

Comments by

American Forest & Paper Association, Inc., America’s Power, Associated Electric Cooperative, Inc., Deseret Electric Power Cooperative, Midwest Ozone Group,¹ National Mining Association, the National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, the Portland Cement Association, and Wabash Valley Power Alliance

on the U.S. Environmental Protection Agency’s Proposed Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States

**88 Fed. Reg. 42,295 (July 31, 2023)
Docket ID No. EPA–HQ–OAR–2021–0668**

August 30, 2023

The above-named parties are individual electric generating companies who own and operate electric generating units (“EGUs”) covered by the U.S. Environmental Protection Agency’s (“EPA”) Good Neighbor Plan for the 2015 Ozone National Ambient Air Quality Standards (“Good Neighbor Plan”) and national trade associations whose members own and operate stationary sources regulated by the Good Neighbor Plan and who provide fuel to and depend on reliable affordable electricity and other products from those sources. As such, these parties have an interest in EPA’s Interim Final Rule entitled: “Federal ‘Good Neighbor Plan’ for the 2015 Ozone National Ambient Air Quality Standards; Response to

¹ The members and participants in the Midwest Ozone Group are listed in Attachment A.

Judicial Stays of SIP Disapproval Action for Certain States” (“Interim Final Rule”).
88 Fed. Reg. 42,295 (July 31, 2023).

1. The Interim Final Rule properly stays the Good Neighbor Plan in those states in which EPA’s disapproval of state implementation plans (“SIPs”) has been stayed.

The Interim Final Rule properly stays the Good Neighbor Plan with respect to the following six states where EPA’s SIP disapprovals have been stayed by various U.S. Courts of Appeals: Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas. 88 Fed. Reg. at 49,295. Six other states (Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia) have also had their SIP disapprovals stayed by various U.S. Courts of Appeals, however. Because EPA has no legal authority to implement a federal implementation plan (“FIP”) like the Good Neighbor Plan in a state in the absence of an effective disapproval of that state’s SIP, EPA is compelled to extend the Interim Final Rule to the remaining six states in which the SIP disapprovals have been stayed. EPA should do so immediately.

2. EPA must revise the Interim Final Rule to explicitly toll the compliance schedule related to future emission control requirements.

The Interim Final Rule fails to explicitly address the fact that for sources in those states that have had their SIP disapprovals stayed, the timetable for compliance with the Good Neighbor Plan’s 2026 control requirements is also stayed with respect to both EGUs and non-EGUs. Accordingly, we urge that EPA revise the Interim Final Rule to explicitly state that sources in the states covered by the Interim Final

Rule do not need to take any action at this time to prepare for meeting the Good Neighbor Plan's 2026 requirements.

This approach would follow the one taken by EPA in connection with the Cross-State Air Pollution Rule in 2014 where the compliance schedule for that rule was tolled for three years by the D.C. Circuit.² Extending the Interim Final Rule to explicitly address the tolling of the 2026 compliance schedules will ensure that the present stays (and any future stays that may occur) serve their intended purpose to preserve the status quo pending judicial review.

3. Given that the SIP disapprovals in more than half the states subject to the Good Neighbor Plan have been stayed, EPA should stay the Good Neighbor Plan in its entirety.

While EPA has correctly determined that major portions of the Good Neighbor Plan should not be allowed to take effect as the result of the SIP disapproval stays, EPA should do more. The fact of the matter is that every court that has been asked to stay a SIP disapproval related to the Good Neighbor Plan has done so; no court has denied such a request. Because the underlying SIP disapprovals have been stayed in 12 states—which is more than half of the total states covered by the Good Neighbor Plan—the Good Neighbor Plan is now on life support, existing as a mere shadow of its former self, eroded by the orders of seven U.S. Courts of

² Order, Doc. 1518738, *EME Homer City Generation, L.P. v. E.P.A.*, No. 11-1302 (D.C. Cir. October 23, 2014).

Appeals. As such, we urge EPA to take the crucial step now of recognizing the flaws underlying the Good Neighbor Plan and staying it in its entirety.

The practical effect of stays of the 12 SIP disapprovals is that 89 percent of anticipated reductions in emissions of nitrogen oxides (“NO_x”) from EGUs and 60 percent of the anticipated NO_x emission reductions from non-EGUs have been removed from the Good Neighbor Plan.

EPA cannot move forward with the Good Neighbor Plan under these circumstances. Specifically, only 11 percent of EGU and 40 percent of non-EGU anticipated emission reductions remain in effect as the result of the stays of the SIP disapprovals that have been granted – stays that courts could only have granted if they found that the challenges to the SIP disapprovals were likely to succeed on the merits. At a minimum, EPA must analyze the effect of the SIP disapprovals on mandatory considerations under section 110(a)(2)(D)(i) of the Clean Air Act, including the effect of the removal of these states on significant contribution and cost-effectiveness. EPA has not conducted such an analysis. And there is no evidence that the Good Neighbor Plan can be justified under these conditions. It would be arbitrary, capricious, unlawful, and contrary to due process and the Clean Air Act to allow for the implementation of a rule that has been modified so dramatically following promulgation.

In addition, even with respect to the states for which the Interim Final Rule stays the effectiveness of EPA’s Good Neighbor Plan, the Interim Final Rule fails in its purported aim to “preserve status quo requirements established in previous [Good Neighbor] rulemakings.”³ Under the status quo prior to the Good Neighbor Plan, states like Alabama, Arkansas, Mississippi, Missouri, Oklahoma, and Texas participated in the Group 2 allowance trading market with states like Wisconsin. But under the Interim Final Rule, that status quo is not restored because EPA is subjecting Wisconsin to the Group 3 allowance market. This is even more true with states like Kentucky and Louisiana, which are being relegated to their own mini-market of emissions allowances, rather than being able to trade with other states in Revised CSAPR’s Group 3. The size and scope of these allowance trading markets have a meaningful impact on the price of allowances in each market, and therefore the cost of compliance within each state. The only way to truly restore the pre-Good Neighbor Rule status quo with respect to all states that have received a judicial stay of their SIP disapprovals is to stay the effectiveness of the *entire* Good Neighbor Plan.

Conclusion

Given the developments that have given rise to the need for the Interim Final Rule and for the reasons set forth in these comments, we respectfully submit that the

³ 88 Fed. Reg. at 49,297.

honorable thing for EPA to do in these circumstances is to stay the entire Good Neighbor Plan pending judicial review of the SIP disapprovals underlying the rule and the rule itself.

ATTACHMENT A

Midwest Ozone Group Members and Participants

Alcoa
Ameren
American Electric Power
American Forest & Paper Association
American Iron and Steel Institute
American Wood Council
Appalachian Region Independent Power Producers Association
Associated Electric Cooperative
Berkshire Hathaway Energy
Big Rivers Electric Corporation
Buckeye Power, Inc.
Citizens Energy Group
City Water, Light & Power (Springfield IL)
Cleveland Cliffs
Council of Industrial Boiler Owners
Duke Energy Corporation
East Kentucky Power Cooperative
ExxonMobil
FirstEnergy Corporation
Indiana Energy Association
Indiana-Kentucky Electric Corporation
Indiana Municipal Power Agency
Indiana Utility Group
LGE/ KU
Marathon Petroleum Company
National Lime Association
North American Stainless
Nucor Corporation
Ohio Utility Group
Ohio Valley Electric Corporation
Olympus Power
Steel Manufacturers Association
Wabash Valley Power Alliance