March 23, 2026

ELECTRONIC SUBMISSION

Attn: EPA-HQ-OAR-2025-0192

Gwyndolyn Sofka
Air Quality Planning Division
Office of State Air Partnerships
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

RE: Interstate Transport Plan Review for the 2015 Ozone NAAQS

Dear Ms. Sofka,

On January 30, 2026, the U.S. Environmental Protection Agency (EPA) published a proposed rule to approve State Implementation Plan (SIP) submissions from eight states, regarding the 2015 8-hour National Ambient Air Quality Standards (NAAQS) for ozone, whilst also explaining EPA's intention to withdraw error-correction actions related to SIPs submitted by Iowa and Kansas.[1] Specifically, this action would greenlight the SIPs as submitted by the States of Alabama, Arizona, Kentucky, Minnesota, Mississippi, New Mexico, Tennessee, Iowa, and Kansas.[2] In addition, EPA expressed the intention to take subsequent actions consistent with this proposal, subject to public input, to address interstate transport obligations for the 2015 8-hour ozone NAAQS for other States.[3]

The SIPs covered by this rulemaking met the statutory requirements to ensure that the States in question did not emit ozone at levels that would cause difficulties in attainment for downwind sources. Therefore, EPA is making the correct decision in reversing its previous actions, and accepting these SIPs in full. However, the Notice contained further information with potentially broader implications, concerning the contribution threshold that EPA seeks to use to determine State responsibilities under the Good Neighbor Provision of the Clean Air Act, and concerning EPA's decision to continue using 2023 as the base analytic year, years after the SIPs were submitted. I appreciate the opportunity to comment on these further matters below.[4]

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[1] U.S. Environmental Protection Agency, "Interstate Transport Plan Review for the 2015 Ozone NAAQS," *Federal Register*, Vol. 91, No. 20 (January 30. 2026), p. 4,026.
[2] *Id.*
[3] 91 Fed. Reg. at 4,029.
[4] 42 U.S.C. § 7401 *et seq.*

DISCUSSION

I. EPA's Proposal to Raise the Contribution Threshold Beyond One Percent is Prudent, and a Five Percent Threshold Would be Justifiable Under the Circumstances

a. *The Caselaw Supports a Higher Contribution Threshold Than EPA Applied in the 2023 Rulemaking in Which it Rejected the SIPs at Issue Here.*

In any analysis of agency action, "[w]e look first to the text of the statute."[5] The Good Neighbor Provision of the Clean Air Act requires that State Implementation Plans (SIPs) must contain adequate provisions to prohibit emissions that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard."[6] Thus, the language of the Clean Air Act does not require, or even empower, EPA to mandate that States prohibit emissions that make merely *any* contribution to nonattainment in downwind States, but rather that contribution must rise to some level of "significance" to fall within the statute.

The Clean Air Act does not itself define the point at which an upwind State's emissions rise to that statutory level of significance. Yet even absent a statutory definition, we can start with the "ordinary meaning" of the statutory language.[7] Helpfully, the Supreme Court has looked at "significance" in the context of the Clean Air Act and other statutes, and has generally allowed the significance threshold to rise well above the one percent contribution threshold that EPA used to reject the SIPs covered in this rulemaking proposal in the first place.

As an example, when interpreting another portion of the Clean Air Act, the Supreme Court specifically contemplated that even a substantial amount of pollution, in this case 75,000 tons per year of Carbon Dioxide equivalents, could still fall below the implied *de minimis* threshold to justify any regulation, even when significance is not specifically required.[8] Various Federal courts have confronted the concept of "significance" in statutory contexts, and have generally found that the term to envision a wider range of variance than the 1 percent threshold that EPA applied to the SIP rejections in 2023.

For example, in the context of class certifications, the U.S. Court of Appeals for the D.C. Circuit agreed that the "few reported decisions" involving uninjured class members supported the suggestion "that 5% to 6% constitutes the outer limits of a *de minimis* number," and proceeded to apply that figure as a benchmark.[9] Separately, the Fourth Circuit considered a

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[5] *Americans for Clean Energy v. EPA*, 864 F.3d 691, 714 (D.C. Cir. 2017) (Kavanaugh, J.).
[6] 42 U.S.C. § 7410(a)(2)(D)(i)(I).
[7] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).
[8] *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 333 (2014).
[9] *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 625 (D.C. Cir. 2019).

confusion rate among consumers of two percent as *de minimis* in the context of a trademark complaint.[10] Indeed, the D.C. Circuit has in the medical compliance context deferred to the U.S. Food & Drug Administration (FDA) in accepting FDA's determination that a 10 percent noncompliance rate fell within the *de minimis* threshold in FDA's regulatory context.[11]

Given that EPA has set the NAAQS for ozone at 70 parts per billion (ppb), EPA's proposal to raise the contribution threshold allowed under the Good Neighbor Provision to one ppb would amount to approximately 1.4 percent of the 70-ppb standard for ozone. Similarly, EPA's proposal to raise the threshold to two-ppb would amount to just under 2.9 percent of the ozone standard. In either case, the proposed level falls safely within the range that the Federal courts have contemplated in other contexts. In fact, even the outermost alternative that EPA has signaled a willingness to adopt, the contribution rate of five percent (which equates to 3.5 ppb), falls within the *de minimis* range explicitly envisioned in most of these precedents.

De minimis non curat lex; the law does not govern trifles. The Supreme Court recognizes this axiom as an "established background legal principle[] against which all enactments are adopted."[12] This background principle is even truer for the Good Neighbor Provision, which specifically limits the power to limit emissions to those that "contribute significantly" to difficulties for downwind States in attaining or maintaining the required NAAQS levels. In determining a level that rises to that significance, it would be "arbitrary and capricious"[13] for EPA to choose a miniscule level without explaining, or even identifying, the rationale for so low a number.

EPA is therefore correct to reconsider the NAAQS contribution limit envisioned in the Good Neighbor Program, and to ground that contribution threshold in a more reasoned basis, which should account both for technical analysis and relevant caselaw, where helpful. Given that even the largest contribution threshold that EPA is considering, the five percent threshold, falls well within the range justified by the caselaw, EPA is correct to contemplate, and to solicit comments on, a threshold larger than the miniscule one percent threshold previously used to reject the SIPs in question in this rulemaking proposal.

b. *The Supreme Court's Decision in EPA v. Homer City Generation, L.P.,[14] does Not Constrain EPA from Adopting a Higher Contribution Threshold*

The Supreme Court's decision in *EPA v. EME Homer City Generation*, in which the Court allowed EPA to use of a one percent contribution threshold under the Good Neighbor Provision, does not bind EPA or prevent EPA from raising the contribution threshold. As a preliminary matter, the Court did not examine the one percent contribution threshold in any

[10] *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263 (4th Cir. 2006).
[11] *See Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995).
[12] *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).
[13] 5 U.S.C. § 706(2)(a).
[14] 572 U.S. 489 (2014).

detail. As with any Supreme Court decision, the reasoning was limited to the grounds of the appellate holding that was being reviewed. As such, *EME* revolves mainly around whether the States had been given a meaningful opportunity to correct the shortcomings in their SIPs that EPA had identified, and secondly the propriety of EPA's method of using costs as the main metric to determine the emissions reduction requirements of the respective states.[15] Thus, the *ratio decidendi*, the Court's reasoning behind the holding, has little to do with weighing the appropriateness of the one percent contribution threshold that EPA used, and the numeric threshold level was not discussed in any detail. This alone gives EPA discretion to raise the contribution threshold, even while respecting the Court's holding in *EME*.

More fundamentally, however, the Court's decision in *EME* was decided under the *Chevron* standard, which has since been overturned by *Loper Bright*. By the very terms of the *EME* decision, the Court did not intend to bind EPA's discretion, but rather to defer to EPA's interpretive authority. The Court applied, and specifically cited, the deferential *Chevron* standard in deferring to EPA's "reasonable interpretation of ambiguous statutory language."[16] Indeed, throughout its opinion, the Court repeatedly described EPA's regulatory methodology as "permissible" rather than mandatory.[17] However, the Supreme Court has since overruled *Chevron*,[18] requiring instead that Federal agencies adhere to the "single, best meaning"[19] of the authorizing statute.

Thus, even on its own terms, *EME* does not mandate that EPA observe the one percent contribution threshold that the Court incidentally upheld, in the context of a broader opinion. Rather, the Court merely deferred to EPA's interpretation at the time. Nothing in the deferential, *Chevron*-laden language of *EME* would rebut the change-in-position doctrine, which gives broad discretion to agencies to update standards, provided that the change is adequately explained.[20]

Meanwhile, under *Loper Bright*, EPA's proposed change is probably required, because the language of the Good Neighbor Provision implicitly requires EPA to at least make a good faith effort to discern the "best meaning" of the statutory mandate that States prohibit emissions that "contribute significantly" to NAAQS levels in struggling downwind States, rather than simply ask the courts to defer to a low number of EPA's choosing. Looking, not just at the caselaw discussed above, but at the technical realities discussed below, it seems clear that the one percent contribution threshold that EPA used in denying the SIPs at issue here was unreasonably low, and would not survive review under the *Loper Bright* standard. Accordingly, EPA is correct to revisit this threshold.

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[15] *See, e.g., id.* at 504-05.
[16] *Id.* at 512-13 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).
[17] *Id.* at 518 and 524.
[18] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled").
[19] *Id.* at 400.
[20] *FDA v. Wages & White Lion Investments, LLC*, 604 U.S. 542, 568 (2025); and *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) ("Agencies obviously have broad discretion to reconsider a regulation at any time").

c. *The One-ppb Contribution Threshold that Underlies EPA's Approvals of the SIPs at Issue is More Reasonable Than the One Percent Threshold that EPA Used to Reject the SIPs in Question, but Represents a Floor Rather than a Ceiling*

The one-ppb threshold envisioned in EPA's proposal is already well-established in EPA guidance on which the States relied when formulating their ozone SIPs, specifically the August 2018 memorandum already included in the docket, which declared it to be generally "reasonable and appropriate" for States to use the one-ppb threshold as a screen for "significant contribution" to downstream nonattainment or difficulties maintaining attainment. As the August 2018 memorandum explained, the one-ppb threshold captured 70 percent of total upwind contribution, compared to the one percent, 0.7-ppb[21] threshold, which captured 77 percent of total upwind contribution, and which EPA ultimately used in rejecting the SIPs at issue here.

As part of the "reasoned decisionmaking"[22] that must ground agency actions, agencies are required to take costs into consideration, both as a matter of longstanding Executive Branch policy as laid out in Executive Order 12866,[23] and as established in Supreme Court caselaw involving the Clean Air Act. Most notably, in *Michigan v. EPA*, the Court held, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[24]

It is a simple tautology that having a lower contribution threshold would necessarily capture a higher percentage of upwind pollution. As the simplest example, a zero-ppb threshold would capture 100 percent of total upwind contribution, and would therefore have a stronger effect in protecting downstream recipients of pollution. Yet such a low threshold would effectively halt upstream economic activity, and would not in fact be a cost-effective way to implement the Good Neighbor Provision.

As EPA undoubtedly understands, regulators do not have the luxury of living in either extreme. The challenge is figuring out where along the spectrum between the extremes lies the point where the balance between cost and effectiveness is optimal, in this case for the purpose of measuring "significant" contribution. In the August 2018 memorandum, EPA made a good faith, technically strong effort to find that balance, by charting the percentage of upwind pollution captured at various ppb levels. Put in relative terms, EPA noted that the one-ppb threshold, even while being more than 40% higher than the one percent threshold, only resulted in 10% more pollution for downwind receptors. This is the type of analysis that should underly an agency effort to administer a Congressional directive to determine significance of contribution. Strikingly, EPA did not even attempt to engage in a similar effort five years later, when EPA summarily used the previous one percent threshold to reject the SIPs that had been created and

[21] One percent of the 70-ppb ozone NAAQS limit.
[22] *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).
[23] Clinton, Bill. Regulatory Planning and Review. Exec. Order No. 12866, 30 September 1993.
[24] 576 U.S. 743, 752 (2016).

already submitted in reliance on the methodology and findings contained in EPA's August 2018 memorandum.[25]

The one-ppb threshold is supported in comparison to the one percent threshold not just technically, but judicially. Given both the extensive analysis that underlay EPA's August 2018 memorandum, and the fact that States relied on that guidance when submitting their SIPs to EPA, the U.S. Court of Appeals for the Sixth Circuit properly held that the one-ppb threshold is "presumptively acceptable."[26] Similarly, the Fifth Circuit vacated EPA's disapproval of Mississippi's SIP, in which EPA had relied on the one percent (0.7-ppb) threshold to invalidate Mississippi's use of the one-ppb threshold.[27]

These holdings are prudent, not just on the basis of reliance interests, but because EPA's guidance and other technical data have shown that the one-ppb threshold captures the vast majority of the pollution captured by the more stringent one percent threshold, which is exactly the kind of analysis that the "contribute significantly" statutory language requires. However, understood properly, these cases and the memorandum establish the one-ppb threshold as a floor, not as a conclusive standard. The courts in these cases limited the scope of their comparison to the one percent threshold that EPA advocated in the litigation, and the one-ppb threshold on which the States had relied. A broader comparison, weighed outside the limitations of litigation, would likely show that a higher contribution threshold is merited.

d. *EPA's Proposed One- and Alternative Two-PPB Thresholds Remain Too Small*

As useful as EPA's August 2018 memorandum is, particularly in exposing the relatively trivial difference between downwind pollutant levels caused by the smaller one percent and higher one-ppb thresholds, there are significant limitations in the analysis. First, the analysis only covered the one percent, one-ppb, and two-ppb thresholds. Second, the memorandum's analysis only covered the amount of upwind contribution covered by the relevant threshold.

Certainly, the percentage of upwind contribution covered by the threshold is a relevant consideration, but it still begs the question. Given that EPA has set 70 ppb as the overall NAAQS limit for ozone, can an upwind contribution below 2 ppb truly be said to "contribute significantly" to nonattainment, or attainment difficulties, at any affected downwind location? Put differently, EPA's August 2018 memorandum places the cart before the horse. The analysis implicitly assumes that upwind contributions should be covered, without actually analyzing, or even defining, the point at which the upwind contributions become significant. It is somewhat mystifying that EPA treated a two-ppb contribution, essentially 1.4 percent of the target level, as

[25] U.S. Environmental Protection Agency, "Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards," *Federal Register*, Vol. 88, No. 29 (February 13, 2023), p. 9,336.
[26] *Kentucky v. EPA*, 123 F.4th 447, 469 (6th Cir. 2024).
[27] *Texas v. EPA*, 132 F.4th 808, 862 (5th Cir. 2025).

"significant" without even attempting to explain how that significance would be defined or measured.

As EPA noted in its March 2018 memorandum, also included on the docket, ozone emissions come from a wide variety of sources. In most situations, the majority of any given locality's airborne pollutants will come from the locality itself, and neighboring localities within the same State. Pollutants can also travel to the locality from tribal lands, offshore sources, and areas outside of EPA's jurisdiction such as Canada and Mexico. Many of the worst ozone levels are found in the Western states, where wildfires and prescribed fires play a major role. Given the variety of sources that contribute to downwind pollution, it is perplexing that, in the August 2018 Memorandum, EPA simply assumed without explanation that a two-ppb (or 1.4 percent) contribution could be defined as significant, purely on the basis of the percentage of upwind contribution traveling to downwind sources, without any inquiry into whether the transported pollutants ultimately "contributed significantly" to downstream NAAQS attainment difficulties.

Pennsylvania and Wisconsin as Examples

This fallacy is replicated in several of the critical comments to EPA's notice here. For example, the Pennsylvania Department of Environmental Protection noted that in 2023, Bristol, PA, had an actual daily value of 73 ppb of ozone in its atmosphere on various days in which the daily values exceeded the NAAQS level of 70 bbp.[28] Pennsylvania also noted contributions from Kentucky, which is covered by this proposed rulemaking. Yet by Pennsylvania's own evidence, Kentucky's contribution to Bristol's ozone levels ranged from 0.9 to 1.16 ppb, depending on the measurement used. Yet even eliminating Kentucky's contribution would not bring Bristol within compliance with EPA's NAAQS level. Simply bringing Kentucky's contribution down to 0.7 ppb, which is technically all that is required under EPA's preexisting framework, would have an even more negligible effect, of reducing Bristol's ozone level from 73 bbp to anywhere from 72.54 – 72.8 ppb. In this context, it is difficult to understand how Kentucky's ozone pollution can in any way be said to "contribute significantly" to Bristol's nonattainment, given the reality that eliminating the Kentucky effect would make at best trivial progress in bringing Bristol toward attainment.

The comment from the Wisconsin Department of Natural Resources is significantly more detailed, but contains the same fallacy within its reasoning, in a way that is quite informative.[29] In Table 3 of its comment, Wisconsin provides ozone monitors in 12 localities within the State, which exceeded EPA's 70-bbp for ozone, ranging from 71 to 77 ppb. The table also includes data depicting the upwind contributions from eight different States, according to the 2016 projections. By any quantitative or qualitative definition, these contributions are more

[28] Comment submitted by Pennsylvania Department of Environmental Protection (PADEP) (March 2026), docketed at EPA-HQ-OAR-2025-0192-0088.
[29] Comment submitted by Wisconsin Department of Natural Resources (WDNR) (March 2026), docketed at EPA-HQ-OAR-2025-0192-0091.

significant than the ones noted by Pennsylvania in relation to Bristol, above. For each of the 12 non-attaining Wisconsin localities, the upwind contributions taken together are numerically sufficient to deprive each of the relevant localities of attainment of their ozone targets.

However, the range of contribution is noteworthy. In each of these cases, the upwind contribution from neighboring Illinois reaches at least 10 ppb.[30] Similarly, nearby Indiana contributes anywhere from 5.75 to 10.48 ppb to non-attainment in these areas, with a small exception for Waukesha, WI, which only received 2.44 ppb of ozone from Indiana. Both independently and acting together, these two States deprive Wisconsin of attainment, and make it very difficult for Wisconsin to achieve the EPA targets using its own measures. It is perhaps worth emphasizing that neither of these State SIPs are covered by the current notice.

Yet the six other States included in Wisconsin's measure provide very little contribution in comparison. None of these sources exceed the alternative two-ppb benchmark, except for Michigan, which contributes 2.83 ppb in ozone to Door County and 2.29 ppb to Kewaunee County. Various other States contribute at levels above the proposed one-ppb benchmark, and above the one percent (0.7-ppb) benchmark.

Yet to use Door County as an example, where the actual measured value was 72 ppb, it is difficult to see how a 0.74-ppb contribution from Kentucky (which is covered by this notice), a 1.58-ppb contribution from Missouri, or even a 2.83-ppb contribution from Michigan, can be said to "contribute significantly" to Door County's nonattainment, given the combined 21.83-ppb contribution from Illinois and Indiana. It seems even more unreasonable to require businesses in Kentucky, Missouri, and Texas to impose expensive measures, potentially at the cost of their own economic feasibility, to contain pollution in Wisconsin, when the major driver for that pollution comes from emissions in places far nearer to Wisconsin. Setting a higher contribution threshold thus allows EPA and the States to focus their enforcement efforts on the upwind sources that actually are causing disproportionate attainment challenges to downwind jurisdictions.

e. *A Five Percent Threshold Reasonably Accounts for Contribution Significance and Statistical Variability, Whilst Addressing the Concerns of Critical Commenters*

The most straightforward answer to the concerns raised by the Pennsylvania and Wisconsin examples would probably be to interpret the "contribute significantly" test as requiring what lawyers would recognize as a "but for"[31] requirement in order to bring a State's emissions within the ambit of the Good Neighbor Provision. Yet, the interests of administrative efficiency admittedly make a bright-line quantitative threshold simpler to administer, both for EPA and for regulated stakeholders, especially but not only in cases where the question of

[30] There is a small exception for Milwaukee UWM UPark, which under the 2016 projections technically received 9.77 ppb of ozone from Illinois, which we can round up to 10 without making a difference in this analysis.
[31] *See, e.g., Barnett v. Chelsea & Kensington Hospital Mgmt. Committee* [1969] 1 QB 428.

causation is complex (for example, where one upwind State's contributed emissions exceed the margin that would bring a downwind state out of compliance, but where other States or other factors play a more significant role). To use a numeric heuristic to try to account for significance of the contribution, a five percent threshold (which equates to 3.5 ppb) is far more reliable than the relatively minor one- or two-ppb thresholds that EPA proposed as alternatives.

First, as a basic statistical precept, no model is perfectly precise, and this imprecision frequently filters through to observed datasets.[32] There will inevitably be some level of variation between what is projected, what is measured, and what actually occurs. In order to be statistically significant, any numerical threshold would need, at a minimum, to exceed the level of variability that occurs in the models on which the agency relies. As the D.C. Circuit has held in the separate but analogous context of geographic evidence sufficiency, EPA "must first establish that there is a measurable contribution" before requiring regulation under the Good Neighbor Provision.[33]

The photochemical models that EPA uses to project the interstate transport of pollutants simply lacks sufficient precision to measure ozone contribution at the one percent level. Other, more technically proficient commenters have analyzed EPA models in past rulemakings, and have found systematic biases that overstate modeled ozone. Perhaps most dramatically, Alpine Geophysics created an independent model that found values at coastal and lakeside monitors to be at least two ppb, an as much as 4.7 ppb lower than EPA's results.[34] Many other examples of such comments exist in previous ozone-related rulemaking projects; without determining whether any of those models are superior to EPA's, it is worth noting that the variance is larger than the one- or two-ppb thresholds that EPA has suggested, to say nothing of the one percent threshold previously used to reject the SIPs at issue in the current proposal.

It should be axiomatic that, in proposing a measure for significant contribution, EPA at least should use a number larger, or even at the higher end, of the variability that has been demonstrated in its models. Using lower thresholds not only fall below the level of statistical confidence in the validity of any projected contribution as a technical matter, but also fall well below any common understanding of "significant" in the context of causing pollution in outside jurisdictions. Such a low number, compared to the demonstrated variability, also creates a misleading impression of precision, which leads to arbitrary regulatory determinations. In a regulatory framework that turns entirely on whether a State's modeled contribution meets a defined numeric threshold, using a threshold that is at the lower end, or a fraction of, the overall variability would lead to an environment in which States are effectively making the decision on

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[32] *See, e.g.*, Krouwer JS, Rabinowitz R. How to improve estimates of imprecision. Clin Chem. 1984 Feb;30(2):290-2. PMID: 6692538.

[33] *Michigan v. EPA*, 213 F.3d 663, 684 (D.C. Cir. 2000).

[34] Alpine Geophysics LLC, "Good Neighbor" Modeling Technical Support Document for 8-Hour Ozone State Implementation Plan Using Midwest Ozone Group's 4kei Modeling Platform, at 3-6, 25-30 (revised June 2019), docketed at EPA-HQ-OAR-2020-0272-0139, Att. A.

whether to proceed with the full four-step analysis based on statistical noise, rather than significant contributions. Put differently, downwind contribution projections of 0.9 and 1.1 ppb would lead to entirely different regulatory outcomes, even though the difference at that level is indistinguishable from statistical noise. Raising the threshold to account for such variability cannot eliminate the uncertainty, but would at least ensure that the downwind pollution contribution is at least meaningful, before potentially requiring regulation.

f. *The Five Percent Threshold Addresses Many of the Concerns of the States that Submitted Critical Comments*

In their comments, seven State Attorneys General supported the one percent contribution threshold by arguing that, "[a]mong other features, the 1-percent threshold becomes more stringent as the NAAQS becomes more stringent, requiring upwind states to limit their sources' pollution as downwind states are doing the same."[35] Similar arguments were raised separately in comments submitted by the New York State Department of Environmental Conservation (NYSDEC).[36]

This is true, as far as it goes, but is less an argument in favor of using the dynamic reference, rather than a basic explanation of how dynamic regulatory references work. The question still remains as to whether the dynamic reference is in fact superior to the static alternatives, and if so, why. It is true, as the State Attorneys General state, that the threshold becomes more contribution stringent as the underlying NAAQS becomes more stringent, but this is also true of static references such as EPA's proposed one- or two-ppb thresholds, as the NAAQS is lowered. As NYSDEC discusses, it is also true that the dynamic metric changes in proportion to any revisions to the underlying NAAQS, but to the extent that this is a benefit, that needs to be weighed against the reasonableness of the dynamic metric that EPA chooses.

The fact is, these arguments have nothing to do with the underlying statutory language, which calls for limitations on emissions that contribute "significantly" to non-attainment. These arguments in favor of a dynamic threshold would be equally true of a contribution threshold of 0.1 percent, but these arguments ignore the question of whether the chosen metric is in fact significant, which is the statutory standard. In addition, these arguments ignore the fact that, as the NAAQS grow smaller, fixing the dynamic reference to such a small percentage makes the standard harder to detect statistically, until (as here) the contribution threshold is essentially below the level of statistical noise, at which point enforcement at the threshold becomes arbitrary.

Most interestingly, the critical Attorneys General and NYSDEC criticized EPA's proposed one- and two-ppb thresholds on these grounds, but do not actually make specific

[35] Comment Submitted by Attorneys General of New York, Connecticut, Illinois, Massachusetts, New Jersey, Oregon, and Wisconsin, at 3 (February 2026), docketed at EPA-HQ-OAR-2025-0192-0077.
[36] Comment Submitted by New York State Department of Environmental Conservation, at 2 (March 2026), docketed at EPA-HQ-OAR-2025-0192-0089.

arguments against EPA's suggested five percent threshold. It is perhaps worth noting that adoption of the five percent, 3.5 ppb threshold would have all the benefits of a dynamic threshold, and address criticisms articulated by the State Attorneys General and NYSDEC, even while being the option most securely grounded in the statutory language of significance, and the only one that could potentially be distinguished from statistical noise, based on the variability of EPA's models.

II. EPA Correctly Retains the 2023 Analytic Year for this Action[37]

Thus far, this comment has focused on the question of the contribution threshold under EPA's four-step interstate transport framework. However, there are other provisions of the Clean Air Act that are also relevant to this broader rulemaking, such as the analytic year to use. Before discussing the appropriate analytic year, it is worth recalling the statutory timeline. After EPA sets a new NAAQS, the Clean Air Act specifically gives States the first chance to create and submit their SIPs implementing the new NAAQS to EPA.[38] Once the State submits its SIP, EPA faces a 12-month deadline within which to fully approve, partially approve, or disapprove the submitted SIP,[39] at which point EPA may, subject to certain conditions, impose its own Federal Improvement Plan (FIP) to displace the SIP proposed by the State in question.[40]

Part of what makes the initial rejections of these SIPs so egregious is that the EPA rejection came years after the statutory deadline. Moreover, EPA acted against its own guidance by using different modeling than that which underlay its March 2018 Memorandum,[41] and rejecting the one-ppb threshold that its August 2018 Memorandum had recommended, in favor of the more restrictive one percent threshold.[42] EPA thus did not merely violate its statutory deadline in rejecting the SIPs, but did so using analyses that contradicted the guidance available to the States when they submitted the SIPs pursuant to their own statutory deadlines, and which had in fact not even been developed or applied until after EPA's own statutory deadline had passed.

To state that this behavior was egregious is not a moral statement, but a legal one. The clear violation of the States' reliance interests on EPA guidance, and administrative due process not only in rejecting the SIPs after their submission, but in developing the necessary analysis for

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[37] 91 Fed Reg. at 4031.
[38] 42 U.S.C. 7410(a)(1) ("Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years…after the promulgation of a [NAAQS]…a plan that provides for implementation, maintenance, and enforcement of such primary standard").
[39] 42 U.S.C. 7410(k)(2) – (3).
[40] 42 U.S.C. 7410(c)(1).
[41] *E.g.*, U.S. Environmental Protection Agency, "Air Plan Disapproval; Nevada; Interstate Transport Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standards," *Federal Register*, Vol. 87, No. 100 (May 24, 2022), p. 31,485, 31,486-87 (discussing the new model used to disapprove the Nevada SIP, in language mirrored in the other rejections).
[42] *E.g.*, *id.* at 31,490 (discussing EPA's decision to substitute the one percent contribution threshold for the previously recommended one-ppb threshold, after submission of the SIPs).

that rejection after EPA's own statutory deadline had passed, underlay the remands of EPA's disapprovals of Kentucky's[43] and Mississippi's[44] SIPs. In fact, due to the litigation that resulted, including a nationwide injunction issued by the Supreme Court,[45] none of the FIPs that EPA attempted to impose to replace the rejected SIPs have actually taken effect.

Given the importance of reliance interests in overturning EPA's disapprovals of Kentucky and Mississippi, the decision to retain 2023 as the year against which to weigh the SIP projections is proper. Creating a new baseline year, even farther into the future, as determinate over SIPs, six years after the initial submission of the SIPs in the first place, would require EPA to substitute its own projections for those contained in the SIP, or otherwise require the States to undergo the lengthy process of updating their SIPs. In either case, such a decision would only exacerbate the reliance interest violations that caused the remands in the first place.

This is to say nothing of the fact that D.C. Circuit precedent requires EPA to use the NAAQS attainment deadline as the analytic year, "not…some later date."[46] There is also no real justification for EPA to use a future analytic year, beyond the timeframe that the States used in the modeling for their own SIPs, as some of the commenters suggest. It is true that there are now six additional years' worth of data, but replacing the 2023 analytic year with a projection six years further into the future, does not actually update the models to account for the latest data. Instead, it simply replaces the 2023 analytic year, on which the State relied in their own SIPs, with a new year that went beyond their modeling ranges, but whose accuracy remains unknowable, because any new, future analytic year would still be a projection.

There is actually an intriguing way in which EPA could account for the new data, which would not have been possible if the statutory deadlines had been met. The best way to account for the new data would not be to choose a new analytic year further out, an approach that would merely replace an uncertainty back when the SIPs were submitted in 2020, with a new year that remains uncertain in 2026, and which would complicate the process further by using a year that the States, acting on EPA guidance, never actually modeled in their SIPs. Instead, with six years' worth of new data, the projections for 2023 have become replaced by observations. In other words, 2023 is now a historic year, rather than a mere projection. There is thus a unique opportunity now, which did not exist when EPA disapproved the SIPs in 2023, to use the actual data from 2021-2023 to measure against the models that drove the SIP evaluations in the first place.

By using the 2023 years, the accuracy of the States' models can be measured against the actual observations, in a way that would not be possible if EPA simply substituted another future projection year. To the extent that the State models are validated by the data, this approach

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[43] *Kentucky v. EPA, supra* n. 26, 123 F.4th at 678-81.
[44] *Texas v. EPA, supra* n. 27, 132 F.4th at 860-62.
[45] *Ohio v. EPA*, 603 U.S. 279, 300 (2024).
[46] *Maryland v. EPA*, 958 F.3d 1185, 1204 (D.C. Cir. 2020).

would largely vindicate the SIPs that found no significant ozone contribution to downwind jurisdictions struggling to maintain their NAAQS. In contrast, where the State models are not validated by the data, it would be prudent for EPA as a first step to try and diagnose why, and decide any further steps to take. As a final, perhaps incidental point, to the extent that the observed record shows model error generally, this would further reinforce the arguments in the previous section, advocating a higher contribution threshold.

Conclusion

As EPA grounds its SIP determinations more directly to the statutory imperative of both the Clean Air Act generally, and the Good Neighbor Provision specifically, it is encouraging to see that EPA is planning to raise the contribution threshold under its Four-Part analysis, above the one percent threshold that has grown untenably low as the NAAQS progressively decreases. However, EPA should consider raising the contribution threshold further, either to a two-ppb or ideally a dynamic five percent threshold, so as to ensure that the ozone emissions captured in this analysis truly fit within the "significance" standard delineated in the statute.

In addition, given how late these determinations are being published, compared to when the States initially submitted their SIPs, and in light of the clear statutory timeline provided in the Clean Air Act, EPA is correct to conclude that it would be unreasonable to weigh the SIPs against a projection date even further into the future than anything that the SIP models covered. If EPA wants to use updated data, they should use that data to validate the projections that were modeled, rather than come up with a new projection that does nothing except replace a projection that was valid when the States submitted their SIPs, pursuant to the statutory timeframes.

In any event, it is encouraging to see that EPA is reconsidering its 2023 rejection of the SIPs covered in this notice. The proposal to accept these SIP's, none of which would cause even one ppb of ozone contribution to downwind sources, embodies the cooperative Federalism that underlies the Clean Air Act, whilst ensuring that EPA's enforcement efforts are instead directed toward States that actually do cause significant challenges for downwind attainment of the ozone NAAQS.

Thank you for your consideration of these comments.

Respectfully yours,

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[47] These comments are submitted in my individual capacity and do not necessarily represent the views of The Heritage Foundation.