



Chase Tower, 17th Floor
P.O. Box 1588
Charleston, WV 25326-1588
304-353-8000
Fax: 304-933-8704
www.stepToe-johnson.com

Writer's Contact Information
Kathy G. Beckett
(304) 353-8172
Kathy.Beckett@stepToe-johnson.com

August 27, 2021

Rosemary E. Hambright
Air and Radiation Law Office (2344A)
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted to Docket ID No. EPA-HQ-OGC-2021-0444
and via email: hambright.rosemary.e@epa.gov

Re: Notice of Proposed Consent Decree;
State of New York, et al. v. Regan et al.,
No. 21 Civ. 252 (ALC) (S.D.N.Y.);
Docket ID No. EPA-HQ-OGC-2021-0444.

Dear Ms. Hambright:

These comments are offered on behalf of the Midwest Ozone Group (“MOG”) in response to the Notice of Proposed Consent Decree in *State of New York, et al. v. Regan et al.*¹ The comment period deadline on this Notice is August 30, 2021.

MOG is an affiliation of companies and associations that draws upon its collective resources to seek solutions to the development of legally and technically sound air quality programs.² MOG's primary efforts are to work with policy makers in evaluating air quality policies by encouraging the use of sound science. MOG has been actively engaged in a variety of issues and initiatives related to the development and implementation of air quality policy, including the assessment of exceptional events, the development of transport rules, NAAQS

¹No. 21 Civ.252 (ALC) (S.D.N.Y. 86 Fed. Reg. 40825 (July 29, 2021).

² The members of and participants in the Midwest Ozone Group include: American Electric Power, American Forest & Paper Association, American Wood Council, Ameren, Alcoa, Appalachian Region Independent Power Producers Association (ARIPPA), Associated Electric Cooperative, Big Rivers Electric Corp., Buckeye Power, Inc., Citizens Energy Group, Cleveland Cliffs, Council of Industrial Boiler Owners (CIBO), Duke Energy Corp., East Kentucky Power Cooperative, ExxonMobil, FirstEnergy Corp., Indiana Energy Association, Indiana-Kentucky Electric Corporation, Indiana Utility Group, LGE / KU, Marathon Petroleum Company, National Lime Association, Ohio Utility Group, Ohio Valley Electric Corporation, Olympus Power, and City Water, Light & Power (Springfield IL).

standards, nonattainment designations, petitions under Sections 126, 176A and 184(c) of the Clean Air Act (“Act”), NAAQS implementation guidance, the development of Good Neighbor state implementation plans (SIPs) and related regional haze and climate change issues. MOG Members and Participants own and operate numerous stationary sources that are potentially affected by the regulatory actions that are the subject of the proposed consent decree. MOG seeks the development of technically and legally sound air pollution rules and actions that may impact their facilities, their employees, their contractors, and the consumers of their products.

Inasmuch as the six Good Neighbor State Implementation Plans (“SIPs”) that are the subject of the proposed consent order were deemed complete more than 12 months ago, EPA appears to be obligated to act on those submittals in accordance with Clean Air Act §110(k)(3).³ However, unless and until EPA disapproves any of the subject SIP in whole or in part, EPA is under no obligation to promulgate a Federal Implementation Plan (“FIP”).⁴ In the event of any such disapproval, EPA has 2 years within which to promulgate a FIP.⁵ In addition, the Clean Air Act authorizes EPA to call for SIP plan revisions should EPA find that a SIP is substantially inadequate, allowing the affected states the opportunity to address such concerns as EPA might have.⁶

MOG objects to the proposed consent decree as being inconsistent with the Clean Air Act, both because: (1) it creates an alternative course of action for EPA that calls for a FIP to be proposed in the absence of the disapproval of the underlying SIP, and (2) it does not address at all EPA’s authority to issue a SIP call under Clean Air Act §110(k)(5). MOG also objects to the proposed consent decree because it fails to provide EPA with the time that will be necessary to promulgate any FIP or SIP call that may be required. As stated above, EPA is allowed 24 months to promulgate a FIP (Clean Air Act §110(c)(1)) and 18 months for states to respond to a SIP call.⁷

The concern of MOG related to the abbreviated schedule suggested by the proposed consent order is highlighted by the agency’s recent experience in promulgating the FIP for the 2008 ozone NAAQS (Revised CSAPR Update). EPA itself provides that it did not have adequate time to address many significant issues in the Revised CSAPR Update undermining the technical and legal merit of the rule. Given the Revised CSAPR Update experience, MOG is concerned that the schedule offered in the proposed consent order similarly will result in the development of a FIP which would result in the:

- failure of EPA to conduct comprehensive photochemical modeling;
- failure of EPA to consider its own flexibilities related to maintenance monitors;
- failure of EPA to consider its own flexibilities related to significant contribution limits;

³ Clean Air Act §110(k)(2).

⁴ Clean Air Act §110(c)(1).

⁵ Id.

⁶ Clean Air Act §110(k)(5).

⁷ Clean Air Act §110(k)(5).

- failure of EPA to update the “on-the-books” emissions control requirements;
- failure of EPA to align compliance deadlines applicable to sources in nonattainment areas to be consistent with the deadlines applicable to Good Neighbor Provisions; and
- failure of EPA to provide a timeperiod for comments that would be adequate to allow stakeholders an appropriate opportunity to fully assess and comment on any proposed FIP.

For these reasons, the Midwest Ozone Group opposes the consent decree as proposed.

Very truly yours,



Kathy G. Beckett
Legal Counsel
Midwest Ozone Group