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Submitted to Docket ID No. EPA-HQ-OGC-2021-0692
and via email: hambright.rosemary.e@epa.gov

Re: Notice of Proposed Consent Decree;
Downwinders at Risk et al. v.
Regan, No. 21-cv-03551 (N.D. Cal).
Docket ID No. EPA-HQ-OGC-2021-0692.

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 *Downwinders at Risk et al. v. Regan*, No. 21-cv-03551 (N.D. Cal)¹ The comment period deadline on this Notice is November 15, 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 standards, nonattainment designations, petitions under Sections 126, 176A and 184(c) of the Clean

¹ 86 Fed. Reg. 57423 (October 15, 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).

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 32 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 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 call⁷ and both of those deadlines significantly exceed the time allotted to EPA or the states in the proposed Consent Decree.

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;

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 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 represented⁸ 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, 2021⁹. 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.

Beyond these general concerns and objections, we note that the language of the proposed consent decree in the case filed by Downwinders differs from the related proposed consent decree in a case filed by New York et. al.¹⁰ that was the subject of MOG’s August 27, 2021, comments. The New York proposed consent decree states that “if, by February 28, 2022, EPA signs a proposal of full or partial disapproval of any of the six good neighbor SIP submissions and signs a proposal for a federal implementation plan to implement any such fully or partially disapproved SIP submission, EPA shall 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, each such good neighbor SIP submission (emphasis added)”. By comparison, the language in the proposed Downwinders consent states that “if EPA proposes to disapprove any of these SIP submissions and proposes a 2015 ozone NAAQS interstate transport federal implementation plan for such states by February 28, 2022, then EPA shall take final action on those SIP submissions by December 15, 2022.” Missing from the Downwinders proposal is any specific reference to

⁸ 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.

⁹ See: <http://views.cira.colostate.edu/wiki/wiki/11208#September-21-2021>

¹⁰ 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; 86 Fed. Reg. 40825 (July 29, 2021).

EPA's approval either of currently pending SIP submissions or those that might be modified during the pendency of the rulemaking related to any proposed interstate transport FIP. We urge that any final version of the Downwinders consent decree make it clear that 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, each such good neighbor SIP submission.

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

Very truly yours,

/s/ Kathy G. Beckett

Kathy G. Beckett
Legal Counsel
Midwest Ozone Group