

**Remarks from Chris Wells to the U.S. Senate Committee on Environment and Public Works Regarding the final Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards signed March 15, 2023, by the U.S. Environmental Protection Agency Administrator, Michael S. Regan**

**I. Introduction**

The Clean Air Act (CAA) tasks the U.S. Environmental Protection Agency (EPA) with setting national ambient air quality standards (NAAQS) for certain air pollutants and empowers the states to determine how best to comply with those standards. In addition to ensuring that the state complies with the NAAQS within their borders, states must demonstrate that their air emissions will not *significantly* contribute to a downwind state’s inability to comply with the NAAQS. This obligation is commonly known as the “Good Neighbor” or “Interstate Transport” provision. After EPA sets or revises a NAAQS, the state must submit a state implementation plan (SIP) describing how it will implement, maintain, and enforce the NAAQS. EPA must either approve or disapprove a SIP within 18 months. If EPA later finds that a state’s approved SIP is substantially inadequate, EPA must notify the state and may establish deadlines for the state to revise the SIP. The process is typically a cooperative process with EPA allowing the states to revise or resubmit their SIPs to resolve inadequacies identified by EPA. If the states fail to submit an adequate SIP, EPA must impose a federal implementation plan (FIP) within two years. EPA typically gives states an opportunity to revise their SIPs to address the deficiencies. In this matter, EPA deviated from that process.

**II. EPA’s Bad Faith**

Instead of giving Mississippi an opportunity to revise its Good Neighbor SIP after EPA found it deficient, EPA had a FIP in its back pocket ready to go *one week* after it proposed to deny Mississippi’s SIP. Not only did EPA not give Mississippi an opportunity to revise its SIP, incredibly Elizabeth Selbst, from EPA’s Air Quality Policy Division, informed Mississippi that there was no form of an approvable SIP that Mississippi could submit if modeling showed significant contribution to a downwind receptor. In other words, EPA substituted its judgment for Mississippi’s by directly deciding which industries in Mississippi must install pollution controls to reduce ozone-causing pollutants rather than deferring to Mississippi—as the CAA contemplates—to determine how to achieve the reductions. This is the opposite of the “cooperative federalism,” “co-regulator partnership” that EPA often touts, but all too often fails to observe.

**III. The Good Neighbor Ozone SIP and FIP Process**

In 2015, EPA revised the ozone NAAQS by reducing the amount of ozone that can be present in outdoor air without harming public health. In the spirit of cooperative federalism contemplated by the CAA, Mississippi worked with EPA and followed EPA’s guidance in determining whether in-state pollution sources significantly contributed to a downwind state’s ability to attain or maintain the NAAQS. Mississippi submitted its SIP in September 2019 demonstrating how it would comply with the revised ozone NAAQS. The SIP was based on information and EPA guidance available at the time and was approvable based on that information.

However, EPA failed to act on Mississippi's SIP within 18 months as mandated by the CAA. EPA then created its own crisis.

#### **IV. The Call to Arms**

In *Downwinders at Risk et al. v. Regan*, several environmental organizations sued EPA for its failure to timely act on the states' SIPs. EPA settled the lawsuit (to which the states were not a party) by entering a consent decree (to which the states were not party) in January 2022 agreeing to expedite its review of the states' SIPs. On February 22, 2022, about six weeks after EPA entered the consent decree and more than two and a half years after Mississippi submitted its SIP, EPA proposed to disapprove Mississippi's SIP. EPA based its proposed disapproval on (1) its recension of its own guidance provided to assist states in developing their ozone SIPs and (2) information and computer modeling that was not even complete, and certainly not available, when Mississippi developed and submitted its SIP for approval in 2019. Mississippi was thus set up for failure.

#### **V. The Rigged Game**

Instead of giving Mississippi an opportunity to revise its SIP to correct the purported deficiencies as contemplated by the CAA, *within one week* of its proposal to disapprove Mississippi's SIP, the EPA administrator signed a proposed FIP. The proposed FIP included sweeping changes to regulate and require reductions of nitrogen oxides, or NO<sub>x</sub>, a pollutant that reacts with volatile organic compounds in the atmosphere to form ozone. These sweeping changes included emission reductions from industrial sectors not previously addressed under EPA's prior Good Neighbor rules, adding many new regulated facilities to the electric generating units which had previously been targeted. Upon Mississippi's review of the proposed FIP, it was clear EPA was in a rush to expand their regulatory reach and had not performed the due diligence necessary to understand even the most basic principles of applying pollution controls to many of these industrial sectors, let alone the feasibility and availability of such controls and their real impacts to manufacturing and energy supply. In other words, EPA suggested pollution control measures that it had no idea were even technologically compatible with specific emission sources. Instead of allowing Mississippi the opportunity to use EPA's most recent modeling results to determine how to regulate sources within the state to comply with the revised NAAQS (modeling that Mississippi does not concede is accurate), EPA seized the opportunity to dictate which Mississippi sources would be required to install pollution controls to reduce their NO<sub>x</sub> emissions.

Moreover, neither EPA's original 60-day comment period for the FIP proposal, nor the extended comment period deadline of only 15 days, provided Mississippi adequate time to review the extensive technical information and broad modeling included in the FIP proposal or assess the widespread impacts on Mississippi. Instead, EPA bootstrapped the *Downwinders* consent decree as the impetus for its decision to immediately regulate via the FIP instead of giving Mississippi time to revise its SIP as intended by the CAA.

Rather than take additional time afforded under the CAA to further vet the proposed FIP, including yet another revised modeling platform used in the final decision-making process, EPA Administrator Michael Regan signed the final FIP on March 15, 2023, only one month following

its disapproval of Mississippi's SIP. While EPA revised the final FIP to address a handful of stakeholder comments, including comments regarding the proposed FIP's more obvious flaws, the final FIP still ultimately requires Mississippi sources to implement *unnecessary* and *unjustified* emissions reductions that are unlikely to have any meaningful impact on ozone concentrations in downwind states. Thus, Mississippi sources will be required to, for the foreseeable future, install, operate, and maintain controls that are not necessary, and those costs will necessarily be passed on to Mississippi taxpayers.

## **VI. The Questionable Modeling**

Modeling refers to the use of mathematics and computer programs to estimate concentrations of pollutants in the air. There are numerous variables that can affect the outcome of a modeling effort (e.g., quantity of emissions, temperature, humidity, cloud cover, other pollutants in the air, etc.). If any one variable changes, the results of the modeling will likely change. EPA's modeling demonstrates that its efforts to reduce 23 "upwind" states' NOx emissions undertaken in the FIP do not appear to be particularly meaningful at all. This is most likely because the impact of localized emissions on ozone formation is a much more significant factor in whether an area can attain and maintain the NAAQS. For example, EPA's modeling purports to demonstrate that Mississippi affects attainment in Texas. The attached maps graphically illustrate how emissions in Texas are infinitely more impactful to air quality in Texas than any emissions in Mississippi. See Attachments A and B.

EPA's most recent modeling results anticipate that, once the FIP is fully implemented, the greatest ozone reduction at any downwind receptor ranges from 0.7 to 0.9 parts per billion (ppb), or a mere 1% of the standard. Most anticipated reductions in ozone concentrations at downwind receptors are well below that, with some reductions being less than 0.1 ppb. However, there is no guarantee that these model predictions will even be realized. The FIP is based simply on one scenario that *could* result. Further, because the atmosphere is so dynamic and formation of ozone is complex, involving a series of complex cycles, the further away from the source of the emissions, the less accurate a modeling estimate of the pollutant concentration attributable to that source can be. The minuscule reductions anticipated at downwind receptors, that may or may not occur, will likely play no role in these receptors actually attaining or maintaining the ozone NAAQS.

## **VII. The Moving Target**

EPA has also created a moving target by continuously updating the modeling basis, *even after proposing to disapprove Mississippi's SIP*, making Ms. Selbst's comments about Mississippi's ability to submit an approvable SIP a self-fulfilling prophesy. For example, in its proposed FIP, EPA indicated that Mississippi's largest contribution at a downwind receptor in Harris County, Texas, was 1.04 ppb. EPA's final FIP indicates Mississippi's largest contribution is 1.32 ppb at a downwind receptor in Galveston County, Texas. Not only did the modeled contribution change, but the model also identified or "linked" Mississippi as a significant contributor to a monitor site (or receptor) not previously identified in the proposed FIP. In the proposed FIP, EPA found that states including Arizona, New Mexico, Kansas, and Iowa did not

significantly contribute to ozone nonattainment or maintenance in downwind states; however, EPA has stated in the final FIP that all four states are now linked to receptors in downwind states. EPA has already approved the Good Neighbor ozone SIPs for Iowa and Kansas [see 87 FR 22463, April 15, 2022, and 87 FR 19390, April 4, 2022] and has proposed approval of Arizona’s SIP [see 87 FR 37776, June 24, 2022]. Therefore, the winners and losers can be expected to change every time EPA tweaks the modeling platform or releases a new version of the model. With EPA’s pre-determined mindset—at least in Mississippi’s case—that there can be no version of an approvable SIP as long as the modeling links Mississippi to receptors in downwind states, EPA has inserted itself into the regulatory role conferred upon Mississippi by the CAA. Due to the complex nature of ozone formation, the real effect of emissions reductions made at upwind sources may never be fully understood or accurately represented by modeling.

### **VIII. In Opposition to Science**

The modeling performed by EPA has already seemingly failed to accurately estimate ozone concentrations at many NAAQS monitor sites. EPA added additional monitor sites to the final FIP to address sites with actual ozone concentrations poised to violate the standard in 2023, although the current modeling shows compliance with the standard. In these cases, the modeling often appears to underestimate ozone by more than 10 ppb. Therefore, EPA’s reliance on their current modeling to accurately project ozone contributions and subsequent impacts from reductions is a game of chance, where states never know where the results may land. As stated by EPA in the final FIP: “Recognizing that no modeling can perfectly forecast the future, and ‘a degree of imprecision is inevitable in tackling the problem of interstate air pollution,’ this approach in the Agency’s judgement best balances the need to avoid both ‘under-control’ and ‘overcontrol.’” (Pre-publication FIP, p. 190). However, this imprecision EPA believes is justified has far-reaching consequences to utilities and industry sectors caught in its crosshairs and, ultimately, costs of compliance will be passed on to the public with very little demonstrable improvements to air quality.

### **IX. It’s All Relative**

EPA should focus more attention on reductions in and around the nonattainment and maintenance areas (i.e., those areas that are currently exceeding or recently attaining the NAAQS) and not continue to target the utility sector, industries, and other stationary sources in Mississippi which are hundreds of miles away from the Texas monitor sites, when there is little certainty such emissions are *actually* impacting ozone in any meaningful way in these areas. For example, EPA linked Mississippi to downwind receptors in the Houston and Dallas/Ft. Worth Metropolitan areas, where the population in each of these municipalities is more than twice the *entire population* of the State of Mississippi, and where mobile sources, known to factor significantly in ozone formation, contribute over 15,000 tons of NOx emissions in each metro area compared to about 12,500 tons in *all* of Mississippi. See EPA’s 2017 National Emissions Inventory. See also, Attachments A and B.

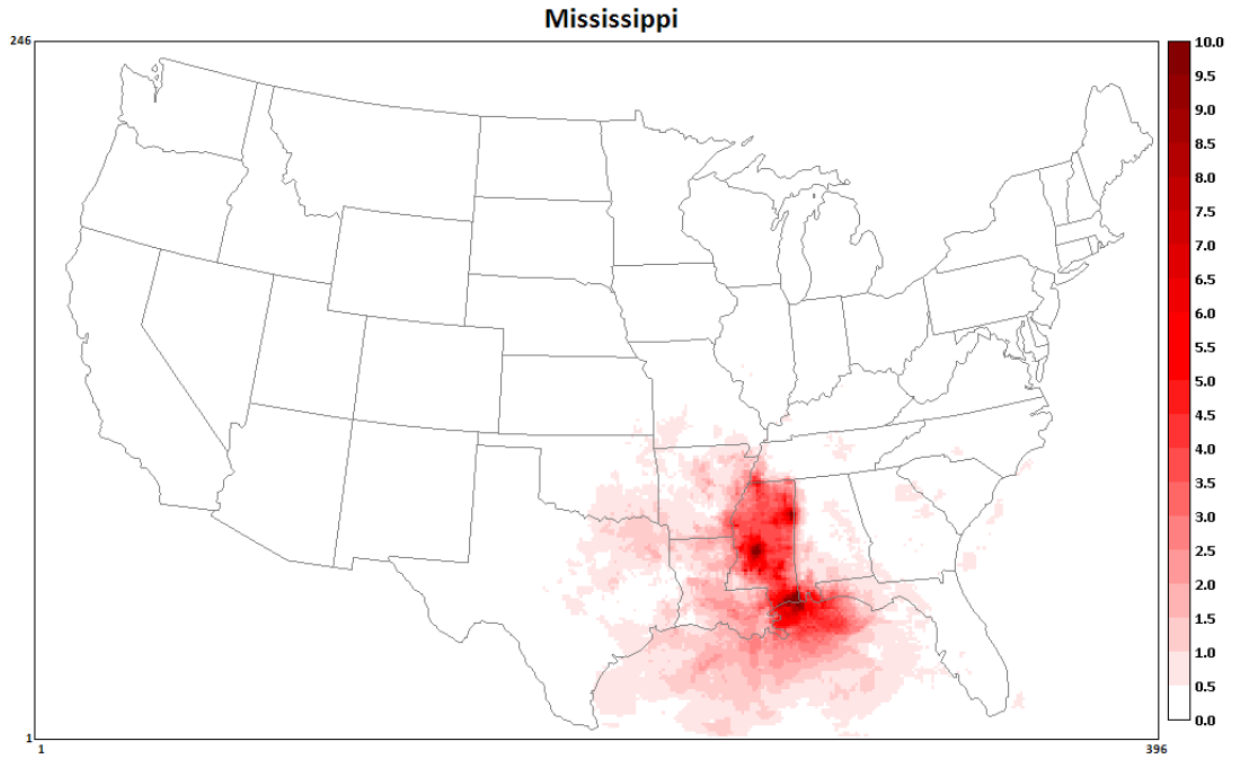
## **X. No Time for Appeasement**

At the very least, and in the spirit of fairness and cooperative federalism, upon deeming a state to be sufficiently “linked” to downwind receptors, EPA should provide that state an opportunity to submit a SIP that identifies both the sources and control requirements that make the most sense to implement given the unique circumstances *in that state*. Such an approach would be consistent with other required SIP demonstrations that Mississippi has made, and EPA has approved. For example, EPA admits its analysis of control strategies in the final Good Neighbor FIP does not consider the age or remaining life of the existing sources they target, stating in the final FIP that there is no such allowance “expressly identified” in the relevant section of the CAA. In this same vein, the CAA does not require states to regulate an entire industrial sector or industry at all, but instead, gives states flexibility to reduce emissions as they deem necessary and appropriate to attain and maintain compliance with the NAAQS. As pointed out in comments by the energy sector, it makes no sense for an electric generating unit scheduled to retire within the next few years to spend millions of dollars installing and operating controls that will no longer be necessary when the plant is shuttered, ultimately passing some, if not all, of these unnecessary costs to rate payers. Flexibilities for allocating any required emissions reductions among similar industry sectors or individual facilities should be afforded the states to allow those in the best position to understand the economics to make decisions that are reasonable while still achieving the end goal. The states are in the best position to evaluate their inventory of emission sources and take reasonable steps to reduce NO<sub>x</sub> emissions in a fair and balanced manner. This approach is what the CAA envisioned.

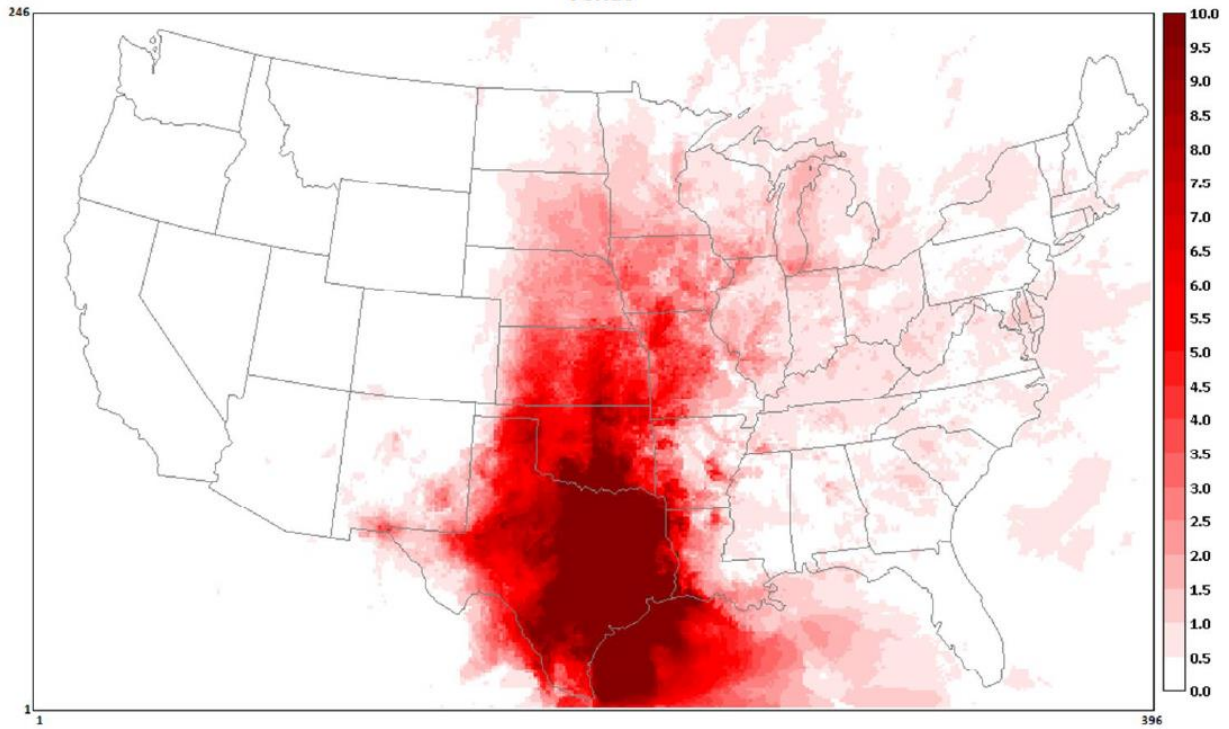
## **XI. Conclusion**

EPA is not particularly interested in meaningfully improving downwind air quality but rather in mandating that Mississippi be in the business of reducing NO<sub>x</sub> emissions for the sake of reducing them. Much like a magician’s use of sleight of hand to misdirect the audience’s attention, EPA is indirectly hijacking the state’s role by engaging in direct pollution source control which it could never do without being in clear violation of the CAA. If the agenda of the interloping EPA prevails, Mississippi industry would have to spend millions of dollars to retrofit plants with the most modern (and costly) emissions technology despite many rapidly nearing the end of their useful life. Decisions regarding how to achieve compliance with the NAAQs should remain primarily within the purview of Mississippi and the other individual states as the Clean Air Act intended.

Air Quality Modeling Final Rule Technical Support Document, 2015 Ozone NAAQS Good Neighbor Plan, Appendix F: Spatial Fields of Top 10-day Average Contributions from Emissions in Upwind States in 2023



Texas



Attachment B