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December 3, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
(via email: regan.michael@epa.gov)

RE: Proposed Disapproval of Interstate Transport Requirements
for the 2008 Ozone National Ambient Air Quality
Standards; New York and New Jersey.
Docket ID No. EPA-R02-OAR-2021-0631.

Dear Administrator Regan:

The following comments are provided in response to the Proposed Disapproval of Interstate Transport Requirements for the 2008 Ozone National Ambient Air Quality Standards; New York and New Jersey, Docket ID No. EPA-R02-OAR-2021-0631 (86 Federal Register 60602, November 3, 2021) on behalf of the Midwest Ozone Group ("MOG"). These comments are limited to the New York State Implementation Plan.

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 programs¹ that may impact their facilities, communities, employees, contractors, and the 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

¹ 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).

policy, including the development of transport rules, NAAQS standards, nonattainment designations, petitions under Sections 126, 176A and 184(c) of the Clean Air Act (“CAA” or “Act”), NAAQS implementation guidance, the development of Good Neighbor state implementation plans (SIPs) and related regional haze and climate change issues.

EPA’s proposed disapproval of the New York Good Neighbor SIP with respect to the 2008 ozone NAAQS, is based upon the recognition that New York did not demonstrate that it was adequately controlling its emissions with New York itself conceding that its emissions were linked to Connecticut’s non-attainment areas. 86 Fed. Reg. 60606 (November 3, 2021). More specifically, EPA notes that New York’s regulation of NOx emissions from simple cycle combustion turbines (“SCCTs”) will not be phased in until the 2023-2025 period, even though the applicable attainment date for those areas is July 20, 2021. *Id.* at 60607.

While EPA cites the *Wisconsin* remand (*Wisconsin v. EPA*, 938 F.3d 303) for the proposition that EPA may not delay implementation of measures necessary to address good neighbor requirements beyond the applicable 2021 attainment dates – that is exactly what EPA has already done in its approval of those controls as part of New York’s infrastructure SIP. 86 Fed. Reg. 43956 (August 11, 2021). Even though MOG pointed out in its comments on that proposed action (which are attached and incorporated into these comments and identified as Exhibit A) that the *Wisconsin* decision obligated EPA to harmonize upwind and downwind obligations such that the emission reductions would occur “on par” with each other, EPA approved delaying controls on SCCTs until 2023 and 2025 for reasons entirely unrelated to the attainment date of 2021².

Emissions from the New York SCCT units alone are causing ***the only remaining*** 2008 ozone NAAQS nonattainment and maintenance areas in the East. ***Appropriate implementation of those controls by the 2021 attainment date would have completely eliminated any need for the promulgation of the Revised CSAPR Update that is at the heart of EPA’s proposed denial.***

The United States Supreme Court has made it clear that upwind states are required “to eliminate” those “amounts” of pollution that “contribute significantly to *nonattainment* in downwind states. *EME Homer II*, 134 S. Ct. at 1584. The D.C. Circuit Court has also made clear that EPA must harmonize the deadline for upwind state contributors to eliminate their significant contribution with the attainment deadlines for downwind areas. *North Carolina v. EPA*, 531 F.3d at 912. The D.C. Circuit Court also repeated that mandate in the *Wisconsin* remand in which it stated, “the Good Neighbor Provision calls for the elimination of upwind States’ significant contribution *on par* with the relevant downwind attainment deadline.” *Wisconsin* 938 F.3d at 315 (emphasis added). In addition, the *Wisconsin* opinion went on to address the need for fairness and equity of states failing to meet their statutory obligations and forcing additional responsibility on their neighbors. As was articulated in the opinion, “... it is the statutorily designed relationship between the Good Neighbor Provision's obligations for upwind States and the statutory attainment

² 6 NYCRR Subpart 227-3, Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines, Assessment of Public Comment, Comments received from February 26, 2019 through 5:00 P.M., May 20, 2019, page 46 of 50. https://www.dec.ny.gov/docs/air_pdf/siprevision2273.pdf. See also Exhibit A, p. 85.

deadlines for downwind areas that generally calls for parallel timeframes.” *Id.* 316. Importantly, this means those obligations apply to all upwind states, but especially to those states that are within the same nonattainment area as the downwind states such as is the case with New York.

As a direct result of New York’s decision to delay the SCCT emission reductions for reasons unrelated to the applicable attainment date, all of the Connecticut nonattainment and maintenance monitors which underlie the Revised CSAPR Update Rule with respect to virtually all upwind states continued to experience exceedances of the 2008 ozone NAAQS. Id. 86 Fed. Reg. 23,054, 23,097 (Apr. 30, 2021).

It is not enough for EPA to only assess upwind control strategies to achieve attainment. The CAA also mandates that downwind state nonattainment and maintenance requirements must be aligned with the applicable attainment date. ***The failure by New York (and EPA) to implement nonattainment controls by the statutory attainment date effectively shifts the responsibility for imposing new controls to upwind states (as was done in the Revised CSAPR Update Rule) in violation of the directives of the U.S. Supreme Court and the D.C. Circuit.***

In this case, that exact result has occurred. Even though the applicable attainment date for the three subject Connecticut monitors is 2021, New York and EPA have concluded that, for reasons unrelated to the attainment obligation of New York, these units would be allowed until 2025 to achieve compliance. ***That decision results in the three subject Connecticut monitors remaining in nonattainment/maintenance status which, if unaddressed, inappropriately shifts the regulatory burden to upstate states under the good neighbor provision of the CAA.*** 42 U.S.C. §7511; 42 U.S.C. §7410(a)(2)(D)(i).

The Regulatory Impact Statement in support of the New York SCCT rule not only links the ozone benefit of these emission reductions to the Westport and Stratford Connecticut air quality monitors that are specifically the basis of the Revised CSAPR Update Rule, it also makes clear that reducing these emissions is the critical measure needed to achieve attainment with the 2008 ozone NAAQS. 86 Fed. Reg. 23,097. The New York Regulatory Impact Statement establishes the basis for this conclusion:

New York significantly contributes to nonattainment monitors in the Connecticut portion of this nonattainment area. Currently, attainment must be reached by June 20, 2021, for the 2008 ozone NAAQS and August 3, 2024, for the 2015 ozone NAAQS....

This rulemaking proposes to lower allowable emission rates for SCCTs [Simple Cycle Combustion Turbines] during the ozone season with the intention to lower NOx emissions from these sources, especially on high ozone days. To better understand the impact of SCCTs on the ambient air quality, DEC [Department of Environmental Conservation] used the Community Multiscale Air Quality Modeling (CMAQ) system to model one high ozone day. The high ozone day modeled was July 23, 2011, and the results

demonstrated that old SCCTs located in New York State *contributed 0.0048 ppm to downwind monitors that currently show nonattainment.*³ (Footnotes omitted; emphasis added.)

In its May 17, 2019, comments⁴ on the New York rule, Connecticut reinforced New York's admission of responsibility for Connecticut's ozone nonattainment and maintenance concerns as follows:

Excessive and unnecessary levels of air pollution from these units contribute to unhealthy ozone levels in Connecticut, particularly on days most conducive to high ozone levels in the region ...

Connecticut cannot attain the ozone standards without further emission reductions occurring in the New York metropolitan area. Connecticut currently exceeds the 70 parts per billion (ppb) ozone standard with design values of 82 ppb at the Stratford and Westport monitors.

Significantly, beyond Connecticut's recognition that New York SCCTs are causing nonattainment at Stratford and Westport, the following Connecticut comments are critical of New York's delay in imposing these emission reductions:

The proposed rule will not begin its first phase until May 2023 and allows for compliance extensions up to four years. Delaying requirements for emission reductions from some of the *most inefficient and dirtiest* units in the region only helps to assure extended nonattainment of the standards. The timeframe for the implementation of the rule should be condensed to be more consistent with attainment dates for the nonattainment area. (Emphasis added).

Id.

³See Exhibit A, p. 84. This air quality improvement not only affected the two Connecticut nonattainment monitors named by New York (Westport and Stratford), but also the New Haven maintenance monitor in the same area of Connecticut. *Id.* See also 6 NYCRR Subpart 227-3, Ozone Season Oxides of Nitrogen (NO_x) Emission Limits for Simple Cycle and Regenerative Combustion Turbines, Assessment of Public Comment, Comments received from February 26, 2019 through 5:00 P.M., May 20, 2019, page 47 of 50.

https://www.dec.ny.gov/docs/air_pdf/siprevision2273.pdf

⁴Tracy Babbidge, Chief, Bureau of Air Management, CTDEEP letter to Ona Papageorgiou, NYDEC, May 17, 2019; See also Exhibit A, p. 85 and 6 NYCRR Subpart 227-3, Ozone Season Oxides of Nitrogen (NO_x) Emission Limits for Simple Cycle and Regenerative Combustion Turbines, Assessment of Public Comment, Comments received from February 26, 2019 through 5:00 P.M., May 20, 2019, page 46 of 50.

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The Honorable Michael Regan

Page 5

December 3, 2021

Because there is a legal obligation for EPA to require New York to impose controls on its sources by the attainment date of 2021, EPA must exercise the authority specified by CAA §110(k)(5) and direct New York to revise its plan to impose controls on its SCCT units by 2021. In addition, EPA must recognize and determine that New York's failure to impose SCCT controls by 2021 constitutes a failure by New York as both an upwind and downwind state to harmonize its attainment date obligations with respect to the 2008 ozone NAAQS. As a consequence of this recognition and determination, the legal foundation for the Revised CSAPR Update Rule is undermined and shown to be beyond the authority of EPA.

Very truly yours,

/s/ David M. Flannery

David M. Flannery
Legal Counsel
Midwest Ozone Group

Exhibit A:

Midwest Ozone Group Comments on Proposed Revised Cross State Air Pollution Rule Update for the 2008 Ozone, December 14, 2020,

cc: Submitted to Docket ID No. EPA-R02-OAR-2021-0631.

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EXHIBIT A