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CLEAN AIR TASK FORCE

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Washington, D.C. 20460

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Re: Comments on Proposed Interstate Transport Plan Review for the 2015 Ozone NAAQS, 91 Fed. Reg. 4026 (Jan. 30, 2026), Docket No. EPA-HQ-OAR-2025-0192

Air Alliance Houston, Appalachian Mountain Club, Chesapeake Bay Foundation, Clean Air Task Force, Clean Wisconsin, Earthjustice, Environmental Defense Fund, Natural Resources Defense Council, RiSE4EJ, Sierra Club, Southern Environmental Law Center, Southern Utah Wilderness Alliance, Utah Physicians for a Healthy Environment, and WildEarth Guardians (together, "Public Interest Organizations") submit these comments to highlight the many legal and technical errors in the U.S. Environmental Protection Agency's (EPA) proposed action titled *Interstate Transport Plan Review for the 2015 Ozone NAAQS*, 91 Fed. Reg. 4026 (Jan. 30, 2026) ("Proposal"). As detailed below, the Proposal unlawfully abdicates EPA's statutory duty to ensure upwind States do their fair share to protect downwind States and their residents from

harmful cross-border ozone pollution, and otherwise exceeds the boundaries of EPA's authority under the Clean Air Act. The Proposal is also based on inadequately explained, unsupported, and unreasonable factual findings and conclusions that render it arbitrary and capricious. EPA fails to satisfy the high standard under the change-in-position doctrine for the sweeping changes in policy that the agency has proposed here; in particular, EPA fails to adequately consider serious reliance interests in EPA's prior policies. Furthermore, EPA's rulemaking process fails to comply with the procedural requirements of the Clean Air Act, the Administrative Procedure Act (APA), and multiple Executive Orders.

EPA should abandon this illegal Proposal, and the agency should instead finalize its prior proposed partial disapprovals of state implementation plan (SIP) submissions from Arizona, New Mexico, and Tennessee, as well as its prior proposed error corrections and federal implementation plans (FIPs) for Iowa and Kansas.

BACKGROUND

A. Ozone Pollution Harms Health and the Environment.

Though EPA set the current standard for ground-level ozone pollution over a decade ago, nearly 130 million Americans continue to breathe air that fails that standard today.[1] Those millions of people accordingly face elevated risk of ozone-caused harms to their health, including asthma attacks, permanent lung damage, and cardiovascular and metabolic disease, as well as early death.[2] Studies have shown that ozone may interfere with the development of the placenta during pregnancy, and therefore impaired blood to the fetus.[3] As a result, virtually all types of pregnancy complications occur more often among pregnant mothers exposed to more ozone, such as gestational hypertension, pre-eclampsia, still births, premature birth and maternal heart dysfunction.[4] For example, chronic and acute ozone consistently increase the risk of still births. Specifically, ozone spikes in the week prior to delivery increased the risk of still birth

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[1] EPA, 8-Hour Ozone (2015) Designated Area/State Information, https://www3.epa.gov/airquality/greenbook/jbtc.html (last visited March 15, 2026) (2010 population).

[2] *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,308 (Oct. 26, 2015); EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* 2-20 to -24, tbl.2-2 (Feb. 2013) (EPA-HQ-OAR-2008-0699-0405); American Lung Assoc., *State of the Air: 2022 Report* at 24-25 (2022) (EPA-HQ-OAR-2021-0668-0270); EPA, *EPA's "Good Neighbor" Plan Cuts Ozone Pollution—Overview Fact Sheet* at 4 (Mar. 2023), https://www.epa.gov/system/files/documents/2023-03/Final%20Good%20Neighbor%20Rule%20Fact%20Sheet_0.pdf.

[3] R. Hunter et al., *Gestational ozone inhalation elicits maternal cardiac dysfunction and transcriptional changes to placental pericytes and endothelial cells*, 196 Toxicological Sciences 238 (2023), https://doi.org/10.1093/toxsci/kfad092 (attached as Ex. 1).

[4] M. Garcia et al., *Early Gestational Exposure to Inhaled Ozone Impairs Maternal Uterine Artery and Cardiac Function*, 179 Toxicological Sciences 121 (2021), https://doi.org/10.1093/toxsci/kfaa164 (attached as Ex. 2); K.M. Rappazzo et al., *Ozone exposure during early pregnancy and preterm birth: A systematic review and meta-analysis*, 198 Environ Res. 111317 (2021), https://pubmed.ncbi.nlm.nih.gov/33989623/ (attached as Ex. 3).

13-22%, meaning thousands of still births a year may be attributable to ozone.[5] In this study, average levels of ozone did not exceed the EPA's national standard. In addition, ozone induces neurotoxicity and may contribute to the risk of neurodegenerative diseases like Alzheimer's disease.[6]

In its 2020 Integrated Scientific Assessment for Ozone, EPA concluded that "[r]ecent studies support and expand upon the strong body of evidence, which has been accumulating over many decades, that short-term ozone exposure causes respiratory effects."[7] Those effects can include decreases in lung function, asthma and chronic obstructive pulmonary disease exacerbations, and increases in respiratory-related hospital admissions and emergency room visits.[8]

For short-term exposure, EPA found that "[e]pidemiologic studies continue to provide evidence that increased ozone concentrations are associated with a range of respiratory effects, including asthma exacerbation, chronic obstructive pulmonary disease (COPD) exacerbation, respiratory infection, and hospital admissions and [emergency department] visits for combined respiratory diseases."[9] Short-term exposure to ozone can have critical health implications. For instance, there is strong evidence of an association between out-of-hospital cardiac arrests and short-term exposure to ozone.[10] Timescales of exposure up to three hours in duration and also at the daily level on the day of the event were significant. This evidence augments the long-standing body of literature demonstrating the serious impacts from short-term exposure to ozone pollution.[11]

Short-term ozone exposure has also been linked to other cardiovascular effects. A large body of research provides robust evidence of the relationship between ozone and strokes, as well as some evidence for arrhythmias in those with pre-existing heart disease. A large meta-analysis of over 20 studies found a 2.45% increase in ischemic stroke rate per 10 parts per billion ("ppb") increase in ozone.[12]

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[5] P. Mendola et al., *Chronic and Acute Ozone Exposure in the Week Prior to Delivery Is Associated with the Risk of Stillbirth*, 14 Int'l J. Environ Res Public Health 731 (2017), https://pmc.ncbi.nlm.nih.gov/articles/PMC5551169/ (attached as Ex. 4).

[6] G. Bjørklund et al., *Ozone-induced Neurotoxicity: Mechanistic Insights and Implications for Neurodegenerative Diseases*, 2026 Current Medicinal Chemistry 1 (2026), https://pubmed.ncbi.nlm.nih.gov/40641015/.

[7] EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants*, at IS-1, EPA/600/R-20/012 (Apr. 2020), https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=348522 ("2020 ISA").

[8] *Id.*

[9] *Id.* at IS-8.

[10] Zhiqiang Zong et al., *Association between Short-Term Exposure to Ozone and Heart Rate Variability: A Systematic Review and Meta-Analysis*, 19 Int'l J. Env't Res. & Pub. Health 11186 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9517606/ (attached as Ex. 5); Katherine B. Ensor et al., *A Case-Crossover Analysis of Out-of-Hospital Cardiac Arrest and Air Pollution*, 127 Circulation 1192 (2013), https://www.ncbi.nlm.nih.gov/pubmed/23406673 (attached as Ex. 6).

[11] *See* 2020 ISA, *supra*, at IS-1

[12] Wan-Shui Yang et al., *An evidence-based appraisal of global association between air pollution and risk of stroke*, 175 Int'l J. Cardiology 307 (2014), https://pubmed.ncbi.nlm.nih.gov/24866079/.

Long-term exposure to ozone likewise has critical health implications. EPA has concluded that there is "likely to be a causal relationship between long-term ozone exposure and respiratory effects."[13] Studies have reported positive associations between long-term ozone exposure and new-onset asthma, and respiratory symptoms in children with asthma.[14] Indeed, following nearly 6,000 patients in six different cities over 10 years, using CT scans and lung function tests to assess lung health, researchers found that an increase of just 3 parts per billion (ppb) in ozone during those 10 years was associated with an emphysematous deterioration of lung tissue comparable to what would be seen from smoking a pack a day of cigarettes for 29 years.[15] The annual average ozone observed during those ten years was between 10 and 25 ppb.

Those harms are not equitably distributed. While ozone is harmful to healthy adults, it is more harmful to children, people with lung disease, those working or exercising outside, and older people.[16] People of color are more likely to be exposed to high levels of ozone and are more likely to suffer from chronic conditions that increase their susceptibility.[17] Black children are twice as likely to be hospitalized for asthma as white children and four times as likely to die from asthma.[18,19]

Ground-level ozone forms from precursor air pollution, such as nitrogen oxides (NOx) emitted by sources like power plants, industrial boilers, and cars.[20] Such air pollution is "heedless of state boundaries" and "often transported … over hundreds of miles, to downwind States." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). As a result, "upwind States are relieved of the associated costs" which "are borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution." *Id.*

In addition to harming human health, ozone pollution damages ecosystems, as EPA documented when it updated the ozone NAAQS in 2015.[21] Ozone impairs plant growth, damages the leaves of plants and trees, and reduces agricultural yields for numerous common and

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[13] 2020 ISA, *supra*, at IS-8 (internal quotation marks omitted).
[14] *Id.*
[15] M. Wang et al., *Association Between Long-term Exposure to Ambient Air Pollution and Change in Quantitatively Assessed Emphysema and Lung Function*, 322 JAMA 546 (2019), https://jamanetwork.com/journals/jama/fullarticle/2747669 (attached as Ex. 7).
[16] American Lung Assoc., State of the Air 2025, Health Impacts of Air Pollution, https://www.lung.org/research/sota/health-risks; *see* S.A. Korrick et al., *Effects of ozone and other pollutants on the pulmonary function of adult hikers*, 106 Env't Health Perspectives 93 (1998), https://pubmed.ncbi.nlm.nih.gov/9435151/ (attached as Ex. 8).
[17] *Id.* at 26.
[18] EPA, Children's Environmental Health Disparities: Black and African American Children and Asthma at 3, https://www.epa.gov/sites/production/files/2014-05/documents/hd_aa_asthma.pdf (accessed Mar. 15, 2026).
[19] For further discussion of the health effects from ozone exposure, including a summary of scientific research and numerous EPA assessments, see the Declaration of Veronica Southerland, Ph.D. (attached as Ex. 9).
[20] EPA, Ground-level Ozone Basics, https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics.
[21] EPA, *Regulatory Impact Analysis of the Final Revisions to the Nat'l Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/R-15-007, at 1-13 (2015), https://www3.epa.gov/ttnecas1/docs/20151001ria.pdf.

economically valuable plant and tree species.[22] "In terms of forest productivity and ecosystem diversity, ozone may be the pollutant with the greatest potential for region-scale forest impacts."[23] NOx emissions, which contribute to ozone formation and are reduced to attain ozone NAAQS, themselves cause ecological harm when they fall to the earth's surface as nitrogen deposition.[24] Excess nitrogen reduces soil and plant biodiversity, especially in low nutrient adapted ecosystems, and, when deposited to surface waters, causes acidification impacts and harmful algae blooms, which block sunlight from reaching underwater grasses and, when decomposing, suck oxygen from the water and create dead zones where fish and other aquatic species cannot survive.[25] For these reasons, regulation of ozone and its precursor NOx plays an important role in protecting and restoring treasured natural areas throughout the country, like national parks[26] and the Chesapeake Bay.[27]

B. Interstate Pollution Contributes Significantly to Ongoing Difficulty Attaining and Maintaining the Ozone Air Quality Standards Across the United States.

To protect public health and welfare, Congress directed EPA to establish national standards limiting ozone. 42 U.S.C. §§ 7408(a), 7409(b). After EPA sets or revises a standard and designates areas as failing to attain that standard, States must then develop and submit to EPA plans that will achieve and maintain the standard "as expeditiously as practicable but not later than" statutory deadlines, which are based on the severity of States' ozone pollution levels. *Id.* §§ 7410(a), 7511(a)(1).

Polluted downwind States often find their efforts to timely achieve attainment hindered by emissions from upwind States. *See, e.g.*, *Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir. 2019). To remedy that problem, the Clean Air Act's aptly named "Good Neighbor Provision"

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[22] EPA, *Air Quality Criteria for Ozone and Related Photochemical Oxidants*, EPA 600/R-05/004aF-cF, at 9-1 (2006), https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=149923.
[23] EPA, *Regulatory Impact Analysis of the Final Revisions to the Nat'l Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/R-15-007, at 7-3 (2015).
[24] *See id*. at 7-2.
[25] *Id*. at 7-6.
[26] Nat'l Parks Conservation Ass'n, *Polluted Parks: How Air Pollution and Climate Change Continue to Harm America's National Parks* at 2 (2024) (attached as Ex. 10) ("96% of parks have sensitive species and natural habitats harmed by sulfur and nitrogen deposition and ozone pollution.").
[27] *See* EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment*, at 4-33 (Dec. 2010), https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document; *Id*. at Appendix L: Setting the Chesapeake Bay Atmospheric Nitrogen Deposition Allocations, at L-23 ("the nitrogen deposition directly to the Bay's tidal surface waters is a direct loading with no land-based management controls and, therefore, needs to be linked directly back to the air sources and air controls as EPA's allocation of atmospheric nitrogen deposition"); EPA, Restore Clean Water Actions: Federal Water Quality Two-Year Milestones for 2024-2025 at 12 (Dec. 2024), https://federalleadership.chesapeakebay.net/files/2025/2024_2025_Federal_2_Year_Milestones_Midpoint_Progress_April_2025_Final.pdf (noting EPA commitments to "[w]ork with states to develop State Implementation Plan (SIP) revisions to reduce NOx emissions" and "[w]ork with states and review SIPs that address infrastructure requirements, including interstate transport, for the 2015 ozone NAAQS").

requires States to implement measures to control pollution that is emitted in their State but contributes to poor air quality in another State downwind. 42 U.S.C. § 7410(a)(2)(D)(i).

Once EPA receives a plan, it is obligated to approve or disapprove the plan based on whether "it meets all of the applicable requirements" of the Clean Air Act, including the Good Neighbor Provision. *Id.* § 7410(k)(3); *New York v. EPA*, 964 F.3d 1214, 1218 (D.C. Cir. 2020). For States with disapproved plans (or those that failed to submit plans), EPA must promulgate within two years a federal plan for those States. *Id.* § 7410(c)(1).

C. The 2015 Ozone NAAQS and Its Stalled Implementation.

In 2015, EPA strengthened the health-based National Ambient Air Quality Standard (NAAQS) for ground-level ozone in the outdoor air to 70 ppb. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). This triggered a requirement for States to adopt and submit to EPA within three years plans that, among other things, contained "adequate provisions" to "prohibit[] ... 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."—the "Good Neighbor Provision." 42 U.S.C. §§ 7410(a)(1), 7410(a)(2)(D)(i)(I).

Many States submitted "do nothing" plans to EPA that failed to control cross-state ozone pollution; others submitted no plans at all. EPA, in turn, failed to meet statutory deadlines to act on those submissions, or to issue findings that states had failed to submit plans. Instead, parties impacted by the unlawful interstate pollution brought suit against EPA challenging its failure to meet statutory deadlines. *See, e.g.*, Order Granting Consent Decree, Downwinders at Risk, et al. v. Regan, No. 4:21-cv-3551 (N.D. Cal., Jan. 12, 2022). Subsequently, EPA disapproved those submissions, as the Clean Air Act required. *See* 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) (the "SIP Disapproval Rule"); 42 U.S.C. § 7410(k)(3). For States with disapproved plans and States that failed to submit a plan, EPA had to issue federal plans. 42 U.S.C. § 7410(c)(1). EPA did so in 2023, when it finalized the Good Neighbor Rule. *See* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, 36,656-57 (June 5, 2023) (the "Good Neighbor Rule"). To satisfy twenty-three States' good neighbor obligations, the Rule limits ozone-precursor emissions from large, high-polluting power plants and other industrial sources in those States. *Id.* The Rule's emission limits apply only during the months of May to September—known as the "ozone season"—when ozone levels typically peak. *See id.* at 36,817. When fully implemented, the Rule would reduce harmful ozone pollution in downwind States and significantly benefit public health. *See id.* at 36,666 (estimating benefits of the Rule).

States and industry groups challenged EPA's state plan disapproval action in multiple courts of appeals and obtained partial stays of the disapproval action during litigation as to twelve States, *see* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 49,295, 49,296-97 (July 31, 2023) (noting judicial stays as to Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas); Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 67,102, 67,103 (Sept. 29, 2023) (noting judicial stays as to Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia), and eventual vacatur of the disapproval actions as to Kentucky, *Kentucky v. EPA*, 123 F.4th 447 (6th Cir. 2024), and Mississippi, *Texas v. EPA*, 132 F.4th 808 (5th Cir. 2025).[28] The Ninth Circuit ultimately lifted the stay of the disapproval action as to Nevada after the parties settled the case. Order, *Nevada Cement Co. v. EPA*, No. 23-682, Doc. 65.1 (9th Cir. Dec. 17, 2024). Litigation over EPA's state plan disapproval actions for seven states (Alabama, Arkansas, Minnesota, Missouri, Oklahoma, Utah, and West Virginia), is currently in abeyance.

The Good Neighbor Rule itself was challenged in the U.S. Court of Appeals for the D.C. Circuit, and all petitions were consolidated under lead case *Utah v. EPA*, No. 23-1157. Multiple petitioners filed motions to stay the Rule, which the court denied. Order, ECF#2018645 (D.C. Cir. Sept. 25, 2023); Order, ECF#2021268 (D.C. Cir. Oct. 11, 2023). In October 2023, certain State and industry parties applied for an emergency stay of the Rule from the U.S. Supreme Court, which the Court granted as to the applicants on June 27, 2024. *Ohio v. EPA*, 603 U.S. 279, 300 (2024). The D.C. Circuit merits litigation is fully briefed but is currently in abeyance pending EPA's ongoing reconsideration of the Rule.

In the meantime, downwind states have continued to struggle with attaining the NAAQS in large part due to pollution flowing in from upwind states. For example, in 2022 EPA noted that 22 areas designated as in marginal nonattainment of the 2015 ozone NAAQS had failed to attain by the applicable deadline, and those areas were accordingly "bumped up" in designation severity to moderate nonattainment. *See* Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,897 (Oct. 7, 2022).[29] And

[28] On March 9, 2026, the Fifth Circuit withdrew the opinion in *Texas v. EPA*, and substituted a new opinion on March 13, 2026. *See Texas v. EPA*, No. 23-60069, slip op. at 1 (5th Cir. filed March 13, 2026). The new opinion reinstates the portions of the 2025 opinion concerning the Mississippi and Louisiana SIP disapprovals. *Id.* at 54 ("... neither Louisiana nor any other party sought panel rehearing or rehearing en banc with regard to our disposition of either Louisiana's or Mississippi's petitions for review of EPA's disapproval of their respective SIPs. We leave our prior determinations regarding their SIPs undisturbed. We reinstate the parts of our prior decision that dealt with Louisiana's and Mississippi's SIPs").

[29] The areas in question are: Allegan County, Michigan (MI); Baltimore, Maryland (MD); Berrien County, Michigan; Chicago, Illinois-Indiana-Wisconsin (IL-IN-WI); Cincinnati, Ohio-Kentucky (OH-KY); Cleveland, Ohio; Dallas-Fort Worth, Texas (TX); Denver Metro/North Front Range, Colorado (CO) (Denver area); Greater

again, in 2024, found that multiple areas failed to attain by the August 3, 2024 attainment deadline, and those areas were consequently bumped up in designation severity to serious nonattainment. *See* Findings of Failure To Attain and Reclassification of Areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin as Serious for the 2015 Ozone National Ambient Air Quality Standards, 89 Fed. Reg. 101,901 (Dec. 17, 2024).[30] The absence of appropriate good neighbor protections means these downwind areas are solely responsible for the cost of reducing pollution impacting their local air quality, whether or not they are its source.[31]

Currently 53 areas consisting of 209 different counties are failing to meet the NAAQS.[32]

DETAILED COMMENTS

I. The Proposal Exceeds EPA's Statutory Authority.

As explained below, the Proposal exceeds the bounds of EPA's authority under Section 110 of the Clean Air Act, 42 U.S.C. § 7410, and is contrary to the text, structure, history, and purposes of the Act—including the Good Neighbor Provision, *id.* § 7410(a)(2)(D)(i)(I), which Congress enacted "to enable downwind States to keep their levels of [air pollution] in check." *EME Homer*, 572 U.S. at 496-97; *see also Wisconsin v. EPA*, 938 F.3d 303, 316 (D.C. Cir. 2019) (same). Nothing in the Fifth and Sixth Circuit's recent decisions on two particular SIP disapproval records requires, let alone authorizes, EPA's wholesale abdication of its statutory duty to ensure upwind States satisfy their good neighbor obligations and take responsibility for the pollution their sources emit. The Proposal must be withdrawn.

Connecticut, Connecticut (CT); Houston-Galveston-Brazoria, Texas; Louisville, Kentucky-Indiana; Mariposa County, California; Milwaukee, Wisconsin; Muskegon County, Michigan; North Wasatch Front, Utah; Pechanga Band of Luiseno Mission Indians; Philadelphia-Wilmington-Atlantic City, Pennsylvania-New Jersey-Maryland-Delaware (PA-NJ-MD-DE); Phoenix-Mesa, Arizona; San Antonio, Texas; Sheboygan County, Wisconsin; St. Louis, Missouri-Illinois (MO-IL); and Washington, District of Columbia-Maryland-Virginia (DC-MD-VA). *Id.* at 60901, tbl.2.

[30] Specifically, Allegan County, MI; Berrien County, MI; Chicago, IL-IN-WI; Cleveland, OH; Milwaukee, WI; Muskegon County, MI; Sheboygan County, WI; and the Illinois portion of the St. Louis, MO-IL areas failed to attain the 2015 ozone NAAQS. *Id.* at 101,902.

[31] There is pending litigation over the bump-ups for at least some of these areas, which has resulted in some stays (*see, e.g.*, State of Wisconsin v. EPA et al., No. 25-1239, Doc. 16 (7th Cir. Sept. 5, 2025), and EPA recently proposed clean data determinations for several such areas, relying on exceptional events. *See, e.g.*, 91 Fed. Reg. 9800 (Feb. 27. 2026) (Cleveland, Ohio); 91 Fed. Reg. 9516, 9519 (Feb. 26, 2026) (St. Louis, Missouri and Illinois). These proposals are pending, however, and may lack merit.

[32] *See* EPA, Green Book, 8-Hour Ozone (2015) Designated Area/State Information, https://www3.epa.gov/airquality/greenbook/jbtc.html (last visited March 15, 2026).

A. EPA's Proposed New Approach to Evaluating State Submissions Is Contrary to the Text and Purposes of the Clean Air Act and Its Good Neighbor Provision.

Air pollution does not stop at state lines, and thus all states have the potential to pollute or be polluted by their neighbors, threatening the ability of states both individually and collectively to achieve safe air quality. Congress recognized that the interstate transport of pollution means that upwind States do not bear the full cost of pollution generated in-state and therefore have an incentive to pollute at the expense of air quality in downwind States. To address this problem, Congress enacted the Good Neighbor Provision, which requires upwind States to eliminate their significant contributions to downwind nonattainment. 42 U.S.C. § 7410(a)(2)(D)(i)(I). To protect downwind States, Congress directed EPA to review state plans implementing these requirements and ensure that states carry out their obligations in compliance with the law, including by promulgating and implementing federal plans where state plans are inadequate. Robust EPA review of good neighbor SIP submissions is necessary for Congress's regulatory scheme to function and for downwind States—and their air-breathing residents—to be assured the full Clean Air Act-promised measure of protection against polluted air from upwind States.

EPA proposes to turn that system of cooperative federalism on its head, abandoning its oversight role in favor of deference to the interests of upwind States. Rather than undertake an independent assessment of whether a State's proposed implementation plan actually eliminates air pollution that contributes significantly to nonattainment or interferes with the maintenance of attainment in downwind States, the Proposed Rule abdicates EPA's supervisory role and approves each SIP at issue by applying the most permissive available alternative. To accomplish this, EPA engages in two inconsistent moves–one ignoring flaws in the upwind State's proposal; the other affirmatively overriding choices the upwind State made in its proposal–with the two moves carefully leading to the same result: privileging upwind emissions at the expense of air quality and public health in downwind States.

First, the Proposed Rule uncritically adopts each State's chosen model, deviating only where new modeling (even if uncited by the State) would allow States to *further* avoid making necessary pollution reductions. In taking this approach without any reference to the quality of the available models, EPA abandons its duty to independently assess each SIP's analysis of significant contributions, allowing States to make self-serving selections designed to avoid their statutory pollution control requirements. But, second, EPA quickly abandons that deference to state modeling where it serves EPA's deregulatory preferences. Where even the State's self-selected model finds linkages above the historically applied threshold for those obligations, the Proposal seeks to ignore those linkages by raising the threshold for linkage–even if the state itself did not follow that approach. In both its approach to modeling and in its choice of contribution threshold, EPA undermines the purpose of the Good Neighbor Provision, and abandons the supervisory role the Act requires it to play in favor of a bespoke process with a

preordained result: to find *no* applicable pollution control requirements for any of these upwind states.

1. EPA's Proposed Approach to Modeling Conflicts with Its Supervisory Obligations under the Act.

The Clean Air Act's "central object is the 'attain[ment] [of] air quality of specified standards [within] a specified period of time.'" *Wisconsin*, 938 F.3d at 316 (quoting *Train v. Nat. Res.*, 421 U.S. 60, 64-65 (1975)). To achieve that goal, the Act divides responsibility for the attainment of NAAQS among the States. Each State must adopt its own SIP providing for the achievement of national air quality standards in their State. *Id.* at 309. Attaining these standards is important because exposure to pollutant concentrations above the NAAQS level is presumptively unhealthy. *See* 42 U.S.C. § 7409(b)(1).

This state-by-state approach faces a "confounding variable." *Wisconsin*, 938 F.3d at 309. Air pollution emitted by one state may travel to, and negatively impact the air quality, of downwind states. *Id.* "Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs." *EME Homer*, 572 U.S. at 495. The downwind State, by contrast, may only compensate for the pollution it receives from upwind neighbors by cutting the levels of pollution generated within its own borders. *Id.* Thus, the interstate transport of pollution makes it more difficult for downwind States to achieve timely attainment of the NAAQS and makes downwind communities and economies bear the costs of upwind pollution.

Congress's answer to this problem is the Good Neighbor Provision, which establishes a system of cooperative federalism under which each State must account for pollution spilling beyond its borders, with EPA overseeing those efforts to make sure that they do so in compliance with the Act. Under the Good Neighbor Provision, States must submit SIPs containing "adequate provisions" prohibiting in-state polluters "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 the applicable NAAQS. 42 U.S.C. § 7410(a)(2)(D).[33] EPA then independently assesses whether the SIP satisfies the State's obligations to eliminate its significant contributions and either approves or disapproves the submission. *Id.* § 7410(k); *see also Texas v. EPA*, 132 F.4th 808, 832 (5th Cir. 2025) ("EPA must undertake an independent analysis of whether the submission complies with the Provision."). If EPA disapproves the SIP in whole or in part, it must promulgate a FIP to address significant contributions to downwind nonattainment unless the State corrects the deficiencies in its plan. 42 U.S.C. § 7410(c)(1). In so

[33] For many years, EPA has applied the same "significant contribution" test to both downwind nonattainment areas and downwind maintenance areas. Though the statute applies that test only to nonattainment areas, not maintenance ones, and we preserve the objection that EPA legally errs in applying it to both, in these comments we generally follow EPA's historical approach.

doing, the Good Neighbor Provision does not seek to impose pollution reduction requirements *beyond* what the NAAQS demand; it merely ensures the reductions–and associated costs–are equitably distributed, rather than falling just on the downwind states affected by the pollution.

Congress has repeatedly amended the Good Neighbor Provision, each time increasing States' obligations to take responsibility for the interstate transport of air pollution. In 1963, Congress required the federal government to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution." *EME Homer*, 572 U.S. at 497-98. In 1970, Congress made that cooperation mandatory, requiring SIPs to include "adequate provisions for intergovernmental cooperation" regarding interstate transport. *Id.* at 498.

In 1977, Congress again amended the Good Neighbor Provision to require that SIPs include provisions "adequate" to "prohibi[t] any stationary source within the State from emitting any air pollutant in amounts which will … prevent attainment or maintenance" by another State. *Id.* at 498-99. This amendment required States to account for in-state emissions, but critically, it regulated only "individual sources that, considered alone, emitted enough pollution to cause nonattainment in a downwind state." *Id.* at 499. Because it did not require states to control the "collective 'emissions [of] multiple sources,'" the provision was ultimately ineffective. *Id*.

Recognizing this shortcoming, Congress enacted the Good Neighbor Provision in its current form in 1990. The provision as amended now requires that SIPs account for collective in-state emissions by prohibiting "any source or other type of emissions activity within the state" from emitting in amounts that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State." *Id.* This sequence of amendments reflects Congress's commitment as a matter of national policy to ensuring that downwind States are not forced unfairly to bear the costs of upwind pollution.

Importantly, Congress recognized that making this commitment true in practice and not just on paper required independent review and oversight at the federal level to make sure that States were meeting their obligations under the Good Neighbor Provision. Although the Good Neighbor Provision leaves States with primary responsibility for determining how to reduce their emissions, Congress provided a strong oversight role for EPA. That oversight is essential, as absent a Good Neighbor Provision, states are primarily incentivized by the structure of the Clean Air Act to reduce in-state emissions that cause in-state problems, and there is little incentive to reduce emissions that cause problems for downwind states. In other words, absent a Good Neighbor Provision, States end up being responsible for achieving air quality within their borders even if a significant part of the problem comes from outside their borders. Indeed, States that consistently fail to attain the NAAQS by applicable deadlines face "serious consequences" that can include "a host of strict mandatory emissions controls and a bump-up" in the severity of their nonattainment status. *Wisconsin*, 938 F.3d at 317; *see also S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887-88 (D.C. Cir. 2006).

Under real world conditions, though, upwind States' emissions can have significant impacts on downwind air quality while having no meaningful effect on their own attainment of the NAAQS–thus avoiding any of the Act's consequences and offloading those regulatory consequences to their neighbors. Accordingly, in the absence of real EPA oversight, upwind States have little incentive to create SIPs that meaningfully account for their contributions to downwind States. Instead, upwind States would benefit from submitting SIPs that do not identify any "significant contributions," regardless of whether they in fact contribute significantly to downwind air quality problems. Meanwhile, downwind States would struggle to comply with the NAAQS in large part due to the unaddressed contributions of upwind States. *See, e.g., Wisconsin*, 938 F.3d at 317-18 (noting a county in Connecticut where emissions from upwind states account for the vast majority of ozone pollution).

Recognizing these misaligned incentives, Congress "entrusted EPA to ensure states achieve the Act's objectives." *Env't Comm. of Florida Elec. Power Coordinating Grp., Inc. v. EPA*, 94 F.4th 77, 93 (D.C. Cir. 2024). That Congress assigned EPA an independent oversight role is clear from the text of the Clean Air Act. In fashioning EPA's supervisory role, Congress put the agency "in the driver's seat," directing it to determine whether SIP submissions "meet[] all of the applicable requirements" of the statute before approving them. *Texas*, 132 F.4th at 832-33. The Act consistently reinforces EPA's responsibility to enforce the States' "strict minimum compliance requirements." *Florida Elec.*, 94 F.4th at 93 (quoting *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000)). For example, the Act directs EPA not to approve any SIP revisions that "would interfere with any applicable requirement concerning attainment … or any other applicable requirement." *Texas*, 132 F.4th at 833 (quoting 42 U.S.C. § 7410(k)(3)). And it obliges EPA to call for SIP revisions if it finds that a SIP "for any area is substantially inadequate," not only to "attain or maintain the relevant [NAAQS]," but also "to otherwise comply with *any* requirement of this chapter." *Id.* (quoting 42 U.S.C. § 7410(k)(5)) (emphasis added). In light of the oversight responsibilities that the Act imposes on the agency, it "is implausible that Congress expected EPA to defer to states during the SIP-approval process." *Id.*

EPA's Proposal, however, would have the Agency abdicate its supervisory role in favor of deference to the interests of upwind states. The Proposal contravenes the text, structure, and purpose of the Act and exceeds the agency's statutory authority in two key ways.

First, rather than rely on what EPA admits is the "best available modeling (*i.e.,* the 2016v3 modeling)," EPA simply adopts whichever model "the State used in its SIP submission"—except in cases where that model found a linkage. 91 Fed. Reg. at 4035. EPA's approach contains no assessment of the utility of the State's model and only evaluates more up-to-date information if it serves EPA's efforts to relieve states of having any pollution control obligations under the Act. *Id.* The Fifth Circuit has recognized that "*at the very least*, the CAA directs EPA to assess independently whether a SIP satisfies a state's chosen reasonable interpretation of the Good Neighbor Provision." *Texas*, 132 F.4th at 831 (emphasis added). But

without even explaining why the modeling each State relied on adequately identifies linkages above the threshold, the Agency cannot purport to have independently assessed whether each SIP adequately prohibits significant contributions. 91 Fed. Reg. at 4035 (absence). Indeed, EPA nowhere explains how the States' chosen models are sufficient to comply with the Good Neighbor Provision, instead arguing that it must defer to these models in the first instance–unless they find a linkage above 1 ppb—to accommodate the purported reliance interests of upwind States.[34] 91 Fed. Reg. at 4035.[35] Even if the agency must consider reliance interests, however, it may not ignore its statutory obligation to independently assess the substantive analysis in each SIP. *See Dep't of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 32 (2020) (noting that "even if … reliance interests rank as serious, they are but one factor to consider"). EPA's failure to exercise its statutorily mandated oversight role by assessing the States' chosen model against the most up-to-date information–including when that up-to-date information is consistent with a finding of significant contribution–is contrary to statute. And its lopsided proposed approach to considering more recent modeling–under which EPA considers up-to-date air quality modeling when it supports a finding that a State is not linked to downwind nonattainment or maintenance issues, but ignores that modeling where it indicates a linkage exists–is arbitrary and capricious and irreconciliable with the Act.

Second, EPA's Proposal to relax the contribution threshold to 1 ppb undermines the purpose of the Good Neighbor Provision. As explained above, Congress repeatedly amended the provision to ensure that upwind States make meaningful emission reductions to account for the problem of interstate transport. EPA's Proposal, however, carves out an exception for upwind States that contribute somewhere between the longstanding 1% threshold and 1 ppb–even if the State itself took a contrary approach. *See* 91 Fed. Reg. at 4042-43 (noting New Mexico's SIP applied a 1% threshold). EPA does not identify a source of authority to make a submission less stringent than the submitting state requested, nor does the Agency explain why such an approach is not in conflict with its treatment of States' modeling choices, having determined it was obligated to defer to the State's own choice. The only evident explanation for the Agency's inconsistency is that it is motivated not by the text or by principles of deference or reliance, but simply by a desire to ensure the Good Neighbor Provision is rendered a nullity. Considered alongside EPA's unquestioning adherence to the most permissive available modeling, the revised contribution threshold ensures that no source in any State covered by this action will have to reduce its nitrogen oxides emissions further. The agency's approach severely limits the Good

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[34] The history of this program and transport SIP evaluation more broadly, and the manner in which EPA has consistently conducted review, suggests states can have no reasonable reliance interests in the idea that their selected models will be unquestioningly accepted, regardless of what better or more updated data before EPA would suggest.

[35] EPA also cites two court decisions from the Fifth and Sixth Circuits, but notes that neither court determined "that the EPA may not consider updated information in taking action on these SIP submissions.... Instead, ... these courts viewed the EPA as having failed to explain the EPA's reasoning." *Id.* As explained *infra*, neither of those record-constrained decisions authorizes the sweeping abdication of statutory duty that EPA proposes now.

Neighbor Provision's ability to remedy downwind States' continued struggle to attain the NAAQS as a result of upwind contributions and undermines Congress's intent.[36]

The Proposal's deferential approach to EPA's review of SIPs turns Congress's intended structure on its head. The Clean Air Act has numerous indications that EPA's review was intended to have teeth, especially when necessary to protect downwind States from the costs of harmful upwind emissions, including the requirement that EPA step in with a FIP whenever a State fails to submit an adequate SIP. *Supra* at 10-12. EPA's proposal to abdicate its responsibility to undertake an independent review and to acquiesce in upwind States' self-serving determinations that they are not significantly contributing to downwind nonattainment is contrary to the Clean Air Act.

2. The Act Requires EPA to Use Best Available Information When Evaluating SIPs.

In the Proposal, EPA explicitly rejects using what it identifies as the "best available" model to evaluate upwind contributions to downwind nonattainment in the first instance, in favor of whichever model turns out to be the most permissive. This choice contradicts black-letter administrative law principles and the Clean Air Act, both of which require the agency to use the best available information when evaluating States' good neighbor submissions. Thus, EPA's proposal is contrary to law.

First, EPA's proposal runs afoul of basic administrative law principles. The Administrative Procedure Act's (APA) and Clean Air Act's rulemaking procedures expressly contemplate the consideration of new information, by allowing interested persons to submit "written data" regarding proposed rules in order to ensure that agencies have the best available information upon which to base final decisions. 5 U.S.C. § 553(c); *see also* 42 U.S.C. § 7607(d)(5) ("the Administrator shall allow any person to submit written comments, data, or documentary information" on a proposed rule). In this action, EPA ignores those commands by failing to fully consider the implications of new modeling that is undoubtedly relevant to each State's contributions to downwind nonattainment.

EPA's Proposal also contradicts the text and purpose of the Clean Air Act and its Good Neighbor Provision. The provision's language prohibits emissions that "will" significantly contribute to problems with attainment, indicating that Congress did not want EPA's analysis to be frozen in time. 42 U.S.C. § 7410(a)(2)(D)(i). And the purpose of the Act is to improve air quality to protect public health. Therefore, by failing to substantively evaluate updated information showing that the SIPs at issue will not bar significant contributions to nonattainment,

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[36] Comments of Earthjustice et al. on EPA's proposed FIP at 23-25 (June 21, 2022) (EPA-HQ-OAR-2021-0668-0758) (demonstrating that upwind States continue to drive nonattainment in downwind States).

EPA fails to effectuate both the Act's requirements and Congress's intent. *See Sierra Club v. EPA*, 671 F.3d 955, 967 (9th Cir. 2012) ("[I]f new information indicates to EPA that an existing SIP or SIP awaiting approval is inaccurate or not current, then … EPA should properly evaluate the new information.").

Ultimately, in order to prohibit emissions that contribute significantly to downwind nonattainment, it is necessary to accurately identify the levels of downwind pollution to which the upwind States contribute. By failing to fully rely on the "best available" model—a model that produces substantially different results than previous iterations—EPA fails to accurately identify upwind State contributions. Thus, EPA's proposal cannot lawfully determine that each State has satisfied its obligations under the Good Neighbor Provision.

B. EPA Lacks "Implicit[]" Authority to Reconsider Its Prior SIP Decisions Outside of the Mechanisms Specified in Clean Air Act Section 110 or Judicial Remand.

EPA incorrectly asserts that Clean Air Act sections 110(k)(2) and (3) provide the Agency with statutory authority to reconsider previously disapproved SIPs, and therefore cannot legally finalize this reconsideration as proposed for Alabama, Minnesota, and Nevada (i.e. the states with disapproved SIPs not subject to judicial remand). EPA claims that its authority to approve or disapprove SIP submissions under these provisions "implicitly includes the authority to reconsider the EPA's previous action on a SIP submission." Interstate Transport Plan Review for the 2015 Ozone NAAQS, 91 Fed. Reg. at 4030. As an initial matter, failing to meet its burden under the APA and relevant caselaw, EPA offers no substantive explanation for how these statutory provisions implicitly grant it authority to reconsider a SIP submission it has already acted upon. Rather, EPA baldly and incorrectly asserts that its proposed action is consistent with agencies' authority to reconsider prior decisions, citing several cases in supposed support of this proposition. *Id*. at n.27.

None of these cases actually support EPA's proposition that it has implicit authority to reconsider previously disapproved SIP submissions. The first three cases referenced all provide the Supreme Court's instruction on the reasoned explanation an agency must provide when changing position, and/or the circumstances under which an agency may change position when there are significant reliance interests on the agency's prior position. *FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898 (2025); *FCC v. Fox TV Stations, Inc*., 556 U.S. 502 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). EPA provides no explanation on how these cases support its authority to reconsider its prior SIP disapprovals, and therefore actually fails altogether to provide the reasoned explanation these actions require for a change in position.

In addition to failing to reasonably explain its authority for its proposed reconsideration, the last case EPA cites as supporting its reconsideration authority, *Clean Air Council v. Pruitt*,

862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014), cuts *against* EPA's purported authority for its proposed action. As the D.C. Circuit in this case emphasized, "it is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress,'" and "EPA must point to something in … the Clean Air Act" that gives it the reconsideration authority it asserts it has. EPA cites its general rulemaking authority under Clean Air Act Section 301(a)(1), in conjunction with its authority to approve or disapprove SIP submissions under Clean Air Act Section 110(k)(2) and (3). Regarding EPA's authority under Clean Air Act Section 301(a)(1), "it is well established that an agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority." *Air All. Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir 2018). For the reasons described below, EPA both does not have implicit authority under Clean Air Act Section 110(k)(2) and (3) to reconsider its prior action on SIP submissions, and cannot circumvent the specific statutory limits Congress placed on the Agency under the *actual* provisions that apply to reconsideration of SIPs.

EPA's interpretation of Clean Air Act Section 110(k)(2) and (3) as providing implicit reconsideration authority is flatly contrary to the "best reading" of these provisions. *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024). Clean Air Act Section 110(k)(2) and (3) plainly speak to EPA's obligation and authority to fully or partially approve or disapprove a SIP submission that meets the completeness criteria and is pending for action in front of the Agency. Clean Air Act Section 110(k)(2) clearly speaks to EPA's obligation to act on a SIP submission that meets the completeness criteria, and Clean Air Act Section 110(k)(3) directs EPA to approve or disapprove a "submittal on which the Administrator is required to act under [Clean Air Act section 110(k)(2)]." If EPA approves or disapproves a SIP submission, the Agency has dispensed with its obligation under these two provisions, and there is no longer "a submittal on which the Administrator is required to act" under Clean Air Act Section 110(k)(2). Nothing in the plain text of Clean Air Act Section 110(k)(2) or (3) speaks to EPA's authority to take further action on the same SIP submission it has already approved or disapproved pursuant to these two provisions.

By contrast, Clean Air Act Section 110(k)(5) and (6) *specifically* speak to EPA's authority to reconsider its action on a SIP submission once it has initially approved or disapproved such submission under Section 110(k)(2) and (3). As the D.C. Circuit has explained, a "general grant of rulemaking power … [cannot] trump the specific provisions of the act." *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Circuit 1992). When two regulations conflict on the same subject matter, "the specific governs the general," and the more specific regulation applies. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158,169-70 (2007); *see also Halverson v. Slater*, 129 F.3d 180, 183–84 (D.C. Cir. 1997). EPA points to Clean Air Act Section 110(k)(2) and (3) as providing it with "implicit" authority; however in doing so the Agency impermissibly "trump[s] the specific provisions of the Act." As previously explained, the best reading of these two provisions is that they provide EPA the authority to take initial action on a SIP submission, and do not provide

EPA with authority to take subsequent action. Accordingly, EPA may not allow its (incorrect) interpretation of implicit reconsideration authority under the latter provisions to "override" the more explicit, specific reconsideration authority under the former. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 169–70 (2007) (explaining that when two regulations conflict on the same subject matter, "the specific governs the general, "and the more specific regulation applies).

Because Clean Air Act Section 110(k)(5) and (6) plainly specify the circumstances under which EPA may reconsider a previously approved or disapproved SIP submission, "EPA cannot escape Congress's clear intent to specifically limit the agency's authority" by relying on more general authorities to reconsider its prior actions. *Air All. Houston*, 906 F.3d at 1061. Per the D.C. Circuit, ''the power to decide is normally accompanied by the power to reconsider'' unless Congress has "'limit[ed] [the] agency's discretion to reverse itself.'" *NRDC v. Regan*, 67 F.4th 397, 401(D.C. Cir. 2023) (quoting *New Jersey v. EPA*, 517 F.3d 574, 582–83 (D.C. Cir. 2008)). Importantly, "any inherent reconsideration authority does not apply in cases where Congress has spoken," and EPA may not rely on inherent reconsideration authority "when Congress has provided a mechanism capable of rectifying mistaken actions." *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (quoting *American Methyl Corp. v. EPA,* 749 F.2d 826 (D.C. Cir. 1984). Here, Congress has plainly displaced any implicit authority to reconsider previously acted upon SIPs, and limited the scope of EPA's discretion to reverse itself by specifying EPA's reconsideration authority under Clean Air Act Sections 110(k)(5) and (6) for previously acted upon SIPs.

The specific limits on EPA's reconsideration of an already acted upon SIP submission do not authorize the type of reconsideration EPA seeks to now take. As an initial matter, EPA has not proposed to take its current action under either Clean Air Act Section 110(k)(5) or (6), and may not finalize action based on such reconsideration authority without a proposal that complies with the relevant requirements. Notably, Clean Air Act Section 110(k)(5)'s SIP call authority gives EPA no power to act here, for it only allows EPA to require a State to revise an already-approved SIP, while here there is no already-approved SIP (and EPA isn't requiring any State to revise anything).

Clean Air Act Section 110(k)(6)'s error correction provision does allow EPA to reconsider its action on an already disapproved SIP; however, EPA's current proposed reconsideration does not meet the limits prescribed under this authority. Under the error correction provision, EPA may reconsider its prior action disapproving a SIP submission whenever EPA determines its prior action "was in error." Unlike Clean Air Act Section 110(k)(5)'s SIP call authority, which requires States to submit a SIP revision in response to EPA's SIP call, Clean Air Act Section 110(k)(6) allows EPA to reconsider its prior action on a SIP submission without requiring further revision by the State. Here, where EPA is seeking to reconsider its prior action disapproving SIP submissions, EPA may only do so under the specific

authority granted to it by Congress under Clean Air Act section 110(k)(6) *if* its actions are consistent with the applicable limits under this provision.

Namely, Clean Air Act Section 110(k)(6) requires a determination by EPA that its prior action "was" in error, i.e. that a legal or factual error existed at the time of EPA's prior action approving or disapproving a SIP submission. The text of this provision plainly does not allow EPA to reconsider a prior disapproval of a SIP submission based on subsequent policy preferences. EPA's proposal clearly asserts it is "reconsidering the *policy* decisions made in our prior actions addressing interstate transport obligations for the 2015 8-hour ozone NAAQS." Interstate Transport Plan Review for the 2015 Ozone NAAQS, 91 Fed Reg. at 4036 (emphasis added). The statute's prescription that EPA may correct an action that "was" in error, rather than allowing EPA to correct an action that "is" in error, places a reasonable limiting principle on EPA's reconsideration authority. The best reading of Clean Air Act Section 110(k)(6)'s error correction authority is that EPA may revise its prior action approving or disapproving a SIP based on a technical, factual, clerical, or legal error that existed *at the time* of such action. A subsequent court decision that renders the legal basis for EPA's prior SIP action as "was in error" also provides the predicate for an error correction, but as described elsewhere in this comment letter, the Fifth and Sixth Circuit record-based decisions do not compel reconsideration of EPA's prior interstate transport SIP disapprovals for Alabama, Minnesota, or Nevada, or any other States. Similarly, EPA does not suggest that any evaluation of the 2023 modeling now shows that factual or technical issues existed at the time of its SIP disapprovals.

EPA's long held interpretation and implementation of Clean Air Act Section 110(k)(6) is consistent with such best reading of this provision. *See e.g.*, Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430, 82,449 (error correction of Texas's SIP on the basis that it was legally flawed at the time of EPA's approval), challenged and upheld in *Texas* v. *EPA,* 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (explaining EPA's agreement with the interpretation of "*was* in error" in Clean Air Act Section 110(k)(6) means the provision can be used to retroactively disapprove a SIP "only if the SIP was out of compliance with the Act or EPA regulations when the SIP was originally approved."); Air Plan Approval; Ohio; Withdrawal of Technical Amendment, 89 Fed. Reg. 13,304, 13,307 (proposed determination that EPA's removal of a nuisance provision from Ohio's SIP was in error, as EPA's original approval of the nuisance provision into the SIP met the Clean Air Act's requirements to provide for the enforcement of the NAAQS, and therefore no legal error existed at the time of EPA's original approval.). If EPA were able to reconsider its prior action on a SIP that "is" now in error because of contemporary changes in policy, nothing would constrain EPA from perpetually revising SIP actions (including reconsidering SIP approvals to disapprovals) based on new policies. This would lead to massive uncertainty for States, the regulated community, and the public, given the potential for an ever-shifting legal

status of a SIP submission cycling through approvals and disapprovals by EPA. To the extent EPA wishes to change its policy and interpretation regarding the appropriate contribution threshold, the Clean Air Act provides a mechanism for approving SIPs consistent with such new developments. Clean Air Act Section 110(k) clearly authorizes and envisions States' ability to submit revisions to their SIPs.Of course, no State here has done so.

For these reasons, EPA does not have the legal authority under Clean Air Act Sections 301(a)(1), 110(k)(2), and 110(k)(3) to reconsider its previous disapproval of the transport SIPs based on its discretionary and illegal new policy changes. Any reconsideration of these SIP submissions must be proposed under the authority of and limits prescribed by Congress under Clean Air Act Section 110(k)(6), which also does not provide the legal grounds for EPA's present action or any other reconsideration of these SIPs based on subsequent changes in policy.

C. This Sweeping Proposal Is Not Compelled by the Record-Confined Rulings of the Fifth and Sixth Circuit.

The Proposal purports to justify evaluating States' fulfillment of their Good Neighbor obligations by ignoring modeling subsequent to the SIP submissions, using a 1 ppb contribution threshold (whether or not the state submissions used such a threshold), and only looking to later, more accurate modeling where it would allow States to avoid any good neighbor obligations, by claiming that this approach is "consistent with the Fifth and Sixth Circuits' interpretation of the March 2018 and August 2018 memoranda." Interstate Transport Plan Review for the 2015 Ozone NAAQ, 91 Fed. Reg. at 4028. In so doing, EPA misreads the *Kentucky* and *Texas* decisions, which were record-based and record-confined, and never reached the conclusions EPA here proposes.

First, and as explained in more detail below, the Sixth Circuit never held that EPA was forced to limit its review to just the material in the Kentucky SIP submittal (let alone held that EPA was forced to limit its review to just the material included in the submittals of any other state, including those outside the Sixth Circuit). *Kentucky v. EPA*, 132 F. 4th 447 (6th Cir. 2024). Instead, the Sixth Circuit merely faulted EPA for not, when disapproving the Kentucky SIP submission, adequately explaining Kentucky's reliance interests in feedback EPA gave on Kentucky's draft SIP revision and whether or not EPA disagreed with the idea that the contribution thresholds employed were "generally comparable." 123 F.4th at 469. At no point did the Sixth Circuit determine as a matter of law that the longstanding 1 percent threshold was invalid, or that EPA was bound to ignore later modeling analyses. The Proposal in fact tacitly admits this, conceding that "[t]he Sixth Circuit vacated and remanded the EPA's disapproval of Kentucky's SIP in part *for failing to address reliance interests Kentucky had* in guidance provided by EPA to Kentucky, *including specific feedback on a draft version* of Kentucky's submission." 91 Fed. Reg. at 4028 (emphasis added).

Second, as noted above, the Fifth Circuit has withdrawn the opinion in *Texas v. EPA*, and substituted a new opinion. *See Texas v. EPA*, No. 23-60069, slip op. at 1 (5th Cir. filed March 13, 2026). The Fifth Circuit's changes to this opinion may have ramifications for EPA's interpretation of its statutory authority as described in the Proposal, which relied on the Fifth Circuit's 2025 holdings and dicta. *See, e.g.*, 91 Fed. Reg. at 4028, 4029, 4030, 4035, and 4044. Yet the public has not had an opportunity to see–much less comment on–EPA's interpretation of its authority in light of the new opinion; more fundamentally, EPA has not even stated what effect the new opinion has on its interpretation. As such, if the new opinion alters EPA's approach to this rulemaking in any manner beyond the Proposal, then EPA must withdraw the Proposal and repropose a revised version that includes discussion of the new opinion and how it impacts EPA's proposed action, with opportunity for the public to comment on EPA's approach in light of EPA's legal reasoning and the new Fifth Circuit opinion.

But even to the extent that EPA relies on material from the 2025 opinion that the Fifth Circuit has reinstated (*see Texas v. EPA*, No. 23-60069, slip op. at 54 (5th Cir. filed March 13, 2026)), that reliance fails because the court never held that EPA was required to ignore record evidence except where it cured a defective SIP submittal. The Proposal focuses on language in the 2025 *Texas v. EPA* opinion suggesting that EPA employed the 2016v3 modeling in an "outcome determinative way" without adequate explanation to make the argument that EPA must defer to a state's choice of modeling. *See* 91 Fed. Reg. at 4028 (citing 132 F.4th 808, 862 (5th Cir. 2023)). But the Fifth Circuit expressly never reached the conclusion that the Proposal purports to shoehorn into the 2025 *Texas v. EPA* opinion; rather than opining on whether "EPA is forbidden from judging a SIP based on data and modeling developed after a SIP was submitted," the Fifth Circuit noted that it "need not address" that question at all. 132 F.4th at 861. Instead, the Fifth Circuit merely held that "the agency's disapproval *was arbitrary and capricious because of its defective explanation*.") (emphasis added). *Id.* at 863.[37] Accordingly, neither *Kentucky* nor *Texas* supports EPA's Proposal here at all.

In face of this, EPA does not point to any other decisions suggesting that either selective use of modeling to preferentially approve state submissions is required or that the longstanding 1% contribution threshold must be junked in favor of 1ppb; nor does EPA point to any authority for the broader idea that mere guidance documents (that, here, expressly note that whatever they say must be tested in notice-and-comment rulemaking processes) can foreclose different decisions in later notice-and-comment rulemaking processes. Indeed, *Kentucky* and *Texas* at most indicate that some additional explanation may be required in such rulemaking processes to address reliance interests. However, even if these two decisions did align with the Proposal's

[37] Tellingly, the Proposal wholly ignores that in *Texas v. EPA*, the Fifth Circuit upheld EPA's disapproval of the Louisiana SIP submissions. *Id.* at 818.

interpretation, they would only bind EPA in the 5th and 6th Circuits, and not in other Circuits (such as the 4th, 8th, 9th, 10th, and 11th Circuits, in which litigation over EPA's disapproval of Good Neighbor SIPs is currently ongoing). *See, e.g.*, 40 C.F.R. 56.4(c). *Kentucky* and *Texas* cannot support an argument that EPA is compelled to take any particular action on the other State submissions covered by this Proposal.

D. The Proposal Violates the Anti-Backsliding Protections in Clean Air Act Section 110(*l*).

Even if EPA had authority to reconsider its prior final decisions on Alabama, Minnesota, and Nevada's SIP submissions (which it does not), and even if EPA had a rational basis for reversing its position on Kentucky and Mississippi's SIP submissions on remand from federal courts (which, as explained below, it does not), the Proposal violates Section 110(*l*) of the Clean Air Act, 42 U.S.C. § 7410(*l*), and must be withdrawn.

Section 110(*l*) is an anti-backsliding provision; it states that "the Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment ... or any other applicable requirement of this chapter," including requirements related to interstate transport under the Good Neighbor Provision. 42 U.S.C. § 7410(*l*). In interpreting the best reading of the term "interfere" in Section 110(*l*), the Tenth Circuit recently affirmed that a SIP revision violates Section 110(*l*) if it will "hamper, frustrate, hinder, or impede any applicable Clean Air Act provision." *Ctr. for Biological Diversity v. EPA*, 129 F.4th 1266, 1274 (10th Cir. 2025); *see also S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006), *decision clarified on denial of reh'g on other grounds*, 489 F.3d 1245 (D.C. Cir. 2007) (Section 110(*l*) precludes actions "that would hinder an area's ability" to comply with Clean Air Act requirements). This interpretation effectuates Congress's intent. "In drafting current § 110(*l*)" as part of the 1990 Clean Air Act Amendments, Congress intended to codify "the 'non-interference' standard [previously] adopted by the EPA and approved by the courts" in caselaw dating back to the 1970s. *Hall v. EPA*, 273 F.3d 1146, 1158 (9th Cir. 2001). Under that longstanding non-interference standard, "EPA must reject any individual requirement that would interfere with attaining and maintaining the NAAQS by the required deadline or with achieving the other requirements of the Act." 44 Fed. Reg. 20,372, 20,373 (Apr. 4, 1979); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006) ("Considered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter.").

For two decades, EPA has more specifically interpreted Section 110(*l*) to prohibit the agency from approving a SIP revision that would increase net emissions—for instance, by relaxing or removing existing pollution controls or otherwise altering the status quo. *See* EPA Br., *Ctr. for Biological Diversity v. EPA*, Nos. 22-1012, 21-3023, Doc. 45-1, at 14 (3d Cir. Sept.

29, 2022). Regardless of whether EPA's responsibility under Section 110(*l*) extends further than that, at the very least, as both EPA and multiple courts of appeals have agreed, Section 110(*l*) prohibits EPA from approving a SIP revision if "the agency finds it will make the air quality *worse*." *Kentucky Res. Council, Inc. v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006) (emphasis added).[38] And where the evidence before EPA indicates the *potential* for a SIP revision to increase emissions—e.g., because the revision would result in weaker pollution standards or the elimination of a pollution-control program—EPA must "solicit further [air-quality] analysis or additional measures before concluding that the revisions would not violate 42 U.S.C. § 7410(*l*)." *Ctr. for Biological Diversity*, 129 F.4th at 1275. Failing to do so would constitute a failure to "appl[y] the appropriate level of rigor based on the nature of the SIP revisions at issue and the evidence before [EPA]," and render any approval unlawful. *Id.*

The Proposal does not present an edge case; the Proposal facially violates Section 110(*l*) in three ways. First, the approvals would violate Section 110(*l*) for the additional reason that they would "interfere with … applicable requirement[s] concerning attainment," 42 U.S.C. § 7410(*l*), by necessitating downwind States revise their own plans either to make up for the lost upwind emissions reductions by more strictly controlling in-state sources or to account for resulting bump-ups in nonattainment designations. And depending on when EPA finalizes the Proposal, it may simply be too late for downwind States that are relying on the FIPs to amend their own programs in time to meet the Clean Air Act's statutory deadlines for attainment, *see id.* § 7410(a), 7511(a)(1).

Second, approving Alabama, Kentucky, Minnesota, Mississippi, and Nevada's submissions, as EPA proposes to do here, would constitute "approv[ing] a revision of a plan" for each of those States, 42 U.S.C. § 7410(l). And those approvals would "interfere with" an "applicable requirement" of the Clean Air Act, *id.*—namely, the FIP requirements that EPA promulgated for each of those States in 2023 as part of the Good Neighbor Rule.[39] By reversing the agency's prior SIP disapprovals for those States, the Proposal would eliminate the legal

[38] *See also Ctr. for Biological Diversity*, 129 F.4th at 1275 (same); *Galveston-Houston Ass'n for Smog Prevention v. EPA*, 289 F.App'x 745, 754 (5th Cir. 2008) (same); *Ala. Env't Council v. EPA*, 711 F.3d 1277, 1292-93 (11th Cir. 2013) (same); *Indiana v. EPA*, 796 F.3d 803, 806 (7th Cir. 2015) (same); *Ctr. for Biological Diversity v. EPA*, 75 F.4th 174, 180 (3d Cir. 2023) (finding that EPA fulfilled its duty under Section 110(*l*) where there was no evidence in the record that the SIP revision could affect air quality); *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1074 (9th Cir. 2014) (petitioner failed to show that SIP approval violated Section 110(*l*) where it "identifie[d] nothing in [the State's] SIP that weakens or removes any pollution controls"); *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 900 (Section 110(*l*) erects "a high threshold for removing controls from a SIP").

[39] *See* 88 Fed. Reg. at 36,889 (FIP requirements for Alabama); *id.* at 36,890 (FIP requirements for Kentucky); *id.* at 36,891 (FIP requirements for Minnesota); *id.* at 36,891-92 (FIP requirements for Mississippi); *id.* at 36,892-93 (FIP requirements for Nevada).

predicate for EPA to implement and enforce the FIP pollution measures. And eliminating the FIP pollution controls would, by EPA's own analysis, worsen air quality downwind.[40]

Finally, the approvals would violate Section 110(*l*) because they would "interfere with" the requirements of the Good Neighbor Provision itself, Section 110(a)(2)(D)(i), because the approvals impermissibly rely on projections that assume now-repealed emission-reduction measures (*see* discussion *infra* at 40-42).

EPA does not dispute that the Proposal, if finalized, would have the effect of worsening downwind air quality compared to the requirements of the Good Neighbor Rule; and the agency provides no new air-quality analysis to support any conclusion otherwise. Indeed, it would be impossible for the agency to support a conclusion that its Proposal is equally protective of air quality as the Good Neighbor Rule's requirements for Alabama, Kentucky, Minnesota, Mississippi, and Nevada. The five state submissions that EPA now proposes to approve all would have required *no* additional pollution controls to satisfy good neighbor obligations under the 2015 ozone NAAQS beyond what those States' SIPs already required (*see* 88 Fed. Reg. at 9355 (Alabama "included no permanent and enforceable emissions controls in its SIP submission"); *id.* at 9356 (same for Kentucky); *id.* at 9357 (same for Minnesota) *id.* at 9358 (same, for Mississippi and Nevada, respectively), whereas the FIPs that EPA adopted in 2023 imposed additional emission-control requirements. *See, e.g.*, 88 Fed. Reg. at 36,889, 36,891-93. And covered sources in the States and/or the States themselves all have conceded that the FIP controls imposed additional pollution-control requirements beyond what the States' SIP submissions would have required.[41]

Faced with this factual reality, EPA instead attempts to wriggle out of its violation of Section 110(*l*) with some hand-waving: EPA asserts that because "EPA's predicate authority for the FIPs as to [Alabama, Kentucky, Minnesota, Mississippi, and Nevada] was judicially stayed or judicially vacated," the Proposal "will not revise any existing requirement in any lawfully promulgated implementation plan." 91 Fed. Reg. at 4044. First, this explanation takes no account of the impacts on downwind States' implementation plans, where the proposed changes—and the assertion that these upwind States bear no responsibility for downwind pollution under the 2015 NAAQS—"interfere" with downwind States' plans for complying with the NAAQS. In any event, EPA cannot get around the plain text of Section 110(*l*), which broadly prohibits

[40] *See* EPA, Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard at 92 *et seq.* (EPA-HQ-OAR-2021-0668-0151).

[41] *See, e.g.*, Petitioners' Mot. to Stay, *Allete Inc. v. EPA*, No. 23-1776, Doc. 5282381, at 21-22 (8th Cir. May 31, 2023) (arguing that the Minnesota FIP imposes ozone-season obligations to reduce emissions by curtailing operations or purchasing emission credits); Jt. Opposed Mot. for Stay, *Alabama v. EPA*, Case Nos. 23-1173 et al., Doc. 18, at 25-26 (11th Cir. June 13, 2023) (arguing that the Alabama FIP required power-plant sources to immediately begin assessing emission-reduction options, and likely would require a shift to generation from lower-emitting power plants).

interference with "any … applicable requirement," by pointing to ongoing judicial review; Congress provided no escape hatch from its broad anti-backsliding mandate where an existing requirement is the subject of pending lawsuits from regulated industry or upwind States who would prefer doing less to limit pollution—or even should EPA later determine that prior requirements were overly stringent. Indeed, Congress's clear intent to ensure no backsliding under any circumstances is manifest in the broad language of Section 110(*l*) and infused throughout the Clean Air Act's text and structure. In the words of the D.C. Circuit, "[c]onsidered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter. Even if EPA set requirements that proved too stringent and unnecessary to protect public health, EPA [is] forbidden from releasing states from these burdens." *See S. Coast*, 473 F.3d at 900.

Furthermore, EPA's reasoning that judicial stay or vacatur orders alleviate the agency of its obligations under Section 110(*l*) is irrational. As an initial matter, there is no judicial stay or vacatur order that covers either Nevada's FIP or EPA's disapproval of Nevada's SIP submission.[42] Accordingly, the Proposal's reasoning regarding judicial orders, regardless of legal sufficiency, does not extend to Nevada, and EPA therefore has failed to provide any explanation to support its conclusion that approving Nevada's SIP would not violate Section 110(*l*). As to Alabama and Minnesota, where judicial stays of SIP disapprovals are currently in place, EPA's reasoning still fails. A judicial stay is an inherently temporary and preliminary form of relief rooted in the judiciary's equitable power that does not reflect final judgment on the legality of a FIP nor vitiate the FIP's requirements; and those requirements will come back into effect should courts lift the current judicial stays applicable to Alabama and Minnesota. EPA's rationale that *permanently* eliminating FIP authority will have no effect because of *temporary* stays is nonsensical—akin to a student telling their parents that dropping out of school is of no consequence because they were suspended for a week anyway. And though courts vacated EPA's SIP disapprovals for Kentucky and Mississippi, those rulings did not vacate any FIPs.[43] The FIPs promulgated in the Good Neighbor Rule thus remain, in EPA's terminology, "lawfully promulgated implementation plan[s]" (91 Fed. Reg. at 4044) unless or until a court vacates them

[42] The Ninth Circuit lifted its prior stay of EPA's SIP disapproval action for Nevada in 2024, *see* Order, *Nevada Cement Co. v. EPA*, No. 23-682, ECF No. 65 (9th Cir. Dec. 17, 2024), as the Proposal acknowledges, *see* 91 Fed. Reg. at 4044. Nevada's SIP disapproval is currently not subject to any judicial stay. Nor does Nevada's FIP fall within the scope of the Supreme Court's partial judicial stay of the Good Neighbor Rule. *See Ohio v. EPA*, 144 S. Ct. 2040, 2058 (2024) (ordering that "[e]nforcement of EPA's rule against the applicants shall be stayed"). EPA has not lifted its interim final rule that administratively relieved Nevada sources of FIP obligations, 88 Fed. Reg. 67,102 (Sept. 29, 2023), even though that interim final rule was predicated solely on the Ninth Circuit's stay of Nevada's SIP disapproval, *see id.* at 67,103 (stating the EPA relieved Nevada of its FIP obligations "[t]o respond to the stay order[]," and citing no other legal authority for such action). But EPA fails to acknowledge this in its Proposal.
[43] *See Kentucky v. EPA*, 123 F.4th 447 (6th Cir. 2024); *Texas v. EPA*, 132 F.4th 808 (5th Cir. 2025). Notably, the Fifth Circuit did not even release its mandate in *Texas v. EPA* until *after* the Proposal was issued. *See* Order, *Texas v. EPA*, No. 23-66069, Doc. 623 (5th Cir. Feb. 9, 2026) (vacating prior order withholding issuance of the mandate).

or EPA repeals them via a new notice-and-comment rulemaking. EPA's elimination of the legal predicate for FIP requirements thus further "interfere[s] with" FIP requirements.[44]

In sum, EPA fails to clear Section 110(*l*)'s "high threshold for removing controls." *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 900. Congress deliberately left no room for EPA to shirk its responsibility to ensure no backsliding on air-quality improvements, as it proposes to do here. The Proposal plainly violates Section 110(*l*)'s anti-backsliding mandate and must be withdrawn.

II. EPA Fails to Provide a Reasoned Explanation for Its Changes in Position.

Even if EPA has statutory authority for the actions proposed in the Proposal, which it does not, the Proposal is arbitrary and capricious and unlawful. To be lawful, an agency action must be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). The agency cannot "rel[y] on factors which Congress has not intended it to consider" or "entirely fail[ ] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Nor can it "offer[ ] an explanation for its decision that runs counter to the evidence before the agency." *Id.* If an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," or when the prior policy has engendered serious reliance interests, the agency must provide a "more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television*, 556 U.S. at 515-16; *see also Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.,* 604 U.S. 542, 568 (2025); *Department of Homeland Sec. v. Regents of the Univ. of Cal*., 591 U.S. 1, 22 (2020). And an agency's failure to adequately consider reliance interests, "independent of the [action's] substantive validity," may "warrant[ ] vacatur and remand." *Capital Power Corp. v. FERC*, 156 F.4th 644, 650 (D.C. Cir. 2025). EPA proposes multiple changes in policy in the Proposal—all of which fail to meet the high bar under the change-in-position doctrine.

[44] The Proposal did not rely on EPA's ongoing administrative stays of FIP requirements for Alabama, Kentucky, Minnesota, Mississippi, and Nevada, *see* 91 Fed. Reg. at 4044, so that rationale cannot be a valid basis for final action. Regardless, EPA's interim final rules staying FIP requirements for Alabama, Kentucky, Minnesota, Mississippi, and Nevada were explicitly temporary and predicated solely on judicial stays. Apart from the judicial stays, EPA lacks statutory authority to administratively stay FIP requirements for those States indefinitely. *See* 88 Fed. Reg. at 49,295 ("This action revises on an interim basis the Good Neighbor Plan," including for emissions sources in Kentucky and Mississippi); *id.* at 49,297 ("The amendments to the regulatory requirements for EGUs and non-EGU industrial sources that the EPA is finalizing in this action in response to the stay orders are being made on an interim basis and will remain in place while the judicial proceedings in which the stay orders were issued remain pending."); 88 Fed. Reg. at 67,102 (same for emissions sources in Alabama, Minnesota, and Nevada).

A. Use of 1 ppb (or Higher) Threshold for Any State Is Unsupported.

EPA's proposed deviation from its prior, longstanding practice of using a 1% of the NAAQS threshold to evaluate ozone transport obligations in favor of a new, much higher 1 ppb threshold is unsupported.

In prior transport rules using the four-step framework, EPA has employed a 1% of the NAAQS threshold. *See* Good Neighbor Plan, 88 Fed. Reg. at 36,712 (detailing EPA's consistent employment of "an air quality screening threshold of 1 percent of the NAAQS, which has been used since the CSAPR rulemaking, including in the CSAPR Update, the Revised CSAPR Update, and numerous actions evaluating states' transport SIP submittals"); *see also* Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,236 (Aug. 8, 2011) (noting that in the CSAPR rulemaking, when setting "separate air quality thresholds for annual PM2.5, 24-hour PM2.5, and 8-hour ozone," each "air quality threshold is calculated as 1 percent of the NAAQS"). This approach resulted in a screening threshold of 0.8 ppb for the ozone component of the original CSAPR rulemaking (since it addressed the 84 ppb ozone NAAQS), and 0.75 for the CSAPR Update and Revised CSAPR Update rulemakings (since they addressed the 75 ppb ozone NAAQS).

Nonetheless, the Proposal now states that "EPA believes it is prudent to implement a policy … that 1 ppb is a 'presumptively acceptable' threshold for all States… [A] 1-ppb threshold is the appropriate Step 2 threshold to rely on in the first instance for the 2015 ozone NAAQS." 91 Fed. Reg. at 4033. Such a threshold is much higher than the 1% threshold of 0.70 ppb—roughly 43% higher. EPA proposes this new finding without support.

First, use of a 1 ppb threshold for evaluation of Good Neighbor obligations under the 2015 ozone NAAQS would mean using a higher threshold, in terms of actual transported pollution, than that employed for the less-protective prior ozone NAAQS in the CSAPR Update and original CSAPR rulemaking. Nowhere does EPA attempt to square the use of a more lax contribution threshold for a more protective NAAQS, nor offer a reasoned rationale for why use of a 1 ppb threshold for the 2015 ozone NAAQS is consistent with the analysis supporting use of a 1% threshold in those prior Good Neighbor rulemakings. (Indeed, any serious attempt by EPA to address reliance interests would militate in favor of retaining the 1% threshold, as discussed further below). As explained above, when EPA's new 1 ppb threshold is considered alongside EPA's consideration of outdated modeling, the revised contribution threshold ensures that no source in any State covered by the Proposal will have to reduce its NOx emissions further, thus frustrating the purpose of the Good Neighbor Provision to remedy downwind States' continued struggle to attain the NAAQS.

Second, EPA mischaracterizes the August 2018 Guidance Memo. In the Proposal, EPA attempts to argue that this memo "presumptively" established a 1 ppb threshold for evaluating Good Neighbor obligations under the 2015 ozone NAAQS. But the memo did no such thing. Not only is the memo *not* a rulemaking that was subject to public notice-and-comment, it is quite explicit in advising that it established no binding rules at all:

- "This document does not substitute for provision or regulations of the Clean Air Act (CAA), nor is it a regulation itself."
- The memo "does not impose binding, enforceable requirements on any party."
- "Following these recommendations does not ensure that the EPA will approve a SIP revision in all instances where the recommendations are followed,"
- The memo "may not apply to the facts and circumstances underlying a particular SIP."
- "Final decisions by the EPA to approve a particular SIP revision will only be made based on the requirements of the statute"
- Final decisions by EPA "will only be made following an air agency's final submission of the SIP revision to the EPA, and after appropriate notice and opportunity for public review and comment."

Memorandum from Peter Tsirigotis to Regional Air Directors, Regions 1-10 at 1 (August 31, 2018) [hereinafter "August 2018 Guidance Memo"].[45] Nor does the memo establish 1 ppb as any sort of default. Instead, in discussing a *potential* 1 ppb threshold, the memo merely notes that "a threshold of 1 ppb *may* be appropriate for states to use to develop SIP revisions addressing the good neighbor provision for the 2015 ozone NAAQS." August 2018 Guidance Memo at 3 (emphasis added).

Third, EPA's attempts to bootstrap this "may be appropriate" language into a regulatory determination rely on a misreading of *Kentucky v. EPA*. In *Kentucky*, the court, while assessing Kentucky's reliance interests, faulted EPA for not adequately explaining in disapproving the Kentucky SIP submission whether or not EPA disagreed with the idea that the thresholds in question were "generally comparable." *Kentucky*, 123 F.4th at 469. The Proposal nonetheless cites *Kentucky* for the proposition that the court had somehow interpreted the memo as "establishing a presumptively approvable ... threshold of 1 ppb," 91 Fed. Reg. at 4033, when the court did nothing of the sort. Instead, the court merely observed that the "memorandum *treated* the 1 ppb threshold as presumptively acceptable." 123 F.4th at 469 (emphasis added). The difference is crucial; *Kentucky* faulted EPA for an explanatory failure: failing to adequately address reliance interests, and did not establish, as a matter of law or otherwise, that 1 ppb is the appropriate good neighbor threshold in general or even in Kentucky in particular.

[45] (EPA-HQ-OAR-2025-0192-0009).

Finally, even if the Sixth Circuit had established that 1 ppb was the appropriate threshold for Kentucky (which it did not), EPA's purported concerns about consistency across States are misplaced. Not only did some States employ a 1% threshold in their SIP submittals (*see* 91 Fed. Reg. at 4034 ("not all States elected to rely on the 1-ppb threshold" as some "found it appropriate to rely on the 1-percent threshold"))[46] but EPA's assertion that it is somehow "essential" to apply a new 1 ppb threshold universally is unexplained and accordingly arbitrary and capricious. Indeed, governing regulations provide that EPA is "not required to issue new mechanisms or revise existing mechanisms ... to address the inconsistent application of any rule, regulation, or policy that may arise in response to the limited jurisdiction of ... a federal circuit court decision arising from challenges to 'locally or regionally applicable actions'" such as SIP disapprovals. 40 C.F.R. 56.4(c) (2026).

Use of the even higher thresholds EPA here proposes are likewise unsupported. A 2 ppb threshold would be nearly triple the 0.70 ppb threshold (and more than double the thresholds employed in the CSAPR and CSAPR Update rulemakings); a 5% threshold, or 3.5 ppb, would be quintuple the current threshold. And even the August 2018 Guidance Memo provides no support for these higher thresholds, observing that

> [T]he amount of upwind contribution captured using a 2 ppb threshold is notably less at most receptors than the amount captured with either a 1 ppb or 1 percent threshold, and therefore emission reductions from states linked at that higher threshold may be insufficient to address collective upwind state contribution to downwind air quality problems.

August 2018 Guidance Memo at 4. EPA cannot rationally weaken the 1% threshold. Indeed, the use of a 1% threshold, as opposed to a threshold of a fixed ppb, is appropriate because, as NAAQS are tightened over time, the threshold is reflective of those new NAAQS. As such, the burden remains fairly distributed among responsible parties as time progresses. By contrast, a fixed ppb threshold would mean–as demonstrated here–that upwind states are increasingly protected from addressing their share of the pollution problem, even if their share of the problem, relative to the downwind state itself, remains the same. A fixed ppb threshold is thus contrary to the intent of the Good Neighbor provision, by slowly shifting all burdens onto the downwind states alone, rather than ensuring that states continue to account for their fair share (of at least 1%).

EPA's explanation for its proposed application of a 1 ppb screening threshold also fails to grapple with the Agency's well-developed rationales for *rejecting* that threshold in the final Good Neighbor rule itself. In the Good Neighbor rule, based on a thorough discussion of

[46] *See also* SIP Disapproval Rule, 88 Fed. Reg. at 9342 ("Nevada also criticized the 1 percent of the NAAQS contribution threshold, but ultimately relied on it to support its submission.").

extensive comments received on this issue, EPA finalized a determination that the long-standing 1 percent screening threshold should be applied to all states, and that it is not reasonable to apply a 1 ppb screening threshold to some or all states. EPA acknowledged the August 2018 Guidance Memo's analysis finding that "there was some similarity in the amount of total upwind contribution captured (on a nationwide basis) between 1 percent and 1 ppb."[47] But as the Agency observed, the analysis in the August 2018 Guidance Memo still found that the 1 ppb threshold is less protective than the 1 ppb threshold and would result in excluding a substantial amount of upwind contribution from Good Neighbor requirements. Moreover, the Agency found that adopting this less protective threshold is inconsistent with the statutory objective of eliminating "all" significant contribution to nonattainment or interference of the NAAQS. In the face of these statutory and policy considerations, the EPA determined that the upwind contribution analysis in the August 2018 Guidance Memo "is hardly a compelling basis to move to a 1 ppb threshold."[48]

The final Good Neighbor Rule went on to explain that maintaining the 1 percent threshold for all states would ensure consistency with the Agency's prior approach in its three preceding interstate transport rules (the CSAPR, the CSAPR Update, and the Revised CSAPR Update). The EPA explained that such consistency was especially appropriate in light of the more protective 2015 ozone NAAQS that the Good Neighbor rule was designed to implement. As EPA observed:

> … a portion of the nonattainment and maintenance problems in the U.S. results from the combined impact of relatively small contributions from many upwind states, along with contributions from in-state sources and other sources. …Where a great number of geographically dispersed emissions sources contribute to a downwind air quality problem, which is the case for ozone, EPA believes that … a state-level threshold of 1 percent of the NAAQS is a reasonably small enough value to identify only the greater-than-de minimis contributors yet is not so large that it unfairly focuses attention for further action only on the largest single or few upwind contributors.[49]

As EPA also noted in the final rule, the 1 percent threshold ensures that if the NAAQS are revised in the future to be made more protective, "an appropriate increase in stringency at Step 2 occurs, so as to ensure an appropriately larger amount of total upwind-state contribution is captured for purposes of fully addressing interstate transport."[50]

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[47] 88 Fed. Reg. at 36,713.
[48] *Id.*
[49] *Id*. at 36,714.
[50] *Id*. at 36,715.

The current proposal neither references nor discusses any of the rationales that underlay the EPA's thoroughly-explained decision–including EPA's judgment that using the 1 ppb threshold for all states would unjustifiably exclude upwind contributions from Good Neighbor protections; that this threshold would jeopardize EPA's statutory obligation to ensure *all* significant contributions to downwind nonattainment and maintenance issues are eliminated; and that doing so was particularly inappropriate in the context of implementing a more protective ozone NAAQS, where contributions from a large number of small upwind sources were understood to represent a large share of the interstate transport problem. EPA cannot abruptly reverse course in this rulemaking–discarding the long-standing 1 percent threshold and adopting the 1 ppb threshold as a matter of national policy for the first time–without contending with the record and reasoning underlying the Good Neighbor rule.[51]

B. EPA's Use of a Past Analytic Year to Approve State Implementation Plans is Unlawful and Unjustified for Any State.

Even assuming EPA has the authority to reconsider SIP decisions, EPA's proposed use of the 2023 analytic year[52] is unreasonable and unlawful.

The Good Neighbor Provision requires that state implementation plans include provisions to prohibit "any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) 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). EPA admits that its "general policy has been to use forward-looking projections associated with a future analytic year, consistent with its interpretation that the interstate transport provision is a forward-looking statute" and recognizes this action "may be perceived as acting inconsistently with the EPA's previous policy of considering a future analytic year from the standpoint of the timing of the EPA's rulemaking action." 91 Fed. Reg. at 4031. Indeed, the Proposal is patently inconsistent with the agency's prior policy, and EPA fails to justify its changed position.

When disapproving good neighbor SIPs in 2023, EPA explicitly stated that it did "not believe it would be appropriate to evaluate states' obligations under CAA section 110(a)(2)(D)(i)(I) as of an attainment date that is wholly in the past, because the Agency interprets the interstate transport provision as forward looking." 88 Fed. Reg. at 9341. The D.C. Circuit has recognized that "it is the statutorily designed relationship between the Good Neighbor Provision's obligations for upwind States and the statutory attainment deadlines for downwind areas that generally calls for parallel timeframes," *Wisconsin*, 938 F.3d at 316, with

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[51] *FCC v. Fox Television Stations,* 556 U.S. 502, 516 (2009) ("... a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

[52] EPA does not invoke error correction authority under Section 110(k)(6) for this Proposal, and therefore these comments do not address whether it would be appropriate for EPA to rely on a past analytic year in the context of an error correction.

the relevant deadline in *Wisconsin* being the 2018 moderate nonattainment deadline, *id*. at 313. And in *Maryland v. EPA*, the court determined that "EPA was required to measure air quality in the year that corresponds with the *next* applicable downwind attainment deadline," 958 F.3d 1185, 1203 (D.C. Cir. 2020) (emphasis added), which in that case was the 2021 marginal nonattainment deadline. And in *North Carolina v. EPA*, the court pointed out that "'will' can mean either certainty or indicate the future tense," 531 F.3d 896, 913 (D.C. Cir. 2008), and that the "agency interpreted 'will" to indicate sources that presently *and* at some point in the future "will" contribute to nonattainment," *id.*, but the court has never suggested the agency could interpret "will" as referring to emissions sources that *previously* contributed to nonattainment.

And when the State of Delaware unsuccessfully argued for the use of a past analytic year in *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019), the D.C. Circuit determined that Delaware's argument could not "be reconciled with the text of the Good Neighbor Provision, which prohibits upwind States from emitting in amounts 'which *will*' contribute to downwind nonattainment. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added)." *Wisconsin*, 938 F.3d at 322. In rejecting Delaware's argument, the court held that "[g]iven the use of the future tense, it would be anomalous for EPA to subject upwind States to good neighbor obligations in 2017 by considering which downwind States were once in nonattainment in 2011." *Wisconsin*, 938 F.3d at 322. EPA's use of the 2023 analytic year in this Proposal is equally contrary to the Act and arbitrary, as EPA in 2026 is proposing to discretionarily reconsider whether to impose good neighbor obligations on upwind States based on 2018 projections of 2023 conditions. EPA makes no attempt to distinguish this Proposal from the Court's reasoning in *Wisconsin*.

Though this Proposal clearly deviates from EPA's consistent past practice[53] and prior interpretation of the Clean Air Act, the agency insists that having previously interpreted the Clean Air Act as requiring the use of a future analytic year does not preclude the agency from using a past analytic year in this Proposal. The agency does not claim the Clean Air Act *requires* the use of a past analytic year, instead referring to "unique and case-specific reliance interests the March 2018 memorandum may have engendered in State air agencies," and stating that the "determination is not being made, and should not be understood, to extend to any other CAA requirements or situations." 91 Fed. Reg. at 4032. But reliance interests cannot excuse EPA from changing position without adequate justification. EPA appears to now interpret the text as granting some amount of discretion to the agency to choose analytic years in the past or in the future depending on the situation, but does not explain where this discretion is found in the text.

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[53] In 2024, EPA proposed supplemental air plan actions for Arizona, Iowa, Kansas, New Mexico, and Tennessee that used 2023 and 2026 as analytic years in assessing good neighbor obligations. *See* Supplemental Air Plan Actions: Interstate Transport of Air Pollution for the 2015 8-Hour Ozone NAAQS and Supplemental Federal "Good Neighbor Plan" Requirements for the 2015 8-Hour Ozone NAAQS, 89 Fed. Reg. 12,666 (Feb. 16, 2024).These actions were not finalized, but even in that proposal EPA considered at least one analytic year (2026) that was in the future at the time. Furthermore, the agency in that action was proposing to satisfy good neighbor obligations for States through a federal plan, and was concerned about parity and interdependency of obligations, while in this action the agency proposes no new obligations.

Moreover, to the extent any such discretion exists, it could only be exercised consistent with the broader context of the Good Neighbor Provision and its plain intent. Here, EPA does not attempt to explain how the use of a past analytic year is nonetheless consistent with the Good Neighbor Provision's forward-looking language and equitable purpose. Accordingly, while the Agency might be able to justify a past analytic year where necessary to ensure the equitable distribution of burdens demanded by the Provision itself,[54] such a deviation would, at a minimum, require a far more substantial showing than provided here that such a choice served the intent of the Act itself, and not just EPA's whim.

EPA cannot choose between different interpretations of the text of Section 110(a)(2)(D)(i), switching when convenient based on the circumstances. And EPA has provided no explanation to support its reading of the statute to confer broad discretion to EPA to take backward-looking or forward-looking approaches involving past analytic years and future analytic years when convenient. As EPA made clear when finalizing the Good Neighbor Rule, the agency "conducted air quality modeling for the 2023 and 2026 analytic years to identify (1) the downwind areas identified as "receptors" (which are associated with monitoring sites) that are expected to have trouble attaining or maintaining the 2015 ozone NAAQS *in the future*." 88 Fed. Reg. at 36,658 (emphasis added). EPA fails to explain how its use of a past analytic year now is permissible and not arbitrary.

The agency's own statements show the use of a past analytic year to determine good neighbor obligations is an important change in position by EPA, one which the agency must recognize and provide good reasons for. *Wages & White Lion, 604 U.S.*, 604 U.S. at 542. Even when EPA finalized the Good Neighbor Plan in 2023, the agency used a 2023 analytic year (which was at least partially in the future at the time, as even at time of publication the 2023 ozone season had not ended) and a 2026 analytic year to identify receptors and contributions. The decision to use only the 2023 analytic year, especially when the agency has previously used a 2026 analytic year and fails to provide good reasons for not doing so in this Proposal, is arbitrary and capricious.

EPA barely acknowledges its previous use of the 2026 analytic year in a footnote, claiming that "the additional analysis for 2026 was conducted for purposes of the Agency's Step 3 analysis in that rulemaking." 91 Fed. Reg. at 4031 n.52. The implication appears to be that not using the 2026 analytic year in this Proposal is consistent with the Good Neighbor Rule's approach, but that falls far short of a reasoned explanation for not using the 2026 analytic year here as it did previously.[55] And in fact statements in the preamble for the Good Neighbor Rule suggest EPA evaluated data for 2026 at multiple steps, as the Agency explicitly stated that "[f]or

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[54] Such a deviation might be justified, for example, where necessary to ensure that later-submitted SIPs did not free-ride on the reductions accounted for in earlier submitted SIPs. *Cf.* 88 Fed. Reg. at 99,113-14 (explaining potential equitable issues arising from addressing state submissions "seriatim").

[55] It is not clear that this is true, but even if it were true and relevant, at the time the Good Neighbor Rule was promulgated, 2023 was still at least in part a future analytic year, while today it is entirely in the past.

this final rule, the EPA evaluated air quality to identify receptors at Step 1 for two analytic years: 2023 and 2026" and that "EPA evaluated interstate contributions to these receptors from individual upwind states at step 2 for these two analytic years." 88 Fed. Reg. at 36,693-94. Furthermore, because of the order of the sequential steps and the fact that Step 3 of the 4-step framework is the point at which EPA actually determines significant contributions under Section 110(a)(2)(D)(i)(I), any analysis in the first 2 steps (using the 2023 analytic year) was also "conducted for purposes of the Agency's Step 3 analysis," so it is unclear how that is any different from how EPA used the 2026 analytic year.

EPA claims to be using the 2023 analytic year "to ensure consistency and equitable treatment of all States, and to give consideration to the information and data available to States at the time they developed these SIP submissions," 91 Fed. Reg. at 4031, and the agency provides "several important, overriding considerations" to support using the 2023 analytic year for this action, but none of them are persuasive and they certainly cannot override the statutory language. But EPA makes no actual case for why a later analytic year would create inequities between States in a manner inconsistent with the Act's purpose. And their resort to the timing of SIP development has no basis in the statutory text, as unlike the forward-looking approach expressed in the Good Neighbor Provision there is no statutory text requiring EPA to use a past analytic year because that was the data available to States when they were developing SIPs. The agency claims "where the need for parity among States or other jurisdictions in like circumstances warrants it, courts have recognized that it may be appropriate for the EPA to rely on a unified dataset to ensure consistency in treatment." 91 Fed. Reg. at 4031. Perhaps, but EPA makes no substantive case here for why the parity concerns are so substantial as to override the forward-looking presumption in the statutory language, and the agency's own proposed approach of *selectively* using newer data to dismiss potential good neighbor obligations contradicts this supposed importance of relying on a unified dataset. 91 Fed. Reg. at 4035.

EPA also claims "it makes sense to conduct this re-evaluation using the existing information in the record, rather than become trapped in a cycle of constantly shifting analysis and output" but the agency has previously relied on (and in this proposal selectively relies on) newer data and admits that "[d]etails on the 2016v3 air quality modeling and the methods for projecting design values and determining contributions in 2023 and 2026 based on this platform are described in 2016v3 TSD included in the docket for this proposed action," 91 Fed. Reg. at 4034. Clearly the newer data for both analytic years was before the agency and could have been considered. And lastly, leaning on its March 2018 memorandum, the agency "find[s] it appropriate to use the same analytic year as the one the EPA's guidance communicated to States (*i.e.,* 2023) during SIP development." 91 Fed. Reg. at 4032. But guidance cannot support or justify an unlawful and unreasonable change in position to read the Good Neighbor Provision as permitting EPA to look backwards now in this Proposal.

The Good Neighbor Provision requires EPA to determine which emissions from upwind States contribute significantly to nonattainment or interfere with maintenance of the NAAQS downwind and therefore must be eliminated, not engage in a pointless academic exercise using agency predictions from 2018 about what would happen three years ago. EPA cannot determine whether emissions from any of the upwind States covered by this Proposal *will* contribute significantly to downwind nonattainment or maintenance problems based solely on an analytic year in the past. Accordingly, if EPA has authority to discretionarily reopen prior SIP disapproval actions (which the Public Interest Organizations dispute), the agency is required in such reconsideration actions to look to the *next* attainment deadline, in this case the serious attainment deadline in 2027 (or the last full year prior to the deadline), as it has previously.

C. Deference to State Submissions and Asymmetric Use of the Best Available Modeling Is Arbitrary and Capricious.

Ignoring evidence in the record is classic arbitrary and capricious agency action; announcing or effectuating a policy of only regarding evidence in the record *when it supports a predetermined outcome* is even worse. Yet that is precisely what EPA suggests to do here in the Proposal:

> EPA's proposed approach for evaluating air quality information in this action is to first rely on information provided in the March 2018 memorandum, as included by States in their SIP submissions, and then consider more recent EPA modeling information *only if necessary to determine whether any linkages are still projected to persist.*

91 Fed. Reg. at 4032 (emphasis added); *see also id.* at 4035 ("If that modeling indicates a State is not linked in the 2023 analytic year to any receptors above 1 ppb, the EPA will approve that submission. If, however, the modeling a State used indicates that a State is linked above 1 ppb to at least one receptor, the EPA will consider the best available modeling (i.e., the 2016v3 modeling) to determine whether any linkages above 1 ppb are still anticipated to persist in 2023"); *id.* (observing that "compared to the March 2018 memorandum modeling, the 2016v3 modeling uses more recent emissions data and incorporates other technical updates to the modeling platform"). In essence, EPA proposes a "heads I win, tails you lose" approach, whereby subsequent modeling—even modeling that EPA concedes is "the best available modeling"—would only be used to cure a SIP submission, but not to disapprove a SIP submission that the modeling demonstrates is inadequate. Not only is this a dramatic reversal from EPA's longstanding approach to rulemakings in general and to evaluation of SIPs under the 2015 ozone NAAQS in specific but also it is plainly arbitrary.[56]

[56] EPA proposing to defer to the State's selected analysis not only abdicates EPA's role in evaluating States' fulfillment of good neighbor obligations but also necessarily freezes in time the information in the record that EPA

Courts have long recognized that EPA must make use of best available information pursuant to basic principles of administrative law and the Clean Air Act. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem ...."); *Sierra Club v. EPA*, 671 F.3d 955, 968 (9th Cir. 2012) (finding that "EPA's failure to even consider the new data and to provide an explanation for its choice rooted in the data presented was arbitrary and capricious"); *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2012) (finding EPA's action arbitrary and capricious when it failed to evaluate the adequacy of an existing SIP after new modeling revealed that the SIP was deficient); *1000 Friends of Md. v. Browner*, 265 F.3d 216, 235 (4th Cir. 2001) ("[T]here may be cases where previously performed modeling is inadequate to demonstrate attainment such that EPA's failure to require new modeling in those cases might be found to be arbitrary or capricious[.]"). Pursuant to these basic principles, EPA must make use of available, up-to-date modeling and data to ensure compliance with the Act.

Indeed, this is consistent with the plain text of the Good Neighbor Provision, which is forward-looking and requires elimination of emissions that "will" significantly contribute to nonattainment or "will" interfere with maintenance in downwind states. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). By contrast, nothing in the Clean Air Act requires EPA to reject more recent modeling and monitoring data, and thereby erroneously approve SIPs that fail to fulfill Good Neighbor obligations, in what should be a forward-looking analysis. *See Bd. of Cnty. Comm'rs of Weld Cnty. v. EPA*, 72 F.4th 284, 290 (D.C. Cir. 2023) (recognizing that EPA generally must base its decisions on the best available data).

Accordingly, EPA cannot rationally carve out these States' submissions from the general requirement that EPA must use the best available information when considering transport obligations. In the SIP Disapproval Rule, and in the Supplemental States Proposal, EPA relied on the 2016v3 modeling and actual monitor data to assess linkages and evaluate SIP submittals. *See* SIP Disapproval Rule, 88 Fed. Reg. at 9343; Supplemental Air Plan Actions: Interstate Transport of Air Pollution for the 2015 8-Hour Ozone NAAQS and Supplemental Federal "Good Neighbor Plan" Requirements for the 2015 8-Hour Ozone NAAQS, 89 Fed. Reg. 12,666, 12,676 (Feb. 16, 2024) (the "Supplemental States Proposal") (("In this proposed action, the EPA primarily relies on modeling based on the 2016v3 emissions platform coupled with measured data"). But here, EPA proposes to selectively ignore "the best available modeling." 91 Fed. Reg. at 4035.

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will regard. This is especially egregious here, where EPA, at a remove of the better part of a decade, ignores what it admits is the best available modeling as well as many years' worth of actual monitor data. Indeed, one might ask what the point of a public comment period is at all, if EPA is foreclosed from addressing new information in its possession when assessing a SIP's adequacy. *Cf.* 91 Fed. Reg. at 4035, n.97 (excluding monitoring data from consideration that "post-dates the information available to States when they developed their 2015 8-hour ozone NAAQS interstate transport SIPs").

For example, in assessing whether Arizona's SIP satisfies the state's good neighbor obligations, EPA merely looks at Arizona's September 2018 submission[57] and the March 2018 memorandum modeling to conclude that "Arizona is not linked above the 1-ppb threshold to any downwind receptor in the State's *chosen* modeling" and thus "EPA is proposing to approve Arizona's SIP submission." 91 Fed. Reg. at 4037 (emphasis added). But the 2016v3 modeling demonstrates that Arizona contributes more than 1% of the NAAQS (and indeed, more than 1 ppb) towards multiple receptors that EPA considers to be maintenance or violating receptors[58]:

Table 1: Arizona Contributions to Maintenance and Violating Monitors, 2016v3 Modeling[59]

Receptor	2016v3 Modeled 2023 Max DV (ppb)	Actual 2023 DV (ppb)	Arizona Contribution (ppb)
Texas El Paso, 481410037	71.4		1.69
New Mexico Lea, 350250008	72.2	71	1.66
New Mexico Bernalillo, 350011012	66.0	72	1.62
New Mexico Eddy, 350151005	74.1	78	1.34
New Mexico, Dona Ana, 350130008	66.3	76	1.13
New Mexico, Dona Ana 350130022	72.4	72	1.06
New Mexico, Dona Ana 350130021	72.1	79	1.04

Nonetheless, the Proposal fails to discuss this data at all.

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[57] *See* EPA-HQ-OAR-2025-0192-0026.

[58] Arizona's SIP submission and EPA's 2016v3 modeling also do not account for EPA's recent proposal to no longer require implementation of emission reduction measures and controls, such as RACM/RACT, by the applicable attainment date for the Phoenix-Mesa 2015 ozone nonattainment area. Determination of Attainment by the Attainment Date but for International Emissions for the 2015 Ozone National Ambient Air Quality Standards; Phoenix-Mesa Nonattainment Area, Arizona, 90 Fed. Reg. 52,019 at 52,023 (Nov. 11, 2025). Failure to implement these controls may lead to further increased upwind emissions impacting downwind receptors to which Arizona is already linked.

[59] Data taken from EPA, Data File with Ozone Design Values and Contributions [hereinafter "2016v3 Analysis"] (EPA-HQ-OAR-2021-0663-0070) and EPA, 2024 Ozone Design Values, table 6, https://www.epa.gov/system/files/documents/2025-05/o3_designvalues_2022_2024_final_05_28_25.xlsx.

Similarly, EPA proposes to withdraw the proposed error correction for Iowa (91 Fed. Reg. at 4038) without any discussion of the 2016v3 Analysis demonstrating that Iowa contributes 1.13 ppb toward the violating monitor in Allegan, Michigan (260050003), and more than 1% of the NAAQS toward maintenance and violating monitors in Cook County, Illinois (170310001 and 170310032, respectively) and Kenosha, Wisconsin (550590025). EPA likewise proposes to withdraw the error correction for Kansas without discussing at all the 2016v3 Analysis demonstrating that Kansas contributes more than 1% of the NAAQS to the same Allegan, Michigan receptor. *Compare* 91 Fed. Reg. at 4038 *with* 2016v3 Analysis. Likewise, EPA proposes to approve Minnesota's SIP submission by ignoring the 2016v3 modeling it considered in disapproving that SIP in 2023, SIP Disapproval Rule, 88 Fed. Reg. at 9357, and instead restricting its analysis to the 2018 analysis. 91 Fed. Reg. at 4040.

Similarly, with Mississippi, EPA applies a 1 ppb threshold to the 2018 analysis, but declines to engage at all with the 2016v3 Analysis, which shows Mississippi contributions of 1.32 and 1.02 ppb to the Galveston, Texas and Denton, Texas (481671034 and 481211032) nonattainment and violating monitors, respectively, or to the *nine other* downwind maintenance or violating monitors to which Mississippi contributes more than 1% of the NAAQS. *Compare* 91 Fed. Reg. at 4041 *with* 2016v3 Analysis. With Nevada and New Mexico, EPA ignores completely the 2016v3 modeling showing that Nevada contributes 1.11 ppb to both the violating Weber, Utah monitor (490571003) and the nonattainment Salt Lake, Utah monitor (490353006), 1 ppb to the Davis, Utah nonattainment monitor (490110004), and more than 1% of the NAAQS to the Salt Lake, Utah nonattainment monitor (490353013), 91 Fed. Reg. 4042, and that New Mexico contributes 1.59 ppb to the El Paso, Texas maintenance monitor (481410037). 91 Fed. Reg. 4043. Likewise, EPA does not even mention the 2016v3 modeling showing that Tennessee contributes more than 1% of the NAAQS to the Dallas (481130075), Denton (481211032), Collin (480850005), and Tarrant (484392003), Texas violating monitors. 91 Fed. Reg. at 4044.

And, while EPA does purport to acknowledge the 2016v3 modeling for Kentucky (91 Fed. Reg. at 4039), it engages with it selectively to arrive at the result of proposing to approve the Kentucky SIP by ignoring both the 2018 analysis's linkage of Kentucky to the Harford, Maryland monitor with a 1.52 ppb contribution, and the 2016v3 Analysis's linkage of Kentucky to violating monitors such as the Lake, Ohio (390850003) monitor, to which Kentucky contributes 1.57 ppb. *See* 91 Fed. Reg. at 4039 (because Kentucky's SIP submittal relies on the 2018 modeling which "shows a contribution over 1 ppb to at least one receptor in 2023, the EPA will confirm whether any linkages are projected to exist in the EPA's updated modeling"). With each State, EPA arbitrarily and capriciously declines to address analyses before it (indeed, *developed* by it) that demonstrate that the do-nothing SIP submissions from the states examined fail to fulfill good neighbor obligations under the Clean Air Act.

Again, EPA concedes that the 2016v3 modeling is the "best available,"—an assessment supported by the number of monitors the analysis assesses to be nonattainment, maintenance, or violating:

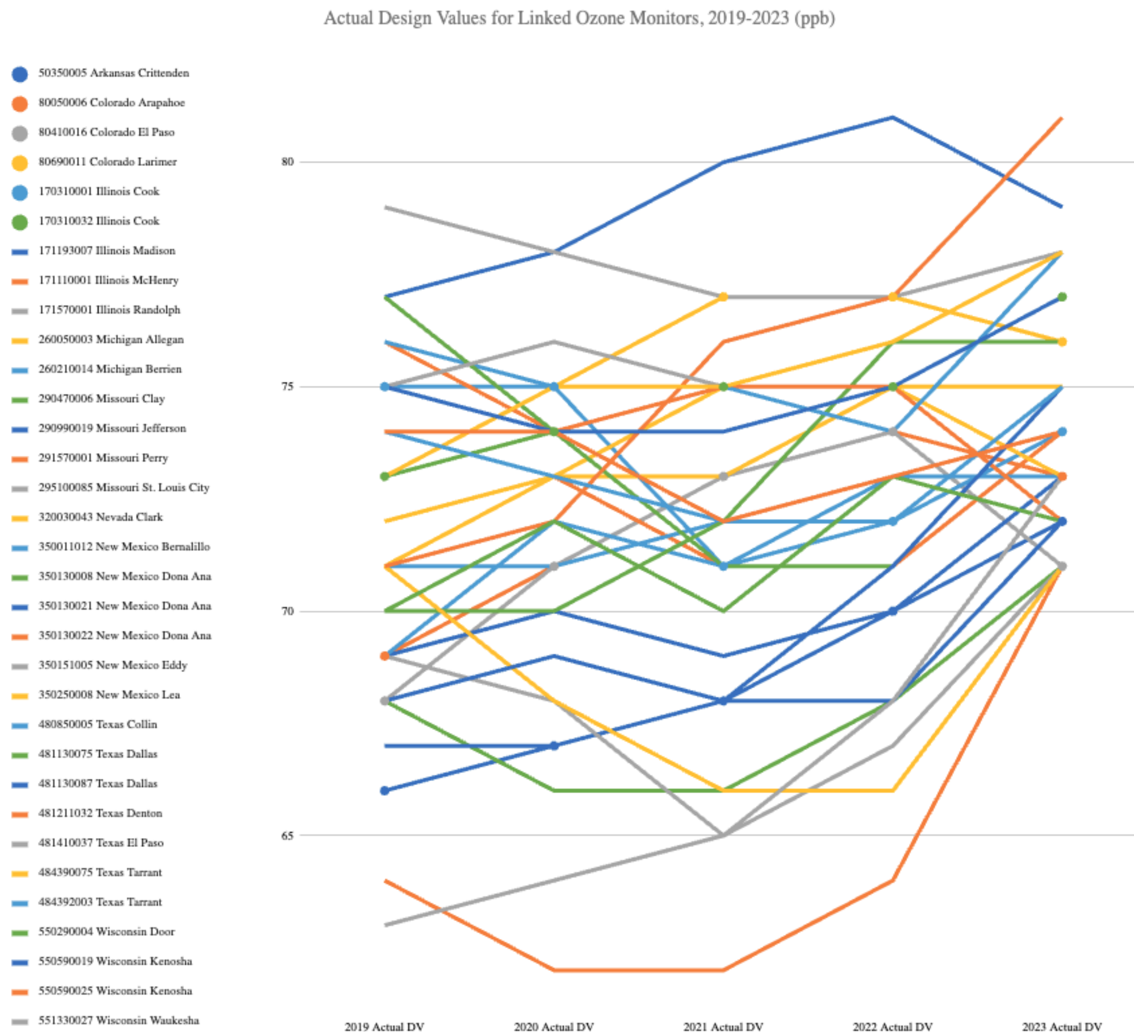
<u>Table 2: Comparison of Numbers of Ozone Monitors Above the 2015 Ozone NAAQS</u>[60]

Data Source	**Number of Nonattainment, Maintenance, or Violating Monitors**
August 2018 Guidance Memo, Attachment C	52 (excluding California)
2016v3 Analysis + "violating" monitors	78 (excluding California)
Actual 2023 Design Values	180 (excluding California)
Actual 2024 Design Values	197 (excluding California)

The 2018 analysis accordingly fails to capture a vast number of downwind monitors struggling to attain the NAAQS, and as such fails to include relevant linkages identified in the subsequent "best available" analyses. This is particularly true given that—as EPA itself acknowledges—even the 2016v3 modeling underpredicts actual ozone levels. *See, e.g.*, Good Neighbor Rule, 88 Fed. Reg. at 36,697 (touting the "improvement" in the 2016v3 versus 2016v2 modeling in that it "improved from a 19 percent under prediction to a 6.9 percent under prediction" in one region, and "from a 13.6 percent under prediction to a 4.8 percent under prediction" in another); Supplemental States Proposal, 89 Fed. Reg. at 12,693 (accord).

[60] Data taken from August 2018 Guidance Memo (EPA-HQ-OAR-2025-0192-0009), 2016v3 Analysis (EPA-HQ-OAR-2021-0663-0070), SIP Disapproval Rule, 88 Fed. Reg. at 9352, and EPA, 2024 Ozone Design Values, table 6, https://www.epa.gov/system/files/documents/2025-05/o3_designvalues_2022_2024_final_05_28_25.xlsx.

Figure 1: Ozone Design Value Trends for 2016v3 Linked Monitors, 2019-2023[61]



As such, EPA's failure to consider the linkages in the 2016v3 modeling or real-world monitor data in lieu of a blind deference to the 2018 memo is arbitrary and capricious.

EPA's decision to rely on the model selected by each State to use in its SIP without any independent assessment also sends an obvious signal to upwind States that EPA likely will permit them in future SIP submissions to cherry-pick data and choose whichever model estimates lower contributions for their State, regardless of its accuracy. As explained above, in the absence of adequate supervision from EPA, upwind States stand to benefit from underestimating their contributions at the expense of downwind States. The Proposal does not

[61] Data taken from EPA, 2024 Ozone Design Values, table 6, https://www.epa.gov/system/files/documents/2025-05/o3_designvalues_2022_2024_final_05_28_25.xlsx.

address the perverse incentives created by its overly deferential approach, which further undermine the purpose of the Good Neighbor Provision. EPA's failure to even consider this potential effect is arbitrary and capricious.

D. EPA Cannot Lawfully or Rationally Approve These SIPs Based on Modeling That Relies on Now-Repealed Measures.

EPA's Proposal is legally and technically impermissible because its other regulatory repeals have fundamentally altered key underlying assumptions, and EPA here does nothing to comply with the black-letter administrative law requirement that an agency rationally address changed circumstances. EPA's repeals will result in increased emissions of air pollution, and EPA thus cannot rationally conclude that analyses that counterfactually include the emission reductions from the repealed rule still show compliance with the Good Neighbor Provision's requirement for States to eliminate adequate amounts of air pollution emissions.

Particularly, where EPA itself has repealed federal measures, it is arbitrary and capricious for EPA to ignore legal and technical deficiencies in the modeling that result from its own actions that undermine the validity of such modeling, and that its proposal now seeks to rely upon. Because EPA is required to "reexamine" its approach "if a significant factual predicate" changes, *Bechtel v. FCC,* 957 F.2d 873, 881 (D.C.Cir.1992), such is the case with the now-repealed measures in the modeling that EPA's proposed action includes, EPA "has a similar obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking." *Portland Cement Ass'n v. EPA*, 665 F.3d 177 at 187, citing *Office of Commc'n of the United Church of Christ v. FCC,* 707 F.2d 1413, 1441–42 (D.C.Cir.1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking process); *see also Gen. Chem. Corp. v. United States,* 817 F.2d 844, 846 (D.C.Cir.1987) (finding agency action arbitrary and capricious because it was "internally inconsistent and inadequately explained").

EPA completely fails to acknowledge, let alone explain or account for, the impact of its own repealed measures on the modeling the agency now seeks to rely upon for its proposed conclusions regarding downwind impacts. To the extent EPA wishes to reconsider its prior disapproval of any State's interstate transport SIP, it must propose such reconsideration both consistent with its actual reconsideration authority under Clean Air Act Section 110 and by using an analysis that does not irrationally rely on measures that are now repealed. EPA's evaluation of whether an upwind State has interstate transport obligations under Section 110(a)(2)(D)(i)(I) necessarily requires an accurate and legitimate assessment of the emissions impacts on downwind receptors. EPA and States may not rely on federal, state, or local measures that do not exist as a legal matter, and are therefore not permanent and enforceable, to support claims that no obligations exist under the Good Neighbor Provision. Both EPA's 2016v3 modeling, and its 2018

memorandum referring to its 2011 base case/2023 analytical year modeling, include such measures that EPA has repealed. By relying on measures that EPA itself repealed to support its proposed approvals of do-nothing SIP submissions, with no explanation of why it can do so under Clean Air Act Section 110(a)(2)(D)(i), EPA fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

EPA proposes to rely first on the modeling a State used in its SIP submission to identify linkages and contribution under Steps 1 and 2, and if the State's modeling indicates it is linked above 1 ppb to at least one downwind receptor, EPA will then consider the 2016v3 modeling to determine whether any such linkage is anticipated to persist in 2023. 91 Fed. Reg. at 4035. On February 13, 2026, EPA finalized its rulemaking titled "Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act," 91 Fed. Reg. 7686 (Feb. 18, 2026). This rule repeals federal greenhouse gas (GHG) emission standards for light-duty, medium-duty, and heavy-duty vehicles and engines. In light of the historic reliance on these emission standards by States for their compliance with Clean Air Act programs such as the NAAQS, EPA is legally obligated to evaluate whether any modeling a State has included in its interstate transport SIP submission includes these vehicle GHG measures or any other federal, state, or local measures that EPA has since repealed. EPA cannot finalize its proposed reconsideration of any State's SIP submissions to the extent such approval relies on either State-submitted or EPA modeling that includes now-repealed measures. Since agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion," *Catawba Cnty. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) (quoting *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997)), or to "reexamine" their approaches "if a significant factual predicate" changes, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (quoting *WWHT, Inc. v. FCC*, F.2d 807, 819 (D.C. Cir. 1981)), an agency must have a similar obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking.

Additionally, EPA cannot finalize its Proposal to the extent it relies on the 2016v3 modeling, as that modeling *certainly* relied upon now-repealed GHG emission standards for vehicles. Per EPA's own TSD for the 2016v3 modeling, the onroad emission factors accounted for the impact of GHG vehicle standards that were valid at the time but are now repealed, such as "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy Duty Engines and Vehicles – Phase 2," 81 Fed. Reg. 73,478 (Oct. 25, 2016), and "Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards," 86 Fed. Reg. 74,434 (Dec. 30, 2021).[62]

[62] *See* EPA, *Onroad Mobile Sources, Technical Support Document (TSD): Preparation of Emissions Inventories for the 2016v3 North American Emissions Modeling Platform*, section 4.3.2 (EPA-HQ-OAR-2025-0192-0054).

As explained above, the Fifth and Sixth Circuit decisions in, respectively, *Texas v. EPA* and *Kentucky v. EPA*, do not compel EPA's proposal to approve Mississippi's and Kentucky's SIPs, and they certainly do not require approving SIPs in other jurisdictions. Importantly, these cases also do not obviate EPA's duty in reconsidering prior SIP disapprovals, through a proposal that meets notice-and-comment rulemaking requirements, to consider the impact of repealed federal measures such as the GHG vehicle standards in evaluating whether an upwind State has interstate transport obligations under the Good Neighbor Provision. As the Sixth Circuit clearly stated, "nothing we have said in this opinion would prohibit the EPA from properly raising any new concerns in additional administrative proceedings on remand." *Kentucky*, 123 F.4th at 472.

Regarding Kentucky's, Mississippi's, or any other State's reliance on EPA's 2018 memorandum referring to its 2011 base case/2023 analytical year modeling, this modeling clearly includes assumptions about federal measures that have since been repealed or local measures that have been revoked or disapproved, and EPA cannot now credit those now repealed measures in any reconsideration of an interstate transport SIP. Section 4.3 of EPA's TSD for this modeling lists a number of mobile source measures that have since been repealed, including light- and medium-duty vehicle GHG standards, *see* Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27,842 (Apr. 18, 2024).[63] EPA legally cannot determine that upwind emissions do not significantly contribute to attainment or interfere with maintenance of the NAAQS based on a wholly inaccurate analysis that includes now-phantom emission reductions that the agency itself has done away with.

Properly considering Mississippi's, Kentucky's or any other State's reliance on the 2018 Memorandum and associated modeling does not necessitate approving these States' SIPs. Nothing in the Sixth Circuit decision requires such approval. The Fifth Circuit itself notes that while EPA must defer to a State's SIP so long as the State's SIP complies with the Good Neighbor Provision, "EPA's determination whether a SIP *does* comply with the Good Neighbor Provision is an independent one." *Texas*, 132 F.4th at 838 (emphasis original). The Fifth Circuit held that EPA's bases for disapproval of Mississippi's SIP submission were "outcome determinative" by solely relying on EPA's updated modeling. *Id.* at 861. In contravention of this holding, failure to evaluate the validity of Mississippi's SIP modeling or EPA's modeling relied upon for reconsideration of the prior disapproval, by failing to account for any measures that were included in such modeling that have since been repealed, is impermissibly outcome determinative.

The Sixth Circuit similarly did *not* hold that EPA is forever beholden to the technical conclusions in a State's SIP submission, acknowledging one possible alternative that Kentucky itself suggested, which is that "EPA could have announced in advance that it would use newer data and given States the option to update their plans." *Kentucky*, 123 F.4th at 469-70. While

[63] *See also* EPA, *Updates to Emissions Inventories for the Version 6.3, 2011 Emissions Modeling Platform for the Year 2023*, at 79 (EPA-HQ-OAR-2025-0192-0058).

proper consideration of States' reliance on the 2018 Memorandum and associated modeling means that EPA cannot ignore such reliance, it also means that EPA cannot flat out fail to properly evaluate the actual information itself that is being relied upon. In this case, that means evaluating technical conclusions about interstate transport obligations in light of now repealed measures.

EPA itself has previously asserted in the context of the prior SIP disapprovals that it "cannot incorporate non-final or uncertain emissions reductions into its transport modeling platform" for purposes of baseline projections at Steps 1 and 2.[64] EPA has found that projected emission changes are not sufficiently certain to occur, for example, if they are anticipated only under proposed but not finalized state or federal rules, or where the potential retirement or conversion of units is not sufficiently committed to be considered reliable. Repealed emission reduction measures are unequivocally non-final or uncertain emission reductions, and therefore, EPA itself cannot rely on its own modeling or that in the SIP submissions in reconsidering the previous disapprovals. Furthermore, as EPA has not proposed how it or States can now rely on modeling that assumes measures that do not exist as a legal matter, EPA cannot permissibly base a final reconsideration on such new explanation (if any existed).

E. EPA Fails to Adequately Consider Serious Reliance Interests in the Prior Policies That It Now Proposes to Reconsider, as Well as the Air Quality Impacts of Its Changes in Position.

1. EPA Fails to Consider Reliance Interests.

EPA violated the change-in-position doctrine by failing to "consider serious reliance interests" in its prior policies and actions. *Wages & White Lion*, 604 U.S. at 568 (citation modified). When changing a prior policy or rescinding a rule, an agency is "not writing on a blank slate" and therefore must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 591 U.S. at 33 (citation modified). After considering comments on reliance interests, an agency ultimately might choose to give "no or diminished weight" to them, *id.* at 32, but it may do so only after "address[ing] them, explaining why they were either insubstantial or overcome by other considerations," *Capital Power Corp.*, 156 F.4th at 652. "It would be arbitrary and capricious to ignore such matters." *Regents*, 591 U.S. at 30 (citation modified). Here, EPA has unlawfully ignored numerous serious reliance interests that the Proposal will impair or destroy, rendering its Proposal arbitrary and capricious.

[64] EPA, *2015 Ozone NAAQS Interstate Transport SIP Disapprovals – Response to Comment (RTC) Document* at 110 (Feb. 13, 2023) (EPA-HQ-OAR-2021-0663-0083).

Downwind States and their residents have, for years, been relying on EPA to ensure upwind sources control harmful cross-border emissions under the 2015 ozone NAAQS. Some of the undersigned Public Interest Organizations even filed a lawsuit to force EPA to act on SIP submissions long after statutory deadlines for EPA to do so had passed. *See* Complaint, *Downwinders at Risk, et al. v. Regan*, No. 4:21-cv-03551-DMR (N.D. Cal. May 12, 2021) (concerning EPA's failure to act on SIP submissions from Alabama, Kentucky, Minnesota, Mississippi, Nevada, and other States). EPA ultimately disapproved SIP submissions from Alabama, Kentucky, Minnesota, Mississippi, and Nevada and finalized the Good Neighbor Rule in 2023. Covered sources in those States have been subject to good neighbor FIPs since August 4, 2023, *see* Good Neighbor Rule, 88 Fed. Reg. 36,654, though judicial stays have temporarily halted implementation of those obligations.[65] In proposing to eliminate the legal predicate for Alabama, Kentucky, Minnesota, Mississippi, and Nevada's FIPs, the Proposal clearly undermines the interests of many stakeholders who are reliant on the stronger pollution controls in those FIPs, and EPA's longstanding use of a 1% contribution threshold for assessing upwind States' good neighbor obligations, and who have no other recourse to secure those emissions reductions by the Clean Air Act's attainment deadlines, including:

- Upwind and downwind States that have reasonably anticipated, and designed their own air-quality plans and long-term planning processes considering, use of 1% of the NAAQS as a threshold to determine linkage across multiple related good neighbor programs for multiple pollutants, and dating back more than two decades;[66]
- Downwind States (including Connecticut, Illinois, Michigan, New York, and other States), which are actively engaged in planning to comply with the 2015 ozone NAAQS requirements, including upcoming attainment deadlines, and who by statute must rely on EPA to enforce upwind States' good neighbor obligations or else risk nonattainment bump-ups and penalties;

[65] *See* Order, *Alabama v. EPA*, No. 23-11173, ECF No. 33 (11th Cir. Aug. 17, 2023) (staying Alabama SIP disapproval); *Kentucky v. EPA*, No. 23-3216 & *Kentucky Energy and Environment Cabinet v. EPA*, No. 23-3225 (6th Cir. July 25, 2023) (staying Kentucky SIP disapproval); Order, *Kentucky v. EPA*, No. 23-3216 (6th Cir. May 31, 2023) (administratively staying Kentucky SIP disapproval); Order, *Allete, Inc. d/b/a Minnesota Power v. EPA*, No. 23-1776, ECF No. 5292580 (8th Cir. July 5, 2023) (staying Minnesota SIP disapproval); Order, *Texas v. EPA*, No. 23-60069, ECF No. 268-1 (5th Cir. May 1, 2023) (staying Mississippi SIP disapproval); Order, *Nevada Cement Co. v. EPA*, No. 23-682, ECF No. 27 (9th Cir. July 3, 2023) (staying Nevada SIP Disapproval Action). As noted above, the Ninth Circuit ultimately lifted its stay of EPA's Nevada SIP Disapproval Action. *See* Order, *Nevada Cement Co. v. EPA*, No. 23-682, ECF No. 65 (9th Cir. Dec. 17, 2024).

[66] *See, e.g.*, Letter to Lisa Jackson, EPA Administrator, from Connecticut, District of Columbia, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, & Wisconsin, at 2 (Sept. 2, 2009), https://otcair.org/upload/Documents/Correspondence/Final%20Recommendation%20Letter_090902.pdf (attached as Ex. 11) ("An upwind state significantly contributes to nonattainment or interferes with maintenance in a downwind area of interest if its total impact from all source sectors equals or exceeds 1% of the applicable NAAQS."); *id.* at 3 ("Use of 1% of the NAAQS as the significance threshold is consistent with EPA's approach in CAIR.").

- Residents of those and other downwind States (such as Connecticut, Illinois, Michigan, New York, Ohio, Texas, and Utah), who will breathe more polluted air and suffer increased costly health harms if EPA can no longer enforce FIPs for Alabama, Kentucky, Minnesota, Mississippi, and Nevada;
- Businesses and industries operating in those downwind States, which may now be subject to stricter and more costly in-state controls to compensate for EPA's failure to require emissions reductions in Alabama, Kentucky, Minnesota, Mississippi, and Nevada;
- Residents of Alabama, Kentucky, Minnesota, Mississippi, and Nevada who live or work near upwind facilities covered by the FIPs, who stand to benefit from reduced local pollution under FIP controls implemented to control interstate transport.

EPA must demonstrate that it has thoroughly considered these serious reliance interests. And any adequate consideration of reliance interests must lead EPA to conclude that it would be unreasonable and contrary to the purposes of the Clean Air Act and its Good Neighbor Provision for EPA to reconsider prior SIP disapprovals and approve SIPs for Alabama, Kentucky, Minnesota, Mississippi, and Nevada. *See, e.g.*, *Kentucky v. EPA*, 123 F.4th 447, 470-71 (6th Cir. 2024) (finding EPA action was arbitrary and capricious where EPA failed to consider State's reliance interests in EPA's previous assurance and State "wasted the costs it incurred drafting its plan").

2. EPA Fails to Consider the Proposal's Health and Air-Quality Impacts.

In addition, EPA must consider the emissions increases and resultant public health harms and other costs that would occur as a result of EPA's finalization of the Proposal and consequent removal of FIP obligations for Alabama, Kentucky, Minnesota, Mississippi, and Nevada. Failing to do so would constitute "fail[ure] to consider an important aspect of the problem" and failure to "examine the relevant data" before the agency. *State Farm*, 463 U.S. at 43; *see also Fox Television*, 556 U.S. at 515 (under the change-in-position doctrine, an agency must demonstrate that "there are good reasons for [a changed policy], and that the agency *believes* it to be better").

Notably, EPA conducted a regulatory impact analysis when it finalized FIPs for those States in 2023.[67] That analysis showed that the FIPs would reduce ambient levels of ozone as well as other dangerous air pollutants, with substantial health benefits. Considering FIP requirements across all States covered by the Good Neighbor Rule, EPA found that the Rule's

[67] EPA, *Regulatory Impact Analysis for Final Federal Good Neighbor Plan* (2023) (EPA-HQ-OAR-2021-0668-1115), https://www.epa.gov/system/files/documents/2023-03/SAN%208670%20Federal%20Good%20Neighbor%20Plan%2020230315%20RIA_Final.pdf ("Good Neighbor Rule RIA").

massive benefits, totaling an estimated $200 billion through 2042, dwarf compliance costs each year. *See* Good Neighbor Rule RIA at 214-17. EPA now proposes to take action that would eliminate the agency's authority to implement and enforce FIPs for certain States, thereby forgoing all of the benefits for downwind air quality and public health that the agency projected would flow from the requirements of those FIPs. EPA must conduct an equally rigorous analysis now that thoroughly considers the harms associated with eliminating EPA's authority for those FIPs, and EPA must repropose its Proposal with that supporting analysis. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule"); *Fox Television*, 556 U.S. at 515 (the APA "make[s] no distinction ... between initial agency action and subsequent agency action undoing or revising that action").

And regardless of whether it conducts a new analysis, EPA must consider its prior factual findings about the benefits of its FIP requirements and explain why EPA now believes that its change in position is a good and permissible policy choice despite the significant lost air-quality and public health benefits. *Fox Television*, 556 U.S. at 515; *see also R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 192 (5th Cir. 2023) (agency action was likely arbitrary and capricious where agency "brushed over its prior statements" and failed to reconcile prior factual findings); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (en banc) ("The absence of a reasoned explanation for disregarding previous factual findings violates the APA."). Ultimately, any adequate consideration of foregone air-quality and health benefits must lead EPA to conclude that it would be unreasonable and contrary to the purposes of the Clean Air Act and its Good Neighbor Provision for EPA to intervene at this late hour to reconsider prior SIP disapprovals and eliminate FIPs for those States.

F. EPA's Proposed New Determinations Regarding Kentucky's SIP Submission are Arbitrary and Capricious for Additional Record-Specific Reasons.

For all of the reasons explained above, it would be arbitrary and capricious and unlawful for EPA to change its prior, longstanding approaches of using a forward-looking analytic year, considering the best available information and modeling, and using a 1% contribution threshold when assessing the interstate transport obligations of any State. But even assuming it were appropriate to only assess linkages identified in the March 2018 Guidance Memo, and that it were appropriate for EPA to discard the 1% or 0.70 ppb threshold in favor of the much higher 1 ppb threshold (which, as discussed above, it is not), EPA's proposal to approve the 2018 Kentucky SIP submittal is unsupported. *See State Farm*, 463 U.S. at 43; *Wages & White Lion*, 604 U.S. at 568.

As the March 2018 Guidance Memo Attachment C makes clear, Kentucky contributes 1.52 ppb to the Harford, Maryland monitor (240251001), which is well above *either* threshold.

Kentucky acknowledged this in its submittal.[68] As EPA itself has determined, the Harford monitor is failing to attain the NAAQS: the official 2023 design value for the monitor is 71 ppb, exceeding the NAAQS (the 2024 design value for the monitor is also 71 ppb, again exceeding the NAAQS).[69] As such, even constraining the analysis to Kentucky's own 2018 SIP submission, the 2018 linkage modeling, and the higher 1 ppb threshold consistent with the Proposal, Kentucky's SIP cannot be approved.

III. It Would Be Arbitrary and Capricious for EPA to Approve SIPs for New Mexico, and Tennessee.

EPA should abandon its proposal to withdraw its prior proposed partial disapprovals for Arizona, New Mexico, and Tennessee and to instead approve those SIPs. *See* 91 Fed. Reg. at 4029, 4044. For all of the reasons explained above, it would be arbitrary and capricious and unlawful for EPA to change its prior, longstanding approaches of using a forward-looking analytical year, considering the best available information and modeling, and using a 1% contribution threshold when assessing the interstate transport obligations for any State. Those arguments equally apply to Arizona, New Mexico, and Tennessee's SIP submissions.

But even if those SIP submissions are reviewed under EPA's proposed new approach, there are additional record-based reasons why it would be arbitrary and capricious for EPA to approve New Mexico's and Tennessee's SIPs. *See Prometheus Radio*, 592 U.S. at 423; *State Farm*, 463 U.S. at 43.

A. New Mexico

EPA proposes to approve the New Mexico SIP submission despite acknowledging that New Mexico itself employed a 1% contribution threshold, and contributed above that threshold according to the modeling New Mexico employed. *See* 91 Fed. Reg. at 4042-43 ("New Mexico identifies that the State contributes above 1 percent of the NAAQS to one maintenance receptor and one nonattainment receptor, both in Colorado."). In particular, according to March 2018 Guidance Memo Attachment C, New Mexico contributes 0.77 ppb towards the Weld County, Colorado monitor (81230009). That monitor had a 2023 design value of 71 ppb and a 2024 design value of 74 ppb–well above the 70 ppb NAAQS.[70] Accordingly, by the modeling and

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[68] *See* Kentucky Final SIP Submittal, Comment Response at 5 ("EPA's updated modeling, along with the 1 ppb threshold memo, show Kentucky significantly contributing to one maintenance monitor located in Harford, Maryland.") (EPA-HQ-OAR-2025-0192-0035); *see also id.* at 3 (concurring "that the Harford monitor is considered a maintenance monitor").
[69] *See* EPA, Air Quality Design Values, https://www.epa.gov/air-trends/air-quality-design-values#report (last updated Aug 28, 2025).
[70] *See* EPA, Ozone Design Values, 2023 (xlsx), at tbl.5 (June 4, 2024), https://www.epa.gov/system/files/documents/2024-06/o3_designvalues_2021_2023_final_06_04_24.xlsx.

contribution threshold chosen by New Mexico, New Mexico contributes above the threshold towards a downwind monitor that fails to attain the NAAQS; as such, EPA cannot approve the New Mexico SIP submission, even under the flawed approach it seeks to adopt in the Proposal.

B. Tennessee

EPA proposes to approve Tennessee's 2018 SIP submission based on a finding that "the State will not contribute significantly to nonattainment or interfere with maintenance of the 2015 8-hour ozone NAAQS in any other State." 91 Fed. Reg. at 4044. This finding directly conflicts with EPA's own data showing that emissions from sources in Tennessee significantly contribute to ozone pollution in Crittenden County, Arkansas, where there is an ongoing violation of the 2015 ozone NAAQS.

As noted in public comments on EPA's February 2024 proposal to partially disapprove Tennessee's SIP submission, 89 Fed. Reg. 12,666, EPA's modeling severely underpredicted 2023 ozone levels.[71] As a result, the list of nonattainment and maintenance monitors provided for use under Step 1 of the Interstate Transport Framework excludes monitors that ultimately recorded violations of the 2015 ozone NAAQS in 2023. One of those monitors is in Crittenden County, Arkansas (site ID 50350005). While EPA projected this monitor's average design value in 2023 would be just 57.3 ppb, the actual certified 2021–2023 design value was 72.3 ppb.[72] Similarly, this monitor's current, certified 2022–2024 design value is 72 ppb.[73]

Crittenden County, Arkansas is part of the Memphis Metropolitan Statistical Area (MSA). In June 2025, three nonprofit organizations filed a petition for EPA to redesignate the Memphis MSA as in nonattainment of the 8-hour ozone NAAQS.[74] EPA has not yet taken action on this petition. However, the petition alerted EPA to the fact that residents of the Memphis MSA are being exposed to presumptively unhealthy levels of ozone pollution–and the problem is getting worse, not better. In particular, two of the five monitors in the Memphis MSA had 2021–2023 design values above 70 ppb, while four of the five monitors now have 2022–2024 design values above 70 ppb.[75] Although the MSA's local regulatory agencies (from Tennessee, Arkansas, and Mississippi) joined EPA's voluntary Ozone Advance program in 2023, they have

[71] *See* Comments of Clean Air Task Force et al. 3–11 (May 16, 2024) (EPA-HQ-OAR-2023-0402-0001) (attached as Ex. 12).
[72] *See id.* at 4 tbl.1; EPA, Ozone Design Values, 2023 (xlsx), at tbl.5 (June 4, 2024), https://www.epa.gov/system/files/documents/2024-06/o3_designvalues_2021_2023_final_06_04_24.xlsx.
[73] *See* EPA, Ozone Design Values, 2024 (xlsx), at tbl.5 (May 28, 2025), https://www.epa.gov/system/files/documents/2025-05/o3_designvalues_2022_2024_final_05_28_25.xlsx.
[74] *See* Memphis Community Against Pollution et al., *Petition to Redesignate the Memphis Metropolitan Statistical Area as in Nonattainment* (June 5, 2025) (attached as Ex. 13).
[75] *See id.* at 16–23.

utterly failed to comply with applicable deadlines and EPA recommendations for preparation and implementation of a plan to reduce the area's ozone pollution.[76]

EPA's own modeling results demonstrate that emissions from sources in Tennessee significantly contribute to ozone pollution in Crittenden County, Arkansas.[77] This modeling shows that Tennessee emissions contribute 15.77 ppb to the Crittenden County ozone monitor,[78] far above either a 1% or 1 ppb threshold. In light of the certified monitoring data showing this Arkansas county is currently violating the 2015 ozone NAAQS and EPA's own modeling results showing that emissions from Tennessee significantly contribute to ozone levels in that location, it would be patently unreasonable for EPA to finalize its proposed determination that Tennessee will not contribute significantly to nonattainment in any other State.

In addition, EPA's Proposal notes that Tennessee's SIP submission relied on anticipated reductions in emissions "from coal-fired EGUs and other large NOx sources," including reductions associated with "source shutdowns," to demonstrate it would not significantly contribute to nonattainment or interfere with maintenance in other States. 91 Fed. Reg. at 4043. To the extent that EPA's proposal to approve Tennessee's SIP submission also relies on such anticipated emission reductions, EPA cannot ignore current data regarding the State's emissions of ozone precursors and recent developments related to coal plant retirements.

For example, over the past few years, the State issued permits authorizing the Tennessee Valley Authority (TVA) to construct and operate two new gas- and oil-fired power plants near its existing coal-fired Kingston and Cumberland power plants, respectively. These new power plants evaded major New Source Review because the State allowed TVA to subtract the anticipated emission decreases from retiring the nearby coal plants from the increased emissions from the new power plants.[79] But in February 2026, TVA's Board of Directors voted to "continue operation" of both coal plants, "alongside new natural gas generation currently under construction at both sites."[80] This new plan to operate the old coal plants indefinitely, along with the new gas- and oil-fired plants, will substantially increase Tennessee's NOx and VOC emissions.

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[76] *See id.* at 23–33.
[77] *See* EPA, *2023 Modeling Released 03-27-18* (July 19, 2021) (EPA-R04-OAR-2019-0156-0030), https://www.regulations.gov/document/EPA-R04-OAR-2019-0156-0030.
[78] *See id.*
[79] *See* Tenn. Dep't of Envt. & Conservation, *Construction Permit Summary Report, Permit No. 981915* (Dec. 15, 2024) (attached as Ex. 14); Tenn. Dep't of Envt. & Conservation, *Construction Permit Summary Report, Permit No. 981885* (Mar. 28, 2025) (attached as Ex. 15).
[80] *See* Tenn. Valley Auth., *TVA Continues Coal Operations to Help Drive U.S. Energy Dominance* (Feb. 11, 2026), https://www.tva.com/news-media/releases/tva-continues-coal-operations-to-help-drive-u.s.-energy-dominance (attached as Ex. 16).

As another example, the Shelby County Health Department (the air permitting agency for Shelby County, Tennessee) refused to enforce the preconstruction permitting rules in Tennessee's current SIP with respect to a new major source of NOx emissions that began operation in southwest Memphis in the summer of 2024.[81] At peak operations, the facility operated 35 unpermitted gas-fired turbines with a total generating capacity in excess of 400 megawatts, which had the potential to emit more than 1,000 tons per year of NOx.[82] The local agency completely disregarded public demands to enforce applicable air quality laws, wrongly claiming that the large turbines were exempt from permitting.[83] The company later applied for a permit for a subset of its 35 turbines, and in response to public comments, the Shelby County Health Department declared its position that portable or temporary turbines are exempt from permitting regardless of their size.[84] This position directly conflicts with federal law requiring preconstruction permits for stationary sources subject to an applicable New Source Performance Standard.[85] In January 2026, EPA confirmed there is no such permitting exemption—and declined to create one—in its promulgation of 40 C.F.R. 60 Subpart KKKKa. *See* New Source Performance Standards Review for Stationary Combustion Turbines and Stationary Gas Turbines, 91 Fed. Reg. 1910, 1925–27 (Jan. 15, 2026). Nevertheless, the Shelby County Health Department has yet to retract its decision that such turbines are exempt from permitting.

In addition, the Shelby County Health Department recently permitted the expansion of TVA's Allen plant, a gas- and oil-fired power plant in Memphis. Despite acknowledging that "Shelby County is currently in violation of the 8-hour ozone standard and awaiting designation as nonattainment,"[86] the agency authorized a significant increase in the power plant's emissions of NOx and unlawfully refused to enforce the provisions of its Local Implementation Plan that apply to a major modification in an area where a NAAQS violation is predicted, such as the requirement to impose NOx limits that reflect the lowest achievable emission rate.[87]

EPA cannot ignore these concerning recent developments regarding new and existing sources of substantial emissions of ozone precursors in Tennessee. Especially given EPA's modeling results showing that Tennessee emissions significantly contribute to ozone pollution in Crittenden County, Arkansas, which certified monitoring data show is currently violating the

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[81] *See* Nat'l Ass'n for the Advancement of Colored People (NAACP), *Notice of Intent to Sue for Violations of the Clean Air Act*, at 4–8, 14–15 (June 17, 2025) (attached as Ex. 17) [hereinafter "NAACP Notice Letter"].
[82] *See id.*
[83] *See id.* at 5.
[84] *See* Shelby Cnty. Health Dep't, *Response to Public Comments on Draft Construction Air Permit No. 01156-01PC for CTC Property LLC*, at 2–4 (June 2, 2025) (attached as Ex. 18).
[85] *See, e.g.*, NAACP Notice Letter at 13.
[86] Shelby Cnty. Health Dep't, PSD Construction Permit Application Evaluation and Review (Permit No. 01280-03PC) at 8 (Dec. 2025) (attached as Ex. 19).
[87] *See* S. Env't L. Ctr., *Petition for Reconsideration of TVA Allen Combustion Turbine Project PSD Construction Permit No. 01280-03PC* at 3–8 (Jan. 22, 2026) (attached as Ex. 20); *see also* Shelby Cnty. Health Dep't, *Decision on Petition for Reconsideration* (Mar. 5, 2026) (denying petition for reconsideration) (attached as Ex. 21).

2015 ozone NAAQS, it would be arbitrary and capricious for EPA to disregard these facts and approve Tennessee's 2018 SIP submission.

IV. EPA Should Finalize the Prior Proposed Error Corrections for Iowa's and Kansas's Prior SIP Approvals, and Must Finalize the Proposed FIPs for Iowa and Kansas.

In 2024, EPA proposed to exercise its error-correction authority under Clean Air Act Section 110(k)(6) to reconsider its prior approvals of good neighbor SIP submissions from Iowa (87 Fed. Reg. 22,463 (Apr. 15, 2022)) and Kansas (87 Fed. Reg. 19,390 (Apr. 4, 2022)). 89 Fed. Reg. at12,692-95. EPA explained that after it approved those SIP submissions, the agency "performed updated modeling in response to comments received on other good neighbor proposals" and also "updated its definition of a maintenance receptor" in light of persistently excessive ozone levels at many monitoring sites. *Id.* at 12,692. EPA further explained that the agency "used this new, unified set of air quality analytics to inform its determinations of the obligations of all other states" in the Good Neighbor Rule, meaning its prior actions for Iowa and Kansas, based on the 2016v2 modeling, were "inconsistent" with EPA's treatment of other States, despite their sharing some of the same linked receptors. *Id.* at 12,693.

"Based on [EPA's] updated air quality modeling and considering contributions to violating-monitor receptors," EPA proposed to find that "both Iowa and Kansas are now projected to contribute more than 1 percent of the NAAQS to downwind receptors" in the 2023 analytic year, but not the 2026 analytic year. *Id.* "[T]he Agency finds it both reasonable—and necessary to ensuring consistency and equity across all states—to use this same analytical information to address the obligations of all states." *Id.* EPA explained in its 2024 proposal that "Had the EPA known of this information regarding the 2023 analytic year reflected in the 2016v3 modeling and the violating-monitor receptor identification methodology at the time it issued those approvals, it would not have approved Kansas or Iowa's submissions. Under the plain meaning of [Section 110(k)(6)'s] word 'error,' those approvals were in error and are in need of correction." *Id.* at 12,694.

Now, in the Proposal, EPA indicates that it intends to withdraw its proposed error corrections for Kansas and Iowa to ensure "consistent treatment between States." 91 Fed. Reg. at 4029, 4037-38. But it would be unreasonable for EPA to leave SIP approvals in place for Kansas and Iowa even though more recent information renders the original approvals of Kansas and Iowa's SIP submissions incorrect, or "in error" under the plain meaning of Section 110(k)(6). 42 U.S.C. § 7410(k)(6). Specifically, better scientific information shows that Kansas and Iowa were linked above the 1% threshold at the time EPA considered their SIP submissions and should not have been screened out of further analysis. (Indeed, if anything, even more recent data show that the 2016v3 modeling that EPA relied upon in its 2024 Proposal likely underpredicted downwind impacts from upwind emissions; for example, the Allegan County Michigan monitor to which

Iowa is linked had a 75 ppb design value in 2023, and a 2024 design value of 74 ppb; by contrast, the 2016v3 modeling projected just 67.4 ppb for the 2023 design value).[88]

Invoking EPA's error-correction authority to reconsider its erroneous actions on Kansas and Iowa's SIP submissions is lawful and appropriate, and distinguishable from EPA's unlawful invocation of error-correction authority in the Proposal. The term "error" in Section 110(k)(6) includes factual as well as legal error. Under D.C. Circuit precedent, EPA has authority to correct prior Good Neighbor SIP approvals based on legal misconceptions. *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 133 (D.C. Cir. 2015) ("*EME Homer II*"). But there is no statutory or other indication that Congress intended to withhold this authority where new factual information is available indicating that a prior action was in error. In addition, the previously proposed error corrections for Kansas and Iowa are straightforward compared to past instances of error correction. Partial disapprovals of Kansas's and Iowa's SIPs would fall squarely within the list of actions that EPA may undertake as revisions under Section 110(k)(6), unlike the more surgical modifications that were upheld as "appropriate" in *Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 950 (9th Cir. 2015). Nor would these partial disapprovals be retroactive: they would require emission reductions in Kansas and Iowa going forward, even though the partial disapprovals themselves are based on data from the 2023 analytical year. *Cf. id.* (noting that modifications to the SIP were the only way to correct an error retroactively).

For all of the reasons explained above regarding EPA's unflagging obligation to rely on the best available science to protect downwind air quality, the unreasonableness of reversing EPA's longstanding positions on use of a 1% screening threshold and the impermissibility of any "deference" to State modeling, EPA should not finalize the flawed reasoning in its Proposal regarding Kansas and Iowa and should not withdraw the proposed error corrections. Instead, EPA should invoke its error-correction authority under Section 110(k)(6), as it proposed to do in 2024, to revise its erroneous prior approvals of those States' submissions in light of better factual information.

V. EPA's Attempt at Nationwide Rulemaking in This Proposal Is Improper; and to the Extent EPA Is Professing New Nationwide Policies, or Policies That Would Govern Future Actions Beyond Eight States, Such Rule is Nationally Applicable or EPA Must Make a Determination of Nationwide Scope or Effect.

EPA cannot legally finalize its action as proposed for the reasons described in this comment letter. Additionally, EPA cannot promulgate new nationally applicable and prospectively binding legal interpretations and policy positions in a state-specific,

[88] *See* 2016v3 Analysis (EPA-HQ-OAR-2021-0663-0070), SIP Disapproval Rule, 88 Fed. Reg. at 9352, and EPA, 2024 Ozone Design Values, table 6, https://www.epa.gov/system/files/documents/2025-05/o3_designvalues_2022_2024_final_05_28_25.xlsx.

record-constrained SIP action. *See Hall,* 273 F.3d at 1146. The proper vehicle for such broadly applicable and binding interpretations and policies is through a national rulemaking that is reviewable in the D.C. Circuit. *EPA v. Calumet Shreveport Refin. L.L.C.,* 605 U.S. 627 (2025) ("*Calumet*"). Under Clean Air Act Section 307(b)(1), "nationally applicable" EPA actions must be challenged exclusively in the D. C. Circuit, while "locally or regionally applicable" actions ordinarily belong in regional Circuits. 42 U.S.C. § 7607(b)(1). However, locally or regionally applicable actions that are "based on a determination of nationwide scope or effect" must be reviewed in the D.C. Circuit if EPA finds and publishes that such basis exists. *Id.* As the Supreme Court has clearly held, "[t]his tripartite system reflects congressional intent to channel nationally significant EPA actions to the D. C. Circuit while keeping most regionally focused matters in local Circuits." *Id* at 627.

Any rule finalizing this action as proposed is unequivocally "nationally significant." *Id.* If the Agency chooses to proceed with finalizing this Proposal, it must determine and publish that such action is based on a determination of nationwide scope or effect, and is therefore judicially reviewable in the D.C. Circuit. EPA's Proposal extends beyond reconsideration of certain SIP submittals and constitutes either a nationally applicable rulemaking or an action based on a determination of nationwide scope and effect. EPA itself declares repeatedly throughout this Proposal that the new policies and interpretations that undergird it have nationwide scope and effect, including for any future actions related to interstate transport requirements under the 2015 ozone NAAQS. *See, e.g.*:

- "EPA is proposing to determine that a 1-ppb threshold is the appropriate Step 2 threshold to rely on in the first instance for the 2015 ozone NAAQS for all States in this action *and any future actions* related to the 2015 ozone NAAQS." 91 Fed. Reg. at 4033 (emphasis added).
- "EPA intends to take a subsequent action *consistent with this proposal*… to address… obligations … for other States." *Id.* at 4029 (emphasis added).
- "Two judicial decisions … have caused the EPA to reconsider key policies related to interstate transport requirements under CAA section 110(a)(2)(A)(i)(I) …. The EPA's new understanding is applicable not just to the States who were the subject of those judicial decisions *but to other States as well*." *Id.* at 4030 (emphasis added).
- "EPA believes it prudent to implement a policy… that 1 ppb is a 'presumptively acceptable' threshold *for all States*…. [A] 1-ppb threshold is the appropriate Step 2 threshold to rely on in the first instance for the 2015 ozone NAAQS for all States in this action and *any future actions* related to the 2015 ozone NAAQS." *Id.* at 4033 (emphasis added).

By EPA's own accounting as excerpted above, the Proposal purports to set forth several new policies, new interpretations of its prior guidance, and new statutory interpretations that EPA

itself asserts will apply nationwide and govern its future action on interstate obligations for any other State. EPA clearly states that it "believe[s] it is "essential" to have national consistency in the implementation of interstate ozone obligations, *see, e.g.*, 87 Fed. Reg. at 9373-74, and so we propose to apply the logic of these judicial decisions more broadly to the EPA's national policies for interstate transport obligations for the 2015 8-hour ozone NAAQS to avoid any unfairness that could result from the uneven application of judicial rulings from different regional circuits." 91 Fed. Reg. at 4026 n.95. One court has already at least implicitly recognized that EPA's Proposal speaks–and, if finalized, binds EPA–nationally. *See Texas v. EPA*, No. 23-600069, slip op. at 52-542 (5th Cir. filed March 13, 2026) (addressing what EPA's proposal says about the threshold for linkages EPA might apply in reviewing good neighbor SIP submissions). By EPA's own terms, any final rule including these new policies and legal interpretations thus must be reviewed in the D.C. Circuit.

The Supreme Court's decision in *Calumet* supports that an action finalizing the proposed new national policies and interpretations is reviewable in the D.C. Circuit. The Court recognizes that there are "edge cases" under Clean Air Act Section 307(b)(1), including the fact that "an action that formally applies to only a subset of the country can be nationally applicable." *Id*. at n.3, citing *ATK Launch Sys., Inc. v. EPA*, 651 F. 3d 1194, 1197 (10th Cir. 2011). EPA's action, if finalized as proposed, is at minimum an edge case, if not a plainly clear case, that formally applies to a subset of the country but is still nationally applicable. An action "applies" nationally only if, on its face, it has binding effect throughout the country. *Oklahoma v. EPA*, 605 U.S. 609, 611 (2025). EPA's Proposal, as evidenced by the excerpts above, clearly indicates that the agency's new policies and interpretations apply nationally, not just to the SIPs it's proposing to reconsider.

EPA purports to take nationally binding action in a record-constrained SIP action. For instance, EPA plainly states that it is "proposing to determine that a 1-ppb threshold is the appropriate Step 2 threshold to rely on in the first instance for the 2015 ozone NAAQS for all States in this action *and any future actions related to the 2015 ozone NAAQS*." 91 Fed. Reg at 4,033 (emphasis added). This is not, in EPA's view, merely an interpretation for a locally or regionally applicable action that "*may* have precedential effect in future proceedings." *Sierra Club v. EPA*, 47 F.4th 738, 744 (D.C. Cir. 2022) (emphasis added). Nothing in EPA's Proposal suggests it is evaluating the applicability of the 1 ppb contribution threshold to each individual SIP on a case-by-case basis. Rather, according to EPA, this Proposal *will* set the legal standard governing *all* subsequent EPA actions regarding interstate transport obligations for the 2015 ozone NAAQS under Clean Air Act Section 110(a)(2)(D)(i) and any other relevant statutory provision. If EPA instead finalizes its reconsideration of these SIPs without confirming such action is nationally applicable or is based on these determinations explicitly of nationwide scope or effect, such action must be tailored to each individual SIP accordingly and clearly explain how the legal and technical basis for each of these individual SIPs is locally or regionally applicable.

However, EPA cannot alternatively finalize a reconsideration of each individual SIP on a case-by-case local or regionally applicable basis using the 1 ppb or any other threshold without first proposing its specific rationale for why such threshold is appropriate for each SIP.

Alternatively, if EPA finalizes its rulemaking as proposed, EPA must find and publish that it is based on the determinations above, which are of nationwide scope or effect under Clean Air Act Section 307(b)(1). To the extent EPA has discretion not to so find and publish, EPA must provide a rational explanation of any refusal to do so, which it has not done here. The nationwide scope or effect exception to local or regional judicial review applies if EPA's rule is based on "a justification of nationwide breadth [that] is the primary explanation for and driver of EPA's action." *Calumet*, 605 U.S. at 645. Such a justification "does not rise to this level if EPA also relied in significant part on other, 'intensely factual' considerations, or if the key driver of EPA's action is otherwise debatable." *Oklahoma*, 605 U.S. at 611 (citing *Calumet,* 605 U.S. at 645). Here, EPA's reconsideration of its prior interstate transport SIP disapprovals is primarily driven by its change of policy and interpretation in proposing 1 ppb as the nationally applicable contribution threshold under Step 1. EPA asserts that it "is proposing to find that these 10 States are screened out from further review after determining their contributions fall below the [1 ppb] contribution threshold, and so the EPA need not examine the additional information contained in the submissions." 91 Fed. Reg. at 4,036. EPA's justification therefore unquestionably relies on its new 1 ppb contribution threshold and does not rely in *any* part on other "intensely factual considerations." *Oklahoma,* 605 U.S. at 611. EPA's preamble evaluating each individual SIP submission merely describes the contents of the submission, and proposes to approve based on the State's contribution being below the 1 ppb threshold.

For these reasons, EPA cannot have it both ways. Either EPA's new policies and interpretations are binding in a nationally significant rulemaking that is reviewable only in the D.C. Circuit, or the Proposal consists solely of record-constrained SIP actions that are only litigable in a regional circuit.

VI. The Proposal Is Procedurally Deficient.

As described below, EPA's rulemaking process fails to comply with the procedural requirements of the Clean Air Act, the APA, and multiple Executive Orders. EPA has denied stakeholders an adequate and meaningful opportunity to engage in this consequential rulemaking process, as well as the consultation and analysis guaranteed by Executive Order. Those process failures prejudice the public, including the undersigned Public Interest Organizations and our members, who have significant interest in existing protections from harmful pollution for downwind States and their residents and businesses. The only way for EPA to remedy these myriad procedural infirmities would be to withdraw and repropose the Proposal.

A. The Rule Is Procedurally Deficient Because EPA Failed to Follow Clean Air Act Section 307(d) Procedures.

As explained above, the Proposal is legally flawed because EPA lacks statutory authority to reconsider prior SIP disapprovals. But assuming EPA has authority to reconsider a prior SIP disapproval and convert it into an approval while a FIP is in place, as EPA proposes to do here, the procedural requirements of Clean Air Act Section 307(d) apply to such action. *See* 42 U.S.C. § 7607(d)(1)(B).

The direct legal consequence of converting prior SIP disapprovals into approvals would be the elimination of EPA's authority to maintain its existing FIPs for those States. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to promulgate a FIP only where a State fails to timely submit an adequate SIP or EPA "disapproves a State implementation plan submission in whole or in part"). EPA itself has previously taken the position that action halting or eliminating a prior SIP disapproval will, as a matter of law, necessarily and immediately eliminate EPA's legal authority to enforce or implement a FIP for that State. *See, e.g.*, 88 Fed. Reg. at 49,299 ("EPA has no discretion as to the regulatory revisions that stay the effectiveness of the Good Neighbor Plan's requirements for sources in the states covered by stay orders [as to SIP disapproval actions]."); Respondents' Mot. to Dismiss or, in the Alternative, Hold These Petitions in Abeyance, *Kinder Morgan v. EPA*, No. 23-1275, ECF No. 2030756, at 20 (D.C. Cir. Dec. 8, 2023) (describing EPA's actions to halt Good Neighbor Rule requirements in light of judicial stays of SIP disapproval actions as "ministerial actions").[89] Thus, under EPA's own interpretation of its authority, regardless of whether and when the agency takes separate administrative action to remove FIP obligations from the Code of Federal Regulations, EPA's legal authority to maintain those obligations disappears upon its finalization of the SIP approval. Consequently, finalization of this Proposal would have the necessary and direct legal effect of revising FIPs for Alabama, Kentucky, Minnesota, Mississippi, and Nevada.

Revising a FIP triggers the rulemaking requirements of Clean Air Act Section 307(d), which are stricter than the APA's general rulemaking requirements. Specifically, Section 307(d) procedures apply to any "revision of an implementation plan by the Administrator under section 7410(c)" (i.e., a FIP). 42 U.S.C. § 7607(d)(1)(B). The plain text of that provision covers the actions in the Proposal, which, as explained above, according to EPA, would have the necessary and immediate legal consequence of "revisi[ng]" existing FIPs for the covered States by eliminating EPA's FIP authority.

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[89] *See also, e.g.*, *Ohio*, 603 U.S. at 297 n.12 ("the FIP cannot apply to a State if its SIP is not disapproved"); Order, *Utah v. EPA*, No. 23-9514, ECF Doc. 11016742, at 4 (10th Cir. July 27, 2023) (staying EPA's disapproval of Oklahoma's and Utah's SIP disapprovals and declaring that "[b]ecause EPA may not enforce a federal implementation plan without first disapproving a state implementation plan, EPA may not enforce its federal Good Neighbor plan for the 2015 ozone NAAQS against Oklahoma or Utah while the stay remains in place.").

Interpreting Section 307(d)(1)(B) to apply to the actions in the Proposal is the best reading of the statutory text. EPA has already acknowledged that finalization of its Proposal will require EPA to take "a future action" to "withdraw[] the Good Neighbor Plan FIPS for [those] states," and that such action "would be subject to CAA section 307(d)." 91 Fed. Reg. at 4,029 n.17. However, applying Section 307(d)'s more robust notice-and-comment procedures to EPA's future FIP-withdrawal action, but not the Proposal, would risk rendering those procedures essentially meaningless. At that point, EPA presumably will maintain that it lacks discretion to take any action other than withdrawal of the FIPs. On the theory that it lacks discretion to do anything else, EPA might even invoke the APA's so-called good cause exception, 5 U.S.C. 553(b)(B), to exempt its FIP withdrawal actions from notice-and-comment requirements—as it has previously done across multiple rules implementing judicial stays of good neighbor SIP disapprovals or FIP requirements. *See* 88 Fed. Reg. at 49,299-300; 88 Fed. Reg. at 67,104-05; Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stay, 89 Fed. Reg. 87,960, 87,965-66 (Nov. 6, 2024).[90] Because EPA's reconsideration of prior SIP disapprovals is both the direct legal trigger for elimination of EPA's FIP authority and the point in EPA's decisionmaking process where it is exercising discretion that could be influenced by Section 307(d)'s more robust notice-and-comment requirements, the best reading of Section 307(d)(1)(B) is to apply the Section 307(d) rulemaking procedures to the actions in the Proposal. *Cf. Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (granting petition for review where federal agency improperly segmented analysis).

Assuming EPA is required to adhere to Section 307(d)'s procedural requirements in this rulemaking, it has thus far failed to do so. 42 U.S.C. § 7607(d). Notably, among other requirements, Section 307(d) mandates EPA to hold at least one public hearing on its proposed action and to allow submission of written public comments for at least thirty days following that hearing. *Id.* § 7607(d)(5) ("In promulgating a rule to which this subsection applies … the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments" and "shall keep the record … open for thirty days after completion of the proceeding"). Because EPA has failed to follow the required Section 307(d) procedures, including providing opportunity for a public hearing, the Proposal must be reproposed.[91]

At the very least, given the significant legal consequences of this Proposal, including purporting to change EPA's longstanding approach to evaluating interstate transport obligations

[90] Given the significant consequences of repealing FIPs for these States, EPA additionally should publicly commit itself to not invoking the APA good cause exception for any future action withdrawing FIPs and to robustly follow Section 307(d) procedures.

[91] Furthermore, as explained *supra*, converting prior SIP disapprovals to approvals would unlawfully "interfere with" FIP requirements in violation of Section 110(*l*), 42 U.S.C. § 7410(*l*). Even assuming that EPA could satisfy Section 110's requirements by reproposing approvals together with withdrawals of the existing FIPs for those States, that rulemaking process would be procedurally deficient unless EPA followed the stricter rulemaking requirements of Clean Air Act Section 307(d), which plainly apply to FIP revisions. *See* 42 U.S.C. § 7607(d)(1)(B). Again, because EPA has not followed Section 307(d) procedures, EPA would need to repropose these actions.

and purporting to bind EPA's decisionmaking as to additional unspecified actions beyond the ten States covered by the current Proposal, as well as the Proposal's enormous harms to public health and to downwind States striving to achieve attainment, the EPA Administrator should exercise his discretion under Section 307(d)(1)(V), 42 U.S.C. § 7607(d)(1)(V), to determine that the more protective Section 307(d) rulemaking procedures apply to this action regardless of whether they are legally required, and repropose in accordance with Section 307(d).

B. The Minimal 30-Day Comment Period on This Proposal, Even with the Subsequent 21-day Extension, Violated the APA's Notice-and-Comment Requirements.

Regardless of whether Clean Air Act Section 307(d)'s procedural requirements apply to the Proposal, under the APA, EPA must provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the substance of the rule. *See* 5 U.S.C. § 553(c); *see also, e.g.*, *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) ("[The] opportunity for comment must be a meaningful opportunity."); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("[I]n order to satisfy [the] requirement[s] [of the APA], an agency must also remain sufficiently open-minded."). EPA's provision of only 30 days for public comment–even when coupled with the 21-day extension, 91 Fed. Reg. 10,360 (March 3, 2026)[92]–on a rule of this scope and import is woefully inadequate and has deprived the public of a meaningful opportunity to participate and to comment on the Proposal. EPA should have issued a notice reopening the comment period for at least an additional 30 days.

EPA proposes to take simultaneous action on multiple state plan submissions that would abdicate all responsibility to ensure those States curb pollution blowing across their borders that imposes legal, economic, and health burdens on other sovereign States and their residents, including members, clients, and supporters of our organizations. Yet EPA initially only provided only 30 days for the public to comment on the Proposal, and eventually only 51 days total. Such a period is insufficient for this consequential and complex proposal, which addresses multiple distinct technical and legal records, proposes to upend previous agency decisions subjected to more substantial public review, and injects unsupported new agency policies into a longstanding legal framework. This Proposal merits at least a 60-day comment period to ensure that the public can fully participate in the administrative process.

The minimal 30-day comment period EPA initially provided is inadequate where rules "are complex or based on scientific or technical data." *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (quoting guidance from the Administrative Conference of the United States to federal agencies). Accordingly, the Administrative Conference of the United States has recommended,

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[92] Notably, the extension was published in the Federal Register on March 3, 2026, one day after the original public comment period had closed; the pre-publication notice of the extension was not posted on EPA's website until February 27, 2026–the Friday before the Monday, March 2 comments deadline.

for significant regulatory actions like this Proposal, that "agencies should use a comment period of at least 60 days."[93] The government's own Executive Order 13,563, Section 2(b), confirms that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment … on any proposed regulation, with a comment period that should generally be *at least* 60 days."[94] EPA has not indicated any basis for deviating from the presumptive 60-day comment period suggested by its own governing authorities.

That error is particularly prejudicial here as the Proposed Transport Review encompasses thirteen actions concerning ten separate state implementation plans submitted pursuant to Clean Air Act Section 110(a)(1) & (a)(2)(D)(i)(I). Had EPA proposed each of these actions separately, their individual notice and comment periods may have run at separate times. EPA's failure to take account of the compound nature of its action in setting an initial notice period of only 30 days is prejudicial to parties with interests in more than one of the thirteen actions, who have been compelled to limit the complexity of the analyses they can perform with respect to each record.

Moreover, each of the proposed actions implicates numerous technical and legal questions concerning the responsibility of upwind States for pollution blowing into downwind States. Technically, EPA's proposal implicates highly specialized, multi-layered air quality modeling conducted by both EPA and individual States, which relies on numerous distinct methodological decisions concerning, among other things, modeling platforms, analytic years, power-sector behavior, and projected emissions inventories. A public comment period of only 51 days is inadequate to allow the public to assess this complex technical record in the necessary detail across all thirteen actions, to compare EPA's proposed technical conclusions to the significant records EPA developed in support of its prior regulatory approaches, and to compare all of that to new or developing data and information relevant to ozone transport in these ten States. Legally, the Proposed Transport Review follows on—and often departs from—a decades-long history of EPA practice and associated judicial precedents, necessitating deep dives into that history, with EPA's novel policy positions creating potentially significant legal consequences for public health, States, and regulated industry. Given the complexity of the issues, the far-reaching detrimental consequences of these proposed actions, and the States' and public's reliance on EPA's prior actions and the existing overarching framework, stakeholders need more than 51 days to consider the proposal and provide informed comment.

A 51-day comment period is also out of step with past practice in similar "Good Neighbor" rulemakings under Section 110(a)(2)(d)(i)(I), including the comment periods provided in the very actions EPA now seeks to undo. In the prior actions now subject to the Proposed Transport Review, EPA consistently provided between 62 and 89 days for public

[93] Admin. Conf. of the United States, *Rulemaking Comments* (June 16, 2011), https://www.acus.gov/document/rulemaking-comments (attached as Ex. 22).
[94] *Id.* (emphasis added).

comment—in particular, when stakeholders were asked to review multiple actions on the same timeline.[95]

Compared to procedures used in those underlying actions, the "condensed comment period" offered here "seems to have been designed to elicit as few comments as possible." *Nat'l Ass'n of Manufacturers v. U.S. SEC*, 105 F.4th 802 (5th Cir. 2024). This divergence raises a substantial likelihood that any final rule or rules arising from this proposal will be found procedurally flawed, for want of adequate public notice and a meaningful opportunity to comment. EPA should allow the public time to comment on the Proposed Transport Review that is comparable, or at least substantially closer, to what it allowed for the initial rules it seeks to unravel. *See, e.g.*, *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012) (holding that 10-day comment period was not "adequate opportunity for comment" when during the prior rulemaking the agency had allowed 60 days for public comment); *California v. U.S. DOI*, 381 F.Supp. 3d 1153, 1177 (N.D. Cal. 2019) (finding 30-day comment period inadequate because prior rulemaking included 120 days for comment).

EPA's refusal to extend the comment period to at least 60 days in response to public requests also diverges from past practice in a manner probative to whether EPA has provided "adequate" public process under the APA. EPA has historically found it appropriate to extend comment periods in response to such requests, with EPA—across Democratic and Republican administrations—understanding that public input is a cornerstone of the rulemaking process.[96] Failure to reopen the comment period to allow for at least 60 days would be arbitrary and capricious, considering EPA's consistent grant of such requests in other good neighbor rulemakings.[97]

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[95] *See* 89 Fed. Reg. 12,666 (Feb. 16, 2024) (providing 90-day comment period on proposed actions or supplemental actions concerning Arizona, Iowa, Kansas, New Mexico, and Tennessee state plans); 87 Fed. Reg. 31,485 (May 24, 2022) (providing 62-day comment period on proposed disapproval of Nevada state plan); 87 Fed. Reg. 9,498 (Feb. 22, 2022) (providing 62-day comment period on proposed disapproval of Kentucky state plan); 87 Fed. Reg. 9,545 (Feb. 22, 2022) (same as to Alabama, Mississippi, and Tennessee state plans); 87 Fed. Reg. 9,838 (Feb. 22, 2022) (same as to Minnesota state plan).

[96] *See, e.g.*, Message from EPA Acting Administrator Andrew R. Wheeler at 1, https://www.epa.gov/sites/default/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf (attached as Ex. 23) ("EPA must provide for the fullest possible public participation in our decision making."); Exec. Order No. 13563, 76 Fed. Reg. 3,821, 3,821-22 (Jan. 21, 2011); Exec. Order No. 12866, 58 Fed. Reg. 51,735, § 6(a)(1) (Oct. 4, 1993).

[97] *See, e.g.*, 87 Fed. Reg. 29,108 (May 12, 2022) (responding to public requests and extending to 76 days the comment period on EPA's Good Neighbor Plan); 89 Fed. Reg. 70,589 (Aug. 30, 2024) (responding to public requests and extending to 76 days the comment period on EPA's action on Missouri's state plan); 80 Fed. Reg. 81,251 (Dec. 29, 2015) (responding to public requests and extending to 60 days the comment period on EPA's CSAPR Update—not including a separate 80-day comment period on the underlying data, *see* 80 Fed. Reg. 52,271 (Aug. 28, 2015)).

C. EPA's Rulemaking Process Fails to Comply with Multiple Executive Orders.

A separate but related deficiency is EPA's failure to comply with multiple applicable Executive Orders. First, EPA baldly asserts that Executive Order 13132, which concerns respect for federalism and consultation with States, does not apply because "[t]his action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." 91 Fed. Reg. at 4044. Each of those assertions is clearly contradicted by the new policies the Agency proposes, which have overt implications for federalism—as well as by the agency's own press statement affirmatively highlighting the Proposal's implications for "federalism" and "the important responsibility EPA shares with [its] state air agency partners to ensure clean air for all Americans."[98]

EPA's Proposal will substantially impact States by shifting the burden of remediating air quality from polluting upwind sources to downwind States, which rely on EPA to ensure relief from upwind contributions in order to attain and maintain compliance with NAAQS. By relieving upwind sources of their FIP obligations to control interstate emissions, the Proposal will impose mitigation costs on downwind States—and those costs will be greater than what it would cost upwind sources to reduce pollution under their FIP obligations. The Proposal also directly affects the relationship between the federal government and the States in the SIP review process: by abandoning its historic screening threshold and adopting a more relaxed one divorced from NAAQS-attainment requirements, EPA functionally abandons its statutory duty to ensure that upwind sources do not significantly contribute to downwind nonattainment in time for downwind States to meet attainment deadlines. Finally, adopting a posture of "deference" toward individual States' modeling choices significantly alters the framework of responsibility for evaluating interstate transport obligations. These plainly substantial direct effects of the Proposal demonstrate that EPA was required to fulfil the requirements of Executive Order 13132, including consultation with State and local officials and certification of compliance to the Office of Management and Budget. *See* Exec. Order No. 13132 §§ 3(d)(4), 8(a). EPA's failure to meet these requirements renders its Proposal deficient and unreasonable, and undermines EPA's claims that the agency is committed to advancing cooperative federalism.

Similarly, the EPA makes no attempt to comply with Executive Order 13045, which requires agencies to protect children from environmental health risks, and instead arbitrarily and incorrectly concludes that "this action does not concern human health risks." 91 Fed. Reg. at 4,045. This conclusion is impossible to reconcile with the corrosive nature of the pollutants at

[98] Press Release, EPA, *EPA Advances Cooperative Federalism to Improve Air Quality by Taking an Important Step to Reconsider Biden-era "Good Neighbor Plan"* (Jan. 28, 2026), https://www.epa.gov/newsreleases/epa-advances-cooperative-federalism-improve-air-quality-taking-important-step (attached as Ex. 24).

issue under the 2015 ozone NAAQS and EPA's Good Neighbor Rule and their impact on every American breathing air downwind of regulated polluters—especially children. As discussed *supra*, ozone is a pervasive and dangerous pollutant that causes and exacerbates a variety of serious respiratory and cardiovascular illnesses—and to which children have heightened vulnerability. The impacts of ozone pollution plainly poses "an environmental health risk ... that [EPA] has reason to believe may disproportionately affect children," rendering EPA's Proposal a "covered regulatory action" under section 2 of Executive Order 13045. What's more, EPA's own Regulatory Impact Analysis for the Good Neighbor Rule anticipated that its full implementation would provide significant and quantifiable public health benefits each year, including saving up to 1,300 lives and avoiding over a million incidents of asthma symptoms and thousands of new asthma cases. *See* Good Neighbor Rule RIA at tbl.5-3. At a minimum, reductions benefitting children in downwind States will be delayed because of EPA's actions, and any reductions in downwind States alone will mean the emissions burden remains higher for children living in communities near FIP-covered upwind sources, who otherwise stood to benefit from reductions from local polluters.

Overall, eliminating EPA's authority to maintain Good Neighbor Rule FIP requirements for sources in five States clearly interferes with the massive health benefits of the Good Neighbor Rule and affects environmental health risks that disproportionately affect children across the United States; yet EPA completely ignores the requirements that Executive Order 13045 imposes on agencies for such proposals, including providing an evaluation of the environmental health effects of its planned regulation to the Office of Information and Regulatory Affairs. Exec. Order No. 13045 § 5.

EPA's failure to comply with these executive orders was deficient and unreasonable, rendering its Proposal arbitrary and capricious and unlawful, and procedurally invalid.

D. To the Extent EPA Relies on Artificial Intelligence in This Action, the Failure to Disclose That Use Violates Applicable Procedural Requirements.

EPA must disclose whether and how it has used artificial intelligence (AI) in this rulemaking. Specifically, if AI has been used, EPA must describe the AI tools employed and explain how the agency has used them, including EPA's inputs and the AI tool's outputs.[99] AI can be used appropriately to improve agency efficiency, but its use must be properly moderated and disclosed.

[99] For a more fulsome list of questions EPA should answer in disclosing its AI use, *see* Governing for Impact, *AI in Agency Rulemaking: Legal Guardrails Issue Brief* at 16 (July 2025), https://governingforimpact.org/wp-content/uploads/2025/07/AI-in-Agency-Rulemaking_Legal-Guardrails.pdf (attached as Ex. 25).

Under the APA, EPA is required to accompany its proposed rule with a statement of the rule's basis and purpose. 5 U.S.C. § 553(c). To be lawful, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) The agency cannot "rel[y] on factors which Congress has not intended it to consider" or "entirely fail[ ] to consider an important aspect of the problem." *Id.* at 43. Nor can it "offer[ ] an explanation for its decision that runs counter to the evidence before the agency." *Id.* The agency's decision must be "justified by the rulemaking record." *Id.* at 42.

If artificial intelligence is used to generate data, analyze data, or otherwise execute data-processing tasks in the course of EPA's rulemaking, it constitutes a basis used to generate the rule. Therefore, any use of AI to construct the Proposal must be disclosed. Any final rule will similarly be required to disclose any use of AI in the methodology behind the rule. These requirements safeguard against potential errors during rulemaking by providing the public an opportunity to identify and correct such errors. To the extent EPA has used AI in the Proposal—or intends to use it in the final rulemaking—and has failed to disclose that use in the rule's statement of basis and purpose, it removes those safeguards in violation of its statutory obligations.

Additionally, reliance on AI for information or data in any part of the rulemaking must be disclosed as the Agency's decision must be "justified by the rulemaking record," *State Farm*, 463 U.S. at 43, and a failure to disclose AI use would result in an incomplete record for judicial review. Courts have declared that these disclosures are "the safety valves in the use of ... sophisticated methodology." *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981). These disclosures are necessary to ensure that agency AI adoption remains open to both public inspection and judicial review. If EPA has used AI in this rulemaking and fails to disclose it in the docket, it hides potential errors and biases from public view.

Moreover, any undisclosed use of AI could render EPA's rule unlawful. When an agency uses computer models to formulate a proposed rule, the agency "must explain the assumptions and methodology used in preparing the model." *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1008 (D.C. Cir. 2002) (quoting *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)). These explanations ensure that the "ultimate responsibility for the policy decision remains with the agency rather than the computer." *Sierra Club*, 657 F.2d at 334-35. Therefore, agencies using AI should disclose, at a minimum, "algorithmic specifications, including the objective function being optimized, the method used for that optimization, and the algorithm's input variables." Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L. J. 1147, 1208 (2017).

In addition to statutory requirements, recent executive branch directives require AI-use disclosure. The executive actions reflect the Administration's understanding that agency AI disclosure is necessary for correcting agency errors and shortcomings, in addition to building public trust. For example, the Office of Management and Budget requires in OMB Memo M-25-21 that when an agency uses AI, the agency must "publicly release a summary describing" whether its use is "high-impact."[100] If EPA's rule uses potentially high-impact AI, EPA must follow several additional requirements outlined in OMB Memo M-25-21, Appendix 4. These requirements include, but are not limited to, ensuring that "individuals affected by AI-enabled decisions have access to a timely human review and a chance to appeal any negative impacts, when appropriate." *Id.* at 17. Even if EPA does not use high-impact AI, the Memo recommends that EPA maintain a "transparent process that seeks public input, comments, or feedback from the affected groups in a meaningful, accessible, and effective manner" regarding AI use.[101]

These OMB guidelines are consistent with key executive action from the first Trump administration. In his December 2020 Executive Order, "Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government," President Trump acknowledged that "the ongoing adoption and acceptance of AI will depend significantly on public trust," and required agencies to "design, develop, acquire, and use AI in a manner that fosters public trust." Exec. Order No. 13,960, 85 Fed. Reg. 78,939 (Dec. 8, 2020). The Order specified that "the design, development, acquisition, and use of AI, as well as relevant inputs and outputs of particular AI applications, should be well documented and traceable." *Id.* Like the APA's procedural requirements, this Order compels disclosure in the interest of avoiding hidden errors and biases in agency decision-making and providing the public a meaningful opportunity to comment on agency practice.

For all of these reasons, to the extent EPA used or plans to use AI tools in this rulemaking, it must document its use and any relevant inputs and outputs for the public.

[100] Office of Mgmt. & Budget, Exec. Office of the President, Memorandum M-25-21, Accelerating Federal Use of AI through Innovation, Governance, and Public Trust (Apr. 3, 2025) (attached as Ex. 26). This document defines "high-impact" as follows: "AI is considered high-impact when its output serves as a principal basis for decisions or actions that have a legal, material, binding, or significant effect on rights or safety."

[101] *Id.* at 24. These OMB guidelines for federal agencies also reflect country-wide efforts to increase AI oversight and disclosure in government. In 2024 alone, 12 laws regulating public sector uses of AI were passed by state legislatures and over 40 bills were introduced. Quinn Anex-Ries, *Regulating Public Sector AI: Emerging Trends in State Legislation*, Ctr. for Democracy & Tech. (Jan. 10, 2025), https://cdt.org/insights/regulating-public-sector-ai-emerging-trends-in-state-legislation/ (attached as Ex. 27); *see also* Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4 (attached as Ex. 28) (asking for transparency in regulatory analysis, "[agencies] should clearly set out the basic assumptions, methods, and data underlying the analysis").

CONCLUSION

For all of the above reasons, EPA must withdraw this illegal and unsupported Proposal.

Respectfully submitted,

Zachary M. Fabish
Senior Attorney
Sierra Club
50 F Street, NW - 8th Floor
Washington, DC 20001
zachary.fabish@sierraclub.org

Abirami Vijayan
Senior Attorney
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
avijayan@nrdc.org

Noha Haggag
Senior Attorney
Environmental Defense Fund
257 Park Ave South
New York, NY 10010
nhaggag@edf.org

Megan Herzog
Donahue, Goldberg & Herzog
Counsel for Environmental Defense Fund
megan@donahuegoldberg.com

Caroline Cress
Senior Attorney
Southern Environmental Law Center
136 East Rosemary St., Suite 500
Chapel Hill, NC 27514
ccress@selc.org

Kevin Breiner
Seth L. Johnson
John E. Bies
Attorneys
Earthjustice
1400 L St NW
Lobby 2, Unit 34117
Washington, DC 20005
kbreiner@earthjustice.org
sjohnson@earthjustice.org
jbies@earthjustice.org

Hayden Hashimoto
Attorney
Shaun Goho
Legal Director
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
hhashimoto@catf.us
sgoho@catf.us

Georgia Murray
Senior Scientist
Appalachian Mountain Club
gmurray@outdoors.org

Ariel Solaski
Director of Litigation
Chesapeake Bay Foundation
6 Herndon Ave.
Annapolis, MD 21403
asolaski@cbf.org

Jennifer M. Hadayia
Executive Director
Air Alliance Houston
2520 Caroline, St 100
Houston, TX 77004

Hanna Larsen
Staff Attorney
Southern Utah Wilderness Alliance
425 E 100 S
Salt Lake City, UT 84111
hanna@suwa.org

Samantha Ruscavage-Barz
Senior Attorney
WildEarth Guardians
301 N. Guadalupe St., Suite 201
Santa Fe, NM 87501
sruscavagebarz@wildearthguardians.org

Katie Nekola
General Counsel
Clean Wisconsin
634 W. Main St., Suite 300
Madison, WI 53703
(608) 251-7020 ext. 314
knekola@cleanwisconsin.org