KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 20, 2022

United States Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OAR-2021-0068
[Submitted electronically via www.regulations.gov]

Re: Docket ID No. EPA-HQ-OAR-2021-0068

Dear Sirs and Madams:

As the chief legal officer of Texas, I am writing to urge withdrawal of the proposed "Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard" 87 Fed. Reg. 20,036 (April 6, 2022) ("Transport FIP"), either in whole or as it relates to Texas. The Office of the Attorney General of Texas fully supports and incorporates here the comments of Texas Commission on Environmental Quality ("TCEQ") and Public Utility Commission of Texas ("PUCT") and the concerns of Electric Reliability Council of Texas ("ERCOT").

In its proposed Transport FIP, EPA unconstitutionally infringes into matters reserved for the states and contradicts the cooperative federalism approach of the Clean Air Act ("CAA"). Regional actors are in the best position to determine how to meet the 2015 ozone transport obligations, but EPA failed to consult the necessary experts and denied states, specifically Texas, the opportunity to regulate where appropriate. EPA ignored critical reliability and grid independence issues within Texas, which is unsurprising considering EPA lacks the agency expertise on such issues. EPA exceeded its statutory authority here and wrongly assumed the role of Congress in this area of vast economic and political significance. It acted arbitrarily and capriciously in several distinct ways, abused its discretion, and failed to observe procedures required by law. The proposed Transport FIP suffers from a host of legal and factual defects and unlawful overreaches. As such, EPA should reprise its secondary role in the framework of cooperative federalism, respect the primary role of the states in the regional ozone transport regime, withdraw its FIP, and approve the State Implementation Plan ("SIP") submitted by TCEQ on August 17, 2018.

Background

The CAA requires EPA to promulgate the National Ambient Air Quality Standards ("NAAQS"), *see* 42 U.S.C. § 7409 (CAA § 109), for air pollutant emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 108. NAAQS criteria air pollutants include carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. *See* 40 C.F.R. Part 50 (the codified NAAQS). Once EPA issues a new or revised NAAQS, it designates geographical areas around the United States as: (1) "attainment" if NAAQs levels are met, (2) "nonattainment" if NAAQs levels are not met, or (3) "unclassifiable" if NAAQS compliance cannot be assessed due to lack of information. CAA § 107. According to the CAA, "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which [the NAAQS] will be achieved and maintained within each air quality control region in such State." CAA § 107(a). The 2015 ozone standard is the NAAQS at issue here. It is set at 70 parts per billion.

Following a new or revised NAAQS being set, each state must submit a SIP within three years that provides for the implementation, maintenance, and enforcement of the NAAQS. CAA § 110. The statutory text of the CAA requires EPA to make a finding of completeness within six months after receipt of a SIP, otherwise the SIP is deemed by operation of law to meet the minimum criteria of completeness. CAA § 110(k)(1)(B). Within 12 months of the completeness determination under Section 110(k)(1), EPA is required to act on the SIP submission in accordance with Section 110(k)(3). CAA § 110(k)(2). EPA shall approve a SIP as a whole if it meets all the applicable requirements. CAA § 110(k)(3). If a portion of the plan revision meets all the applicable requirements, EPA may approve the plan revision in part and disapprove the plan revision in part. CAA § 110(k)(3). EPA shall promulgate a FIP within two years after it disapproves a SIP in whole or in part. CAA § 110(c)(1)(B).

SIPs must address certain amounts of pollution generated in one state but moving to another. CAA § 110(a)(2)(D)(i)(I). Specifically, to ensure emissions do not interfere with a neighboring state's compliance with the NAAQS, each SIP must contain adequate provisions to ensure that sources within their borders do not emit air pollutants in amounts that will contribute significantly to the nonattainment, or interfere with the maintenance, of any other state with respect to the NAAQS. *Id.* This requirement is known as the Good Neighbor Provision. The Good Neighbor

Provision is intended to keep upwind states from making it impossible for downwind state to attain or maintain the NAAQS.[1]

Here, TCEQ submitted the 2015 Ozone SIP Revision ("Texas SIP") on August 17, 2018, to address the Good Neighbor Provision. EPA did not act on the Texas SIP for three and a half years. On February 22, 2022, EPA finally proposed disapproving the Texas SIP, 42 months after TCEQ's SIP submittal. Virtually simultaneously though, before even considering the comments submitted on the proposed Texas SIP disapproval, EPA issued the proposed Transport FIP on April 6, 2022.

1. The proposed Transport FIP is arbitrary and capricious and an abuse of EPA's discretion, in violation of the APA. 5 U.S.C. § 706(2)(A).

A. EPA's actions are arbitrary and capricious.

EPA's actions are arbitrary and capricious because the agency relied on factors which Congress did not intend it to consider, entirely failed to consider important aspects of the problem, offered explanations for its decision that run counter to the evidence, and are so implausible that they cannot be ascribed to a difference in view or the product of agency expertise. *Judulang v. Holder*, 565 U.S. 42, 53 (2011); *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012); *Texas v. EPA*, 829 F.3d 405, 425 (5th Cir. 2016) (stating standard for setting aside agency actions for being arbitrary and capricious). While courts will not substitute their judgement for that of an agency, courts will determine if an agency considered relevant factors or whether there has been a clear error in judgement. *Id.* Here, it is clear the latter occurred.

Examples of EPA's arbitrary and capricious conduct, discussed more fully in the comments of the Texas agencies, include its failure to adequately consider the difficult supply chain and bottleneck issues that will arise from the large-scale deployment of new or upgraded emissions controls contemplated by the proposed Transport FIP. EPA furthermore fails to account for operational variability in Electrical Generating Units ("EGUs") and the complexities surrounding maintenance, start up, and shutdown events in its proposed backstop emissions limits. It also fails to adequately consider the costs required by the proposed Transport FIP in relation to the actual benefits. EPA fails to consider Texas's prosperity, its long-term growth, the well-being of its populous, and its economic, industrial, and natural resource contributions to the United States. And, perhaps most concerning of all given that EPA has made the same mistake in the past, the proposed Transport FIP fails to take Texas grid reliability concerns into account. When EPA gave short shrift to Texas's reliability concerns in promulgating the

[1] *Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 86 Fed. Reg. 23054, 23065 (Apr. 30, 2021), https://www.federalregister.gov/documents/2021/04/30/2021-05705/revised-cross-state-air-pollution-rule-update-for-the-2008-ozone-naaqs.

Regional Haze Rule under CAA § 169A, the Fifth Circuit noted EPA's limited authority to dictate how ERCOT should rule the Texas grid and granted Texas's request for a stay of the rule. *See Texas v. EPA*, 829 F.3d at 433. Now, EPA has done it again, this time including many states outside the Fifth Circuit in the proposed Transport FIP, no doubt hoping to avoid the effect of the Regional Haze ruling. Details of these examples, and more, may be found within the comments of the Texas agencies.

EPA should heed the expertise of TCEQ, PUCT, and ERCOT.

B. EPA abused its discretion throughout the promulgation of the Transport FIP.

EPA does not have license to rely on unexplained or faulty assumptions, inaccurate or incomplete data, or unaccounted-for rationales or definitions. Yet, this is exactly what EPA does consistently throughout the proposed Transport FIP. EPA abuses its discretion and violates the APA.

Examples of EPA's abuses of discretion include its reliance on faulty assumptions and errors within its assessment tools, such as the Air Quality Assessment Tool ("AQAT"). The AQAT was also insufficient to determine if the unlawful overcontrol of sources will occur—EPA should not have depended on it when photochemical modeling is superior and available. EPA also relied on inaccurate data stemming from miscalculations of the other relevant industrial sources ("non-EGUs") in Texas and the existing emissions controls on such non-EGU units. EPA furthermore provides no clear definition of "significant contribution to nonattainment or interference to maintenance" and conflates *ability to mitigate* with *significance of contribution* within its methodology. EPA should determine the significance of contributions to nonattainment first. Details of these examples and other instances of EPA's abuses of discretion may be found within the comments of the Texas agencies.

2. In promulgating the proposed Ozone FIP, EPA acted outside its statutory authority in violation of the APA. 5 U.S.C. § 706(2)(C).

A. EPA lacks authority to regulate the Texas electric grid.

EPA takes on—however poorly—critical reliability issues and ignores the independent nature of the Texas electric grid. The FIP also inappropriately requires the consideration of electric generation shifting as a control strategy. EPA has no authority to do these things. Congress will speak clearly when authorizing an agency to exercise such powers of "vast 'economic and political significance.'" *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The EPA should take special note of the expertise and comments by TCEQ and PUCT, and the expertise and concerns of ERCOT. Those comments appropriately sound the alarm regarding dire

reliability consequences that may arise from the proposed Transport FIP due to its faulty assumptions and modeling and other shortcomings. EPA should have consulted the experts on this one.

The unique design and largely independent function of the Texas electric grid, and the potential reliability issues specific to it, are principal reasons the CAA's state-respecting regime must be followed by EPA here. The EPA's proposals within the Transport FIP unconstitutionally infringe on Texas's sovereign powers and attempt to seize authority held by the legislative branch and other regulatory agencies.

Beyond tampering with the reliability of Texas's independent electrical grid, EPA also moves uninvited into the space of requiring the consideration of generation shifting. The law requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power. *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021). No such enactment exists here, and EPA unlawfully requires generation shifting as a control strategy within the proposed Transport FIP.

B. EPA exceeds its statutory authority in many parts of the Ozone FIP.

In addition to exceeding its statutory authority by taking on electric reliability and generation shifting issues, EPA acts outside of its statutory authority in instances of overcontrolling sources via the proposed Transport FIP. "If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked, the Agency will have overstepped its authority, under the Good Neighbor Provision, to eliminate those 'amounts [that] contribute … to nonattainment." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 521 (2014). As explained in TCEQ's comments, EPA failed to use proper photochemical modeling verification to ensure it is not overcontrolling. EPA moreover conflates *ability to mitigate* with *significance of contribution* within its methodology, as stated before, and cannot be sure if overcontrol exists. EPA also failed to accurately consider existing emissions controls and applicable non-EGUs in Texas—including cement kilns, various chemical, petroleum, and coal products manufacturing facilities, pulp, paper, and paperboard mills, and iron, steel, and ferroalloy manufacturing sources—so it likely could be overcontrolling the sources it has selected to regulate and inaccurately estimating the impacts to downwind sources. EPA failed to give stakeholders adequate time to analyze the proposed Transport FIP and the accompanying technical analyses regarding the relevant issues, including overcontrol. It is clear, however, that EPA does not understand whether overcontrol exists.

3. Even when EPA stayed within its statutory authority it violated the terms of the Clean Air Act—both substantively and procedurally—in violation of the APA. 5 U.S.C. § 706(2)(A) and (D).

A. Ignoring the spirit of cooperative federalism embedded in the Clean Air Act, EPA stepped into the primary role Congress intended for the states.

To ensure emissions do not interfere with a neighboring state's compliance with the primary and secondary NAAQS required by the CAA, states must ensure sources within their borders do not emit air pollutants in amounts which will contribute significantly to the nonattainment, or interfere with the maintenance, of any other state with respect to the NAAQS. CAA § 110(a)(2)(D)(i)(I). The CAA is a state-respecting act. Indeed, the control of air pollution at its core is the primary responsibility of the states. *See Union Elec. Co. v. EPA,* 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as national standards were met, the power to determine which sources would be burdened by regulation and to what extent.")

So long as Texas complies with the CAA, it should be free to adopt its own mix of emission controls that it determines right for itself and its citizens. *See Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975) ("the [CAA] gives the Agency no authority to question the wisdom of the State's choices of emission limitations if they are part of a plan which satisfies the standards … so long as the ultimate effect of the State's choice of emission limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.").

States submit SIPs to implement, maintain, and enforce air pollution controls. Of course, if a SIP is actually deficient, EPA is directed to step in—but EPA's role is secondary, and it reviews a state's plans for compliance with the CAA. *See Train*, 421 U.S. at 79 (EPA is plainly "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met."). EPA must approve such plans if it meets the minimum requirements. CAA § 110(k)(3).

Texas submitted a robust and capable SIP. However, EPA ignored its responsibilities and had its own calculated plan all along to regulate 25 states within its own EGU cap-and-trade program, which includes Texas. As demonstrated in TCEQ's comments, EPA also ignored key data regarding existing units and emissions controls related to the other part of its plan, the regulation of non-EGUs. Even though Texas submitted a statutorily compliant SIP, EPA maneuvers hastily towards consolidated CAA power and ignores cooperative federalism. The statutory structure of the CAA affords Texas a meaningful opportunity to allocate reduction responsibility among the sources within its borders. EPA should respect that.

B. EPA's failure to follow the deadlines of the Clean Air Act is not mere procedural error, but also indicates an intention to disregard the Texas SIP all along.

The State of Texas objects to two core procedural defects committed by EPA in its issuance of the proposed Transport FIP: (1) EPA ignored its duties outlined in the CAA by missing its deadline to act upon the Texas SIP, and (2) EPA proposed the Transport FIP prior to final disapproval of the Texas SIP.

First, instead of working with Texas to correct any perceived deficiencies in the SIP, as contemplated by Section 110(k)(5), EPA sat on the SIP for 42 months. TCEQ submitted its 2015 Transport SIP Revision on August 17, 2018. EPA finally took action and proposed denying the Texas SIP on February 22, 2022. In waiting so long, EPA violated the timelines set forth in Section 110(k)(2)-(3). The statutory text of the CAA requires EPA to make a finding of completeness within six months after receipt of the state SIP, otherwise the SIP is deemed by operation of law to meet the minimum criteria of completeness. CAA § 110(k)(1)(B). Within 12 months of the determination under Section 110(k)(1), EPA is required to act on the SIP submission in accordance with Section 110(k)(3). CAA § 110(k)(2). EPA shall approve a SIP as a whole if it meets all the applicable requirements. CAA § 110(k)(3). If a portion of the plan revision meets all the applicable requirements, EPA may approve the plan revision in part and disapprove the plan revision in part. *Id.* However, EPA did nothing to comply with the 12-month deadline for action under Section 110(k)(2). It could have approved the entire Texas SIP or part of the Texas SIP. *See id.* EPA has no discretion to wait to take action for 42 months though. EPA failed to comply with its statutory mandate and the Texas SIP should be approved for meeting all applicable requirements.

Second, EPA did not wait until the final Texas SIP disapproval when it proposed the Transport FIP on April 6, 2022. EPA shall promulgate a FIP at any time within two years after it disapproves a SIP in whole or in part. CAA § 110(c)(1). EPA failed to wait to promulgate its proposed Transport FIP until final SIP disapproval. "[T]he CAA sets a series of precise deadlines to which the States and EPA must adhere." *EME Homer*, 572 U.S. at 507. In violating the deadlines in the CAA, EPA deprived Texas of any meaningful opportunity to correct deficiencies, in violation of the CAA. Unlike in *EME Homer*, here the EPA did not wait until after final SIP disapproval to promulgate the FIP. *See id.* at 507-509. EPA did not even wait until after the SIP disapproval comment period to propose the Transport FIP. Through its actions, EPA not only committed procedural error, but it defied the purpose and spirit of the CAA by dispossessing Texas of its primacy.

Conclusion

For the foregoing reasons, as well as the many others raised in the comments of Texas agencies and other interested parties, EPA should withdraw the proposed Transport FIP, either in whole or as it relates to Texas.

Respectfully,

KEN PAXTON
Attorney General of Texas