Case No. 23A-384

In the Supreme Court of the United States

UNITED STATES STEEL CORPORATION,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

On Application for Stay to the Honorable John G. Roberts, Jr., Chief Justice and Circuit Justice for the District of Columbia Circuit

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

November 3, 2023

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicant United States Steel Corporation ("U. S. Steel") respectfully submits this reply in support of its application for stay of the United States Environmental Protection Agency's ("EPA's") final rule: Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, App.1 (June 5, 2023) ("Plan") as it applies to reheat furnaces (40 CFR 52.43) and boilers at iron and steel mills (40 CFR 52.45).

RELATED CASES

Three other applications for stay of the Plan are pending before the Court. *See Ohio, et al. v. EPA*, Case No. 23A349, App.291 ("Ohio Application"); *Kinder Morgan, Inc., et al. v. EPA*, Case No. 23A350, App.327 ("Kinder Morgan Application"); *American Forest & Paper Assoc., et al. v. EPA*, Case No. 23A351, App.366 ("AF&P Application").[1] Responses to these applications were filed on October 30, 2023. Replies were filed November 1, 2023. U. S. Steel continues to support these applicants, including the arguments raised in the *See* Reply, *Ohio, et al. v. EPA, et al.*, Case No. 23A349 (Nov. 1, 2023) ("Ohio Reply"); Reply, *Kinder Morgan, Inc., et al. v. EPA, et al.*, Case No. 23A350 (Nov. 1, 2023) ("Kinder

[1] Unless otherwise noted, citations to the Appendix are to the Appendix to U. S. Steel's Application for Stay.

Morgan Reply"); Reply, *American Forest & Paper Assoc., et al. v. EPA, et al.*, Case No. 23A351 (Nov. 1, 2023) ("AF&P Reply"), and writes separately to address points specific to the iron and steel requirements in the Plan.

INTRODUCTION

The responses underscore why a stay is justified here. On the merits, they point to no justification for sustaining a federal implementation plan ("Plan") after half of its factual basis is invalidated. Nor do they provide any justification for continuing to include iron and steel in the Plan when the majority of the data on which that decision was based is also proven wrong. Nor does any respondent offer a legal justification for EPA's reheat furnace and boiler requirements for the iron and steel industry, which violate black letter requirements of the Clean Air Act and have no basis in the proposed rule. These infirmities, combined with the many others that have been raised by applicants already, demonstrate that the Plan is likely to be vacated and, if not, subject to *certiorari* review.

Despite the Plan's infirmities, U. S. Steel must incur substantial costs now to prepare for compliance and commit to actions that cannot be revoked or remedied in the event of a favorable ruling. These include not just spending millions on unnecessary testing and engineering, but shutting down necessary equipment to perform modifications for this testing and obtaining permits that will impose their own obligations on U. S. Steel. These costs and burdens are not just unnecessary,

they are also not justified by any countervailing public benefit. The only value any respondent has tried to place on continued enforcement of the Plan is emission reduction, which for iron and steel will not occur for years even under the Plan's own terms.

The entire Plan is likely to be vacated, but the equities in favor of stay of the iron and steel regulations in the Plan are particularly stark. Therefore, U. S. Steel respectfully requests that the Court stay the iron and steel requirements in EPA's Plan pending judicial review.

STANDARD OF REVIEW

While the standards for stay and injunction are related, respondents err when they attempt to transform U. S. Steel's application for stay into one for injunction. *See, e.g.*, EPA Response at 14. In *Nken v. Holder*, the Court rejected this same contention and reaffirmed the distinction between an injunction and a stay. 556 U.S. 418, 428 (2009) (quotations omitted). As the Court's opinion makes clear, a stay remains "part of [the Court's] traditional equipment for the administration of justice" and not subject to the heightened standard for issuance of an injunction. *Id.* at 421.

STATEMENT

I. Respondents Cannot Defend a Plan Built on Plain Error.

Respondents underplay the significance the Circuit Court stays of EPAs disapproval of 12 state implementation plans (the "SIP Disapprovals"). The stays

not only "undermine" the Plan by showing that it will not accomplish what EPA intended, EPA Response at 17, they remove the factual basis for EPA's entire determination of significant contribution for all States, including the 11 still subject to the Plan.

As EPA itself explains, the Plan uses an "analytical framework" that bases emission reductions on "representative cost thresholds." Response at 6-7. These representative cost thresholds, in turn, are determined "for the covered region." 88 Fed. Reg. at 36,660; *see also id.* at 36,676 (the Plan "identifies a uniform level of emissions reduction that the covered sources *in the linked upwind states* can achieve that cost-effectively delivers improvement in air quality at downwind receptors on a regional scale") (emphasis added). Specifically, EPA determined what emission reductions would be required from each industry by estimating the total emission reductions and total costs of each control strategy applied to all of the "emissions units estimated to be captured by the applicability criteria." 88 Fed. Reg. at 36,738. Removing 12 States' worth of data necessarily alters that calculus.[2] This interconnectedness, where the costs and emissions reductions sources in one state can achieve affects the limit that will be imposed in other states, was intentional, and is at the heart of EPA's argument that its "uniform"

[2] The one exception to this is Nevada, which, as EPA notes, had no non-EGU sources that met the applicability criteria. 88 Fed. Reg. at 36,739, n.233.

approach is equitable. *See EPA v. EMA Homer City Generation, L.P.*, 572 U.S. 489, 501-502 (2014). EPA was of course not required to define significant contribution in this way, but having done so, it cannot avoid the consequences of its choice.

Perhaps recognizing the flaws in the Plan, the Respondent States try to recast EPA's assertions of the "vital" necessity of uniform control stringency across all upwind States as a mere "observation" of the Court's conclusion in *EME Homer* that EPA "may" adopt such an approach. State Response at 19-20. But EPA's words speak for themselves. While EPA cites the Court's opinion in *EME Homer*, there is no question that EPA is asserting the vital necessity of applying the Plan "across all jurisdictions" that are "[w]ithin the broad upwind region covered by this rule." 88 Fed. Reg. at 36,691. This is because, as discussed above, the EPA chose to apply "a uniform level of control stringency" based on the assumed regulation of all these jurisdictions. *Id.* The fact that the cost thresholds EPA applies to the remaining 11 States are still "uniform" is no justification for applying the wrong thresholds. Nor does uniform application to only 11 States address the free rider problem, which the States themselves concede the current partial Plan allows to "inequitably continue." State Response at 20.

This issue is also not procedurally barred. While EPA asserts it could not have been raised in public comments because the SIP Disapproval stays "had not

yet occurred," EPA Response at 18, the legal infirmities in EPA's SIP Disapprovals were well known before seven Circuit Courts issued stays. U. S. Steel expressly raised in its comments that EPA did not have the authority to mandate emission limits because States had submitted adequate SIPs. USS FIP Comments at 111, App.528. Others raised similar objections during public comment. *See* Ohio Reply at 8-10, AF&P Reply at 10-11. That seven Circuit Courts agreed that petitioners are likely to prevail on the merits of challenges to the SIP Disapprovals confirms the accuracy of these earlier public comments, but did not preclude EPA from addressing the issue before promulgating the final Plan.

While the SIP Disapproval stays were not necessary to raise the deficiency in EPA's statutory authority to promulgate the Plan, respondents are also wrong when they assert that the "post-promulgation" SIP Disapprovals have no bearing on stay of the Plan at all. *See, e.g.*, EPA Response at 18. First, as others have pointed out, not all stays were "post-promulgation." *See* Ohio Reply at 10-11, Kinder Morgan Reply at 6, AF&P Reply at 4-5. Second, while, as discussed above, the SIP Disapprovals were invalid even before seven Circuit Courts stayed them for 12 States, the Circuit Court's orders do not just indicate likelihood of success of the merits, they bar EPA's SIP Disapprovals for 12 States from taking effect. This itself impacts EPA's statutory authority to promulgate the Plan for these States. 42 U.S.C. § 7410(c). EPA has itself recognized it lacks authority to

apply the Plan in 12 States and issued its own stays of the Plan. 88 Fed. Reg. 49,295 (July 31, 2023); 88 Fed. Reg. 67,102 (Sept. 29, 2023). What EPA has refused to do is recognize that the lack of authority to promulgate a federal plan for over half the States it used to justify the emission controls in the Plan fundamentally alters the entire Plan and renders what is left arbitrary and capricious.

Finally, while respondents try to defend as "rational" (if no longer equitable) the remnants of the Plan by reference to their other response briefs, *see, e.g.*, EPA Response at 18, this issue is amply addressed in U. S. Steel's Application for Stay and the replies of the other applicants. *See* Reply, *Ohio, et al. v. EPA, et al.*, Case No. 23A349, at 3-8, 11-15 ("Ohio Reply"); Reply, *Kinder Morgan, Inc., et al. v. EPA, et al.*, Case No. 23A350, at 5-7 ("Kinder Morgan Reply"); Reply, *American Forest & Paper Assoc., et al. v. EPA, et al.*, Case No. 23A351, at 4-9 ("AF&P Reply").

EPA cannot sustain the Plan after over half the factual predicate for it is shown to be false. Having already recognized that it lacks authority to promulgate the Plan for 12 States, it cannot justify continuing to apply the rest.

II. Respondents Offer No Defense to the Plan's Violation of Cooperative Federalism.

While EPA is required to interpret the Clean Air Act with a "view to [its] place in the overall statutory scheme," *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302,

322 (2014) (quotation omitted), no respondent attempts to defend the Plan as actually advancing cooperative federalism. Instead, they try to defend EPA's hostile takeover of implementation plan authority by arguing individual provisions and decisions, taken out of context, do not prohibit EPA's actions. EPA asserts, for example, that the Clean Air Act does not require it to wait 2 years after disapproval of a state plan to promulgate a federal plan, and that it does not require EPA to consider its own years-long delay in deciding when to issue a federal plan. Response at 19. But nothing in these provisions sanctions EPA attempting to thwart legitimate good faith efforts by the States to retain their primary role in developing state implementation plans. *See* Ohio Reply at 4-8. EPA asserts that the Clean Air Act authorizes it to shorten state plan submission deadlines after a finding that it is necessary to do so. Response at 20. But EPA did not do so here. Here, EPA waited years to address state plans that had been timely submitted, used new modeling to move the goalposts on the States to facially justify invalid SIP Disapprovals, then rushed to promulgate a federal plan before any review of its SIP Disapprovals could occur. *See* Ohio Reply at 4-8; *see also* App.653-57 (discussing Minnesota's SIP submission as an example of how EPA moved the goalposts on the States after they submitted their plans).

The State Respondents further argue the Clean Air Act does not require EPA to approve deficient state plans. State Response at 15. But that is also not what

happened here. Here, States submitted plans that satisfied the requirements of the Clean Air Act. EPA then waited years to approve them, during which it developed new modeling it asserted could be used to supersede the States' analyses. *See, e.g.* Unpublished Order, *Texas v. EPA*, Case No. 23-60069, ECF 269-1, 2023 U.S. App. LEXIS 13898, at *24-*25 (5th Cir. May 1) (*per curiam*).

The State Respondents' references to the Cross-State Air Pollution Rule ("CSAPR") only underscore how far afield the Plan is from honoring the cooperative federalism principles embodied in the Clean Air Act. There, EPA issued new standards for ozone and particulate matter in 1997. By 2005, no State had submitted a plan, and EPA therefore issued a finding of disapproval. 75 Fed. Reg. 42,210, 45,341-42 (Oct. 1, 2010); *see also* 70 Fed. Reg. 21,147 (May 25, 2005). EPA's 2010 proposal was hardly contemporaneous with this finding. Further, while the final rule "rescinded approvals for 22" States, this was because of the "unusual circumstance" presented by that case, where EPA had relied on a rule for approval (the Clean Air Interstate Rule or "CAIR"), which the courts subsequently invalidated, requiring EPA to invoke 42 U.S.C. § 7410(k)(6) to correct this error in its original approvals. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 135, n.12 (D.C. Cir. 2015). Again, no such circumstance is present here.

While, as discussed below, the Plan violated black-letter statutory requirements, EPA is obligated to do more than avoid violating express statutory prohibitions. It must also honor the spirit and purpose of the statutes it administers. The Plan fails in this respect.

III. EPA Did Not Support the Regulation of Iron and Steel Mills.

At the start of its rulemaking, EPA developed a process to screen for industries that should be subject to regulation. This was done based on the "potentially controllable emissions" of each industry, which EPA used to identify industries that would be the "most impactful" to regulate by affording "the most emissions reductions." Screening Assessment at 2, App.533.

There is no question that EPA vastly overcounted the iron and steel emissions that were "potentially controllable" and therefore how "impactful" regulation of the iron and steel industry would be. Respondents does not even attempt to defend the accuracy of the Screening Assessment. Instead, EPA argues that this threshold determination was somehow irrelevant because it was "simply the first step EPA use to identify high-emitting industries" and was not used to establish the final emission limitations. EPA Response at 22. But just because the Screening Assessment was not the only step in EPA's process does not mean it was irrelevant, or that EPA can ignore basic errors in it. As EPA concedes, it was "[t]he Screening Assessment [that] identified iron and steel mills as industries that

warranted further evaluation because they [had] impacts above the applicable air quality thresholds." EPA Response at 22. Indeed, EPA screened out 32 of 41 non-EGU industries at this initial stage. *See* Screening Assessment at 25, Appendix A, Table A-3, App.556.

EPA tries to minimize its error by asserting that iron and steel "involves large-scale combustion." Response at 22. But this was not the threshold EPA used to identify industries for regulation. Many industries involve large-scale combustion and were excluded by the Screening Assessment because their "potentially controllable emissions" were not significantly impactful. *See* Screening Assessment at 25, Appendix A, Table A-3, App.556 (eliminating one industry with almost twice the ozone season emissions as iron and steel). And EPA does not contend that, after eliminating the numerous emission sources that in fact lacked "technically feasible and cost effective" control options, Response at 11, iron and steel would still exceed the Screening Assessment's thresholds.

EPA also cites a misleading statement in its Response to Comments that the Agency's finding that there were no technically feasible and cost effective emission controls for the majority of emission sources at iron and steel mills "did not contradict its finding that the iron and steel industry is a source of significant contribution." EPA Response at 23 (citing RTC at 128). "Significant contribution," is relevant to later steps in the process, not the Screening

Assessment, as EPA itself takes pains to point out. EPA Response at 22 ("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.'") (quoting RTC at 99)). The Screening Assessment, as noted above, was based on "potentially controllable emissions," which EPA used to determine "the most impactful industries" based not on their total emissions but on their ability to "make meaningful air quality improvements at the downwind receptors at a marginal cost threshold." Screening Assessment at 2, App.55. These findings are clearly affected by the technical feasibility and cost of emission controls.

This issue is also not procedurally barred. It is not clear if EPA includes this issue in the "challenges to the lawfulness of EPA's approach" that it incorrectly states are procedurally barred, EPA Response at 20-21, but the adequacy of EPA's Screening Assessment was squarely raised in U. S. Steel's comments. *See* USS FIP Comments at 12-14, App.429-31.

Removing the emission units from the Screening Assessment for which EPA lacked any data to claim "potentially controllable emissions" would have had a significant impact on the outcome of the assessment. Iron and steel was already the smallest-emitting industry included at the Screening Assessment stage, and this was before EPA recognized that most emission sources at these facilities did not

have potentially controllable emissions. Had EPA corrected the errors in its Screening Assessment, rather than simply dismissing them as irrelevant, it would likely have been unable to justify the inclusion of iron and steel. At a minimum, it cannot justify the inclusion of iron and steel on the current record.

IV. The Plan's Iron and Steel Requirements Violate the Clean Air Act.

The iron and steel requirements in the Plan (covering reheat furnaces and boilers) violate explicit requirements of the Clean Air Act. The reheat furnace requirements have no basis in the proposed rule. The most EPA can say is that a different test-and-set approach was proposed for a different type of emission unit in a different industry in the proposed rule. EPA Response at 26. This does not provide adequate notice that "EPA could adopt a similar approach for other units with similar variability." *Id.* EPA cites no authority for such a stretch of the logical outgrowth test, and adopting it would deprive the public notice of any meaning.

The test-and-set approach for reheat furnaces also contains material differences from the approach proposed for metal ore mining. Most significantly, the metal ore mining approach requires a final rulemaking to establish an enforceable emission limit. *See, e.g.*, 40 CFR 42.1235(b)(1)(ii)(A)(1)-(7). The reheat furnace requirement has EPA setting emission limits in "a separate adjudicatory process." EPA Response at 28. This violates the explicit requirement

that any promulgation or revision of an implementation plan by the Administrator under 42 U.S.C. § 7410(c) be proposed and promulgated through notice in the Federal Register. 42 U.S.C. § 7607(d)(1)(B) and (d)(3). This is not mere paperwork. In the Clean Air Act, Congress put particular care into establishing a rulemaking process that ensures both adequate public participation (*see* 42 U.S.C. § 7607(d)(2)-(5)) and the creation of an adequate record for judicial review (*see* 42 U.S.C. § 7607(d)(6)-(8)). These are necessary protections against ineffective regulation and administrative overreach. While EPA asserts its separate process will have "procedural protections, including deadlines for EPA to act, notice and a requirement that EPA publicly document the basis for its decision," EPA offers no assurance that they will satisfy the goals of the Clean Air Act (where for example, is the adequate record for judicial review) and in any event, EPA does not have the authority to develop its own procedure outside 42 U.S.C. § 7607(d). The examples EPA cites of adjudicatory procedures in various other regulations are not to the contrary. None involve setting emission limitation outside of the Clean Air Act's express rulemaking process and the ability to administratively approve alternative monitoring, recordkeeping requirements, or appeal permitting decisions is not comparable to establishing the emission limitations that are the basis of the Plan.

EPA asserts that it is really promulgating a "40%-reduction requirement" so it does not need to follow 42 U.S.C. § 7607(d) in merely translating the percent

reduction into a numeric limit. EPA Response at 28. Not so. The Plan imposes a design requirement of "at least a 40% reduction." 88 Fed. Reg. at 36,879, 40 CFR 52.43(c). The emission limit is to be set based on a work plan that can justify a higher or lower limit. *Id.* at 40 CFR 52.43(d)(2) and (3). So the "adjudicatory process" will involve far more than mere translation. Further, a percent reduction requirement only has meaning in comparison to a baseline. And the Plan does not establish the baseline either.

The boiler and reheat requirements in the Plan are also notable for being creations completely of the final rulemaking, having no footing in the proposal that was provided for public comment. EPA asserts that it proposed two different tests for applicability, "production capacity" or "an emissions threshold." EPA Response at 26. But neither of these is design capacity, which is the problem with the adequacy of EPA's notice. Nor do respondents contest that these regulations capture units that burn process gases, like blast furnace gas and coke oven gas, that introduce technical problems EPA has not adequately addressed in the Plan.

EPA did not afford notice and opportunity for comment on the most fundamental elements of its reheat furnace and boiler regulations for iron and steel mills. This was arbitrary and capricious and violated the procedural requirements of the Clean Air Act. *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 508, 543 (D.C. Cir. 1983); 42 U.S.C. §7607(d). It then promulgated a

procedure for reheat furnaces that allows the Agency to circumvent explicit statutory requirements designed to ensure adequate public participation and judicial review of its actions. This was both arbitrary and capricious and in excess of EPA's statutory authority.

V. This Case Involves Certiorari-Worthy Issues

While the grounds for certiorari will naturally depend on the outcome of the case before the D.C. Circuit, EPA is wrong to assert that the issues presented are only "case-specific" or "industry-specific" or even "highly complex and technical." Response at 29. As U. S. Steel and others have amply briefed, this case presents a significant and substantial overreach of the federal EPA into the province and primary authority of the States to regulate air pollution that crosses state borders. *See* Ohio Reply at 3-15, Kinder Morgal Reply at 5-7, AF&P Reply at 4-9. This goes to the very heart of the Clean Air Act and to whether the cooperative federalism structure on which was based will be a bedrock principle on which EPA must build its regulations or whether it is merely a notion, with no substantive effect.

EPA's creative circumvention of the notice and comment rulemaking requirements of the Clean Air Act by using a test-and-set approach may here be targeted to iron and steel, but has wide-ranging relevance, not just to the scope and meaning of the rulemaking requirements of the Clean Air Act, but to the

Administrative Procedure Act as well, on which the provisions of 42 U.S.C. § 7607(d) were largely based.

These issues are appropriate for Supreme Court review, and adequately presented below such that, in the event of an adverse decision, there is a likelihood that at least four Members of the Court would grant review.

VI. Absent a Stay, U. S. Steel Will Suffer Imminent Irreparable Harm.

EPA is wrong when it asserts U. S. Steel relies "solely on its alleged compliance costs" for irreparable injury. While these are sufficient, they are not the only harm. *See* USS Application at 23-24 (discussing the need to modify facilities to install testing equipment, shut down production, collect testing data, and apply for new permits).

Further, while EPA and the Public Interest Respondents ("PIR") dispute the amount of costs that must be incurred during judicial review, there is no dispute that significant steps must take place during judicial review, and that these steps involve have both irreparable costs and commitments to regulatory compliance obligations. EPA itself warned owners and operators that they should "begin engineering and financial planning" as of the date of *the proposed rule* to be able to meet EPA's implementation timetable. 87 Fed. Reg. at 20,036; *see also* PIR Response at 2 (action by iron and steel facilities is "urgently needed" for them to be able to meet the emission limitations that "do not phase in for several years").

As EPA states, for example, U. S. Steel's "work plan," which is to provide the data, modeling, engineering, and plans for establishing emission limitations for rehear furnaces, is "due August 5, 2024." EPA Response at 30. No one disputes that this extensive work must therefore be started this year, as it has. PIR's own declarant recognizes that permitting and engineering for the emissions sampling infrastructure required by the Plan must occur now, and indeed he argues for even earlier commencement than U. S. Steel's own schedule. Stroudt Decl. at ¶ 12.

U. S. Steel has provided a detailed project-level assessment of the steps and costs that will need to be incurred. Piscitelli Decl. at ¶¶3, 11-20, App.715, 717-720. The PIR's declarant, who has not visited U. S. Steel's facility, challenges the details of that assessment based on comparisons to when electric generating units did more than two decades ago in response to another rulemaking. Retrofitting a reheat furnace located in the middle of a building, however, involves very different considerations from a stand-alone stack at an EGU. *See* Second Piscitelli Decl. at ¶8, Supp.App.002. While, for example, PIR's Declarant asserts initial engineering costs should not be expensive, this was based on assumption about testing of EGU stacks, which are much simpler to address than reheat furnaces located in the middle of an operating steel facility. *See id.* U. S. Steel has already had to commit over $1 million to the engineering and design for one facility alone. *Id.* at ¶13, Supp.App.004.

There also remains a high likelihood of labor shortages that will further extend the deadlines U. S. Steel predicted. PIR's own Declarant cites to a labor buildup for EGUs that took years to develop, well past the time the Plan affords for iron and steel. *See* Stroudt Decl. at ¶18. This example also involved EGUs, which required general worker and boilermaker availability. For the specialized labor required to work on reheat furnaces, the labor shortage is anticipated to be far more significant and harder to address through a buildup in the supply of labor. *See* Second Piscitelli Decl. at ¶10, Supp.App.003.

Further, no respondent asserts that the costs, shutdowns, and new permitting obligations that will be required during judicial review are reversible or that their costs will be recoverable, when the Plan is vacated.

U. S. Steel faces immediate and certain injuries from the Plan while judicial review is pending in the form of compliance with an illegal rule, expenditure of millions in costs, diversion of specialized resources from other projects, and the imposition of permitting obligations that would not otherwise be required. Piscitelli Decl. at ¶¶6-10, App.716-17; Second Piscitelli Decl. at ¶¶7-14, Supp.App.002-005. These injuries are irreparable and justify a stay pending judicial review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) ("complying with a regulation later held invalid almost always produces the

irreparable harm of nonrecoverable compliance costs") (Scalia, J., concurring in part and in the judgment).

VII. A Stay Is in the Public Interest.

Respondents try to have it both ways, arguing first that there is no irreparable injury because U. S. Steel has ample time to implement controls after judicial review, but then arguing that a stay that alleviates U. S. Steel of the need to implement controls during judicial review will necessarily delay implementation beyond the May 2026 deadline. *See, e.g.* EPA Response at 31. Respondents have it backwards. While U. S. Steel must prepare for compliance now, there are no emission reductions required by the Plan from iron and steel sources until May 2026 at the earliest, "with the potential for compliance extensions of up to three years." EPA Response at 29-30.

Any further extensions to address delays arising from a partial vacatur or remand without vacatur, or delays arising from the stays of the SIP disapproval actions that have already been granted, or even a stay of this Plan issued by the Court, are academic at this time, and would be addressed in the future regulatory action creating such extensions.

Finally, EPA's assertion that there is public interest in requiring "the use of emissions-control mechanisms" that EPA lacks the legal authority to impose is unsupported and incorrect. Response at 33. The public interest lies in seeing the

laws properly implemented and administered. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The Plan seeks to impose immediate and irreversible burdens through a clearly illegal rule. The result will be needless public expenditures on a Plan likely to be vacated. On the other hand, denying a stay will create an incentive directly opposed to the public interest by encouraging EPA and other agencies to promulgate rules, not in the hopes of withstanding judicial scrutiny, but in the hope of inflicting enough irreversible commitments while judicial review is pending to achieve their policy goals regardless of the outcome.

A stay is necessary to prevent the waste of private and public resources, and to avoid the implementation of a clearly unlawful rule pending judicial review.

CONCLUSION

EPA's Plan is likely to be vacated, in particular as applied to iron and steel facilities. Yet U. S. Steel is required to commit scarce specialized resources and expend millions and commit to permitting obligations while judicial review is pending, none of which will be reparable after a decision is made. A stay will preserve the *status quo* and avoid these injuries without any adverse environmental impact. Under these circumstances, a stay of the Plan, and in particular the iron and steel requirements, is justified. For the foregoing reasons, Applicant United

States Steel Corporation respectfully requests that the Court stay the Plan for reheat furnaces (40 CFR 52.43) and boilers at iron and steel mills (40 CFR 52.45).

November 3, 2023

Respectfully Submitted,

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Second Declaration of Alexis Piscitelli

I, Alexis Piscitelli, am over 18 years of age and make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am the Senior Director Environmental for North American Flat Roll. at United States Steel Corporation ("U. S. Steel"), where I am responsible for ensuring compliance and reporting requirements are met in accordance with federal, state and local environmental permits and regulations. I have been employed by U. S. Steel for over 26 years and have advanced through various positions.

2. I am providing this second declaration on behalf of U. S. Steel's Application for Stay of the United States Environmental Protection Agency's ("EPA's") Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards ("Good Neighbor Plan" or "Final Rule"), 88 Fed. Reg. 36,654 (June 5, 2023).

3. Previously, I provided a declaration on behalf of U. S. Steel's Motion for Stay filed in the case *U. S. Steel v. EPA*, Case No. 23-1207 (D.C. Cir.).

4. As further explained in this declaration, the Final Rule will require immediate actions by U. S. Steel, including either curtailing the operation of reheat furnaces and boilers at U. S. Steel, or the expenditure of millions of dollars to prepare now for implementation of the Good Neighbor Plan.

Either or both of these actions will impose significant additional cost on U. S. Steel. Curtailing or the potential shutdown of the reheat furnaces would impact downstream units and ultimately customers. Curtailing the boilers will reduce electricity generation and increase the demand for outside purchased power, increasing costs and putting additional strain on the grid.

5. The Good Neighbor Plan also omits important flexibilities U. S. Steel uses to effectively and efficiently manage its environmental obligations.

6. This declaration is based on my personal knowledge of facts and information pertaining to U. S. Steel's business and the implications of EPA's Good Neighbor Plan. My knowledge is based on my history with U. S. Steel and analysis U. S. Steel has conducted of the Good Neighbor Plan.

I. EGUs are Different than Hot Strip Mills

7. I have reviewed the Declaration of James E. Staudt, PH.D., CFA submitted by Public Interest Respondents in their Response in Opposition to Emergency Application for Stay of Final Agency Action Pending Judicial Review. Dr. Straudt's assessment does not adequately reflect the circumstances specific to reheat furnaces.

8. Existing reheat furnaces at the Gary Hot Strip Mill are significantly different from the power plant boilers referenced in Dr. Straudt's declaration and present unique challenges with access to safely test. Specifically, the

furnace stacks at these reheat furnaces exit the middle of a building roof and are not designed for access. Access will require engineering to design and install including evaluation of the existing structure. Shutdown of reheat furnaces involves substantial impacts, both on the ability to maintain production and to other systems, such as refractory, which require specific maintenance and repair during a shutdown.

9. My prior Declaration in Support of U. S. Steel's Motion for Stay included consideration of the application of the Good Neighbor Plan's requirements to reheat furnaces, and it continues to reflect my best professional judgment of the costs and schedule that will be needed for these units.

II. Contractor Availability will be Limited

10. U. S. Steel has also had difficulty finding and scheduling qualified union contractors to work on significant projects at our facilities. For example, there are four reheat furnaces at Gary, each will require a significant outage to retrofit the equipment with low NOx burners or the equivalent. We anticipate the availability of qualified union workers will become even a larger issue with multiple sources being impacted by the Good Neighbor Plan. Coupled with the Infrastructure Bill, availability of qualified union tradesman in Northwest Indiana will be significantly limited.

III. Implementation of the Good Neighbor Plan Requires U. S. Steel to Incur Immediate and Significant Costs

11. Among other things, the Good Neighbor Plan as promulgated imposes requirements on certain reheat furnaces at iron and steel mills, including the requirement to design a low-NOx burner or alternative low-NOx technology to achieve NOx emission reductions of at least 40% from baseline emission levels measured during performance testing that meets the criteria set forth in the rule. Additional obligations include emissions monitoring, recordkeeping, and reporting requirements.

12. To comply with the Good Neighbor Plan, U. S. Steel will need to take reheat furnaces and boilers offline while they are retrofitted. This will involve multiple outages that would be unnecessary without the Good Neighbor Plan. These outages will impact production.

13. Preauthorization Engineering Expenses to develop the project at Gary Works, including burner design, equipment design modification, testing access design and installation is estimated to cost over $1 million. A stay of the FIP is necessary to avoid these unnecessary costs and outages until a final decision is reached on what obligations should apply to reheat furnaces and boilers at iron and steel mills.

14. Without a stay, U. S. Steel will incur significant and irreparable harm in reconfiguring the hot strip mill at Gary Works to allow for baseline

performance testing and implementing the rule's requirements at the Company.

15. A stay of the Good Neighbor Plan will mitigate these harms.

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

Executed November 3, 2023.

Alexis Piscitelli
Sr. Director Environmental – NAFR
United States Steel Corporation