corporation based in Owensboro, KY and owned by three Member-Owners: Kenergy Corp., Jackson Purchase Energy Corporation, and Meade County Rural Electric Cooperative Corporation. These Member-Owners are, in turn, owned by the residential, agricultural, commercial, and industrial consumers located in the rural areas of Western Kentucky that encompass their respective service areas.
3. Big Rivers owns and operates electric generation stations and electric transmission facilities for the benefit of its Member-Owners. The Big Rivers

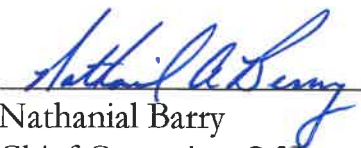
owned generation fleet primarily consists of the 417MW (coal fired) Wilson Station and the 454MW (natural gas fired) Green Station. Big Rivers also has contractual rights to the output of third-party owned hydro, and solar generation assets that are under development. However, this third-party generation comprises a relatively small portion of Big Rivers' generation needs.

4. The proposed federal action at dispute in this matter will result in Big Rivers incurring significant costs and negative long term financial impacts associated with complying with the proposed action.
5. All of Big Rivers' facilities are located in, and Big Rivers is a member of, the Midcontinent Independent System Operator ("MISO") footprint. Pursuant to the MISO tariff, Big Rivers sells all of the generation output it produces into the MISO market and purchases its native load energy requirements back from that same MISO market.
6. Big Rivers sales of electricity fall into two broad categories: (i) sales to its distribution Member-Owners for energy needed to serve retail customers (i.e., all the residential, commercial, industrial, farms, schools, churches, etc., in Big Rivers service area) at rates established by the Kentucky Public Service Commission ("Rural Sales"); and (ii) off-system wholesale sales ("Off System Sales").
7. Since pricing for Off System Sales is set largely by MISO Market rates and, fixed contract rates, other market forces, Big Rivers has exceptionally limited ability to

recover cost increases associated with environmental regulations from these sales.

8. This means that the vast majority of the costs and long term financial impacts of complying with the proposed action will be disproportionately borne by the Member-Owners of Big Rivers and their retail customers.
9. In light of the foregoing, Big Rivers and its Member-Owners will suffer irreparable harm if the proposed action were allowed to take effect.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 19 day of May, at Owensboro, KY.



Nathaniel Barry
Chief Operating Officer
Big Rivers Electric Corporation

EXHIBIT 6

Declaration of Jeffrey D. Brock, Vice President of Business
Development for Alliance Coal, LLC (May 23, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY

Petitioner,

v.

Case No. 23-3216

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*

Respondents.

**DECLARATION OF JEFFREY D. BROCK IN SUPPORT OF PETITIONER
COMMONWEALTH OF KENTUCKY’S MOTION TO STAY**

I, Jeffrey D. Brock hereby declare as follows:

1. I am over eighteen (18) years of age, suffer from no disability that would preclude me from providing this declaration, and make this declaration based upon personal knowledge.
2. I am the Vice President of Business Development for Alliance Coal, LLC (“Alliance”). I have a business address of 1146 Monarch Street, Suite 350, Lexington, Kentucky 40513.
3. I am offering this declaration in support of the Commonwealth of Kentucky’s Motion to Stay in the above-captioned case.

4. In the operation of its business, Alliance provides certain support services to various wholly-owned, independent operating subsidiaries engaged in the mining, preparation, and processing of coal.
5. Alliance’s independent operating subsidiaries engaged in the mining, preparation, and processing of coal in Kentucky include, without limitation: River View Coal, LLC (“River View”) and Warrior Coal, LLC (“Warrior”).
6. I have a Bachelor’s Degree from the University of Kentucky, in mining engineering, and have worked with Alliance (or its predecessors) since September 1994. I have more than thirty (30) years of experience working in and around the energy and mining industries.
7. On February 13, 2023, the EPA published its Final Disapproval of Kentucky’s State Implementation Plan (“SIP”) entitled, “Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards,” 88 Fed. Reg. 9336 (“Final Disapproval”).
8. As a direct result of the Final Disapproval, Kentucky’s authority to enact a reasonable state-specific plan has been nullified.
9. The EPA’s Final Disapproval, in favor of the Proposed Federal Implementation Plan (“FIP”), will have a detrimental and irreversible impact on Alliance Coal, LLC (“Alliance”) and its independent operating subsidiaries, River View Coal, LLC (“River View”) and Warrior Coal, LLC (“Warrior”), as well as their respective employees, vendors, and communities in which they operate.

10. One example of the detrimental and irreversible impact is observed in the request of Kentucky Utilities to prematurely close one (1) coal-fired generating unit at the Ghent power plant and in the request of Louisville Gas & Electric Company to prematurely close two (2) coal-fired generating units at the Mill Creek power plant. These requests are part of current proceedings before the Kentucky Public Service Commission (“PSC”), in *Electronic Joint Application of Kentucky Utilities and Louisville Gas & Electric Company For Certificates of Public Convenience and Necessity and Site Compatibility Certificates and Approval of a Demand Side Management Plan*, Case No. 2022-00402 and *Electronic Joint Application of Kentucky Utilities Company and Louisville Gas & Electric Company For Approval of Fossil Fuel-Fired Generating Unit Retirements*, Case No. 2023-00122 (consolidated with Case No. 2022-00402, by Order of the Kentucky PSC on May 16, 2023).

11. In the event the EPA’s Final Disapproval and corresponding rush to adoption of the Proposed FIP result in the afore-mentioned premature retirement of three (3) coal-fired generating units, the cost of replacement electricity generation sources will result in substantial increases to Alliance, River View and Warrior’s electricity rates.

12. In particular, River View and Warrior are energy intensive businesses, relying upon affordable and reliably available energy.

13. Substantial increases to electricity rates, caused by unnecessary, premature and disruptive replacement of electricity generation sources will make it more

difficult for Alliance, River View, and Warrior to retain current customers and compete economically, particularly against businesses that are less energy intensive and/or operated in states that are not engaged in costly replacement of electricity generation sources.

14. In the event the EPA’s Final Disapproval and Proposed FIP result in the aforementioned premature retirement of three (3) coal-fired generating units, the loss of coal sales to the Mill Creek power plant would jeopardize the viability of Warrior’s Cardinal Mine and its approximately five hundred (500) direct jobs, and substantially more indirect jobs. Consequently, the cascading impact to Warrior’s Cardinal Mine is likely to result in significant economic hardship and damage to the local communities in and around Madisonville, Kentucky, due to the lost economic activity and destruction of the tax base.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 23rd day of May, 2023, at Fayette County, Kentucky.



Jeffrey D. Brock

EXHIBIT 7

Order, *Texas v. EPA*, No. 23-60069 (5th Cir. Apr. 30, 2023)

United States Court of Appeals for the Fifth Circuit

No. 23-60069

STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; LUMINANT GENERATION COMPANY, L.L.C.; COLETO CREEK POWER, L.L.C.; ENNIS POWER COMPANY, L.L.C.; HAYS ENERGY, L.L.C.; MIDLOTHIAN ENERGY, L.L.C.; OAK GROVE MANAGEMENT COMPANY, L.L.C.; WISE COUNTY POWER COMPANY, L.L.C.; ASSOCIATION OF ELECTRIC COMPANIES OF TEXAS; BCCA APPEAL GROUP; TEXAS CHEMICAL COUNCIL; TEXAS OIL & GAS ASSOCIATION; PUBLIC UTILITY COMMISSION OF TEXAS; RAILROAD COMMISSION OF TEXAS; STATE OF MISSISSIPPI; MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY; MISSISSIPPI POWER COMPANY; STATE OF LOUISIANA; LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY; ENTERGY LOUISIANA, L.L.C.; LOUISIANA CHEMICAL ASSOCIATION; MID-CONTINENT OIL AND GAS ASSOCIATION; LOUISIANA ELECTRIC UTILITY ENVIRONMENTAL GROUP, L.L.C.; TEXAS LEHIGH CEMENT COMPANY, LP,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, *Administrator, United States Environmental Protection Agency,*

Respondents.

Petition for Review of a Final Rule
by the Environmental Protection Agency
88 Fed. Reg. 9336-9384

UNPUBLISHED ORDER

Before ENGELHARDT, WILSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

There are five motions before us. The first two concern whether venue should be transferred to the D.C. Circuit. It should not; so, we DENY the motions. The third, fourth, and fifth motions concern whether the case should be stayed pending review of the EPA’s disapproval of Texas’s and Louisiana’s State Implementation Plans. It should; so, we GRANT the three motions.

I.

We first (A) detail the relevant statutory and regulatory background. Then we (B) describe the factual and procedural background.

A.

The Clean Air Act (“CAA” or “the Act”), 42 U.S.C. § 7401 *et seq.*, “establishes a comprehensive program for controlling and improving the nation’s air quality.” *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). But unlike many other federal statutes, the CAA divides enforcement responsibility between the federal and State governments. *See Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (“*Texas 2016*”) (“The Clean Air Act is ‘an experiment in cooperative federalism.’” (quoting *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001))); *see also New York v. United States*, 505 U.S. 144, 167–68 (1992) (listing a handful of similar statutes); *Hodel v. Virginia Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 289 & n.30 (1981) (same). Namely, the EPA identifies air pollutants and sets air quality

No. 23-60069

standards, while the States implement those standards. 42 U.S.C. §§ 7408–10. Though the EPA and the States both have statutory responsibilities under the CAA, Congress gave the States “primary” authority in this context. *Id.* § 7401(a)(3) (“[A]ir pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”); *id.* § 7407(a) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State”); *see also Texas 2016*, 829 F.3d at 411 (“The structure of the Clean Air Act indicates a congressional preference that [S]tates, not EPA, drive the regulatory process.”).

For its part, the EPA is required to set national ambient air quality standards (“NAAQS”) for pollutants that “may reasonably be anticipated to endanger public health or welfare.” *See* 42 U.S.C. §§ 7408, 7409. “Once a NAAQS has been promulgated, the [EPA] Administrator must [continue to] review the standard (and the criteria on which it is based) ‘at five-year intervals’ and make ‘such revisions . . . as may be appropriate.’” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 462–63 (2001) (third alteration in original) (quoting 42 U.S.C. § 7409(d)(1)).

After the EPA promulgates or revises a NAAQS, “[e]ach State must submit a State Implementation Plan”—or “SIP”—“within three years of any new or revised NAAQS.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014) (citing 42 U.S.C. § 7410(a)(1)). Of course, SIPs need to comply with the CAA generally and the NAAQS specifically. *See* 42 U.S.C. § 7410(a)(2) (listing elements that must be included in all SIPs). But States otherwise have “wide discretion” in formulating their SIPs. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976); *see also BCCA*, 355 F.3d at 822 (“[S]tates have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.” (citation omitted)). Indeed: “So long as the ultimate effect of a State’s choice of

No. 23-60069

emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever [approach] it deems best suited to its particular situation.” *Train v. NRDC*, 421 U.S. 60, 79 (1975).

Next—after States submit their SIPs—the EPA conducts a “limited” review. *Texas v. EPA*, 690 F.3d 670, 675 (5th Cir. 2012) (“*Texas 2012*”). The Agency’s review is “limited” in the sense that the CAA “confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act’s requirements.” *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (“*Luminant 2012*”) (citations omitted); *see also* 42 U.S.C. § 7410(k) (detailing the EPA’s timeline for reviewing SIPs). “Thus, if a SIP or a revised SIP meets the statutory criteria of the CAA, then the EPA *must* approve it.” *Texas 2012*, 690 F.3d at 676 (emphasis added); *see* 42 U.S.C. § 7410(k)(3) (“[T]he [EPA] Administrator *shall* approve [a SIP] as a whole if it meets all of the applicable requirements of this chapter.” (emphasis added)). But if (and only if) a SIP is inadequate, “the Act requires the Agency to promulgate a Federal Implementation Plan”—or “FIP”—“within two years.” *EME Homer*, 572 U.S. at 498 (citation omitted); *see* 42 U.S.C. § 7410(c)(1)(B); *see also Texas 2016*, 829 U.S. at 412 (“Only if the [S]tate has not complied with the requirements of the Clean Air Act does EPA assume the role of primary regulator by drafting a state-specific plan.”). A FIP “fill[s] all or a portion of . . . an inadequacy in a [SIP]” and binds the State. 42 U.S.C. § 7602(y).

B.

This case involves the EPA’s 2015 revision of the ozone NAAQS. On October 26, 2015, the EPA lowered the allowable concentration of ozone in the ambient air from 75 parts per billion (“ppb”) to 70 ppb. Ozone NAAQS, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

That triggered the States’ duty to craft SIPs implementing the revised NAAQS—including plans for compliance with the CAA’s so-called “Good

No. 23-60069

Neighbor Provision.” *See EME Homer*, 572 U.S. at 495–99. Because the wind is “heedless of state boundaries,” pollution emitted in upwind States can undermine downwind States’ ability to satisfy NAAQS. *Id.* at 495. To address this aspect of national air quality, Congress included the Good Neighbor Provision in the CAA. It requires that, in addition to meeting NAAQS emissions thresholds within a State’s borders, SIPs must also “contain adequate provisions” prohibiting emissions in amounts that will “contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].” 42 U.S.C. § 7410(a)(2)(D)(i)(I).¹ Although the EPA did not promulgate any regulations regarding the States’ Good Neighbor obligations under the 2015 ozone NAAQS, *see* 42 U.S.C. § 7601(a), it did issue various memos designed to help States satisfy the Provision.²

¹ Areas where concentrations of regulated pollutants satisfy the NAAQS are called “attainment” areas, while those that don’t are called “nonattainment” areas. 42 U.S.C. § 7407(d)(1)(A)(i)–(ii).

² *See* Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, *Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)* (Mar. 27, 2018) [hereinafter March 2018 Memo]; Memorandum from Peter Tsirigotis, Director, Office of Air Quality Planning and Standards, *Considerations for Identifying Maintenance Receptors for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards* (Oct. 19, 2018) [hereinafter October 2018 Memo]; *see also* Notice of Availability of the EPA’s Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone NAAQS, 82 Fed. Reg. 1,733 (Jan. 6, 2017) [hereinafter 2017 Data Announcement]. None, however, was supposed to be binding. *See* October 2018 Memo at 1 (“States may use this information when developing [SIPs] for the 2015 ozone NAAQS addressing the [G]ood [N]eighbor [P]rovision,” but “[t]his document . . . does not impose binding, enforceable requirements on any party.”); March 2018 Memo at 2–3, 6 (similar); 2017 Data Announcement at 1,735 (“[S]tates may rely on this or other appropriate modeling, data or analyses to develop approvable Good Neighbor SIPs.”).

No. 23-60069

After the States submitted their SIPs, the EPA promulgated a final rule on February 13, 2023, disapproving more than 20 States' SIPs for lack of compliance with the Good Neighbor Provision. *See* Interstate Transport of Air Pollution for the 2015 8-Hour Ozone NAAQS, 88 Fed. Reg. 9,336 (Feb. 13, 2023) [hereinafter Final SIP Denial]. Then on March 15, 2023, the EPA signed the Federal Good Neighbor Plan for the 2015 Ozone NAAQS ("Final FIP"), which provides FIPs for 23 upwind States. Three of those States—Louisiana, Mississippi, and Texas, and a variety of other governmental and non-governmental entities therein—petitioned this court for review of the EPA's February 13, 2023 disapproval of their SIPs. *See* 42 U.S.C. § 7607(b).

Our court will consider those petitions in due course. Before us now are five prefatory motions: (1) the EPA's motion to transfer all petitions to the D.C. Circuit; (2) the EPA's motion to dismiss based on improper venue; (3) Texas-based petitioners' two motions to stay the Final SIP Denial as it relates to Texas; and (4) the State of Louisiana's motion to stay the Final SIP Denial as it relates to Louisiana. For the reasons that follow, we DENY the first two motions and GRANT the rest.

II.

We begin with the EPA's motion to transfer venue to the D.C. Circuit under 42 U.S.C. § 7607(b)(1). We assess the "applicability" of § 7607(b)(1) *de novo* and without deference to the agency. *Texas 2016*, 829 F.3d at 417–21. Section 7607(b)(1) states, in relevant part:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator *under this chapter* may be filed only in the United States Court of Appeals for the District of Columbia. A petition

No. 23-60069

for review of the Administrator’s action in approving or promulgating any implementation plan . . . or any other final action of the Administrator *under this chapter* . . . which is *locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is *based on a determination of nationwide scope or effect* and if in taking such action the Administrator *finds and publishes* that such action is based on such a determination.

42 U.S.C. § 7607(b)(1) (emphasis added).

In other words, the CAA’s venue statute divides challenges to EPA “actions” into three general categories. First, “nationally applicable” actions—which must be filed in or transferred to the D.C. Circuit. Second, “locally or regionally applicable” actions—which must be filed in or transferred to the appropriate regional circuit. Third, locally or regionally applicable actions that are “based on a determination of nationwide scope or effect” and accompanied by the EPA’s published finding to that effect—which must be filed in or transferred to the D.C. Circuit. *See Texas 2016*, 829 F.3d at 419; *see also Am. Rd. & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013).

As a preliminary matter, the parties dispute what the relevant “action” is for purposes of § 7607(b)(1). We have said that § 7607(b)(1)’s use of “action” means “the rule or other final action taken by the agency that the petitioner seeks to prevent or overturn.” *See Texas 2016*, 829 F.3d at 419.

No. 23-60069

However, such a broad articulation can be difficult to apply when the Agency takes multiple actions in a single rule. What guides us in those cases?³

We look primarily to the text of the statute. *See Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007); *CleanCOALition v. TXU Power*, 536 F.3d 469, 473–74 (5th Cir. 2008). The applicable statute (here the CAA) is the legal source of the agency’s (here the EPA’s) authority to take the challenged actions (here the SIP denials).⁴ And the CAA makes clear that the EPA’s relevant actions for purposes of the present litigation are its various SIP denials. Specifically, we consider how the EPA’s Final SIP Denial fits into CAA’s step-by-step procedure. First, the EPA sets NAAQS. 42 U.S.C. § 7409(b)(1). Next, “each State” submits its own SIP implementing those NAAQS. *Id.* § 7410(a). Then the EPA approves or disapproves *each State’s* SIP. *See id.* 7410(k)(1)–(3) (“the State,” singular). This final step is the relevant “action,” and it is precisely what the EPA did here. As required by § 7410(k)(3), the EPA *separately considered and disapproved* Texas’s SIP,

³ The precise contours of the Petitioners’ challenges do not define the relevant “action” for § 7607(b)(1)’s purposes. *See, e.g., ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (“The nature of the regulation, not the challenge, controls.”). Nor do the “practical effects” of the action. *Am. Rd. & Transp. Builders*, 705 F.3d at 456. Nor does the EPA’s chosen method of publishing or labeling the action. *See Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979); *accord Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 481 (2d Cir. 1972) (“[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.” (citation omitted)). Accordingly, we do not consider these as guidance in deciding the motion before us.

⁴ *See* 42 U.S.C. § 7607(b)(1) (“final action . . . *under this chapter*” (emphasis added)); *ibid.* (“any other final action of the Administrator *under this chapter*” (emphasis added)). The phrase “under this chapter” in § 7607(b)(1) refers to the Chapter 85 of Title 42 (*i.e.*, the Clean Air Act). *See generally* 42 U.S.C. §§ 7501–7671q; 42 U.S.C. Ch. 85: Front Matter, Editorial Note (“Act July 14, 1955, ch. 360, 69 Stat. 322, as amended, known as the Clean Air Act, which was formerly classified to chapter 15B (§1857 et seq.) of this title, was completely revised by Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 685, and was reclassified to this chapter.”).

No. 23-60069

Louisiana’s SIP, and Mississippi’s SIP because (in its judgment) each failed to comply with the Good Neighbor Provision. Yes, the EPA packaged these disapprovals together with the disapprovals of eighteen other States in the Final SIP Denial. *See* 88 Fed. Reg. 9,336. But again, the EPA’s chosen method of publishing an action isn’t controlling. What controls is the CAA. And the CAA is very clear: The relevant unit of administrative action here is the EPA’s individual SIP denials.

Having isolated the relevant EPA actions at issue, we next (A) explain why the EPA’s SIP denials for Texas, Louisiana, and Mississippi are locally or regionally applicable. Then we (B) reject the EPA’s argument that § 7607(b)(1)’s exception applies.

A.

Under § 7607(b)(1), “nationally applicable” actions must be transferred to the D.C. Circuit, whereas “locally or regionally applicable” actions must not.

The question of whether the three EPA SIP disapprovals at issue are “nationally applicable” “turns on the legal impact” of the three SIP disapprovals. *Texas 2016*, 829 F.3d at 419; *see also, e.g., Texas v. EPA*, 2011 WL 710598, at *3 (5th Cir. 2011) (“*Texas 2011*”) (concluding a nationwide SIP call under 42 U.S.C. § 7410(k)(5) is nationally applicable); *Am. Rd. & Transp. Builders*, 705 F.3d at 455–56 (action disapproving California’s SIP is locally applicable and must be filed in the Ninth Circuit); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (observing that SIPs are “undisputedly regional action[s]” and “the nature of the regulation . . . controls”).

Courts have long held that “SIP rulemakings” are the “prototypical locally or regionally applicable action that may be challenged only in the appropriate regional court of appeals.” *Am. Rd. & Transp. Builders*, 705 F.3d

No. 23-60069

at 455 (quotation and citation omitted); *accord Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 866 (D.C. Cir. 1996). That is unsurprising: the vast majority of actions involving SIPs are necessarily about individual States and are thus “purely local” and “undisputedly regional.” *ATK Launch Sys., Inc.*, 651 F.3d at 1199. Of course, some final actions related to SIPs may be “nationally applicable”—such as when the EPA promulgates regulations that apply to *all* States equally, *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 299–300 (1st Cir. 1989), or issues a SIP call, *see* 42 U.S.C. § 7410(k)(5), requiring States to revise their SIPs in light of a new requirement that applies to *all* States, *Texas 2011*, 2011 WL 710598, at *4. In those cases, transfer to the D.C. Circuit is appropriate because the actions uniformly apply to a broad swath of States. *See id.* (concluding that “Congress intended the D.C. Circuit to review matters on which national uniformity is desirable” as a means to take advantage of the D.C. Circuit’s “administrative law expertise” and facilitate “the orderly development of the basic law under the Act,” and because “[c]entralized review of national issues is preferable to piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results” (quotations and citations omitted)).

But here, the “legal impact” of the three SIP disapprovals is plainly local or regional. Consider “the location of the persons or enterprises that the action[s] regulate[.]” *Texas 2011*, 2011 WL 710598, at *3. The EPA’s three SIP disapprovals at issue involve only the regulation of Texas, Louisiana, and Mississippi emission sources and have legal consequences only for Texas, Louisiana, and Mississippi facilities. The EPA doesn’t point to a single example of our circuit (or any of our sister circuits) granting a similar motion to transfer a petition challenging a SIP approval/denial to the D.C. Circuit, and for good reason: the *State* Implementation Plans, of course, primarily involve individual *States*. Given that the “legal impact” of the EPA’s three SIP disapprovals is in Texas, Louisiana, and Mississippi

No. 23-60069

respectively, we conclude that the EPA’s actions at issue in this case are “locally or regionally applicable.”

B.

Next, the § 7601(b)(1) exception. To overcome the “default presumption” that petitions for review of locally or regionally applicable actions “may only be filed in the United States Court of Appeal for the appropriate circuit,” *Texas 2016*, 829 F.3d at 419 (quoting 42 U.S.C. § 7607(b)(1)) (internal quotation omitted), the EPA must meet both prongs of the § 7601(b)(1) exception. Because the EPA can’t meet the first, we need not consider the second.

To satisfy prong one, the EPA must show that the three SIP disapprovals here were “based on a determination of nationwide scope or effect.” 42 U.S.C. § 7607(b)(1). And we must make an “independent assessment of the scope of the determinations.” *Texas 2016*, 829 F.3d at 421. The EPA faces a steep hurdle given that SIP disapprovals are usually “highly fact-bound and particular to the individual [S]tate.” *Id.* at 421 n.24. That is particularly true here where the EPA itself stated in the Final SIP Denial that each SIP was judged “in light of the *facts and circumstances of each particular state’s submission.*” Final SIP Denial at 9,340 (emphasis added).

The EPA cannot meet its burden. Just like the SIP disapprovals at issue in *Texas 2016*, the three SIP disapprovals at issue here were plainly based “on a number of intensely factual determinations” unique to each State. 829 F.3d at 421. Tellingly, the Final Rule’s explanations for the Texas, Louisiana, and Mississippi SIP denials rely on the individual EPA *regional* offices’ assessments of the unique features of the Texas, Mississippi, and Louisiana SIPs. *See, e.g.*, Final SIP Denial at 9,343; *id.* at 9,354 (disapproving Texas’s SIP based on Region 6’s evaluation of the “individual” attributes of

No. 23-60069

Texas’s SIP). Consider Texas, for example. The EPA’s Region 6 determined: that Texas’s use of the most recent three-year period (2012–2014) to identify downwind maintenance monitors “is less likely to successfully identify maintenance receptors than the EPA method,” EPA Region 6, *2015 8-Hour Ozone Transport SIP Proposal Technical Support Document 11* (Feb. 2022); that Texas’s “modeling underestimates future ozone levels” in 2023, 87 Fed. Reg. at 9,829; and that Texas’s multi-factor weight-of-evidence analysis was not sufficiently “compelling” to “counter” “EPA’s [one-percent] contribution methodology,” *id.* at 9,833–34. These “intensely factual determinations” do not have nationwide scope or effect because they all relate “to the particularities of the emission sources in Texas” and their alleged impact on downwind air quality. *Texas 2016*, 829 F.3d at 421.⁵ The same pattern holds true for Louisiana and Mississippi.

⁵ The dissent acknowledges that “the SIP process is generally highly fact-bound and particular to the individual state.” *Post*, at 28 (quoting *Texas 2016*, 829 F.3d at 421 n.24). However, notes the dissent, “EPA has made determinations in other SIP approvals that may have nationwide scope or effect.” *Id.* (quoting *Texas 2016*, 829 F.3d at 421 n.24). True, in *Texas 2016*, we noted that “[a] determination that a national standard satisfies a particular requirement in each state *may* be a determination that has nationwide scope or effect.” *Texas 2016*, 829 F.3d at 421 n.24 (emphasis added). But “may” implies the Court’s discretion. On the facts before us, the intensely factual determinations do not have nationwide scope or effect.

No. 23-60069

Because the EPA fails to rebut the default presumption that locally or regionally applicable actions must not be transferred to the D.C. Circuit,⁶ the EPA's transfer motion⁷ is DENIED.⁸

III.

Satisfied that venue is proper, we turn to the stay motions.

The Texas and Louisiana Petitioners (“Stay Petitioners”) moved for a stay pending review of the EPA's Final SIP Denial. *See* FED. R. APP. P. 18. To prevail, they must satisfy this familiar four-prong test:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). We consider each prong in turn.

⁶ The dissent contends that the EPA “*explicitly* chose to make” a published finding that the Final Rule was based on a determination of nationwide scope or effect. *Post*, at 29 (citing Final SIP Denial at 9,380-81). But the EPA's position on the matter is not determinative. “Because ‘the determination of our jurisdiction is exclusively for the court to decide,’” we do not defer to the agency when determining venue. *Texas 2016*, 829 F.3d at 417–18 (citations omitted).

⁷ The EPA also filed a motion to dismiss based on improper venue. For the reasons set forth above, venue in the Fifth Circuit is proper. Accordingly, the motion to dismiss is DENIED.

⁸ Our decision today accords with that of the Eighth Circuit. *See Arkansas v. EPA*, No. 23-1320, ECF No. 5269098 (8th Cir. Apr. 25, 2023) (denying EPA's motion to transfer Arkansas's petition to the D.C. Circuit or dismiss for improper venue); *see also State of Utah v. U.S. Environmental Protection Agency*, No. 23-9509, ECF No. 10110851072 (10th Cir. Apr. 28, 2023) (referring respondents' motions to transfer petitions to the D.C. Circuit or dismiss for improper venue to merits panel).

No. 23-60069

A.

First, likelihood of success on the merits. To prevail, Stay Petitioners must demonstrate that the EPA likely “acted arbitrarily, capriciously, or unlawfully.” *Texas 2016*, 829 F.3d at 424–25; *see also Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (“*Luminant 2013*”) (“A petition to review the EPA’s approval or disapproval of a SIP is governed by the Administrative Procedure Act. *See* 5 U.S.C. § 706.”).

Stay Petitioners satisfy their burden in two ways. They (1) make a strong showing that the EPA acted unlawfully by considering factors listed nowhere in the CAA. And they (2) are likely to prevail on the claim that the EPA arbitrarily and capriciously based its Final SIP Denial in part on information only available after Texas and Louisiana had submitted their SIPs.

1.

The EPA exceeded its authority under the CAA by giving undue weight to non-statutory factors when evaluating Stay Petitioners’ SIPs. *See* 5 U.S.C. § 706(2)(A), (C) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law” and/or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”); *see also Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .”). Under the CAA’s cooperative federalism framework, Congress gave the States “‘wide discretion’ in formulating their SIPs, including the ‘broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.’” *Luminant 2013*, 714 F.3d 841 at 845 (first quoting *Union Elec.*, 427 U.S. at 250; then quoting *BCCA*, 355 F.3d at 822). The CAA, by contrast, “confines the EPA to the ministerial function

No. 23-60069

of reviewing SIPs for consistency with the Act’s requirements.” *Id.* at 846 (citing 42 U.S.C. § 7410(k)(3)).

The EPA exceeded its “ministerial” role. Rather than merely ensuring that Texas’s and Louisiana’s SIPs complied with the text of the CAA, *see* 42 U.S.C. § 7410(k)(3), the EPA instead subjected Stay Petitioners’ submissions to a range of factors “not found in the Act,” *Texas 2016*, 829 F.3d at 428. For example, “[t]he EPA used a 4-step interstate transport framework (or 4-step framework) to evaluate each [S]tate’s [SIP] addressing the [Good Neighbor] [P]rovision for the 2015 ozone NAAQS.” Final SIP Denial at 9,338. In its words:

[T]he EPA has developed and used the following 4-step interstate transport framework to evaluate a [S]tate’s [Good Neighbor] obligations . . . : (1) Identify monitoring sites that are projected to have problems attaining and/or maintaining the NAAQS (i.e., nonattainment and/or maintenance receptors); (2) identify states that impact those air quality problems in other (i.e., downwind) states sufficiently such that the states are considered “linked” and therefore warrant further review and analysis; (3) identify the emissions reductions necessary (if any), applying a multifactor analysis, to eliminate each linked upwind state’s significant contribution to nonattainment or interference with maintenance of the NAAQS at the locations identified in Step 1; and (4) adopt permanent and enforceable measures needed to achieve those emissions reductions.

Ibid. This is one “permissible” way to effectuate the CAA’s Good Neighbor Provision, *EME Homer*, 572 U.S. at 524 (holding as much in the FIP context), but it is by no means the only way. That is because the EPA’s preferred “4-step framework” is nowhere to be found in the Good Neighbor Provision. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I) (only requiring that SIPs “contain adequate provisions” prohibiting emissions that will “contribute significantly to

No. 23-60069

nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]”).

True, the EPA “recognized” in its Final SIP Denial “that [S]tates may be able to establish alternative approaches to addressing their [Good Neighbor] obligations for the 2015 ozone NAAQS that vary from [the 4-step] framework.” Final SIP Denial at 9,340. But the Agency backtracks in the next breath: “deviation from [the 4-step] approach to ozone transport *must be substantially justified* and have a well-documented technical basis.” *Ibid.* (emphasis added). Put differently: If a State wants to evaluate its Good Neighbor obligations in any way other than the EPA’s 4-step approach, it must first “substantially justif[y]” that decision to the Agency. *Ibid.* If not violative of the CAA itself, this is at least inconsistent with the statute and jurisprudence applying it.

The EPA’s approach inverts the CAA and “reflects a misapprehension by the EPA of its authorized role in the SIP-approval process.” *Luminant 2012*, 675 F.3d at 928 n.8. The CAA’s text and our precedent compel that “the EPA does not possess *any* discretionary authority in th[e] [SIP-approval] process. *Only* the states enjoy discretion in implementing the dictates of the CAA.” *Ibid.* (emphasis added) (quotation and citations omitted); *see also Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981) (“The great flexibility accorded the states under the Clean Air Act is further illustrated by the sharply contrasting, narrow role to be played by EPA.”). Of course, if the EPA were instead defending a FIP (a *Federal Implementation Plan*) the Agency would be entitled to exercise far more discretion in how to effectuate the Good Neighbor Provision—including by using its preferred 4-step framework. *E.g.*, *EME Homer*, 572 U.S. 489. But unless and until a SIP is lawfully denied, the State remains “primary.” *Compare* 42 U.S.C. § 7401(a)(3) (“[A]ir pollution prevention . . . is the primary responsibility of States . . .”), *and id.* § 7407(a)

No. 23-60069

(“Each State shall have the primary responsibility for assuring air quality . . .”), *and Train*, 421 U.S. at 79 (“The Agency is plainly . . . relegated by the [CAA] to a secondary role . . .”), *with Final SIP Denial* at 9,367 (“The EPA does not, however, agree with the comments’ characterization of the EPA’s role in the [S]tate-[f]ederal relationship as being ‘secondary.’”).

The EPA’s imposition of its preferred 4-step framework is just one example of how the Agency “improperly failed to defer to [Stay Petitioners’] application of the [CAA].” *Texas 2016*, 829 F.3d at 428. Others abound—including the EPA’s rejection of “Texas[’s] . . . definition of maintenance receptors” and “Louisiana’s . . . application of a higher contribution threshold than 1 percent of the NAAQS.” *Final SIP Denial* at 9,356, 9,359; *cf.* 42 U.S.C. § 7410(a)(2)(D)(i)(I) (offering no definition of “maintenance”); *Texas v. EPA*, 983 F.3d 826, 839 (5th Cir. 2020) (“*Texas 2020*”) (“[T]he text of the [CAA] does not require EPA to adopt a one-percent threshold.”). In sum, because the “EPA’s lack of deference to the [S]tate[s] inverts the agency’s ‘ministerial function’ in this system of ‘cooperative federalism,’” *Texas 2016*, 829 F.3d at 428 (citation omitted), Stay Petitioners have made a strong showing that the EPA acted unlawfully. *See also Texas 2012*, 690 F.3d at 675 (“The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over [it] . . .” (quotation omitted)).

2.

The EPA’s actions are also constrained by the Administrative Procedure Act’s arbitrary-and-capricious standard. *See* 5 U.S.C. § 706(2)(A). When an agency acts, it must “reasonably consider[] the relevant issues and reasonably explain[]” its actions. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (citations omitted); *see also Michigan v. EPA*, 576 U.S. 743, 751–52 (2015) (“[A]gency action is lawful

No. 23-60069

only if it rests on a consideration of the relevant factors” and “important aspect[s] of the problem.” (internal quotations and citations omitted)). We cannot “substitute” our “own policy judgment for that of the agency.” *Prometheus*, 141 S. Ct. at 1158. But we must still ensure that “the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained its decision.” *Ibid*. The upshot is that we “must set aside any action premised on reasoning that fails to account for ‘relevant factors’ or evinces ‘a clear error of judgment.’” *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).

Stay Petitioners have demonstrated a strong likelihood of success on their claim that the EPA acted arbitrarily and capriciously. The EPA likely violated § 706(2)(A) when it based its SIP disapprovals in part on policies and modeling data developed *after* Texas and Louisiana had already submitted their SIPs and *after* the EPA’s statutory deadline to act had expired. Two of those decisions are exemplars.

First, the EPA based its disapproval of Texas’s SIP in part on policies that the EPA released on October 19, 2018—months after Texas submitted its SIP, and eighteen days after the October 1 deadline for all States to submit theirs. *See* October 2018 Memo; 42 U.S.C. § 7410(a)(1) (SIP deadline). Worse yet, the October 2018 Memo represented a material shift from earlier guidance, because it changed the EPA’s previous March 2018 guidance by adding *new* hurdles for States to clear when identifying maintenance receptors—such as by proffering evidence of a downward trend in ozone concentrations at the site since 2011. October 2018 Memo at 4; *cf.* March 2018 Memo at A-2 (no such hurdles). The EPA disapproved Texas’s SIP in part because of its failure to abide by the October 2018 Memo—which, to reiterate, was issued *after* the statutory deadline for Texas to submit its SIP.

No. 23-60069

Final SIP Denial at 9,364 (“[The] [S]tates’ submissions did not meet the terms of the . . . October 2018 [Memo] addressing . . . maintenance receptors.”); *see also id.* at 9,370 (“EPA evaluated [S]tate’s [sic] analyses and found no [S]tate successfully applied the[] criteria [in the October 2018 Memo] to justify the use of one of these alternative approaches.”). Such a “[s]udden . . . change” after the SIP submission window was likely arbitrary and capricious. *Smiley v. Citibank*, 517 U.S. 735, 742 (1996). That is particularly true where, as here, the EPA apparently disavowed its initial assurance that its after-the-statutory-deadline memo would “not impose binding, enforceable requirements on any party.” October 2018 Memo at 1.

Second, the EPA also acted arbitrarily and capriciously by grounding its Final SIP Denial in modeling data that wasn’t available when Louisiana and Texas submitted their SIPs. Louisiana’s SIP submission was finalized on November 14, 2019; Texas submitted its SIP on August 17, 2018. Under the CAA, the EPA was required to “act on the submission[s]” by either approving or disapproving them “within 12 months.” *See* 42 U.S.C. § 7410(k)(2). The EPA therefore had until November 14, 2020 to render a final decision on Louisiana’s submission, and almost a year less for Texas’s. Instead of rendering a timely decision, the EPA slow-walked for *years* beyond CAA’s statutory deadline—finally acting on *February 13, 2022*. And when it eventually got around to evaluating Stay Petitioners’ SIPs, the EPA did not use the modeling data that it had published on the eve of the SIP-submission deadline “to assist [S]tates’ efforts to develop [G]ood [N]eighbor SIPs for the 2015 ozone NAAQS.” March 2018 Memo at 1–2. Instead, it relied upon various significant changes to its modeling data that it adopted long *after* the statutory deadline. *See* Final SIP Denial at 9,366 (the “meteorology and boundary conditions used in modeling” became available in November 2020, the “updated emissions inventory files used in the current modeling were

No. 23-60069

publicly released” in September 2021, and the modeling software the EPA used was not public until December 2020).

At best, these choices evince a “clear error of judgment” on the EPA’s part. *Anderson Cancer Ctr.*, 985 F.3d at 475 (quotation omitted). And at worst they perpetrate a “surprise switcheroo” on both Texas and Louisiana. *Env’t Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (Sentelle, J.); accord *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810 (2019) (“surprise switcheroo”). Agencies have wide discretion to deploy their expertise, but they cannot move the administrative goalpost in so doing. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (“[A]gencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires.” (quotation and alteration omitted)).

The EPA responds that the “Act does not prohibit EPA from using the most accurate, up-to-date data to evaluate Good Neighbor SIP submissions, even if that data was not available when a state submitted its SIP.” See also Final SIP Denial at 9,366 (“It can hardly be the case that the EPA is prohibited from taking rulemaking action using the best information available to it at the time it takes such action. Nothing in the CAA suggests that the Agency must deviate from that general principle when acting on SIP submissions.”). That response is unavailing for at least two reasons.

First, regardless of whether the CAA “prohibit[s] EPA from using the most accurate, up-to-date data,” it was nevertheless arbitrary and capricious of the EPA to do so without giving due consideration to the reliance the EPA itself had engendered by publishing guidance and data that—in its words—was designed “to assist [S]tates’ efforts to develop [G]ood [N]eighbor SIPs for the 2015 ozone NAAQS.” March 2018 Memo at 1–2. The EPA isn’t required to issue such guidance to help States discharge their obligations

No. 23-60069

under the Good Neighbor Provision. *See EME Homer*, 572 U.S. at 509–10; Final SIP Denial at 9,363–64. But when the EPA *does* issue such guidance and modeling data—like it did in March 2018—it must take due account of the State’s “serious reliance interests” before “chang[ing] course.” *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citing *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016)). The EPA’s failure to adequately consider the States’ reliance interests before holding them to new guidance and modeling data issued long after the States were statutorily required to submit their SIPs was arbitrary and capricious.

Second, the EPA’s decision to consider after-the-statutory-deadline information also “fail[ed] to account for ‘relevant factors’”—namely, the CAA’s system of cooperative federalism. *Anderson Cancer Ctr.*, 985 F.3d at 475 (quoting *Marsh*, 490 U.S. 360 at 378). Congress decided that the States should “drive the regulatory process.” *Texas 2016*, 829 F.3d at 411. This choice is clearly reflected throughout the CAA, such as the provisions cabin[ing] the Agency’s decisional timeframe, 42 U.S.C. § 7410(k)(1)–(2), and the sections “confi[n]g the EPA to the ministerial function of reviewing SIPs for consistency with the Act’s requirements,” *Luminant 2012*, 675 F.3d at 921; *e.g.*, 42 U.S.C. § 7410(k)(3) (“shall approve”). Here, however, the EPA ignored its statutory deadline by a measure of *years*; used that extra time to collect more data, issue novel guidance, and develop new modeling; denied Stay Petitioners’ SIPs in part based on that new information; then created FIPs imposing the EPA’s policy preferences on the States. Even if, as the EPA suggests, the CAA “does not [explicitly] prohibit EPA from using the most accurate, up-to-date data to evaluate Good Neighbor SIP submissions,” the EPA must still recognize the tension between what it did and what the Act’s system of cooperative federalism requires, then account for that “relevant factor[],” *Marsh*, 490 U.S. 360 at 378. Otherwise, the EPA could easily flout the CAA’s deadlines with impunity, then leverage that disregard

No. 23-60069

to summarily reject SIPs based on the States' failure to consider information that only became available after the SIP-submission deadline.

In so thwarting the CAA, this would also transform the EPA's statutory role from that of a "ministerial" overseer to one of a freewheeling dictatorial regulator. *Luminant 2012*, 675 F.3d at 921; *see also Texas 2016*, 829 F.3d at 430 ("EPA may not use its own delay as an excuse for imposing burdens on [the States] that the [CAA] does not permit."); *Texas 2012*, 690 F.3d at 675 ("The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over [it]." (quotation omitted)). Accordingly, Stay Petitioners have made a strong showing that the EPA "acted arbitrarily, capriciously, [and] unlawfully." *Texas 2016*, 829 F.3d at 424–25.

B.

The remaining factors likewise favor a stay.

Stay Petitioners "will be irreparably injured absent a stay" of the EPA's Final SIP Denial. *Nken*, 556 U.S. at 426 (quotation omitted). The Final SIP Denial was the statutory prerequisite for the EPA to create the Final FIP and impose its preferred system of emissions controls and reductions on the States. 42 U.S.C. § 7410(c)(1)(B). As Stay Petitioners point out, those changes will soon become operative, including for the 2023 ozone season: "The EPA posted the [F]inal FIP on its website on March 15, 2023 . . . [and] has stated that it expects the FIP to be effective in June or July of 2023." And many regulated entities have already commenced compliance efforts or will soon be required to do so. *See* Final FIP at 420 (providing that certain of Stay Petitioners' facilities "will begin participating in the [FIP's] Group 3 trading program on May 1, 2023, regardless of the rule's effective date"); 87 Fed. Reg. 20,036 (Apr. 6, 2022) ("[Regulated entities] should begin engineering and financial planning *now* to be prepared to meet this

No. 23-60069

implementation timetable.” (emphasis added)). The EPA’s Final SIP Denial has thus already caused irreparable injury. Unless stayed, it will do even more harm.

First, “allowing the Final [SIP Denial] to stand pending the appeal would disrupt the system of cooperative federalism enshrined in the Clean Air Act.” *Texas 2016*, 829 F.3d at 433.

Second, Stay Petitioners will be forced to spend billions of dollars in compliance costs to achieve the Final FIP’s emissions-reduction targets. That includes the costs of buying new equipment and retrofitting existing equipment; installing, operating, and maintaining that machinery; and purchasing allowances (at greater cost) on the emissions-trading market. These harms are undoubtedly irreparable because—as the EPA does not contest— “[n]o mechanism here exists for the [Stay Petitioners] to recover the compliance costs they will incur.” *Id.* at 434; *see also BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (“[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” (quotation and emphasis omitted)); *Texas 2016*, 829 F.3d at 433 (“The tremendous costs of the emissions controls impose a substantial financial injury on the petitioner power companies which, in this circuit, may also be sufficient to show irreparable injury.” (quotation omitted)).

Third, the Final FIP will strain Texas’s and Louisiana’s power grids. That’s particularly true here because the Final FIP will become operative in the middle of the summer 2023 peak load conditions. This simultaneous change to Stay Petitioners’ emissions budgets alongside the increased seasonal demand on their power grids will dramatically increase the probability of price spikes and “load-shedding”—*i.e.*, as Stay Petitioners observe, “requir[ing] utilities to disconnect customers from the power grid

No. 23-60069

to avoid a system-wide blackout.” And we have recognized that “the threat of grid instability and potential brownouts alone constitute irreparable injury.” *Texas 2016*, 829 F.3d at 434.

Accordingly, Stay Petitioners have made a strong showing of irreparable harm. The EPA, by contrast, has not demonstrated that “issuance of the stay will substantially injure the[m]” or undermine the “public interest.” *Nken*, 556 U.S. at 426 (quotation omitted). As Stay Petitioners point out, the EPA’s multi-year delay in disapproving Texas’s and Louisiana’s SIPs undercuts any claim that time is of the essence when it comes to imposing the EPA’s Final FIP. But time *is* of the essence with respect to “the public’s interest in ready access to affordable electricity,” *Texas 2016*, 829 F.3d at 405, and “a steady supply of electricity during the summer months,” *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999).

IV.

For the foregoing reasons, the EPA’s motion to transfer all petitions to the D.C. Circuit and motion to dismiss for improper venue are DENIED. Stay Petitioners’ three motions to stay the Final SIP Denial as it relates to Texas and Louisiana are GRANTED. Our ruling here concerns only the motion for transfer, the motion to dismiss, and the motions for stay pending review; “our determinations are for that purpose” only “and do not bind the merits panel.” *Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017).

No. 23-60069

DANA M. DOUGLAS, *Circuit Judge*, dissenting:

The instant matter concerns the EPA’s Final Rule of February 13, 2023, disapproving 21 States’ SIPs for lack of compliance with the Good Neighbor Provision. 42 U.S.C. § 7607(b)(1) determines the proper venue for petitions for review of a final rule. Under its provisions, petitions for review of actions that are “nationally applicable” or that the EPA found and published based on determinations of “nationwide scope or effect” may be filed only in the D.C. Circuit. Here, the EPA applied a uniform national approach to evaluate state plans and ensure equity among them, making the Final Rule at issue nationally applicable on its face. But even assuming the Final Rule to be regional, the EPA made and published a finding that its Final Rule was based on a determination of “nationwide scope or effect.” Because I find venue to be improper in this circuit, I dissent.

In its motion to dismiss or transfer the petitions, the EPA raises the threshold question of whether the petitions are properly adjudicated in this court or whether they belong in the D.C. Circuit under the judicial review provision of the Clean Air Act. *See* 42 U.S.C. § 7607(b)(1). The inquiry begins by determining if the challenged regulation is “nationally applicable” or “locally or regionally applicable.” Applicability turns on “the legal impact of the action as a whole.” *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016) (“*Texas 2016*”). Whether an action is “nationally applicable” is based on “the face of the rulemaking, rather than its practical effects.” *Texas v. EPA*, 706 F. App’x 159, 163 (5th Cir. 2017) (“*Texas 2017*”) (quoting *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015)).

On its face, the Final Rule is nationally applicable. It applied a

No. 23-60069

consistent four-step interstate transport framework⁹ to evaluate plans submitted by states across the country and disapproved of SIPs from 21 states throughout eight of the ten EPA Regions and ten federal judicial circuits. *See Texas v. EPA*, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011) (transferring petition challenging an EPA action notifying 13 states that their SIPs were inadequate) (“*Texas 2011*”); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1200 (10th Cir. 2011) (transferring challenge to an action designating portions of 18 states as failing to comply with a NAAQS because it employed a single uniform regulatory approach across states nationwide); *S. Ill. Power Coop v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (transferring challenge to an action “of broad geographic scope containing air quality attainment designations covering 61 geographic regions across 24 states,” which was “promulgated pursuant to a common, nationwide analytical method”).

The face of the Final Rule indicates it is nationally applicable, but I am further convinced by the arguments raised by Petitioners in their motions to stay which clearly show that Petitioners are challenging a nationally applicable aspect of the Final Rule. Naturally, Texas, Louisiana, and Mississippi frame the challenged actions as particularized SIP denials to support their regional venue argument. However, their own briefing indicates that this is not the action the Petitioners are challenging. Instead,

⁹ The EPA utilized a four-step framework to evaluate compliance with the Good Neighbor Provision for prior ozone NAAQS. The EPA (1) identified nonattainment and maintenance “receptors”; (2) identified upwind states that impact air quality problems in downwind states sufficiently such that the states are considered “linked”; (3) identified any necessary emissions reductions to eliminate each upwind state’s significant contribution to nonattainment or interference with maintenance of the NAAQS at the locations identified in Step 1; and (4) adopted permanent and enforceable measures needed to achieve those emissions reductions. Final Rule, 88 Fed. Reg. 9336, 9338 (Feb. 13, 2023).

No. 23-60069

the State Petitioners' Opposed Motion to Stay challenges the Final Rule on a national scale. The State parties argue that the Final Rule is being challenged because "it fails to explain EPA's after-the-fact reversal of prior guidance regarding how States should identify maintenance receptors," and "disregards the Act's cooperative federalism by denying the SIP based on emissions-modeling data available only *after* Texas [or insert any other state] was statutorily required to submit its SIP provisions." (emphasis in original).

Put differently, the State parties are challenging the EPA's actions of reversing a prior policy that applied to and impacted *all* the states and not providing necessary data to *all* the states prior to the statutory deadline to submit SIP revisions. When framed in the context of the State parties' *own* arguments against the agency action, it becomes clear that they are not challenging the denial of their state SIPs such that the legal impact is only felt in this region, but the framework in which the EPA determined denial was necessary to 21 states throughout this country. See *ATK Launch Systems, Inc.*, 651 F.3d at 1199-1200. Accordingly, the nature of Petitioners' challenge is inextricably intertwined with arguments applicable to challenges to *all other* SIP disapprovals in the Final Rule because they were based on a common EPA rationale and methodology that Petitioners now seek to attack.

The D.C. Circuit, then, is the proper venue for such a challenge. This is supported by our circuit's decision in *Texas 2011*. There, Texas argued its challenge to the SIP call implicated a local, rather than national, aspect of the rule. 2011 WL 7140598 at *4. However, our court noted that Texas's "merits argument in its motion to stay the SIP call challenge only national features of the rulemaking" including that the SIP call was procedurally unlawful. *Id.* We stated "[n]one of these issues turn on the particulars of the SIP Call's impact within this Circuit." *Id.* Likewise, here, none of the issues raised by Texas, Louisiana, and Mississippi turn on particulars within this circuit, but instead on EPA determinants of a national scale that should be

No. 23-60069

considered by the D.C. Circuit. *See also Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 299-300 (1st Cir. 1989) (finding EPA regulations to be “nationally applicable” where they applied to any SIP “that ha[d] been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards” and the list of states governed by the regulations changed as SIPs were approved and disapproved by the EPA).

Accordingly, I would find that our venue inquiry ends there because the State Petitioners challenge nationally applicable regulations, and thus any challenges should be considered by the D.C. Circuit.

However, for the same reasons, this case satisfies the § 7601(b)(1) exception for actions that have nationwide scope or effect. The exception involves a two-pronged inquiry, and the majority finds that the EPA fails at prong one. The majority relies on the disapprovals being based “on a number of intensely factual determinations” which “do not have nationwide scope or effect” because they relate to particularities of emissions sources. However, as noted, although there may be factual determinations relevant to each state, the challenged action is the *nationally applied framework* in which the EPA reviewed the SIPs of all states and denied 21 of them.

The majority relies on *Texas 2016*, which also provides support for a finding of a nationwide scope or effect under the instant allegations. Specifically, *Texas 2016* provides that “[a]lthough the SIP process is generally highly fact-bound and particular to the individual state, EPA has made determinations in other SIP approvals that may have nationwide scope or effect.” *Id.* at 421, fn. 24. Moreover, “[a] determination that a national standard satisfies a particular requirement in each state may be a determination that has nationwide scope or effect.” *Id.* That is precisely the case here.

No. 23-60069

To the second prong, in *Texas 2016*, the EPA explicitly did not make a finding that its Final Rule had a nationwide scope or effect, and thus, our court concluded that this venue was proper. Here, however, the EPA *explicitly* chose to make this finding, stating that its justification for the Final Rule is based on a determination of nationwide scope or effect. Final Rule, 88 Fed. Reg. 9,336, 9380-81 (Feb. 13, 2023) (“[T]o the extent a court finds this action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of ‘nationwide scope or effect’ within the meaning of CAA section 307(b)(1).”).

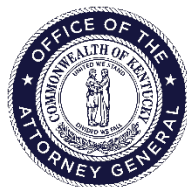
Finally, it is clear from the briefing that these petitions concern “matters on which national uniformity is desirable” and raise the kinds of issues Congress intended for the D.C. Circuit to decide. *Texas 2011*, 2011 WL 710598, at *4. Petitioners here invite multiple circuits to concurrently review the merits of the same legal interpretation, policy decisions, and analytical methodology that the EPA applied consistently in a single agency action to SIPs throughout the United States. Courts may well reach inconsistent outcomes on matters of interstate pollution, which were clearly meant to be filed and considered together in the D.C. Circuit. This is not just a hypothetical problem—states in other circuits are bringing practically the same challenges, which are currently before the Eighth and Tenth Circuits. If this circuit were to determine that the underlying standard utilized by the EPA was wrong, this would impact the EPA’s determinations in other states and would gut the underlying policy of the venue provision: uniformity in standards that have national effect and centralization of SIP review. *See id.* (“Centralized review of national issues is preferable to piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results.”).

No. 23-60069

Having determined venue to be improper, I respectfully dissent, not finding it necessary to reach Petitioners' motions to stay.

EXHIBIT 8

State Comment Letter (June 21, 2022)



Commonwealth of Kentucky
Office of the Attorney General

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June 21, 2022

Via Federal eRulemaking Portal
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 (NO_x) emissions have also fallen, with emissions down by almost 70% since 1990.¹³

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 (NO_x) 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

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-curtailling-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 "inadvertent[t] or . . . unexplained change of course" without a proper justification

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 NO_x.”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

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.

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 furnaces⁴⁵ and produce 79% fewer CO₂ emissions than blast furnaces.⁴⁶ The range of NO_x emissions per ton of steel produced is narrow for electric arc furnaces; they emit around 0.5 – 0.6 lb. of NO_x/ton.⁴⁷ By contrast, the range for basic oxygen furnaces is broad, with some basic oxygen furnaces emitting up to 1 lb. of NO_x/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 NO_x reductions for both.⁵⁰ But an SCR on an already efficient electric arc furnace is not likely to result in NO_x 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 NO_x 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

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 NO_x 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

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

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

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 NO_x 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

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 NO_x, 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

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 NO_x emissions, 2,944 tons in EGU NO_x emissions in the coal steam industry, 188 tons in the oil/gas steam industry, and 3,132 tons in the all-steam industry⁹²—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

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

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

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.

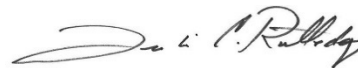
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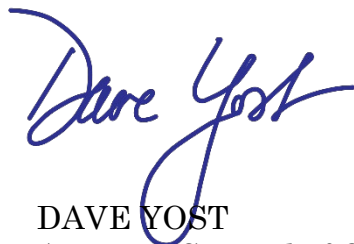
¹¹² U.S. CONST. Art. 1, § 1.



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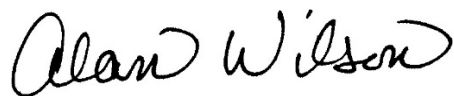
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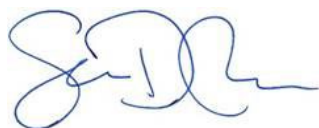
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