

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:

Air Plan Disapprovals; Interstate )  
Transport of Air Pollution for the 2015 )  
8-Hour Ozone National Ambient Air )  
Quality Standards )

Docket Nos: EPA-R06-OAR-2021-0801 and  
EPA-HQ-OAR-2021-0663

**PETITION FOR RECONSIDERATION AND REQUEST FOR  
ADMINISTRATIVE STAY**

**I. Introduction**

Pursuant to Section 307 of the Clean Air Act (“CAA”)<sup>1</sup>, the Arkansas Department of Energy & Environment, Division of Environmental Quality (“DEQ”) submits this Petition for Reconsideration requesting that the Administrator of the U.S. Environmental Protection Agency (“EPA”) convene a proceeding for reconsideration of the final Rule, “Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards” (“Rule”)<sup>2</sup>. The DEQ also requests that the EPA immediately stay the Rule pending completion of this reconsideration. Absent a stay, EPA will implement its Good Neighbor Federal Implementation Plan (FIP)<sup>3</sup> for Arkansas, which will require unduly burdensome and unnecessary expenditures by approximately 47 facilities within Arkansas. These costs will adversely impact Arkansas’s workforce and economy and, ultimately, be borne by the Arkansas citizens.

Given the issues raised in this petition, the EPA should contact the DEQ to discuss an appropriate schedule and process for reconsideration with an administrative stay in place. In the event the EPA has neither granted the petition nor made alternative arrangements with the consent

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<sup>1</sup> 42 U.S.C §7607(d)(7)(B).

<sup>2</sup> 88 Fed. Reg. 9336 (February 13, 2023) (hereinafter “Rule”).

<sup>3</sup> Prepublication Notice (March 15, 2023) (hereinafter “Good Neighbor FIP”)

<https://www.epa.gov/system/files/documents/2023-03/FRL%208670-02->

[OAR\\_Good%20Neighbor\\_Final\\_20230314\\_Signature\\_ADMIN%20%281%29.pdf](https://www.epa.gov/system/files/documents/2023-03/FRL%208670-02-OAR_Good%20Neighbor_Final_20230314_Signature_ADMIN%20%281%29.pdf)

of the DEQ to establish a schedule for reconsideration within seventy (70) days of receipt of this request, such inaction will be deemed a denial of the Petition. As a precautionary measure, DEQ, through the office of the Arkansas Attorney General, filed a Petition for Review of the final Rule with the United States Court of Appeals for the Eighth Circuit, Case Number 23-1320, on February 16, 2023.

## **II. Background**

Under the CAA, Congress established a cooperative framework between the EPA and states for the protection of air quality. Under CAA §109, Congress granted EPA the authority to establish National Ambient Air Quality Standards (“NAAQS”) for common air pollutants at a level requisite to protect public health and welfare with an adequate margin of safety. Under CAA §110, Congress charged states with the primary responsibility to develop and implement plans for attainment and maintenance of the NAAQS. The EPA must review and approve each state implementation plan (“SIP”) submission that meets all applicable requirements under CAA §110. The EPA also provides technical assistance to the states by issuing guidance and conducting analyses that states may use during SIP development. If a state fails to submit a SIP or submits a SIP that fails to meet all of the requirements under Clean Air Act §110, EPA serves a backstop role to ensure implementation of the NAAQS by issuing a FIP within two years of issuance of a finding of failure to submit a SIP or within two years of finalizing a SIP partial or complete disapproval. Therefore, a FIP addresses the applicable requirements not satisfied by a SIP until the state submits a revised SIP approved by the EPA.

On October 1, 2015, the EPA finalized a revised NAAQS for ozone, setting in motion a three-year timeline of events for each state to develop and submit plans for implementing the revised NAAQS. In January of 2017, the EPA released modeling results to help guide states in

their policy decisions and data analysis. The EPA followed up with clarifying Memorandums in October 2017, March 2018, August 2018, and October 2018. The March 2018 Memorandum included a four-step framework for assessing interstate transport of air pollutants. Arkansas initiated rulemaking associated with the NAAQS revision in September 2018, which became final in September 2019. DEQ consulted with EPA Region 6 throughout the process of SIP development and, as a result, made changes to its analyses both before and after the comment period in response to EPA feedback. DEQ submitted a SIP revision for implementing the 2015 ozone NAAQS to EPA on October 4, 2019. The EPA made a completeness determination for the SIP submission on November 7, 2019. The completeness determination established a November 7, 2020, deadline for EPA to review and make a proposed action (approval or disapproval) under Clean Air Act §110k. EPA approved the majority of Arkansas's 2019 SIP submittal for implementing the 2015 ozone NAAQS on February 12, 2021. After this approval, DEQ received no further comments on its submittal until EPA published its notice on January 30, 2022, that the proposed Rule was sent for publication in the Federal Register.

In the proposed Rule, EPA disapproved one (1) component of Arkansas's 2019 plan for implementing the 2015 ozone NAAQS: DEQ's demonstration that the SIP contains adequate provisions to prohibit emissions sources and emissions activity from within the state from emitting any air pollutant in amounts that "will contribute significantly to nonattainment" or "interfere with maintenance" of the NAAQS in other states.<sup>4</sup> This component is often referred to as the "interstate transport" or "good neighbor" requirement for implementation of the NAAQS. Concurrently with the Rule, the EPA has also proposed the Good Neighbor FIP to address CAA §110(a)(2)(D)(i)(I)

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<sup>4</sup> Clean Air Act §110(a)(2)(D)(i)(I).

based on its own policies in place of the state policies. The final Good Neighbor FIP was noticed on March 15, 2023, for publication in the Federal Register.

**III. EPA should reconsider the Rule based on the DEQ's objections and find that the original Arkansas SIP is sufficient to reach attainment.**

The CAA requires the EPA to convene an administrative proceeding for reconsideration of a rule if a party raising an objection to the rule demonstrates to the EPA that: 1) 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; and 2) the objection is of central relevance to the outcome of the rule.<sup>5</sup> The objections raised below arose after the comment period, are within the time specified for judicial review, and are of central relevance to the outcome of the final SIP Disapproval. Arkansas raises the following objections to the Rule:

- a. EPA nullified cooperative federalism and state-led action in violation of the CAA by engaging in a combination of arbitrary and capricious decisions.
- b. EPA released new modeling data in its Good Neighbor FIP on March 15, 2023, demonstrating that the control strategy included in Arkansas's 2019 SIP submission was adequate to prohibit sources in the state from continuing to contribute to nonattainment or interfere with maintenance before imposition of the new control requirements included in the Good Neighbor FIP.

The EPA asserted in its Response to Comments that it may utilize new data produced after the deadline for a SIP submittal, after the completion of the submittal, and after EPA's statutory deadline for a SIP approval decision.<sup>6</sup> EPA also contends that it may disregard its own guidance

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<sup>5</sup> 42 U.S.C. § 7607(d)(7)(B).

<sup>6</sup> This is contrary to long standing EPA practice to not base review upon data updated just prior to or after SIP submission. See: Partial Approval and Partial Disapproval of Air Quality Implementation Plans; California; San Joaquin Valley Serious Area and Section 189(d) Plan for Attainment of the 1997 Annual PM2.5 NAAQS, 86 FR 67,329, 67,333 (Nov. 26, 2021). See: Determination of Attainment of the 1-Hour Ozone Standard; Determination Regarding Applicability of Certain Clean Air Act Requirements; Approval and Promulgation of Ozone Attainment Plan; San Francisco Bay Area, CA, 69 FR 21,717, 21,727 (Apr. 22, 2004). See: Approval and Promulgation of Air Quality State Implementation Plans; California; San Joaquin Valley; Moderate Area Plan for the 2006 PM2.5 NAAQS, 81 FR 59,876, 59,878 (Aug. 31, 2016). See: Approval and Promulgation of Implementation Plans: 1-Hour Ozone Extreme Area Plan for San Joaquin Valley, CA, 75 FR 10,420, 10,422-23 (Mar. 8, 2010). See: EPA, Office

relied upon by the state in promulgating a SIP submittal. Furthermore, the EPA defended its reliance upon modeling data created after the publication of the draft Rule and to finalize the disapproval of the Arkansas SIP. The EPA asserts that at any point during the evaluation of a SIP it may rely on information unavailable to the states during the development of the SIP.

EPA fails to present sufficient precedent supporting the combination of these actions and the combined effects upon cooperative federalism and state-led action as required by the CAA. By continuously changing the requirements for an approvable SIP, the EPA has prevented the Arkansas from engaging in meaningful participation in the process. Accordingly, EPA's actions have negated cooperative federalism and state-led action in violation of the CAA.

**a. EPA nullified cooperative federalism and state-led action in violation of the CAA by engaging in a combination of arbitrary and capricious decisions.**

“The Clean Air Act is an ‘experiment in cooperative federalism.’”<sup>7</sup> A state has “wide discretion in formulating its plan” to achieve the NAAQS<sup>8</sup>, and it is the states, not the EPA, that have “the power to determine which sources would be burdened by regulation and to what extent.”<sup>9</sup>

In addressing the comments made regarding the EPA's disregard of cooperative federalism, the EPA replied:

As an initial matter, the EPA agrees that the CAA establishes a framework for state-federal partnership to implement the NAAQS based on “cooperative federalism.” Under the general model of cooperative federalism, the federal government establishes broad standards or goals, states are given the opportunity to determine how they wish to achieve those goals, and if states choose not to or fail to adequately implement programs to achieve those goals, a federal agency is empowered to directly regulate to achieve the necessary ends. Thus, the EPA also agrees that states have the obligation and opportunity in the first instance to develop an implementation plan to achieve the NAAQS under CAA section 110, that state air agencies are fully capable of developing

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of Transportation and Air Quality, “Policy Guidance on the Use of MOVES3 for State Implementation Plan Development, Transportation Conformity, General Conformity, and Other Purposes,” November 2020, 7, 8.

<sup>7</sup> *Texas v. EPA*, 829 F.3d 405, 406 (2016) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1083(D.C. Cir. 2001))

<sup>8</sup> *Id.* at 411

<sup>9</sup> *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976)

SIP submissions that satisfy the requirements of the CAA, and that the EPA will approve SIP submissions under CAA section 110 that fully satisfy the requirements of the CAA. This sequence of steps is not in dispute.<sup>10</sup>

DEQ agrees that the sequence of steps is not in dispute. DEQ disagrees that “steps” are all that is required by cooperative federalism. Cooperative federalism necessarily includes the opportunity for states to have meaningful participation in the process described above. EPA’s failure to include this opportunity would render the statement “wide discretion in formulating its plan”<sup>11</sup> meaningless.

The EPA has made it impossible for DEQ to meaningfully participate. DEQ can submit a proposed SIP or revised SIP at any time and satisfy a “step.” However, this submission is meaningless if EPA is given the ability to disapprove the plan using new data unavailable to states at the time of the SIP creation, disregard its own guidance, and issue a final Rule without allowing comment on new changes. Any SIP Arkansas submits will be outdated prior to its submission and there will be little to no chance of it being approved. If EPA allows this to be the process of SIP approval, it renders cooperative federalism under the CAA useless.

The first arbitrary and capricious action EPA took is that it changed the modeling upon which it evaluated the Arkansas SIP twice since DEQ submitted the SIP. Each time, the numbers, and therefore the linked receptors, have changed. One of these changes even occurred between the publication of the draft Rule and the publication of the final Rule. Not only are the linked receptors different in the final Rule but it also included a new classification of receptors<sup>12</sup>, none of which DEQ had the opportunity to comment on.

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<sup>10</sup> EPA RTC doc pg 424

<sup>11</sup> *Texas v. EPA*, 829 F.3d 405, 406 (5<sup>th</sup> Cir. 2016)

<sup>12</sup> In the final Rule, EPA also identified four additional “violating monitor” maintenance-only receptors based on recent monitoring data. See Final Rule, Section IV.S; Air Quality Modeling Technical Support Document 2015 Ozone NAAQS SIP Disapproval Final Action (“Air Quality Modeling TSD”), at 14.

Second, the process of writing and formalizing an initial or revised SIP submittal takes between eighteen (18) to thirty (30) months to complete and submit to EPA for review. As described above, the EPA has already moved the goal post once during the past year after moving it at least twice in the previous two years. It is reasonable to expect the EPA to move the goal post yet again, perhaps multiple times, before any<sup>13</sup> state, including Arkansas, can formulate a revised SIP. Then, based upon the EPA's prior actions, it will not approve or disapprove the SIP within the statutorily required time frame and will change the data yet again rendering Arkansas's SIP submission obsolete. The EPA should have determined a definite set of modeling data upon which Arkansas's SIP would be evaluated instead of constantly changing the data. EPA's refusal to acknowledge the modeling in effect at the time DEQ submitted Arkansas's proposed SIP suggests EPA never intended for DEQ to have a chance to submit an approvable SIP.

Third, EPA disregarded its own guidance. DEQ relied upon the EPA's March 2018 Memorandum<sup>14</sup> in formulating its SIP submittal. As specified by the EPA, DEQ used 2023 future year results provided in the EPA's March 2018 Memorandum to identify nonattainment and maintenance receptors. In the proposed Rule, the EPA relied primarily upon 2023 and 2026 future year results from the 2016v2 modeling platform. Based on this new modeling data, the only receptor that DEQ identified as having a potential linkage to Arkansas at Step 2 of the framework (Allegan County, MI) is no longer among the areas identified as nonattainment and maintenance receptors in Step 1. In the final Rule, the EPA relied upon 2016v3 modeling. Neither of these

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<sup>13</sup> States that manage to have their SIPs approved are rarely linked to a nonattainment downwind state or they get lucky with new data only showing linkage to receptors in attainment.

<sup>14</sup> March 27, 2018. Information on Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I). EPA Office of Air Quality Planning [https://www.epa.gov/sites/default/files/2018-03/documents/transport\\_memo\\_03\\_27\\_18\\_1.pdf](https://www.epa.gov/sites/default/files/2018-03/documents/transport_memo_03_27_18_1.pdf)

modeling platforms were available to DEQ when it submitted its SIP. Again, the EPA changed the basis upon which a SIP could be formulated in quick succession.

Fourth, EPA applied a one percent (1%) threshold without adequate justification<sup>15</sup> and ignored its own guidance. Consistent with the EPA's August 2018 Memorandum<sup>16</sup>, DEQ selected a 1 part per billion (ppb) threshold for identifying linkages between Arkansas and nonattainment and maintenance receptors. The EPA disregarded its own guidance and applied a one percent threshold without adequate justification.<sup>17</sup> As a result, the nonattainment and maintenance receptors changed. The EPA has arbitrarily and capriciously required a standard that was initially packaged as just one option.

Finally, the EPA erroneously claims DEQ did not conduct an adequate analysis of emissions from sources and other emission activity from within the state to determine whether its contributions were significant. DEQ did conduct such an analysis and provided information in its comments on the draft Rule confirming same. When using 2016v2, DEQ's SIP should have been approved. Now, the EPA has changed the data and relied upon 2016v3.

The combined actions of EPA have made it impossible for Arkansas to have any meaningful participation in the process. Accordingly, EPA should reconsider its final Rule.

- b. EPA released new modeling data in its Good Neighbor FIP on March 15, 2023, demonstrating that the control strategy included in Arkansas's 2019 SIP submission was adequate to prohibit sources in the state from continuing to contribute to nonattainment or interfere with maintenance before imposition of the new control requirements included in the Good Neighbor FIP.**

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<sup>15</sup> "It is axiomatic that the APA requires an agency to explain its basis for a decision." *Physicians for Soc. Responsibility v Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020). "This foundational precept of administrative law is especially important where, as here, an agency changes course." *Id.* "Reasoned decision-making requires that when departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'" *Id.* (quoting *Sw. Airlines Co. v FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019).

<sup>16</sup> August 31, 2018. P. Tsirigotis Memo: Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards [https://www.epa.gov/sites/default/files/2018-09/documents/contrib\\_thresholds\\_transport\\_sip\\_subm\\_2015\\_ozone\\_memo\\_08\\_31\\_18.pdf](https://www.epa.gov/sites/default/files/2018-09/documents/contrib_thresholds_transport_sip_subm_2015_ozone_memo_08_31_18.pdf)



On March 15, 2023, the EPA released new modeling results for 2026 ozone projections and state contributions based on its revised 2016v3 modeling platform with its final Good Neighbor FIP. This data was not available during the comment period on the proposed Rule or in the supporting documentation of the final Rule. Consistent with the modeling results included in the draft Rule, the 2016v3 results demonstrate that Arkansas will only be linked at EPA's threshold of one percent (1%) to projected maintenance receptors that are expected to attain the 2015 ozone NAAQS based on on-the-books controls by 2026. EPA's Good Neighbor FIP does not require new controls for sources in Arkansas until 2026 (or later in the case of extensions and phase in of obligations for power plants and industrial sources). Therefore, no controls would go into place until the linked downwind receptors have already achieved the standard. This renders such controls unnecessary to meet Clean Air Act Good Neighbor obligations when paired with DEQ's EPA-approved prevention of significant deterioration rules. DEQ's prevention of significant deterioration new source review process prohibits emissions from a new source or modification to an existing source in an amount that could contribute to nonattainment or interfere with maintenance of the NAAQS. Therefore, EPA's final Rule is inconsistent with the 2016v3 modeling 2026 projections and EPA's compliance deadlines in the Good Neighbor FIP. EPA should approve DEQ's SIP submission based upon this new information.

#### **IV. Conclusion.**

DEQ's SIP should be approved based upon the information and guidance, including the August 2018 Memorandum, available at the time the EPA was statutorily required to render a decision. Furthermore, the control strategy in DEQ's SIP continues to ensure that emissions from Arkansas sources will not contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS even after consideration of new data released with the Rule and the Good Neighbor

FIP. In the alternative, the final Rule should be withdrawn until such time as Arkansas has the opportunity to perform a thorough review of the new data released with the Rule and Good Neighbor FIP and comment on the changes between the draft and final Rule. EPA's failure to either approve Arkansas's SIP or withdraw the Rule disregards the requirements of cooperative federalism. Finally, the Rule should be stayed pending the conclusion of this review.

Date: March 21, 2023

Respectfully Submitted,

Arkansas Department of Energy &  
Environment, Division of Environmental  
Quality

By: 

Tracy R. Rothermel  
Senior Attorney  
AR Dept. of Energy & Environment  
5301 Northshore Drive  
North Little Rock, AR 72118  
(501) 682-0743  
tracy.rothermel@adeq.state.ar.us