

Concerns Related to USEPA’s Proposed Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone NAAQS

87 Fed. Reg. 20036 (April 6, 2022)

1. **EPA Has Wrongly Concluded That This Rule Would Result In Any Meaningful Improvement In Air Quality.** By EPA’s own analysis the proposed rule, if finalized, would result in a cost of \$22 Billion at a 3% discount rate. EPA seeks to justify this cost by suggesting that this cost would result in “meaningful” improvements in air quality. To the contrary, in connection with the implementation of a National Ambient Air Quality Standard of 70.00 ppb, EPA’s own analysis (87 Fed. Reg. 20097) shows the following air quality improvement from the 4 categories of controls involved – falling short of “meaningful” improvement:

Existing EGU controls in 2023	0.07 ppb
New EGU controls/Gen. shifting in 2026	0.36 ppb
Non-EGU (Tier 1)	0.18 ppb
Non-EGU (Tier 2)	0.04 ppb
Total	0.64 ppb

2. **EPA’s Proposed Accelerated Rulemaking Is Not Mandated By The CAA.** EPA has begun an accelerated effort to implement a new transport rule and in doing so has taken an approach that is not mandated by the Clean Air Act which allows states the opportunity to address any deficiencies EPA may identify. This accelerated effort disenfranchises not only meaningful technical analysis of the agency’s proposals but also curtails meaningful participation by all stakeholders.
3. **EPA Improperly Changed Its SIP Development “Flexibility” Policies to Facilitate its FIP Decision.** In 2018, EPA published three guidance documents describing the process by which upwind states could incorporate various “flexibilities” into their Good Neighbor SIPs to attain the 2015 ozone NAAQS. Now, four years after the memos were published, EPA is attempting to assert that these documents are archival in nature and states should not have relied upon that guidance. The disavowal of EPA’s guidance is reflected in the proposed disapproval of 19 Good Neighbor SIPs. EPA now compounds its arbitrary abuse of authority by continuing to assert a FIP is needed because of EPA’s proposed decision that states have failed to develop adequate SIPs that were in fact approved at the time they were submitted.

4. **EPA Has Stated Its Intent to Conduct Additional Air Quality Modeling Without Allowing Public Comment.** In December 2021, many stakeholders submitted detailed comments to correct errors in the emission inventory platform used by EPA to support its proposal. EPA's efforts to revise this emission inventory platform at this time raises the question about whether EPA intends to update the modeling used to support its proposal in support of the final rule. While EPA must rely on modeling that accurately reflects current on-the-books regulatory requirements, EPA representatives have stated that any such additional modeling would be undertaken without allowing the opportunity for public comment.
5. **EPA Failed To Align Upwind and Downwind State Emission Reduction Obligations.** Nowhere in its discussion of the regulatory framework underlying these proposals does EPA recognize its obligation to align the responsibility of upwind states to the obligation of downwind states to control emissions. EPA's statutory duty is to harmonize the Good Neighbor Provision of CAA §110(a)(2)(D)(i) with nonattainment and maintenance requirements of CAA §172 so that compliance burdens are aligned among upwind and downwind states. EPA, however, has proposed a new transport rule without consideration of the timing of the implementation of nonattainment controls by downwind states - effectively shifting the burden of additional controls to the upwind states. EPA has a duty to delay the upwind compliance date to align with the downwind state compliance deadlines. Both plans must be aligned with the same timeframes to avoid an inappropriate shifting of the compliance burden from one group of states to another.
6. **EPA Must Assess Ongoing Emissions Reductions Programs and On-The-Books Controls to Correctly Assess Nonattainment.** EPA has the burden to assess both upwind and downwind emissions reductions programs. The modeling relied upon for these proposals, however, fails to include all such emission control requirements. Principal among the omitted control programs is the New York State Department of Environmental Conservation recently adopted controls for simple cycle and regenerative combustion turbines ("SCCT") or "peaking units" noted by the agency as being inefficient and approaching 50 years of age. Yet, while New York has estimated controls will result in a 4.8 ppb significant air quality improvement to nonattainment monitors within the New York Metropolitan Nonattainment Area (NYMA), implementation is delayed until 2025 and beyond. This is occurring while EPA seeks to impose new controls on upwind states in 2023.
7. **EPA's Air Quality Modeling Is Defective.** EPA's air quality modeling used to support the new transport rule contains numerous defects including (a)

reliance on 12 km grid resolution domain which does not accurately account for ozone transport in the Lake Michigan area where finer grid modeling is necessary (b) assessing days in which the downwind monitors are actually in attainment with the ozone NAAQs (and therefore are not indicative of the cause of nonattainment) and (c) selection of days for analysis in which the nonattainment was caused by “exceptional events” - contrary to CAA requirements.

8. **EPA Has Significantly Underestimated The Cost of New Emission Controls Resulting In An Attainment Strategy That Is Not Achievable.** EPA’s proposed transport rule significantly under-estimates the cost of controls on EGU and non-EGUs and results in control obligations that are not achievable and certainly not achievable in the time-period being proposed.
9. **EPA Has Failed To Address NOx Mitigation Strategies For Several Key Local Sources.** EPA should consider other NOx mitigation strategies from local sources like simply cycle combustion turbines, municipal waste combustors, and distributed generation. These sources are known to be causing nonattainment or maintenance problems in their own areas.
10. **EPA Continues To Address Point Sources In Its Proposed Rule When It Is Undisputed That Mobile Sources Are The Primary Cause Of Remaining Air Quality Problems.** Available modeling data clearly shows that the most significant contributor to ozone air quality is mobile sources. The air quality impacts from downwind state mobile source emissions reductions programs are measurable and warrant incorporation into the overall calculation of emissions reductions from CAA programs that will improve ozone air quality as part of the initial and aligned analysis of attainment strategies for both upwind and downwind states.
11. **EPA’s Proposal Is Limited Only To NOx Emissions And Fails To Recognize That VOCs Are A Matter Of Significant Concern in Wisconsin And Illinois Because Of Modeling Inaccuracies.** Several downwind nonattainment monitors in urban areas around Lake Michigan have recently been shown to be largely unresponsive to ozone reduction strategies consisting of regional interstate NOx control and that high ozone days in the region were predominantly VOC-limited in nature.
12. **EPA’s Reliance On Generation Shifting As An Emission Reduction Strategy Is Beyond Its Authority.** In its proposed FIP, EPA offers assurances its generation shifting is constrained, but that the “sector’s unusual

flexibility with respect to how emissions reductions can be achieved makes” their task difficult particularly relative to trading and generation shifting. EPA asserts that managing generation shifting is both technically and legally authorized under the Clean Air Act as it is simply a tool for implementing emissions reductions. EPA’s efforts to justify its overreach both technically and legally are not supported by the Clean Air Act and potentially raises the same issue identified as problematic in the Affordable Clean Energy (ACE) currently before the US Supreme Court, where it is asserted that authority to manage the generation and shifting of the power generation industry is far beyond the task Congress gave to EPA and raises a “major question” that extends far beyond the agency’s expertise.

13. **The Deadlines Established By EPA For The Installation Of EGU And Non-EGU Controls Is Not Feasible and Should Be Extended.** The unique supply of materials, transportation limitations and workers during these times of geopolitical disruption triggered by the Russian invasion of Ukraine and ongoing COVID-19 pandemic-driven disruption, raises significant concern about meeting deadlines. Reference to historical three-year installation timeframe by EPA is not reasonably projected whether related to EGUs or non-EGUs emissions controls installation. The three-year default may prove to be unachievable, which EPA concedes with its request for comments about the merit of allowing extensions of the proposed compliance dates.
14. **EPA’s Comment Period Is Too Short.** The proposed FIP is dramatically broader in scope than the transport rules that have preceded it. Not only does the proposed rule cover a much larger geographic area than prior rules, it proposes to impose new control requirements on both EGU’s and a broad category of industrial sources. The expanded scope of this rule adds yet another significant layer of complexity to the analysis of the proposed rule, making development of meaningful comments that much more resource intensive and time consuming. In response to numerous requests, EPA agreed to extend the comment period – but only for 2 weeks. In her letter of May 17, 2022, U.S. Senator Shelley Capito correctly urged EPA Administrator Regan to extend the comment period by an additional 45 days to provide enough time for careful review and feedback on this proposal.