COMMENTS OF THE POWER GENERATORS AIR COALITION ON EPA'S PROPOSED RULE AND RECONSIDERATION OF FINAL RULE ENTITLED "INTERSTATE TRANSPORT PLAN REVIEW FOR THE 2015 OZONE NAAQS"

91 Fed. Reg. 4026 (Jan. 30, 2026)

Docket ID No. EPA-HQ-OAR-2025-0192

The Power Generators Air Coalition ("PGen") respectfully submits these comments to the United States Environmental Protection Agency ("EPA" or "Agency") on its proposed rule and reconsideration of final rule entitled "Interstate Transport Plan Review for the 2015 Ozone NAAQS," which was published in the Federal Register on January 30, 2026 (hereinafter, "Proposed Rule").[1] The Proposed Rule is a collection of eight actions to approve the state implementation plan ("SIP") submissions from eight states (Alabama, Arizona, Kentucky, Minnesota, Mississippi, Nevada, New Mexico, and Tennessee) addressing interstate transport for the 2015 8-hour ozone national ambient air quality standards ("NAAQS").[2] EPA also notes that if it finalizes the Proposed Rule, it anticipates withdrawing its previous proposed rule disapproving the interstate transport SIPs for three of those states (Arizona, New Mexico, and Tennessee) and withdrawing its previously proposed error-correction actions for two other states' interstate transport SIPs (Iowa and Kansas).[3] If finalized, the Proposed Rule "would resolve these 10 States' obligations to eliminate significant contribution to nonattainment or interference with maintenance of the 2015 8-hour ozone NAAQS in other States."[4]

PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—and two national trade associations (the American Public Power Association and the National Rural Electric Cooperative Association). PGen members own and operate a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.[5] PGen's individual members are collectively responsible for over 260,000 megawatts of electric generation and operate and serve over 50 million customers in 40 states. When the membership of the two trade associations that are members of PGen are considered, PGen members

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[1] 91 Fed. Reg. 4026 (Jan. 30, 2026).

[2] *Id.* at 4028-29.

[3] *Id.* at 4029. The proposed rule that EPA anticipates withdrawing is published at 89 Fed. Reg. 12,666 (Feb. 16, 2024).

[4] *Id.* at 4026. EPA has correctly not made a determination of nationwide scope and effect, and as a result, judicial review of any of the final actions on these ten SIPs may be filed only in the United States Court of Appeals for the appropriate regional circuit in which each state is located. CAA § 307(b), 42 U.S.C. § 7607(b); *see also Oklahoma v. EPA*, 145 S. Ct. 1720, 1727-28 (2025) (holding that SIP disapprovals—and thus SIP approvals under the same reasoning—are "locally or regionally applicable actions reviewable in a regional Circuit").

[5] Additional information about PGen and its members can be found at https://pgen.org/.

serve over 152 million customers in all 50 states plus five U.S. territories. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation.

PGen as an organization does not participate in legislative lobbying or litigation, but some PGen members are participating in litigation challenging EPA's interstate transport federal implementation plan ("FIP") for the 2015 8-hour ozone NAAQS (also known as the Good Neighbor Plan) and in litigation challenging the underlying disapprovals of states' interstate transport SIPs that led to the interstate transport FIP.

PGen's individual members and the members of PGen's trade association members combined own and operate fossil fuel-fired electric generating units ("EGUs") in all ten of the states affected by the Proposed Rule. As such, PGen has an interest in the Proposed Rule. PGen has filed extensive comments on the interstate transport FIP and on all subsequent related rulemakings, including EPA's proposed supplement to the FIP and the interim rules involving the FIP.[6]

EPA's rationale in the Proposed Rule is sound and provides support for EPA's proposed approval of the interstate transport SIPs for the ten states. For the reasons discussed below, PGen supports the Proposed Rule and urges EPA to finalize it.

I. History of Prior Actions by EPA and the States to Address Interstate Transport Obligations for the 2015 8-Hour Ozone NAAQS

In 2015, EPA issued a revised NAAQS for ozone, lowering the standard from 75 parts per billion ("ppb") to 70 ppb.[7] States then had three years to develop SIPs for the 2015 ozone NAAQS.[8] These SIPs needed to address, among other requirements, the Clean Air Act's ("CAA") interstate transport provision, which requires that each SIP "contain adequate provisions … prohibiting … any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]."[9] This obligation for SIPs to address interstate transport are at the heart of the Proposed Rule.

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[6] PGen Comments on EPA's Federal Implementation Plan Addressing Regional Transport for the 2015 Ozone NAAQS, EPA-HQ-OAR-2021-0668-0551 (June 21, 2022); PGen Comments on EPA's Proposed Federal "Good Neighbor Plan" for the 2015 Ozone NAAQS; Response to Judicial Stays of SIP Disapproval Actions for Certain States, EPA-HQ-OAR-2021-0668-1205 (Aug. 30, 2023); PGen Comments on EPA's Proposed Federal "Good Neighbor Plan" for the 2015 Ozone NAAQS; Response to Additional Judicial Stays of SIP Disapproval Actions for Certain States, EPA-HQ-OAR-2021-0668-1228 (Oct. 30, 2023); PGen Comments on EPA's Proposed Rule "Supplemental Air Plan Actions: Interstate Transport of Air Pollution and Supplemental Federal Good Neighbor Plan for the 2015 Ozone NAAQS, EPA-HQ-OAR-2023-0402-0070 (May 16, 2024).

[7] 80 Fed. Reg. 65,292, 65,293-94 (Oct. 26, 2015); *see also* 91 Fed. Reg. at 4028.

[8] CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1).

[9] *Id.* § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I).

The following is a summary of the relevant actions EPA and the states have taken to develop SIPs for the 2015 ozone NAAQS and address the CAA's interstate transport provision:

The CAA's interstate transport provision requires states to make complex predictive judgments about the future effect of their emissions on other states. For decades, EPA has used a 4-step framework to evaluate what obligations a state may have, if any, to address interstate transport.[10] As summarized in the Proposed Rule, the framework uses the following four steps:

> (1) identify monitoring sites that are projected to have problems attaining and/or maintaining the NAAQS (*i.e.*, nonattainment and/or maintenance receptors);
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> (2) identify States that impact those air quality problems in other (*i.e.*, downwind) States sufficiently such that the States are considered to "contribute" (*i.e.*, are considered "linked") to those receptors and whose emissions, therefore, warrant further review and analysis;
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> (3) identify the emissions reductions necessary (if any), applying a multifactor analysis, to eliminate each linked upwind State's significant contribution to nonattainment or interference with maintenance of the NAAQS at the locations identified in Step 1;[11] and
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> (4) adopt permanent and enforceable measures needed to achieve those emissions reductions.[12]

EPA issued several memoranda to support states' development of their SIPs for the 2015 ozone NAAQS:

- March 2018 Memorandum: EPA released updated air modeling, which used a 2011 base year and a 2023 analytic year, to assist states with assessing state contributions to downwind

[10] *See* 91 Fed. Reg. at 4030-4031. This framework is not required by the CAA, and states are free to evaluate their obligations in a different manner. *Id.* at 4031.

[11] EPA does not find it necessary in the Proposed Rule to consider any Step 3 evidence to support its decision "[b]ecause all States included in this proposal can be approved in Steps 1 and 2." *Id.* at 4035. Nevertheless, it would be helpful for EPA to indicate that it is aware that Step 3 information exists for some of the states and to note that this Step 3 information may also support EPA's determination that the state is not significantly contributing to nonattainment or interfering with maintenance in a downwind state. *See, e.g.*, *id.* at 4040 (Minnesota). EPA should ensure all this information is included in the record for each SIP action.

[12] *Id.* at 4031. EPA notes that it "does not require States to use the Framework in interstate transport SIP submissions." *Id.* EPA should clarify in this rulemaking that weight of evidence analyses represent a second, equally appropriate method for approving state SIPs outside of or as part of the 4-step framework. Some of the states in this Proposed Rule used a weight of evidence analysis in their SIP, and EPA should ensure all of the previously submitted data supporting that those analyses are included in the record for each SIP action. *See id.* at 4036 (Alabama); *id.* at 4042 (New Mexico).

receptors. The March 2018 Memorandum also provided information on potential flexibilities for states to incorporate in their SIP submissions.[13]

- August 2018 Memorandum: EPA provided analytical information on various air quality screening thresholds to assist states in identifying "linked" receptors that could warrant further evaluation, concluding that "it may be reasonable and appropriate for states to use a 1 ppb contribution threshold, as an alternative to a 1 percent threshold."[14]
- October 2018 Memorandum: EPA provided new information to guide states' evaluation of maintenance receptors, identifying key considerations states may take into account.[15]

States were required to submit their SIPs for the 2015 ozone NAAQS to EPA by October 1, 2018.[16] Under Section 110(k) of the CAA, EPA is required to complete its review of a SIP submission within 18 months of the SIP's submittal to EPA.[17] Assuming a state submitted its SIP within the three-year deadline, EPA was required to review such a timely SIP no later than April 1, 2020. But EPA did not take final action on the majority of the interstate transport SIPs for the 2015 ozone NAAQS until 2023,[18] and EPA still has not taken final action on some states' SIPs.[19]

When EPA finally evaluated states' interstate transport SIPs in 2022, it relied on new 2016-based modeling (called 2016v2 and 2016v3) that was not available at the time states prepared and submitted their SIPs, rather than the 2011-based modeling that EPA had provided to the states in the March 2018 Memorandum for the purpose of assisting the states in the development of their SIPs.[20] The use of the newer 2016-based modeling led to the 2023 disapproval of 21 states' SIPs[21]

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[13] *See* Memorandum from Peter Tsirigotis, Director, to Regional Air Division Directors, Regions 1-10, "Information on the 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)" (Mar. 27, 2018) ("March 2018 Memorandum").

[14] *See* Memorandum from Peter Tsirigotis, Director, to Regional Air Division Directors, Regions 1-10, "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" at 4 (Aug. 31, 2018) ("August 2018 Memorandum").

[15] *See* Memorandum from Peter Tsirigotis, Director, to Regional Air Division Directors, Regions 1-10, "Considerations for Identifying Maintenance Receptors 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" (Oct. 19, 2018) ("October 2018 Memorandum").

[16] CAA § 110(a)(1); 42 U.S.C. § 7410(a)(1); *see also* 80 Fed. Reg. at 65,437, 65,452.

[17] *See* CAA § 110(k)(1)-(2), 42 U.S.C. § 7410(k)(1)-(2).

[18] *See, e.g.*, 88 Fed. Reg. 9336 (Feb. 13, 2023) (disapproving the interstate transport SIPs of 21 states for the 2015 ozone NAAQS).

[19] *See, e.g.*, 89 Fed. Reg. 12,666, 12,668 (Feb. 16, 2024) (proposed disapproval of the interstate transport SIPs for Arizona, New Mexico, and Tennessee and withdrawal of proposed approvals of Arizona and Tennessee's SIP that EPA issued in 2022).

[20] *See* 91 Fed. Reg. at 4034; March 2018 Memorandum at 1.

[21] *See, e.g.*, 88 Fed. Reg. at 9344 (noting "EPA used version 3 of the 2016-based modeling platform (*i.e.*, 2016v3) for the air quality modeling for this final SIP disapproval action" of 19 states' interstate

even though those SIPs would have likely been approvable under EPA's 4-step framework if EPA had evaluated them in a timely manner using the 2011-based modeling from the March 2018 Memorandum. EPA's use of the newer 2016-based modeling to evaluate the interstate transport SIPs for the 2015 ozone NAAQS under the Agency's 4-step framework also led to the withdrawal in 2024 of the 2022 proposed approvals for Arizona and Tennessee and, in turn, the proposed disapproval of those states' interstate transport SIPs.[22]

After EPA proposed to disapprove many states' interstate transport SIPs in 2022, EPA developed a proposed interstate transport FIP (which it called the "Good Neighbor Plan") that would address outstanding interstate transport obligations for 26 states, and EPA used 2016-based modeling (2016v2) to support this proposal.[23] Prior to finalizing the Good Neighbor Plan, EPA released a new iteration of its 2016-based modeling (2016v3) that it used to support the final Good Neighbor Plan FIP, which covered 23 states.[24] EPA characterized this modeling as merely updating the emissions data used in the 2016v2 inventories based on public feedback.[25]

Several states that were included in the final Good Neighbor Plan challenged the disapproval of their SIPs in numerous U.S. Courts of Appeals on the grounds that EPA's reliance on the 2016v3 modeling, which was not available when the states submitted their interstate transport SIPs in 2018 for the 2015 ozone NAAQS, violated the CAA and exceeded EPA's statutory authority. The Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits granted stays of EPA's SIP disapprovals pending judicial review for several states, and in many instances cited to EPA's post hoc modeling as support for the stays.[26]

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transport SIPs); *see also id.* at 9365 (noting commenters had expressed the view that it was arbitrary and capricious for EPA to "disapprove a SIP based on data not available to states during development of the SIP submissions or to the EPA during the period statutorily allotted for the EPA to take final action on SIP submissions").

[22] 89 Fed. Reg. at 12,685-86. Even under the 2016-based modeling, many of these SIPs should have been approved under either a weight-of-evidence analysis, a lack of cost-effectiveness under Step 3 of the framework, or a more appropriate screening threshold at Step 2.

[23] 87 Fed. Reg. 20,036, 20,063 (Apr. 6, 2022).

[24] *See* 88 Fed. Reg. 36,654, 36,696 (June 5, 2023) (Good Neighbor Plan). The Good Neighbor Plan is not a single FIP, but rather is a collection of FIPs for 23 individual states. *See id.* at 36,693.

[25] *Id.* at 36,674, 36,696.

[26] *See Texas v. EPA*, No. 23-60069, slip op. at 21-22 (5th Cir. May 1, 2023) ("EPA could easily flout the [Act's] deadlines with impunity, then leverage that disregard to summarily reject [plans] based on the States' failure to consider information that only became available after the submission deadline."); *Kentucky v. EPA*, No. 23-3216, Doc. 39-2 (6th Cir. July 25, 2023) (staying disapproval of Kentucky's SIP based on EPA's reliance on "modeling data and policy changes developed after Kentucky had submitted" its SIP); *see also West Virginia v. EPA*, No. 23-1418, Doc. 51 (4th Cir. Jan. 10, 2024) (staying disapproval of West Virginia's SIP); *Arkansas v. EPA*, No. 23-1320, Doc. 5280996 (8th Cir. May 25, 2023) (staying disapproval of Arkansas's SIP); *Missouri v. EPA*, No. 23-1719, Doc. 5281126 (8th Cir. May 26, 2023) (staying disapproval of Missouri's SIP); *Texas v. EPA*, No. 23-60069, Order, Doc. 359-2 (5th Cir. June 8, 2023) (staying disapproval of Mississippi's SIP); *Allete, Inc. v. EPA*, No. 23-1776, Order (8th Cir. July 5, 2023) (staying disapproval of Minnesota's SIP);

In June 2024, the U.S. Supreme Court stayed the Good Neighbor Plan pending judicial review.[27] Then in December 2024, the Sixth Circuit issued its opinion in *Kentucky v. EPA*, which was the case in which Kentucky challenged EPA's disapproval of its interstate transport SIP for the 2015 ozone NAAQS.[28] The court found that EPA's disapproval of Kentucky's SIP "violated the Administrative Procedure Act" because "EPA acted in an 'arbitrary' way by telling Kentucky one thing and then doing another."[29] The court noted that EPA had "recommended that Kentucky use certain modeling and a certain threshold. Yet it denied Kentucky's [SIP] using different modeling and a different threshold."[30] The court vacated EPA's disapproval of Kentucky's SIP.[31]

The Sixth Circuit's decision was followed by a decision in March 2025 from the Fifth Circuit in *Texas v. EPA*, where that court issued an opinion vacating EPA's disapproval of Mississippi's SIP for similar reasons.[32] The court found that EPA's disapproval of Mississippi's SIP was based on the use of the updated data that "was entirely outcome determinative."[33] Mississippi's SIP was approvable under the data available when the SIP was developed, but disapproved on no other basis than the updated "data that did not exist when the state submitted its SIP."[34] The court vacated EPA's disapproval of the Mississippi SIP, "declin[ing] to permit EPA to implement its FIP for Mississippi until the agency has lawfully disapproved the state's SIP."[35]

On March 13, 2026, the Fifth Circuit issued a revised opinion on rehearing that left the portion of its original opinion vacating EPA's disapproval of the Mississippi SIP intact, but changed its position with regard to Texas's SIP.[36] The court's reasons for vacating EPA's disapproval of Texas's SIP involves EPA's statements in the Proposed Rule that shows "considerable reliance" by the Agency on the 2016-based modeling that was done after Texas had submitted its SIP.[37] Based on these statements, the court on rehearing said that it is "no longer confident that the … analyses by EPA

Utah v. EPA, No. 23-9509, Doc. 010110895101 (10th Cir. July 27, 2023) (staying disapproval of Utah's SIP); *Oklahoma v. EPA*, No. 23-9514, Doc. 010110895101 (10th Cir. July 27, 2023) (staying disapproval of Oklahoma's SIP); *Alabama v. EPA*, No. 23-11173, Doc. 33-2 (11th Cir. August 17, 2023) (staying disapproval of Alabama's SIP).

[27] *Ohio v. EPA*, 603 U.S. 279 (2024). The Supreme Court's stay applied to certain parties challenging the Good Neighbor Plan, but "EPA complied with that order by staying the FIPs as to all sources in all the remaining" Good Neighbor Plan states that were not already subject to judicial stays. 91 Fed. Reg. at 4030 (citing 89 Fed. Reg. 87,960 (Nov. 6, 2024); 88 Fed. Reg. 42,295 (July 31, 2023); 88 Fed. Reg. 67,102 (Sept. 29, 2023)).

[28] *Kentucky v. EPA*, 123 F.4th 447 (6th Cir. 2024).

[29] *Id.* at 452 (citing 5 U.S.C. § 706(2)(A)).

[30] *Id.*

[31] *Id.* at 472-73.

[32] *Texas v. EPA*, 132 F.4th 808 (5th Cir. 2025).

[33] *Id.* at 862.

[34] *Id.*

[35] *Id.* at 863.

[36] *Texas v. EPA*, No. 23-60069, slip op. at 2-3, 54 & n.268 (5th Cir. Mar. 13, 2026).

[37] *Id.* at 51.

[that were unrelated to the 2016-based modeling] formed the basis for its decision to disapprove Texas's SIP. If instead, EPA's modeling and data published after Texas filed its SIP was outcome determinative or was the primary basis for denying approval of Texas's SIP, Texas would be similarly situated to Mississippi," which had its SIP disapproval vacated by the court.[38] The reliance on the newer modeling, coupled with EPA's decision in the Proposed Rule to reconsider its use of the 1 percent threshold to determine whether a state significantly contributes to a downwind state's nonattainment or interferes with its maintenance of a NAAQS, the court vacated EPA's disapproval of Texas's SIP.[39]

EPA issued the Proposed Rule in January 2026, which "[i]n light of the Fifth and Sixth Circuit judicial decisions and upon further review, … now proposes to evaluate the relevant SIP submissions under policies related to the contribution threshold and choice of modeling consistent with the Fifth and Sixth Circuit's interpretation of the March 2018 and August 2018 memoranda."[40] If EPA finalizes the Proposed Rule, the interstate transport obligations of the ten states addressed in the Proposed Rule would be resolved.[41] EPA also notes in the Proposed Rule that it "intends to address the Good Neighbor Plan, and the remaining States covered by that action, which are not addressed in this action, in a future action," including "address[ing], as relevant, the applicability of the Good Neighbor Plan FIPs in areas in Indian country."[42]

II. The Proposed Approvals of the Interstate Transport SIPs Using the 2011-Based Modeling Provided to the States in the March 2018 Memorandum and Using a Contribution Threshold of 1 ppb as Suggested in the August 2018 Memorandum Is Appropriate Here Given the Reliance Interests of the States and EPA's Failure to Evaluate the SIPs Within the CAA's 18-Month Deadline.

In the Proposed Rule, EPA acknowledges the reliance interests states may have had with regard to using the March 2018 Memorandum's modeling and adopting the August 2018 Memorandum's option to use a 1 ppb contribution threshold as an alternative to the one percent threshold in preparing their interstate transport SIPs.[43] In addition, if EPA had acted in a timely manner and met its CAA obligation to review a SIP within 18 months after submission by a state, EPA would have had to approve the interstate transport SIPs for all of the states covered by the Proposed Rule because there would not have been any other modeling data besides the 2011-based data provided by EPA in the March 2018 Memorandum.[44] Those modeling data show that interstate emissions

[38] *Id.* at 40-41.

[39] *Id.* at 54.

[40] 91 Fed. Reg. at 4028.

[41] *Id.* at 4026.

[42] *Id.* at 4029.

[43] *Id.* at 4032, 4033, 4035.

[44] Alabama, which resubmitted its SIP to attempt to address EPA's 2016v2 modeling, *see id.* at 4036, had previously submitted an approvable SIP based on the 2011 modeling, *see* 84 Fed. Reg. 71,854, 71,858-59 (Dec. 30, 2019) (proposing to approve Alabama's August 20, 2018 SIP revision "that

from all ten states are either under the 1 ppb contribution threshold EPA offered as an alternative in the August 2018 Memorandum or are shown to be not linked to a downwind receptor modeled for nonattainment or interference with maintenance based on a weight of evidence analysis, or both.[45]

Acknowledging the states' reliance interests is appropriate in light of the Fifth and Sixth Circuit's decisions. In vacating EPA's disapproval of Kentucky's SIP for the 8-hour ozone NAAQS, which relied on the March 2018 Memorandum and the August 2018 Memorandum, the Sixth Circuit found that "EPA told Kentucky that it could use the 2011 modeling and 1 ppb threshold and then denied Kentucky's [SIP] in large part because Kentucky had done what the EPA told it to do."[46] The court then held that "because the EPA did not adequately consider Kentucky's 'reliance interests' when changing course in these ways, it acted arbitrarily."[47]

While EPA is not *required* to provide states with guidance on their interstate transport obligations,[48] many states do not have the resources to develop their own modeling, and therefore, EPA's modeling was important to support those states' analyses. Moreover, once EPA does provide states with guidance, it is reasonable for states to rely on that guidance in conducting their analyses.[49] The Sixth Circuit noted that "EPA argued that the [CAA] did not require it to give States 'specific metrics' to help them comply with" interstate transport requirements.[50] The court found "this generic response ignores the key question: May the EPA affirmatively give the States *one* set of 'metrics' to draft their [SIPs] and then use *another* set of metrics to grade them?," and then held that "EPA's response thus confirms its utter disregard of Kentucky's reliance interest."[51]

Similarly, the Fifth Circuit found that EPA "failed to recognize, much less 'reasonably consider[],' that for Mississippi the use of the updated data was entirely outcome determinative" for EPA's disapproval of Mississippi's SIP.[52] The court held that the Mississippi SIP disapproval was arbitrary and capricious based on EPA's failure to "'reasonably explain[]' its decision to base its disapproval of Mississippi's SIP on data that did not exist when the state submitted its SIP."[53]

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relied on the results of EPA's modeling for the 2015 ozone NAAQS, contained in the March 2018 memorandum").

[45] *See* 91 Fed. Reg. at 4036-44.

[46] *Kentucky v. EPA*, 123 F.4th at 471 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[47] *Id.*

[48] *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014).

[49] *See FCC v. Fox*, 556 U.S. at 516 (emphasizing that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

[50] *Kentucky v. EPA*, 123 F.4th at 470 (citing 88 Fed. Reg. at 9363 and quoting *EME Homer*, 572 U.S. at 510).

[51] *Id.*

[52] *Texas v. EPA*, 132 F.4th at 862 (citing *FCC v. Prometheus Radio Project,* 592 U.S. 414, 423 (2021)).

[53] *Id.* (citations omitted). EPA notes in the Proposed Rule that the Fifth Circuit has withheld its mandate vacating and remanding the Mississippi SIP disapproval pending the resolution of pending petitions for rehearing en banc that "are focused on the portion of the opinion upholding EPA's

The Fifth and Sixth Circuits are not alone in expressing concern about states' reliance interests in preparing interstate transport SIPs for the 2015 ozone NAAQS. The Fourth, Eighth, Ninth, and Tenth Circuits have all granted stays pending judicial review of EPA's disapprovals of several states' SIPs that were based on modeling that did not exist at the time the states submitted their SIPs.[54]

In the Proposed Rule, EPA explains that "it makes sense to conduct this re-evaluation using the existing information in the record, rather than become trapped in a cycle of constantly shifting analysis and output."[55] The D.C. Circuit has agreed that using original data rather than updated data is reasonable when it results in "greater parity … and faster turnaround."[56] EPA proposes that it is appropriate to retain the 2023 analytical year and adopt the 1 ppb contribution threshold for all states to ensure consistency.[57] PGen agrees that this was an appropriate conclusion to reach under the circumstances present in the Proposed Rule for these ten states but cautions EPA that this may not always be appropriate for other states or for future interstate transport rulemakings. For example, in conducting its Phase 2 assessment of the remaining SIP disapprovals for other states, EPA may determine that a different threshold is appropriate. Thus, EPA should clarify that its preference for consistency in connection with this rulemaking does not reflect broader policy judgments about the Agency's authority or approach under other circumstances. EPA should avoid putting itself in a situation where stakeholders might argue for consistent application of these principles in cases where it does not make as much sense as it does here, which could potentially create pressure on the Agency to adopt this approach more broadly or to articulate clear limiting principles. Moreover, while EPA may sometimes have a preference for consistency, as it does here, each state has the authority under the CAA to take its own reasonable approach to assessing and satisfying its SIP obligations.

In sum, the states included in the Proposed Rule submitted approvable interstate transport SIPs, which were reasonably based on the March 2018 Memorandum and the August 2018 Memorandum. These reliance interests provide sufficient support for EPA to evaluate the States' SIPs based on the modeling and other materials submitted with each state's SIP and to finalize the Proposed Rule.

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disapproval of Texas's SIP submission." 91 Fed. Reg. at 4028 n.9. Even though the Mississippi SIP has not been vacated and remanded yet, the reasoning of the panel, discussed above, is nonetheless persuasive support for the Proposed Rule.

[54] *See supra* note 26.

[55] 91 Fed. Reg. at 4031. Regarding the "existing information in the record," it would be helpful for EPA to clarify whether *all* of the data submitted in response to prior interstate transport actions for these ten states are part of this rulemaking record. Similarly, EPA should clarify that data submitted by commenters at the state rulemaking level that were then included by the states when they submitted their SIPs to EPA are considered part of the state's SIP submission and the rulemaking record.

[56] *See, e.g.*, *Bd. Cnty. Comm'rs of Weld County v. EPA*, 72 F.4th 284, 290 (D.C. Cir. 2023).

[57] *Id.* at 4031, 4034.

III. EPA Needs to Account for International Transport of Ozone in the Evaluation of Interstate Transport SIPs, and International Transport May Provide a Basis for an Increase in the Contribution Threshold above 1 ppb.

Under Section 179B(b) of the CAA, a SIP is approvable if the state can demonstrate to the satisfaction of the EPA Administrator that the SIP "would be adequate to attain and maintain the relevant [NAAQS] by the attainment date … but for emissions emanating from outside of the United States."[58] EPA needs to account for international transport of ozone in its evaluation of interstate transport SIPs and FIPs. In the Proposed Rule, EPA "solicits comment on the use of thresholds other than the 1-percent or 1-ppb thresholds discussed in this action, such as a 5-percent threshold or a 2-ppb threshold."[59] One way EPA could address international transport issues for interstate transport SIPs would be through a higher Step 2 threshold.

International transport of ozone is not a trivial issue, particularly as the level of the NAAQS becomes more stringent. For example, the Maricopa Association of Governments conducted an analysis of EPA's modeling for the Good Neighbor Plan FIPs and found that in Maricopa County, Arizona, background and international transport constitutes 75.6 percent of the ozone in the county, with the remaining 24.4 percent coming from interstate transport (4.6 percent) and from manmade ozone within the state (19.8 percent).[60] Importantly, not all of the manmade ozone within the state can be regulated through a SIP. Much of the manmade ozone comes from on-road and off-road internal combustion engines, and only EPA can regulate emissions from these sources under the CAA.

EPA recently issued a proposed rule to find that the Phoenix-Mesa nonattainment area would have attained the 2015 ozone NAAQS by its deadline "but for emissions emanating from outside the United States."[61] In the proposed rule, EPA found that "photochemical modeling … indicated an international anthropogenic contribution of 8.5-10 ppb to the Phoenix-Mesa area [design value]."[62] These numbers illustrate the scope of the problem that can be caused by international emissions, where the modeling for the Phoenix-Mesa area shows that international emissions are 8.5 to 10 times higher than the 1 ppb threshold for Step 2 of the 4-step framework for evaluating interstate transport issues for the 2015 ozone NAAQS. If the one percent threshold of 0.7 ppb is used instead, then international emissions are 12.1 to 14.3 times higher than the threshold.

In thinking about how to account for international emissions as part of the interstate transport evaluation, PGen urges EPA to think about the CAA holistically and identify a consistent approach that can be used across the CAA to determine what is relevant and significant for the purposes of the pollutant and CAA program at issue.

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[58] CAA § 179B(a)(2), 42 U.S.C. § 7509a(a)(2).

[59] 91 Fed. Reg. at 4034.

[60] Maricopa Association of Governments, Ozone – A Complex Problem in the Maricopa Region, https://azmag.gov/Programs/Environmental/Ozone-A-Complex-Problem-in-the-Maricopa-Region.

[61] 90 Fed. Reg. 52,019 (Nov. 19, 2025).

[62] *Id.* at 52,029.

IV. Suggestions for How EPA Can Preserve Additional Ways to Improve Interstate Transport SIPs for the 2015 Ozone NAAQS

As stated above, PGen supports the Proposed Rule, but it has some additional comments regarding ways in which PGen believes the approach in the Proposed Rule could be improved.

A. The 1 ppb contribution threshold

With regard to EPA's use of the 1 ppb contribution threshold in the Proposed Rule, EPA is correct that state reliance interests stemming from the August 2018 Memorandum justify using that threshold for these ten states.[63] Nevertheless, EPA may want to consider providing additional explanation of why the 1 ppb threshold (or a higher threshold) is appropriate more broadly for the 2015 ozone NAAQS. The Agency could consider expanding on why it concludes that emissions below this level do not meaningfully contribute to downwind air quality problems and, therefore, should not trigger additional control requirements. EPA may also want to address why a 1 ppb (or higher) threshold is presumptively appropriate. The August 2018 Memorandum suggested that 1 ppb might work nationally in the aggregate but did not specify whether certain areas might need different treatment.

In addition, because EPA's prior statements supporting a 1 ppb threshold appeared primarily in guidance (e.g., the August 2018 Memorandum) EPA may want to consider providing a thorough, record-based justification now for the use of the 1 ppb threshold for these ten states. EPA could assess what threshold would capture a sufficient portion of collective upwind contribution to address downwind problems and why screening out contributions below this level is consistent with the statutory requirement to prohibit emissions that "contribute significantly" to nonattainment. EPA should clarify that any screening threshold remains an assessment tool and that state SIPs that assess and conclude through a weight-of-evidence analysis that contributions above that screening threshold are insignificant may also be approvable.

B. The Selection of 2023 as the Analytic Year

In the Proposed Rule, EPA appropriately—especially given states' reliance interests—has "conduct[ed] this re-evaluation using the existing information in the record, rather than becom[ing] trapped in a cycle of constantly shifting analysis and output."[64] In the March 2018 Memorandum, EPA selected 2023 as the analytic year because it was the last full ozone season before the August 2024 attainment deadline for moderate nonattainment areas.[65] The 2023 ozone season has now concluded, and actual monitored air quality data for that period is likely available. The Proposed Rule does not discuss whether 2023 monitored data exist or whether actual air quality measurements from 2023 align with the 2011-based modeling projections upon which the SIPs and the Proposed Rule rely. Although EPA mentions using "the most recent monitored design values" in Step 1 for

[63] 91 Fed. Reg. at 4033.

[64] *Id.* at 4031.

[65] *Id.*

receptor identification,[66] it does not specify what time period this covers or whether any 2023 data have been incorporated.

In the 2023 rule disapproving the interstate transport SIPs for 21 states, EPA developed a "violating monitor maintenance-only" approach that incorporated actual monitored air quality data from 2021-2022 when identifying which areas would have difficulty maintaining the ozone standards.[67] EPA explicitly declines to use any similar approach here, however, stating that monitoring data from 2021-2022 post-dates what was available to states when they developed their plans in 2018-2019.[68]

EPA could consider strengthening the Proposed Rule by addressing whether 2023 monitoring data exists and, if so, whether it generally confirms the modeling projections made in the March 2018 Memorandum. EPA could clarify its reasoning for not incorporating any monitoring data from 2021-2022 or 2023, particularly given that it found such data relevant in the 2023 SIP disapproval rule.[69] This explanation would help address any potential challenges from those who might argue that EPA should validate its modeling in the March 2018 Memorandum against actual outcomes, especially when approving SIPs based on projections for a time period that has now passed.

V. Lawful Cooperative Federalism Principles Support the Proposed Rule.

States are tasked with the primary responsibility for determining the manner in which air quality standards are to be achieved, while EPA is relegated to a more secondary role in evaluating SIP submissions against the requirements of the CAA.[70] Section 110(k) of the CAA requires EPA to approve a SIP submission in full "if it meets all of the applicable requirements."[71] If a state fails to submit an approvable SIP, EPA must issue a FIP addressing the state's obligations within two years of either disapproving the SIP or issuing a finding of failure to submit.[72] EPA may disapprove a SIP only when it is inconsistent with the CAA. EPA has never suggested that the states' use of the data available to it in the March 2018 Memorandum violates the CAA or questioned the technical soundness of its 2011-based modeling. Nor has EPA ever suggested that the states' reliance on that state-of-the-science modeling when they submitted their SIPs could be unreasonable. Moreover, the CAA does not require application of EPA's 4-step framework. Instead, other approaches, including weight-of-evidence approaches submitted by some of the states addressed in the Proposed Rule, are

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[66] *Id.* at 4032.

[67] 88 Fed. Reg. at 9342.

[68] *See* 91 Fed. Reg. at 4034-35.

[69] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (emphasizing that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

[70] *See, e.g., Virginia v. EPA*, 108 F.3d 1397, 1407 (D.C. Cir.), *decision modified on reh'g,* 116 F.3d 499 (D.C. Cir. 1997); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasizing that EPA has "a secondary role in the process of determining and enforcing the specific, source-by-source emissions limitations").

[71] 42 U.S.C. § 7410(k)(3) ("[T]he Administrator *shall* approve [a SIP or SIP revision] as a whole if it meets *all of the applicable requirements* of this chapter.") (emphases added).

[72] *Id.* § 7410(c)(1).

appropriate methods for states to assess "significant contribution" or "interference" because they are consistent with the CAA. Because the ten interstate transport SIPs in the Proposed Rule "meet[] all of the applicable requirements" of the CAA, EPA properly proposes to approve them.

EPA's disapproval (or proposed disapproval) of the ten SIPs at issue in the Proposed Rule resulted from EPA shifting the goalposts by providing the states with one set of modeling data to assist them in preparing their SIPs, only to reverse course and disapprove (or propose to disapprove) those SIPs based on an entirely different set of modeling data that EPA developed years after the statutory deadline for EPA to act on the SIP submissions. This flaw in EPA's review was then compounded by treating its 4-step framework as dispositive even where weight-of-evidence analyses determined no significant contribution. Had EPA acted in a timely manner and met its CAA obligation to review a SIP within 18 months after submission and had EPA assessed the weight-of-evidence only against consistency with the CAA instead of against its default 4-step framework, EPA would likely have had to approve all of the SIPs based on both the 2011-based modeling and information provided by EPA in the March 2018 Memorandum.

Only by exceeding its statutory review deadline by multiple years and creating entirely new models during that unlawful period of delay and then rejecting weight-of-evidence analyses did EPA manage to construct a basis for disapproving the interstate transport SIPs of the ten states at issue in the Proposed Rule. EPA's use of a post hoc model that the states could not have considered when they submitted their SIPs (because it did not exist) transforms EPA's role from that of a secondary reviewer to the primary regulatory authority, writing on a blank slate of new modeling. Likewise, EPA's decision to assess weight-of-evidence analyses against the 4-step framework was not supported by the CAA. These errors fly in the face of lawful cooperative federalism principles, rendering the role of the states as the primary regulators a nullity and arrogating to EPA the primary regulatory authority that Congress vested in the states.

EPA's choice to evaluate the SIPs based on modeling not available when the states submitted them prevents the states from fulfilling their role as the primary regulator. Modeled emissions and air quality data often act as the starting point for any interstate transport SIP. Many states choose, often for resource considerations, to rely on data supplied by EPA to analyze their potential significant contributions and develop their SIPs, and yet EPA's 2016v3 modeling data (on which the SIP disapprovals and proposed disapprovals relied) did not even exist at the time the states were statutorily required to create their SIPs. By evaluating the SIPs based on models that did not exist when the states submitted their SIPs to the Agency, EPA is functionally casting aside each state's plan and starting from scratch, unlawfully assuming the role of "primary" regulator. EPA's post hoc modeling renders each state's SIP an exercise in futility because EPA changed the rules in the middle of the game.

In prior rulemakings, EPA has stated that:

> There will always be situations when new, better information is on the horizon. Evaluating a plan element based on information that was not available at the time of submittal would create a moving target that would be impossible to meet. We do not, therefore, believe it is

> appropriate to disapprove the inventories based on data that was developed subsequent to submittal of the [SIP].[73]

EPA has admitted in prior rulemakings that it should not evaluate a state's SIP "based on information that was not available at the time of submittal" because that would "create a moving target that would be impossible to meet."[74] EPA has further explained that "[a]gencies … must be able to make and rely on modeling projections, and this reliance is appropriate and lawful even if modeling projections later may be found to deviate from real-world information."[75] In the case of the prior SIP actions addressed in the Proposed Rule, EPA instead divested (or proposed to divest) these states from their role as the primary regulators.

To comply with lawful cooperative federalism principles and respect the states' role as primary regulators under the CAA, EPA should finalize the Proposed Rule, approve the eight states' SIPs and withdraw the proposed disapprovals of the two remaining states' SIPs.

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For all these reasons, PGen supports the Proposed Rule and urges EPA to finalize it. If EPA has any questions on these comments, PGen asks EPA to contact its counsel, listed below, who will put EPA in contact with PGen's Board of Directors.

Dated: March 23, 2026

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[73] 69 Fed. Reg. 21,717, 21,727 (Apr. 22, 2004) (regarding attainment determinations under the 1-hour ozone NAAQS for the San Francisco Bay area).

[74] 68 Fed. Reg. 19,106, 19,121 (Apr. 17, 2003) (EPA's review of SIPs for the District of Columbia, Maryland, and Virginia) (noting "[i]t would be unreasonable to require the States to revise [their] SIPs with [newer modeling] since significant work has already occurred" and when SIPs were "prepared and submitted well before [the newer modeling] was released," and further noting that requiring the use of the newer modeling would "purposely contradict EPA's long established policies").

[75] 89 Fed. Reg. at 12,695.