Nos. 23A349, 23A350, 23A351

IN THE SUPREME COURT OF THE UNITED STATES

OHIO, ET AL. (No. 23A349);
KINDER MORGAN, INC., ET AL. (No. 23A350);
AMERICAN FOREST & PAPER ASSOCIATION, ET AL. (No. 23A351),
APPLICANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATIONS FOR A STAY

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The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA) and Michael S. Regan, Administrator of the EPA, respectfully submits this response in opposition to the applications for a stay pending the disposition of the petitions for review.

This case concerns various challenges to the EPA's final rule entitled Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023) (Rule). The Rule implements a provision of the Clean Air Act (CAA or Act), 42 U.S.C. 7401 et seq., that ensures that sources in upwind States whose pollutant emissions are affecting air quality in downwind States take the necessary steps to reduce that pollution. See 42 U.S.C. 7410(a)(2)(D)(i)(I). The CAA gives each State the initial opportunity to submit a plan that will achieve com-

pliance with that requirement. If a State fails to submit an adequate plan, however, EPA must promulgate a federal plan to address the requirements in the State's place. 42 U.S.C. 7410(c). The provision is referred to as the Good Neighbor Provision. In accordance with that provision, in February 2023, EPA concluded that 23 States had failed to submit adequate plans to comply with revised ozone standards. EPA then promulgated the Rule to establish an emissions-control program for large industrial polluters in those States, based on the same core methodology that this Court has approved and that EPA has used for decades.

In separate litigation that is not the subject of this suit, various parties filed petitions for review challenging EPA's disapproval of 12 state plans, and the relevant regional courts of appeals stayed the disapproval as to those 12 plans pending the disposition of those petitions. EPA recognized that the stays precluded application of the Rule to sources in those 12 States.

Applicants here -- three States and various industry participants -- took a different course. They filed petitions for review in the D.C. Circuit challenging the federal plan (i.e., the Rule) as arbitrary and capricious, and they sought a stay of the plan's implementation pending the disposition of their petitions for review. The D.C. Circuit correctly declined to enter a stay. This Court should likewise deny applicants' request for extraordinary interim relief.

Applicants contend that the circuit-court stays of some state-plan disapprovals in separate litigation undermine the Rule. But the validity of those disapprovals is not the subject of this suit and has not been finally determined by any court. The circuit courts did not stay the disapprovals until after EPA had adopted the Rule, and those subsequent court actions could not render the Rule retroactively invalid. And in any event, EPA's original rationales for regulating emissions sources in the 11 States currently subject to the Rule continue to apply with full force and the Rule continues to function properly in those States, even though the Rule does not presently apply to sources in the other 12 States.

Applicants also challenge several technical aspects of the Rule, including its consideration of costs, its applicability criteria, its compliance timeline, and its control requirements for various industries. But each of those challenged features of the Rule is reasonable and adequately explained. The Rule appropriately regulates industrial sources based on technical and policy determinations that are supported by a detailed record, and it provides a variety of compliance flexibilities to ensure that the necessary emissions reductions can be achieved without overcontrolling or overburdening the industry. Consistent with the CAA's requirements, the Rule thus strikes a proper balance between the interests of upwind and downwind States. And applicants further

have not established that their case-specific and record-intensive objections to the Rule would warrant this Court's review.

Applicants also have not demonstrated that they will suffer irreparable harm absent the extraordinary relief they seek. Many of the Rule's challenged aspects do not alter applicants' obligations until 2026. EPA's analysis indicates that near-term capital expenditures to achieve compliance need not be extensive and will not endanger natural-gas supply or power-grid operations. On the other side of the balance, staying the Rule's implementation would significantly harm the public interest. It would delay efforts to control pollution that contributes to unhealthy air in downwind States, which is contrary to Congress's express directive that sources in upwind States must assume responsibility for their contributions to emissions levels in downwind States. By leaving air pollution caused by upwind States unabated, applicants' requested extraordinary relief would impose negative health consequences and additional regulatory burdens on downwind States and their citizens -- thus violating the central aim of the Good Neighbor Provision. The applications should be denied.

STATEMENT

1. The CAA seeks "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare," 42 U.S.C. 7401(b)(1), and to control air pollution through a system of shared federal and state responsibility, see

General Motors Corp. v. United States, 496 U.S. 530, 532 (1990). Title I of the Act requires EPA to establish national ambient air quality standards (NAAQS or air quality standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. The Act also directs States to submit to EPA state implementation plans to meet those standards. 42 U.S.C. 7410(a). If EPA determines that a state plan is inadequate, or if a State fails to submit a plan, EPA must issue a federal implementation plan within two years after making that determination. 42 U.S.C. 7410(c)(1). Those provisions reflect Congress's effort to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution." Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64 (1975).

The Act's requirements for state plans recognize that "[a]ir pollution is transient, heedless of state boundaries," and may be "transported by air currents" from upwind to downwind States. EPA v. EME Homer City Generation, L. P., 572 U.S. 489, 496 (2014). When air pollution travels beyond the originating State's boundaries, that State is "relieved of the associated costs," which are "borne instead by downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution." Ibid. To account for that "complex challenge," ibid., state plans must include "adequate provisions * * * prohibiting * * * any source or other type of emissions

activity within the State from emitting any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [air quality standard]," 42 U.S.C. 7410(a)(2)(D)(i)(I). This statutory requirement, known as the Good Neighbor Provision, is Congress's chosen method of balancing the interests of upwind and downwind States. EME Homer, 572 U.S. at 498-499.

EPA has engaged in numerous rulemakings pursuant to the Good Neighbor Provision. In 1998, EPA limited the emissions of nitrogen oxide -- a precursor to ozone -- for both power plants and non-electricity generating units (non-EGUs), including pipeline engines, in 23 upwind States upon finding their existing plans inadequate. See 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998). The D.C. Circuit largely upheld that regulation against challenges brought by power plants, non-EGUs, and States. See generally Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). More recently, this Court upheld a rule that curtailed emissions of 27 upwind States to assist downwind attainment of three different air quality standards. See EME Homer, 572 U.S. at 524. The Court rejected contentions that EPA had intruded on state authority or had erred in using cost as a factor in allocating responsibility among upwind States. Ibid.

In many of its rulemakings pursuant to the Good Neighbor Provision, including those involving ozone, EPA proceeds in four steps. First, EPA uses air quality modeling and monitoring data across the 48 contiguous States to identify areas, known as "receptors," that are expected to have difficulty attaining or maintaining compliance with the given air quality standard. See, e.g., 88 Fed. Reg. at 36,659. Second, EPA uses that modeling to quantify pollutant contributions from upwind States to receptors in downwind States. Ibid. EPA identifies upwind States that are "linked" to downwind pollution by determining which upwind States contribute more than one percent of the air quality standard to ambient concentrations of the relevant pollutant at downwind-state receptors. Ibid. Third, EPA identifies upwind emissions that "contribute significantly" to nonattainment or interfere with maintenance of air quality standards in downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I). In doing so, to ensure that each linked upwind State does its fair share to reduce the States' collective contribution, EPA considers the cost-effectiveness of potential emissions controls and the total emissions reductions that may be achieved by requiring such controls, and it evaluates the effect such reductions would have on air quality in the downwind States. 88 Fed. Reg. at 36,659. Emissions in excess of the emissions-control strategies that EPA finds justified under this analysis are deemed "significant" and therefore prohibited under the CAA.

Id. at 36,659-36,660; EME Homer, 572 U.S. at 519-520. Fourth, EPA imposes enforceable control measures to prohibit those "significant" emissions. 88 Fed. Reg. at 36,659-36,664.

2. The Rule challenged here applies that same regulatory framework, which has been upheld by both this Court and the D.C. Circuit. See EME Homer, 572 U.S. at 524; Michigan, 213 F.3d at 674-679.

In 2015, EPA revised the applicable air quality standard for ozone, triggering the States' obligations to submit implementation plans to comply with that standard. Upon reviewing those submissions, EPA disapproved 21 state plans for failing to satisfy the Good Neighbor Provision. 88 Fed. Reg. 9,336, 9,338 (Feb. 13, 2023). Each of those States had proposed to take no action to assist downwind neighbors. Ibid. EPA then promulgated a federal plan covering those 21 States, as well as two other States that had failed to submit plans altogether. 88 Fed. Reg. at 36,654.

EPA first concluded that those 23 States are contributing significantly to air pollution in other States. 88 Fed. Reg. at 36,659-36,665. That analysis indicated that within those 23 States, many power plants' nitrogen-oxide emissions could be more effectively limited through improved operation of existing controls and by installing control technologies that have been widely adopted across the industry. Id. at 36,660-36,661. Upon analyzing non-EGU emissions sources, EPA found that similarly cost-effective

and feasible emissions reductions were available at high-emitting sources in nine industries, including natural-gas pipelines, cement kilns, steel mills, and paper mills. Id. at 36,661, 36,664. To eliminate those emissions that "significantly contribut[e]" to nonattainment or "interfer[e] with maintenance" of the air quality standard, EPA adopted an emissions-reduction program covering all 23 States. Id. at 36,667

For power plants, consistent with previous rules, EPA created for each covered State a "budget[]" of permissible emissions by modeling the quantity of pollutants that each source in the upwind State would emit if all emission reductions EPA identified as necessary to eliminate significant contributions were implemented. 88 Fed. Reg. at 36,761. Instead of imposing source-specific emissions limits to reach that budget, the Rule permits sources to achieve the necessary reductions through an interstate, market-based trading program that allows covered sources to buy, sell, and bank emissions allowances, including from sources in other States. Id. at 36,904-36,918. Within this program, power plants are allocated allowances authorizing emissions at a given level, with all allowances in the aggregate authorizing emissions only up to the States' combined budgets. Allowances are traded like other commodities. Sources that can reduce emissions less expensively than others therefore may sell their unneeded allowances. Con-

versely, sources that cannot reduce their emissions as cost-effectively may purchase additional allowances on the market.

Although EPA established similar trading programs in previous rules, EPA's experience with those programs showed that too much flexibility could undermine the program's intended stringency. The Rule thus announced several enhancements to ensure that emissions deemed "significant" are adequately mitigated. 88 Fed. Reg. at 36,657. As relevant here, beginning in the 2026 ozone season (May 1 through September 30), the Rule implements a dynamic emissions budget-setting procedure. Id. at 36,765. EPA explained that the efficacy of the trading program depends on the stability of power-plant fleet composition over time. Id. at 36,764. For example, if EPA had required every power plant to implement a given cost-effective control technology to eliminate its significant contribution, the retirement of one or more power plants would not affect the obligations of others. In the trading program, by contrast, if multiple power plants retire unexpectedly, EPA's budgeted emissions allowances no longer reflect the cost-effective emissions abatement potential of the remaining plants -- and thus no longer ensure that significant emissions from those plants are abated. EPA observed that, under prior rules, the preset emissions budgets had not kept pace with changes in power-plant fleet composition, so that covered sources had surplus allowances and could increase emissions in later years, even though decreasing emis-

sions would have been achievable at the cost threshold EPA had identified as appropriate. Ibid.

To ensure that the program continues to require the abatement of significant emissions to the same degree as source-specific controls, the Rule tailors emissions budgets in later years to the actual composition of the power-plant fleet. 88 Fed. Reg. at 36,777-36,779. The Rule implements the new budgeting methodology gradually. Through 2029, a preset budget will set the floor, but a dynamic budget using updated fleet-composition data will be used to increase the budget if appropriate. Id. at 36,778. Starting in 2030, the budgets will be set exclusively by dynamic budgeting, allowing the budgets to rise or fall based on fleet composition. Id. at 36,779.

The Rule also provides for annual recalibration of "bank[s]" of unused emissions allowances. 88 Fed. Reg. at 36,788. Like dynamic budgeting, this change serves to "prevent allowance surpluses from accumulating and adversely impacting the ability of the trading program in future control periods to maintain" the "control stringency" that EPA deemed necessary. Ibid. Thus, each year, EPA will set an appropriate percentage of the total budget that may be banked and will deduct any allowances exceeding that amount. Ibid.

For non-EGUs, EPA conducted an initial screening assessment to identify which industries have the greatest impact on air qual-

ity in downwind States. 88 Fed. Reg. at 36,732-36,733. See EPA, Screening Assessment of Potential Emissions Reductions, Air Quality Impacts, and Costs from Non-EGU Emissions Units for 2026 (Feb. 28, 2022) (Screening Assessment), https://perma.cc/AFJ9-7G7Y. Among the industries it identified, EPA analyzed emissions units that had emitted more than 100 tons of nitrogen oxide per year. 88 Fed. Reg. at 36,732-36,733. EPA considered potential air quality improvements that could be provided to downwind areas by applying various emissions-control strategies to those sources. In making that assessment, EPA identified a marginal cost threshold -- the point at which further emissions controls generally appear to become less cost-effective -- at $7500 per ton. EPA explained that "this threshold is not intended to represent the maximum cost any facility may need to expend." Id. at 36,733. Instead, it was intended as a starting point to begin assessing various industries and "evaluating technologies" that might be imposed at "different levels of stringency." Ibid.

Based on that threshold, EPA created an initial list of non-EGU emissions units for potential coverage under the Rule. Screening Assessment 3-4. Using that list as a starting point, EPA performed a more detailed review of potential emissions controls, taking into account state and federal emissions standards, technical literature, consent decrees, and permit limits for similar source types. 88 Fed. Reg. at 36,740. Based on the updated

analysis, EPA concluded that the $7500-per-ton threshold "does not reflect the full range of cost-effectiveness values that are likely present" given the many different types of non-EGU industries and emissions units. Id. at 36,746. Rather, EPA found that a range of reductions would be cost-effective across the industries, averaging from $939 per ton to $14,595 per ton, with an overall average of $5339 per ton. Ibid. EPA explained that this range "compares favorably with the values used to evaluate" power plants, which face representative costs of $11,000 per ton. Ibid. EPA found that the control strategies would meaningfully improve downwind air quality, producing approximately one-third of the total air quality benefits of the Rule. Id. at 36,748. Based on that assessment, EPA imposed controls on a variety of non-EGU emissions sources, including natural-gas pipelines, cement kilns, steel-industry reheat furnaces, and paper-industry boilers.

With respect to natural-gas pipelines, EPA's analysis revealed the potential to eliminate approximately 32,247 tons of ozone-season nitrogen-oxide emissions from pipeline engines (the highest level of emissions reductions from any non-EGU industry covered by the Rule) at an average cost per ton of $4981 -- well within the representative values that EPA had found justified. 88 Fed. Reg. at 36,739 (Tbls. V.C.2-1, V.C.2-3). EPA thus established emissions limitations applicable to pipeline engines of 1000 horsepower or greater. The Rule permits operators to implement an

averaging plan, allowing them to prioritize the most cost-effective emissions reductions across multiple engines in a facility so long as the total emissions reductions are at least equivalent to those that would be individually required. 40 C.F.R. 52.41(d); 88 Fed. Reg. at 36,823-36,824. Operators may also seek approval for higher emissions limits if they cannot comply with the applicable limit "due to technical impossibility or extreme economic hardship." 40 C.F.R. 52.40(e). Pipelines must comply with the emissions limits by May 1, 2026, with the possibility of compliance extensions premised upon a showing that the operator cannot meet the compliance date "due to circumstances entirely beyond [its] control." 40 C.F.R. 52.40(d)(1). EPA finalized the Rule and made it public on March 15, 2023. See Press Release, EPA, EPA Announces Final "Good Neighbor" Plan to Cut Harmful Smog, Protecting Health of Millions from Power Plant, Industrial Air Pollution (Mar. 15, 2023) (EPA Press Release), https://perma.cc/8EUA-7YFG.

3. In separate litigation, various States and industry groups challenged EPA's disapproval of 12 state plans by filing petitions for review in various federal regional courts of appeals. Months after EPA had promulgated the Rule implementing the federal plan, those courts stayed the challenged state-plan disapprovals pending further review.[1] Because EPA's authority to promulgate a

[1] See Texas v. EPA, No. 23-60069 (5th Cir. May 1, 2023 and June 8, 2023); Arkansas v. EPA, No. 23-1320 (8th Cir. May 25,

federal plan in those States depended on the agency's antecedent determinations that the covered States had not submitted adequate state plans, EPA recognized that those stays currently preclude application of the Rule to the 12 States for which stays of the state-plan disapprovals have been entered. EPA has issued interim final rules to address applicable standards in those States while the stays remain in effect. See 88 Fed. Reg. 49,295 (July 31, 2023); 88 Fed. Reg. 67,102 (Sept. 29, 2023).

4. In this case, the applicants here (the States of Ohio, Indiana, and West Virginia, along with members of industries subject to the Rule as power plants and non-EGU sources) petitioned for review of the Rule in the D.C. Circuit.[2] Shortly thereafter, applicants moved to stay the Rule pending the disposition of their petitions for review. On September 25, 2023, the D.C. Circuit denied the stay applications. State Appl. App. A1. Judge Walker dissented. Ibid.

2023); Missouri v. EPA, No. 23-1719 (8th Cir. May 26, 2023); Nevada Cement Co. v. EPA, No. 23-682 (9th Cir. July 3, 2023); ALLETE, Inc. v. EPA, No. 23-1776 (8th Cir. July 5, 2023); Kentucky v. EPA, No. 23-3216 (6th Cir. July 25, 2023); Utah v. EPA, No. 23-9509 (10th Cir. July 27, 2023); West Virginia v. EPA, No. 23-1418 (4th Cir. Aug. 10, 2023) (administrative stay pending disposition of motions to stay or transfer); Alabama v. EPA, No. 23-11173 (11th Cir. Aug. 17, 2023).

[2] This brief refers to applicants in No. 23A349 as State Applicants; applicants in No. 23A350 as Pipeline Applicants; and applicants in No. 23A351 as AFPA Applicants.

ARGUMENT

The applications should be denied. Applicants seek what in practical effect is an injunction against enforcement of the Rule pending review. To obtain such an injunction, applicants generally must show that their "claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). A similar standard applies to a request for a stay. See Nken v. Holder, 556 U.S. 418, 434 (2009). But because a request for an injunction seeks judicial relief that a lower court has withheld, it "'demands a significantly higher justification' than a request for a stay." Respect Maine PAC v. McKee, 562 U.S. 996 (2010) (citation omitted). Such an injunction should be granted "sparingly and only in the most critical and exigent circumstances," Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted), as when "the legal rights at issue are 'indisputably clear,'" ibid. (citation omitted); see Roman Catholic Diocese, 141 S. Ct. at 66 (granting injunction where "applicants ha[d] clearly established their entitlement to relief").

In considering whether a party seeking extraordinary relief from this Court has made the requisite showing, moreover, the Court not only considers "the underlying merits" but also makes "a discretionary judgment about whether the Court should grant review in the case." Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett,

J., concurring in the denial of application for injunctive relief) (citing Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam)). "Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take -- and to do so on a short fuse without benefit of full briefing and oral argument." Ibid.

Applicants have not satisfied the standard for a stay, much less the more demanding standard for an injunction pending review. Their various challenges to the Rule are not likely to succeed on the merits because the Rule is a reasonable exercise of EPA's authority under the CAA and is not arbitrary, capricious, or otherwise contrary to law. Applicants also have not shown that any of those factbound challenges would warrant this Court's review. And the balance of equities and the public interest tip decisively in favor of allowing the Rule to remain in effect, since the Rule provides important public benefits in reducing harmful ozone levels across the United States.

A stay of the Rule could result in years of delays for the phase-in of significant reductions in emissions. Such delays would seriously harm the downwind States that suffer from their upwind neighbors' emissions, placing the entire burden of achieving healthy air quality on those States and exposing their residents to public-health risks. On the other side of the scale, applicants cannot show that they will be irreparably harmed if the Rule re-

mains in effect during the pendency of the D.C. Circuit proceedings. The Rule sets reasonable compliance deadlines for covered industry participants, and many of the Rule's programs do not go into effect until 2026 or later. The Rule imposes no requirements on States at all, and it appropriately balances the State Applicants' interests against those of the downwind States that the Good Neighbor Provision protects.

I. APPLICANTS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS, MUCH LESS A CLEAR ENTITLEMENT TO RELIEF

Applicants assert that a variety of purported flaws render the Rule arbitrary and capricious. But the arbitrary-and-capricious standard is "narrow," and a reviewing court "is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The court must assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Ibid. (citation omitted). The Rule readily survives review under that deferential standard.

A. The Stays Of Various State-Plan Disapprovals Entered By Regional Circuits In Other Litigation Do Not Retroactively Render the Rule Invalid.

Applicants rely substantially on the fact that, months after EPA finalized the Rule, various regional circuits in other litigation entered orders temporarily staying EPA's disapprovals of 12 state plans pending judicial review. Applicants argue that those stays undermine the Rule and its continued application to the 11

remaining upwind States within its original coverage. That challenge is barred by the CAA's judicial-review provision, and it lacks merit in any event. Applicants provide no basis for considering the Rule's reasonableness based on events that postdated its promulgation. Those arguments do not cast doubt on the Rule's validity at the time it was originally promulgated. Rather, they are better viewed as claims that the agency should have reconsidered its decision or taken a subsequent action in light of later-arising events. In any event, EPA's original rationales for the Rule continue to apply with full force and the Rule can continue to function properly in the remaining 11 States, even though the Rule currently applies to a smaller set of upwind States than EPA had originally envisioned.

1. Under the CAA, "[o]nly an objection to a rule * * * which was raised with reasonable specificity during the period for public comment * * * may be raised during judicial review." 42 U.S.C. 7607(d)(7)(B). If "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment," a party who seeks to pursue the objection must move for "reconsideration of the rule." Ibid. Only if EPA "refuses to convene such a proceeding" may a party "seek [judicial] review of such refusal." Ibid.

In commenting on the Rule, applicants did not raise before EPA any objection to the Rule's continued applicability in cir-

cumstances like those presented here. Indeed, contrary to State Applicants' contention (Appl. 19-20), none of EPA's state-plan disapprovals had been stayed before the Rule was finalized. The Rule was signed and publicized on March 15, 2023, see EPA Press Release, and the first stay of a state-plan disapproval was entered on May 1, 2023, see Texas v. EPA, No. 23-60069 (5th Cir. May 1, 2023). Applicants thus "did not and could not have raised" a specific challenge based on those stays "during the period for public comment"; rather, "the only appropriate path for [applicants] to raise this issue is through an initial petition for reconsideration." EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 137 (D.C. Cir. 2015). But applicants have not exhausted that requirement. The Court therefore is "without authority" to reach the question they press here. Ibid.

In basing their claims on the stays of the state-plan disapprovals, applicants attempt to circumvent the statutorily-mandated process. Because those stay orders were entered months after the Rule was signed and publicized, they have no bearing on whether the Rule was lawful when it was promulgated. Applicants cite no authority for their implicit premise that an agency action may be rendered retroactively arbitrary and capricious based on events that occur after it is finalized. Indeed, given the Court's demand that agency action be supported based only on the justifications given "at the time of the agency action," see, e.g., DHS v. Regents

of the Univ. of Cal., 140 S. Ct. 1891, 1907 (2020) (citation and emphasis omitted), it would make little sense to evaluate the reasonableness of those justifications by reference to circumstances that did not yet exist.

Rather, to the extent a change in circumstances merits reconsideration of an agency action, regulated parties can petition for such reconsideration or other agency action. But such a claim is not appropriately brought as a challenge to the original agency action; it is a challenge to a subsequent failure to reconsider or take other action in response to later-arising events. Addressing applicants' arguments here would allow them to evade that process and the "important values of administrative law" that it serves. Regents, 140 S. Ct. at 1909.

2. Even if this Court concludes that the applicants' arguments based on post-promulgation events can properly be asserted within their current challenge to the Rule, those arguments lack merit. The agency action under review in the D.C. Circuit is the federal plan (i.e., the Rule), not the separate agency action disapproving state plans that has been stayed in 12 States in other proceedings that are currently pending before various regional circuits. The orders entered by those courts stay the effectiveness of disapproval as to the 12 States during the pendency of the review proceedings, but they do not reflect any final judicial determination as to the legality of EPA's state-plan disapprovals.

And neither this Court nor the D.C. Circuit is in a position to determine in this case whether the state-plan disapprovals were lawful.

Moreover, even if the Court views the post-promulgation regional-circuit proceedings as relevant to the proper disposition of applicants' challenge to the Rule itself, the only question at this juncture is whether, during the pendency of those proceedings, it is rational for EPA to continue to apply the Rule to the 11 States whose plan disapprovals have not been challenged. EPA's record and the reasoning underlying the Rule make plain that it is. And in any event, the question whether the Rule can continue to apply in 11 States during the pendency of the regional-circuit proceedings does not warrant this Court's review.

As an initial matter, while various regional circuits have stayed particular state-plan disapprovals, none of those courts has finally determined whether the challenged disapprovals were unlawful. In those proceedings, the government is defending EPA's state-plan disapprovals on the merits and has argued that the D.C. Circuit, rather than the regional circuits, is the proper venue for those challenges. It therefore is unclear whether any of the challenged state-plan disapprovals will ultimately be declared unlawful. At the conclusion of the various proceedings, there may be anywhere between 11 and 23 States to which the Rule might validly apply. Applicants do not specify what minimum number of

States they believe the Rule must cover in order to constitute a rational exercise of agency authority.

For States that challenged their state-plan disapprovals, the various stays put the effectiveness of the disapproval on hold, thereby limiting EPA's duty to implement a federal plan as to those States. But for States that chose not to challenge their disapprovals, there is no reason to question EPA's judgment that the state plans are invalid. EPA's unchallenged state-plan disapprovals triggered a statutory obligation to establish, for each of those 11 States, a federal plan that "achieves something measurable toward the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance 'in any other State.'" North Carolina v. EPA, 531 F.3d 896, 907 (D.C. Cir. 2008) (per curiam) (quoting 42 U.S.C. 7410(a)(2)(D)(i)(I)). And barring a showing of impossibility, EPA must do so in time to "bring th[ose] State[s] into compliance before upcoming attainment deadlines." Wisconsin v. EPA, 938 F.3d 303, 318 (D.C. Cir. 2019) (per curiam); see id. at 318-319.

Although applicants argue it is arbitrary and capricious for the Rule to continue to apply to those 11 States, they do not identify any alternative interim rule that might apply. Rather, applicants appear to contemplate that emissions within those States will not be controlled at all during the pendency of these proceedings. That approach ignores the obligations that EPA as-

sumes when it disapproves a state implementation plan. And given the uncertain landscape and the present possibility that some or all of the challenged state-plan disapprovals will ultimately be upheld, it is particularly reasonable for EPA to fulfill its statutory obligations by continuing to apply the Rule pending resolution of the disapproval litigation.

Nothing about the Rule's operation undermines that conclusion. EPA explicitly provided that the Rule is "severable along * * * [S]tate and/or tribal jurisdictional lines, such that the [R]ule can continue to be implemented as to any remaining jurisdictions" even if it is invalidated elsewhere. 88 Fed. Reg. at 36,693. That statement reflected EPA's recognition that the Rule's viability and validity do not depend on the number of jurisdictions it covers. See App., infra, 3a-4a.

Consistent with the CAA, EPA could have promulgated 23 separate rules, one for each of the States that lacked an approved state plan. Although EPA instead found it efficient to promulgate a single Rule covering emissions sources in all such States, the Rule need not apply to any minimum number of States in order to operate coherently. App., infra, 3a-7a. Neither the statutory Good Neighbor Provision nor the Rule is premised on accomplishing some minimum total of emissions reductions. Id. at 6a-7a. Rather, each State must eliminate its own "significant contribution" to air pollution in downwind States. See 42 U.S.C. 7410(a)(2)(D)(i).

And it would contradict both the Act and the Rule to allow one State's significant contributions to continue unabated merely because EPA's efforts to abate pollution from other States have been stayed.

The Rule identified a "uniform level of emissions reduction" to equitably allocate responsibility among the States, 88 Fed. Reg. at 36,676, and it applied "emissions control strategies on a uniform basis," id. at 36,741; but covered sources in each State are responsible for eliminating their own significant contribution to downwind pollution regardless of whether other contributors do so, see Wisconsin, 938 F.3d at 324-325. Applicants note (Pipeline Appl. 11-12; AFPA Appl. 18; State Appl. 17) that the Rule now regulates fewer emissions than it would if it applied to all 23 of the States it originally covered, because the stays lessen the restrictions on emissions in the 12 States for which EPA's state-plan disapprovals have been stayed, without triggering increased control obligations on emissions sources in other covered States. But that simply indicates that (a) the Rule operates State by State and (b) the judicial stays that currently preclude the Rule's application to 12 States do not alter the obligations that the Rule imposes on emissions sources in the remaining 11, since those sources remain responsible for their own significant contribution to downwind pollution.

Nor does the allowance-trading program require participation

of any particular number of States. EPA's determinations concerning the amounts of emissions reductions required from covered sources does not depend on use of the trading program at all. App., infra, 40a-41a. The trading program simply smooths the cost curve by incentivizing sources with cheap reductions to overperform, thereby generating credits that can be purchased by sources for which reductions would be more expensive. 88 Fed. Reg. at 36,754. In any event, applicants have not demonstrated that the trading program will no longer serve its purpose if fewer States participate. EPA's data show the opposite: prices for emissions allowances "have dropped significantly in the past several months and are at the lowest levels since EPA proposed the [Rule]," indicating that allowances are readily available and are likely to remain so. App., infra, 40a; see id. at 9a. Consistent with that analysis, EPA has previously implemented, with "no issues," similar trading programs covering 12 or fewer States, including one that covers sources in a single State. Id. at 41a; see id. at 18a-19a.

Applicants fare no better in attempting to frame the problem as a failure to consider, or to provide notice and comment on, a Rule that currently applies to a smaller number of States than EPA had anticipated. See Pipeline Appl. 19; AFPA Appl. 18-19. As already explained, see pp. 20-21, supra, none of EPA's state-plan disapprovals had been stayed before the Rule was finalized. EPA

was not required to foresee that courts of appeals would stay some subset of the State disapprovals -- temporarily or otherwise.

In any event, EPA's discussion of severability in its preamble to the Rule makes clear that the agency did consider whether the Rule could cogently be applied to a subset of the 23 covered States -- and concluded that it could. See App., infra, 4a. EPA observed that the Rule established a federal implementation plan for each covered State and for tribal jurisdictions within those States. 88 Fed. Reg. at 36,693. The agency then stated that, "[s]hould any jurisdiction-specific aspect of the final rule be found invalid, the EPA views this rule as severable along those state and/or tribal jurisdictional lines, such that the rule can continue to be implemented as to any remaining jurisdictions." Ibid. The agency explained that this approach to severability "reflects the important public health and environmental benefits of this rulemaking in eliminating significant contribution and to ensure to the greatest extent possible the ability of both upwind states and downwind states and other relevant stakeholders to be able to rely on this final rule in their planning." Ibid.

To be sure, EPA did not anticipate the precise combination of States for which judicial rulings would temporarily preclude the application of the Rule. But EPA made clear at the time of promulgation that it viewed the Rule as capable of coherent application to a subset of the covered States. And in the 11 States where

stays of state-plan disapprovals have not been entered, the Rule continues to subject covered emissions sources to the same requirements that would have applied to them if no stays were in effect and all 23 States were covered. Continued application of the Rule to those sources is both wholly reasonable and demonstrably consistent with EPA's expressed intent in promulgating the Rule.[3]

B. The Rule's Regulation Of Both Power Plants And Non-EGU Emissions Sources Is Reasonable

Pipeline Applicants and AFPA Applicants also challenge numerous technical aspects of the Rule's regulation of both power plants and non-EGU emissions sources. EPA's determinations as to the amount of permissible emissions, the applicability criteria,

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[3] Pipeline Applicants assert in passing (Appl. 8-9 n.4) that the Rule implicates the major questions doctrine because it "universally disapprov[es] state plans in favor of a federal plan." Even setting aside that EPA's state-plan disapprovals are not the agency action at issue here, the major questions doctrine has no relevance to this case. The CAA unambiguously requires EPA to disapprove a state plan and to promulgate a federal plan when a state plan will not achieve emissions reductions necessary to protect downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I), (c), and (k). This Court has upheld EPA's use of that authority. EME Homer, 572 U.S. at 509-510. And the Rule currently applies only in States that did not challenge EPA's disapprovals of their own implementation plans. The circumstances here thus are far removed from those in which the Court has previously applied the major questions doctrine. See, e.g., West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (applying the major questions doctrine when the agency purported to use an "unheralded power representing a transformative expansion in [its] regulatory authority") (citation and quotation marks omitted; brackets in original).

and the implementation timeline are reasonable and well-supported, as are the enhancements it placed on the power-plant trading program.

1. EPA lawfully determined the amount of emissions reductions to be required from covered non-EGU sources

Pipeline Applicants claim (Appl. 13-17) that EPA acted arbitrarily and departed from past practice by failing to adopt a cost threshold when determining the amount of upwind emissions from natural-gas pipeline engines that would be deemed significant. Applicants misunderstand EPA's methodology and its application here.

Under EPA's longstanding approach, the amount of emissions that will be viewed as significantly contributing to downwind pollution is "that amount of emissions that is in excess of the emissions control strategies the EPA has deemed cost-effective" for potentially impactful industries. 88 Fed. Reg. at 36,676; see id. at 36,678 (noting that the current Rule applies "the same approach as the prior three" rulemakings); see also EME Homer, 572 U.S. at 519-520 (approving use of this methodology). To determine cost-effectiveness, EPA applies a multifactor analysis that assesses cost-per-ton estimates along with comparative emissions reductions and air-quality benefits available from different control strategies. 88 Fed. Reg. at 36,678-36,679, 36,718-36,719, 36,741.

In performing that analysis here, EPA confirmed that the

available control technologies for pipeline engines were well within the range of anticipated costs deemed appropriate for other sources.[4] The average cost-per-ton for available pipeline controls was $4981, see 88 Fed. Reg. at 36,746-36,747, far below the representative control cost for power plants of $11,000 per ton, id. at 36,746. And in assessing the efficacy of available controls, EPA found no drop-off in air quality benefits as the cost-per-ton rose to the selected stringency level. Id. at 36,741.

EPA explained that the representative costs it identified do not establish a cap on what any individual source might spend to comply. See 88 Fed. Reg. at 36,746. They are instead intended to facilitate a comparison of different available controls in different industries, which allows EPA to determine which controls would optimally yield significant emission reductions with downwind benefits. Ibid. Such a use of average representative costs is consistent with EPA's approach in prior Good Neighbor rules. See id. at 36,660, 36,746-36,747 (citing prior Good Neighbor rules). And to the extent that certain sources are unable to implement the presumptive controls due to technical impossibility

[4] In addressing the 2008 ozone standards, EPA performed a similar comparison of potential reductions at a comparable cost for power plants and for non-EGU sources. See 88 Fed. Reg. at 36,678. Based on that assessment, EPA determined that emissions reductions from non-EGU sources were not necessary at that time to eliminate significant contribution to downwind air quality problems. Ibid.

or extreme economic hardship, EPA allows those sources to comply with alternative emissions limits. Id. at 36,818.

Pipeline Applicants contend (Appl. 13-17) that EPA selected a $7500 threshold in its proposed rule and then improperly abandoned it in the final Rule. That is incorrect. The $7500 threshold was never intended to serve as a cap for purposes of the "significant contribution" determination. 88 Fed. Reg. at 36,740. Rather, EPA used that metric in its initial Screening Assessment to determine what non-EGU industries and emissions-unit types had potential for meaningful emissions reductions. See ibid.; EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, Response to Public Comments on Proposed Rule 97 (Mar. 2023) (RTC), https://perma.cc/6DY8-Y5G4. That screening allowed EPA to focus on nine industries out of the 41 the agency had initially identified, and it served as a starting point for the analysis of appropriate controls. RTC 97. EPA explained, however, that "the results of the Screening Assessment should not be confused with regulatory requirements, applicability determinations, or emissions limits." RTC 99. EPA's post-Screening Assessment analysis accounts for additional data, improved understanding, and consideration of comments. After undertaking that analysis, EPA reasonably determined an appropriate emissions reduction for natural-gas pipeline engines that is consistent with past practice and the controls for power-plant emissions.

2. EPA reasonably applied a 1000-horsepower applicability criterion for natural-gas pipeline engines

Pipeline Applicants object (Appl. 21-23) to the Rule's 1000-horsepower applicability criterion for natural-gas pipeline engines. Their arguments on that point reflect the same misunderstanding as their objection to EPA's determination of the appropriate amount of emissions reductions.

In the initial Screening Assessment, EPA evaluated units with 100 tons per year of actual, historical emissions to identify the most impactful potential emissions-reductions opportunities. 88 Fed. Reg. at 36,732-36,733; see Screening Assessment 2-3. Like the $7500 threshold, this initial assessment provided a starting point that allowed EPA to focus its analysis on the largest emitters with the most significant potential reductions. It did not reflect an EPA determination that particular pipeline engines make a significant contribution to downwind air pollution. After EPA had performed the Screening Assessment, the agency considered numerous additional factors to determine what reductions to require. 88 Fed. Reg. at 36,740.

When it completed that assessment, EPA determined that most of the existing standards that the agency had reviewed establish applicability criteria for pipeline engines based on design capacity rather than historic emissions. 88 Fed. Reg. at 36,821. For consistency with those requirements, EPA selected a design capacity of 1000 horsepower, which it determined would capture the

relevant engines. Ibid. EPA recognized that use of a design-capacity threshold "may capture low-use units and some units with emissions of less than 100 tons per year." Ibid. EPA nonetheless viewed the horsepower-based measure as appropriate because operators could otherwise shift emissions between controlled and uncontrolled units, thereby evading the limits. Ibid.; see id. at 36,746; RTC 123. To further respond to concerns that the 1000-horsepower threshold would cover some pipeline engines that produce small quantities of emissions, EPA established facility-wide emissions averaging, "allow[ing] facilities to prioritize emissions reductions from larger, higher-emitting units," and reducing the number of engines that must have controls installed. 88 Fed. Reg. at 36,821.

Pipeline Applicants claim (Appl. 23) that EPA's concern with shifting emissions cannot justify its decision because the agency could instead impose reporting obligations.[5] But EPA is authorized to regulate "any source" and any "emissions activity" that significantly contributes to nonattainment in a downwind State. 42 U.S.C. 7410(a)(2)(D)(i). Even where particular pipeline engines individually emit at lower levels, their aggregate contribution to

[5] The reporting requirements for boilers that the Pipeline Applicants cite (Appl. 23) are not comparable. The cited provision applies to a low-use exemption for boilers that operate less than 10% of the year, and it is not equivalent to a 100-tons-per-year threshold. See 88 Fed. Reg. at 36,819, 36,833.

nonattainment may be significant. 88 Fed. Reg. at 36,680-36,684; see RTC 109-110. EPA determined that, although the 1000-horsepower criterion captures more units than the agency had estimated at the time of the proposal, that threshold still allows for cost-effective emissions reductions of 32,247 tons of ozone-season nitrogen oxide, at an average cost per ton value of $4921. RTC 124. EPA's technical determinations are due significant deference, see Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 (1989), and the Pipeline Applicants have not shown that the agency's approach was arbitrary and capricious.

3. EPA's compliance timeline adequately accounted for reliability concerns for natural-gas pipelines

The Rule does not require non-EGU sources to implement reductions until the 2026 ozone season, giving those sources at least three years before compliance obligations begin. 88 Fed. Reg. at 36,755-,36,757. Pipeline Applicants nonetheless claim (Appl. 17-21) that the Rule's timeline is impossible; that it will threaten the reliable delivery of natural gas; and that EPA failed to consider those harms. Contrary to those contentions, EPA thoroughly considered the compliance schedule, including by commissioning a report to review the timing needs associated with installing controls for covered non-EGU emissions sources like pipeline engines, see SC&A, NOx Emission Control Technology Installation Timing for Non-EGU Sources: Final Report (Mar. 14, 2023) (Timing Report), https://perma.cc/4HYP-R62J, and by establishing a process for in-

dividual non-EGU sources to seek compliance extensions of up to three years, 88 Fed. Reg. at 36,759-36,760.

As the Timing Report explains, natural gas compressor stations are located every 50 to 100 miles along a transmission pipeline and use engines to raise the pressure of the gas to help it flow through the pipeline. Timing Report 8. The Timing Report's analysis of available data showed that 80% of compressor stations have more than one unit, about 25% of units operate at less than 40% capacity, and more than 40% of units operate at less than 80% capacity. Timing Report ES-8, 8. For engine controls, "[e]quipment [i]nstallation" is estimated to take a single month, or between three and seven months, depending on the technology used. Id. at 22, 32. Those data cast substantial doubt on Pipeline Applicants' claim (Appl. 18) that lengthy outages will be required. To be sure, due to review required by the Federal Energy Regulatory Commission (FERC), the Timing Report was "not able to complete an evaluation" of delays that could occur. Timing Report ES-8. The Timing Report noted, however, that the findings regarding relatively low capacity utilization and the "ability to coordinate outages and work with FERC may not present a substantial basis for assuming much if any delay in control installation timing." Ibid. In light of the excess capacity and short installation period, EPA reasonably determined that individual unit outages may be staggered and need not interrupt natural-gas supply. See 88 Fed. Reg.

at 36,759-36,760; RTC 877.

Pipeline Applicants contend (Appl. 19) that, because "engines are spread every 40 to 100 miles along the pipeline network," an engine immediately ahead of or behind an offline engine may not be able to substitute for its capacity in periods of "high demand." But given the extended compliance timeline and the short installation period, there is no reason that the pipelines should need to complete the installation during such peak periods. In circumstances where unforeseen events would require an operator to install equipment during peak season in order to comply with the deadline, and the required installation would threaten the reliability of gas supply, EPA has provided for compliance extensions of up to three additional years. 88 Fed. Reg. at 36,760. EPA has also provided an exemption for emergency engines that could help to accommodate unforeseen circumstances. Id. at 36,820-36,821.

Pipeline Applicants thus have identified no sound reason to believe that the Rule will lead to widespread reliability concerns. Indeed, EPA modeled the Rule's requirements on many similar federal and State requirements applicable to pipeline engines, and applicants have not suggested that those requirements interfered with gas supply. See EPA, Final Non-EGU Sectors TSD 5-18 (Mar. 2023), https://perma.cc/FCR2-F2R6. EPA adequately considered reliability concerns in adopting the compliance timeline; it simply did "not agree with all of the * * * assertions regarding the time [ap-

plicants] claim is needed for control installation." 88 Fed. Reg. at 36,755. That technical, predictive judgment is reasonable and should not be disturbed. See Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983) (noting that a reviewing court is "at its most deferential" when an agency "is making predictions, within its area of special expertise").

4. The Rule's provisions that regulate emissions from cement kilns, the paper industry, and the steel industry are well-supported

AFPA Applicants make a series of perfunctory allegations (Appl. 23-24) that EPA relied on flawed assumptions or failed to provide adequate opportunities to comment when it promulgated the Rule's provisions governing emissions from cement kilns, the paper industry, and the steel industry. Those arguments lack merit.

EPA recognized that many non-EGU emissions sources, including cement kilns, already have controls installed or are achieving reductions at or below the limits the Rule set. 88 Fed. Reg. at 36,827. The Rule is simply intended to bring all units within each industry up to a specified level of compliance. Ibid. Any kiln whose existing control technology enables it to meet the applicable emissions limit need not change anything to comply with the Rule. RTC 117.

EPA's regulation of the paper industry was likewise reasonable. EPA found that paper-industry boilers will account for an approximately 1836-ton reduction in nitrogen-oxide emissions --

the highest level of emissions reductions from boilers in any non-EGU industry covered by the Rule. RTC 121. As EPA explained in response to AFPA's comments, AFPA's objections rely on commenter-submitted data that could not be verified and reflect misunderstandings of the Screening Assessment and $7500 threshold. RTC 119-121. And in response to comments concerning potential implementation challenges for boilers, EPA exempted low-use boilers and boilers burning less than 90% fossil-fuel; adopted a formula to calculate emissions limits for boilers that burn a combination of fossil-fuel types; and allowed for case-by-case exemptions and alternative emissions limits. 88 Fed. Reg. at 36,819, 36,833-36,836, 36,844.

AFPA Applicants' contentions regarding the steel industry also miss the mark.[6] AFPA Applicants claim (Appl. 24) that EPA deprived them of an opportunity to comment on emissions limits for the steel industry. The proposed rule identified a single emissions limit for steel-industry reheat furnaces. See 87 Fed. Reg. 20,036, 20,145 & Tbl. VII.C-3 (Apr. 6, 2022). After considering industry comments on that aspect of the proposed rule, however, EPA concluded that the wide variability of performance made a

[6] In a separate order, the D.C. Circuit unanimously rejected a stay motion specific to the steel industry, which included similar arguments. See United States Steel Corp. v. EPA, No. 23-1207 (D.C. Cir. Oct. 11, 2023), stay application pending, No. 23A___ (filed Oct. 26, 2023).

single limit inappropriate. 88 Fed. Reg. at 36,828. Based on industry comments, EPA finalized an approach that requires installation of low-nitrogen-oxide burners (or equivalent technology) and performance testing to determine an appropriate limit for each unit that is achievable using that technology. Ibid. The agency's incorporation of greater flexibility into the final rule in response to industry comments is a desirable feature of notice-and-comment rulemaking, not an indication that the Rule is arbitrary and capricious.

C. The Rule's enhancements to the power-plant trading program are reasonable

In regulating power plants, EPA relied on its longstanding framework for determining appropriate reductions, and the agency chose to implement those reductions by allowing covered sources to use a market-based trading program. Based on EPA's experience operating such trading programs, however, EPA included various enhancements designed to "better sustain over time the incentives created by the trading program to achieve the degree of emissions control for [power plants] that the EPA has determined is necessary to address [S]tates' good neighbor obligations." 88 Fed. Reg. at 36,762. EPA explained that prior trading programs had resulted in lower stringency over time because the dynamic nature of the industry had hindered EPA's ability to predict future developments when the agency set allowance budgets.

In prior trading programs, EPA had established fixed budgets

based on current power-plant fleet composition. 88 Fed. Reg. at 36,764. When fleet composition changed over the subsequent years, excessive amounts of emissions allowances accumulated and could be banked for future years, allowing sources to idle controls despite EPA's determinations that such controls were necessary. Id. at 36,720-36,724, 36,752-36,753. As EPA noted, that was inconsistent with its intention in prior rules. See id. at 36,688. To prevent that sequence of events from recurring, the Rule provides for dynamic budgeting to ensure that the number of allowances matches the actual composition of the State's power-plant sources, and for recalibration of allowance banks to ensure that unused allowances cannot build up over time to a degree that undermines the elimination of significant contributions to downwind pollution. Id. at 36,657.

AFPA Applicants object (Appl. 21-22) to those enhancements, claiming that they result in unlawful over-control of emissions. That argument reflects a misunderstanding of the nature of the enhancements. The enhancements are not designed to reduce emissions beyond States' significant contribution; they are intended to ensure that EPA's trading program is not undercut by changed conditions in later years. 88 Fed. Reg. at 36,764. EPA's over-control analysis confirmed that the Rule does not compel any State to reduce emissions to a greater degree than is necessary to eliminate its significant contribution. Id. at 36,748-36,754.

"[W]hile EPA has a statutory duty to avoid over-control, the Agency also has a statutory obligation to avoid 'under-control.'" EME Homer, 572 U.S. at 523. EPA determined that the enhancements in the Rule are an appropriate method of ensuring that the trading program adheres to both requirements. Applicants have not provided any reason to second-guess EPA's judgment or to presume that any over-control will occur. And even if (contrary to EPA's expectation and intent) the trading-program enhancements were to result in over-control as they are implemented in later years, the appropriate remedy would be for applicants to "bring a particularized, as-applied challenge," not to seek "judicial condemnation of the rule in its entirety." Id. at 524.

II. THE COURT IS UNLIKELY TO GRANT CERTIORARI IF THE D.C. CIRCUIT UPHOLDS THE RULE

Applicants' request for extraordinary interim relief should also be denied because they have failed to show that this Court would likely grant certiorari if the D.C. Circuit upholds the Rule. Each of the issues applicants raise is a case-specific question regarding the application of arbitrary-and-capricious review to highly complex and technical facts. See pp. 18-41, supra. Those issues are not recurring legal questions of broader importance that would warrant this Court's review.

Applicants barely even attempt to show otherwise. State Applicants fail to address the issue altogether. Pipeline Applicants include a footnote claiming (Appl. 10-11 n.7) they do not need to

address the likelihood of certiorari. But see Mills, 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief) (noting that whether to grant extraordinary relief includes consideration of "whether the Court should grant review in the case"). They then tack on a single conclusory sentence claiming that they satisfy the standard because of "the importance of the issues and the Rule's significant legal flaws." Appl. 11 n.7. As already explained, however, applicants have failed to show any such legal flaws, and the issues applicants press are highly technical and case-specific.

AFPA Applicants' arguments (Appl. 13) on this score are similarly sparse. They focus on the costs of the Rule and note that the Court has granted petitions for certiorari in other CAA cases. Ibid. (citing West Virginia v. EPA, 142 S. Ct. 2587 (2022); Michigan v. EPA, 576 U.S. 743 (2015); EME Homer, 572 U.S. at 506). But in each of those cases -- unlike this one -- the Court was presented with important questions about the interpretation of certain provisions of the CAA, not just fact-dependent arbitrary-and-capricious challenges like those present here. See West Virginia, 142 S. Ct. at 2610 (considering EPA's interpretation of 42 U.S.C. 7411(d)); Michigan, 576 U.S. at 750 (considering EPA's interpretation of 42 U.S.C. 7412); EME Homer, 572 U.S. at 509 (considering EPA's interpretation of 42 U.S.C. 7410). And although AFPA Applicants attempt to characterize the Rule as an "unprece-

dented abrogation of the congressionally granted rights of States," Appl. 13, the Rule is in fact an exercise of authority Congress expressly granted to EPA to regulate sources of pollution in States when those States fail to do so in the first instance. Accordingly, none of the applicants has shown that the issues in this case warrant the Court's discretionary review, and that "counsels against a grant of extraordinary relief in this case." Mills, 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief).

III. THE REMAINING EQUITABLE FACTORS WEIGH HEAVILY AGAINST INJUNCTIVE RELIEF

A. Applicants' request to enjoin the Rule should be rejected for the additional reason that they have not demonstrated irreparable harm. To satisfy that requirement, applicants must do more than "simply show[] some 'possibility of irreparable injury.'" Nken, 556 U.S. at 434 (citation omitted); see Winter v. NRDC, Inc., 555 U.S. 7, 22 (2008). They have not done so here.

Applicants contend (Pipeline Appl. 27-28; AFPA Appl. 25-27) that they will be required to spend hundreds of millions of dollars in compliance costs in the months following the Rule's effective date. But non-EGU sources do not need to meet emissions deadlines until May 2026 at the earliest, with the potential for compliance extensions of up to three additional years. See 88 Fed. Reg. at 36,755-36,760. In view of the expected timeline for installation, EPA concluded that "the controls for non-EGU sources needed to

comply with this final rule are generally not expected to be installed significantly before the 2026 ozone season." Id. at 36,759. The Timing Report similarly suggests that applicants should be able to avoid significant expenditures pending judicial review. The report estimates that retrofitting of pipeline engines would generally take between three and six months of design, analysis, and permitting before installation begins. Timing Report 25.[7] And the entire retrofitting process is estimated to take between six and 19 months (depending on the type of technology used), inclusive of fabrication and installation. Id. at 25, 32. To the extent applicants may undertake some initial design and planning during judicial review, their potential costs are likely to be minimal.

A similar analysis applies to power plants' compliance costs. For the 2023 through 2025 ozone seasons, the Rule contemplates familiar control strategies that are not meaningfully different from those included in EPA's two most recent Good Neighbor rules. App., infra, 25a. More stringent budgets do not phase in until 2026. And "the preliminary analysis and engineering steps" required for the relevant control strategies "involve no capital

[7] The Timing Report notes that supply-chain delays could impact timing, but that those disruptions are easing. Timing Report 50-54; 88 Fed. Reg. at 36,759-36,760. In any event, the availability of compliance extensions adequately addresses concerns with shortages and with the need for specialized labor. Timing Report 59-60.

costs." Id. at 33a. For power plants that choose to comply with emissions budgets by installing technology, "much of the first year of project work typically need not entail substantial capital outlays." Id. at 34a. Applicants have thus failed to demonstrate that they will incur substantial compliance costs pending judicial review, which can proceed expeditiously in the D.C. Circuit.

Pipeline Applicants attempt to bolster (Appl. 24-27) their claims of financial injury by alleging that the Rule will harm natural-gas reliability. Those arguments do not show irreparable harm for the same reason they fail on the merits: the Rule's compliance timeline does not threaten reliability. See pp. 34-37, supra. The record reveals that the vast majority of compressor stations contain multiple units and that those units have excess capacity, indicating that pipeline operators can manage unit outages for pollution-control upgrades without endangering service. Timing Report 8. Applicants' contrary claims depend on inflated estimates of installation time (Pipeline Appl. 24) and unwarranted assertions that pipelines will be required to complete the installations during peak periods (id. at 25-26).

Applicants also minimize the significance of the Rule's compliance flexibilities (Pipeline Appl. 26-27), but those provisions cannot be so easily disregarded. The availability of emissions averaging "means that of the approximately 3,000 engines subject to the [Rule]'s applicability criteria for pipeline engines, less

than one-third (or about 900) are estimated to need to improve emissions performance to achieve full compliance." App., infra, 53a. Applicants dispute that conclusion and criticize EPA's data sample. Pipeline Appl. 26. But EPA relied on data from a statistically significant number of facilities across the affected States. EPA, Final Non-EGU Sectors TSD 19 (Mar. 2023), https://perma.cc/FCR2-F2R6.

EPA's use of that sample was reasonable, particularly because many facilities are not required to submit annual emissions inventories. See National Ass'n for Surface Finishing v. EPA, 795 F.3d 1, 12 (D.C. Cir. 2015). Courts "generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to invest the resources to conduct the perfect study." Ibid. (citation omitted). And if unforeseen circumstances arise -- like increased demand due to anomalous weather conditions during a scheduled outage -- the Rule authorizes compliance extensions of up to three years. App., infra, 52a. The exemption for emergency engines could also serve to avoid reliability concerns. Id. at 53a. Applicants thus have shown no more than a "possibility" of irreparable injury, which is an insufficient basis for the injunctive relief they seek. Nken, 556 U.S. at 434 (citation omitted).

State Applicants' assertions (Appl. 24-25) of irreparable harm are no more persuasive. Like the other applicants, the States

identify potential compliance costs as a form of irreparable harm. Appl. 24-25. But the Rule imposes requirements only on covered sources, not on the States. The States cite the burden of processing permit applications and ensuring compliance (the latter of which is at the States' discretion), but executing traditional permitting functions within their regular duties is not an irreparable injury. Treating such routine costs as irreparable injury would be "inconsistent with [the] characterization of [equitable] relief as an extraordinary remedy." Winter, 555 U.S. at 22.

State Applicants also assert (Appl. 25-26) that the Rule will cause electricity-grid destabilization, with accompanying economic impacts. But State Applicants provide no more than speculative allegations that some power plants may opt to retire at some future point. EPA analyzed that possibility and concluded that the Rule would not degrade electric-system reliability because neither the power-plant emissions reductions nor the trading program requires that any power plant retire. See 88 Fed. Reg. at 36,770-36,775; see also App., infra, 27a, 29a-31a, 43a. And in the event that some power plants decide to retire, they must comply with the procedures established by the relevant Regional Transmission Organization, which is charged with maintaining grid reliability. 88 Fed. Reg. at 36,771.

The States likewise cannot show irreparable harm by claiming (Appl. 26) an intrusion on their "sovereign authority to regulate

air quality within their borders." Even assuming that abstract interest could give rise to a cognizable injury, the federal government has a weighty countervailing sovereign interest in enforcing the Rule -- and "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Under the CAA, each State has an opportunity to regulate emissions under an appropriate state implementation plan that accounts for the harm that emissions from within its borders impose on downwind States. When a State fails to submit an adequate plan, the Act requires EPA to step in to balance the interests of upwind and downwind States. Because EPA promulgated the Rule pursuant to that congressional command, and because the Rule currently applies only in States that did not challenge EPA's disapprovals of their plans, the State applicants cannot rely on abstract conceptions of sovereignty to justify the extraordinary relief they seek.

B. Any injury that applicants have demonstrated cannot outweigh the injuries to the government and the public interest -- which merge in this context, see Nken, 556 U.S. at 435 -- that a stay of the Rule would entail. Most fundamentally, emissions reductions under the Rule will provide significant benefits to the residents of downwind States. A delay in the implementation of the Rule would eliminate the incentive to improve emissions performance in the short-term -- an incentive that has already re-

sulted in a "substantial reduction in emissions," with some sources improving their emissions by more than 75%. App., infra, 35a, 44a. And a stay would likely delay the phase-in of more significant reductions for both power plants and non-EGU emissions sources that are slated to begin in 2026. Stays of two prior rules implementing the Good Neighbor Provision led to implementation delays of up to three years, even though the rules were later largely upheld. Id. at 21a-22a; see Michigan, 213 F.3d at 695; EME Homer, 795 F.3d at 132. A stay here could similarly delay elimination of upwind States' significant contributions until at least 2029. App., infra, 21a-22a.

During that delay, downwind States would suffer significant harms. The emissions that contribute to cross-state air pollution represent a public health hazard in downwind communities, associated with worsened asthma and increased mortality. 88 Fed. Reg. at 36,671. In addition, those emissions generate economic harm in downwind States as areas in violation of ozone standards can face increasingly stringent regulatory burdens mandated by the CAA to ensure those States attain the standards. See 42 U.S.C. 7511a; see also App., infra, 46a-47a.

Applicants suggest that EPA's timing in disapproving the various state plans and promulgating the Rule demonstrates a lack of any urgency in implementing the Rule's requirements. See Pipeline Appl. 29; State Appl. 27. But the delay in promulgating the Rule

arose in part because of litigation on the preceding rule implementing the Good Neighbor provision. And the D.C. Circuit has held that the Act requires elimination of upwind emissions in time for the next downwind attainment deadlines. Wisconsin, 938 F.3d at 318-319. Here, that requires all feasible reductions by May 2026 at the latest, making the Rule's compliance deadlines consistent with the Act's requirements. See 42 U.S.C. 7410(c)(1), 88 Fed. Reg. at 36,755-36,756. In any event, downwind States and their residents cannot fairly be punished for any delay in EPA's promulgation of the Rule. In light of the significant public benefits the Rule provides and the significant public harms a stay would impose, the balance of equities strongly disfavors the extraordinary relief applicants seek.

C. AFPA Applicants seek relief that is greatly disproportionate to the vast majority of the errors they allege. Those applicants focus on particular aspects of the Rule that apply to particular industries, yet they request that the whole Rule be stayed. See AFPA Appl. 29. To the extent those arguments have any merit, they would not justify staying the Rule in its entirety. Cf. 88 Fed. Reg. at 36,693 (noting that the Rule "promulgates discrete emissions control requirements for the power sector and for each of [nine] other industries," and that "[s]hould any industry-specific aspect of the final rule be found invalid, the EPA views this rule as severable as between the different industries

and different types of emissions control requirements"). Pipeline Applicants, by contrast, ask only that the Court stay "the Rule's provisions for pipeline engines." Appl. 29.

If the Court concludes relief is warranted with respect to any discrete aspects of the Rule, it should tailor the relief instead of granting a sweeping stay that would more broadly disrupt the Rule's protection of downwind States and their residents. But because applicants cannot satisfy the standards for extraordinary relief, the better course is to deny the applications in full.

CONCLUSION

The applications should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

OCTOBER 2023

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OHIO, et al., KINDER MORGAN, INC., et al., AMERICAN FOREST & PAPER ASSOCIATION, et al. *Applicants*	)	
v.	)	Nos. 23A349, 23A350, 23A351
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.	)	

DECLARATION OF JOSEPH GOFFMAN

I, Joseph Goffman, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

1. I am Principal Deputy Assistant Administrator performing delegated duties of Assistant Administrator for the United States Environmental Protection Agency Office of Air and Radiation (OAR), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

2. OAR is the EPA headquarters-based unit with primary responsibility for administration of the Clean Air Act (CAA or the Act). As the Principal Deputy Assistant Administrator performing delegated duties of Assistant Administrator for OAR, I serve as the principal advisor to the Administrator of EPA on matters pertaining to air and radiation programs, and I am responsible for managing these programs, including program policy

development and evaluation; development of emissions standards; program policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

3. As part of my duties as Principal Deputy Assistant Administrator performing delegated duties of Assistant Administrator of OAR, I oversee the development and implementation of actions, regulations, policy, and guidance associated with the review and establishment of National Ambient Air Quality Standards (NAAQS) under sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409, and implementation of the NAAQS under section 110 of the CAA, 42 U.S.C. § 7410, including the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), and relevant other parts of Title I of the Act, including Part D (plan requirements for nonattainment areas).

4. This declaration is filed in support of EPA's opposition to applications for a stay of the "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36654 (June 5, 2023) (the Good Neighbor Plan or Plan), filed before the U.S. Supreme Court in applications 23A349, 23A350, and 23A351.

5. The purpose of this declaration is to provide the Court information pertaining to the regulatory design of the Good Neighbor Plan, to explain why it is EPA's view that the Plan can and should remain in effect for each of the 11 states that it currently covers, notwithstanding temporary administrative stays of the Plan for 12 other states. As I will explain, the Plan is designed to eliminate each covered state's "significant contribution," using the same analytical framework the Supreme Court upheld in *EME Homer City Generation, L.P. v. EPA*, 572 U.S. 489 (2014). The Plan can be implemented in each state to accomplish this statutory objective as to each state, irrespective of the total number of states the Plan covers.

6. EPA issued stays of the Plan for 12 states through two interim final rules. 88 Fed. Reg. 49295 (July 31, 2023) (First IFR); 88 Fed. Reg. 67102 (Sept. 29, 2023) (Second IFR). The IFRs were issued to ensure EPA's compliance with preliminary stay orders several regional circuit courts issued pending judicial review of a separate EPA action disapproving 21 states' state implementation plan (SIP) submissions addressing Good Neighbor obligations for the 2015 ozone NAAQS, 88 Fed. Reg. 9336 (Feb. 12, 2023) (the Disapproval). Because the Disapproval is a predicate to EPA's authority to issue the Good Neighbor Plan for most states, EPA had no choice but to stay the effectiveness of the Plan as to those states once the preliminary stay orders issued.[1]

7. The stay of the Plan as to some states has no bearing on the lawfulness and appropriateness of its application in other states. The Plan is comprised of a series of 23 federal implementation plans (FIPs), promulgated for 23 states. Depending on the analysis of each state's contribution to downwind ozone problems and cost-effective emissions control opportunities (using EPA's nationwide "4-step interstate transport" analytical framework), the Plan subjects the states to certain emissions control programs for electric generating units (EGUs) and for certain affected units in other industries (often referred to in this context as non-EGUs).

8. Neither the legal basis for the Plan, nor its design and implementation, preclude it from being carried out in only a subset of the states that were originally covered. For the 11

[1] In the case of Utah, EPA had separate authority to issue the FIP through a predicate "finding of failure to submit" issued in 2019. *See* 88 Fed. Reg. at 36689. The Tenth Circuit in staying the Disapproval concluded that its stay order as to the Disapproval blocked the Good Neighbor Plan from taking effect for Utah. *State of Utah v. EPA*, 23-9509 (10th Cir.), ECF No. 11016742. EPA has complied with the Tenth Circuit order by staying the Plan as to Utah. However, it has raised this issue to the Tenth Circuit in its merits brief. *Id.* ECF No. 010110917156, at 82-83.

states that remain covered, EPA's determination that the emissions control requirements in the Good Neighbor Plan are necessary to eliminate their "significant contribution" remains unchanged.[2] The implementation and rationale of the Good Neighbor Plan do not depend on the specific number of states that it covers.

9. For this reason, EPA found in the Good Neighbor Plan that the Plan is severable by state. 88 Fed. Reg. at 36693. While the analytical methods, policy judgments, and technical analyses that informed the Plan are conducted at a national scale, the actual definition of significant contribution is determined at the state level, and the implementation of the measures necessary to eliminate significant contribution is fully achievable by the sources within each state, irrespective of other states' participation.

10. The Plan determines on a state-by-state basis which of the EGU (i.e., power plant) and non-EGU emissions-control programs should apply. *See* 40 C.F.R. § 52.38(b)(2) (as amended by 88 Fed. Reg. at 36862-63) (identifying states subject to the Good Neighbor Plan's "Group 3" EGU emissions trading program promulgated at 40 C.F.R. Pt. 97, subpart GGGGG); 40 C.F.R. § 52.40(c)(2) (as promulgated at 88 Fed. Reg. at 36869) (identifying states subject to non-EGU emissions control requirements promulgated at *id.* §§ 52.41-46). The regulations at 40 C.F.R. Pt. 97, subpart GGGGG, and 40 C.F.R. §§ 52.41-46 are uniform in nature. But states are "enrolled" into these requirements based on state-specific findings regarding the level of their

[2] "Significant contribution" is often used as a shorthand to refer to the identification of those amounts of emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other states and therefore must be prohibited under the Good Neighbor Provision. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

contribution to other states' ozone problems and how long that contribution is projected to continue into the future.[3]

11. In other words, it is through the application of those uniform programs, as appropriate, in each state, that the Good Neighbor Plan eliminates each covered state's significant contribution, as required by 42 U.S.C. § 7410(a)(2)(D)(i)(I).

12. The state-specific coverage of the Plan (at the time it was promulgated on March 15, 2023), by regulatory program, is as follows:

a. EGUs in all covered states except California (22 states total) are required to participate in the Group 3 EGU emissions trading program at the level of stringency associated with near term emissions-control strategies that EPA found can be implemented in 2023 and 2024.

b. EGUs in Alabama, Minnesota, and Wisconsin are only subject to this "near-term" stringency level within the Group 3 Trading Program, and no more, because EPA found these states are no longer linked to downwind ozone problems in the year 2026.

c. EGUs in 19 states (excluding Alabama, Minnesota, and Wisconsin) that are covered by the Group 3 trading program, are subject to the enhanced stringency in the budgets that takes effect over 2026 and 2027 because these states are linked through the 2026 analytic year.

[3] This is identical in structure to how EPA has promulgated Good Neighbor federal requirements through multiple prior rulemakings. *See* 40 CFR § 52.38-39 (identifying the enrollment of states into emissions trading programs for ozone season NO_X, annual NO_X, and annual sulfur dioxide promulgated as subparts to 40 C.F.R. Pt. 97, as necessary to address Good Neighbor obligations for other ozone and particulate matter NAAQS).

d. EPA found California has no cost-effective fossil-fuel fired EGU emissions reductions available at the stringency levels determined in the Good Neighbor Plan and so is not subject to the Group 3 Trading Program at all.

e. Non-EGUs in 20 states are subject to the uniform emissions control regulations for non-EGUs. Because EPA found these requirements may take up to three years to be implemented (i.e., until 2026), this number excludes Alabama, Minnesota, and Wisconsin, for the same reason as above: these states are not "linked" in 2026.

13. These state groupings illustrate how the application of each set of regulatory requirements promulgated in the Plan depend on the circumstances of each state, as determined through the application of the nationwide 4-step analytical framework. In no case are all of the Plan's EGU and non-EGU control programs applicable in all 23 states.

14. The Good Neighbor Plan was never premised on an assumption that it must be applicable in specifically 23 states.[4] As further illustration of this fact, the Good Neighbor Plan, like all prior Good Neighbor federal rulemakings before it, recognizes that states may choose to replace their FIP with a SIP. *See, e.g.,* 88 Fed. Reg. at 36838-42. In doing so, states may opt to leave the interstate trading program for EGUs in favor of an adequate, alternative approach to addressing their Good Neighbor obligations. *Id.* at 36841-42; *see also, e.g.,* Cross-State Air Pollution Rule, 76 Fed. Reg. 48208, 48328 (Aug. 8, 2011) (CSAPR).

15. The emissions control requirements are not in any way dependent on a minimum number of states' enrollment in the Plan. This is not just a function of the regulatory structure of

[4] As EPA acknowledged in the Plan, there are several additional states that may have Good Neighbor obligations, which EPA is still in the process of addressing. *See* 88 Fed. Reg. at 36658. However, there is no evident reason why the Good Neighbor Plan should be considered improper or un-implementable because those states are not currently included in it.

the Plan as described above. It is because, as a factual matter, EPA's determinations as to the level of emissions reductions that are appropriate to eliminate significant contribution (even though evaluated on a national scale) do not depend on the application of the Plan's requirements in multiple states. The Plan is not premised on accomplishing a minimum total of emissions reductions but rather in holding the sources in each linked upwind state to minimum levels of emissions performance deemed to be cost-effective. 88 Fed. Reg. at 36741. In establishing what that level of stringency should be, the Plan identified conventional, at-the-source, NO_X emissions control technologies that have been available in the covered industries for many years. *See, e.g.,* 88 Fed. Reg. 36738 (identifying control technologies for EGUs); *id.* at 36739 (identifying control technologies for non-EGUs). The feasibility of these control technologies is not in any way dependent on the inclusion of a minimum number of states in the Rule.

16. This is true even in the case of the interstate trading program for EGUs. Interstate trading for EGUs is a feature of this rule as with prior Good Neighbor rules like CSAPR. Interstate trading can help make compliance more efficient, but even before the Good Neighbor Plan, EPA took measures to ensure that interstate trading does not undermine the obligation to eliminate each state's significant contribution. *See North Carolina*, 531 F.3d 896, 921 (D.C. Cir. 2008), *modified on reh'g*, 550 F.3d 1176. *See, e.g.,* 76 Fed. Reg. at 48268-71; 88 Fed. Reg. at 36752-53.

17. While interstate trading would generally increase the size of the allowance trading market and thus may increase market liquidity in ways that can improve market efficiency, there is no reason that the program cannot be implemented on a state-by-state level.[5] Indeed, each

[5] In fact, the size of the trading region is not the only determinant of liquidity; the relative demand for allowances is an important factor. For example, sources that are not well-controlled

state's budget is set in the Plan at levels that provide sufficient allowances for each state assuming EGUs achieve a level of reduction equivalent to what can be achieved by the at-the-source technologies identified to eliminate significant contribution.

18. Trading regions have always varied in size over the history of implementation of the Good Neighbor provision. This has never posed a challenge to compliance feasibility, nor does EPA have any evidence of allowance shortages occurring in any of these programs. For example:

a. Currently, Georgia is the only state whose EGUs remain in the original CSAPR "Group 1" ozone season NO_X trading program.

b. In 2021, the Revised CSAPR Update created a 12-state trading region to complete the remedy to significant contribution for the 2008 ozone NAAQS (ie, the original "Group 3" program).

c. With the Revised CSAPR Update in place, the 2016 CSAPR Update "Group 2" program trading region was reduced from 22 states to 10 states.

d. Currently, with the stay of the Good Neighbor Plan as to 12 states, EGUs in three states (Kentucky, Louisiana, and West Virginia) are in a temporary trading program ("Expanded Group 2") to maintain status quo regulatory requirements for these

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for NO_X would tend to put upward pressure on allowance prices (and potentially reduce liquidity). If such sources are removed from the Group 3 trading program, for example due to judicial stays as to the states in which they are located, this may put downward pressure on allowance prices (and potentially increase liquidity). See paragraph 22 below on current Group 3 allowance prices.

EGUs under the Revised CSAPR Update during the pendency of litigation over the Disapproval.[6]

19. Illustrating the long history of successful implementation of emissions trading programs, allowance prices have tended to decline substantially over time as emissions reductions are implemented and a bank of unused allowances builds up. *See* 88 Fed. Reg. at 36687 (discussing experience in prior programs).[7]

20. So far, the experience with the Good Neighbor Plan has been no different—even with the stays in place for 12 states. Allowance prices have been declining substantially since EPA promulgated the Plan in March 2023. The current price of a Group 3 allowance now stands at less than $2000/ton (reflecting a drop of 90% from where Group 3 allowance prices were a year ago and reflecting a continuing decline in allowance prices over 2023, despite reductions in the number of states covered by the program resulting from the stays). This continuing price drop illustrates that the Plan remains achievable within the current 10-state trading region, and there is no shortage of allowances available for compliance.

21. Finally, the non-EGU emissions control strategies do not entail interstate trading. These control programs are based on a regulatory structure where emissions limitations and associated compliance assurance requirements apply directly to individual covered emissions

[6] The emissions and allowance-availability data indicate that there will not be compliance challenges for this group. Their combined EGU ozone season NO_X emissions were 40,648 tons in 2021, and 35,403 tons in 2022. Their combined budget in 2023 and each subsequent year (so long as they remain in the "Expanded Group 2" program) is 41,753 tons. Taking into account already-banked allowances, they will have a total of 61,011 allowances available for compliance for the 2023 ozone season. Assuming their 2023 emissions are similar to 2022 emissions, they will therefore carry over a substantial bank of allowances for use in 2024 and later years.

[7] For example, according to S&P Global Market Intelligence, a subscription-based reporting service, allowances in each of the original CSAPR annual SO_2 and annual NO_X trading programs are currently trading between $2.00 and $3.00 per ton.

units. These requirements are unaffected by the number of states that are covered by the Good Neighbor Plan. And as with the power plant control strategies, these limits are based on at-the-source emissions-control technologies that are well-demonstrated and in fact mandated in many downwind states with ozone nonattainment areas.

22. The stays of the SIP Disapproval that have been entered constitute preliminary rulings that do not bind the merits panels, and have been issued on a temporary basis, only for the purpose of preserving the status quo pending judicial review. EPA has argued that once these cases are briefed on the merits, the regional circuit courts should transfer those cases to the D.C. Circuit or dismiss them on the basis that venue is improper in those courts, uphold EPA on the merits of the Disapproval, or remand without vacatur even if some error is identified. In any of these scenarios, the preliminary stays will be lifted, allowing EPA to bring the Good Neighbor Plan into effect for these states.

23. Should any court vacate the Disapproval as to any state upon adjudication of the merits, EPA anticipates that its course of action in that circumstance would be dependent on the grounds of that court's ruling, including evaluation in consultation with the Department of Justice whether there are grounds for rehearing or appeal.

24. At this time, EPA has not identified any policy or legal justification that would warrant an agency action staying the Good Neighbor Plan as to the 11 states where it is presently in effect. For these states, the Disapproval or findings of failure to submit remain unchallenged and effective and thus EPA has the authority and obligation to promulgate FIPs for these states.[8]

[8] In the case of Pennsylvania and Virginia, EPA's FIP authority stems from a 2019 finding of failure to submit. *See* 88 Fed. Reg. at 36689.

25. By contrast, the First and Second IFRs staying the Good Neighbor Plan were done to comply with the regional circuits' preliminary stay orders. EPA cannot implement a FIP for any state for which it lacks predicate authority through disapproval of a SIP or a finding of failure to submit a complete SIP. *See* 42 U.S.C. § 7410(c)(1). Thus, so long as the preliminary court orders are in place, EPA must abide by such orders and did so by staying the effectiveness of the Good Neighbor Plan FIPs for those states until such time as its authority to implement those FIPs is restored. 88 Fed. Reg. 49295, 49297 (July 31, 2023); 88 Fed. Reg. 67102, 67103 (Sept. 29, 2023).

26. Because the judicial stays were of the underlying Disapproval, not the FIP, EPA determined that to comply with the stay orders and to provide regulatory certainty to relevant sources, the proper course was to promulgate the interim final rules (IFRs) that administratively stay the GNP for the 12 states covered by judicial stays.

27. EPA was clear in issuing these IFRs that they entail no exercise of agency discretion, but rather are necessary to comply with the preliminary stay orders and to preserve status quo regulatory requirements pending judicial review of the Disapproval. *See* 88 Fed. Reg. at 49299.

28. Because these IFRs are necessary to comply with court orders, were not an exercise of agency discretion, and were important to implement quickly to provide regulatory certainty, EPA found good cause to issue the IFRs without prior opportunity for comment on grounds that comment is both unnecessary and impractical in this circumstance. *Id.* at 49299-300. Nonetheless, recognizing that there was some potential that in executing these stays, some flaw or unintended consequence might result, EPA provided for 30-day comment periods on both IFRs in its discretion. *See id.* at 49300.

29. So far, EPA has reviewed comments on the First IFR and has identified no grounds on which its IFRs were issued in error, should be modified, extended to include other states, or limited to exclude any states. No comments identified any technical flaws or mistakes in the regulatory changes it made to preserve the status quo. The discretionary comment period on the Second IFR closes on October 30, 2023. 88 Fed. Reg. at 67102.

30. There is no basis to extend an administrative stay of the Good Neighbor Plan to any state not currently subject to a judicial stay of the underlying SIP disapproval. As to each of the 11 states where the Plan is currently in effect, the requirements of the Act as interpreted through relevant case law make clear that there are no legal grounds not to continue the Plan in effect for these states.[9]

31. EPA is obligated to address each state's significant contribution. *North Carolina*, 531 F.3d at 921. EPA is obligated to do so consistent with the attainment schedule faced by downwind areas, i.e., for ozone, pursuant to 42 U.S.C. § 7511(a), as expeditiously as practicable and no later than the next attainment date. *Id.* at 911; *Wisconsin*, 938 F.3d 303, 313-20. EPA may deviate from this mandate only upon a sufficient showing of necessity, taking into consideration the ultimate objective of timely attainment of the NAAQS in downwind areas. *Id.* at 320.

32. An agency action staying the Good Neighbor Plan as to any of the 11 states where it is currently in effect would not be consistent with this legal framework or sound air quality planning. First, this would unnecessarily cause and/or extend ongoing harm to air quality and public health and welfare resulting from these 11 states' emissions. In the near term,

[9] EPA also lacks authority to issue a stay of this action under 42 U.S.C. § 7607(d)(7)(B), which authorizes no more than a 3-month stay in any case, and such an action must be predicated on commencement of a mandatory reconsideration process, which EPA has not done.

improvements in EGUs' emissions performance that were achieved in the 2023 ozone season and can continue to be achieved in 2024 and beyond would be stalled. Further, the additional emissions reductions required to eliminate these states' significant contribution beginning in 2026 likely would be delayed, possibly by years. The deferral of emissions reductions from these states would leave downwind states that face increasing regulatory burdens associated with continuing nonattainment with no relief from these upwind states' sources. *Maryland v. EPA*, 958 F.3d 1185, 1200-04 (D.C. Cir. 2020).

33. The Plan follows the same approach to defining significant contribution as EPA applied in CSAPR, which the Supreme Court upheld in *EME Homer City Generation, L.P. v. EPA*, 572 U.S. 489 (2014). Within that framework, which the Court found to be an "equitable" and "efficient" solution to the "thorny" causation problem of interstate ozone pollution, the Plan "requires the most impactful sources in each state . . . to come up to minimum standards of environmental performance based on demonstrated NO_X pollution-control technology." 88 Fed. Reg. at 36741 (citing 572 U.S. at 519).

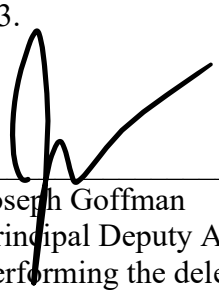
34. Covered sources in each state that remains subject to the Plan can still meet that requirement. While it is true that the stays of the Plan for 12 states mean that the Plan's air quality benefits for downwind areas will only be partially realized for the time being, this does not imply grounds for staying the Plan as to 11 more states with valid disapprovals or findings of failure to submit. The Act requires timely elimination of each state's significant contribution.

35. Consistent with its understanding of its statutory authority and duty, EPA will continue to implement the Good Neighbor Plan in all states where it has the authority to do so. To the extent that its authority is currently unaffected by court decisions, EPA will proceed with

implementation of the Good Neighbor Plan and take other actions as needed to eliminate significant contribution for purposes of the 2015 ozone NAAQS.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of October, 2023.



Joseph Goffman
Principal Deputy Assistant Administrator
performing the delegated duties of Assistant Administrator
Office of Air and Radiation
United States Environmental Protection Agency

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al.,	)	
Petitioners,	)	
v.	)	No. 23-1157 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

DECLARATION OF RONA BIRNBAUM

1. I, Rona Birnbaum, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge, or on information contained in the records of the United States Environmental Protection Agency ("EPA" or the "Agency"), or on information supplied to me by EPA employees.

2. I am the Director of the Clean Air Markets Division in the Office of Atmospheric Protection within the Office of Air and Radiation at EPA. The Clean Air Markets Division, which was initially created to implement the acid rain provisions of the Clean Air Act Amendments of 1990, designs and operates market-based programs to reduce emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X"), generates and provides public access to power plant emissions data, facilitates and oversees emissions monitoring and reporting, assesses emissions control technology options, conducts atmospheric deposition monitoring and analysis, develops information systems for market-based programs, assesses environmental and human health effects, assesses benefits and costs of programs, and educates the public regarding regional air pollution problems and market-based programs. The currently operated market-based programs were established under the Acid Rain Program, the Cross-State Air Pollution Rule ("CSAPR"), the CSAPR Update, and the Revised CSAPR Update.

3. In my current capacity as Director of the Clean Air Markets Division, I oversee EPA's implementation of components of the Clean Air Act including Title IV (acid deposition control) and parts of Title I (air quality standards and associated emission limitations). In coordination with other EPA offices, I manage the promulgation and implementation of regulations pursuant to the Clean Air Act including the suite of CSAPR programs. I manage all of the Clean Air Markets Division's activities as listed in paragraph 2, including overseeing EPA's collection of emissions data from the power sector (and some other stationary emissions sources) under the Acid Rain Program and the suite of CSAPR programs.

4. Prior to becoming Director of the Clean Air Markets Division in 2022, I held several management positions in the Office of Atmospheric Protection including in the early years of the Acid Rain Program. I joined EPA in 1988 and the Office of Atmospheric Protection in 1991. I hold a bachelor's and master's degree in environmental and natural resource policy from The George Washington University.

5. The purpose of this declaration is to provide information responsive to certain allegations made in several parties' ("Movants") Motions for Stay filed by August 4, 2023 respecting the Good Neighbor Plan's requirements for power plants ("electric generating units" or "EGUs"). In addition, Section V concerns the regulatory, public health, and economic consequences for downwind nonattainment areas if the Good Neighbor Plan is stayed. Unless otherwise noted, information and data presented in this declaration regarding the Good Neighbor Plan reflect the rule as it was signed on March 15, 2023. Section IV addresses the continuing feasibility of the Good Neighbor Plan's requirements for EGUs despite judicial stay orders that have required EPA to stay the rule's requirements in eleven states.[1]

I. The Emission Allowance Trading Program Established by the Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards.

A. Overview of the Good Neighbor Plan

6. Once EPA sets new or revised national ambient air quality standards ("NAAQS," or "air quality standard"), states must submit state implementation

[1] *See* EPA Response to Judicial Stay Orders, *https://www.epa.gov/csapr/epa-response-judicial-stay-orders* (last visited Aug. 17, 2023).

plans ("SIPs") to satisfy certain Clean Air Act requirements, including the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). With respect to the 2015 NAAQS for ozone, EPA reviewed states' good neighbor SIPs, and it approved 24 plans, disapproved 19 plans, and partially approved / partially disapproved 2 plans. *See* 88 FR 9336 (Feb. 13, 2023). EPA separately found several states failed to submit complete plans, including Pennsylvania, Utah, and Virginia. *See* 84 Fed. Reg. 66612, 66613 (Dec. 5, 2019). A finding of failure to submit or disapproval of a Good Neighbor SIP imposes no legal obligation on the state or sources within the state, but rather imposes a legal obligation on EPA to promulgate a federal implementation plan ("FIP"), at any time, within two years of the disapproval. 42 U.S.C. § 7410(c)(1).

7. EPA Administrator Michael S. Regan signed a FIP action related to these requirements, referred to as the "Good Neighbor Plan"[2] (or the "Plan"), on March 15, 2023, to achieve emissions reductions required by the good neighbor provision with respect to the 2015 NAAQS for ozone. The Plan establishes federal requirements for qualifying power-plant and industrial sources in 23 covered states, to reduce ozone pollution during the May 1-to-September 30 "ozone season" by reducing emissions of NO_X, which is an ozone precursor pollutant.

8. The objective of the Plan is to eliminate the covered states' significant contribution to nonattainment and interference with maintenance of the 2015 ozone NAAQS in other states as expeditiously as practicable and in alignment with the statutory attainment schedule.

9. With respect to fossil fuel-fired power plants in 22 states, this action will prohibit those emissions by implementing an allowance-based trading program beginning in the 2023 ozone season, although the majority of the emission reductions captured in the trading program will not begin until the phase-in of reductions associated with new post-combustion control technology retrofits over the 2026 and 2027 ozone seasons. The Plan also prohibits emissions through emissions limitations and associated requirements for certain other industrial stationary sources in 19 of those 22 states, and one other state (California), beginning in the 2026 ozone season.

[2] Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 FR 36654 (June 5, 2023). The rulemaking docket is EPA-HQ-OAR-2021-0668 and can be accessed through *www.regulations.gov*. A number of key supporting materials and additional information are available at EPA's website, Good Neighbor Plan for 2015 Ozone NAAQS, *https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs* (last visited June 5, 2023).

10. In assisting downwind states with attaining and maintaining the 2015 ozone NAAQS, the Plan will deliver substantial public health and environmental benefits across wide swaths of the United States. The benefits of the Plan far exceed its anticipated costs. Like its predecessor programs, the NO_X SIP Call,[3] Clean Air Interstate Rule ("CAIR"),[4] and CSAPR,[5] the Plan can be implemented without disruption to the reliability or affordability of the electrical power supply.

Estimated Monetized Health and Climate Benefits, Compliance Costs, and Net Benefits of the Good Neighbor Plan, 2023 Through 2042 (Millions 2016$, Discounted to 2023)[6]

		3% Discount Rate	7% Discount Rate
Present Value	Health Benefits	$200,000	$130,000
	Climate Benefits	$15,000	$15,000
	Compliance Costs	$14,000	$9,400
	Net Benefits	**$200,000**	**$140,000**
Equivalent Annualized Value	Health Benefits	$13,000	$12,000
	Climate Benefits	$970	$970

[3] "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (Oct. 27, 1998).
[4] "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule)," 70 FR 25162 (May 12, 2005).
[5] "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 FR 48208 (Aug. 8, 2011) (generally referred to as the Cross-State Air Pollution Rule, or "CSAPR").
[6] Adapted from Good Neighbor Plan Executive Summary. For explanations, caveats, and table notes associated with these figures, see 88 FR 36654, 36666.

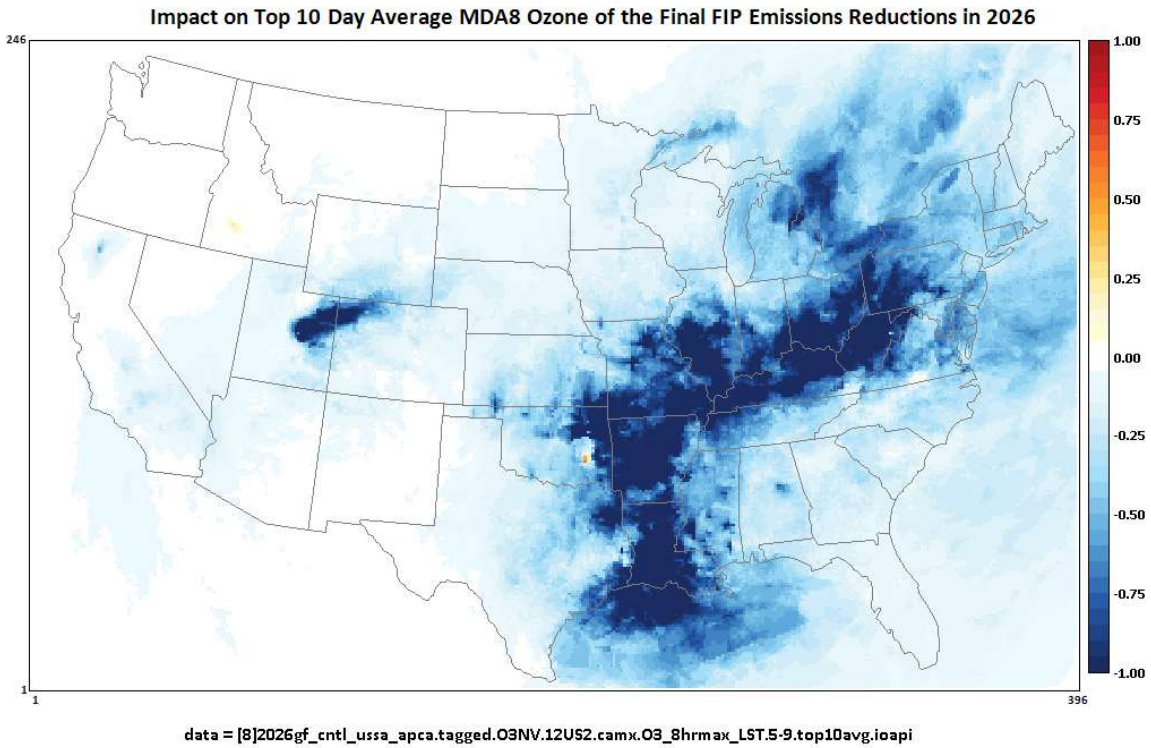
Compliance Costs	$910	$770
Net Benefits	**$13,000**	**$12,000**

The estimated annualized compliance costs for the Plan of $910 million (3% discount rate, 2016$) or $770 million (7% discount rate, 2016$) are comparable to or less than those prior interstate transport rulemakings. For example, EPA estimated that the NO_X SIP Call would cost $1.7 billion (1990$) annually to implement. 63 FR at 57478. Similarly, CAIR was estimated to cost the power sector $2.4 billion in 2010 and $3.4 billion in 2015 (1999$). 70 FR at 25305. CSAPR was estimated to cost the power sector $810 million in 2014 (2007$). 76 FR at 48215.

11. The Plan will deliver substantial public health and environmental benefits. On average, the ozone levels at the identified "receptor" locations around the country are projected to decrease by 0.66 parts per billion (ppb). Good Neighbor Plan, Table V.D.3-1 (88 FR at 36748). The Plan will help many downwind areas make substantial progress toward coming into compliance with the 2015 ozone NAAQS. In some cases, such as for receptors in Colorado, coastal Connecticut, and Texas, the Plan is projected to make substantial progress toward achieving full attainment of the standard.

12. According to the air quality analysis for the SIP disapproval Final Rule, there are 43 air quality monitoring sites throughout the United States that are identified as "receptors"—i.e., locations that are projected to struggle to attain or maintain the 2015 ozone NAAQS. *See* 88 FR at 36706-08. The combined population of the designated ozone nonattainment areas associated with these receptors in 2021 is 82.3 million people, representing roughly 25 percent of the total U.S. population.

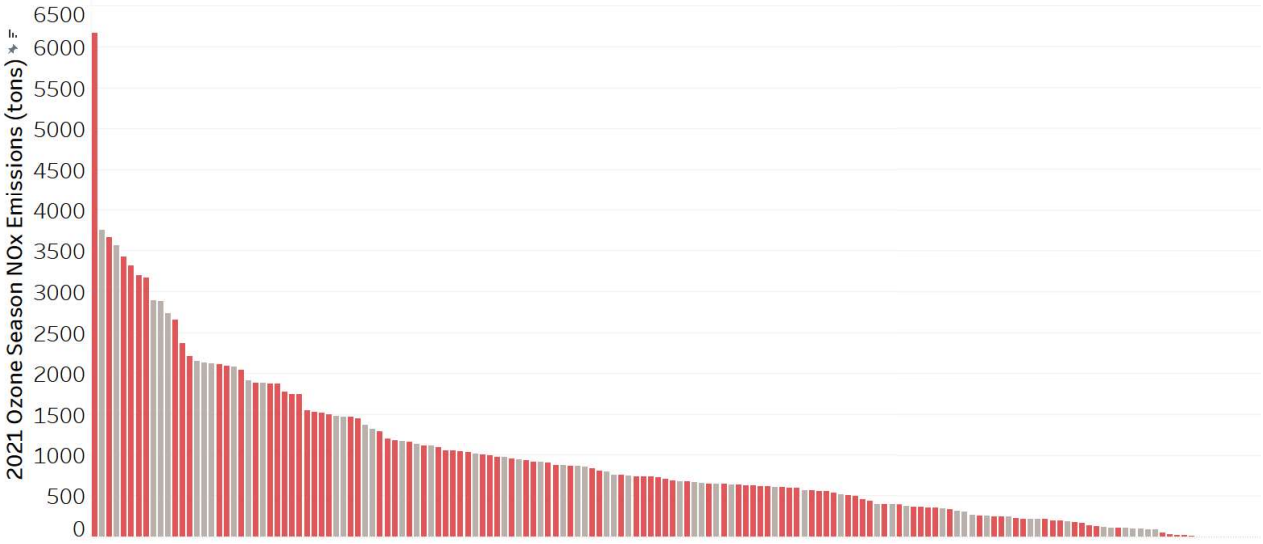
13. The air quality benefits of the Plan will also reach many other people beyond the specific areas where receptor sites are located. The map below graphically illustrates the reduction in ozone levels that is projected to occur across the United States with full implementation of the Plan.



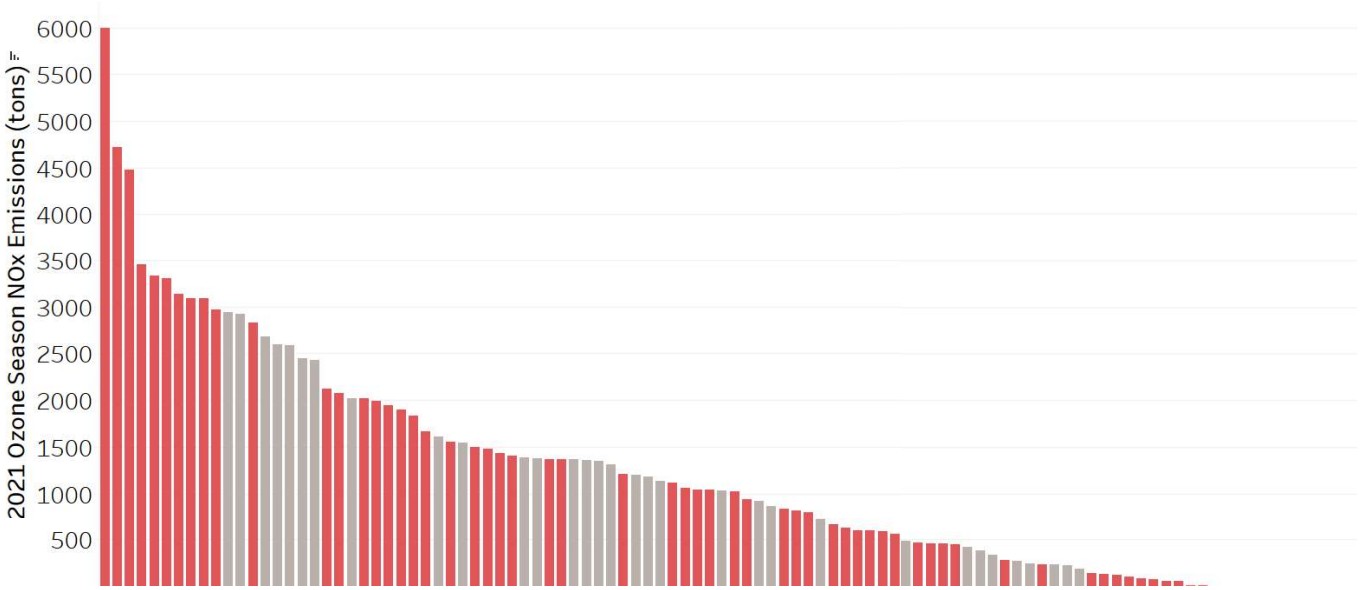
14. The emissions control strategies on which the Plan is premised are all conventional, widely-used, at-the-source technologies that have been available to power plants and industrial sources for decades. This level of control is widely mandated for these types of sources in downwind areas with ozone air quality problems. For example, selective catalytic reduction ("SCR") control technology is already installed at roughly two-thirds of the coal-fired power plant capacity in the U.S. fleet. Good Neighbor Plan, 88 FR at 36768.

15. As can be seen in the figures below, many fossil fuel-fired power plants in the states that are included in the Good Neighbor Plan have relatively high, poorly controlled NO_X emissions contributing to ozone pollution. These sources along with other anthropogenic emissions sources in the States are impacting air quality hundreds of miles away. (Emissions from power plants in states subject to the Good Neighbor Plan are highlighted in red.)

Coal-fired EGUs with SCR or SNCR in the Contiguous U.S.



Coal-fired EGUs without SCR or SNCR in the Contiguous U.S.



16. A delay in the implementation of the Plan would result in the continuation of significant contribution to harmful levels of air pollution across the United States. Delays of as long as three years in the implementation of two prior good neighbor rulemakings (NO_X SIP Call and CSAPR) have been experienced as a result of stay litigation. In both cases, the regulations were largely upheld once courts were able to adjudicate the merits. EPA is applying this same, now-Supreme Court-upheld analytical framework in this Plan. A delay of three years or more here would delay the full elimination of significant contribution under this Plan

until 2029 or later. This would be eight years after the 2021 Marginal area attainment deadline, five years after the 2024 Moderate area attainment deadline, and two years after the 2027 Serious area attainment deadline.[7] In the meantime, many Americans could suffer illness and premature death from the harmful pollution that would be allowed to continue, while downwind areas that fail to attain the health-based NAAQS will be subject to ever more stringent regulatory requirements under the Act without relief from the contributing effects of upwind-state pollution. For example, the forgone emissions reductions in 2026 could result in forgone reductions in avoided premature mortalities and illnesses equal to as much as $14 billion (2016$, 3% discount rate).

B. Establishment, Applicability, and Relationship to Other Trading Programs

17. Among other things, the Plan implements a revised and expanded allowance trading program for electricity generating units – the CSAPR NO_X Ozone Season Group 3 Trading Program (the "Trading Program"). This program generally applies to fossil fuel-fired boilers and combustion turbines that are located in covered states and serve generators larger than 25 megawatts producing electricity for sale. 40 CFR 97.1004.

18. The Plan amends the existing CSAPR NO_X Ozone Season Group 3 Trading Program established for twelve states in 2021 under the Revised CSAPR Update.[8] The CSAPR NO_X Ozone Season Group 3 Trading Program was first established to achieve emissions reductions required by the good neighbor provision with respect to the 2008 ozone NAAQS. For several other states, the Trading Program will replace the CSAPR NO_X Ozone Season Group 2 Trading Program established in 2016 under the CSAPR Update and currently still being implemented for ten states.[9] The CSAPR NO_X Ozone Season Group 1 Trading Program was first established in the original CSAPR rulemaking in 2011 to address good neighbor obligations associated with the 1997 ozone NAAQS, and currently applies only in the State of Georgia.[10]

19. Under the Plan, power plants in seven states will transition from the CSAPR Group 2 Trading Program to the CSAPR Group 3 Trading Program, and power plants in three states not currently covered by a CSAPR trading program for seasonal NO_X emissions will be added to the CSAPR Group 3 Trading Program.

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[7] Further discussion of the disruptive consequences of a stay of the Final Rule is in section V below.
[8] "Revised CSAPR Update for the 2008 Ozone NAAQS," 86 FR 23054 (April 30, 2021).
[9] "CSAPR Update for the 2008 Ozone NAAQS," 81 FR 74504 (October 26, 2016).
[10] CSAPR, 76 FR 48208 (Aug. 8, 2011).

20. Virtually all of the electric generating units covered by the Plan, including those in the three states not currently covered by a seasonal NO_X emissions program, nonetheless participate in the Acid Rain emissions trading program under Title IV of the Clean Air Act and already meet rigorous monitoring and reporting requirements in compliance with 40 CFR Part 75.[11]

21. Power plants have deep familiarity with Clean Air Act compliance assurance and permitting obligations and face minimal administrative burdens associated with entry into the Trading Program. All of the units that will participate in the Trading Program already participate in multiple CSAPR trading programs for 20 of the 22 states. For the remaining two, Utah and Nevada, nearly all EGUs already participate in the Acid Rain Program.

22. As finalized (and not accounting for judicial stays, which are discussed in Section IV), the emissions reduction requirements associated with the new Trading Program emissions budgets established by the Plan apply as of the effective date of the Plan, which was August 4, 2023, 60 days after publication of the Plan in the Federal Register on June 5 (88 FR 36654).[12]

23. As finalized (and not accounting for judicial stays, which are discussed in Section IV), for units in the states already covered by either the CSAPR NO_X Ozone Season Group 2 or Group 3 trading programs, the Plan has transitional provisions so that the new budgets apply only after the Plan's effective date.[13] For units in the remaining states that will be newly covered by the Trading Program, no requirements, either in terms of emissions reductions or in terms of other administrative requirements, applied until the effective date.

C. How Emissions Trading Programs Work and the Enhancements to the Trading Program

24. The Clean Air Markets Division operates or has operated a number of allowance trading programs, the earliest of which started more than 25 years ago. These include the NO_X Budget Trading Program for ozone-season NO_X emissions

[11] Approximately 97 percent of ozone season NO_X emissions reported under Part 75 are determined using continuous emissions monitoring systems ("CEMS"). Gas- or oil-fired units that qualify as peaking units or low mass emissions units under the regulations have options to determine reported emissions using other methodologies.
[12] *See* Good Neighbor Plan Preamble Section VI.B.12.a (88 FR at 36811-13).
[13] *See id*.

under the NO_X SIP Call,[14] programs for ozone-season and annual NO_X emissions under CSAPR and CAIR,[15] and programs for annual SO_2 emissions under CSAPR, CAIR, and the Acid Rain Program.[16] Most of the units that are covered by the Plan's Trading Program also participate or participated in some of these other programs. There has not been, nor have Declarants identified, a single instance where implementation of these EPA trading programs has caused an adverse reliability impact.

25. EPA provides robust technical analysis for identifying its emission reduction requirements. For power plants, this includes starting with reported data for recent historical operations. It further tests these requirements against future expectations for the sector by using a state-of-the-art, peer-reviewed programming model of the contiguous U.S. electric power sector (the Integrated Planning Model, or IPM). IPM provides forecasts of least-cost capacity expansion, electricity dispatch, and emissions control strategies while meeting energy demand and environmental, transmission, dispatch, and reliability constraints.

26. The Trading Program, like the other current and former allowance trading programs operated by the Clean Air Markets Division, does not impose any fixed limits on the operations or emissions of individual affected units. Instead, each affected unit is required to monitor and report its emissions, and each source with affected units is required to hold quantities of emission "allowances" based on the reported emissions from all its affected units for each "control period" for the program. (For the Trading Program, the control period is the May-September ozone season.) Allowances can be traded with other sources covered by the program in the same or other states or with third parties (e.g., brokers). The aggregated emissions from all the affected units under such a program are limited by the total number of allowances issued for use in the program, each of which authorizes the emission of up to one ton of NO_X.

27. The Trading Program budgets are set based on an evaluation of available NO_X mitigation control technologies. As in the prior CSAPR rulemakings, as well as the earlier CAIR and NO_X SIP Call rulemakings, EPA assessed several well-understood, widely-available, at-the-source emissions control

[14] "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (Oct. 27, 1998).
[15] "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule)," 70 FR 25162 (May 12, 2005).
[16] CAA subchapter IV-A, 42 U.S.C. 7651-7651*o*; 40 CFR parts 72-78.

strategies. Following a multifactor assessment at "Step 3" of the interstate transport framework, EPA arrived at a suite of control strategies that obtain cost-effective emissions reductions delivering meaningful downwind air quality benefits. EPA's assessment of these technologies is set forth in Section V.B-C of the Plan preamble, 88 FR at 36720-40.

28. The primary strategies for power plants that emerged from this analysis are: starting in 2023, optimizing existing post-combustion controls; starting in 2024, upgrading to state-of-the-art combustion controls at the few remaining coal facilities without them; and, over the 2026-2027 ozone seasons, retrofitting post-combustion controls on large emitting units currently lacking them. *See* Good Neighbor Plan Preamble Section VI.A, 88 FR at 36754-58.

29. It bears noting that the 2023 and 2024 strategies of optimizing existing post-combustion controls and upgrading combustion controls are essentially identical to the emissions control strategies that were identified in CSAPR, the CSAPR Update, and the Revised CSAPR Update. EPA's analysis in the Good Neighbor Plan is that these strategies remain widely available on a relatively near-term basis and additional, cost-effective emissions reductions can be obtained from these strategies across the fleet of existing power plants in the covered upwind states.

30. For each control period, the total quantity of allowances is initially allocated among the affected units.[17] Allocations in Good Neighbor trading programs have followed a similar methodology for many years, relying on historical heat input and emissions data to determine how many allowances to allocate to each unit, as well as to new units. The Plan generally follows this approach with some minor changes from prior programs. *See generally* Good Neighbor Plan Preamble Section VI.B.9, 88 FR at 36801-08. Among the features of the Plan's allocation methodology, similar to prior programs, is a "new unit set aside," which is available for any power plants that would not otherwise receive allocations, mainly (but not exclusively) new power plants that come online after the Plan is issued. Power plants that have gone offline but are then returned to operation also qualify to receive allocations from the new unit set aside if the plants are no longer eligible to receive allocations as existing units. Often, there are

[17] CSAPR trading programs are designed to allow states to easily replace EPA's allocation methodology with their own. States may also leave the FIP through adopting the trading program in full (in addition to replacing EPA's allocation methodology) into their state program or developing their own approaches for approvable SIPs that can replace the FIP. *See* Good Neighbor Plan Preamble Section VI.D, 88 FR at 36838-43.

allowances remaining in each state's new unit set aside, and if so, these are recycled back to existing units in proportion to their original allocation. Thus, the entire budget for each compliance period is fully allocated, and units typically will receive more allowances than their initial allocation figures suggest.

31. The allowance allocation methodology is distinct from the method of determining the emissions budget for each state. The number of initial allocations each affected unit receives is not an emission limit, nor is it an express or implied prohibition on how much that source may emit; rather, sources may buy or sell allowances with any other party and use them for compliance. This incentivizes units that can reduce their emissions easily or cheaply to make those reductions and reap the benefits from selling their unneeded allowances, while units with relatively more expensive reduction opportunities can comply by purchasing those allowances. For a more comprehensive overview of emissions trading programs, see the Division's website at *https://www.epa.gov/emissions-trading-resources*.

32. Sources with affected units under the Trading Program are not required to hold allowances to cover their emissions before or at the actual time of the emissions (e.g., in or during the 2023 ozone season). Instead, each source is obligated to surrender allowances to cover its affected units' emissions for a control period by the program's "allowance transfer deadline," which is June 1 of the year *after* the year of the control period. 40 CFR 97.1002, 97.1006(c)(1). For the 2023 ozone season, the allowance transfer deadline will be June 1, 2024. Thus, a source in the Trading Program has an extended period of time—eight months after the end of the ozone-season control period on September 30—in which to acquire any additional allowances that may be needed for compliance.

33. Each state's budget determines the total number of allowances to be allocated among the state's affected units for each control period. However, a state budget is not a limit on how much NO_X a state's affected units may emit, in the aggregate, during the control period. Under the Trading Program (like the trading programs under the original CSAPR), the aggregated emissions from a state's affected units can exceed the state's budget up to a certain level, called the "assurance level," without triggering any further obligations beyond each source's basic compliance obligation to hold allowances equal to the sum of its affected units' emissions. If the aggregated emissions from the affected units in a single state exceed the state's assurance level during a control period, the sources that contributed to the state's exceedance must surrender two additional allowances for each ton of their respective shares of the exceedance. 40 CFR 97.1025. The assurance levels include "variability limits" beyond the respective state emissions budgets that allow for potential inter-annual variability in operating needs for each

state. At the same time, the assurance levels function within the structure of an interstate trading program to meet the Act's requirement that each state's sources are held to the elimination of the state's significant contribution.

34. The Trading Program is fully achievable without any need for sources to reduce their operations or retire, because the emission budgets are premised on widely available pollution control technologies described above whose use would achieve the required emission reductions without need to reduce operations or retire any affected EGU. However, under the Trading Program, no power plant is *required* to follow these strategies. In general, a power plant owner has options to operate the emissions controls identified by the EPA for that particular type of unit (including installation or upgrade of controls), operate other types of emissions controls, or adapt the unit's levels of operation to produce less emissions. The Plan generally preserves the compliance flexibility of prior transport trading programs in reserving these decisions to sources' owners and operators.

35. While preserving the intrinsic emissions trading compliance flexibilities noted above, the Trading Program contains several enhancements relative to prior trading programs. These enhancements operate together to ensure that, within the structure of an interstate trading program, sources continue to achieve a degree of emissions reduction consistent with the Act's requirement to eliminate "significant contribution." As EPA discusses in the Plan, experience with prior trading programs has produced evidence that over time sources may not be properly incentivized to operate emissions controls to the degree needed to eliminate significant contribution on an ongoing basis. The enhancements included in the Trading Program continue to provide flexibility while providing greater assurance that significant contribution will be eliminated on the most critical days of the ozone season and will remain eliminated on a permanent basis. EPA made several adjustments to these enhancements from the proposal in light of comments regarding grid reliability, as discussed in the following section beginning at paragraph 37.

36. There are four enhancements to the Trading Program in the final Plan, compared to prior CSAPR programs: dynamic budgeting; annual bank recalibration; unit-specific backstop daily emissions rates; and a secondary emissions limitation:

a. *Dynamic Budgets:* Prior trading rules used a single, fixed emissions budget, set based on power sector data as of the date of the action. In the Revised CSAPR Update, EPA established preset budgets for several years into the future, to better reflect known changes in the power sector

over time. In the Good Neighbor Plan, EPA is again establishing preset budgets as floors for the 2023 to 2029 control periods. Beginning in 2026, dynamic budgets (i.e., budgets set by applying the emission control strategies selected in the Plan to more recent operating data) will be calculated for each control period. From 2026 through 2029, a state's dynamic budget will be used only if it is higher than the state's preset budget for that control period. Beginning in 2030, dynamic budgeting will be the sole method of budget calculation. *See* Good Neighbor Plan Preamble Section VI.B.4, 88 FR at 36777-79.

b. *Bank Recalibration:* If a source does not use all of its allowances to demonstrate compliance in a given control period, the Trading Program, like all the other allowance trading programs operated by the Clean Air Markets Division, allows the unused allowances to be banked for use in the program in future control periods. In the CSAPR Update and the Revised CSAPR Update, EPA executed one-time conversions of available banked allowances from prior trading programs into initial allowance banks appropriately scaled to the budgets under the new trading programs. The Plan carries that process forward by limiting the collective allowable number of banked allowances for the Trading Program that can be carried over each year to 21% of the sum of the states' emissions budgets, starting with the 2024 ozone season. This will prevent the buildup of an excessively large bank of allowances that would undermine program stringency in the latter years of a program. *See* Good Neighbor Plan Preamble Section VI.B.6, 88 FR at 36788-91.

c. *Unit-specific Backstop Daily Emissions Rates:* To ensure more consistent operation of installed controls on sources with the highest level of emissions potential throughout each day of ozone seasons going forward, the Plan includes backstop daily emission rates applied to each of a subset of the covered sources. This rate applies beginning in 2024 for large, coal-fired sources that have SCR post-combustion emissions controls already installed. The rate is set at a level that reflects seasonal optimization of the control (not daily maximal performance), and sources must surrender additional allowances for the emissions associated with exceedances of this rate (after a 50-ton threshold, which accommodates the potential unavoidable emissions sources might have above the daily rate associated with activities like start-up). The same rate is applied for large coal-fired units with SCR-retrofit potential in the second control period after such control is installed or in 2030,

whichever occurs first. *See* Good Neighbor Plan Preamble Section VI.B.7, 88 FR 36791-97.

d. *Secondary Emissions Limitations:* To avoid foreseeable exceedances of the state-by-state assurance levels, the Plan establishes the conditions for an enforceable Clean Air Act violation in defined circumstances of egregious failure to operate existing pollution controls, starting with the 2024 ozone season. *See* Good Neighbor Plan Preamble Section VI.B.8, 88 FR at 36797-801.

D. Key Changes in the EGU provisions of the Good Neighbor Plan from Proposal

37. The proposal underwent a comment period of 76 days, and EPA held many stakeholder meetings, including with electricity reliability coordinators, to receive feedback as well. This public engagement provided useful information to the Agency and produced a number of important changes in the Good Neighbor Plan.

38. The information regarding the contents of the Good Neighbor Plan, reflective of these changes, became available to the general public on or about March 15, 2023, with the release of the unofficial, pre-publication copy of the Plan on EPA's website.

39. Several changes to the EGU-related provisions in the Good Neighbor Plan bear directly on the claims of harm put forward by Movants. These changes respond to concerns raised by commenters that the Plan, as proposed, could have unintended effects on power sector grid-reliability.

40. Commenters observed that the fleet of fossil-fuel fired power plants is undergoing a period of transition to cleaner fuels and technologies. Many power plant owners and operators highlighted their interest in seeing flexibility in this program that would facilitate their business decisions, while, in their view, the Plan as proposed could force uneconomical decisions either to retire power plants earlier than intended or to force expensive pollution-control retrofits for sources that in their judgment would otherwise not continue in operation for much longer. *See* Good Neighbor Plan Preamble Section VI.B.1.d, 88 FR at 36770-75.

41. During rule development, EPA also actively engaged with key stakeholders in the electricity sector, including system operators, regional

transmission operators ("RTOs"), the U.S. Department of Energy ("DOE"), the Federal Energy Regulatory Commission ("FERC"), and other parties that have the responsibility for ensuring reliability. EPA hosted a series of meetings with reliability organizations who had commented on the proposal to ensure we had a solid understanding of their concerns and perspectives. *See* Good Neighbor Plan Preamble Section III.B.1.c, 88 FR 36678-80.

42. In light of these viewpoints, EPA adopted multiple changes from the proposal to address the reliability-related concerns identified in comments and brought into greater focus through consultations with RTOs and other agencies. These changes have been carefully crafted to ensure the statutory mandate to eliminate significant contribution to interstate pollution problems under the Clean Air Act is met without disrupting the reliable operation of the bulk power grid. *See* Good Neighbor Plan Preamble Section VI.B.1.d, 88 FR at 36770-75.

a. EPA had proposed to apply "preset" state emissions budgets only for the control periods in 2023 and 2024, with dynamic budgeting allowing for changes in the budget both upward and downward beginning in 2025. EPA had proposed to use only one year of data in the dynamic budget-setting process. In the Final Good Neighbor Plan, preset budgets will operate as floors from 2023 through 2029. This will establish predictable minimum quantities of allowances available during the period when commenters have expressed concern that the reliability-related need for such predictability is greatest. In addition, the dynamic budgets will be set using multiple years of operating data to prevent an anomalous year of data from skewing the budgets. *See* Good Neighbor Plan Preamble Section VI.B.1.b.i, 88 FR at 36764-66.

b. The target percentage of the state emission budgets used to annually recalibrate the allowance bank will not be set at the proposed 10.5 percent level until the 2030 control period. For the control periods from 2024 through 2029, a target percentage of 21 percent will be used instead. The adoption of the higher target percentage for use through the 2029 control period is intended to enhance the availability of allowances during this period by allowing power plant owners and operators to "bank" allowances at a higher level through 2030. *See* Good Neighbor Plan Preamble Section VI.B.1.b.ii, 88 FR at 36766-67.

c. The application of the backstop daily emissions rate for units without existing SCR controls is deferred until the 2030 control period from the 2027 control period as EPA had proposed. This change extends by several years the period during which the highest emitting sources in the fleet may continue surrendering only one allowance per ton emitted, as opposed to three allowances per ton emitted, while operating without widely available pollution control technology within the Trading Program. *See* Good Neighbor Plan Preamble Section VI.B.1.c.i, 88 FR 36767-69.

43. Additionally, EPA made several other key changes in the Good Neighbor Plan from the proposal that will also help ensure it can be implemented on a feasible and cost-effective basis in light of comments and other record-based considerations that in EPA's judgment warranted attention:

a. The Good Neighbor Plan does not require any emission reductions associated with projected generation shifting using EPA's Integrated Planning Model. *See* Good Neighbor Plan Preamble Section V.B.1.f, 88 FR at 36731-32.

b. EPA finalized a phase-in approach for emission reductions associated with the SCR-retrofit strategy. These reductions are phased in over 2026-2027 in the final Good Neighbor Plan, as opposed to just 2026 at proposal. This change provides an additional year for the full implementation of reductions associated with this strategy relative to the proposal. *See* Good Neighbor Plan Preamble Section VI.A, 88 FR at 36757-58.

c. Emissions control stringency associated with combustion control upgrades does not go into effect for any state until the start of the 2024 ozone season. *See* Good Neighbor Plan Preamble Section V.A, 88 FR 36754-55.

II. NO_X Mitigation Strategies and Timing: Further Detail

44. The Plan assumes two mitigation strategies in setting emission budgets for the 2023 ozone season. This is the optimization of two types of existing post-combustion controls—SCR and selective non-catalytic reduction ("SNCR"). Therefore, no new pollution control equipment is assumed in 2023, only the operation of existing equipment. EPA uses its database of reported

historical power sector operations and emissions performance to derive state emissions budgets based on these (and other) strategies. According to EPA data, power plants have demonstrated through their historical operation (for more than 90% of such units) that they have already achieved this level in the past, in many cases significantly out-performing the representative performance rates used by EPA to establish budgets based on these strategies.

45. The vast majority of SCR-controlled units (nationwide and in the 22 states covered by the Trading Program) at least partially operated these controls during the 2021 and 2022 ozone seasons, based on reported emissions rates. Existing SCRs operating at partial capacity still provide functioning, maintained systems that may only require increased frequency or quantity of delivered chemical reagents (i.e., ammonia or urea), which can be accomplished within a few weeks. In many cases, units with SCR have historically achieved more efficient NO_X removal rates than their current performance and therefore are capable of reverting to earlier operation and maintenance plans that achieved demonstrably better SCR performance.

46. There is ample evidence of units restoring optimal performance of post-combustion controls within a timeframe of two months or less. *See* Good Neighbor Plan Preamble Section V.B.1.a, 88 FR at 36720-25. Not only have units reactivated SCR performance levels at the start of an ozone season or when requirements took effect, but unit-level data also shows instances where sources demonstrated the ability to quickly alter their emissions rate within an ozone-season and even within the same day in some cases. Moreover, this emissions control technique is familiar to sources and was analyzed and included in the Revised CSAPR Update emissions budgets finalized in 2021 and the CSAPR Update emissions budgets finalized in 2016.

47. The recently implemented Revised CSAPR Update was finalized on March 15, 2021, with emissions reductions premised on the same technology and nearly identical implementation schedules as this Plan regarding existing control optimization. See paragraph 51. Sources were able to comply with a 100% success rate in meeting their allowance-holding requirements, and units optimized their controls, showing significant improvement in emissions performance relative to prior years. Neither sources nor state agencies and reliability authorities reported any difficulty maintaining compliance with electric reliability standards as a function of achieving compliance with the Revised CSAPR Update.

48. The recent experiences with both the Revised CSAPR Update and CSAPR Update underscore the eminently achievable nature of the control

strategies informing the establishment of the Trading Program budgets for 2023 and 2024.

49. In the Plan, EPA finds that new SCR retrofit installation is cost-effective and is included as part of the overall strategy to eliminate significant contribution. Corresponding emission reductions are reflected in state emissions budgets, phasing in over the 2026 and 2027 ozone seasons. EPA extended the timeframe for installation of SCR controls from 36 months at proposal to 36-48 months in the final Plan. There are many instances of individual SCR-retrofit projects being completed well within a three-year timeframe; however, a 36-48 month period corresponds with EPA's expectations regarding timing needs for fleetwide implementation of this strategy. There is significant engineering literature and third-party testimonials as to the feasibility of this timing for sources pursing this compliance option. This technology is widely available. SCR controls already exist on over 60 percent of the coal fleet in the states covered by the Trading Program. Nearly every pulverized coal unit larger than 100 MW built in the last 30 years has installed this control.

50. The timeframes by which the requirements of the Plan go into effect are all keyed to the finalization of the Plan. Thus, the phasing in of the SCR-retrofit stringency over the 2026-2027 ozone seasons corresponds to a 36-48 month period from the date of issuance of the Plan. *See* Good Neighbor Plan Preamble Sections V.B.1.e, 88 FR at 36726-31, and VI.A, 88 FR at 36757-58.

51. The implementation of the Plan's budgets reflecting the 2023 control strategy as of the effective date 60 days after publication in the Federal Register accommodates the two-month period EPA found to be the maximum amount of time needed to implement these strategies. These exact technology and timing assumptions were just successfully implemented on an identical schedule in the Agency's Revised CSAPR Update rule, which was finalized on March 15, 2021 and included emission reduction requirements premised on optimization of existing controls going into effect upon the effective date of the rule during the 2021 ozone season. *See* Good Neighbor Plan Preamble Section V.B.1.a., 88 FR at 36720-21; *see also* Revised CSAPR Update, 86 FR 23054.

52. With respect to the control strategies reflected beginning in the 2026 and 2027 ozone seasons, the preliminary analysis and engineering steps involve no capital costs; these include pre-construction activities, such as engineering studies, conceptual design, schedule, specifications, and cost estimates. For power plants that choose to pursue a strategy of retrofitting post-combustion controls such as

SCR, much of the first year of project work typically need not entail substantial capital outlays.[18]

III. Achievability of the Good Neighbor Plan

53. The emissions reductions implemented through the Plan's Trading Program are readily achievable for the covered power plants, and the Program is designed so as not to threaten resource adequacy or otherwise degrade electric system reliability in any state or region. This section will discuss the achievability of the Trading Program as finalized in the Good Neighbor Plan on March 15, 2023. The following section will discuss why the Trading Program remains achievable for covered states not under judicial stays.

54. Under the Trading Program, for each control period EPA allocates an amount of allowances equal to each state budget among the affected units in the respective state. For control periods after 2023, a state may submit a state implementation plan revision replacing EPA's unit-level allocations with unit-level allocations of its choosing, provided that the total number of allocations does not exceed the state budget. 40 CFR 52.38.

55. The sum of the preset state budgets under the Trading Program for 2023 as designed was 208,119 tons. (For the set of states that would have been subject to the trading program for the entire 2023 ozone season, prorating of the budgets to account for the effective date of the plan, as discussed in paragraphs 22-23, would have increased this amount by 20,123 tons.) Adding the amount of allowances in the anticipated starting bank (see paragraph below), EPA estimated that the total number of allowances that would have been available for compliance in 2023 was approximately 269,479 allowances prior to any 2023 prorating due to the August 4 effective date. Under EPA's prorating approach, the quantity of allowances available per day of compliance increased in proportion to each day of delay in the FIP's effective date beyond May 1, 2023.

56. In addition to allowances allocated for each control period and already banked under the Group 3 Trading Program, the EPA will convert for use in the Trading Program an amount of allowances banked under the existing CSAPR NO_X Ozone Season Group 2 trading program. 40 CFR 97.826. Any affected unit (or other entity) that holds banked allowances issued under the CSAPR Group 2 program will be issued a proportional number of converted allowances that can be

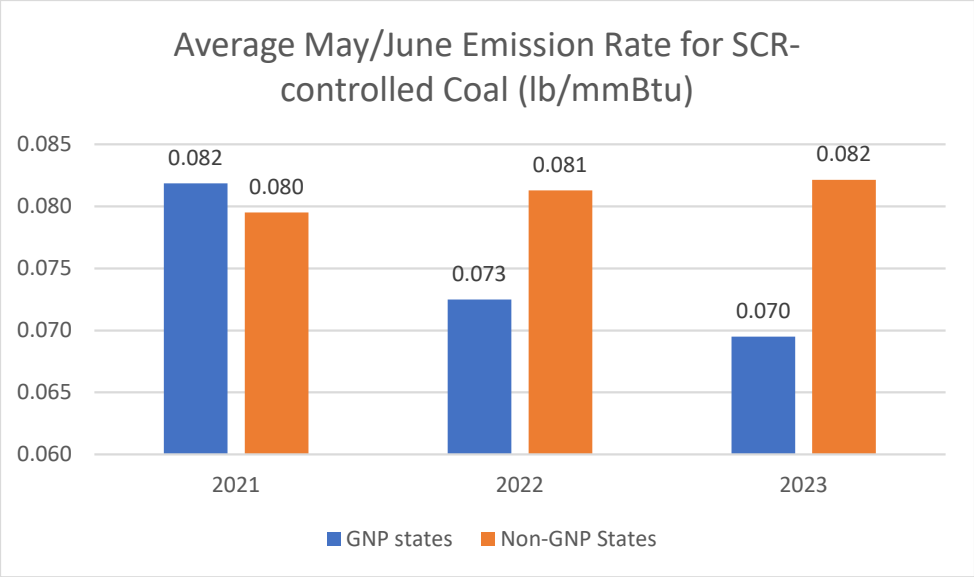
[18] *See* document titled "Typical SCR and SNCR Schedules 2023" in the docket for the Good Neighbor Plan (EPA-HQ-OAR-2021-0668-0975).

used under the Trading Program just like allowances allocated from the Trading Program state budgets. Based on emissions data for 2022, in total, the already-banked and converted allowances collectively would have constituted a "starting bank" of approximately 61,360 allowances available for 2023 compliance prior to any 2023 prorating due to the August 4 effective date.

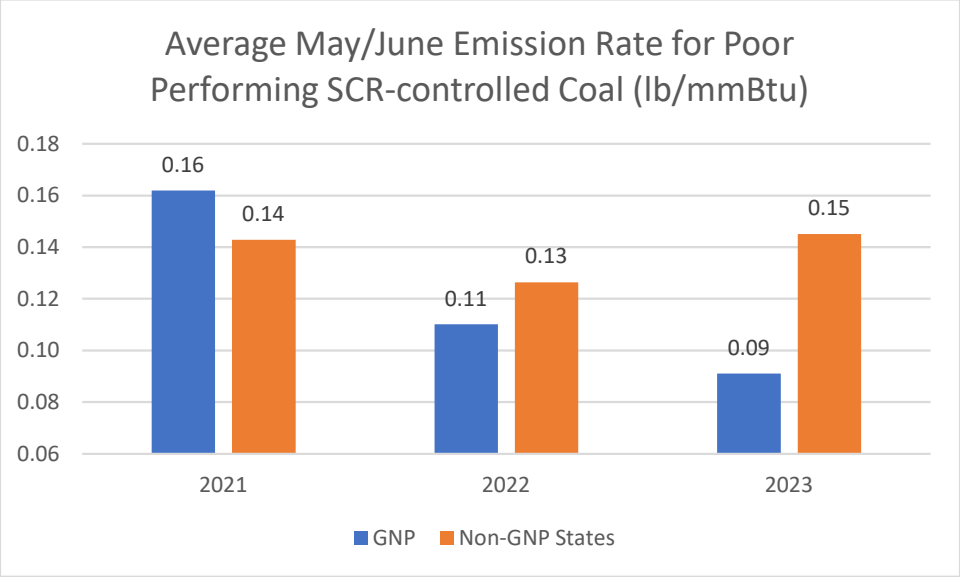
57. Total emissions from the sources that would be covered by the Trading Program in 2021 were 239,507 tons, and in 2022 were 207,524 tons. As EPA has observed in prior CSAPR trading programs, EPA fully anticipates that sources will in fact optimize existing controls during the 2023 ozone season and/or pursue other emissions reduction opportunities, in response to the allowance price signal and in order to maintain or increase the respective amounts of banked allowances they hold for their own use or for sale to others. Nonetheless, these numbers indicate that even if no sources had chosen to reduce emissions in 2023 below where they already were in 2022, there would have been adequate allowances available for compliance. As explained in Section IV, even with judicial stays limiting the scope of the program, there are more than enough allowances available for compliance in 2023 for the eleven states currently in the program.

58. The most recently reported emissions data, which are for the first and second quarters of 2023, show a substantial reduction in emissions was achieved among power plants within the Good Neighbor Plan trading region. NO_X emissions decreased by 19 percent for the months of May and June, compared with 2022 levels, from approximately 75,000 to 60,000 tons. (Data available at *https://campd.epa.gov/*.)

59. In addition, the data for May and June of 2023 compared with the same time period in 2021 and 2022 indicate a marked improvement in the emissions performance of coal-fired EGUs equipped with SCR in the 22 states covered by the Good Neighbor Plan Trading Program. The data also indicate that performance remained flat or deteriorated in states not covered by the Good Neighbor Plan. SCR-controlled coal-fired units in the Good Neighbor Plan (GNP) footprint improved emission-rate performance by approximately 15% while non-GNP states saw a deterioration in performance among similar units.



SCR performance among the worst performing SCR-controlled units (those emitting > 0.1 lb/mmBtu in 2021 prior to GNP proposal) has improved significantly in GNP states but has been flat in non-GNP states.



60. The Good Neighbor Plan will not adversely affect the reliability of electricity supply. EPA conducted a "resource adequacy" assessment for the Good Neighbor Plan. This assessment shows that accredited capacity projections, and therefore reserve margins, are expected to be virtually identical for the power sector between the baseline and the Good Neighbor Plan "policy case." In particular, in 2023, 2025, and 2030, reserve margin projections under the Plan

remain consistent with baseline projections and are at or above target reserve margins.[19]

61. For all North American Electric Reliability Corporation (NERC) reliability assessment regions and for all years, adequate reserve margins are projected to be maintained under the Good Neighbor Plan. Projected changes in reserve margins under the Plan through 2030 are exceedingly small relative to the baseline without the rule.[20]

62. The Plan's projected effect on retail electricity prices relative to baseline projections is also projected to be exceedingly small. In 2023, there is a 0% change projected. In 2025, the changes are on the order of -1% to 1%. In 2030, the changes are of a similar magnitude, with only one area of the country projected to see a greater than 2% change in electricity prices.[21]

63. Compliance with the Good Neighbor Plan is anticipated to be even less costly than EPA's primary analysis of compliance costs in the Plan's regulatory impact analysis (RIA) suggests (see paragraph 10). EPA conducted a supplementary analysis to assess the effects of the Inflation Reduction Act of 2022, Pub. L. 117-169 ("IRA"). That analysis indicates that the annualized cost of the Plan for the power sector over the 2023-2045 period declines under the IRA from $449 million/year to $196 million/year (2016$). *See* RIA Appendix 4A, Table 4A-2. For comparison, the annualized costs of the NO_X SIP Call were estimated at $1.7 billion (1990$), which would be $2.8 billion in 2016$.

64. There has never been a shortage of allowances in any allowance trading program operated by the Clean Air Markets Division from 1995 – the first year of the Acid Rain Program's trading program for SO_2 emissions – to the present. After the allowance transfer deadline for every control period for every such program, a bank of unused allowances has always been available for

[19] *See* Resource Adequacy and Reliability Analysis Final Rule TSD 2, Tbl. 1, *available at* https://www.epa.gov/system/files/documents/2023-03/Resource%20Adequacy%20and%20Reliability%20Analysis%20TSD.pdf.
[20] *Id.* Tbl. A3, B3, C3.
[21] *See* Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard 166-68, Tbl. 4-15, 4-16, 4-17, *available at* https://www.epa.gov/system/files/documents/2023-03/SAN%208670%20Federal%20Good%20Neighbor%20Plan%2020230315%20RIA_Final.pdf.

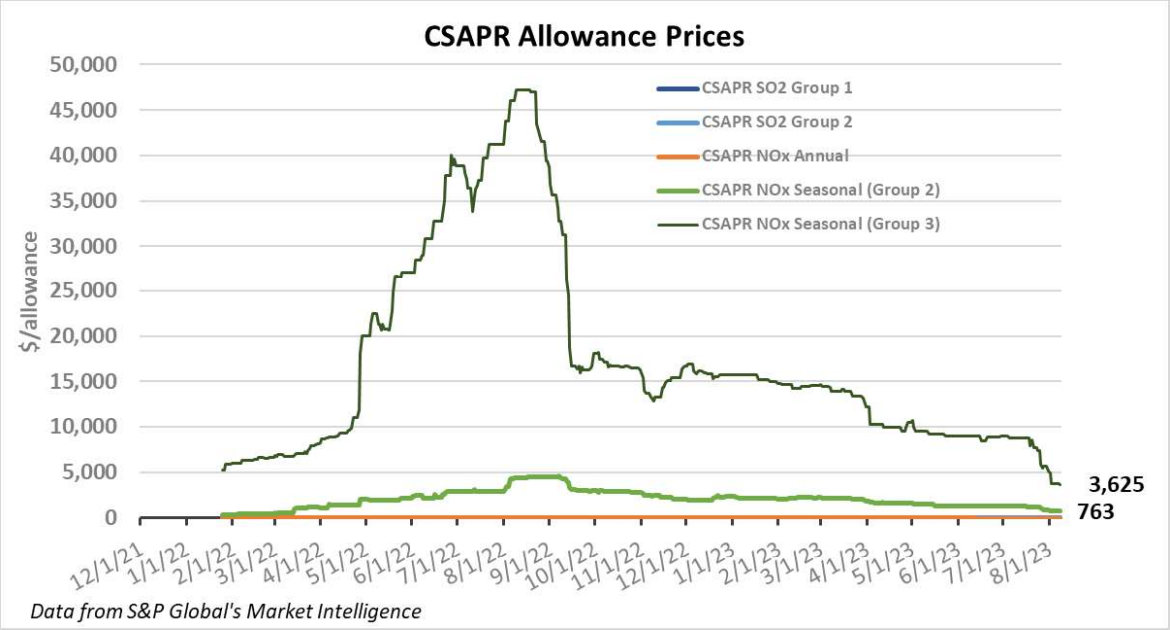
carryover to future control periods. See the Division's progress reports at *https://www3.epa.gov/airmarkets/progress/reports/index.html*.

65. Under the Trading Program, like EPA's other allowance trading programs, affected units are required to report their hourly emissions data to the Clean Air Markets Division on a quarterly basis, and all allowance allocations and transfers are also recorded by the Division. 40 CFR 97.1020–97.1035. The Division maintains publicly accessible databases of the reported emissions data and the recorded allocation and transfer data at *https://campd.epa.gov/*. Sources and other participants in the market for emissions allowances, such as brokers, can use these data to assess the potential supply of and demand for allowances and to identify potential buyers and sellers.

66. Buyers and sellers of allowances are generally not required to report transaction prices to the Clean Air Markets Division. However, subscription data services regularly survey and report market prices for allowances in EPA's allowance trading programs. As of August 8, 2023, one such service reported a market price of $763 per Group 2 allowance and $3,625 per Group 3 allowance.[22] The recently reported Group 3 allowance price of $3,625/ton represents a decline of about 75 percent from reported prices immediately prior to the mid-March pre-publication release of the Plan. In particular, prices declined steeply in mid-July, around the same time that 2023 second quarter emissions data became publicly available, indicating a substantial decrease in emissions compared to 2022.

	$/allowance as of: 08/08/2023
CSAPR SO2 Group 1	2.31
CSAPR SO2 Group 2	2.81
CSAPR NOx Annual	2.00
CSAPR NOx Seasonal (Group 3)	3,625
CSAPR NOx Seasonal (Group 2)	763

[22] Price data are reported by S&P Global Market Intelligence and are available by subscription at https://www.SNL.com.



67. While prices reported for the first part of the 2022 ozone season were higher than prices in the later part of and after the ozone season, relatively few allowance transfers among unrelated parties took place during the period of the highest reported prices. Moreover, EPA's data indicates that there were more than enough allowances available for compliance with the Revised CSAPR Update Group 3 program in 2022. Our data indicate total emissions in the Revised CSAPR Update Group 3 program (covering 12 states) of around 90,458 tons in the 2022 ozone season, while available allowances (including banked allowances) to cover 2022 ozone season emissions totaled 128,724 tons.

68. The allowance price increase that was observed in the summer of 2022 in that pre-existing Group 3 trading program has since declined about 90 percent from its reported peak of $47,250 (see paragraph 66 above). It is notable that reported Group 3 allowance trading prices are now far less than the representative SCR retrofit costs that EPA calculated in the Plan ($11,000/ton as a representative figure).

69. Finally, to the extent Movants seek to use allowance prices as a proxy for their compliance costs, this is misleading. Reported allowance prices do not necessarily reflect actual costs to sources for each ton emitted. EPA allocates allowances for free to existing source owners and operators. Most sources have all or nearly all of their allowances freely available to them through allocations or existing banks. Therefore, these sources only need to purchase a minority, if any at

all, of their total needed allowances, as well as pursuing further emissions reductions as desired.

70. Multiplying total expected emissions by the highest historically reported allowance price would generate a wildly inflated estimate of compliance burden, not only because that highest historical price is by no means indicative of the average allowance price going forward (see paragraphs 66-68 above), but also because it ignores the fundamental expectation within a market-based program that sources will rationally pursue any emissions-reduction opportunities that are less costly than the purchase of additional allowances.

IV. Achievability of the Plan for Power Plants in Eleven States Not Subject to a Judicial Stay Order

71. Movants claim that judicial stay orders issued by various regional circuit courts of appeals blocking the Good Neighbor Plan from going into effect in eleven states will inhibit the viability of the interstate trading program for the eleven remaining states. This is refuted by both current data and historical precedent.

72. The eleven states where the Trading Program is now in effect are: Alabama, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin. The states where the Trading Program has been stayed pending judicial review of EPA's SIP Disapproval (88 FR 9336; Feb. 13, 2023) are: Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia.[23]

73. Despite the smaller trading region due to the stays, Group 3 allowance prices have dropped significantly in the past several months and are at the lowest levels since EPA proposed the Good Neighbor Plan (see paragraphs 66-68 above). This price drop is indicative of growing confidence (not waning) among participants that they will be able to comply with the Trading Program's allowance holding requirements (through either allocated or purchased allowances).

74. Additionally, EPA's most recently implemented Good Neighbor emissions trading program, the Revised CSAPR Update, was comprised of a

[23] The Good Neighbor Plan for West Virginia is currently subject only to an interim stay pending oral argument on the pending stay and venue motions. *See West Virginia v. EPA*, 23-1418 (4th Cir. Aug. 10, 2023).

similar number of states as the Good Neighbor Plan Trading Program currently covers due to the stays (i.e., twelve states versus eleven states). There have been no issues with compliance in that trading program implementation due to the smaller number of states.

75. Trading programs can be implemented with even smaller regions than this – such as the single-state Group 1 trading program covering Georgia (see paragraph 18 above). The Good Neighbor Plan Trading Program budgets are set at a stringency that reflects emissions reductions that each source could achieve on its own through available control technology options (see paragraph 27), so, while there are clearly benefits to an interstate market, a smaller trading geography does not render the Plan un-workable or unreasonable, particularly given that each state must ultimately be required to eliminate its own significant contribution.

76. In the final Good Neighbor Plan, for the eleven remaining states, the aggregate budget is 69,597 tons in 2023 before prorating as described in paragraph 55. The aggregate 11-state emissions budget is 66,511 and 66,204 in 2024 and 2025, respectively, reflecting known, planned fleet changes in the region and the incorporation of combustion control mitigation strategies starting in 2024. The aggregate budgets are 55,642 tons and 51,304 tons in 2026 and 2027, respectively (reflecting the two-year phase in of SCR-retrofit stringency).

77. As explained in paragraphs 22-23, based on the publication date of June 5, 2023 and corresponding effective date of August 4, 2023, EPA identifies a prorated 2023 aggregate state emissions budget for the remaining 11-state region of 75,944 tons.

78. The Plan includes provisions to convert most allowances banked under the CSAPR NO_X Ozone Season Group 2 trading program into a quantity of banked Group 3 allowances available for use in the Trading Program. This is no different than the conversion of banked allowances for use in updated trading programs that was done in two prior Good Neighbor rules: the CSAPR Update and the Revised CSAPR Update. While the number of new Group 3 allowances created in the conversion is smaller than the number of Group 2 allowances converted, the new Group 3 allowances each are worth more, preserving value to their holder. Based on the estimated effective date, and the number of Group 2 allowances held by sources in the 11-state region that are available for conversion, the covered EGUs are anticipated to start with at least 2,355 banked Group 3 allowances created through conversion of Group 2 allowances and 17,779 Group 3 allowances

carried over from previous control periods in addition to receiving unit-level Group 3 allowance allocations from the 2023 emissions budget for the 11-state region.

79. This brings the combined anticipated number of allowances initially held by affected EGUs in the 11-state region for the 2023 ozone season to around 96,128 allowances.

80. The 11-state region's power plants' 2021 ozone season NO_X emissions were 86,624 tons and their 2022 ozone season NO_X emissions were 66,984 tons.

81. For the Trading Program, each state's variability limit is 21 percent of the state budget, and each state's assurance level is therefore the state budget plus 21 percent. 40 CFR 97.1025. *See* paragraph 33. The 11-state region's aggregate assurance level in 2023 is therefore 84,212 tons (prior to any pro-rating). No enhanced allowance-surrender penalty is applied for emissions up to the assurance level.

82. Table 1 summarizes the Trading Program final state budgets and assurance levels in the final Plan for the 11-state region, and the actual 2021 and 2022 ozone-season NO_X emissions reported to the Clean Air Markets Division by affected units (available at *https://campd.epa.gov/*). The table also shows the prorated 2023 budget.

Table 1: Comparison of Expected 2023 Allowance Holdings and Recently Reported Emissions at EGUs in 11-State Region

2023 GNP emissions budget (tons)	2023 Prorated GNP Budget (tons)	2023 GNP Variability Limit (tons) (before prorating)	2023 GNP Assurance Level (tons) (before prorating)	2023 GNP Starting Allowance Bank + State Budget	2021 Reported Emissions from GNP EGUs (tons)	2022 Reported Emissions from GNP EGUs (tons)
69,597	75,994	14,615	84,212	96,128	86,624	66,984

C. Observations

83. Movants' allegations that the Plan will impact the reliability of the power grid are not borne out by the evidence provided above and in the power

sector emissions and operating data in the final Plan. There are sufficient allowances available for compliance in 2023 in the 11-state region even if emissions were held constant at 2022 levels. Movants have not cited any reliability issues in 2022 and have not explained how operating at the same levels as in 2022 would somehow cause reliability issues when operating at those levels did not cause reliability issues in 2022. While the updated budgets are set to incentivize power plants to continue to optimize emissions performance, this control stringency through 2025 is effectively no different than what EPA previously set for the twelve states in the Revised CSAPR Update rulemaking two years ago, which was upheld by the D.C. Circuit earlier this year (61 F.4th 187) and has been successfully implemented with no reliability issues.

84. Over the 2026 and 2027 control periods, the Trading Program budgets reflect the onset of emissions control strategies (i.e., the retrofit of post-combustion controls such as SCR) that were found to be achievable and cost-effective to eliminate significant contribution in the final Plan, with sufficient lead time built in. See paragraphs 49-52. The fact that budgets will decline as the final Plan is implemented simply reflects the emission reduction measures needed to ensure the elimination of significant contribution as required by the Clean Air Act.

85. Movants' claims that power plants that fail to install SCR will be forced to close early or will be forced to make uneconomical investments due to already-planned retirements (with attendant alleged effects on the reliability or cost of electrical service) are not factually supported, reflect a misunderstanding of the compliance obligation under the Group 3 Trading Program, and ignore key flexibilities included in the Plan. The Trading Program establishes emissions budgets *premised* on widely available pollution control technologies like SCR, but it does not require or mandate any specific pollution control installation. Rather it requires allowance surrender for each ton of emissions. For those units facing relatively costly pollution-control retrofit decisions or already-planned retirements, the Plan reflects input from power sector stakeholders to accommodate that planning by deferring the start of a daily backstop emissions rate to 2030 (among other changes). See paragraphs 37-43. Even after 2030, units without SCR may continue to operate so long as they comply with enhanced allowance-surrender requirements for those emissions subject to the backstop rate. See paragraph 36.c.

V. The Consequences of Staying the Good Neighbor Plan

86. Staying the Good Neighbor Plan will be harmful to public health and the environment and will undermine the planning efforts and increase the

regulatory burdens for all downwind areas that are impacted by the upwind states' emissions, with these impacts extending far beyond just those areas that were formally identified as "receptors" in EPA's modeling analysis.

87. EPA is now in the process of taking administrative measures to stay the Plan as to states for which other circuit courts have judicially stayed EPA's separate SIP Disapproval action. EPA must undertake a series of revisions to ensure that the status quo is maintained in these eleven states, including maintaining sources' participation in earlier CSAPR trading programs to ensure the respective states continue to meet their Good Neighbor obligations under prior ozone NAAQS.[24]

88. By far the most concerning consequence of a stay is the effect on the downwind areas in other states that face continuing violating ozone levels and ratcheting, mandatory ozone-nonattainment requirements. Beyond the continuing harm to public health that ozone levels above the NAAQS signify, the failure to eliminate upwind states' significant contribution under the Good Neighbor Provision is also contributing to downwind areas' increased regulatory burdens under the Act, and a stay impacting EPA's ability to implement the Good Neighbor Plan will exacerbate the consequences of this already-delayed implementation.[25]

89. Even before it became effective on August 4, 2023, covered power plants voluntarily improved their emissions performance, Illustrating the readily-achievable nature of the Good Neighbor Plan's near-term emissions control strategies for power plants, these sources began better operating their SCR controls in May and June of 2023, before the Plan was even effective, resulting in a collective 15% improvement in emission rates from SCR-controlled coal plants, including an over-75% improvement at some individual units.[26] But, to the extent these measures were taken in preparation for compliance with the Trading Program, the incentivizing effect of the Plan will be degraded or lost entirely if the

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[24] *See* Notice of Forthcoming EPA Action to Address Judicial Stay Orders (June 1, 2023), *available at* https://www.epa.gov/csapr/notice-forthcoming-epa-action-address-judicial-stay-orders.

[25] In *Maryland v. EPA*, 958 F.3d 1185, the D.C. Circuit held that states and EPA are obligated to eliminate significant contribution under the Good Neighbor Provision for the 2015 ozone NAAQS no later than the Marginal area attainment date, which fell on August 3, 2021. Thus, 2020 should have been the relevant year for analysis and, to the extent possible, elimination of significant contribution. *See* Final Rule, 88 FR 9336, 9340-41 (discussing EPA's interpretation of the *Maryland* holding).

[26] Based on comparison of 2021 and 2023 May/June emission rates for SCR-controlled EGUs in the 22-state Good Neighbor Plan Trading Program region.

Plan is stayed. A stay of program implementation will remove the Plan's incentivizing effects to operate these controls and risks backsliding from these readily available and cost-effective reductions, along with the corresponding air quality, cardiovascular, and respiratory health gains for downwind populations.

90. Emissions from the 23 upwind states covered by the Good Neighbor Plan were found by EPA to significantly contribute to unhealthy ozone levels at receptors in designated ozone nonattainment areas across the country. These areas include: Phoenix-Mesa, AZ; Yuma, AZ; the Morongo Band of Mission Indians, CA; the Pechanga Reservation, CA; Denver Metro/North Front Range, CO; Greater Connecticut, CT; Chicago, IL-IN-WI; New York-Northern New Jersey-Long Island, NY-NJ-CT; Allegan, MI; Muskegon, MI; Las Vegas, NV; Cleveland, OH; Dallas-Fort Worth, TX; El Paso-Las Cruces, TX-NM; Houston-Galveston-Brazoria, TX; San Antonio, TX; Northern Wasatch Front, UT; Milwaukee, WI; Sheboygan, WI.[27] Most of these areas are now in Moderate nonattainment of the 2015 ozone NAAQS.[28] Downwind-state obligations to attain the NAAQS for most of these areas are therefore driven by the statutory attainment date of August 3, 2024, for Moderate areas. Areas that fail to attain by that date will be reclassified (or "bumped up") to Serious nonattainment, indicating persistent unhealthy air and triggering even greater regulatory obligations. *See* 42 U.S.C. §§ 7511(b)(2), 7511a(c).

91. Because attainment is determined using an average of the three prior calendar years' monitoring data, the last year that air quality data may impact whether nonattainment areas are found to have attained by the 2024 attainment date is 2023. Thus, the objective of the Plan is to obtain emissions reductions from power plants that EPA found were achievable using existing, installed control technology in 2023 to improve ozone levels in downwind areas through eliminating, to the extent possible, the upwind states' "significant contribution" by this year. This aspect of the Plan's design was done to comply with judicial holdings in *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019) and *Maryland v. EPA*, 958 F.3d 1185 (D.C. Cir. 2020), among others. *See* Good Neighbor Plan, 88 FR at 36754-58.

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[27] Air Quality Modeling Final Rule TSD, Appendix C, *available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs.

[28] EPA Green Book, 8-Hour Ozone (2015) Nonattainment Areas (data current as of July 31, 2023), https://www3.epa.gov/airquality/greenbook/jnc.html. The Morongo Band of Mission Indians is in Serious nonattainment. El Paso-Las Cruces, TX-NM and Yuma, AZ are in Marginal nonattainment.

92. Nonattainment areas that had been classified originally as Marginal nonattainment have already faced one attainment deadline under the 2015 ozone NAAQS with no relief from the significant contribution of upwind states. Under the CAA, Marginal areas that failed to attain by the August 3, 2021 attainment date were mandatorily reclassified to Moderate nonattainment, making them subject to a January 1, 2023 deadline to submit a new SIP and, by that same date, to implement, among other requirements, reasonably available control measures (RACM) and reasonably available control technology (RACT). *See* 87 FR 60897, 60900 (Oct. 7, 2022).[29]

93. This schedule for downwind areas is driven by the statute at §§ 7511 and 7511a, as well as EPA's implementation regulations, 40 CFR 51.1312(a)(3)(i). These regulations established a RACT implementation deadline for areas initially classified Moderate as no later than January 1, 2023. The need for emissions reductions in 2023 is also informed by the modeling and attainment demonstration requirements in 40 CFR 51.1308(d), which require a downwind state to provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season (i.e., 2023).

94. If these nonattainment areas fail to attain based on the monitoring data for the 2021-2023 period, they would likely be reclassified to Serious nonattainment as of the August 3, 2024 attainment date, meaning a cascade of additional, statutorily mandated requirements would be triggered on top of the requirements already mandated for Moderate areas. *See generally* 42 U.S.C. § 7511a(c). Among other things, the application of RACT on existing sources and major new source permitting requirements begins to apply to sources half the size of those subject to these requirements at lesser ozone-nonattainment classifications (i.e., sources with the potential to emit just 50 tons per year of ozone precursors, rather than 100 tons per year). *Id.*; *id.* § 7511a(f)(1).[30]

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[29] Other substantial requirements are triggered by the Moderate classification, including: making an attainment demonstration, implementing reasonable further progress (RFP) requirements, establishing a motor vehicle inspection and maintenance program, and complying with a higher emissions offset ratio before new major sources can be permitted to construct. *See generally* 42 U.S.C. § 7511a(b).

[30] Accounting for the fact that certain areas are already in Serious or Severe nonattainment for the 2008 ozone NAAQS, these requirements would not newly impact Dallas-Fort Worth, Denver/Front Range, Houston-Galveston-Brazoria, Morongo Band, New York-New Jersey-Long Island, or the Greater Connecticut nonattainment areas. EPA Green Book, 8-Hour Ozone (2008) Nonattainment Areas (data current as of July 31, 2023), https://www3.epa.gov/airquality/greenbook/hnc.html.

95. These ratcheting statutory requirements have obvious implications for industrial expansion, economic development, and tax base in nonattainment areas. Meanwhile, with no Good Neighbor requirements in place, an upwind state's existing sources may continue to emit at levels that are significantly contributing to the downwind area's ozone violations, even when cost-effective emissions control measures for those sources have been found to be available.

96. Finally, areas that stand to benefit from and which are relying upon the air quality improvements of the Good Neighbor Plan extend beyond just those "receptor" areas that were identified in EPA's modeling. Areas throughout the country were reclassified to Moderate nonattainment in EPA's October 2022 action (see paragraph 92), including cities such as Baltimore, Cincinnati, Louisville, Philadelphia, St. Louis, and Washington, DC. *See* 87 FR at 60899 (Table 1) (listing all areas that failed to attain). EPA and state air planning agencies had counted on taking the air quality benefits of the Good Neighbor Plan into account in numerous regulatory actions associated with these areas. Indeed, actions have already been planned or have been taken that rely on the air quality benefits of the Good Neighbor Plan, assuming it would take effect in 2023. *See, e.g.,* Air Plan Approval; Michigan; Redesignation of the Detroit MI Area to Attainment for the 2015 Ozone Standards, 88 FR 32594, 32605 (May 19, 2023).

97. The nationwide improvement in ozone levels from the Plan illustrated in paragraph 13 thus provides both health and regulatory-relief benefits to both upwind and downwind states across a wide swath of the country. Staying the Good Neighbor Plan disrupts the planning of both EPA and state air agencies, shifts the regulatory compliance burden to the sources in downwind areas, and frustrates the fundamental purpose of the Act to expeditiously meet and maintain the nation's air quality standards.

SO DECLARED:

RONA BIRNBAUM

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Date: 2023.08.17 16:25:46 -04'00'

Rona Birnbaum, Director
Clean Air Markets Division

DATED: August 17, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	)	No. 23-1157 (and consolidated cases)

DECLARATION OF SCOTT MATHIAS

1. I, Scott Mathias, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge, or on information contained in the records of the United States Environmental Protection Agency ("EPA" or the "Agency"), or on information supplied to me by EPA employees.

2. I am the Director of the Air Quality Policy Division ("AQPD") within the Office of Air and Radiation ("OAR") at EPA, a position I have held since May 2020. AQPD is the division at EPA Headquarters that has primary responsibility for developing national programs, technical policies, regulations, and guidance to implement the national ambient air quality standards ("NAAQS") under the Clean Air Act ("CAA" or the "Act").

3. As part of my duties as Director of AQPD, I oversee the development and implementation of national policies, regulations, and guidance relevant to section 110 of the CAA, 42 U.S.C. § 7410, including those developed or promulgated to implement section 110(a)(2)(D)(i)(I), known as the "good neighbor" or "interstate transport" provision, regarding air pollution that significantly contributes to nonattainment or interferes with maintenance of the NAAQS in other states. My responsibilities include ensuring consistent implementation of the interstate transport provision across the United States

through coordination of the substantive evaluation of state implementation plans ("SIPs") and the development of federal implementation plans ("FIPs") where necessary. I or my staff also coordinate closely with EPA's Regional offices in reviewing and acting on SIPs and addressing other issues related to NAAQS implementation.

4. The purpose of this declaration is to address certain claims made by parties moving for a stay of the Good Neighbor Plan in the D.C. Circuit Court of Appeals, with respect to the Plan's requirements for certain sources in nine industries. These sources will be referred to as "industrial sources" in this declaration. These are sometimes also referred to as "non-electricity generating units" ("non-EGUs"). This declaration does not address the Plan's requirements for power plants (i.e., EGUs).

I. The Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards.

5. EPA Administrator Michael S. Regan signed the "Good Neighbor Plan"[1] (or the "Plan"), on March 15, 2023, to achieve emissions reductions required by the Good Neighbor Provision of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), with respect to the 2015 National Ambient Air Quality Standards ("NAAQS") for ozone. The Plan establishes federal requirements for qualifying power-plant sources in 22 states and certain industrial sources in 20 states, to reduce ozone pollution during the May 1-to-September 30 "ozone season" by reducing emissions of nitrogen oxides (NO_X), which is an ozone precursor pollutant.[2]

6. The objective of the Plan is to eliminate the covered states' significant contribution to nonattainment and interference with maintenance of the 2015 ozone NAAQS in other states as expeditiously as practicable and in alignment with the statutory attainment schedule.

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[1] Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 FR 36654 (June 5, 2023). The rulemaking docket is EPA-HQ-OAR-2021-0668 and can be accessed through *www.regulations.gov*. A number of key supporting materials and additional information are available at EPA's website, Good Neighbor Plan for 2015 Ozone NAAQS, *https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs* (last visited June 5, 2023).

[2] Unless otherwise noted, information and data presented in this declaration regarding the Good Neighbor Plan reflect the rule as signed on March 15, 2023, and do not account for potential impacts of subsequent administrative or judicial stays. *See* EPA Response to Judicial Stay Orders, *https://www.epa.gov/csapr/epa-response-judicial-stay-orders* (last visited Aug. 9, 2023).

7. With respect to industrial sources in 20 states, the Plan will prohibit those emissions that "significantly contribute" to downwind air-quality problems through emissions limitations and associated requirements for certain high-emitting units in nine industries.

8. The nine industries, the regulated emissions unit types within them, the assumed emissions-control technologies on which the emissions limits are based, the annual costs, and the tons of ozone season emissions reductions that will be achieved are provided in Table V.C.2-1, 88 FR at 36739. (Note that "Iron and Steel Mills and Ferroalloy Manufacturing" is listed twice because this industry uses boilers in addition to its other regulated emissions unit type, reheat furnaces.)

9. These emissions limits do not require compliance until the start of the 2026 ozone season (May 1, 2026) at the earliest, and thus the Plan provides more than three years for these sources to come into compliance from the date the Plan was signed and issued to the public on March 15, 2023.

10. The emissions control strategies on which the Plan is premised are all conventional, widely used, at-the-source technologies that have been available to power plants and industrial sources for decades and for which several states have already set similar or more stringent emissions-control requirements. These control strategies are widely mandated for these types of sources in downwind areas with ozone air quality problems. *See generally* "Final Non-EGU Sectors Technical Support Document" (March 2023) (Document ID EPA-HQ-OAR-2021-0668-1110) (hereinafter "Non-EGU TSD").

11. In addition, the numerical emissions limits that the Good Neighbor Plan establishes do not mandate that any source install any specific pollution control technology. Rather, sources may choose any emissions control technologies or strategies they wish so long as the relevant emissions limit is met. For a non-exhaustive list of potential NO_X control measures, see Non-EGU TSD at 9-11 (engines), 24-25 & 27-29 (cement kilns), 38 (reheat furnaces), 42-47 (glass furnaces), 68-84 (boilers), and 92-93 (municipal waste combustors). Thus, setting aside the availability of alternative emissions limits as discussed in the following section, even the default emissions limits in the Good Neighbor Plan reserve the choice of means of compliance to sources' discretion in recognition of the variety of emissions control technologies that could be deployed. *See* 88 FR at 36835.

12. As explained in the following section, the Plan also includes key flexibilities that allow industrial facilities meeting specified criteria to obtain compliance extensions or alternative emissions limits, and the Plan includes industry-specific flexibilities as well.

II. Compliance Flexibilities Available for Industrial Sources

13. EPA recognized that while the emissions-control requirements it set for industrial sources in the Plan were generally expected to be achievable and implementable by the 2026 ozone season, not all facilities may be able to meet the requirements. Good Neighbor Plan, 88 FR at 36758-60, 36818-19.

14. Thus, the requirements in the Plan that apply to industrial sources include numerous changes from the proposal that EPA developed in response to concerns raised by commenters about the costs of controls and the time needed to install controls on industrial sources. These provisions bear directly on stay movants' claims of monetary and non-monetary harm.

15. EPA has met with and will continue to meet with industry representatives to answer questions regarding the requirements for industrial sources and the process for taking advantage of the Plan's compliance flexibility mechanisms. We intend to issue within the next few weeks a set of implementation tools that will provide further direction that will aid sources in navigating this process.

A. Flexibilities Available To All Non-EGU Industrial Sources

16. Two regulatory provisions in the Plan appear to be of potential relevance to the circumstances described in the stay motions. Without a more detailed assessment of the specific conditions at the specific facilities mentioned, EPA cannot at this time state definitively that they would qualify for any of these flexibilities.

17. First, under 40 CFR § 52.40(e), the owner or operator of an affected unit that "cannot comply with the applicable requirements in [the Federal Plan] due to technical impossibility or extreme economic hardship may submit to the Administrator," within 425 days after the date the Plan publishes in the Federal Register, a request for approval of a "case-by-case emissions limit."[3]

[3] 40 CFR § 52.40(e) (88 FR at 36871). Subparagraph (2) of 40 CFR § 52.40(e) specifies the information that the owner or operator must include in a request for a case-by-case emissions

18. If EPA determines that the request contains information sufficient to confirm that the affected unit is unable to comply with the applicable emissions limit due to technical impossibility or extreme economic hardship, EPA may establish an appropriate case-by-case emissions limit that applies to the affected unit in lieu of the emissions limit that would otherwise apply under the Federal Plan.[4]

19. These provisions for establishing case-by-case emissions limits reflect EPA's recognition that there may be "unique circumstances" that "would, for a particular source, render the final emissions control requirements [of the Federal Plan] technically impossible or impossible without extreme economic hardship."[5]

20. It is my understanding that any decision by EPA to grant or deny a request for a case-by-case emissions limit under 40 CFR § 52.40(e) would be a final action subject to judicial review under CAA § 307(b)(1).

21. Second, under 40 CFR § 52.40(d), the owner or operator of an affected unit that cannot comply with the applicable requirements of the Federal Plan by May 1, 2026 due to "circumstances entirely beyond the owner or operator's control" may request an initial compliance extension of up to 1 year and may thereafter request a second compliance extension of up to 2 additional years (i.e., until May 1, 2029).[6] These provisions for limited compliance extensions reflect EPA's recognition that "labor shortages, supply shortages, or other circumstances beyond the control of source owner/operators may, in some cases, render compliance by 2026 impossible for a particular industrial source."

22. It is my understanding that any decision by EPA to grant or deny a request for a compliance extension under 40 CFR § 52.40(d) would be a final action subject to judicial review under CAA § 307(b)(1).

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limit and subparagraphs (5) through (8) of this section specify the criteria and procedures that EPA will apply to evaluate and grant or deny such a request within a specified timeframe.

[4] 40 CFR § 52.40(e)(4).

[5] Good Neighbor Plan, 88 FR at 36818.

[6] 40 CFR § 52.40(d) (88 FR at 36870). Subparagraph (3) of 40 CFR § 52.40(d) specifies the information that the owner or operator must include in each request for a compliance extension, and subparagraphs (6) through (10) of this section specify the criteria and procedures that EPA will apply to evaluate and grant or deny such a request within a specified timeframe.

23. Any owner or operator of an affected unit may request both a case-by-case emissions limit and a compliance extension under the Plan.

24. Because it is still very early in the process of implementing the Good Neighbor Plan, and the deadlines for applying for these types of relief are still months off, no sources have yet submitted any request for relief under either provision, and EPA thus has not taken final action on any such request in accordance with the applicable procedures in 40 CFR § 52.40(d) or (e).

B. Other Flexibilities Available to Specific Industries

25. EPA also recognized that unique aspects of particular industries or emissions unit types warranted certain additional regulatory mechanisms to ensure the implementation of the Good Neighbor Plan could go forward without imposing undue or unintended hardship on covered sources.

26. For example, with respect to engines used in pipeline transport of natural gas, the Plan contains emissions averaging provisions and an exemption for emergency engines, both of which allow these sources to avoid installing controls on engines for which installation of controls would be far less cost-effective compared to controls on higher-emitting units. See 40 CFR 52.41(d) (Facility-Wide Averaging Plan) and (b) (exempting emergency engines from emissions limits). Good Neighbor Plan Preamble, Section VI.C.1 (88 FR at 36821-22). The averaging approach means that of the approximately 3,000 engines subject to the Plan's applicability criteria for pipeline engines, less than one-third (or about 900) are estimated to need to improve emissions performance to achieve full compliance. Non-EGU TSD at 19-20.

27. Similarly, with respect to the requirements for fossil-fuel fired boilers in several industries, the Good Neighbor Plan contains several provisions to focus regulatory compliance efforts on cost-effective control measures. The rule includes an exemption for "low-use" boilers, i.e., those that operate less than 10 percent per year, in recognition that the lesser amount of emissions reductions that could be obtained from such boilers would have a smaller air quality benefit that would not justify the cost of control. See 40 CFR 52.45(b); *see also* 88 FR at 36833. And in recognition of comments explaining that boilers firing non-fossil fuels (e.g., biomass) may have greater difficulty achieving the emissions limits, EPA included a criterion that the rule applies only to boilers burning 90 percent or more of coal, residual or distillate oil, or natural gas or combinations of these fossil fuels on a heat-input basis. *See* 40 CFR 52.45(b); *see also* 88 FR at 36833-34.

28. These provisions for industrial sources together provide the flexibility needed to address stay movants' Declarants' concerns about circumstances in which compliance could impose costs beyond those EPA found justified to eliminate "significant contribution" in the Good Neighbor Plan and also provide the time needed to install controls, where additional time is needed beyond May 1, 2026.

SO DECLARED:

Scott Mathias, Director
Air Quality Planning Division

DATED: August 11, 2023