

NAAQS Regulatory Review & Rulemaking Coalition

COMMENTS OF THE NAAQS REGULATORY REVIEW & RULEMAKING COALITION ON EPA'S PROPOSED FEDERAL IMPLEMENTATION PLAN ADDRESSING REGIONAL OZONE TRANSPORT FOR THE 2015 8-HOUR OZONE NAAQS

DOCKET NO. EPA-HQ-OAR-2021-0668

American Coke and Coal Chemicals Institute

American Iron and Steel Institute

American Forest & Paper Association

Corn Refiners Association

Council of Industrial Boiler Owners

National Association of Manufacturers

National Lime Association

National Mining Association

U.S. Chamber of Commerce

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I. Introduction

The NAAQS Regulatory Review & Rulemaking (“NR3”) Coalition presents these comments on the Environmental Protection Agency’s (“EPA” or the “Agency”) proposed “Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 8-Hour Ozone NAAQS” (“Proposed Rule”).¹ The Proposed Rule addresses emissions under Clean Air Act (“Act”) § 110 (a)(2)(D)(i)(I) (the “Good Neighbor Provision”) from upwind sources that EPA has determined significantly contributes to nonattainment or interference with maintenance of the 2015 ozone national ambient air quality standards (“NAAQS”).

Members of the NR3 Coalition and their member companies are committed to reducing emissions, as necessary and consistent with the requirements of the Act, to provide air quality protective of public health and welfare, while continuing to facilitate economic growth in the United States. Our industries have worked for many decades with EPA, states, and local authorities to lower concentrations of ozone, its precursors, and other common pollutants in ambient air. As a result, between 1970 and 2020, emissions of criteria air pollutants have steadily declined, while both U.S. gross domestic product and population have grown by over 270% and 60% respectively.²

¹ 87 Fed. Reg. 20,036 (Apr. 6, 2022).

² See EPA, *Our Nation's Air: Trends Through 2020*, <https://gispub.epa.gov/air/trendsreport/2021/#growth> (last visited May 30, 2022).

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Regarding ozone specifically, the national average level of the fourth-highest daily maximum 8-hour ozone concentration declined from 0.088 ppm in 1990 to 0.066 ppm in 2020, a 25 percent decline.³ This reduction in ozone in the ambient air resulted, in part, from reductions in emission of the ozone precursors nitrogen oxides (“NOx”) and volatile organic compounds (“VOC”) by companies represented by NR3 Coalition members and by Coalition members themselves. Emissions of NOx declined by 68 percent and of VOC by 48 percent between 1990 and 2020.⁴ Emissions of these pollutants are likely to continue to decline as a result of private sector innovation; further implementation of existing federal, state, and local programs aimed at reducing emissions; improvements in energy efficiency; and use of cleaner energy technology.

The NR3 Coalition agrees with other industrial stakeholders, including those raising the specific issues noted in section IV of these comments, that there are significant concerns with EPA’s analysis in the Proposed Rule. EPA should re-evaluate the Proposed Rule and re-propose it to address these concerns, including re-evaluating the Proposed Rule’s inclusion of sources that are not Electric Generating Units (“EGUs”). Remedying these deficiencies in a re-proposal would enhance the legal defensibility of any final rule, particularly to the extent it includes non-EGU sources. The NR3 Coalition recommends that EPA’s re-evaluation also consider the two specific issues raised in these comments. First, the Agency should consider, and discuss in its re-proposal, whether some type of trading program would be a cost-effective option for obtaining any required emissions reductions from non-EGUs. Second, EPA should abandon the Proposed Rule’s

³ *Id.*, <https://gispub.epa.gov/air/trendsreport/2021/#naaqs>.

⁴ *Id.*

establishment of “dynamic” state emissions budgets, which are not authorized by the Act and undermine public opportunity to review and comment on emissions budgets.

II. EPA Should Include Emissions Trading When Re-Proposing the Inclusion of Non-EGU Sources.

EPA and the courts have recognized that emissions trading is a cost-effective approach to reducing emissions on a regional basis. *See, e.g., EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584, 1597 n.10 (U.S. 2014) (recognizing that a system of tradeable emissions allowances “cuts costs while still reducing pollution to target levels”); 63 Fed. Reg. 57,356, 57,457 (EPA describing the NOx SIP Call trading program as “a proven means of cost effectively meeting a specific emissions budget”); *see also* LaCount, Melanie D., Haeuber, Richard A., Macy, Taylor R. & Murray, Beth A., *Reducing power sector emissions under the 1990 Clean Air Act Amendments: A retrospective of 30 years of program development and implementation*, 245 ATMOSPHERIC ENVT. 118012, at 2 (2021) (noting that EPA staff members explain that allowance trading, unlike approaches that “require individual plants to install specific control technologies to reduce pollution, regardless of varying costs of controls among the plants,” allows “emissions [to] be reduced more cost effectively and with less administrative burden”).

In the Proposed Rule, EPA indicates, “[A]pplying unit-level emissions limitations on non-EGU emissions units rather than constructing an emissions trading regime is more administratively feasible and more easily implementable.” 87 Fed. Reg. at 20,141.⁵ Elsewhere,

⁵ In the Proposed Rule, EPA indicates that a trading program for non-EGUs would require sources within the program to comply with monitoring and reporting requirements under part 75, noting these requirements include use of CEMS or an approved alternative method. 87 Fed. Reg. at 20,141. We note that EPA previously determined that non-EGU sources included in the NOx Budget Trading Program under the NOx SIP Call, including industrial facilities, could use alternatives to the Part 75 monitoring requirements. 84 Fed. Reg. 8,422 (Mar. 8, 2019). We encourage EPA to consider whether alternatives to Part 75 monitoring requirements might similarly be appropriate for any non-EGU trading program to implement the 2015 ozone NAAQS.

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however, EPA points to the “low administrative costs” of a trading program. See EPA, *What is Emissions Trading?*, <https://www.epa.gov/emissions-trading-resources/what-emissions-trading> (last visited June 16, 2022). Moreover, some non-EGU sources were included in the NOx Budget Trading Program under the NOx SIP Call, including some industrial facilities. 84 Fed. Reg. 8,422 (Mar. 8, 2019). And even if administrability considerations weighed in favor of excluding non-EGU units, administrative convenience and ease of implementation do not necessarily justify adopting an implementation approach that is “poorly matched” to the objective of the program being implemented. *Am Trucking Ass’n v. EPA*, 175 F.3d 1027, 1055 (D.C. Cir. 1999), *modified on other grounds*, 195 F.3d 4, *rev’d in part on other grounds sub nom Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001). EPA has extensive experience with development and implementation of successful emissions trading programs. See, e.g., NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27, 1998); Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005); Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 16, 2005); Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011).⁶ Indeed the portion of the Proposed Rule that addresses EGUs continues to use such a program. 87 Fed. Reg. at 20,160-64. As with EGUs, a trading program would allow affected non-EGU sources to determine how best to achieve the emissions reductions necessary to eliminate significant interstate contributions to nonattainment or interference with maintenance.

⁶ The Clean Air Mercury Rule, as well as portions of the NOx SIP Call and Cross-State Air Pollution Rule, were vacated for reasons unrelated to their trading programs. See *EME Homer City Generation v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015); *New Jersey v. EPA*, 517 F.3d 674, 583 (2008), *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000). The Clean Air Implementation Rule was remanded to EPA for allowing trading of allowances without a demonstration that such trading would not interfere with attainment and maintenance of the ozone NAAQS in downwind states. *North Carolina v. EPA*, 531 F.3d 896, 908, *modified*, 550 F.3d 1176 (D.C. Cir. 2008). The Cross-State Air Pollution Rule was EPA’s response to that remand, and the Supreme Court upheld its overall approach to emissions trading. *EME Homer City*, 134 S. Ct. at 1610.

On the whole, emissions trading is preferable to the use of direct, command-and-control regulation.⁷ In fact, EPA has stated that emissions trading programs can create an incentive for faster compliance than would have otherwise occurred.⁸ With its ample experience, EPA is well-equipped to consider the full range of potential trading program scopes, including, but not limited to, regional; state-wide; industry-wide; company-wide; and facility-wide. Thus, as it reconsiders the non-EGU aspect of the Proposed Rule as a whole, EPA should carefully consider whether establishing an emissions trading program in which non-EGUs could opt to participate would provide a more reasonable and cost-effective approach to implementing any resulting control requirements. If so, EPA should propose such a program. If not, EPA should explain its decision not to do so.

III. EPA’s Proposal to Impose “Dynamic State Emissions Budgets” for EGUs Exceeds EPA’s Authority Under the Good Neighbor Provision and, Even if EPA Had Authority to Change State Budgets from Year to Year, It Could Not Do So Without Notice-and-Comment Rulemaking.

EPA proposes to establish “dynamic” state emissions budgets for EGUs beginning with the ozone season in 2025. *See* 87 Fed. Reg. at 20,105. Under the Proposed Rule, EGU state emissions budgets would be adjusted for each control period beginning with ozone season 2025 by applying the control stringency selected by EPA to updated heat input data measured in the two years before the control period for which the budget would apply (for example, EPA would use heat input data from 2023 to establish 2025 state emissions budgets). *Id.* EPA explains that

⁷ *See, e.g.,* INT’L EMISSIONS TRADING ASSOC., *Why Emissions Trading is More Effective than Command and Control*, available at <https://www.iet.org/Three-Minute-Briefings/3891688>

⁸ EPA OFFICE OF AIR AND RADIATION, *Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control* (June 2003) available at <https://www.epa.gov/emissions-trading-resources/tools-trade-guide-designing-and-operating-cap-and-trade-program>.

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using its proposed methodology, EPA would “continually adjust[] [the ozone-season NO_x budgets applicable to EGUs] to ensure that emissions outcomes are achieved—and downwind air quality benefits are delivered—that are commensurate with the continuous operation of emissions controls at the selected control stringency.” *Id.* at 20,096.

As explained in comments submitted by utility industry stakeholders, EPA lacks authority under the Good Neighbor Provision to reduce state emissions budgets from year to year. *See* comments filed in this rulemaking by the American Public Power Association (“APPA Comments”). Rather, EPA’s authority to issue the Proposed Rule derives from section 110(c)(1) of the Act, which authorizes EPA to issue a federal implementation plan (“FIP”) to resolve a state’s interstate transport obligations set out in the Good Neighbor Provision.

To issue a FIP under the Good Neighbor Provision, EPA must find that the state has failed to fulfill that obligation within the timeframe required by the Act. Under the Good Neighbor Provision, states are required to submit implementation plans that “contain adequate provisions prohibiting . . . any source or other type of emissions activity in 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].” 42 U.S.C. § 7410(a)(2)(D)(i)(I). In promulgating a FIP under the Good Neighbor Provision, EPA was required to quantify the “amount” of emissions from each state that contributes significantly to nonattainment or interferes with maintenance and require elimination of *only* those “amounts.” *See id.* In its CSAPR programs, EPA fulfilled this task through promulgation of state emissions

budgets.⁹ Once the reductions required by a budget are achieved, it follows that emissions that significantly contribute to nonattainment, or interfere with maintenance, have been eliminated. As APPA explains in its comments, dynamic state emissions budgets – and the other EGU trading program “enhancements” that EPA proposes to impose in the Proposed Rule – are not authorized under the Good Neighbor Provision because the deficiency triggering EPA’s FIP responsibilities – failure to eliminate significant contribution to nonattainment and interference with maintenance – is cured by compliance with the EPA-promulgated state budgets.

Finally, assuming that EPA had authority to revise Good Neighbor Provision budgets for EGUs as it proposes to do through its dynamic budgeting approach, section 307(d) of the Act would require EPA to undertake full notice-and-comment rulemaking to do so. *See* 42 U.S.C. § 7607 (d)(1)(B) (subsection 307(d) “applies to . . . the promulgation or alteration of an implementation plan by the Administrator under section 7410(c) of this title”). In the Proposed Rule, EPA describes a procedure via which it would issue new state emissions budgets each year “by ministerial action.” *See* 87 Fed. Reg. at 20,117 (describing EPA’s plan to issue a notice of data availability by March 1 of each year beginning in 2024, announcing the state budget for the following ozone season). As described previously, state emissions budgets are – and have been since the inception of the CSAPR program – the control measure that is used under §110(a)(2)(A) to define the amount of emissions that the Good Neighbor Provision prohibits.

⁹ *See, e.g.*, 82 Fed. Reg. 23,054, 23,065 (Apr. 30, 2021) (Final Revised CSAPR Update) (explaining that the state emissions budgets promulgated in that rule “represented emissions remaining in each state *after elimination of the amounts of emissions that EPA identified would significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in downwind states.*” (emphasis added)). EPA describes the role of state emissions budgets in a consistent manner in the Proposed Rule. *See* 87 Fed. Reg. at 20,106 (“An ‘emissions budget’ is established for each state for each control period, representing EPA’s quantification of the emissions that would remain under certain projected conditions after elimination of the emissions prohibited by the good neighbor provision under those projected conditions”).

Accordingly, even if EPA had substantive authority to change the stringency of state budgets, EPA could only do so following a Section 307(d) FIP rulemaking; EPA could not do so without affording notice to the public and an opportunity for comment.

IV. Other Stakeholder Comments Highlight Many Issues with the Proposed Rule

The NR3 Coalition understands that comments filed in this rulemaking from the organizations identified below address the following issues in the Proposed Rule. We are aligned with these views and encourage EPA to address these issues, and other concerns raised by stakeholders, in a re-proposal.

- **Thresholds Exceed Technical Capability:** The Proposed Rule’s 1% threshold to link upwind states with downwind receptors is so low that it likely exceeds the detection capability of existing modeling and measurement tools. This highlights that EPA’s use of the 1%-of-NAAQS threshold is becoming even more arbitrary and unjustified as the Agency applies it to the more stringent and numerically lower 2015 ozone NAAQS. EPA lacks a reasonable basis to conclude that a 1%-of-NAAQS threshold can be deemed to reflect a “measurable contribution” to downwind nonattainment and maintenance problems, as required by governing D.C. Circuit case law. Similarly, the Agency’s 0.01 ppb threshold to evaluate emissions from individual boilers in EPA emissions analysis is so low that it is not measurable. (*see* Comments of the Midwest Ozone Group (“MOG”), American Forrest & Paper Association (“AF&PA”), and National Mining Association (“NMA”)).
- **Unrealistic Control Cost and Emission Reduction Assumptions:** EPA’s 1%-of-NAAQS threshold is based on the Agency’s premise that there are impactful emissions

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reduction opportunities available at reasonable cost-effectiveness thresholds. However, EPA does not give adequate consideration to the significant efforts of states in their SIPs to identify reasonable cost-effective thresholds. In fact, EPA's contention that controls are available to comply with the Proposed Rule at \$7,500/ton of emissions or less is, in many cases, unrealistic. Analysis indicates that no controls sufficient to meet the proposed emissions limits are available for many impacted boilers at \$7,500/ton or less. Although EPA asserts that the Proposed Rule does not require specific control technologies, stakeholder analysis indicates that compliance will, in fact, often require the most stringent controls, namely selective catalytic reduction ("SCR"). However, SCR is not feasible on many industrial facilities, and its costs well-exceed \$7,500/ton. In many instances, SCR could require exhaust gas preheating – increasing compliance costs and greenhouse gas emissions. Stakeholder analysis further indicates that the emissions reductions from these measures will be less than those contemplated by EPA. EPA's skewed assumptions mask the reality that the Proposed Rule will have higher costs combined with the lower emissions reductions. This will lead to strain on the struggling economy for air quality improvements that will often not even be measurable at downwind ambient monitors. (See Comments of MOG, AF&PA, American Iron and Steel Institute ("AISI"), and U.S. Steel).

- **The Act's Federalism Process is Undermined:** Throughout the Act, Congress carefully crafted a balanced federalism approach to improving air quality by giving states the responsibility of implementing federal air quality requirements. Rather than fulfilling congressional intent to review state implementation plans ("SIPs") and provide states an

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opportunity to correct deficiencies, EPA is disregarding the SIPs. Yet EPA sat on these previously submitted SIPs for years, only to now propose to simultaneously deny them and impose a FIP. EPA is effectively supplanting the primary role that the Act gives states in implementing air quality improvements. (*See Comments of MOG, AF&PA, NAM, and U.S. Steel*).

- **Account for on-the-Books Programs:** Modeling and emissions inventories should account for on-the-books control programs. This includes programs like the Illinois Climate and Equitable Jobs Act, which began significantly limiting emissions of NO_x from gas-fired EGUs in that state in 2021. EPA should give controls such as this a chance to reduce NO_x at downwind locations before imposing costly upwind controls that over-control emissions. (*See Comments of MOG and AF&PA*).
- **Extend Deadline to Install Controls:** The Proposed Rule's three-year installation deadline for non-EGUs does not account for timing to obtain necessary permits even in nominal periods. When accounting for permitting, some facilities may need at least four years to implement such controls. Obtaining skilled labor and necessary components for such controls has become even more difficult during these times of geopolitical instability triggered by the Russian invasion of Ukraine, ongoing COVID-19 pandemic-driven disruption, and supply chain shortages. EPA should provide more time to install controls. (*See Comments of MOG, AF&PA, AISI and U.S. Steel*).
- **Correct Modeling Skewed by Exceptional Events:** EPA's analysis in the Proposed Rule erroneously relies on air quality monitoring data influenced by exceptional events.

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This overstates the ozone design values for certain monitors identified as having contribution from upwind states and results in over-control that is prohibited under the Act. EPA should recalculate projected design values excluding concentrations skewed by exceptional events, and determine attainment status and significant contribution metrics resulting from these new values. (*See* Comments of MOG).

V. Conclusion

The NR3 Coalition appreciates this opportunity to comment on the Proposed Rule. We recommend that EPA re-evaluate and re-propose the Proposed Rule to address the flaws noted in these and other comments, and suggest that non-EGU sources not be included in that re-proposal. Should EPA continue to include non-EGU sources, the Agency should examine trading programs as a means to provide for flexible and more cost-effective compliance. EPA should also abandon the establishment of dynamic state emission budgets, as they are not authorized by statute and inappropriately foreclose public notice and comment. We look forward to continuing to work with the Agency on this and other NAAQS regulatory issues.