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December 17, 2021

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Submitted to Docket ID No. EPA-HQ-OGC-2021-0800
and via email: pettit.elizabetha@epa.gov

Re: Notice of Proposed Consent Decree;
Our Children's Earth
Foundation v. Regan, No. 20 Civ. 8232
(JPO) (S.D. New York).
Docket ID No. EPA-HQ-OGC-2021-0800.

Dear Ms. Pettit:

These comments are offered on behalf of the Midwest Ozone Group ("MOG") in response to the Notice of Proposed Consent Decree in *Our Children's Earth Foundation v. Regan*, No. 20 Civ. 8232 (JPO) (S.D. New York).¹ The comment period deadline on this Notice is December 23, 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 programs² that may impact their facilities, communities, employees, contractors, and the

¹ 86 Fed. Reg. 66546 (November 23, 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 Colorado • Kentucky • Ohio • Pennsylvania • Texas • West Virginia

consumers of their products. 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 (including comments on proposed consent decrees), NAAQS 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.

While the proposed consent decree addresses only pending submissions by the state of New York, it is clear that the remedy being proposed has a clear common link with the proposed consent decree in State of New York, et al v. Regan et al., No. 21 Civ. 252 (ALC) (S.D.N.Y.) and Downwinders at Risk et al v. Regan, No. 21-cv-03551 (N.D. Cal). The common link in all three proposed consent decrees is that if by February 28, 2022, EPA signs a Federal Register publication which proposes disapproval of the state plans involved and proposes a new transport rule, the EPA would have until December 15, 2022 to sign a final action to approve, disapprove, conditionally approve, or approve in part and conditionally approve or disapprove in part, the interstate transport provisions of the subject plans.

MOG objects to this approach as being inconsistent with the Clean Air Act which makes it clear that unless and until EPA disapproves any of the subject SIP in whole or in part, EPA is under no obligation to promulgate a transport rule of this kind that effectively constitutes a Federal Implementation Plan ("FIP").³ In the event of any such disapproval, EPA has 2 years within which to promulgate a FIP.⁴ 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.⁵

In addition, MOG objects to the proposed consent decree as being inconsistent with the Clean Air Act, because 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 properly review and analyze SIP submittals and subsequently 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)) after a finding that the SIP is inadequate, and states are allowed 18 months to respond to a SIP call⁶ and both of those deadlines significantly exceed the time allotted to EPA or the states in the proposed Consent Decree.

Lime Association, Ohio Utility Group, Ohio Valley Electric Corporation, Olympus Power, and City Water, Light & Power (Springfield IL).

³ Clean Air Act §110(c)(1).

⁴ Id.

⁵ Clean Air Act §110(k)(5).

⁶ Clean Air Act §110(k)(5).

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 has stated 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 Decree 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 flexibilities it authorizes to states related to maintenance monitors;
- failure of EPA to consider flexibilities it authorizes states related to significant contribution limits;
- 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 time period for comments that would be adequate to allow stakeholders an appropriate opportunity to fully assess and comment on any proposed FIP.

Our concern about inadequate time to conduct comprehensive photochemical modeling is underscored by the fact that EPA has represented⁷ that the modeling that would be used as the basis for any proposed 2015 ozone NAAQS transport rule will include an emission inventory (2016v2) and underlying modeling platform with respect to which EPA is accepting comments from states and MJO's through December 17, 2021⁸. EPA has also represented that court ordered deadlines preclude the opportunity for EPA to remodel any revised emission inventory in advance of the release of any proposed rule. This circumstance creates the untenable circumstance of issuing a proposed rule on the basis of a modeling platform that is different from the one on which the final rule will be based. MOG and other stakeholders are entitled to have a full and fair opportunity to review and comment on any proposed rule EPA might advance. To allow that to occur, we urge that the schedule included in the proposed consent decree be enlarged to allow EPA to perform the appropriate modeling that it acknowledges it did not have time to perform for the Revised CSAPR Update and to assure that the air quality modeling that will be used to support the final rule will be available for comment when the rule is proposed.


⁷ See: https://cleanairact.org/wp-content/uploads/2021/10/Wayland_Monitoring-Modeling-and-Emission-Inventory-Updates_9-30-21-1.pdf ; https://cleanairact.org/wp-content/uploads/2021/10/Mathias_NAAQS-Regional-Haze-Permit_9-30-21.pdf.

⁸ See: <http://views.cira.colostate.edu/wiki/wiki/11208#September-21-2021>

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For these reasons, the Midwest Ozone Group opposes the consent decree as proposed.⁹

Very truly yours,



Kathy G Beckett
Legal Counsel
Midwest Ozone Group

⁹ While MOG objects to the portions of this proposed consent decree described above, MOG supports the provisions contained in paragraph 3.b. of the proposed consent decree that would allow EPA to continue to assess the merit of state implementation plans even as any proposed transport rule is being finalized. This alternative will be particularly important to states that could be shown by updated modeling not to be significant contributors to downwind nonattainment and maintenance areas.