No. 23A384

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES STEEL CORPORATION,
APPLICANT

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONSE IN OPPOSITION TO THE APPLICATION 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 application for a stay pending the disposition of the petition 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 compliance 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 -- none of which proposed any action to assist downwind neighbors -- 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.

U.S. Steel, the applicant here, took a different course. It filed a petition for review in the D.C. Circuit challenging the federal plan (i.e., the Rule) as arbitrary and capricious as applied to reheat furnaces and boilers in the iron and steel industry, and sought a stay of the plan's implementation as to those units pending the disposition of its petition for review. The D.C. Circuit correctly declined to enter a stay. This Court should

likewise deny applicant's request for extraordinary interim relief.

Applicant contends 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.

Applicant also challenges several technical aspects of the Rule's application to iron and steel mills. But the Rule's regulation of that industry is reasonable and consistent with the CAA. The Rule appropriately regulates a subset of high-emitting iron-and-steel-mill sources in upwind States based on technical and policy determinations that are supported by a detailed record and that directly accommodate industry comments received during the notice-and-comment period. The measures on which the requirements are based are widely deployed at many similar sources throughout the country. The Rule also provides various compliance flexibil-

ities 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 while applicant acknowledges that its entitlement to a stay turns in part on whether the case presents certworthy issues, applicant has not even attempted to establish that its industry-specific, case-specific, and record-intensive challenges would warrant this Court's review if the D.C. Circuit rejects applicant's arguments.

Applicant also has not demonstrated that it will suffer irreparable harm absent the extraordinary relief it seeks. The Rule does not require applicant to meet emissions limits until 2026. EPA's analysis indicates that any near-term capital expenditures to achieve compliance need not be extensive and will not unduly strain the industry. 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 the iron and steel industry in upwind States unabated, applicant's requested extraordinary relief would impose negative health conse-

quences and additional regulatory burdens on downwind States and their citizens -- thus violating the central aim of the Good Neighbor Provision. The application 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) in 23 upwind States upon finding their existing plans inadequate. See 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998). Establishing the analytical framework that EPA has used ever since, that rule evaluated control strategies across multiple industries, identified representative cost thresholds, and included all power-plant and non-EGU control

strategies with average costs falling below the highest selected representative cost figure. Id. at 57,417. 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 (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, following essentially the same methodology. 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 recep-

tors. 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. 9336, 9338 (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. With respect to non-EGU sources, that analysis indicated that cost-effective and feasible emissions reductions were available at high-emitting sources in nine industries, including iron and steel 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 emissions-reduction standards covering the identified non-EGU sources in the relevant States. Id. at 36,667.

For non-EGUs, EPA conducted an initial screening assessment to identify which industries have the greatest impact on air quality 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 actually emitted more than 100 tons of nitrogen oxide per year according to its database. 88 Fed. Reg. at 36,732-36,733. EPA identified iron and steel mills as one of nine industries with

units emitting above that threshold. Screening Assessment 3, 24 Tbl. A-2. EPA then considered potential air quality improvements that could be provided to downwind areas by applying various emissions-control strategies that appeared to be cost effective. Id. at 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. 87 Fed. Reg. 20,036, 20,143, 20,145 (Apr. 6, 2022). Based on that review, for iron and steel sources, EPA proposed to set emissions limits "based on type of unit" for those units that directly emit 100 tons-per-year or more of nitrogen oxide and for facilities with two or more such units that collectively emit or have the potential to emit 100 tons-per-year or more of nitrogen oxide. Ibid. EPA explained that there are "many types of units within [i]ron and [s]teel [m]ills * * * that are not currently subject to [nitrogen oxide] limitations of the stringency necessary to eliminate significant contribution," and that it was proposing emissions limits and had estimated reduction potential based on the anticipated performance of the identified control technology. Id. at 20,146. Addressing boilers in that industry, EPA requested comment on "whether it should set an applicability threshold based on a unit's production capacity rather than an emissions thresh-

old." Id. at 20,145. EPA had chosen production-capacity limits for other boilers, noting that its measure "reasonably approximates" the 100 tons-per-year emissions threshold. Id. at 20,148.

EPA received hundreds of comments on the rulemaking proposal, including from applicant. See Appl. App. 418-531. In response to those comments, EPA altered its approach to regulating iron and steel mills. 88 Fed. Reg. at 36,827. EPA explained that certain iron-and-steel-industry emissions units would not be covered by the Rule because EPA had "insufficient" data to support the conclusion that the control technology it had identified for certain units is "currently both technically feasible and cost effective on a fleetwide basis" for those units. Ibid. EPA did not rule out the possibility that emissions reductions from those technologies may be shown to be achievable and cost-effective with further development, but EPA acknowledged that the Rule's intention is to bring sources up to widely demonstrated levels of emissions control that can be applied industry-wide. Ibid.; see EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, Response to Public Comments on Proposed Rule 62-63, 128 (Mar. 2023) (RTC), https://perma.cc/6DY8-Y5G4. In light of those challenges, EPA determined that the Rule would apply only to "reheat furnaces" and boilers in the iron and steel mills. Ibid.; see id. at 36,832.

With respect to reheat furnaces, EPA explained that "there is sufficient information to determine that" low-nitrogen-oxide burners "can be installed on reheat furnaces," and that EPA had identified 32 reheat burners that had already installed such technology. 88 Fed. Reg. at 36,827. EPA thus concluded that the burners are a "readily available and widely implemented emissions reduction strategy." Ibid. EPA explained, however, that after evaluating state and federal emissions standards, technical literature, and consent decrees, it had identified "variations in the emissions rates that different types of reheat furnaces can achieve." Id. at 36,828.

Because of that variation, EPA declined to adopt "one emissions limit for all reheat furnaces." 88 Fed. Reg. at 36,828. Instead, the agency required the installation of low-nitrogen-oxide burners or equivalent technology that is "designed to achieve a minimum 40 percent reduction from baseline [nitrogen oxide] emission levels." Ibid. EPA will then determine "source specific emissions limits" based on pre- and post-installation "performance testing." Ibid. EPA directed owners and operators of the affected units to submit work plans identifying the technologies they intend to implement within one year after the effective date of the Rule. See ibid.

As for boilers, EPA established an applicability threshold based on design capacity. See 88 Fed. Reg. at 36,832. EPA noted

that all state standards it had reviewed use design capacity to regulate boilers and that design capacity serves as a "reasonabl[e] approximat[ion]" of potential emissions. Id. at 36,833.

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 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).

[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, 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).

4. In this case, applicant petitioned for review of the Rule in the D.C. Circuit. The court consolidated applicant's petition with other pending challenges to the Rule, including those at issue in Ohio v. EPA, No. 23A349; Kinder Morgan, Inc. v. EPA, No. 23A350, and American Forest & Paper Ass'n v. EPA, No. 23A351. Shortly thereafter, applicant moved to stay the Rule pending the disposition of its petition for review. On September 25, 2023, the D.C. Circuit denied the stay applications in the prior petitions, with Judge Walker dissenting. See Gov't Stay Resp. 15, Ohio v. EPA, No. 23A349 (Oct. 30, 2023) (Gov't Stay Resp.). On October 11, 2023, a different panel of the D.C. Circuit unanimously denied applicant's stay application. Appl. App. 266.

ARGUMENT

The application should be denied. Applicant seeks 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.

Applicant has not satisfied the standard for a stay, much less the more demanding standard for an injunction pending review. Its 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 oth-

erwise contrary to law. And applicant has not even attempted to show that any of its factbound, industry-specific challenges would warrant this Court's review if the D.C. Circuit rejects those challenges. The balance of equities and the public interest also 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, applicant cannot show that it will be irreparably harmed if the Rule remains in effect during the pendency of the D.C. Circuit proceedings. The Rule sets reasonable compliance deadlines for covered industry participants, and applicant's emissions-reduction obligations do not go into effect until 2026 or later.

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

Applicant asserts that a variety of purported flaws render the Rule arbitrary and capricious or otherwise unlawful. 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. Applicant's remaining arguments reflect misunderstandings of the CAA, the Rule, and administrative procedures, and should likewise be rejected.

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

Like the other applicants that are currently challenging the Rule, applicant here relies 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. Applicant argues (Appl. 15-16) that those stays undermine the Rule and its continued application to the 11 remaining upwind States within its original coverage. As EPA has explained (Gov't Stay Resp. 19-28), that challenge is barred by the CAA's judicial-review provision, and it lacks merit in any event.

The CAA requires objections to rules to be raised during the comment period or considered through a petition for reconsideration before they may be subject to judicial review. 42 U.S.C. 7607(d)(7)(B); see Gov't Stay Resp. 19. During the public comment period, applicant did not raise and could not have raised an ob-

jection based on the stays because those stays had not yet occurred. Gov't Stay Resp. 20. And although applicant has filed a petition for reconsideration, that petition is still before the Agency. See Appl. 12. Until EPA concludes its review and grants or denies the petition, or applicant seeks review alleging that the agency has refused to act, 42 U.S.C. 7607(d)(7)(B), this Court is "without authority" to reach the argument applicant presses here. EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 137 (D.C. Cir. 2015). Applicant cannot circumvent that statutorily-mandated process by invoking post-promulgation events that have no bearing on whether the Rule was lawful when it was issued. Gov't Stay Resp. 20-21. Rather, the petition for reconsideration and any subsequent judicial review are the appropriate process to determine whether events that occurred after the Rule's promulgation merit any change in the agency's action. Id. at 21.

In any event, for all of the reasons EPA has explained (Gov't Stay Resp. 21-28), the temporary stays of state-plan disapprovals do not undermine the Rule. It is rational and consistent with EPA's statutory obligations for the agency to continue to apply the Rule to the 11 States whose plan disapprovals have not been challenged, and the Rule continues to function appropriately in those States. Ibid.

B. The Rule Is Consistent With The CAA

Applicant similarly misses the mark in asserting (Appl. 16-

18) that EPA violated the CAA by issuing the Rule shortly after disapproving 21 state plans. The Act requires EPA to promulgate a federal plan whenever it "disapproves a State implementation plan submission in whole or in part," and to do so "within 2 years" after the disapproval. 42 U.S.C. 7410(c)(1). Under that unambiguous statutory directive, EPA need not delay for any minimum period of time between disapproving a state plan and promulgating a federal one. See EME Homer, 572 U.S. at 509 ("EPA is not obliged to wait two years or postpone its action even a single day.").

Applicant is also wrong in contending (Appl. 16) that EPA's failure to act on the state-plan submissions by the statutory deadline precluded it from quickly promulgating a federal plan after those disapprovals occurred. "[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003) (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)). Here, the Act provides its own remedial mechanism for missed statutory deadlines: the ability to bring a citizen suit in district court to obtain court-ordered deadlines, see 42 U.S.C. 7604(a)(2) -- a course that some pursued here, see 88 Fed. Reg. at 36,689 n.100. Particularly in light of that congressionally-prescribed remedy, it would make little sense to hold that delayed action by an agency compels further delay,

particularly when the CAA also mandates that EPA bring States "into compliance before upcoming attainment deadlines." Wisconsin v. EPA, 938 F.3d 303, 318 (D.C. Cir. 2019) (per curiam). Indeed, the D.C. Circuit has recognized that, in order to comply with the nonattainment deadlines, EPA may sometimes find it necessary to "shorten[] the deadline for a [state plan] submission" and "issu[e] a [federal plan] soon thereafter." Ibid. Congress did not impose the "counterintuitive limit on authority to act" that applicant proposes. Barnhart, 537 U.S. at 163.

Contrary to applicant's contention (Appl. 16-17), EPA's promulgation of the federal plan soon after disapproving the state submissions is not at odds with the cooperative-federalism principles embodied in the CAA. Consistent with the Act, States had the opportunity to submit compliant plans in the first instance and they remain free to submit alternative plans for eliminating significant contributions now. See 88 Fed. Reg. at 36,838-36,843. But when EPA determines that States have not fulfilled their duty to eliminate significant contributions, the agency must step in, and must do so in time to meet attainment deadlines. See 42 U.S.C. 7410(c)(1); Wisconsin, 938 F.3d at 318. EPA acted properly to meet those deadlines here. See 88 Fed. Reg. at 36,755-36,756.

C. The Rule's Regulation Of Iron And Steel Mills Is Reasonable And Procedurally Proper

Applicant also challenges technical and procedural aspects of the Rule's regulation of iron and steel mills. Applicant's chal-

lenges to the adequacy of the notice that EPA provided, and to the lawfulness of EPA's approach to regulating reheat furnaces and boilers, were not raised in comments, and therefore are not subject to judicial review within the current challenge to the Rule because EPA must first evaluate those arguments in assessing applicant's petition for reconsideration. See 42 U.S.C. 7607(d)(7)(B); EME Homer, 795 F.3d at 137 (holding that an argument that EPA "significantly amend[ed] the Rule between the proposed and final versions" must be raised "through an initial petition for reconsideration"); see also pp. 17-18, supra. In any event, EPA's approach to eliminating significant contribution from iron and steel mills is lawful, rational, and well-supported; EPA provided adequate notice to regulated parties; and EPA selected an appropriate method of regulation.

1. EPA reasonably concluded that regulation of iron and steel mills is warranted

After receiving comments on the proposed rule, EPA chose to limit the types of iron-and-steel-industry emissions units that the final Rule would regulate. Applicant contends (Appl. 18-19) that, once the agency made that decision, the rationale for iron-and-steel-industry regulation identified in EPA's Screening Assessment no longer applied. Like similar arguments previously advanced by other applicants, that argument reflects a misunderstanding of the Screening Assessment's function. See Gov't Stay Resp. 29-31, 38.

The Screening Assessment was simply the first step EPA used to identify high-emitting industries, which would then be subject to further evaluation to determine whether emissions from those industries could constitute a "significant contribution" to downwind pollution. See Screening Assessment 7-8; RTC 104. Throughout the rulemaking, EPA repeatedly underscored that the "results of the Screening Assessment should not be confused with regulatory requirements, applicability determinations, or emissions limits." RTC 99. For that reason, the Rule's departures from the initial results of the Screening Assessment "do not undermine [the Screening Assessment's] antecedent findings * * * that these industries and emissions units warranted evaluation for appropriate, cost-effective emissions control opportunities." Ibid.; see Screening Assessment 7 (noting that the "screening assessment is not intended to be, nor take the place of, a unit-specific detailed engineering analysis that fully evaluates the feasibility of retrofits for the emissions units, potential controls, and related costs"); 87 Fed. Reg. at 20,157 (same).

The Screening Assessment identified iron and steel mills as industries that warranted further evaluation because they have impacts above the applicable air quality thresholds. Screening Assessment 25, Tbl. A-3. That determination reflects the fact that the iron and steel industry's manufacturing process involves large-scale combustion. RTC 97-98. After conducting further

analysis and considering industry comments regarding technical challenges associated with implementation of the proposed control technologies for certain types of sources, EPA in the final Rule pared back the requirements for iron and steel mills that it had previously proposed. 88 Fed. Reg. at 36,828. EPA explained, however, that this adjustment did not contradict its finding that the iron and steel industry is a source of significant contributions. RTC 128. EPA also observed that, "with adequate time, modeling, and optimization efforts," control technology for additional iron-and-steel-industry emissions sources "may be achievable and cost-effective" in the future. 88 Fed. Reg. at 36,827. That EPA promulgated fewer control requirements for the iron and steel industry than it had initially proposed reflects EPA's serious consideration of industry comments, not any flaw in the Screening Assessment.

Applicant is also wrong in suggesting (Appl. 18) that EPA's decision to regulate a smaller set of iron-and-steel-industry sources than the agency had initially identified resulted in over-control of those sources that the Rule covers. Applicant proceeds from the false assumption that because some emissions reductions from this industry were not included in the final Rule, no emissions from the industry could qualify as a "significant contribution." EPA reasonably rejected that view, concluding that the industry remains "impactful" and that the reductions are "feasible

and cost-effective." RTC 128; see RTC 92-93. Further, taking into account the updated estimate of the number of sources and emissions reductions from non-EGU industries achieved in the Rule, EPA's analysis confirmed that the Rule achieves meaningful downwind air quality benefits and does not compel greater emissions reductions than are necessary. RTC 124; see 88 Fed. Reg. at 36,748-36,754. Applicant has not provided any reason to second-guess that judgment or presume that over-control will occur.

2. EPA complied with applicable procedural requirements in promulgating the Rule

Applicant argues (Appl. 19-20) that the notice EPA provided regarding the regulation of reheat furnaces and boilers in the iron and steel industry did not give applicant an adequate opportunity to comment. Those arguments fail.

The proposed rule identified an emissions limit for steel-industry reheat furnaces. See 87 Fed. Reg. at 20,145 & Tbl. VII.C-3. After considering industry comments on that aspect of the proposed rule, EPA agreed that the wide variability of performance made a single limit inappropriate. 88 Fed. Reg. at 36,828. Based on industry comments, EPA finalized a "test-and-set" approach that requires installation of low-nitrogen-oxide burners (or equivalent technology) and performance testing to determine for each unit an appropriate limit achievable using that technology. Ibid.

Those rulemaking procedures comported with applicable notice requirements. See 42 U.S.C. 7607(d)(3) (requiring EPA to publish

notice of proposed rulemaking "as provided under" 5 U.S.C. 553(b)); 5 U.S.C. 553(b)(3) (requiring each agency to publish notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved"). "EPA is not required to adopt a final rule that is identical to the proposed rule." Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 351 (D.C. Cir. 2004). Otherwise, EPA "could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end." Ibid. (citation omitted). Notice-and-comment requirements are intended to encourage agencies "to modify proposed rules as a result of the comments they receive." Ibid. Thus, so long as the final rule is a "logical outgrowth" of the proposed rule, such that parties could have "'anticipated' that the change was possible," the agency's failure to solicit comments on the precise rule that it ultimately adopts does not render its notice inadequate. Id. at 951-952 (citation omitted); see Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

Here, EPA adopted the test-and-set approach to reheat furnaces in direct response to comments (including from applicant) suggesting that variability across reheat furnaces made a unit-specific approach appropriate. See, e.g., Appl. App. 508-509. The Rule's approach accommodates that feedback by providing for the establishment of unit-specific limits after testing to deter-

mine what a low-nitrogen-oxide burner or equivalent technology can achieve at each unit. See 88 Fed. Reg. at 36,828. To address variability among units, EPA had proposed a similar test-and-set requirement for other iron-and-steel-industry emissions sources, 87 Fed. Reg. at 20,145, and applicant had commented on the proposal to use that approach for those sources, Appl. App. 523-525. Applicant thus had sufficient notice that EPA could adopt a similar approach for other units with similar variability.

As for boilers, applicant briefly contends (Appl. 20) that it lacked adequate notice because EPA initially proposed to regulate units based on annual emissions or production, but finalized a rule based on design capacity. But EPA specifically sought comment on "whether it should set an applicability threshold based on a unit's production capacity rather than an emissions threshold." 87 Fed. Reg. at 20,145. That statement gave applicant clear notice that EPA was considering different modes of measurement and an opportunity to comment on the perceived strengths and weaknesses of the competing approaches.

3. The Rule's method of regulating iron-and-steel-industry reheat furnaces is consistent with the CAA and supported by the rulemaking record

Applicant contends (Appl. 20-23) that EPA's adoption of a test-and-set method to regulate reheat furnaces is unlawful because it results in an emissions limit that is set outside of notice-and-comment procedures and otherwise lacks record support.

That is incorrect. EPA utilized the requisite notice-and-comment procedures in determining that reheat furnaces lacking low-nitrogen-oxide burners must achieve a 40% reduction from prior emissions levels in order to eliminate their significant contribution. 88 Fed. Reg. at 36,827-36,828; 40 C.F.R. 52.43. The CAA gives EPA broad authority in determining what control measures are appropriate and nothing prevents the agency from using a percentage-based emissions limit. See 42 U.S.C. 7602(y) (noting that a federal plan may include "enforceable emission limitations or other control measures, means or techniques").

EPA's percentage-based approach to setting a unit-specific emissions limit is fully supported by the rulemaking record, which indicates that low-nitrogen-oxide burners have successfully been used and have effectively reduced nitrogen-oxide emissions in a range of reheat-furnace types and sizes, with potential reduction rates as high as 98%. RTC 747-748. A mandate to use this or an equivalent technology to achieve a similar level of reduction precisely accords with EPA's definition of "significant contribution" in the Rule, which is "that amount of emissions that is in excess of the emissions control strategies the EPA has deemed cost-effective." 88 Fed. Reg. at 36,676. EPA conservatively set the required reduction rate at 40%, 88 Fed. Reg. at 36,828, and allowed for exceptions if necessary, 40 C.F.R. 52.40(e). Based on industry comments regarding the variation among reheat furnaces, EPA did

not translate the 40%-reduction requirement into a uniform emissions-rate limit for all units. Instead, EPA established an administrative process to set that limit on a unit-by-unit basis after considering testing data for each unit. 40 C.F.R. 52.43(c).

The establishment of unit-specific emissions rates based on testing data involves a separate adjudicatory process that will incorporate procedural protections, including deadlines for EPA to act, notice, and a requirement that EPA publicly document the basis for its decision. See 40 C.F.R. 52.43(d)(4). Any EPA decision under this provision will be a final agency action subject to judicial review. See 42 U.S.C. 7607(b)(1). EPA routinely includes comparable adjudicatory, application, and appeal procedures within federal plans and other rules promulgated under the Act. See, e.g., 40 C.F.R. 97.508 (providing for appeal of decisions of the Administrator involving the trading program); 40 C.F.R. 97.535 (providing an administrative-petition process for obtaining alternative compliance-assurance requirements); 40 C.F.R. 60.44b(f) (providing an administrative process for obtaining alternative emissions limits).

EPA thus had sufficient data to support the 40%-reduction requirement, and it has established appropriate adjudicative mechanisms to set unit-specific emissions limits, subject to judicial review. Nothing more is required.

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

Applicant recognizes (Appl. 13-14) that its entitlement to a stay depends in part on whether four Members of this Court would likely vote to grant review if the D.C. Circuit rules in EPA's favor. Applicant makes no effort, however, to establish a probability of such review. The application identifies no recurring legal question of broad importance. Rather, each of the issues applicant raises is a case-specific, industry-specific question, involving highly complex and technical facts. See pp. 17-29, supra. Applicant's failure to identify any legal issue that would warrant this Court's review further "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); see Gov't Stay Resp. 41-43.

III. THE REMAINING EQUITABLE FACTORS WEIGH HEAVILY AGAINST INJUNCTIVE RELIEF

A. Applicant has not demonstrated that it will suffer irreparable harm in the absence of a stay. To satisfy that requirement, applicant 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). It has not done so here.

Applicant relies (Appl. 23-25) solely on its alleged compliance costs. But, as applicant recognizes (Appl. 25), its emissions-reduction obligations do not begin until 2026, with the potential

for compliance extensions of up to three 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 that EPA commissioned similarly suggests that applicant should be able to avoid significant expenditures while D.C. Circuit review proceeds. See SC&A, Nox Emission Control Technology Installation Timing for Non-EGU Sources: Final Report 25 (Mar. 14, 2023). The report estimates that iron and steel mill reheat furnaces will spend between three and six months on analysis and permitting, with equipment design, fabrication, and installation taking another six to nine months. Ibid. With little explanation, applicant more than doubles that timeline, claiming that the full process will require 34 months. Appl. App. 623-625. But even on that inflated schedule, applicant's first order and "procurement" steps will not occur until March 2025 and April 2025, respectively. Id. at 624. And the work plan for installation of controls on reheat furnaces is not due until August 5, 2024. 40 C.F.R. 52.43(d)(1).

Applicant provides no basis for its assertion that compliance on EPA's timeframe, including the possibility of extensions, is

impossible.[2] And despite asserting (Appl. 24) that it has already incurred "significant compliance costs," applicant does not quantify or explain the costs it has undertaken, pointing instead (ibid.) to the total expenditures it anticipates for one of its facilities. Applicant thus provides no way for this Court to assess whether the costs it has incurred were a necessary result of the Rule or can appropriately be deemed "significant."

B. Any injury that applicant has 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, including those from the high-emitting iron and steel industry, will provide significant benefits to the residents of downwind States. 88 Fed. Reg. 36,747-36,748; App. infra, 14a-15a. Applicant ignores those benefits (Appl. 25), claiming that they cannot be considered because they will not occur until 2026. But while the Rule does not require the reductions to be in place until 2026, a stay would likely delay their phase-in beyond that date. App., infra, 7a-8a; 14a-17a. Stays of two prior rules implementing the Good Neighbor Provision led to implementa-

[2] Applicant's declarant speculates that vendor and labor shortages will cause unspecified delays. Appl. App. 605-606. But EPA carefully considered those issues in the Rule and found that they were largely being resolved post-pandemic. 88 Fed. Reg. at 36,759-36,760; App., infra, 11a.

tion delays of up to three years, even though the rules were later largely upheld. Id. at 7a-8a; see Michigan, 213 F.3d at 695; EME Homer, 795 F.3d at 132.

During that delay, downwind States would suffer significant harms. Indeed, the particular facility on which applicant focuses its cost analysis is in close proximity to designated ozone non-attainment areas in three different States. App., infra, 9a, 16a. The emissions that contribute to cross-state air pollution represent a public health hazard in those and other 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, 15a.

On the other side of the ledger, applicant theorizes (Appl. 25) that the Rule will implicate "economic and national security" concerns. But the principal basis applicant provides for that speculation is the assertion that installation of the requisite controls will require outages in the steel industry. Appl. 26. EPA considered the possibility of such disruption or other strain on the steel industry and concluded that it is unlikely. 88 Fed. Reg. at 36,759-36,760; App., infra, 11a-12a. That conclusion is supported by the final Rule's coverage of only reheat furnaces and

boilers in the steel and iron industry, the length of the compliance timeline, and EPA's finding that pandemic-related supply-chain issues were already being resolved. 88 Fed. Reg. at 36,759-36,7960; RTC 1064. If unforeseen circumstances arise that indicate a likelihood of disruptions, the Rule authorizes compliance extensions of up to three years. 88 Fed. Reg. at 36,760.

Applicant thus cannot show any public interest in delaying implementation of the Rule, which simply requires the use of emissions-control mechanisms that many of its competitors have already adopted. See 88 Fed. Reg. at 36,827. The public interest in addressing "the steady stream of infiltrating pollution" in downwind States, EME Homer, 572 U.S. at 496, outweighs applicant's asserted interests and disfavors the extraordinary relief it seeks.

C. Applicant seeks a stay of the Rule "as it applies to reheat furnaces and boilers at iron and steel mills." Appl. 1 (citation omitted). If the Court concludes that relief is warranted with respect to any discrete aspects of the Rule, it should tailor the relief accordingly. But because applicant cannot satisfy the standards for extraordinary relief, the better course is to deny the application in full.

CONCLUSION

The application should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2023

APPENDIX

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 U.S. Steel in its motion for a stay of the Good Neighbor Plan in the D.C. Circuit Court of Appeals, with respect to the Plan's requirements for reheat furnaces and boilers at iron and steel mills. These are some of the "non-electricity generating units" ("non-EGUs"), or "industrial sources," regulated under the Plan.

5. 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.[1] Due to temporary judicial stays of the predicate state plan disapproval action, the Plan is currently administratively stayed in 12 states: Alabama, Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia. The non-EGU requirements of the Plan are currently in effect for 10 states: California, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Virginia. (The Plan is also in effect for Wisconsin, but Wisconsin is not subject to the Plan's non-EGU requirements.)

I. 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 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 FR 66612, 66613 (Dec. 5, 2019). A finding of failure to submit or disapproval of a Good Neighbor SIP imposes no

[1] *See* EPA Response to Judicial Stay Orders, https://www.epa.gov/csapr/epa-response-judicial-orders (last visited Aug. 9, 2023).

legal obligation on the state or sources within the state, but rather imposes a legal obligation on EPA to promulgate a 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 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 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 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 non-EGU industries.[3]

10. 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 36654, 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.)

11. 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

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[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).

[3] It is a typical convention in interstate transport to use the term "significant contribution" as a shorthand to encompass both the "contribute significantly" and "interfere with maintenance" prongs of the Good Neighbor provision.

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.

12. 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 "Final Non-EGU Sectors TSD").

13. 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 38 (reheat furnaces), and 68-84 (boilers). Thus, setting aside the availability of alternative emissions limits as discussed in Section III below, 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.

B. Benefits of the Good Neighbor Plan

14. 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. EPA estimates the benefits of the Plan far exceed its anticipated costs. Like its predecessor programs, the NO_X SIP Call,[4] Clean Air Interstate Rule ("CAIR"),[5] and CSAPR,[6] EPA is confident the

[4] "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).
[5] "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule)," 70 FR 25162 (May 12, 2005).
[6] "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").

Plan can be implemented without disruption to domestic supply of key commodities and services such as steel, natural gas, and electricity.[7]

Estimated Monetized Health and Climate Benefits, Compliance Costs, and Net Benefits of the Good Neighbor Plan, 2023 Through 2042 (Millions 2016$, Discounted to 2023)[8]

		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
	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.

[7] *See* Regulatory Impact Analysis, EPA-452/R-23-001 (March 2023), at 158-68, 169-72, 266, *available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs. *See also* paragraphs 38-41 below.

[8] Adapted from Good Neighbor Plan Executive Summary. For explanations, caveats, and table notes associated with these figures, see 88 FR 36654, 36666.

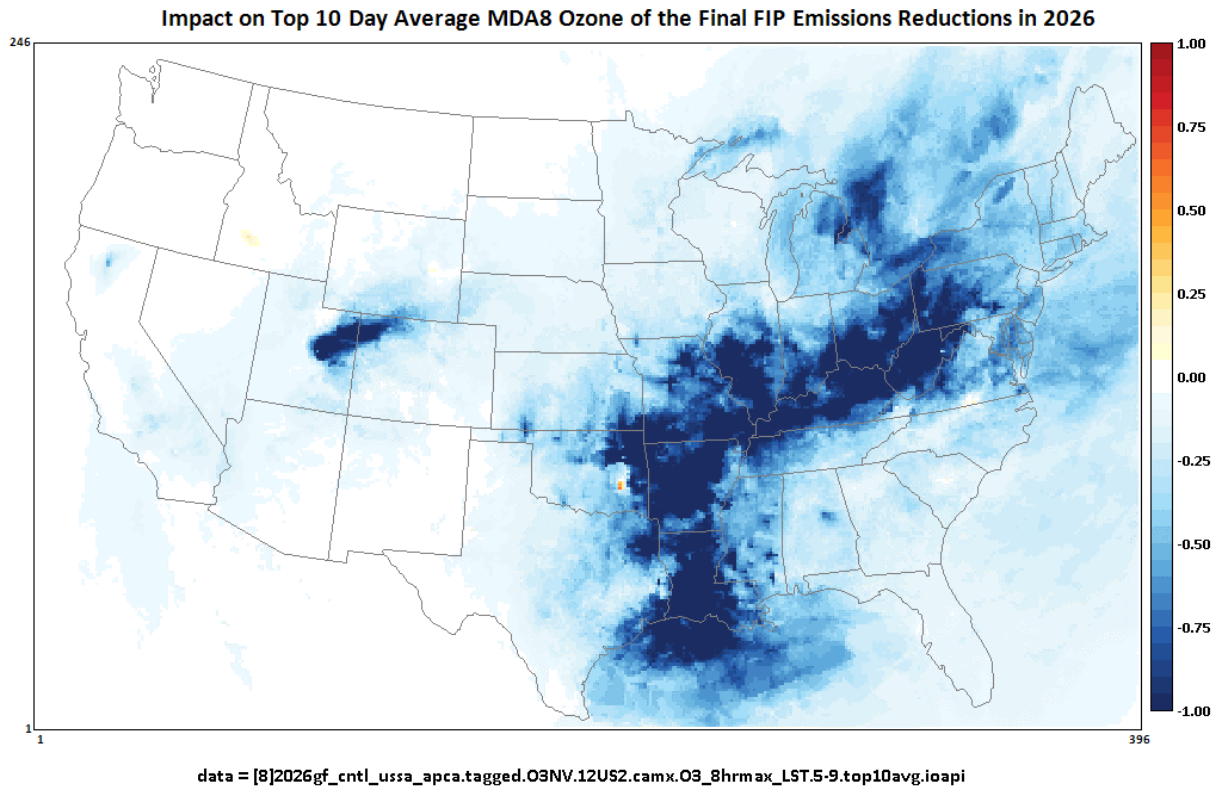
CSAPR was estimated to cost the power sector $810 million in 2014 (2007$). 76 FR at 48215.

15. The Plan will deliver substantial public health and environmental benefits, including reductions in mortality and morbidity associated with emissions from power plants and non-EGUs like steel mills.[9] 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, 88 FR at 36748, Table V.D.3-1. The Plan will help many downwind areas make progress toward coming into compliance with the 2015 ozone NAAQS.

16. 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.

17. 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 projected to occur across the United States with full implementation of the Plan.

[9] *See* Regulatory Impact Analysis, EPA-452/R-23-001 (March 2023), at 215-16 (Tbl. 5-3), *available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs.



18. 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, low-NO_X burner (LNB) combustion-control technology is widely in use across multiple industries, and according to EPA's data is already installed at thirty-two reheat furnaces in the iron and steel industry. 88 FR at 36827 (citing Final Non-EGU Sectors TSD, Section 4.). At least eight of those are located in Indiana, where U.S. Steel's Gary Works facility is located. 88 FR at 36828, fn. 388.

19. 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. 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 valued at as much as $14 billion (2016$, 3% discount rate) in 2026. Good Neighbor Plan, 88 FR at 36851.

II. Achievability and Cost-Effectiveness of the Plan's Requirements for Reheat Furnaces and Boilers at Iron and Steel facilities

20. Producing steel is an energy-intensive process that generally requires significant energy, often achieved by burning large amounts of fossil fuels. As such, this industry has high NO_X emissions and was therefore a natural focus of attention in identifying potential emissions-reduction opportunities to address upwind states' significant contribution to nonattainment and interference with maintenance of the 2015 ozone NAAQS. *See* Technical Memorandum, "Screening Assessment of Potential Emissions Reductions, Air Quality Impacts, and Costs from Non-EGU Emissions Units for 2026" (Feb. 28, 2022) (Document ID EPA-HQ-OAR-2021-0668-0150).

21. EPA proposed a relatively wide-ranging set of emissions control requirements on this industry in the proposal, reflecting available information and literature on potential emissions-control opportunities. 87 FR 20036, 20145.

22. However, EPA received many comments from this industry identifying concerns with many of the proposed analytical findings and assumptions that EPA had applied in developing the proposed rule. 88 FR at 36827.

23. EPA carefully reviewed these concerns, and ultimately determined that, while many of the emissions control technologies it had identified could be viable for this industry, it did not have a sufficient record to confidently conclude that these emissions control strategies were sufficiently demonstrated and cost-effective on an industry-wide basis to mandate emissions limits based on those strategies in the final Plan. *Id.* (citing Final Non-EGU Sectors TSD, Section 4).

24. EPA did not hear these same concerns when it came to LNB combustion control technologies for reheat furnaces in this industry, nor did industry commenters establish that emissions control technologies on boilers in this industry were undemonstrated, unavailable, or otherwise not cost-effective. *Id.*

25. Although EPA recognized that it was appropriate not to finalize its proposed controls for many of the unit types in this industry, the final record established that there clearly were cost-effective emissions reductions to be obtained from reheat furnaces and boilers through the application of conventional and demonstrated NO_X-control technologies. *Id.* (citing Final Non-EGU Sectors TSD, Section 4).

26. EPA estimated that the installation of LNB technology on reheat furnaces could generally achieve upwards of a 50% reduction in NO_X emissions from baseline levels with potential reduction rates as high as 98%. "Technical Support Document for the Proposed Rule: Non-EGU Sectors TSD" at 31–34, 41, 43 (December 2021) (Document ID EPA-HQ-OAR-2021-0668-0145) (hereinafter "Proposal Non-EGU TSD").

27. EPA used technical literature to inform its database of emissions controls to estimate a representative cost-per-ton for implementation of this technology, estimated at $3,656 (2016$). Technical Memorandum, "Summary of Final Rule Applicability Criteria and Emissions Limits for Non-EGU Emissions Units, Assumed Control Technologies for Meeting the Final Emissions Limits, and Estimated Emissions Units, Emissions Reductions, and Costs," at 7, 10, tbl. 6 (March 15, 2023) (Document ID EPA-HQ-OAR-2021-0668-0956).

28. EPA also found that this technology was demonstrated for these unit types. EPA found that 32 reheat furnaces already have LNB technology installed. 88 FR at 36827; Final Non-EGU Sectors TSD at 38.

29. Among other things, EPA observed that the Indiana Department of Environmental Management had set a limit of 0.077 lb/MMBtu for a reheat furnace at the NLMK facility based on LNB/ultra-LNB technology. Final Non-EGU Sectors TSD at 39. And EPA found that at least eight reheat furnaces in Indiana alone, where the Gary Works facility is located, have LNB technology installed. 88 FR at 36828 fn. 388.

30. EPA had proposed a numerical emissions limit of 0.05 lb/MMBtu for reheat furnaces. But EPA listened to steel-industry commenters regarding whether

a single numerical emissions limit would be appropriate to set for reheat furnaces based on application of LNB technology. 88 FR at 36828. Commenters, such as U.S. Steel, argued that given the variability in unit configuration and operation, a single numerical emissions limit would not be appropriate or necessarily achievable at all sources. U.S. Steel Comment letter, at 91-92 (Document ID EPA-HQ-OAR-2021-0668-0798).

31. Thus, U.S. Steel advocated for a case-by-case approach to setting a numerical emissions-rate limit. *Id.*

32. A way to do this is through what is sometimes referred to as a "test-and-set" approach. In a test-and-set approach, a source would work with a regulator (here, the EPA) to evaluate what emissions rate a control technology could achieve at a particular unit, and then set an emissions limit based on that demonstrated rate. 88 FR at 36827-28.

33. EPA acknowledged commenters' concern and decided to adopt a test-and-set approach for reheat furnaces, using as a model a regional haze FIP that U.S. Steel had previously supported. *See* 81 FR 21671, 21678-79 (April 12, 2016); EPA-R05-2015-0196-0112 (U.S. Steel's comment letter). EPA finalized a "test-and-set" approach so that an appropriate emissions limit is established for each reheat furnace in light of its unique circumstances, assuming the application of a well-demonstrated NO_X-control technology, LNB. 88 FR at 36818, 36827-28.

34. Under this approach, sources still have the flexibility to use a technology other than LNB, if it can be demonstrated to achieve an equivalent level of reduction. 40 CFR 52.43(d)(1).

35. The 40% reduction target is a somewhat conservative performance estimate based on a review of documentation of what LNBs have been able to achieve in practice. Proposal Non-EGU TSD at 43. EPA reached the 40% figure by analyzing the range of emissions reductions achieved by LNBs at reheat furnaces. *Id.* at 31-34, 41, 43. EPA's analysis led it to conclude that LNBs on reheat furnaces could generally achieve a reduction of 66%, with potential reduction rates as high as 98%. *Id.*; "Response to Public Comments on Proposed Rule," at 747-48 (Document ID EPA-HQ-OAR-2021-0668-1127) (hereinafter "RTC"). EPA conservatively set the requirement at 40%, *see* 88 FR at 36828; Final Rule Non-EGU TSD at 38. However, if this reduction amount is demonstrated not to be achievable at a particular unit, operators may seek an alternative limit. (See paragraphs 45-49 below regarding alternative emissions limits.)

36. The work that is expected in the next year for facilities with reheat furnaces is the development of a work plan, which is due August 5, 2024. 40 CFR 52.43(d)(1). Assuming facilities elect to install LNB, EPA found the time for actual installation of the LNB is estimated at 9-15 months (inclusive of design and permitting). "Non-EGU Control Installation Timing Report," at 25 (Document ID EPA-HQ-OAR-2021-0668-1077) (hereinafter "Timing Report").

37. U.S. Steel does not present any information regarding the achievability or cost-effectiveness of NO_X control technologies on boilers at any of its facilities. However, in regard to the claim that U.S. Steel or others could not prepare for compliance based on the proposed rule if the final Rule significantly changed from proposal (*see* U.S. Steel Motion at 6), EPA determined that the necessary time for compliance is available based on the date of finalization of the Rule, not the date of the proposal. *See* 88 FR at 36755, 36758-59. *See also* Timing Report at ES-2-ES-3. And EPA made available compliance extensions even from that date, if they prove to be needed, see Section III below.

38. In the final Plan, EPA carefully evaluated concerns regarding supply-chain delays and the potential for economic disruption that might be caused by the Rule. In the report on control installation timing that EPA commissioned, researchers found that supply-chain issues caused by the COVID-19 pandemic and other factors were "ameliorating." Timing Report at 48; *see also* 88 FR at 36759-60; RTC at 1064.

39. In particular, the Timing Report found that as of 2022: business inventories were on the upswing; the number of containerships awaiting berths was slowly declining; interstate freight and goods shipping exceeded pre-pandemic levels; the RSM US Supply Chain Index had normalized; and the Federal Reserve Bank of New York's global supply chain index was approaching normal levels. Timing Report at 48-54.

40. The Timing Report did not identify LNB technology as facing any unique labor or supply constraints. To the contrary, relevant U.S. manufacturing indexes suggested that capacity utilization in relevant sectors like metal fabrication, machinery, and construction were roughly at long-term average levels. Timing Report at 54-56.

41. During the rulemaking, EPA was not provided with any evidence that the Rule posed a threat to national security or economic productivity due to any

alleged disruption to steel supply. *See* RTC at 696-97, 1064. Commenters raising such concerns in this industry were reacting to the scope of the *proposed* rule, but for iron and steel, the requirements in the final Rule were substantially pared back from what EPA had proposed. The far more limited emissions-control requirements that EPA actually finalized for this industry are not anticipated to create challenges to the domestic supply of steel, in particular given that the control requirements are based on well-demonstrated technologies that are already in use at many facilities and do not impose any inherent constraints on production. *See* 88 FR at 36760.

III. Compliance Flexibilities Available for Industrial Sources

42. 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. 88 FR at 36758-60, 36818-19.

43. 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 U.S. Steel's claims of monetary and non-monetary harm.

44. 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 using the Plan's compliance flexibility mechanisms. We intend to issue within several weeks a set of implementation tools that will provide further direction to aid sources in navigating this process.

45. Two regulatory provisions in the Plan may be of potential relevance to the circumstances described by U.S. Steel at its Gary Works facility, though EPA does not at this time determine whether they would qualify for either of these flexibilities.

46. 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."[10]

47. 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.[11]

48. 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."[12]

49. 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).

50. 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).[13] 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."

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[10] 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 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.

[11] 40 CFR § 52.40(e)(4).

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

[13] 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.

51. 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).

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

53. 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 an official 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).

54. 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. The unit-specific "test-and-set" approach for reheat furnaces is explained above in Section II.

55. With respect to the requirements for fossil-fuel fired boilers in several industries, including iron and steel, 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.

IV. The Consequences of Staying the Good Neighbor Plan

56. Staying the Good Neighbor Plan—to any extent—is 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. While U.S.

Steel seeks a stay of the Plan only as to the iron and steel industry, the consequences described in this section are presented at the program level.[14]

57. 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.[15]

58. 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.[16] Most of these areas are now classified as Moderate nonattainment of the 2015 ozone NAAQS.[17] Downwind-state obligations to attain the NAAQS for most of these areas are therefore driven by the statutory attainment

[14] EPA's analysis in the final Plan indicates that iron and steel facilities potentially subject to the Rule are located in at least five states for which the Plan's requirements are currently in effect: Indiana, New York, Ohio, Pennsylvania, and Virginia. See Technical Memorandum, "Summary of Final Rule Applicability Criteria and Emissions Limits," at 12-14, Tbl. 9 (Document ID EPA-HQ-OAR-2021-0668-0956).

[15] 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).

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

[17] 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.

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).

59. 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 Moderate 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. The Plan seeks further reductions from power plants and industrial sources by 2026, which similarly corresponds to the Serious area attainment date in 2027. 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.

60. 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 Clean Air Act, Marginal areas that failed to attain by the August 3, 2021, attainment date were mandatorily reclassified to Moderate nonattainment, making their respective states subject to a January 1, 2023, deadline to submit revised ozone SIPs 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).[18]

61. 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

[18] Other substantial requirements are triggered by the Moderate classification, including: making an attainment demonstration, implementing reasonable further progress (RFP) emissions reduction 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).

implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season (i.e., 2023).

62. If EPA determines that these nonattainment areas fail to attain the 2015 ozone NAAQS based on the monitoring data for the 2021-2023 period, they will be reclassified to Serious nonattainment unless eligible for 1-year attainment date extensions (*see* 42 U.S.C. § 7511(a)(5)), 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.*; 42 U.S.C. § 7511a(f)(1).[19]

63. 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.

64. 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 60), 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

[19] 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.

Plan Approval; Michigan; Redesignation of the Detroit MI Area to Attainment for the 2015 Ozone Standards, 88 FR 32594, 32605 (May 19, 2023).

65. The nationwide improvement in ozone levels from the Plan (see paragraph 17) 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 emissions 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:

Scott Mathias, Director
Air Quality Policy Division

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