

Enclosure

The EPA's Basis for Partially Denying Petitions for Reconsideration of the Good Neighbor Plan on Grounds Related to Judicial Stays of the SIP Disapproval Action as to 12 States

The Environmental Protection Agency (EPA) is partially denying four petitions to reconsider or modify the Good Neighbor Plan (the "Plan" or "Rule"). These petitions object to the Plan on two grounds. First, the petitions assert that because the Plan is suspended in several states due to preliminary judicial stays of a predicate action, it should not apply in the remaining states. Second, the petitions assert that the Plan should not have been published in the *Federal Register* because it included states subject to these judicial stays. Under the Clean Air Act (CAA or the "Act"), the EPA must convene a proceeding for reconsideration where (1) it was impracticable to raise the objection during the comment period or the grounds for the objection arose after the comment period but during the period for judicial review; and (2) the objection is of central relevance to the outcome of the rule. CAA section 307(d)(7)(B). The Agency concludes that, with respect to the issues discussed herein, while the petitions satisfy the first criterion for mandatory reconsideration, they do not satisfy the second because the objections they raise are not "centrally relevant" to the outcome of the Plan. Consistent with the statute and case law, the Plan imposes obligations on sources in each individual state. Because the methodology for defining those obligations ultimately relies on a determination regarding what emissions reductions each type of regulated source can cost-effectively achieve, the obligations set for sources in each state are independent of the number of states included in the Plan. Accordingly, the fact that obligations are suspended with regard to some states does not impact the Plan's conclusions as they apply in other states. To the extent the Petitioners seek discretionary reconsideration under the Clean Air Act or the Administrative Procedure Act, the EPA denies those requests for the same reasons.¹

The good neighbor provision of the CAA requires "each state" to have a plan in place that "contain[s] adequate provisions prohibiting" sources within the state from "contribut[ing] significantly" to nonattainment or interfering with maintenance of air quality standards in downwind states. CAA section 110(a)(2)(D). The provision addresses the issue of transport of pollution from one state to another. For ozone, this has long been understood to be a "collective contribution" problem in which emissions from many sources over a wide geographic area combine to create unhealthy air in areas that may be hundreds of miles away. Thus, the EPA has administered this requirement for ozone through a four-step framework, upheld in *EPA v EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) ("*EME Homer City*"), that recognizes both the

¹ The EPA is not acting on the remainder of these petitions or other petitions for reconsideration of the Plan at this time. While the EPA will continue to review other objections raised in the petitions for reconsideration, the EPA is acting first to address these two related questions because they were raised by multiple petitions and have immediate and broad relevance. Both questions concern whether the EPA should continue to implement the Plan at all in several states, so these petitions, if their arguments were substantiated, would warrant substantial relief that is not specific to individual states or industries. Accordingly, the EPA has prioritized taking final action on these portions of the petitions for reconsideration while it continues to review the remaining issues raised.

overlapping and interwoven pollution linkages between states and the statutory direction for “each state” to prohibit its own significant contribution.

In the Plan, the EPA applied this four-step framework for the 2015 air quality standards for ozone. In doing so, the Agency: (1) identified downwind areas that were not attaining or at risk of not attaining the air quality standard; (2) identified which upwind states’ pollution “contributes” to each of those downwind areas; (3) determined the pollution control technologies that could be used cost-effectively by sources in those states to reduce this pollution and identified the level of stringency associated with those technologies that would not “overcontrol” those sources; and (4) established requirements for sources in those states included in the Plan² to achieve emissions reductions up to the identified stringency. The framework yields an “amount” of pollution for “each state” that must be “prohibited,” CAA section 110(a)(2)(D), based on the amounts of pollution that would be avoided in that state by applying the control technologies the EPA determined were cost-effective for the covered industries. The amounts to be prohibited are thus premised on reasonable levels of pollution control upwind rather than on a specific, aggregate quantum of ozone reduction that must be achieved downwind. *Michigan v. EPA*, 213 F.3d 663, 674-80 (D.C. Cir. 2000).

Under this framework, the size of each state’s emission reduction obligation under the Plan, and the resulting improvement in air quality downwind, depends on the particular sources present in that state and the level of pollution reduction those sources are already achieving. If a state’s sources are already well-controlled, they will have to do less to meet the EPA’s defined level of control stringency; if the state’s sources have lagged behind in installing available emissions controls, they will have to do more. But these state-specific obligations derive from the application of common, uniform levels of emission control stringency calculated for each type of source that can be fairly replicated in any state to which the Plan applies. *EME Homer City*, 572 U.S. at 519-20. In this way, the Plan prohibits each state’s “significant contribution” to downwind ozone problems in a “permissible, workable, and equitable” manner. *Id.* at 524.

Given this statutory structure and regulatory framework, the Plan is “modular” by nature, defining and implementing the obligations for each state. Thus, Petitioners’ objections are not centrally relevant to the outcome of the rule. First, in line with the statutory text, structure, and case law, the EPA determines the “significant contribution” that must be prohibited at the individual state level. *North Carolina v. EPA*, 531 F.3d 896, 906-08, 920-21 (D.C. Cir. 2008). None of the steps in the four-step framework differ based on the number of states included in the Plan. For example, the control technologies and cost-effectiveness figures the EPA considers at Step 3 do not depend in any way on the number of states included. Instead, the Plan regulates the large emitting sources in each included state (including both new and existing sources meeting the relevant criteria), up to a uniform level of pollution control that is common across

² The Plan included each state for which the EPA was required to promulgate a federal implementation plan, excepting those states that the EPA found were contributing at Step 2 but for which the EPA had yet to complete adequate rulemaking process. Those five states are included in a supplemental rulemaking proposal that is currently undergoing public comment. See 89 FR 12666 (Feb. 16, 2024).

sources of that type in the states that are linked. Whether the four-step framework is applied to two states or twenty, it would yield the same obligations for included states. That means that when the number of states in the Plan changes from the number included at promulgation, which is historically common and consistent with states' authority under the Act to replace federal plans with state plans, the emissions reduction obligations of the states remaining in the Plan remain exactly the same, and the obligations of states joining the Plan are set by the same rules that were applied to the states already included.

Second, given the state-specific statutory mandate, for those components of the Plan that necessitated consideration of multi-state effects, the EPA was careful to avoid creating any interdependency among the particular states included in the Plan, both in the Agency's analytical methodology and in the Plan's regulatory requirements. For example, when evaluating the Plan to ensure it did not "overcontrol" (i.e., yield more reductions than necessary), the EPA did not just look at the states included in the Plan, but at other states the modeling showed were affecting downwind air quality above the "contribution" threshold, even if those states were not included in the Rule (see note 2 above). The EPA found that even making *all* cost-effective reductions available in *all* upwind states (including those not currently under a federal plan) would not constitute overcontrol. Accordingly, requiring available emission reductions in any subset of those states cannot possibly constitute overcontrol of those upwind states. The Plan's regulatory requirements, including the emissions trading program for power plants, also are designed to be fully implementable in each individual state and do not depend on a minimum number of states' participation.

Third, while equity and consistency in obligations among states are at the core of the statute and the EPA's framework, the suspension of the Plan's requirements in some states does not provide a lawful basis to suspend them in others. The EPA has a statutory obligation to address "each state" when it has a federal responsibility to act. Indeed, the goals of equity and consistency extend to the downwind states for whom the good neighbor provision was enacted. The good neighbor provision's requirement of consistency with the rest of the Act, *see* CAA section 110(a)(2)(D)(i), including the air quality attainment schedules that are the "heart" of the Act, *Train v. NRDC*, 421 U.S. 60, 66 (1975), means that each downwind state with identified air quality problems has a statutory right to timely relief from the public health and regulatory burdens of upwind pollution, in proportion to each upwind state's significant contribution to that unhealthy air. It would be contrary to this statutory purpose to revise or suspend the Plan as to upwind States for which it is under a statutory requirement to act merely because the Plan's requirements were suspended for other states.

In short, the objections asserting that the EPA should stay, revise, or withdraw the Plan because the good neighbor obligations of some upwind states included in the Plan are suspended are not centrally relevant to the outcome of the Rule. For those states where the Plan is currently suspended, good neighbor obligations will ultimately be met, either through an approved state plan or a federal plan as necessary. Meanwhile, sources in the remaining upwind states currently regulated by the Plan would be under the same legal obligation to control their pollution even if the EPA developed a federal plan containing just those states or some subset of

them or separate federal plans for each state, and the EPA’s methodology shows they would bear the same actual emission reduction obligations as well. Accordingly, the EPA is partially denying the four petitions for reconsideration. For these same reasons, Petitioners’ requests that the EPA administratively stay the Plan are also denied.

I. Background

On March 15, 2023, the EPA promulgated the Good Neighbor Plan, which established emissions control requirements through federal implementation plans (FIPs) for sources in 23 states to address “good neighbor” obligations under CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), for the 2015 ozone national ambient air quality standards (NAAQS). The Plan published in the *Federal Register* on June 5, 2023 (88 FR 36654). The EPA had previously disapproved 21 states’ state implementation plan (SIP) submissions in a “SIP disapproval” action that published in the *Federal Register* on February 13, 2023 (88 FR 9336) (“SIP Disapproval”). That action formed the exclusive predicate requiring the EPA to issue a federal plan for 20 of the 23 states included in the Plan. CAA section 110(c)(1)(B). For the remaining three states (Pennsylvania, Utah, and Virginia), the EPA’s FIP authority was established when it issued a finding of failure to submit complete plans in 2019 (84 FR 66612; Dec. 5, 2019) (“2019 FFS Action”). See CAA section 110(c)(1)(A).

Multiple parties filed petitions for review of the SIP Disapproval as to specific states in regional circuit courts. The first two petitions for review, from Texas et al., No. 23-60069 (5th Cir.) and Utah, No. 23-9509 (10th Cir.), were filed on February 13, 2023.³ In total, petitions seeking review of the SIP Disapproval were filed as to twelve states. Petitioners in these cases also filed motions to partially stay the SIP Disapproval as to the respective states pending judicial review. The first stay motion, from Texas in No. 23-60069, was filed on March 3, 2023.

After the promulgation of the Plan on March 15, 2023, but prior to its publication in the *Federal Register* on June 5, 2023, three regional circuit courts granted partial stays of the SIP disapproval action pending judicial review as to particular states. As of June 5, 2023, courts had granted stays pending judicial review, or administrative stays pending review of the stay motions, as to five states: Arkansas, Kentucky, Louisiana, Missouri, and Texas.⁴ Eventually, the SIP Disapproval was stayed as to seven additional states, for a total of 12 states, pending judicial review on the merits of petitioners’ challenges.⁵

³ On February 27, 2024, ruling on the EPA’s motion, the Tenth Circuit transferred the petitions for review filed in that circuit to the D.C. Circuit. *Oklahoma ex rel. Drummond v. EPA*, 93 F.4th 1262 (10th Cir. 2024).

⁴ See Unpublished Order, *Texas, et al. v. EPA, et al.*, No. 23-60069 (5th Cir. May 1, 2023) (Louisiana and Texas); Unpublished Order, *Arkansas, et al. v. EPA, et al.*, No. 23-1320 (8th Cir. May 25, 2023) (Arkansas); Unpublished Order, *Missouri v. EPA, et al.*, No. 23-1719 (8th Cir. May 26, 2023) and Unpublished Order, *Union Elec. Co. d/b/a Ameren Missouri v. EPA, et al.*, No. 23-1751 (8th Cir. May 26, 2023) (Missouri); and Unpublished Order, *Kentucky v. EPA*, No. 23-3216 (6th Cir. May 31, 2023) (administrative stay, Kentucky); see also *id.* (6th Cir. July 25, 2023) (judicial stay, Kentucky).

⁵ Unpublished Order, *Texas, et al. v. EPA*, No. 23-60069 (5th Cir. June 8, 2023) (Mississippi); Unpublished Order, *Allete, Inc. v. EPA*, No. 23-1776 (8th Cir. July 5, 2023) (Minnesota); Unpublished Order, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. July 3, 2023) (Nevada); Unpublished Order, *Utah v. EPA*, No. 23-9509, *PacifiCorp v. EPA*, No. 23-

The EPA recognized that for these states, it lacked authority under CAA section 110(c) to implement a FIP while the SIP Disapproval was stayed, because a SIP disapproval (or the EPA's finding of a state's failure to submit a complete SIP submission) is a necessary prerequisite to a FIP.⁶ Therefore, to comply with these orders, the EPA took action to indefinitely suspend the application of the Plan for these 12 states through two interim final rules. 88 FR 49295 (July 31, 2023) ("First IFR"); 88 FR 67102 (September 29, 2023) ("Second IFR"). The EPA explained that if any of those 12 states' SIP disapprovals were ultimately found to be lawful, or the judicial stays were otherwise dissolved, the EPA would need to take subsequent rulemaking action to bring these states back into the Plan. *Id.* at 67103-04.

As to the 11 remaining states for whom the SIP Disapproval or the 2019 FFS Action had not been challenged and which remained in effect, the EPA did not take any action to stay or modify the Plan. These states are: California, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin. The Plan took effect for these states on August 4, 2023, 60 days after publication in the *Federal Register*, as required under the Congressional Review Act for certain rules. 88 FR at 36859.

II. Summary of Petitions for Reconsideration

Following the finalization and publication of the Plan, several parties filed petitions with the EPA seeking reconsideration and/or an administrative stay of the Plan, pursuant to either the Administrative Procedure Act (APA), 5 U.S.C. § 705, or CAA section 307. Under the APA, any party may petition the EPA to reconsider a rule or to promulgate a new rulemaking. 5 U.S.C. § 553(e). In addition, the CAA contains a specific provision requiring the EPA to open a reconsideration proceeding where certain statutory criteria are met and authorizes a time-limited stay of the rule during that proceeding. CAA section 307(d)(7)(B). Four of these petitions expressly sought reconsideration by the Agency on grounds related to the issuance of the judicial orders partially staying the SIP Disapproval as to several of the states covered by the Plan.⁷ These petitions generally argued that it was arbitrary and capricious for the EPA to

9512, *Utah Associated Municipal Power Systems v. EPA*, No. 23-9520, *Oklahoma v. EPA*, No. 23-9514, and *Oklahoma Gas & Electric Co. v. EPA*, No. 23-9521 (10th Cir. July 31, 2023) (Oklahoma and Utah); Unpublished Order, *Alabama v. EPA*, No. 23-11173; *Alabama Power Co. v. EPA*, No. 11196 (11th Cir. August 17, 2023) (Alabama); Unpublished Order, *West Virginia v. EPA*, No. 23-1418 (4th Cir. August 10, 2023) (administrative stay, West Virginia); *see also West Virginia v. EPA*, 90 F.4th 323 (4th Cir. 2024) (judicial stay, West Virginia).

⁶ In the case of Utah, although the EPA disapproved its re-submitted plan, the EPA had independent authority to issue the FIP through the predicate "finding of failure to submit" issued in 2019. *See* 88 FR at 36689. The Tenth Circuit in staying the SIP Disapproval concluded that its stay order precluded the Plan from taking effect for Utah. *State of Utah v. EPA*, 23-9509 (10th Cir.), ECF No. 11016742. The EPA has complied with the Tenth Circuit order by staying the Plan as to Utah. However, it raised this issue to the Tenth Circuit in its merits brief. *Id.* ECF No. 010110917156, at 82-83. That court has since transferred the cases to the D.C. Circuit in response to the EPA's motion. *See* No. 23-9514 (February 16, 2024), ECF 010111002361; and No. 23-9514 (February 27, 2024), ECF 010111006052.

⁷ Several parties filed petitions with the EPA for an administrative stay of the Plan but did not expressly seek reconsideration, and three of these petitions argued for a stay in part based on the change in scope of the Plan resulting from the SIP Disapproval stays. These were filed by a group of Utah utilities lead by PacifiCorp on July 7, 2023; a coalition of industry groups and companies (including America's Power, American Forest & Paper

publish the Plan and continue to apply it to some states while suspending it with respect to other states.

A. *United States Steel Corp.*

On August 4, 2023, United States Steel Corp. (USS) submitted a “Petition for Reconsideration and for Stay” of the Plan (“USS Pet.”). Invoking CAA section 307 and APA section 705, USS claims, among other things, that “[t]he factual circumstances” underlying the Plan “have changed dramatically since the close of the public comment period,” including that “courts have stayed EPA’s disapproval of SIPs for ten States.” USS Pet. at 1. USS asserts that the EPA predicated the Plan on “EGU emissions from 23 States and non-EGU emissions from 20 States,” and that the loss of this “central premise” through judicial stays “justifies an administrative stay and a complete withdrawal or rewrite of the Final Rule.” *Id.* at 7. USS cites passages from the final Plan preamble that it interprets to mean the EPA viewed the Rule as dependent on simultaneous application in specifically 23 states. *Id.* at 6-8. USS maintains that since the EPA conceived of the Plan as a collective solution to a collective problem, the non-operation of the Plan as to a subset of states renders the analysis underlying the Plan’s requirements factually unsupported. *See id.* at 8. Because the stays cover “a large portion of the operations that EPA assumed would be subject to its FIP as it determined what industries to regulate, what costs to consider ‘significant,’ and what emissions reductions to impose,” USS claims that the stays “undermine EPA’s factual support for” the Plan. *Id.* USS states a belief that the preliminary stays of the SIP disapprovals pending judicial review means the Plan will likely never apply in those states. *See id.* at 7. Further, USS maintains that the stays will cause its costs to rise as an electricity consumer, because it views the original scope of the interstate trading program for EGUs as necessary to “maintain a reasonable regulatory cost and to ensure adequate grid reliability.” *Id.* at 8. USS also claims the stays render unreliable the “policy case modeling [that] depended on emission reductions from these States.” *Id.* It concludes,

The FIP reconsideration is necessary to determine whether, in light of the stay of EPA’s SIP Disapproval for many States, and likely vacatur of EPA’s SIP Disapproval, the FIP cannot still be equitably applied to the remaining States. Indeed, given the significant shift in the fundamental facts on which EPA attempted to equitably allocate regulatory burdens since the publication of the FIP, it is likely that reconsideration of the FIP will demonstrate that it must be withdrawn and redone entirely based on new modeling that incorporates the SIPs EPA will likely be unable to disapprove after the pending cases are complete.

Id. at 9.

Association, Midwest Ozone Group, National Rural Electric Cooperative Association, Portland Cement Association, and National Mining Association) on July 17, 2023; and Buckeye Power and Ohio Valley Electric Corporation on August 3, 2023. This denial is limited to the petitions that expressly sought reconsideration of the Plan, but the EPA notes that the petitions for stay did not raise substantive arguments concerning the SIP Disapproval stays distinct from those addressed here.

B. ALLETE, Inc., et al.

On August 4, 2023, ALLETE, Inc., and others (generally Minnesota power companies along with USS and Cleveland Cliffs) (collectively “Allete”) submitted a “Petition for Reconsideration and Stay” of the Plan (“Allete Pet.”) pursuant to CAA section 307. Among other issues, Allete argues that the ten SIP disapproval stays issued by the time of their petition constitute “a substantial likelihood that the FIP will never apply to most or all of these States.” Allete Pet. at 9-10 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Allete maintains that because they obtained a stay of the EPA’s SIP Disapproval as to Minnesota on July 5, 2023, the Plan is ultra vires as to Minnesota and so must be withdrawn.⁸ *Id.* at 8. They maintain that the states under stays “represent a large portion of the emission allowances that EPA assumed would be available for trading in the Group 3 trading program.” *Id.* at 10. They cite passages from the final Plan that they interpret to mean the EPA thought the availability of an interstate trading program for EGUs was essential to the reasonable operation of the Rule in terms of cost and electricity reliability. *Id.* They also maintain that “emissions reductions from these States [with stays] were also a significant factor in the policy cases used by EPA for its IPM modeling with Steps 1 and 2 and its AQAT modeling for Steps 3 and 4.” *Id.* Allete concludes:

EPA must therefore reconsider the FIP and determine whether, in light of the inapplicability of the FIP for the above states pending judicial review (which may extend into the 2024 ozone trading season) and likely permanently, [sic] requires modification or withdrawal of the FIP for those remaining States, as well as the above States.

Id.

C. Arkansas Department of Energy & Environment

The Arkansas Department of Energy & Environment (Arkansas) submitted a “Petition for Reconsideration,” pursuant to CAA section 307, on August 2, 2023 (“Arkansas Pet.”). Arkansas argues that because the EPA’s disapproval of its “SIP submission was stayed by the 8th Circuit on May 25, 2023,” which was “11 days before EPA promulgated the FIP in the *Federal Register* on June 5, 2023 . . . there was no final decision disapproving Arkansas’s SIP in place on the date the FIP was promulgated.” Arkansas Pet. at 4. This lack of predicate, Arkansas says, renders the FIP for Arkansas invalid. *Id.* Arkansas maintains that the FIP for Arkansas must be completely withdrawn and that a suspension of FIP obligations, as the EPA implemented, is inadequate. *See id.*

D. Hybar LLC

Hybar LLC (Hybar), a steel manufacturing facility in Arkansas, pursuant to CAA section 307 and APA section 705, submitted its “Petition for Administrative Reconsideration” on August 4, 2023 (“Hybar Pet.”). Like Arkansas, Hybar argues that the Eighth Circuit’s stay of the SIP disapproval

⁸ The EPA will not address in this denial Allete’s separate contention that the Agency has a nondiscretionary duty to approve Minnesota’s SIP. The lawfulness of the EPA’s SIP disapproval as to Minnesota is the subject of Allete’s petition for review of that action pending currently in the Eighth Circuit, Case No. 23-1779.

for Arkansas removed the legal predicate necessary to promulgate the Plan with respect to Arkansas. Hybar Pet. at 3. It goes on to claim that this “infirmity remains at the core of the Good Neighbor Plan Final Rule, because EPA lacked any authority to publish the federal implementation plan with respect to Arkansas . . .” *Id.*

* * *

As indicated by these summaries, these administrative petitions did not provide a detailed explanation of the manner in which Petitioners believed the Plan’s methodology or conclusions would change in light of the stay of obligations in some states. In the interest of fully resolving these petitions, however, the EPA provides below a detailed review of the aspects of the Plan that could be seen as having relied on some interrelationship between covered states and explains why any such concerns lack merit.

III. Criteria for Granting a Mandatory Petition for Reconsideration

Because at least some Petitioners styled their petitions as requests for mandatory reconsideration pursuant to the requirements of CAA section 307(d)(7)(B), the EPA has analyzed each of these petitions under that test. The EPA would also deny these petitions even if it considered them to be more general petitions for reconsideration or new rulemaking under the APA, for the same reasons explained in this action.

Under section 307(d)(7)(B) of the Act, “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review.” However, “[i]f a person raising an objection can demonstrate . . . that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) *and* if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule.” *Id.* (emphasis added). Thus, the EPA is required to convene a reconsideration proceeding only if the petitioner demonstrates to the EPA both: (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (*i.e.*, within 60 days after publication of the final rulemaking notice in the *Federal Register*, see CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule. CAA section 307(d)(7)(B).⁹

An objection is of “central relevance” to the outcome of a rule “if it provides substantial support for the argument that the regulation should be revised.” See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012) (internal citation and quotation omitted). The EPA “may deny petitions for reconsideration of a rule and provide an explanation for that denial,

⁹ When the EPA grants a petition for mandatory reconsideration under section 307(d)(7)(B), typically the Agency would publish a proposal on reconsideration for public comment and then take final action on that proposal after considering public comment. Granting reconsideration does not automatically stay the underlying rule, and the EPA may stay the effectiveness of a rule for no longer than 3 months pending reconsideration. CAA section 307(d)(7)(B).

including by providing support for that decision, without triggering a new round of notice and comment for the rule.” *Id.* at 126.

As explained in this final action, the EPA is partially denying these four petitions for reconsideration (collectively, “the Petitions”) because they fail to meet the statutory criteria for mandatory reconsideration under CAA section 307(d)(7)(B) and fail to identify any other basis for reopening or revising the Plan under the Act or the APA. As this document explains, the fact that some states’ obligations are suspended in light of the judicial stay orders does not alter the methodology or conclusions underlying the application of the Plan to the 11 states in which it presently applies or as to any other state. In other words, the EPA concludes that based upon the methodology the Agency used in promulgating the Plan, the obligations on the states currently subject to the Plan do not depend upon the number of states subject to the Plan. Accordingly, the EPA finds that these petitions provide no basis for mandatory or discretionary reconsideration of the Plan and is taking action to partially deny the requests for reconsideration.

This document considers two issues raised by Petitioners: first, whether reconsideration is warranted on the basis of the changes in the number of states covered due to judicial stays; and second, whether reconsideration is warranted on the basis that the Plan was published in the *Federal Register* following some of the judicial stays.

IV. Evaluation of the Petitions for Reconsideration, Issue 1: Reconsideration Is Not Warranted on the Basis of Changes in the Scope of States Covered by the Plan.

The EPA considers each of the mandatory statutory criteria for reconsideration in turn. We conclude that Petitioners satisfy the first criterion (grounds arose after the period for public comment and within the period for judicial review), but do not satisfy the second criterion (central relevance).

The first criterion of the mandatory reconsideration test is met if either Petitioners demonstrate that it was impracticable to raise such objection during the comment period *or* if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review). Petitioners’ objection that the Plan be reconsidered because it currently only applies to a subset of the states originally included in the Plan is based on events that occurred after promulgation of the Rule. Specifically, Petitioners seek reconsideration, in part, due to regional circuit courts’ stays of the predicate SIP Disapproval, which occurred after the Plan was promulgated (the first occurred on May 1, 2023, roughly 6 weeks after the Plan was promulgated on March 15, 2023). Most of the 12 stays that were issued occurred before August 4, 2023, which marked the close of the 60-day window for judicial review under CAA section 307(b)(1).¹⁰ The comment period for the Plan closed nearly a year before these events on June 21, 2022. No party had or could have had advance knowledge of the fact that the is presently applicable in 11 rather than 23 states. Thus, the Petitioners’ objections pertaining to the stay

¹⁰ While some preliminary stay orders were issued after the period for judicial review and thus arguably beyond the period for mandatory reconsideration under CAA section 307(d), the issue is irrelevant here because, even if the Petitions were viewed as “after-arising” petitions or a petition for rulemaking, the analysis and conclusions below affirm that no modification of the Plan is appropriate in any case.

orders issued for 12 states “arose after the period for public comment (but within the time specified for judicial review)” under CAA section 307(d)(7)(B) and meet the first criterion of the mandatory reconsideration inquiry.¹¹

However, their objections do not warrant mandatory reconsideration under CAA section 307(d)(7)(B) unless the EPA also finds that the “objection is of central relevance to the outcome of the rule.” CAA section 307(d)(7)(B). Petitioners maintain that because the EPA has suspended the Plan for 12 states to comply with preliminary judicial stays pending review of the separate SIP Disapproval, the Plan is no longer capable of functioning lawfully and reasonably to prohibit significant contribution from each of the remaining 11 states. USS Pet. at 9; Allete Pet. at 10. Petitioners contend that the Rule was promulgated as a single 23-state plan, and that if the Rule is now only operational in some subset of states, then the EPA’s analysis applying the four-step interstate transport framework is no longer correct. USS Pet. at 9; Allete Pet. at 10.

The EPA has given careful consideration to the objection and concludes that it is not of central relevance to the outcome of the Plan—*i.e.*, that the objection does not provide substantial support for the argument that the regulation should be revised. Reviewing the record of the Plan shows that the EPA’s method for defining good neighbor obligations, while applied consistently across the nation, defines “significant contribution”¹² for the sources in each individual state, and provides for the prohibition of such emissions in a manner that is not dependent on the inclusion of any particular number of states. The EPA’s methodology is consistent with the state-specific structure of the Act and the fundamental statutory obligation to define and prohibit each state’s own significant contribution. *See* CAA section 110(a)(1) and 110(a)(2)(D); *Wisconsin v. EPA*, 938 F.3d 303, 324-25 (D.C. Cir. 2019); *North Carolina*, 531 F.3d at 906-08, 920-21.

Consistent with the statutory text and structure and judicial precedent, the EPA’s four-step framework was designed to be independent of the number or scope of included states. Because the statute allows states to replace a FIP with a SIP – and because as a practical matter the EPA does not necessarily receive or act on each state’s SIP submission at the same time – the Plan is expressly designed to allow additional states to be added to or removed from the federal emissions control program over time, as circumstances require (including where a state submits an approvable SIP to replace their FIP, as described in the Plan itself, 88 FR at 36838-39). The Plan does so primarily by setting good neighbor obligations based on the available, cost-effective technologies that can be applied to each type of high-polluting source – a technology-focused definition of “significant contribution” that has been approved by the Supreme Court and that can be evenhandedly applied to existing sources and those that may be newly located in any contributing state at any time. Accordingly, under the EPA’s methodology as discussed

¹¹ Notably, no commenter asserted during the comment period that the Plan would not function properly or lawfully as a definition of “significant contribution” for any given state if it was not in effect in all 23 states, or in some other minimum number of states, nor did any commenter raise an objection to the Plan based on the possibility of a reduced geographic scope.

¹² “Significant contribution” is often used as a shorthand to refer to the identification of those amounts of emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other states and therefore must be prohibited under the good neighbor provision. *See* CAA section 110(a)(2)(D)(i)(I).

further below, a change in the number of states covered does not impact the obligations of the states or sources that remain covered.

A. Record Basis Establishing Why the Plan Functions Independently by State

Under the EPA's methodology explained in the Plan, each of the four steps of the EPA's interstate transport framework is applied on a state-specific basis. Application of these steps does not require a particular number of states to be included. Indeed, the steps are designed so that they can be applied to one state (for example, by a single state in its SIP submission) or multiple states (as the EPA has historically done in FIPs). Notably, when the EPA promulgates a FIP, it does not seek to accomplish a particular aggregate total of emissions reductions, or to achieve any specific air quality result at each receptor; under the statute, upwind states are not required to resolve downwind pollution problems, but rather must take responsibility for their own significant contribution. See *Wisconsin*, 938 F.3d at 324-25 (distinguishing the good neighbor provision from a "but-for" causation standard). Accordingly, after first establishing through modeling the baseline levels of ozone across the country and the contribution to those levels from each state, the EPA analyzes emissions control opportunities that are widely available and cost-effective based on the Agency's interpretation that upwind states should only be responsible for eliminating as "significant" any emissions that they can cost-effectively control. The EPA's analysis also confirms that if those particular levels of emissions control stringency were applied in a uniform manner across all states shown to be contributing to downwind pollution problems, it would produce a meaningful improvement in ozone levels at the downwind receptors.¹³ At the fourth step of the EPA's analysis, the Plan establishes regulatory programs for EGUs and non-EGUs for the prohibition of emissions constituting significant contribution on a state-by-state basis, consistent with the findings from the first three steps.

1. Steps 1 and 2

In the Plan, the EPA identified receptors based on nationwide modeling and monitoring data and evaluated each state's contribution to receptors in downwind states on an individual-state basis to identify upwind-state-to-downwind-state linkages. The air quality modeling and the monitoring data that the EPA considered for Steps 1 and 2 cover the contiguous United States. See 88 FR at 36696.

At Step 1, the EPA identified downwind receptors that are expected to have problems attaining or maintaining the NAAQS. For a detailed explanation of what receptors are and how the EPA identified them, see 88 FR at 36703-08. At Step 2, the EPA identified which upwind states contribute to the identified receptors in amounts sufficient to "link" the individual upwind states to downwind air quality problems. For a detailed explanation of how the EPA identified these linkages, see 88 FR at 36708-12.

¹³ While all of those states may not ultimately be covered by a *federal*, rather than a state, plan, this analysis shows how well available technologies in contributing states can help address the downwind nonattainment and maintenance issues associated with an updated ozone NAAQS, and determine whether such technologies should or should not be considered cost-effective.

The identification of receptors that are expected to have problems attaining or maintaining the NAAQS and of states “contributing” to those receptors does not rely upon the number of states included in a particular FIP rulemaking. The modeling of baseline conditions did not contain or rely on the emissions reductions in the Plan, and the monitoring data were based on measurements during years prior to when the Plan was final and thus these data do not reflect the impacts of emissions reductions from the Plan.¹⁴ Likewise, the EPA applied a common threshold for determining which states “contribute” to downwind air quality problems. Thus, the analytic methods in both Step 1 and Step 2 to determine “contributing” states rely on emissions and air quality data that are independent of which or how many states are covered by the Plan.

2. Step 3

The Act requires each state to eliminate its “significant contribution” to downwind nonattainment or interference with maintenance of air quality standards. To determine which emissions from contributing states are “significant” at Step 3, the EPA analyzed available emissions control strategies and their costs. Based on that analysis, the EPA then identified a uniform degree of emissions control stringency that was reasonable to require from upwind high-emitting sources, calculated based on the emissions performance those sources would achieve through the application of the technologies the EPA found were most cost-effective. Step 3 is a multi-factor analysis, with its primary focus on technology availability and associated cost, the level of emissions reductions that are thereby achieved, and the associated air quality benefits delivered to downwind receptors. The approach applies uniform levels of emission control stringency across all upwind states, with the objective of bringing the covered sources in each state up to a minimum level of emissions performance to reduce ozone-precursor emissions, specifically nitrogen oxides (NO_x). See 88 FR at 36719. “The ‘amount’ of pollution that is identified for elimination at Step 3 of the framework is therefore that amount of emissions that is in excess of the emissions control strategies the EPA has deemed cost-effective.” 88 FR at 36676. Because it is possible that a uniform level of stringency may produce more emissions reductions than is necessary to fully resolve a particular upwind state’s linkages to all downwind receptors, the EPA tested its identified level of stringency for “overcontrol.” For a detailed explanation of how the EPA applied Step 3, see 88 FR at 36718-54.

In the Plan, the EPA found that the following technologies (and associated emissions limitations or other control requirements) were cost-effective for industries with high emissions of NO_x:

Table 1: Industry, Emissions Unit Type, Assumed Control Technologies, and Requirements

Industry/ Industries	Emissions Unit Type	Assumed Control Technologies	Process, Product, or Fuel Type	NO _x Emissions Requirement
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¹⁴ Both the EPA and states can use air quality modeling and monitoring information on ozone concentrations and contribution levels to make individual determinations for each state concerning whether it is contributing to any out-of-state receptors. See, e.g., 88 FR at 9365 n.286 (identifying individualized approvals of SIPs using modeling at Steps 1 and 2).

				105 ppmvd 30-day rolling averaging period
Fossil Fuel-Fired Electric Power Generation	Electric Generating Unit	Optimizing SCR and SNCR, upgrading combustion controls, retrofitting SCR and SNCR	Electric Generating Unit	State emissions budgets based on consistent application of the identified strategies to the sources, implemented through a trading program.

Acknowledging that some of the factors considered in the Step 3 analysis are considered at a national scale, the EPA here explains in more detail why the selected levels of control stringency for particular industries, and therefore the particular obligations of individual states, do not vary depending on the number of states subject to FIPs under the Plan.

The EPA identified potential levels of emissions control stringency that would be sensible and workable for each industry, and thus for the set of sources found in each state, regardless of the number of states covered by an approved SIP or a FIP or not yet covered by either. In evaluating those potential levels of stringency, the EPA conducted a wide-ranging survey of emissions control technologies (and associated cost data) used throughout the United States and even internationally. Then, the EPA conducted the air-quality-improvement and overcontrol analyses considering the effects of the potential uniform stringency levels at each identified receptor, across all of the states linked to that receptor (and the downwind, “home” state for that receptor). This allowed the EPA to ascertain whether a selected level of stringency was effective at achieving improvements in the air quality downwind that were reasonable in relation to the identified costs, while also ensuring a selected stringency level was not more than necessary to bring any given receptor into attainment.

This method of analysis can be extended to states not covered by the Plan either because the state is covered by an approved SIP or prior FIP or because the EPA has not yet taken action to review a SIP or impose a FIP. It may seem counter-intuitive that a good neighbor analysis can be multi-state in nature yet not depend on the actual participation of other states in a given solution. However, the EPA’s approach reasonably functions to resolve a tension inherent in the Act, which calls for addressing the multi-state ozone problem in a way that defines each state’s obligations on an individualized basis.¹⁵

¹⁵ Thus, the EPA’s analytical approach allows for each state to conduct a similar analysis of its own obligations in the context of developing a SIP without definitive knowledge of what other states will do in order to fulfill their own obligations. At Step 3 of the EPA’s four-step interstate transport framework, each state that is found to be contributing to one or more receptors can conduct an analysis of emission control measures that would be cost-effective within the state. If each state linked to a given receptor (and the downwind state where that receptor is located, to account for that state’s own fair share), made pollution-control efforts at these levels, a state could

Specifically, the EPA took the following steps in conducting its Step 3 analysis in the Plan:

a) Technology, Cost, and Emissions Reduction Analyses

The EPA's analysis started by examining emissions control technologies (sometimes also referred to as "strategies") and their associated costs and emissions reductions. The Plan identified conventional, at-the-source, NO_x emissions control technologies that have been available in the covered industries for many years. *See, e.g.*, 88 FR at 36738 (identifying control technologies for EGUs); *id.* at 36739 (identifying control technologies for non-EGUs). These analyses were not specific to the particular group of upwind states whose inclusion the EPA had proposed or finalized in the Plan but looked instead at demonstrated technologies across each industry as a whole.

For EGUs, the EPA conducted an inquiry nearly identical to prior good neighbor rules, looking at several widely available and well-understood NO_x control strategies that can be and have been applied to EGUs for decades throughout the United States. *See* 88 FR at 36720. For non-EGUs, the EPA consulted a wide range of sources of information, starting with national databases like the National Emissions Inventory (NEI) and the Control Measures Database (CMDDB), and proceeding to consult national and international technical literature, as well as a variety of existing state and federal NO_x control requirements. *See id.* at 36732-33; *see generally* Non-EGU Sectors Final Rule technical support document (TSD);¹⁶ EGU NO_x Mitigation Strategies Final Rule TSD.¹⁷ These included trade association literature; academic studies; multi-state regional organization publications; state rules and publications; contractor studies; EPA rules, publications, and databases like the RACT/BACT/LAER Clearinghouse (RBLC); European Commission publications; and data on what emissions limits specific facilities or companies were achieving. *See, e.g.*, Non-EGU Sectors Final Rule TSD at 9-11 (pipeline engines), 27-29 (cement kilns), 35-39 (iron/steel furnaces), 42-43, 45-47 (glass furnaces), 62-65, 68-84 (boilers), 92-94 (Municipal Waste Combustors (MWCs)).

The EPA derived estimated "representative" costs for particular control strategies for EGUs through a nationwide analysis of the likely costs associated with capital, material, equipment, and labor. *See generally* EGU NO_x Mitigation Strategies Final Rule TSD. The EPA derived its cost estimates for non-EGUs primarily from the CMDDB, which contains a compilation of a variety of sources of technical literature and examples.¹⁸ The "representative" costs that the EPA identified for different levels of control stringency and for different industries were derived from

demonstrate that ozone levels at the downwind receptors would be measurably improved (without undertaking more emissions control work than necessary). In the context of a FIP, this approach to evaluating air quality change at downwind receptors is necessary, because to avoid overcontrol, the EPA must consider whether applying a given stringency level to other states would achieve more emissions reduction than necessary to bring a receptor into attainment.

¹⁶ Available in the docket at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-1110>.

¹⁷ Available in the docket at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-1092>.

¹⁸ *See* 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 5-7 ("Non-EGU Memorandum"), available in the docket at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0956>.

this nationwide analysis and were not specific to the particular states included in the proposed or final Plan. Considering a wider range of cost information than the data that might be available in any particular state makes sense since it allows for a more comprehensive assessment of the costs each source type might be expected to face.¹⁹ While the EPA provided for more individualized consideration of the costs particular facilities might bear and made available alternative emissions limits through its implementing regulations that could be justified on the basis of excessive cost, see 88 FR at 36818-19, the EPA explained that cost in the Step 3 analysis “is not intended to represent the maximum cost any facility may need to expend but is rather intended to be a representative figure for evaluating technologies to allow for a relative comparison between different levels of control stringency.” 88 FR at 36740.

The EPA also used its technology analysis to calculate the anticipated emissions reductions that could be achieved if those strategies were applied to the population of sources in each covered state. 88 FR at 36737-40. At this stage of the analysis, the EPA’s assessment of the emissions reductions expected from particular strategies under consideration did not depend on the number or identity of the states included in the Plan. Rather, these figures provided the inputs by which air quality benefits and overcontrol could then be assessed in the next stages of the Step 3 analysis (discussed in the following sections).

b) Air Quality Benefits

After compiling the data on available technologies, their relative cost-per-ton, and the expected emissions reductions that would result from each state, the EPA’s Step 3 methodology then proceeded to evaluate the effect those emissions control strategies would have on downwind ozone levels. This component of the EPA’s analysis looked at the incremental ozone improvement that would be accomplished at each receptor from the reductions accruing from the upwind states linked to that particular receptor (whether included in a particular rule or not) at each of the assessed stringency levels. This analytical exercise allowed the EPA to evaluate what level of stringency was appropriate in terms of delivering an acceptable level of air quality benefit to downwind receptors in light of associated costs.

Petitioners’ general contention that the Rule is no longer justified or effective because the judicial stays have narrowed the air quality benefits the EPA hoped to achieve with the Plan does not present an issue of “central relevance.” See USS Pet. at 8 (citing various statements in the Plan preamble concerning cost-effective emissions reductions “on a regional scale”). It is true that the Plan is presently securing fewer air quality benefits than anticipated because sources in 12 states are currently not under any obligations to eliminate their significant contributions for the 2015 ozone NAAQS (though they must ultimately be subject to either an approved SIP or a FIP). But the status of these 12 states cannot alter the fact that the EPA must, by congressional command, eliminate the significant contribution of each of the remaining 11

¹⁹ In response to comments, the EPA conducted a sensitivity analysis for EGUs to see if looking at control costs on a regional basis would change the results and found that it would not. EGU NO_x Mitigation Strategies Final Rule TSD at 49. The fact that the EPA conducted this as a sensitivity analysis to address a comment further illustrates that the primary technology and cost analysis the EPA conducted, as described above, was not limited to a 23-state geography, and would not be altered if that geography were different.

states “as expeditiously as practicable,” see *Maryland v. EPA*, 958 F.3d 1185, 1203-04 (D.C. Cir. 2020), and does not undermine the EPA’s factual determinations concerning the emission reduction opportunities that are available and cost-effective for sources in those states.

The emissions reductions required in each of the 11 states currently covered by the Plan continue to provide real downwind pollution-reduction benefits. See, e.g., Ozone Transport Policy Analysis Final Rule TSD at 70 (Table C-12) (Ozone Policy TSD) (showing reductions in the maximum contribution of each upwind state to receptors in 2026).²⁰ This is further confirmed by the re-calculations the EPA performed for these 11 states, which are displayed later in this section. Nonetheless, consistent with the same statutory interpretation and methodology the EPA has applied throughout each of its good neighbor rulemakings, the Plan is not premised on accomplishing a precise, aggregate air quality result at each receptor, such that the omission of some states would increase the “share” of the problem that must be addressed by the remaining states. Rather, the Plan holds the sources in each linked upwind state to minimum levels of emissions performance deemed to be cost-effective; so long as they meet that level of performance, each individual source in *any* state regulated under the Plan is understood to have lawfully addressed its good neighbor obligations and eliminated its significant contribution to downwind air pollution.

This methodology is consistent with the EPA’s and the courts’ understanding of the good neighbor provision. Under that provision, it is not upwind states’ responsibility to ensure that downwind receptors are brought into attainment; each state must only eliminate its own significant *contribution* to nonattainment or interference with maintenance of the NAAQS in other states. In reviewing allocation of responsibility under this contribution standard, courts have upheld the EPA’s approach as a reasonable way to allocate good neighbor obligations among multiple states for regional-scale pollutants like ozone, even though the air quality benefits resulting from a particular degree of control stringency will necessarily vary by state and receptor. This variation is the consequence of an approach that respects the reality of the interstate ozone problem: the “overlapping and interwoven linkages between upwind and downwind states,” “the vagaries of the wind” (*i.e.*, the variability in meteorological conditions that makes precise ozone projections impossible), and the wide variation in the degree of baseline levels of emissions control that states have already achieved. *EME Homer City*, 572 U.S. at 496-97, 519-20; see *Wisconsin*, 938 F.3d at 322; *Michigan*, 213 F.3d at 679-80. An approach that requires high-emitting sources in each state to come up to minimum levels of emissions control continues to function as a lawful and reasonable definition of each covered state’s “significant contribution,” and fulfills those covered upwind states’ legal obligations under the good neighbor provision. 88 FR at 36675-76, 36741.

Both the Supreme Court and the D.C. Circuit have recognized that variation in what a good neighbor rule will achieve in any particular state is a logical consequence of the EPA’s approach to defining “significance” through identifying a uniform level of emissions control based on cost-effectiveness. As the Supreme Court explained in *EME Homer City*, “by imposing uniform cost thresholds on regulated States, EPA’s rule subjects to stricter regulation those States that have

²⁰ Available in the docket at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-1080>.

done relatively less in the past to control their pollution” and ensures that “[u]pwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors’ efforts to reduce pollution.” *EME Homer City*, 572 U.S. at 519. The fact that a particular state may have a very small emission reduction obligation, and so improve downwind air quality by a very small amount, does not call the approach into question. The fact that a state may have less to do to meet the EPA’s selected levels of emission control may reflect that its sources have already invested in pollution control. But whether a state’s required reductions are large or small, they serve to align investments in pollution control across contributing states – whether through a FIP like the Plan, or an approved SIP – which is at the heart of the methodological construct the Court approved in *EME Homer City*. See *Wisconsin*, 938 F.3d at 322 (concluding that the EPA reasonably regulated sources in Wisconsin whose reductions would only benefit downwind air quality “by just two ten-thousandths of a part per billion”).

Petitioners raise a more specific contention: that the EPA’s identification of the appropriate degree of emissions reductions (*i.e.*, the determination of what level of emission control was “cost-effective”) was dependent on the Plan’s evaluation of the effects of the control strategies at the particular downwind receptors associated with the particular geography of upwind states. See 88 FR at 36741-48. That analysis, Petitioner USS contends, must be different if some alternate set of states were analyzed than those for which the EPA finalized the Plan. See USS Pet. at 8. Stated differently, could there be a different “knee in the curve,” a different point at which emissions control stringency is maximized in relation to downwind benefit? Based on the EPA’s review of the data available in the record, the contention is belied by the facts; the Plan continues to deliver cost-effective air quality improvements in the receptors to which the remaining 11 states are linked.

The final Plan explains that the purpose of the EPA’s air quality analysis at Step 3 was to check on whether a level of emissions reduction that appeared cost-effective on a cost-per-ton basis would in fact deliver measurable progress toward attainment of the 2015 ozone NAAQS at the downwind receptors. “These analytical findings cement EPA’s identification of the selected EGU and non-EGU mitigation measures as the appropriate control stringency” 88 FR at 36741 (emphasis added). To perform this check for any particular receptor, it makes sense to consider the effect of emissions reductions from all of the states linked to that receptor, not just those covered by a particular FIP rulemaking, because all states must ultimately discharge their good neighbor obligations whether through an approved SIP or a FIP. Thus, the Step 3 air quality analysis is a “test” that serves to confirm that an appropriate degree of emissions-control stringency has been reached for any given state; it does not depend on the actual, simultaneous inclusion of a certain number of states in a given rulemaking. Given the multi-state nature of the interstate ozone pollution problem, analysis of the air quality benefit produced by regulating sources in any particular upwind state assumes that other states linked to a common receptor and the home state of that receptor make emission reductions at a comparable level of emission control regardless of whether they are covered by the Plan.

Illustrating this, the EPA’s analysis in the Plan included an analysis of other linked states that were not included in the Plan, on the view that this was the most appropriate way to analyze

the collective effects of identified stringency levels at Step 3. *See* Ozone Policy TSD at 46, 55 (explaining that the EPA included all upwind states modeled to be contributing in this assessment, *i.e.*, including states that were not presently included in the Plan but might be through a future rule, such as Iowa, New Mexico, and Arizona²¹). Accordingly, the EPA’s Step 3 air quality analysis did not “rel[y] on” a 23-state scope of coverage. *Cf.* USS Pet. at 1. For any particular receptor, the EPA’s analysis looked at the group of upwind states linked to that receptor in the modeling (the numbers of which vary), and also assigned the home state for that receptor a “fair share” (*i.e.*, the same stringency that would be imposed in the upwind states for that receptor). 88 FR at 36742 n.238. The analysis did not depend on the actual inclusion of those particular states in the Rule; it simply looked at what the effect would be if, for any given upwind state, the other upwind states and the downwind state were held to the same stringency level.²²

As discussed above, in the Plan, the EPA’s analysis of air quality benefits at Step 3 was not limited to the specific set of states expected to be covered by a FIP, but appropriately considered the cost-effective emissions reductions available from all upwind states linked to each downwind receptor (as well as the receptor’s home state). However, solely for purposes of responding to the Petitions, the EPA has taken the data available in the Plan to recalculate the emissions reductions and air quality benefits that would be delivered to the relevant receptors with a scope of application of the Plan in the 11 states where it is currently in effect.²³ We note at the outset that the current grouping of 11 states only reflects the fact that certain other states presently have preliminary judicial stays and does not represent an intentional grouping within the four-step methodology of the Rule. Nonetheless, when the analysis of the Plan is isolated to just these 11 states, the selected emissions control stringency in the Plan continues to occupy a “knee in the curve” where substantial air quality improvements are achieved downwind, while any more stringent emissions-control obligations become increasingly less cost effective (*i.e.*, emissions reductions and air quality benefits start to plateau). *See* 88 FR at 36741. The figures below show the relationship between the cost-per-ton estimates, emissions reductions, and air quality improvements as finalized in the Plan on the one hand, and the same data when limited to the 11 states for which the Rule is currently in effect.

The receptors analyzed are those to which these 11 states are linked in 2026. Due to data limitations, these graphs are limited to displaying the estimated reductions and air quality

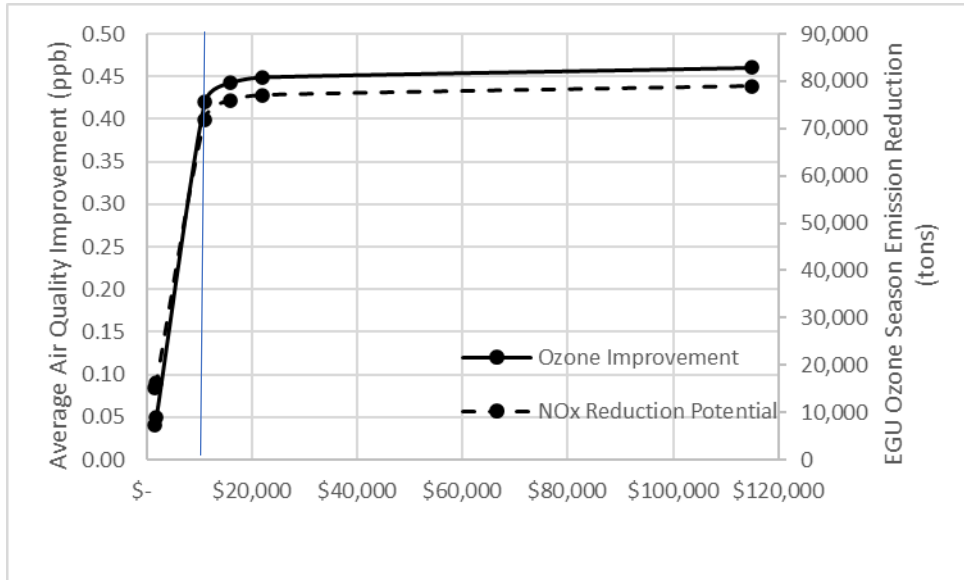
²¹ Due to data limitations at the time of finalizing the Plan, the analysis was unable to include a full assessment of control measures in Kansas or Tennessee, or from non-EGUs in Arizona. In the supplemental proposal to add these states to the Plan, the EPA has updated its Step 3 air quality and overcontrol assessment to represent these additional control measures in these states. *See* 89 FR 12705.

²² Stated differently, the EPA’s analysis identified 28 states as contributing at Step 2, and neither the EPA (through an approved SIP or other action) nor any court has presently determined that identification was in error. As such, the EPA appropriately assessed the effect of applying the uniform levels of emissions control stringency across all contributing states to any given receptor (*i.e.*, varying combinations of the 28 states plus home state for each receptor)—regardless of their inclusion in the Plan—in evaluating whether the Plan reasonably addresses the “significant contribution” of any particular state.

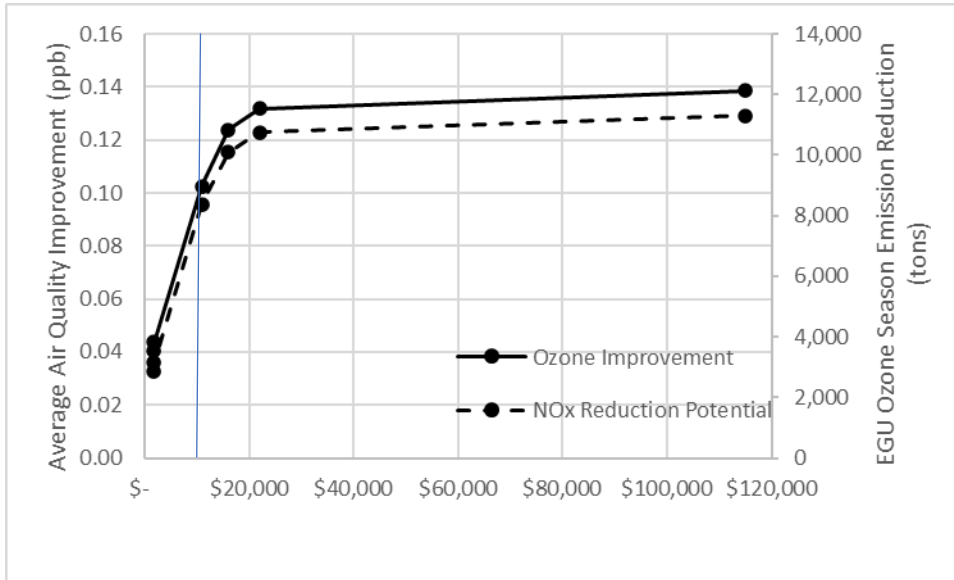
²³ The data and calculations underlying the figures below are contained in a workbook file entitled “11 State NO_x and Air Quality Cost Curve Calculations,” which has been added to the docket and is available at <https://www.regulations.gov/docket/EPA-HQ-OAR-2021-0668>.

improvements for the EGU emissions control strategies. Because California is not included in the EGU emissions control program of the Plan, the analysis is limited to the receptors associated with the remaining 10 states for which the Plan is currently in effect in analytic year 2026. These are two Fairfield, Connecticut receptors and the Sheboygan, Wisconsin receptor.

Original “knee in the curve” graph for EGUs from Appendix I of the Ozone Policy TSD (blue vertical line denotes \$11,000/ton stringency level)



“Knee in the curve” graph for EGUs in the 11 states (blue vertical line denotes \$11,000/ton stringency level)



For these same receptors, the EPA also recalculated improvements in air quality that would result from adding in the non-EGU emissions control strategies applicable in 10 of the 11 states (excluding Wisconsin). As explained in the Plan, these emissions control strategies are generally all commensurate with or more cost-effective on a \$/ton basis than the \$11,000/ton strategy selected for EGUs. See 88 FR at 36746-47. Although not plotted on a cost-curve graph due to data limitations, the AQAT results displayed below show continuing air quality improvement at the relevant receptors, with these additional emissions reductions added in.

Table 2. Average air quality improvements (ppb) for 2026 relative to the Engineering Analysis Base

State	Engineering Analysis Base	SCR Optimize + SOA CC	SCR Optimize + SOA CC + SNCR Optimize	SCR Optimize + SOA CC + SNCR Optimize + SCR/SNCR Retrofit (“Full Step 3 – EGU only”)	SCR Optimize + SOA CC + SNCR Optimize + SCR/SNCR Retrofit + non-EGU (“Full Step 3”)
All GNP states (as finalized), for 2026 GNP receptors	0.00	0.04	0.05	0.47	0.66

All GNP states (as finalized), for 2026 receptors in Wisconsin and Connecticut	0.00	0.10	0.11	0.27	0.55
The 11 current states, for 2026 receptors in Wisconsin and Connecticut	0.00	0.04	0.04	0.10	0.32

These figures taken together illustrate that the Rule functions reasonably with respect to the 11 states. While the total amount of emissions reductions and associated air quality benefits at the representative cost-per-ton thresholds are necessarily smaller in absolute terms (due to the smaller number of states covered), the benefits remain proportional and continue to demonstrate a “knee in the curve” similar to that observed at the selected stringency level of the Plan when applied across the full 23-state geography. *See* 88 FR at 36741. With the addition of each increment of emissions-control requirements as established in the Plan for these 11 states, additional, non-trivial air quality benefits are delivered to the relevant receptors for these states, and no evident “knee in the curve” is present at emissions control stringencies less than those on which the Plan was finalized.

c) Overcontrol Assessment

Finally, at Step 3, the EPA “tests” whether its selected uniform emissions-control stringency levels result in any “overcontrol.” 88 FR at 36749-50. In *EME Homer City*, the Supreme Court held that the EPA cannot “require[] an upwind State to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked.” 572 U.S. at 521. To find overcontrol, the EPA would have had to conclude that the uniform control stringencies the EPA selected produced more emissions reductions than necessary to resolve all of any state’s linkages to downwind receptors, or more than necessary to bring receptors into attainment. In that case, under the overcontrol holding in *EME Homer City*, the EPA would have been obligated to adjust the requirements of the Rule to avoid overcontrol. This overcontrol assessment is conducted using the same air quality effects analysis derived from AQAT, described above.

As an initial matter, implementing the Plan in fewer upwind states does not (and cannot possibly) result in overcontrol, because the EPA demonstrated that there was no overcontrol even when more states, making more emission reductions, were included. Now that fewer states are making fewer emission reductions, the downwind receptors cannot be cleaner than they were under the Plan’s original scope.

Moreover, in the Plan, the EPA looked at potential overcontrol in two separate ways. Both the primary “step 3 configuration” and the alternative “full geography configuration” specifically considered overcontrol as to the 11 states presently regulated by the Plan and found that the obligations defined for each state, which have not changed in light of the judicial stays, did not overcontrol the emissions of any of these states. 88 FR at 36749-50. Accordingly, the EPA

expressly found that the Rule did *not* overcontrol emissions in any state and so made no adjustments in the stringency of the Rule on that basis. *Id.* at 36750. Thus, while the overcontrol analysis is one element of the Rule that considers, in part, the particular geography to which the Plan applies, the current reduced scope of states included in the Plan presents no risk of overcontrol and so does not affect the reasonableness of the Plan.²⁴

d) Regional Elements of the Non-EGU Step 3 Analysis

Two elements of the EPA's technology and cost analysis for non-EGUs incorporate analytical methodologies related to the upwind region covered by the Rule. These are: (1) the identification of potentially impactful industries in the "Screening Assessment" conducted for non-EGUs; and (2) the "weighting" of average costs for two non-EGU industries and a specific emissions unit type (boilers) where multiple control types were identified at Step 3. The EPA has reviewed, based on the record for the Rule, whether either of those elements materially influenced the determination of each State's "significant contribution." As explained below, the EPA concludes that they did not. Neither of these aspects of the analysis suggest that the EPA should reach different conclusions as to each covered state's "significant contribution" while the Plan applies in a different group of states.

1. *Screening Assessment identification of potentially impactful industries*

For non-EGUs, the EPA needed to identify which industries and emissions-unit types would be appropriate subjects for analysis of cost-effective NO_x reductions. While power plants have consistently been understood to have high levels of controllable NO_x emissions and have been included in each good neighbor rulemaking, non-EGUs have not. 88 FR at 36720. Certain non-EGU industries and emissions units/sources were included in the NO_x SIP Call, but not in subsequent rules, although the EPA had acknowledged that such sources may necessitate regulation to prohibit significant contribution. *See* 88 FR at 36719. For the 2015 ozone NAAQS, the EPA determined that it could not determine that states had eliminated the entirety of their "significant contributions" to downwind nonattainment by addressing power plants alone. 88 FR at 36680-82. To that end, the EPA was required to determine which other large industrial sources beyond the power sector have substantial amounts of ozone-precursor emissions that could be cost-effectively controlled and therefore should be obligated to reduce those emissions.

To identify which industries and emissions-unit types would make the most sense to focus on from an emission-reduction standpoint, the EPA developed a "Screening Assessment."²⁵ In the Screening Assessment, the EPA used emissions and control technology information to identify those industries and emissions unit types that had potentially controllable emissions and air

²⁴ Notably, the EPA's overcontrol analysis also showed that requiring emissions reductions in all linked states, including those beyond the original 23 states included in the Plan, also would not result in overcontrol of upwind emissions in any individual state. *See* 88 FR at 36749; Ozone Policy TSD at 46, 55, 59, 60; *supra* note 21 and accompanying text. This broader and more conservative analysis ensured that upwind states in the Plan did not end up overcontrolled simply because emissions reductions have not yet been implemented in some other state.

²⁵ Screening Assessment of Potential Emissions Reductions, Air Quality Impacts, and Costs from Non-EGU Emissions Units for 2026, available in the docket at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0150>.

quality criteria to identify how much those industries and emissions units would likely benefit downwind areas. *See* Screening Assessment at 1-3. This analysis used the modeled nonattainment and maintenance receptors in 2023 and the inventory of sources in those upwind states identified using prior modeling that was available when the EPA was developing the proposal.²⁶ *See* Screening Assessment, Appendix A (Table A-3). This could be considered a regional-scale analysis in that it assessed the non-EGU NO_x sources by industry across the set of upwind states identified by the available modeling.

Having reviewed the role of this analysis in the larger framework of the Plan, however, the EPA concludes that this portion of the non-EGU analysis does not need to be redone on the basis of the current states where the Plan is in effect. The EPA was clear in the record of the Plan that the Screening Assessment served only a limited purpose: to broadly identify those industries and emissions-unit types where further analysis was likely to identify more impactful and less costly emissions reduction opportunities. *See* 88 FR at 36740; RTC at 90-92. Notably, the EPA could have chosen to forgo this analysis, which served to narrow the set of non-EGUs it considered for inclusion in the Plan, and instead investigate regulating a much broader set of non-EGU sources of ozone precursors, consistent with the statutory language. *See* CAA section 110(a)(2)(D) (authorizing regulation of “any source or other type of emissions activity” for significant contribution); *see also* 88 FR at 36680-81. The Screening Assessment was a valuable way of focusing the Agency’s limited resources and narrowing the scope of the regulation but was not intended to dictate final determinations regarding “significant contribution.” *See, e.g.*, RTC at 97-99, 101. The EPA affirms here that the Screening Assessment serves that purpose. Indeed, as noted above, the scope of states covered by the Plan for non-EGU control requirements actually changed between the proposed and final rules. But the EPA concluded when finalizing the Plan that its initial Screening Assessment – although based on a slightly different group of states at proposal (and other data regarding baseline conditions that was subject to change) – had served its purpose and did not need to be redone. *See* 88 FR at 36685, 36719.²⁷

²⁶ We developed the Screening Assessment using inputs from the air quality modeling for the Revised CSAPR Update for 2023 (2016v1), as well as the projected 2023 annual emissions inventory from the 2016v2 emissions platform that was used for the air quality modeling for the proposed rule. Screening Assessment at 1-2.

²⁷ As is always the case with regard to good neighbor obligations, states remain free to address a different set of sources than the EPA identified in the Plan if they prefer to regulate through a SIP in a manner different than the EPA proceeded in the FIP. *Id.* at 36842.

2. “Weighted” averaging of costs

In the EPA’s final analysis of non-EGU representative costs, for two industries (pipeline engines and municipal waste combustors) and a specific emissions unit type (boilers), the Agency identified a weighted average of costs to address the fact that multiple control technologies had been identified in the Step 3 analysis, rather than a single control type. 88 FR at 36739-40 (Table V.C.2-3). For those industries and for boilers, the analysis weighted the average cost according to the control technologies that certain sources, anticipated to be subject to the Rule across the 20 states with non-EGU requirements, might select as their method of compliance.

Representative costs for these sources were calculated by weighting the average representative costs derived from national data sources by estimated emissions reductions for the applicable control technologies. Non-EGU Memorandum at 5-7. For these industries and for boilers, looking at different groupings of states could result in a different “representative” cost (as displayed on Table 6 of the Non-EGU Memorandum at 10).

However, upon reviewing this element of the non-EGU analysis, the EPA concludes that any differences in the identified “representative” costs for these sources would not affect the outcome of the analysis. For each of these three types of sources, the record shows that the costs associated with each of the different control types falls within the range of costs that the EPA had concluded were reasonable to impose. See 88 FR at 36746-47. In other words, even if a different group of states produces a higher representative cost when weighted by those states’ population of sources, the results all still fall within the upper bound of the cost-per-ton that the EPA found appropriate. The EPA’s conclusion – that the representative cost was reasonable – would be the same.

For example, for pipeline engines, the following table indicates the data sources and cost-per-ton estimates the EPA adapted from the CMDDB to inform its determination of representative cost for these sources. These were the figures, adjusted to 2016 dollars, that informed the EPA’s weighting analysis to generate a representative cost figure of \$4,981/ton for pipeline engines.

Table 3. Data Sources and Cost Estimates for Pipeline Engine Controls

Control Technology/Engine Type	Original Reference	\$/ton Value
SCR, 4 Stroke Natural Gas Engines, Lean Burn 17% (of engines in analysis population)	2003, cost information from CARB 2001 report	\$2,900 (2001 dollars)
Non-Selective Catalytic Reduction or Layered Combustion, for SCCs where the firing technology is not specified as to Rich Burn or Lean Burn 36%	2009/2000 (from 2009 ERLE study and 2000 Pechan Phase II NOx SIP call report)	\$4,538 (2013 dollars)
Layered Combustion, 2 Stroke Natural Gas, Lean Burn 44%	2009 (ERLE study)	\$4,900 (2010 dollars)

Non-Selective Catalytic Reduction, 4 Cycle Natural Gas, Rich Burn 3%	2000 (Pechan, Phase II NOx SIP call report)	\$422 (1999 dollars)
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Likewise, for MWCs, the EPA provided the cost assumptions used for the different control types in Appendix B of the Non-EGU Memorandum.

For boilers, the EPA likewise explained that its cost estimates were derived from the CMDB, and the EPA identified a number of assumptions used in developing representative cost figures, which the EPA was clear may not be reflective of all sources' circumstances. Non-EGU Memorandum at 7. Noting that boilers have the highest representative costs among the non-EGU industries, the EPA explained in the Rule that for individual sources, costs on a per-ton basis could well be higher than the estimated \$14,595/ton representative cost, but still be commensurate with the range of costs that informed the identification of the most stringent control strategy selected in the Plan for EGUs (for which costs at the 90th percentile ran as high as \$20,900/ton). 88 FR at 36746.

The EPA also emphasized that cost-per-ton figures are only one factor in the Step 3 multi-factor analysis, can vary widely depending on the assumptions used, and the conclusions in the Plan regarding appropriate stringency levels were informed by a broader review of how widely adopted and proven various control strategies had become. *Id.* at 36746-47. Because of this, the determinations in the Plan regarding the appropriate level of emission control that could be expected of a particular type of source considered not just cost-per-ton estimates, but analysis of which technologies were already in wide use or on which existing standards had been based. RTC at 62-63. Still, recognizing that individual sources may face circumstances of extreme economic hardship or infeasibility, the EPA also provided a mechanism for sources to obtain alternative emissions limits, among other mechanisms for flexibility in the Plan, to address outlier cases. *See* 40 CFR 52.40(e). These provisions are adequate to cover any potential gap in the Plan's estimate of representative costs.

Accordingly, recalculating the weighted average representative cost for these particular non-EGU sources based on the states for which the Rule is currently in effect would not produce a representative cost falling outside the acceptable range. Thus, any change in the weighted average used to derive "representative" costs for these industries and emissions unit types resulting from looking at some subset of states would not materially affect the analysis.

3. Step 4

At Step 4, implementation occurs through compliance activities at the source level. As all of the obligations of the Plan can be met by the sources in each state regardless of the application of the Rule in any other state, the change in the Rule's scope in light of the judicial stays does not pose any issues of "central relevance" at Step 4.

This can be seen in the structure of the regulations themselves. The Plan determines on a state-by-state basis which of the EGU and the non-EGU emissions-control programs (or both) should be applied. *See* 40 CFR 52.38(b)(2) (as amended by 88 FR at 36862-63) (identifying states subject to the Plan's "Group 3" EGU emissions trading program promulgated at 40 CFR pt. 97,

subpt. GGGGG); 40 CFR 52.40(c)(2) (as promulgated at 88 FR at 36869) (identifying states subject to non-EGU emissions control requirements promulgated at *id.* 52.41-46). The regulations at 40 CFR pt. 97, subpt. GGGGG and 40 CFR 52.41-46 are uniform in nature. But states are “enrolled” into these requirements based on state-specific findings regarding the level of their contribution to other states’ ozone problems and how long that contribution is projected to continue into the future.²⁸

It is through the application of those uniform programs, as appropriate, in each state, that the Plan eliminates each covered state’s significant contribution, as required by CAA section 110(a)(2)(D)(i)(I). The state-specific coverage of the Plan (at the time it was promulgated on March 15, 2023), by regulatory program, is as follows:

- EGUs in all covered states except California (22 states total) are required to participate in the Group 3 EGU emissions trading program at the level of stringency associated with near term emissions-control strategies that the EPA found can be implemented in 2023 and 2024.
- EGUs in Alabama, Minnesota, and Wisconsin are only subject to this “near-term” stringency level within the Group 3 Trading Program, and no more, because the EPA found these states are no longer linked to downwind ozone problems in 2026.
- EGUs in 19 states (excluding Alabama, Minnesota, and Wisconsin) that are covered by the Group 3 trading program, are subject to the enhanced stringency in the budgets that takes effect over 2026 and 2027 because these states are linked through the 2026 analytic year.
- The EPA found California has no cost-effective fossil-fuel fired EGU emissions reductions available at the stringency levels determined in the Plan and so is not subject to the Group 3 Trading Program at all.
- Non-EGUs in 20 states are subject to the uniform emissions control regulations. Because the EPA found these requirements may take up to three years to be implemented (*i.e.*, until 2026), this number excludes Alabama, Minnesota, and Wisconsin, for the same reason as above: these states are not “linked” in 2026.

Table 4: Coverage of Plan Regulatory Programs

State	EGU Program – Near Term Stringency	EGU Program – Long Term Stringency	Non-EGU
Alabama	X		
Arkansas	X	X	X
California			X
Illinois	X	X	X
Indiana	X	X	X

²⁸ This is identical in structure to how the EPA has promulgated good neighbor federal requirements through multiple prior rulemakings. See 40 CFR 52.38-39 (identifying the enrollment of states into emissions trading programs for ozone season NO_x, annual NO_x, and annual sulfur dioxide promulgated as subparts to 40 CFR. pt. 97, as necessary to address good neighbor obligations for other ozone and particulate matter NAAQS).

Kentucky	X	X	X
Louisiana	X	X	X
Maryland	X	X	X
Michigan	X	X	X
Minnesota	X		
Mississippi	X	X	X
Missouri	X	X	X
Nevada	X	X	X
New Jersey	X	X	X
New York	X	X	X
Ohio	X	X	X
Oklahoma	X	X	X
Pennsylvania	X	X	X
Texas	X	X	X
Utah	X	X	X
Virginia	X	X	X
West Virginia	X	X	X
Wisconsin	X		

These state groupings illustrate how the application of each set of regulatory requirements promulgated in the Plan depends on the circumstances of each state, as determined through the application of the nationwide four-step analytical framework. No particular requirement is applicable in all 23 states, and the workability of the Plan is not premised on an assumption that it must be applicable in specifically 23 states or any particular number of states.

As a practical matter, compliance is achievable through the at-the-source control technologies on which the EPA’s determination of “significant contribution” at Step 3 rested (or their equivalents, because the Plan does not mandate the use of particular control technologies). For non-EGUs, all of the requirements are established at the source-specific level. *See* 88 FR at 36675. The same is true of EGUs: the stringency of the Rule is premised on at-the-source, conventional control technologies. *See* Table 1 *supra*. The EPA has also designed a market-based, interstate emissions trading program to allow EGU sources to achieve their required emissions as efficiently and cost-effectively as possible, but that trading program is merely a more flexible means of implementing the source-specific requirements that otherwise apply under the Rule. Indeed, the enhancements the EPA established for the Plan’s trading program (as compared to prior good neighbor trading programs) were meant to ensure the flexibility of the trading program did not undermine the benefits of defining source-specific emission controls in the first place, which helps assure that EGU sources in each state have eliminated their own significant contribution and thus provided improvements in air quality to the downwind receptors to which their home states are linked. *See* 88 FR at 36657, 36684, 36752.²⁹

²⁹ Even before the Plan, following *North Carolina*, the EPA took measures to ensure that interstate trading does not undermine the obligation to eliminate each state’s significant contribution. *See North Carolina*, 531 F.3d at 921, *modified on reh’g*, 550 F.3d 1176. *See, e.g.*, 76 FR 48208, 48268-71 (Aug. 8, 2011); 88 FR at 36752-53.

Petitioners assert that without the participation of all states originally included in the Plan, market liquidity will be affected, allowance prices will increase, and/or there will not be sufficient allowances available for compliance. See USS Pet. at 8; Allele Pet. at 10. But the record, along with more recent evidence regarding the continuing successful operation of the trading program over the past year despite the suspension of the Rule in a number of states, shows that Petitioners' concerns are unjustified.

While interstate trading – especially among a large group of states – would generally increase the size of the allowance trading market and thus may increase market liquidity in ways that can improve market efficiency, the use of a trading program does not render implementation of a good neighbor rule in a smaller group of states, or even a single state, unreasonable. That is because, in the first instance, the good neighbor provision regulates EGU *sources*, not states. Even within a single state, there would be multiple participating sources to populate and benefit from an emissions trading program. Moreover, the history of the EPA's good neighbor rulemakings shows that these trading programs have continued to provide valuable, effective compliance flexibility even where they cover a smaller group of states.³⁰ Indeed, each state's budget is set in the Plan at levels that provide sufficient allowances for each state, assuming EGUs achieve a level of reduction equivalent to what can be achieved by the at-the-source technologies identified to eliminate significant contribution. And as explained above, all of the EPA's good neighbor rules, including the Plan, are designed with the understanding that states have the option to develop SIPs that remove their sources from a trading program and that the state-coverage of a FIP may otherwise change.

As a consequence, the size of the trading regions used to implement the good neighbor provision has both varied between rules and regularly changed within trading programs over time. This has never posed a challenge to compliance feasibility, nor does the EPA have any evidence of allowance shortages occurring in any of these programs. For example:

- Currently, Georgia is the only state whose EGUs remain in the original CSAPR “Group 1” ozone season NO_x trading program, which originally included 25 states.
- In 2021, the Revised CSAPR Update created a 12-state trading region to complete the remedy to significant contribution for the 2008 ozone NAAQS (*i.e.*, the original “Group 3” program).
- With the Revised CSAPR Update in place, the 2016 CSAPR Update “Group 2” program trading region was reduced from 22 states to 10 states.

The Plan's trading program remains an effective compliance flexibility, even with only 10 participating states. As the EPA has explained in court filings, the operation of temporarily smaller emissions trading regions for power plants participating in the Group 3 or other CSAPR

³⁰ The size of the trading region is not the only determinant of liquidity; the relative magnitude of demand for allowances compared to supply is an important factor. For example, inclusion in the program of states with sources that are not well-controlled for NO_x would tend to put upward pressure on allowance prices (and potentially reduce liquidity). If states with such sources are removed from the Group 3 trading program, for example due to judicial stays as to the states in which they are located, this may put downward pressure on allowance prices (and potentially increase liquidity). This may partially explain the ongoing decline in current Group 3 allowance prices.

trading programs has not negatively affected market liquidity, pricing, or allowance availability.³¹ Typically with emissions trading programs, allowance prices have tended to decline substantially over time as emissions reductions are implemented and a bank of unused allowances builds up. See 88 FR at 36687 (discussing experience in prior programs).³² So far, the experience with the Plan has been no different—even with the stays in place for 12 states allowance prices have been declining substantially since the EPA promulgated the Plan in March 2023. The current price, as of February 28, 2024, of a Group 3 allowance is \$925/ton (reflecting a drop of over 90% from where Group 3 allowance prices had been prior to the finalization of the Plan and reflecting a continuing decline in allowance prices over 2023, despite reductions in the number of states covered by the program resulting from the stays). This price trend further supports the record’s demonstration that suspension of 12 states from the trading program has not reduced the program’s liquidity or made allowances either scarce or unaffordable. To the contrary, the price trend shows that the Plan remains achievable within the current 10-state trading region, and there is no shortage of allowances available for compliance.³³

In short, under the Plan, the sources in each individual state may comply without regard to what sources in other states are doing—and even where cooperative market-based mechanisms are available to aid in that compliance, those mechanisms remain sound. 88 FR at 36760-61, 36817.

Finally, Petitioners have not supplied any information substantiating that a dynamic of competitive disadvantage has emerged among sources in states currently covered by the Plan as compared to sources in states with stays. As an initial matter, because the good neighbor provision imposes legal obligations on each state individually, it does not allow individual states to defer compliance with their legal obligations based on circumstances in other upwind states. That is consistent with the provision’s purpose, which is intended to ensure equity and fairness among states by prohibiting harmful upwind state emissions that impose regulatory, economic, and health burdens on downwind states. The inaction of some upwind states is not an appropriate justification for further relaxing *all* upwind states’ obligations, including those states who did not contest the inadequacy of their state plans, when it is downwind states who will

³¹ See Declaration of Joseph Goffman, Nos. 23A349, 23A350, 23A351 (S. Ct. filed Oct. 30, 2023), *available at* <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23a349.html>.

³² For example, according to S&P Global Market Intelligence, a subscription-based reporting service, allowances in each of the original CSAPR annual SO₂ and annual NO_x trading programs are currently trading between \$2.00 and \$3.00 per ton.

³³ Currently, EGUs in three states where the Plan is on pause (Kentucky, Louisiana, and West Virginia) are in a temporary trading program (“Expanded Group 2”) to maintain status quo regulatory requirements for these EGUs under the Revised CSAPR Update (86 FR 23054; April 30, 2021) during the pendency of litigation over the SIP Disapproval. See First IFR, 88 FR at 49297; Second IFR, 88 FR at 67104. The emissions and allowance-availability data indicate that there will not be compliance challenges for this group. Their combined EGU ozone season NO_x emissions were 40,648 tons in 2021, and 35,403 tons in 2022. Their combined budgets in 2023 and each subsequent year (so long as they remain in the “Expanded Group 2” program) are 41,753 tons. Taking into account already-banked allowances, they will have a total of 59,710 allowances available for compliance for the 2023 ozone season. Preliminary data indicates 2023 emissions for this group were 33,019 tons, so they will carry over a substantial bank of allowances for use in 2024 and later years. Therefore, there is no reason for any concern regarding compliance feasibility for the EGUs in these states.

suffer. That burden will fall not just on downwind communities, but on industries in downwind states with ozone nonattainment problems, who will bear even greater competitive disadvantages vis-à-vis their competitors in upwind states whose unchecked pollution is contributing to the enhanced regulatory burdens they already face under the Act. *See EME Homer City*, 489 U.S. at 519; *Maryland*, 958 F.3d at 1200-01, 1203-04. This is particularly true given the impending August 3, 2024 attainment date for compliance with the 2015 ozone NAAQS for Moderate nonattainment areas located throughout the country, and the Plan’s objective of further assisting downwind states in time for the 2027 Serious area attainment date. 88 FR at 36690, 36695.³⁴ In any case, in light of the unique ability of the power sector to shift generation among sources in supplying electricity to the power grid, the EPA conducted an analysis of the potential for power generators to shift production and emissions from EGUs in states covered by the Plan to states not covered by the Plan and found that the risk, while not zero, was relatively small. RTC at 604-05. Further, that risk is attendant and unavoidable at the boundaries of any multistate or regional program, regardless of its size, and so not particular to the issuance of the judicial stays here.

In short, the implementation of the regulatory requirements of the Plan is not impacted or undermined by only being applied to a subset of the states included in the Rule.

B. Other Features of the Statute and Plan Supporting the EPA’s Conclusion on Central Relevance

In light of the statutory text and context, the Plan is designed to be modular—*i.e.*, to apply on a state-by-state basis and to whichever states are presently subject to the EPA’s responsibility to issue a FIP. That the Plan functions to appropriately define and prohibit significant contribution on a state-by-state basis, regardless of the number of states covered, can be seen in a number of other features and elements of the Plan that were discussed in the proposal and final preambles.

First, as directed by the statute and relevant precedent, the EPA must define significant contribution in such a way that sources in “each state” are held responsible for the elimination of their own significant contribution. CAA section 110(a)(2)(D); *see* 88 FR at 36687-88, 36762 (citing *North Carolina*). In an earlier good neighbor rule, the Clean Air Interstate Rule (CAIR), the EPA quantified emissions reduction requirements at the regional level based on a regional analysis, and then apportioned the responsibility for reducing each pollutant among the

³⁴ Petitioner USS quotes at length a passage from the final preamble concerning the justification for application of the Plan in areas of Indian country within the borders of states covered by the Rule not subject to states’ SIP authority (referred to in the Plan as “301(d) FIP areas”). USS Pet. at 7 (quoting 88 FR at 36691). USS views this passage as establishing an “assumption” on the EPA’s part that the Rule must be simultaneously applied in all of the covered upwind states. First, this discussion concerned why the EPA viewed it as necessary and appropriate to extend the Plan’s requirements to 301(d) FIP areas located within the borders of states whose sources were found to be significantly contributing. The EPA explained that not doing so would pose a risk that such areas would then be targeted for the siting of polluting facilities to avoid the Plan’s requirements, frustrating the purpose of the Plan and the statute. 88 FR at 36691. This concern exists at the “intra-state” level. Second, the EPA remains concerned that to the extent it is within the Agency’s ability, equity and consistency should be maintained across all similarly situated jurisdictions. But for the reasons explained in this section, that does not extend to excusing one upwind state of its statutory obligations simply on the basis that another upwind state is currently under a preliminary judicial stay.

contributing states based on either the total allowance allocations for the states' EGUs under the Acid Rain Program (in the case of required sulfur dioxide reductions) or the total historical heat input amounts for the states' EGUs, adjusted for the types of fuels used (in the case of required NO_x reductions). *See* 70 FR 25162, 25176 (May 12, 2005).

In *North Carolina*, the D.C. Circuit found that CAIR had unlawfully defined "significant contribution" at a regional level rather than on a state-specific basis. 531 F.3d at 906-08, 919-21. After this ruling, the EPA took care to ensure the successor rule to CAIR, the Cross-State Air Pollution Rule (CSAPR), defined and prohibited significant contribution for each state. *See* 76 FR at 48271. It did this by evaluating and selecting appropriate uniform levels of control stringency for the sets of upwind states linked to each identified downwind receptor and then quantifying and implementing the required emissions reductions resulting from the selected control stringencies independently for each upwind state. *See id.* To ensure that each state would eliminate its own significant contribution within the flexible compliance mechanism of an interstate trading program for EGUs, the EPA also imposed a constraint on interstate trading within the trading program, through "assurance provisions" that imposed a 3-to-1 allowance-surrender ratio for emissions in excess of a certain percentage of each state's budget. As explained in the Plan, "The establishment [in CSAPR] of assurance levels with associated extra allowance surrender requirements was intended to respond to the D.C. Circuit's holding in *North Carolina* requiring the EPA to ensure within the context of an interstate trading program that sources in each state are required to address their good neighbor obligations within the state and may not simply shift those obligations to other states by failing to reduce their own emissions and instead surrendering surplus allowances purchased from sources in other states." 88 FR at 36786.

The features of CSAPR included to address the *North Carolina* decision have been retained in the Plan and enhanced to further ensure that each state remains responsible for elimination of its own significant contribution.³⁵ *See id.* at 36687-88, 36762 (citing *North Carolina*, at 906-08, 921; *see also* RTC at 42 ("[T]he D.C. Circuit has held that the EPA may not implement an emissions reduction program under the good neighbor provision that fails to ensure that each state has eliminated its own significant contribution. *North Carolina*, 531 F.3d at 921."); *id.* at 48 (same)).

Second, also consistent with the state-by-state structure of CAA section 110, as recognized in *North Carolina*, the EPA made specific findings regarding its authority to promulgate a FIP for each individual state covered by the Plan. 88 FR at 36689 n.109. Notably, the EPA had originally proposed that the rulemaking would promulgate FIPs for 26 states, not 23. *See* 87 FR 20036, 20038 (April 6, 2022). The modeling that informed the final rule indicated that Delaware and Wyoming were not linked to any out-of-state receptors, and that Tennessee would only be linked to a new class of "violating monitor" receptors. Thus, these three states were excluded from the final Rule. Including fewer states in the final rule than were included in the proposal

³⁵ For example, by strengthening incentives for individual units to optimize operation of their emissions controls, the backstop daily NO_x emissions rate provisions and the secondary emissions limitation provisions also both increase assurance that each state's significant contribution will be eliminated within that state. *See, e.g.*, 88 FR at 36767-68 and 36799-800.

did not alter the approach to defining the remaining states' significant contribution, nor cause any change in the covered states' obligations or the requirements imposed on emitting sources in those covered states.

The final modeling also indicated that several additional states were potentially linked and may "contribute significantly," and thus the EPA acknowledged in the final Rule that these states' obligations still needed to be addressed. *See* 88 FR at 36658 (identifying Arizona, Iowa, Kansas, New Mexico, Tennessee, and Wyoming as needing to be further addressed in a subsequent action). Under the EPA's analytical approach to the Rule, the absence of these states from the final Plan did not pose any challenge to finalizing and moving forward with implementing the Plan for the states included. Indeed, in the supplemental proposal the EPA has since issued to address sources in five of these additional states, the EPA proposed to find that there is no basis to adjust any aspect of the program as already applied in many other states in applying it in several additional states. *See, e.g.*, 89 FR at 12700.

Third, the Plan, consistent with the statute and like all prior good neighbor federal rulemakings, recognizes that states may choose to replace their FIP with a SIP. *See, e.g.*, 88 FR at 36838-42. In doing so, states may opt to leave the interstate trading program for EGUs in favor of an adequate, alternative approach to addressing their good neighbor obligations. *Id.* at 36841-42; *see also, e.g.*, CSAPR, 76 FR at 48328. Both the proposed and final Plan contained an extended discussion of how states could exit the Plan through several options for submitting approvable SIPs. 87 FR 20149-51; *see also id.* at 20040 ("[T]his proposal will provide states with as much information as the EPA can supply at this time to support their ability to submit SIP revisions to achieve the emissions reductions the EPA believes necessary to eliminate significant contribution."). In the final Rule, the EPA explained that it encouraged states to replace their FIP with an approvable SIP, specifically identifying that states could choose to exit the trading program, regulate different sources, or devise adequate alternative methodologies to defining "significant contribution." *See* 88 FR at 36839.

Fourth, the EPA's experience with prior good neighbor rules informs its determinations concerning the ability of the Plan to function sensibly regardless of the number of states included. As described in section IV.A.3 above, the EPA has removed states from coverage of prior good neighbor rules (including from interstate trading programs) in the past without any loss of program viability. *See* 88 FR at 36669. In addition, at times the EPA has been required to remove specific states from a good neighbor program as a result of adverse court decisions. For example, CSAPR was remanded as to multiple states based on overcontrol concerns in the aftermath of the Supreme Court's decision in *EME Homer City*, but the D.C. Circuit expressly declined to vacate CSAPR, even as to those states. *See EME Homer City Generation, LP v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015). Subsequent rulemakings moved several states out of the original CSAPR programs, without any issues concerning the feasibility or propriety of the remaining states' obligations. *See, e.g.*, 81 FR 74504, 74506-07 (October 26, 2016); *see also* 86 FR at 23056-57. Similarly, in *Michigan*, 213 F.3d at 695, the D.C. Circuit vacated the NO_x SIP Call as to Wisconsin, Missouri, and Georgia, but left the rule in place and remanded without vacatur

as to certain issues as to other states.³⁶ The modular nature of past good neighbor rules has functioned well and ensured that when the scope of a rule might change based on issues specific to particular states, the rule can continue to function properly for the states that remain covered by the rule.

Finally, there are no statements in the record of the Plan that suggest the EPA considered the Rule interdependent among states or dependent on a minimum number of states' participation. To the contrary, the EPA included a severability provision in the Plan indicating the Agency's expectation that the Plan would be implemented in individual states as necessary. 88 FR at 36693. While in one instance, the Rule did refer to the "interdependent nature of interstate pollution transport," see 88 FR at 36860, this was in reference to the nature of the pollution problem, not the nature of the EPA's solution. While the variable, interstate nature of ozone transport certainly presents a "thorny causation problem," *EME Homer City*, 489 U.S. at 514, the EPA's solution to that problem through a consistent application of the four-step interstate transport framework to each state is expressly designed to *avoid* the creation of unworkable interdependencies. See *Kentucky Energy & Env't Cabinet, Commonwealth of Kentucky, Energy Transfer, LP, and Buckeye Power, Inc. & Ohio Valley Elec. Coop. v. EPA*, Nos. 23-3605, 23-3624, 23-3641, and 23-3647, at 8 (6th Cir. Nov. 9, 2023) (order granting transfer to the D.C. Cir. and describing the Plan's requirements as interrelated, but avoiding interdependence).

By contrast, Petitioners' view that the analysis underlying the Plan would change depending on its scope of coverage misapprehends how the Rule is designed and operates. If Petitioners were correct that the EPA had designed a good neighbor rule that was contingent for any particular state on whether the rule covered other states, this would seemingly introduce an interdependency problem and render the rule invalid under *North Carolina*. It could also require that the EPA revise a good neighbor rule every time a state opted to impose a SIP to exit its FIP or was moved into a new FIP for a revised NAAQS or to fully address its obligations. The practical problems of such an approach reinforce why this would be an unreasonable way to define states' obligations. It would render good neighbor obligations an ever-shifting target, undermining regulatory certainty for sources and states. The Plan was designed to avoid such complications.

C. *Whether the Judicial Stays Justify Re-analysis of the Plan*

Petitioners maintain that the Plan must be re-analyzed in light of the judicial stays as to 11 states' SIP disapprovals. See *Allete Pet.* at 9–10; *USS Pet.* at 7. However, as explained in sections IV.A and IV.B above, a re-analysis would come to the same result because the analytical underpinnings and the implementation of the Plan do not depend on the specific number of states that it covers. For this reason, the EPA found in the Plan that it is severable by state. 88 FR

³⁶ The D.C. Circuit has in fact emphasized that the important public health benefits of the EPA's interstate transport rules, as well as the potential disruption to emissions trading markets, counsel against vacatur even when some aspect of the rules may be found unlawful or necessitate re-analysis. See *North Carolina*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *Wisconsin*, 938 F.3d at 336-37; *EME Homer City*, 795 F.3d at 132.

at 36693.³⁷ While the analytical methods, technical analyses, and policy judgments that informed the Plan were developed and conducted consistently across the nation, they ultimately produced a determination of significant contribution at the state level. The implementation of the measures necessary to eliminate significant contribution is achievable by the sources within each state, irrespective of other states' participation. It does not matter if there is one state or 50 states in the plan—the methodology and the result for any particular state would remain the same.

Further, although the substantive circumstances of the states remain constant, the circumstances of the rulemaking and litigation are likely to remain in flux. At the time of this response, there are currently 11 states for which the Plan is in effect, 12 states with preliminary stays pending judicial review of their SIP disapproval, and five other states for which the EPA has proposed to disapprove SIP submissions and promulgate FIPs that, if finalized, would establish requirements for each of the states pursuant to the Plan (see 89 FR 12666). The courts that have granted stays pending judicial review may later affirm the SIP Disapproval or may remand the SIP Disapproval as to particular states with or without vacatur. On any remand, the EPA will have to act on that state's SIP submission again, in accordance with the court's holdings. See *Calcutt v. Federal Deposit Ins. Corp.*, 598 U.S. 623, 629 (2023). And, at any point, any state may submit a new SIP to the EPA and the EPA will review that SIP. Ultimately, under the statute, every linked state will need to be covered by either an approved SIP or a FIP—with the number subject to each potentially changing at any point.

D. Conclusion on Issue 1

The EPA concludes that although the grounds for Petitioners' objections (i.e., the stays as to certain states) arose after the period for public comment but during the period for judicial review, the denial of their petitions for reconsideration on this issue is appropriate because the objections are not centrally relevant. The Petitions do not provide substantial support for the argument that the Plan should be revised because it currently applies to fewer states. As discussed throughout this section, the record for the Plan demonstrates that the obligations of each upwind state are designed to be independent of the number of states covered by the Plan and have not been affected by the judicial stays.³⁸ Therefore, the Petitioners' objection, that the Plan must be reconsidered due to preliminary stays of the Plan in several states, is not "centrally relevant" within the meaning of CAA section 307(d)(7)(B). The EPA would not have a basis to modify the Plan as to any state even if it had known the stays would occur when it promulgated

³⁷ The EPA stated: "In particular, this action promulgates a FIP for each covered state (and, pursuant to CAA section 301(d), for each area of tribal jurisdiction within the geographic boundaries of those states). Should any jurisdiction-specific aspect of the final rule be found invalid, the EPA views this rule as severable along those state and/or tribal jurisdictional lines, such that the rule can continue to be implemented as to any remaining jurisdictions." 88 FR at 36693.

³⁸ To the extent the lack of a more explicit explanation of how the Rule is not interdependent in the preamble for the Plan might be considered a procedural error, Congress established that any such errors must be extraordinarily important before any CAA action should be set aside as a result of them. See CAA section 307(d)(8) ("In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.").

the Plan. The EPA is denying the petitions for reconsideration as to this objection. For the same reasons, the EPA would deny these petitions even if they were petitions for reconsideration or rulemaking under the APA.

V. Evaluation of the Petitions for Reconsideration, Issue 2: Publication in the *Federal Register* after Stays Had Issued

Petitioners Arkansas and Hybar object that it was unlawful for the EPA to have allowed the Plan to be published in the *Federal Register* after stays of the predicate SIP Disapproval had been issued for several states. They particularly highlight the fact that the Eighth Circuit stayed the SIP Disapproval for the State of Arkansas on May 25, 2023. Arkansas Pet. at 4; Hybar Pet. at 3. Associating the date of publication in the *Federal Register* with the moment of “promulgation,” Arkansas Pet. at 4, they maintain that the EPA lacked authority to “promulgate” the Plan as to Arkansas on June 5, because the Arkansas SIP disapproval had been stayed, and thus Arkansas’s FIP is “void,” *id.*

For the same reasons explained in Section IV of this action, the first criterion for reconsideration under CAA section 307(d)(7)(B) is met. The specific circumstances giving rise to this objection arose after the period for public comment but within the time specified for judicial review of the Plan. Nonetheless, this objection is not “centrally relevant,” and the EPA denies reconsideration on this basis.

As an initial matter, for the reasons explained in Section IV above, there was no methodological, legal, or policy reason why the Plan (as signed and promulgated on March 15, 2023) should have been modified as to any particular state due to circumstances concerning other states initially included in the Rule. The states’ obligations are distinct, and the methodology remains reasonable regardless of the number of states included. And, as explained below, the EPA took appropriate action to ensure that good neighbor obligations would be suspended in states that were subject to judicial stays.

In any event, Petitioners’ request for reconsideration on the basis of the timing of publication confuses the “promulgation” of a rule under the Act with its publication date in the *Federal Register*. The Plan was promulgated on March 15, 2023, when it was signed by the EPA Administrator and then widely disseminated to the public through web posting. These two acts together (signature plus widespread dissemination) constitute “promulgation” as that term is used in CAA section 307. This reflects longstanding judicial understanding and agency practice under the Act. *See, e.g., Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 24 (D.C. Cir. 1979). The Act requires that the EPA’s substantive work on a rule subject to CAA section 307(d) must cease as of the date of promulgation; the EPA cannot augment or modify the record after that point. CAA section 307(d)(6)(C) & (d)(7)(A).

Publication of a rule in the *Federal Register*, by contrast, establishes the beginning of the 60-day window for filing petitions for judicial review under CAA section 307(b)(1) and may trigger an effective date. Nonetheless, under the provisions of CAA section 307, judicial review of actions the EPA takes pursuant to CAA section 307(d) is limited to the record at the time of promulgation, and only objections raised with reasonable specificity during the comment period

can be the subject of judicial review. CAA section 307(d)(7)(B). Thus, events or changed circumstances that occur post-promulgation but before publication in the *Federal Register* generally cannot be introduced as objections to the lawfulness of a rule subject to section 307(d). These statutory provisions make sense as a practical matter, because once the EPA has submitted a signed document to the Office of Federal Register for publication, the Agency largely loses control of the timing of publication and the remaining process.

The EPA acknowledges that agencies generally possess the ability to withdraw notices from the Office of Federal Register before they publish. However, the circumstances in this instance did not justify that the EPA withdraw the Plan from publication. The Plan appropriately identifies and prohibits “significant contribution” from 23 states on an individual basis. Nonetheless, the final rule notice and the supporting underlying technical documents and other materials constituted an integrated whole reflecting a single rulemaking effort that could not be easily modified. The EPA concluded it was not appropriate to withdraw a promulgated rule to effect revisions to its scope when, as explained in Section IV above, the Plan operates reasonably and lawfully for any state where it is in effect. The EPA had an alternative means of ensuring that the Plan did not go into effect for particular states, and that alternative better accounted for the fact that the ultimate outcome of litigation over the SIP Disapproval remained (and remains) unknown. Further, the EPA could not have re-drafted an entirely new notice for a subset of states and still obtained necessary emissions reductions for the 2023 ozone season, in accordance with the statutory attainment schedule faced by downwind states. *See* 88 FR at 36694 (citing *Wisconsin*, 938 F.3d at 318-20).

Instead, the EPA undertook a reasonable alternative course of action that ensured compliance with all of its legal obligations through less onerous means. Before the Plan published on June 5, the Agency on June 1 made clear its intention to stay the application of the Plan as to particular states as necessary in light of any judicial stays of the underlying SIP Disapproval. *See* Memorandum from Joseph Goffman, Notice of Forthcoming EPA Action to Address Judicial Stay Orders (June 1, 2023).³⁹ The EPA made clear that sources in those states would not need to comply with the Plan so long as its predicate authority to implement FIPs for the states was stayed. The EPA then issued two interim final rules to render the Plan inapplicable on an indefinite basis for a total of 12 states. 88 FR 49295 (July 31, 2023); 88 FR 67102 (Sept. 29, 2023). In this manner, the EPA was able to ensure that the Plan was published and would be effective in those states for which the EPA continued to possess authority to implement the FIPs, while ensuring the Rule would be suspended pending future rulemaking activity in states where preliminary judicial stays were in place. The EPA made clear that to lift its administrative stays of the Plan for any states, it would need to take subsequent, judicially reviewable rulemaking action, at which time any issues associated with transitioning states back into the Plan could be addressed.

Petitioners maintain that the EPA should not have allowed the Plan to publish at all for states like Arkansas that had obtained a stay in the days immediately prior to publication in the

³⁹ Available at https://www.epa.gov/system/files/documents/2023-06/Goffman%20Memo%20re%20Stay%20Orders_060123%20JG%20%281%29.pdf.

Federal Register. Petitioners' objection is at best already moot, or at worst amounts to no more than harmless procedural error. The EPA timely suspended these states' requirements under the FIP in the Interim Final Rules, and any further modification of the FIP is unnecessary.

Reconsideration would not provide any relief that these Petitioners do not already have. In addition, the standard for procedural error in CAA section 307(d)(9) applies in this instance. An EPA action may be set aside for failing "observance of procedure required by law" only if such failure is arbitrary and capricious, the exhaustion requirement of CAA section 307(d)(7)(B) has been met, and the condition of the last sentence of CAA section 307(d)(8) is met. CAA section 307(d)(9). The last sentence of CAA section 307(d)(8) provides, "In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."

Under that standard, first, an alleged failure to do something post-promulgation does not constitute a violation of any procedural requirement under CAA section 307(d) or other provision of law, because CAA section 307(d) establishes procedural obligations leading up to "promulgation" of a rule. Petitioners have cited no "procedure required by law," CAA section 307(d)(9)(D), and the EPA is aware of none, that would establish additional procedural rights during the period between promulgation and *Federal Register* publication, especially where the Agency has acted to maintain the status quo through other means. Second, the test of CAA section 307(d)(8) is not met. Even if considered a "procedural error" (which the Agency disputes), Petitioners cannot establish a "substantial likelihood" that the Rule would have been "significantly changed," for the reasons explained in Section IV above. See CAA section 307(d)(8).

The EPA thus concludes that Petitioners' objection that the Plan as published in the *Federal Register* covered a particular state after a stay of the SIP Disapproval had been granted as to such state is not centrally relevant. Accordingly, the EPA is denying the petitions for reconsideration as to this objection. For the same reasons, the EPA would deny these petitions even if they were petitions for reconsideration or rulemaking under the APA.

VI. The EPA's Evaluation of the Petitions for Administrative Stay

The petitions for reconsideration on the two objections addressed in Sections IV and V above also requested that the EPA stay the Plan. See *Allete Pet.* at 2; *USS Pet.* at 2. As explained in Sections IV and V, however, the EPA finds that these objections are not "centrally relevant" because they misapprehend the relevant statutory provisions and how the Rule was designed and operates. As such, the EPA finds that these objections provide no basis for an administrative stay of the Plan under either the APA or the Act for those states where it is currently in effect.

Section 10 of the APA, 5 U.S.C. § 705, authorizes an agency to postpone the effective date of an agency action pending judicial review when the agency finds that justice so requires. This standard is not met because, for the same reasons explained in Sections IV and V of this document in denying Petitioners' requests for reconsideration, the EPA finds no basis on which to stay the requirements of the Plan as to any particular state or group of states solely on the basis that the Rule is not currently in effect as to another state or states.

The EPA is also authorized to issue an administrative stay for up to 3 months if the criteria for mandatory reconsideration under CAA section 307(d)(7)(B) are met. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017); *see also Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018). For the reasons provided in Sections IV and V above, Petitioners’ objections concerning the geographic scope of the Plan following post-promulgation judicial stays fail to satisfy the criteria in CAA section 307(d)(7)(B) for mandatory reconsideration proceedings. Accordingly, the EPA is not authorized to administratively stay the Plan on these bases under CAA section 307(d)(7)(B). *Clean Air Council*, 862 F.3d at 8.

VII. Judicial Review

This final action may be challenged in the United States Court of Appeals for the District of Columbia Circuit. Pursuant to CAA section 307(b)(1), petitions for judicial review of this action must be filed in that court within 60 days after the date notice of this final action is published in the *Federal Register*.

CAA section 307(b)(1) governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the D.C. Circuit: (1) when the Agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (2) when the Agency action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” Numerous petitions for review of the Plan are currently proceeding before the D.C. Circuit. For the same reasons that the D.C. Circuit is the appropriate venue for challenges to the Plan, it is also the appropriate venue for any challenges to this final action.

This action is “nationally applicable” within the meaning of CAA section 307(b)(1) because it denies petitions to reconsider and stay the Plan, which is itself a nationally applicable action. 88 FR at 36860; *see also Order, Kentucky Energy and Environment Cabinet v. EPA*, No. 23–3605 (6th Cir. Nov. 9, 2023). On its face, the Plan is nationally applicable because it applies nationally consistent standards and uniform methodologies to 23 states located in ten of the eleven regional federal judicial circuits across the nation. 88 FR at 36860. Although the Plan is temporarily stayed in 12 states as a result of pending litigation, *see notes 4 and 5 supra*, these temporary stays do not alter the Rule’s national applicability.⁴⁰ This denial is likewise nationally applicable because the result of this partial denial of the four petitions identified herein is that the existing Plan remains in place and undisturbed – and because any judicial order disturbing the EPA’s reasoning herein would impact sources, states, and other parties across multiple judicial circuits.

In the alternative, to the extent a court finds this action or a relevant portion thereof to be locally or regionally applicable, the Administrator hereby makes and publishes a finding that the action is based on several determinations of “nationwide scope or effect” within the meaning of CAA section 307(b)(1). These determinations, which lie at the core of this action and are the

⁴⁰ Upon the conclusion of the separate supplemental rulemaking, the Plan may also apply in up to five additional states. *See* 89 FR 12666.

primary aspects of the Plan that petitioners ask the EPA to reconsider, include: the determination that the Plan is lawful and implementable as applied in any individual state even if it is not in effect for any other particular state or group of states; the determination that the Plan is premised on a series of national-scale analyses that are not limited in scope to any particular geography or group of states; and the determination that the Plan need not be reconsidered as to any group of sources or states on the basis that publication of the Plan in the *Federal Register* occurred following the issuance of preliminary judicial stay orders as to several states.