

23-3216(L) / 23-3225(Con)

United States Court of Appeals for the Sixth Circuit

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN,
ADMINISTRATOR, United States Environmental Protection Agency,

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency
88 Fed. Reg. 9,336 (Feb. 13, 2023)

BRIEF FOR STATES OF NEW YORK, CONNECTICUT, DELAWARE, MARYLAND, MASSACHUSETTS, AND NEW JERSEY AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI AND SUMMARY OF ARGUMENT

These cases involve a challenge to a recent rulemaking by the U.S. Environmental Protection Agency (EPA) that disapproved proposed revisions to Kentucky's state implementation plan (SIP) for ozone under the federal Clean Air Act. *See* 88 Fed. Reg. 9,336 (Feb. 13, 2023). In its SIP, Kentucky had purported to satisfy its obligations under the Good Neighbor Provision of the Clean Air Act by determining not to take any additional steps to reduce smog-forming emissions that travel into downwind jurisdictions. Kentucky and its Energy and Environment Cabinet (collectively, Kentucky) now seek to stay EPA's disapproval. Mot. of the Commonwealth of Ky. for a Stay Pending Review (Mot.), No. 23-3216 (May 23, 2023), ECF No. 24-1; Pet'r's Mot. for Stay of Final Rule (Cabinet Mot.), No. 23-3225 (June 1, 2023), ECF No. 14-1.

Amici curiae the States of New York, Connecticut, Delaware, Maryland, Massachusetts, and New Jersey and the District of Columbia have a strong interest in opposing the requested stay, because emissions of smog-forming pollutants from upwind sources in Kentucky contribute to air quality problems and associated health impacts in amici States and localities.

Based on their extensive experience with interstate emissions, amici urge the Court to deny Kentucky's stay request for two reasons. First, a stay would cause significant and irreparable harm to amici by delaying emissions reductions from Kentucky that amici need to meet their own federal air quality obligations by August 2024 and to prevent harm to their residents' health. Staying the disapproval of Kentucky's SIP would, at a minimum, delay EPA's implementation of a federal implementation plan (FIP) for Kentucky that was published on June 5, 2023.¹ The FIP, which applies to Kentucky and twenty-two other States, is critical to reducing smog pollution in the 2023 ozone season, which is already underway. Amici in the New York Metropolitan Area² need these reductions as soon as possible to comply with the federal ozone standards by 2024. By contrast, Kentucky has no compelling interests justifying a stay: for the current ozone season, the FIP simply requires Kentucky sources with *existing pollution controls* to operate those controls from

¹ See 88 Fed. Reg. 36,654 (June 5, 2023).

² The New York Metropolitan Area encompasses nine counties in New York (including all of New York City), twelve counties in New Jersey, and three counties in Connecticut. See 83 Fed. Reg. 25,776, 25,794, 25,819, 25,821 (June 4, 2018).

August 4, the FIP's effective date, through September 30—less than two months.

Second, Kentucky is unlikely to prevail on the merits for several reasons, including especially for the threshold reason that it has petitioned for review in the wrong court. Here, Kentucky challenges an EPA rulemaking that disapproved not only Kentucky's SIP but also the SIPs of twenty other States spread across multiple federal judicial circuits. The Clean Air Act plainly requires EPA regulations that are nationally applicable or based on a determination of nationwide scope or effect to be reviewed in the D.C. Circuit. That conclusion is confirmed by the fact that previous challenges to interstate ozone transport rules have been resolved in that venue.

BACKGROUND

Ozone and its precursors travel with the wind across state lines, sometimes hundreds or thousands of miles from their sources. *See* 88 Fed. Reg. at 9,372. This interstate transport of ozone pollution unfairly shifts costs and health burdens from upwind States like Kentucky onto downwind States like amici and their residents.

For example, upwind emissions impact the ability of many amici and other downwind States to meet federal ozone standards in their own States. To compensate for substantial upwind contributions, downwind States must regulate in-state sources more stringently—at greater cost to these in-state sources. Further, even after imposing such costly in-state controls, many downwind States are still unable to attain healthy air due to upwind contributions. *See North Carolina v. EPA*, 531 F.3d 896, 912 (D.C. Cir.), *amended in part on reh'g by* 550 F.3d 1176 (D.C. Cir. 2008); *Midwest Ozone Grp. v. EPA*, 61 F.4th 187, 189 (D.C. Cir. 2023). In addition, excess ozone from upwind States affects the health of residents in downwind States, as breathing ozone can trigger asthma and airway inflammation; worsen bronchitis and emphysema; and cause early death. *EPA, Health Effects of Ozone Pollution* (last updated May 24, 2023);³ *see also* 88 Fed. Reg. at 9,362.

Congress enacted the Good Neighbor Provision to address the problem of transported interstate pollution. When States devise SIPs to comply with the national ambient air quality standards, the Good

³ For sources available online, full URLs appear on the Table of Authorities. All URLs were last visited on June 16, 2023.

Neighbor Provision requires those SIPs to “contain adequate provisions” to “prohibit[]” emissions that will “contribute significantly” to nonattainment, or “interfere with maintenance,” of federal air quality standards in a downwind State. 42 U.S.C. § 7410(a)(2)(D)(i)(I). SIPs must also provide that upwind States will satisfy their Good Neighbor obligations in time to allow downwind States to attain the federal standards by the requisite statutory deadlines. *See Wisconsin v. EPA*, 938 F.3d 308, 314-15 (D.C. Cir. 2019).

EPA plays a critical role in enforcing the Good Neighbor Provision. If EPA determines that a SIP is inadequate to prohibit emissions that contribute significantly to downwind nonattainment, EPA must disapprove the SIP and, within two years, issue a FIP that satisfies the Good Neighbor Provision’s requirements. 42 U.S.C. § 7410(c)(1).

Here, EPA issued the relevant national ambient air quality standards for ozone in 2015, reducing the maximum permissible concentration of ozone from 75 to 70 parts per billion. 80 Fed. Reg. 65,292 (Oct. 26, 2015). Although modeling showed that emissions from Kentucky sources would affect the ability of amici and other downwind States to attain these standards, Kentucky’s SIP had proposed not to impose any

further emissions reductions requirements on Kentucky's sources to remedy this problem. *See Mot.* at 6. Accordingly, EPA disapproved Kentucky's SIP and, in the same rule, simultaneously disapproved the SIPs of twenty other States. 88 Fed. Reg. 9,336. EPA then promulgated a FIP, which will require economically feasible emissions reductions from these States, in satisfaction of the Good Neighbor Provision. 88 Fed. Reg. 36,654.

ARGUMENT

POINT I

A STAY WOULD IRREPARABLY HARM AMICI AND CONTRAVENTE THE PUBLIC INTEREST

A stay of the rule would irreparably harm amici and the public interest by delaying emissions reductions urgently needed in the current ozone season.⁴ *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). After the 2023 ozone season concludes, amici cannot retroactively reduce pollution levels for that time period, meet an attainment deadline that has already passed, or protect residents from harmful air they have already breathed.

⁴ Ozone seasons run each year from May 1 to September 30, when ozone levels increase with temperature and sunlight. 88 Fed. Reg. at 36,669, 36,694.

Because of ozone-forming pollution emitted in upwind States like Kentucky, many amici have struggled to attain or maintain the 2015 ozone standards nearly eight years after they were promulgated. For example, EPA has identified one Fairfield County, Connecticut, monitor (a device located in the tristate New York Metropolitan Area) as the downwind nonattainment receptor most highly affected by Kentucky's excess emissions. 88 Fed. Reg. at 9,356. All of New Jersey remains in nonattainment of the 2015 ozone standards, 83 Fed. Reg. at 25,819, with Kentucky significantly contributing more than 1 percent of ozone to three monitoring locations. *See* [EPA, Final GNP O3 DVs Contributions \(2023\)](#) ("2023gf Ozone Contributions" tab). Amici in the Philadelphia Metropolitan Area and Greater Connecticut Area receive meaningful levels of cross-border ozone from Kentucky that contribute to nonattainment. *See* 87 Fed. Reg. 60,897, 60,917, 60,919, 60,921 (Oct. 7, 2022). Other amici, even if they are formally in attainment, continue to measure unhealthy spikes in ozone levels, partly due to emissions from Kentucky. *See, e.g.,* [EPA, Massachusetts](#) (n.d.) (registering exceedances of the ozone standards at seven different monitoring sites across Massachusetts in 2021).

The absence of sufficient controls on upwind emissions has forced amici to adopt increasingly stringent controls on in-state sources to satisfy the Clean Air Act's attainment deadlines. *See* 42 U.S.C. §§ 7511, 7511a(a)-(e). Indeed, amici have some of the strictest emissions limits and controls in the country and emit much less pollution than other States, including Kentucky, where sources are less tightly controlled. *See, e.g.*, 86 Fed. Reg. 23,054, 23,059 tbl.I.B-1 (Apr. 30, 2021) (setting, in a prior regulation, a seasonal emissions budget of 3,421 tons of ozone-forming nitrogen oxides for New York and 14,051 tons for Kentucky).⁵

These controls impose considerable, disproportionate, and unfair burdens on amici and their sources. For example, New York has required in-state sources to implement controls costing up to \$5,500 per ton of nitrogen oxides removed. *See* 87 Fed. Reg. 9,484, 9,490 (Feb. 22, 2022). By comparison, the recent FIP promulgated for Kentucky and other upwind States does not require upwind sources to implement controls in 2023 costing more than \$1,800 per ton of nitrogen oxides removed. *See* 88 Fed. Reg. at 36,846. A stay would force amici to attempt to squeeze

⁵ *See also* Comment Letter from Att'ys Gen. 8 (June 21, 2022).

additional reductions from their own in-state sources, which are already highly controlled—all under the threat of reclassification to a more severe level of nonattainment. In contrast, denying a stay would merely require Kentucky sources to activate existing pollution control technology for the last two months of the 2023 ozone season.

Moreover, the timing of these emissions reductions is critical. New York, New Jersey, and Connecticut face an August 2024 deadline to attain or maintain the 2015 ozone standards in the New York Metropolitan Area and other nonattainment areas. *See* 88 Fed. Reg. at 36,695; 83 Fed. Reg. at 25,794, 25,819, 25,821. Delaware and Maryland face the same deadline for their nonattainment areas. *See* 87 Fed. Reg. at 60,917, 60,919. And because attainment status for this 2024 deadline will be determined by averaging data for the 2021, 2022, and 2023 ozone seasons, a stay that delays needed reductions from upwind States like Kentucky until after the 2023 ozone season would impact amici's ability to meet this deadline. Amici should not be forced to bear those costly impacts because of Kentucky's recalcitrance to address (at far less cost) pollution sources in Kentucky.

These harms to amici and the public far outweigh any potential harm to Kentucky. The SIP disapproval itself does “not impose any requirements or penalties on any state or sources within that state.” 88 Fed. Reg. at 9,364. The alleged economic hardships to Kentucky in the absence of a stay are conclusory (*see* Cabinet Mot. at 14-15, 19), and, regardless, “economic loss does not constitute irreparable harm, in and of itself,” *Ohio ex rel. Celebrezze v. Nuclear Regul. Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987); *accord Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). Nor does the FIP impose onerous requirements on Kentucky in 2023. Rather, the FIP merely requires Kentucky sources with existing controls to turn on and operate those controls for a portion of the current ozone season. *See* 88 Fed. Reg. at 36,660.

POINT II

PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS BECAUSE THEY HAVE CHOSEN TO FILE IN THE WRONG COURT

This Court should deny Kentucky’s requested stay for the additional reason that Kentucky is unlikely to succeed on the merits of a petition that it has filed in an improper venue. The Clean Air Act provides that petitions for review of EPA actions that are “nationally applicable” or that EPA finds are “based on a determination of nationwide scope or effect” must be filed in the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

Here, the rule that Kentucky challenges is both nationally applicable and contains EPA’s express finding that it is based on a determination of nationwide scope or effect. 88 Fed. Reg. at 9,380. The rule exclusively concerns the *interstate* transport of ozone—that is, emissions of smog-forming pollutants from States that blow into and demonstrably impair the air quality in other States. As the Supreme Court recognized, interstate ozone transport creates a “thorny causation problem” for EPA, which must “allocate among multiple contributing upwind States responsibility for a downwind State’s excess pollution.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 514 (2014). Review in a centralized venue is thus required by the plain text of the

Clean Air Act because EPA is implementing a statutory requirement aimed at addressing an inherently interstate problem that crosses both state and judicial-circuit boundaries. *See id.* at 496-97.

Moreover, the rule is of nationwide scope or effect because evaluating multiple proposed ozone transport SIPs in the same action demands a nationally consistent framework. 88 Fed. Reg. at 9,380. Using this framework, EPA must first identify *all* States “linked” to downwind nonattainment—an inquiry requiring a uniform contribution threshold. The Supreme Court has upheld EPA’s use of this approach to interstate ozone pollution under the Good Neighbor Provision. *See EME Homer City*, 572 U.S. at 518-20. Reviewing Kentucky’s SIP in isolation would countermand that well-settled approach.

Interstate transport of ozone-forming pollution from Kentucky and other upwind States into the New York Metropolitan Area illustrates the need for a nationally applicable and consistent framework subject to judicial review in Congress’s choice of centralized forum. EPA’s modeling supporting its disapproval of Kentucky’s and twenty other States’ SIPs predicted that eleven upwind States, including Kentucky, would significantly contribute ozone-forming pollutants to the New York Metropolitan

Area. See EPA, Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS, SIP Disapproval Final Action app. C at C-2 to -3 (2023).

These upwind States are located in five different federal circuits. If this Court were to adopt Kentucky's approach, in violation of the Clean Air Act, no single court would be able to review the aggregate impacts on amici in the New York Metropolitan Area or account for the collective action problem that the Good Neighbor Provision is intended to remedy.

Allowing different upwind States, including Kentucky here, to challenge EPA's rule in different circuit courts around the country, rather than in the D.C. Circuit, could also generate confusion and inconsistent rulings. This risk is not theoretical: several upwind States (as well as private parties) have already challenged the rule in other circuits. And Kentucky and other petitioners have stated that these multiple lawsuits in different forums will challenge similar aspects of EPA's rule.⁶ As a result, various upwind States could be subject to potentially inconsistent rulings and timelines governing their Good Neighbor obligations—an

⁶ Compare Mot. at 11-17 (challenging timing and version of air quality data and modeling), *with* State of Utah's Non-Binding Statement of Issues to Be Raised ¶ 3, *Utah v. EPA*, No. 23-1102 (D.C. Cir. May 15, 2023), ECF No. 1999306 (same).

outcome the Clean Air Act expressly seeks to avoid. EPA, for its part, could be subject to similar rulings and timelines, greatly complicating its efforts to administer the Good Neighbor Provision. As this Court has observed, “[t]he validity of a nationwide rule—and the assurance that it is non-arbitrary—should not turn on the caprice of who happens to challenge it or not challenge it and what arguments are made or not made during the rulemaking process.” *St. Marys Cement Inc. v. EPA*, 782 F.3d 280, 288 (6th Cir. 2015).

CONCLUSION

The Court should deny petitioners' stay motions.

Dated: New York, New York
June 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,556 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: New York, NY
June 16, 2023

/s/ Elizabeth A. Brody