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July 22, 2022

Submitted to Docket ID Nos.: EPA-R08- OAR-2022-0268 (WY)
EPA-R08-OAR-2022-0315 (UT)

Ms. Kathleen C. Becker
Regional Administrator, Region 8
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, CO 80202-1129

Re: Air Plan Disapproval; WY and UT;
Interstate Transport Requirements for the
2015 8-Hour Ozone National Ambient Air
Quality Standards;
Docket ID No. EPA-R08- OAR-2022-0268 (WY) and
EPA-R08-OAR-2022-0315 (UT).

Dear Ms. Becker:

These comments are offered on behalf of the Midwest Ozone Group (“MOG”) in response to the proposed rule of the U.S. Environmental Protection Agency (“EPA”) in connection with the Air Plan Disapproval; Utah and Wyoming; Interstate Transport Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standards published on May 24, 2022 (87 Fed. Reg. 31470 and 31495). The comment period deadline on these proposals is July 25, 2022.

MOG is an affiliation of companies and associations¹ that draws upon its collective resources to seek solutions to the development of legally and technically sound air quality programs. 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 of transport rules (including the Revised CSAPR Update), NAAQS standards, nonattainment designations, petitions under Section 126, 176A, and 184(c) of the Clean Air Act (“CAA”), NAAQS implementation guidance, the development of Good

¹ The members of and participants in the Midwest Ozone Group include: 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, Big Rivers Electric Corp., Buckeye Power, Inc., Citizens Energy Group, City Water, Light & Power (Springfield, IL), Cleveland Cliffs, Council of Industrial Boiler Owners, 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, North American Stainless, Nucor Corporation, Ohio Utility Group, Ohio Valley Electric Corporation, Olympus Power, and Steel Manufacturers Association.

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 affected by air quality requirements including the ozone NAAQS. MOG seeks the development of technically and legally sound air pollution rules and actions that may impact on their facilities, their employees, their contractors, and the consumers of their products.

EPA notes that these disapprovals, if finalized, would not start a mandatory sanctions clock but rather would establish a 2-year deadline for EPA to promulgate a Federal Implementation Plan (FIP), unless EPA were to approve a subsequent SIP submittal that meets CAA requirements. EPA has now proposed a FIP to be finalized December 15, 2022, in complete disregard for the 2-year time period allowed by the Clean Air Act (“CAA”) for responding to any such SIP disapprovals. See: 87 Fed. Reg 20036 (April 6, 2022).

As will be pointed out in detail in the attached comments, EPA’s proposed Good Neighbor SIP disapprovals are both legally and technically flawed in that EPA seeks to advance the Good Neighbor SIP disapprovals based on incorrect air quality assumptions and calculations and in the absence of consideration of implementation of the flexibility guidance issued by EPA for application to 2015 ozone NAAQS Good Neighbor SIPs. These comments will also highlight the agency’s failure to align the responsibilities of upwind and downwind states as it selected the analytical year for evaluating the Good Neighbor Provisions of the CAA. In addition, these comments address the failure by EPA to give appropriate recognition to the merit of the SIPs involved. These comments also renew MOG’s objection to the length of the comment period that EPA has offered for this and the related SIP disapproval proposals for the states involved.

For the reasons set forth in these comments, the Midwest Ozone Group urges that EPA withdraw the subject proposed SIP disapprovals in favor of correcting the legal and technical errors that have been identified in its analysis and proposing an appropriate opportunity for states to address any deficiencies EPA may find in any Good Neighbor Plans implementing the 2015 ozone NAAQS.

Very truly yours,

Kathy G. Beckett

Kathy G. Beckett
Legal Counsel
Midwest Ozone Group

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**MIDWEST OZONE GROUP COMMENTS ON
PROPOSED AIR PLAN DISAPPROVALS;
INTERSTATE AIR TRANSPORT OF AIR POLLUTION
FOR THE 2015 8-HOUR OZONE NAAQS.**

(Federal Register May 24, 2022)

JULY 22, 2022

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**MIDWEST OZONE GROUP COMMENTS ON
PROPOSED AIR PLAN DISAPPROVALS
INTERSTATE AIR TRANSPORT OF AIR POLLUTION
FOR THE 2015 8-HOUR OZONE NAAQS**

JULY 22, 2022

1. Introduction.

The Midwest Ozone Group (“MOG”) takes this opportunity to offer comments² on the proposal by the U.S. Environmental Protection Agency (“EPA”) to disapprove certain State Implementation Plan (“SIP”) submittals related to the Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard (“NAAQS”) that appeared in the Federal Register on May 24, 2022.

MOG is an affiliation of companies and associations³ that draws upon its collective resources to seek solutions to the development of legally and technically sound air quality programs. 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

² These comments were prepared with the technical assistance of Alpine Geophysics, LLC. Comments or questions about this document should be directed to David M. Flannery, Kathy G. Beckett or Edward L. (Skip) Kropp, Legal Counsel, Midwest Ozone Group, Steptoe & Johnson PLLC, 707 Virginia Street East, Charleston, West Virginia 25301; 304-353-8000; dave.flannery@steptoe-johnson.com;kathy.beckett@steptoe-johnson.com; or skip.kropp@steptoe-johnson.com, respectively.

³ The members of and participants in the Midwest Ozone Group include: 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, Big Rivers Electric Corp., Buckeye Power, Inc., Citizens Energy Group, City Water, Light & Power (Springfield, IL), Cleveland Cliffs, Council of Industrial Boiler Owners, 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, North American Stainless, Nucor Corporation, Ohio Utility Group, Ohio Valley Electric Corporation, Olympus Power, and Steel Manufacturers Association.

issues and initiatives related to the development and implementation of air quality policy, including the development of transport rules (including the Revised CSAPR Update), NAAQS standards, nonattainment designations, petitions under Sections 126, 176A and 184(c) of the Clean Air Act (“CAA”), 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 affected by air quality requirements including the ozone NAAQS. MOG seeks the development of technically and legally sound air pollution rules and actions that may impact on their facilities, their employees, their contractors, and the consumers of their products.

In the proposals being advanced⁴, EPA notes that these disapprovals, if finalized, would not start a mandatory sanctions clock but rather would establish a 2-year deadline for EPA to promulgate a Federal Implementation Plan (FIP) unless EPA were to approve a subsequent SIP submittal that meets CAA requirements. However, EPA has now proposed a FIP to be finalized

⁴ See:

- Air Plan Disapproval; Maryland; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,463, February 22, 2022.
- Air Plan Disapproval; New York and New Jersey; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,484, February 22, 2022.
- Air Plan Disapproval; Kentucky; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,498, February 22, 2022.
- Air Plan Disapproval; West Virginia; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,516, February 22, 2022.
- Air Plan Disapproval; Missouri; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,533, February 22, 2022.
- Air Plan Disapproval; AL, MS, TN; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,545, February 22, 2022.
- Air Plan Disapproval; Arkansas, Louisiana, Oklahoma, and Texas; Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,798, February 22, 2022.
- Air Plan Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin; Region 5 Interstate Transport Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standard. 87 Fed. Reg. 9,838, February 22, 2022.
- Air Plan Disapproval: California; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone Ambient Air Quality Standards, 87 Fed. Reg. 31443, May 24, 2022.
- Air Plan Disapproval: Nevada; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone Ambient Air Quality Standards, 87 Fed. Reg. 31485, May 24, 2022.
- Air Plan Disapproval: Utah; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone Ambient Air Quality Standards, 87 Fed. Reg. 31470, May 24, 2022.
- Air Plan Disapproval: Wyoming; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone Ambient Air Quality Standards, 87 Fed. Reg. 31495, May 24, 2022.
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December 15, 2022, in complete disregard for the 2 year time period allowed by the CAA for responding to any such SIP disapprovals. See: 87 Fed. Reg. 20,036 (April 6, 2022).

As will be pointed out in these comments, EPA's proposed Good Neighbor SIP disapprovals are both legally and technically flawed in that EPA seeks to advance the Good Neighbor SIP disapprovals on the basis of flawed air quality modeling and in the absence of consideration of the flexibility guidance issued by EPA for application to 2015 ozone NAAQS Good Neighbor SIPs. These comments will also point out the agency's failure to have aligned the responsibilities of upwind and downwind states as it selected the analytical year for evaluating the Good Neighbor Provisions of the CAA. In addition, these comments will address the failure by EPA to have given appropriate recognition of the merit of the SIP involved. These comments also renew MOG's objection to the length of the comment period that EPA has offered for these proposals as not being adequate to allow time for thoughtful assessment of the proposed rule.

2. EPA's accelerated approach to denial of these plans is inconsistent with the CAA.

As evidenced by these several proposals for disapproval of Good Neighbor SIPs that accompanied this, EPA has begun an accelerated denial of the efforts of upwind states' and to implement a new transport rule and in doing so has taken an approach that is inconsistent with applicable law and appropriate science. This accelerated effort disenfranchises not only meaningful technical analysis of the agency's proposals but also curtails meaningful participation by all stakeholders.

Section 110(c) of the CAA states that "The [EPA] Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator" if he: (1) finds that a state has failed to make a required submission or that the state plan submitted "does not satisfy" the minimum criteria in Section 110(k)(1)(A), or (2) "disapproves a State implementation plan submission in whole or in part," unless the State corrects the deficiency and the Administrator approves the correction before the Administrator promulgates the plan.

In the event of a justified disapproval, EPA then is required to promulgate a Federal Implementation Plan (“FIP”) within two years unless the State corrects the deficiency before promulgation of the FIP. At issue in connection with the subject proposed SIP disapprovals are two initial considerations. First, EPA must offer adequate justification for the proposed disapprovals. As will be discussed extensively in these comments, EPA has not adequately demonstrated the basis for its actions. Second, EPA has not provided adequate public notice and comment as required by law. EPA is also obligated pursuant to Executive Orders 12898 (Feb. 11, 1994) and 14008 (Jan. 27, 2021), to ensure its actions support the principal of environmental justice, particularly in energy communities. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Again, these comments will illustrate EPA is improperly advancing implementation plan denials, while threatening with an imminent FIP proposal published in the Federal Register on April 6, 2022.

EPA does not offer explanation for not electing to work with the states to develop a state implementation plan call pursuant to 110(k)(5) which provides for up to 18 months for states to address flaws in the disapproved SIPs. These accelerated actions by the agency clearly indicate that transparency is not a priority. EPA should, instead, have provided updated guidance, updated modeling, instructions on addressing specific state deficiencies, and adequate time for state response.

Pursuant to the January 12, 2022, Consent Decree entered in *Downwinders at Risk et al. v. Regan*⁵ EPA must by April 30, 2022, approve or disapprove the interstate ozone state implementation plans (SIPs) of 21 states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New

⁵ 4 U.S. District Court for the Northern District of California, Case No. 4:21-cv-3551.

York, Ohio, Oklahoma, Tennessee, Texas, West Virginia and Wisconsin. Also, if EPA by February 28, 2022, proposes full or partial disapproval of a SIP from one of the 21 states, along with a proposed FIP to directly regulate interstate ozone emissions from that state, it must finalize its full or partial disapproval of the state's own plan by December 15, 2022. MOG also notes that the proposed *Downwinders* Consent Decree was provided for comment and that the concerns of the upwind states and the regulated community were ignored. See comments of Alabama, Missouri, Wyoming, and MOG in docket EPA-HQ-OGC-2021-0692.

The Clean Air Act does not mandate promulgation of a FIP in such an abbreviated time frame. The CAA allows FIP action any time within 2 years after the Administrator finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria or disapproves a State implementation plan submission in whole or in part. The CAA also specifically provides for the State to be allowed the opportunity to correct any deficiencies. We urge EPA to revise its proposals to allow States an appropriate opportunity to respond to EPA's findings of deficiency.

3. EPA improperly asserts that its three 2015 ozone NAAQS Good Neighbor SIP flexibility guidance memoranda should no longer be considered applicable to development of the SIPs that are the subject of its proposed disapprovals.

In 2018, EPA published three guidance documents describing the process by which states could incorporate various "flexibilities" into their Good Neighbor SIPs. All of the documents were issued by the USEPA, Director of Office of Air Quality Planning and Standards Peter Tsirigotis.

The March 27, 2018, Tsirigotis memo, styled "Information on Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards Under Clean Air Act Section 110(a)(2)(D)(i)(I)," was addressed to EPA Regional Air Directors in all EPA Regions. The memo states,

[t]he purpose of this memorandum is to provide information to states and the Environmental

Protection Agency Regional offices as they develop or review state implementation plans (SIPs) that address section 110(a)(2)(D)(i)(I) of Clean Air Act (CAA), also called the "good neighbor" provision, as it pertains to the 2015 ozone National Ambient Air Quality Standards (NAAQS). Specifically, this memorandum includes EPA's air quality modeling data for ozone for the year 2023, including newly available contribution modeling results, and a discussion of elements previously used to address interstate transport. In addition, the memorandum is accompanied by Attachment A, which provides a preliminary list of potential flexibilities in analytical approaches for developing a good neighbor SIP that may warrant further discussion between EPA and states.

The August 13, 2018, Tsirigotis guidance memo, styled "Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards," also was addressed to EPA Regional Air Directors in all EPA Regions. The memo states,

"[t]he purpose of this memorandum is to provide analytical information regarding the degree to which certain air quality threshold amounts capture the collective amount of upwind contribution from upwind states to downwind receptors for the 2015 ozone National Ambient Air Quality Standards (NAAQS). It also interprets that information to make recommendations about what thresholds may be appropriate for use in state implementation plan (SIP) revisions addressing the good neighbor provision for that NAAQS . . . [t]his document does not substitute for provisions or regulations of the Clean Air Act (CAA), nor is it a regulation itself. Rather, it provides recommendations for states using the included analytical information in developing SIP submissions, and for the Environmental Protection Agency (EPA) Regional offices in acting on them. Thus, it does not impose binding, enforceable requirements on any party. State air agencies retain the discretion to develop good neighbor SIP revisions that differ from this guidance.

The October 19, 2018, Tsirigotis guidance memo is titled "Considerations for Identifying Maintenance Receptors for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards," also was addressed to EPA Regional Air Directors in all EPA Regions. As in the first two memoranda, the memo stated,

[t]he purpose of this memorandum is to present information that states may consider as they evaluate the status of monitoring sites that the Environmental Protection Agency (EPA) identified as potential maintenance receptors with respect to the 2015 ozone national Ambient Air Quality Standards (NAAQS) based on EPA's 2023 modeling. States may use this information when developing state implementation plans (SIPs) for the 2015 ozone AAQS addressing the good neighbor provision in Clean Air Act (CAA) section 110(a)(2)(D)(i)(I). In brief this document discusses (1) using alternative technical methods for projecting whether future air quality warrants identifying monitors as maintenance

receptors and (2) considering current monitoring data when identifying monitoring sites that although projected to be in attainment as described below, should be identified as maintenance receptors because of the risk that they could exceed the NAAQS due to year-to-year (i.e., inter-annual) variability in meteorological conditions.(emphasis added).

In the ensuing period of time since the last guidance document was published, EPA has known that states might be incorporating the 2018 guidance into Good Neighbor SIP submittals and has made no public statement saying that it would not honor its guidance.

The disavowal of the guidance by EPA this late in the SIP development process is an arbitrary abuse of authority. The Administrative Procedures Act allows federal agencies such as EPA to issue guidance without following rulemaking procedures. 5 U.S.C. § 553. Although agency guidance is not binding on regulated parties, such parties are permitted to rely on agency guidance as the agency's public statement of how it intends to construe the statutes and rules it governs. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96–97 (2015). Indeed, Tsirigotis expressly notes in his 2018 memos that states could rely on the information provided in the memos, including the “alternative technical methods” authorized by the memos, when developing their SIPs in compliance with CAA Good Neighbor Provisions.

Once an agency issues guidance to regulated parties, the agency cannot “simply disregard” the substance of its guidance and rely on “post hoc justifications” when deciding whether regulated parties have acted in accordance with such guidance. *Hoosier Env't Council v. Nat. Prairie Indiana Farmland Holdings, LLC*, No. 4:19-CV-71 DRL-JEM, 2021 WL 4477152, at **13, 16 (N.D. Ind. Sept. 29, 2021). Doing so constitutes an arbitrary and capricious action by the agency. *Id.* at *17. By waiting for years and until after states complied with EPA's 2018 guidance to backtrack on the guidance, add a new requirement, not in the guidance, that alternative methods used by states in their SIPs must be “substantially justified and have a well-documented technical basis,” and disapprove SIPs on that basis, EPA is engaging in arbitrary and capricious actions. EPA should alter its position and encourage states to take advantage of these flexibilities, as appropriate, and to

incorporate these guidance flexibilities into their Good Neighbor SIPs.

4. EPA’s intention to revise its emission inventory and to conduct new air quality modeling without allowing an appropriate opportunity for stakeholder review and comment is inappropriate

EPA notes in the proposed disapprovals that, after the modeling it conducted in support of earlier transport rules, e.g., CAIR, CSAPR, CSAPR Update, CSAPR Closeout, and Revised CSAPR Update, the agency revised the emission inventory used in the modeling to assess the efficacy of prior transport rules. EPA conducted new modeling using the revised inventory. The agency describes the process as follows:

Following the Revised CSAPR Update final rule, the EPA made further updates to the 2016 emissions platform to include mobile emissions from the EPA’s Motor Vehicle Emission Simulator MOVES3 model 17 and updated emissions projections for electric generating units (EGUs) that reflect the emissions reductions from the Revised CSAPR Update, recent information on plant closures, and other sector trends. The construct of the updated emissions platform, 2016v2, is described in the emissions modeling technical support document (TSD) for this proposed rule. (emphasis added).⁶

In December 2021, MOG and other stakeholders submitted detailed comments on the 2016v2 emission inventory platform in an effort to correct errors that existed in that platform. EPA’s efforts to revise this emission inventory platform at this time raises the question about whether EPA intends to update the modeling that has been used as the basis for the SIP disapprovals and the proposed FIP - but only in support of the final rule.

While MOG urges EPA to rely on modeling that accurately reflects current on-the-books regulatory requirements and up-to-date emission inventories, we strenuously object to the possibility that EPA would conduct any such additional modeling to support a final rule and not provide the opportunity for that data to be reviewed, analyzed and commented on in advance of any final decision on the subject SIP disapproval (or for that matter the related proposed FIP).

⁶ See: 87 Fed. Reg. 31,445, 31,472, 31,487, and 31,497.

These concerns were also expressed earlier, in July 2021, by several MJOs (Westar, LADCO, SESARM, MARAMA, and CENSARA).⁷

5. EPA’s modeling and emission inventories must include the control programs and related permitted emission limits on ozone precursors that significantly impact air quality design values in 2023 and beyond.

Downwind states and regulated entities are on an ever-changing path to manage the complex implementation of emissions reductions programs to address local and regional impacts on ambient air quality. EPA’s modeling of applicable emission control programs to assess attainment strategies supports the iterative nature of these programs. 87 Fed. Reg. 9,484, 9,494 (February 22, 2022). Private sector and government investments in emission reduction strategies are considerable. As EPA engages in proposed denials of the 2015 Ozone NAAQS Good Neighbor State Implementation Plans, the agency has the burden and obligation to assess both upwind and downwind emissions reductions programs. The modeling relied upon for these proposals; however, EPA fails to provide a wholistic assessment of these emission control requirements.

Consideration of these upwind and downwind state control programs are critical not only to assure the correct modeling results in the future analytical year, but also to allow an assessment of the alignment of the emission reduction burdens of the upwind and downwind states, as will be discussed in the next comment.

6. EPA’s selection of 2023 as the analytical year for its assessments of the state plans fails to align the obligation of upwind states with downwind states inasmuch as certain nonattainment areas have delayed implementation of nonattainment controls until 2025 and beyond.

EPA’s statutory duty is to harmonize the Good Neighbor Provision of CAA §110(a)(2)(D)(i) with nonattainment and maintenance requirements of CAA §172 so that compliance burdens are

⁷ See the attachment “EPA Decisions Final” to Wyoming’s comments on proposed Downwinders. <https://www.regulations.gov/comment/EPA-HQ-OGC-2021-0692-0012>.

aligned among upwind and downwind states. MOG is not critical of the downwind state plans to the extent those plans are designed and demonstrated to achieve attainment within the attainment deadlines. MOG is, however, critical of EPA for disapproving upwind state Good Neighbor Plans without consideration of the timing of the implementation of nonattainment controls by downwind states - effectively shifting the burden of additional controls to the upwind states.

The *Wisconsin* remand concluded that EPA exceeded its statutory authority under the Good Neighbor Provision “by issuing a Rule that does not call for upwind States to eliminate their substantial contributions to downwind nonattainment in concert with the attainment deadlines.” *Wisconsin*, 938 F.3d at 318. The *Wisconsin* remand directed EPA to address the downwind state “deadline” in such a manner as to “harmonize” the deadlines of upwind and downwind states and to apply “parallel timeframes.” *Id.* at 312, 314. The D.C. Circuit repeatedly has explained the CAA directive to “harmonize” and manage the relationship described as parallel between the Good Neighbor obligations for upwind states and statutory attainment deadlines for downwind areas. That relationship is one of “par,” using the Court’s term, meaning to be judged on a common level with the other.⁸ With this proposed disapproval, EPA ignores the obvious relationship between the downwind states’ obligation to implement controls to attain the standard relative to the obligation of an upwind state to not significantly contribute to the nonattainment at issue.

This Court in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), found that EPA did not explain why it did not coordinate the Good Neighbor Provision with the Clean Air Interstate Rule to provide a sufficient level of protection to downwind states.

Despite CAA §110(a)(2)(D)(i)'s requirement that upwind contributions to downwind nonattainment be "consistent with the provisions of [Title I]," EPA did not make any effort to *harmonize* CAIR's Phase Two deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas. . . . As a result, downwind

⁸ Definition of Par, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/par> (last visited Mar. 24, 2022).

nonattainment areas must attain NAAQS for ozone and PM2.5 without the elimination of upwind states' significant contribution to downwind nonattainment, forcing downwind areas to make greater reductions than CAA §110(a)(2)(D)(i)(I) requires. *Id.* (emphasis added). The D.C. Circuit described its *North Carolina* ruling in the *Wisconsin* remand as follows:

We explained that EPA needed to "harmonize" the "Phase Two deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas." . . . Otherwise, downwind areas would need to attain the NAAQS "without the elimination of upwind states' significant contribution."

Wisconsin, 938 F.3d at 314 (emphasis added). The *Wisconsin* remand explained, "In sum, under our decision in *North Carolina*, the Good Neighbor Provision calls for elimination of upwind States' significant contributions on *par* with the relevant downwind attainment deadlines." *Id.* at 315 (emphasis added). The *Wisconsin* opinion explains further:

The Good Neighbor Provision, as *North Carolina* emphasized, requires upwind States to eliminate their significant contributions to downwind pollution "consistent with the provisions of this subchapter," i.e., Title I of the Clean Air Act. 42 U.S.C. §7410(a)(2). One of the "provisions of this subchapter" is §7511(a)(1), which in turn requires downwind areas in moderate non-attainment to attain the NAAQS by July 20, 2018.

Id. at 315-16. The *Wisconsin* remand summarizes that "it is the statutorily designed relationship between the Good Neighbor Provision's obligations for upwind states and the statutory attainment deadlines for downwind areas that generally calls for parallel timeframes." *Id.* at 316.

EPA, however, takes the following actions. It interprets the court's holding in *Maryland v. EPA*, 958 F. 3d 1185 (D.C. Cir. 2020) as requiring the states and the Agency, under the good neighbor provision, to assess downwind air quality as expeditiously as practicable and no later than the next applicable attainment date, which is now the Moderate area attainment date under CAA §181 for ozone nonattainment. The Moderate area attainment date for the 2015 8-hour ozone NAAQS is August 3, 2024. The EPA provides that it believes that 2023 is now the appropriate year for analysis of interstate transport obligations for the 2015 8-hour ozone NAAQS because the 2023 ozone season is the last relevant ozone season during which achieved

emissions reductions in linked upwind states could assist downwind states with meeting the August 3, 2024, Moderate area attainment date for the 2015 8-hour ozone NAAQS.” 87 Fed. Reg. 9,487-8. EPA is inappropriately shifting the burden to the transport states.

For New York’s disapproved transport plan, EPA offers the following criticism, “under the *Wisconsin* decision, states and the EPA may not delay implementation of measures necessary to address good neighbor requirements beyond the next applicable attainment date without a showing of impossibility or necessity. See 938 F.3d at 320. In those cases where the measures identified by the State had implementation timeframes beyond the next relevant attainment dates the submission did not offer a demonstration of impossibility of earlier implementation of those control measures. Similarly, the State’s submittal is insufficient to the extent the implementation timeframes for identified control measures were left unidentified, unexplained, or too uncertain to permit the EPA to form a judgment as to whether the timing requirements for good neighbor obligations have been met. 87 Fed. Reg. 9,494. This narrative illustrates the disconnect between standards to which downwind plans are held versus the standards to which upwind plans are held. Both plans must be aligned with the same timeframes.

Within the Clean Air Act, Subchapter 1, Part D titled “Plan Requirements for Nonattainment Areas” is found Subpart 1 titled “Nonattainment Areas in General.” Subpart 1 includes Section 177 addressing new motor vehicle emissions standards in state plans for nonattainment areas. It is apparent that the CAA contemplated the option of developing nonattainment plans per Section 172 to address certain new motor vehicles or new motor vehicle emissions. For those approved downwind nonattainment plans that include motor vehicle emissions reduction strategies for achieving attainment, delay in implementation beyond the attainment date is unacceptable under CAA §179. Delay in implementation of committed controls by a downwind state shifts the emissions reduction burdens onto upwind states if EPA fails to engage in alignment of the dates upon which each of the states must satisfy nonattainment strategy performance.

This issue of imbalance was specifically addressed by D.C. Circuit in the *Wisconsin* remand as an appropriate basis for extending the compliance deadline for upwind states. In that case the Court stated that: “if a modified attainment deadline applies to downwind States, EPA may be able, if justified, to make a corresponding extension for an upwind State’s good neighbor obligations.” *Wisconsin*, 938 F.3d at 317.

Nowhere in its discussion of the regulatory framework underlying these proposals does EPA recognize the alignment obligation as articulated in the *Wisconsin* remand.

7. In the absence of any guidance from EPA related to the assessment of Step 3 control measures, EPA should defer to state plans which evaluate such control measures.

While EPA’s proposed disapprovals criticize states for failing to conduct an appropriate Step 3 analysis, EPA makes it clear that it has not established guidelines for how states should conduct that analysis. EPA’s treatment of this issues is illustrated by the following statement made by EPA:

While the EPA has not directed states that they must conduct a Step 3 analysis in precisely the manner the EPA has done in its prior regional transport rulemakings, state implementation plans addressing the obligations in CAA section 110(a)(2)(D)(i)(I) must prohibit “any source or other type of emissions activity within the State” from emitting air pollutants which will contribute significantly to downwind air quality problems. Thus, states must complete something similar to the EPA’s analysis (or an alternative approach to defining “significance” that comports with the statute’s objectives) to determine whether and to what degree emissions from a state should be “prohibited” to eliminate emissions that will “contribute significantly to nonattainment in or interfere with maintenance of” the NAAQS in any other state.⁹

It is apparent that most states did little or no Step 3 analysis because, with many incorporating the 2018 flexibilities that EPA advised could be used in 2015 NAAQS Good Neighbor SIPs, they concluded in either Step 1 or 2 that no controls were required. The proposed Good Neighbor SIP disapprovals should therefore not impose a FIP without first allowing the states, working with their respective MJOs for a regional approach, an opportunity to conduct a

⁹ 87 Fed. Reg. 31,482, 31,508, 31,493. See also 87 Fed Reg 31,461

Step 3 analysis better tailored to their state and/or region.

Rather than a wholesale disapproval of state Good Neighbor SIPs, EPA should propose an 18-month period for states to proceed with Steps 3 and 4, especially since the EGU-only approach is insufficient and the other source contributions provide even more opportunity for the development of state- and region-specific control strategies that would likely be more cost effective and avoid the over-control that occurs with a generic FIP approach.

8. Mobile sources are the primary cause of remaining air quality problems.

Available source apportionment data clearly shows that the most significant contributor of ozone is mobile sources. The EPA Strategic Plan at page 43 states that “EPA will collect and evaluate mobile source emission data to help guide future program priorities related to reducing criteria pollutant and greenhouse gas emissions from light-duty cars and trucks, heavy-duty trucks and buses, nonroad engines and equipment, and from the fuels that power these engines. The Agency will develop the next round of multi-pollutant emission standards for light-duty and highway heavy-duty vehicles, which will improve air quality and reduce pollution near roads and other areas of high truck activity, such as warehouses and ports. EPA will also continue to work to ensure that Clean Air Act requirements are met for new transportation projects with heavy-duty diesel traffic, such that they do not worsen air quality near communities with environmental justice concerns. The Agency will address air quality concerns in these communities through implementing regulations, developing improved air quality models and mitigation measures, and collaborating with a broad range FY 2022-2026 EPA Strategic Plan – Objective 4.1 44 of stakeholders — including state air quality agencies and communities with environmental justice concerns — to develop targeted, sector-based, and place-based strategies for diesel fleets (including school buses, ports, and other goods movement facilities). EPA will support and oversee projects for the replacement of existing school buses with low- or zero-emission school buses funded under the Bipartisan Infrastructure Law, which will be implemented in alignment

with Justice.”¹⁰

MOG notes that EPA plans to deal with mobile sources in the future and has initiated regulatory work in this regard as noted in the EPA Strategic Plan. Specifically, EPA has finalized “Late Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards.” 86 Fed. Reg. 74,434 (December 30, 2021). EPAS has also proposed “Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards,” 87 Fed. Reg. 17,414 (March 28, 2022).

EPA revised the GHG emission standards for passenger cars and light trucks under the authority provided by section 202(a) of the CAA. This section is found within the Chapter 85 of the U.S. Code titled, “Air Pollution Prevention and Control” and is incorporated into the chapter reference found within the state implementation plan obligations found under Section 110(a)(2),

Each implementation plan submitted by a State under **this chapter** shall be adopted by the State after reasonable notice and public hearing. Each such plan shall – (A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of **this chapter**; (Emphasis added).

In summary, nonattainment plans are required to meet the applicable requirements of the Clean Air Act also described as Chapter 85 of Title 42 of the U. S. Code. Approvable NAAQS implementation plans are required to incorporate relevant sections of the Clean Air Act, to include the programs promulgated under Subchapter II – Emission Standards for Moving Sources such as the GHG emissions standards for light-duty vehicles for 2023 and later model years. The air quality impacts from this rule will have tailpipe emissions are measurable and warrant incorporation into the overall calculation of emissions reductions from CAA programs that will improve ozone air quality. 86 Fed. Reg. 74,490.

The proposed Heavy-Duty Engine and Vehicle Standards rule is anticipated to “reduce air

¹⁰ As noted in the November 23, 2021, Midwest Ozone Group Comments on Environmental Justice Considerations for 2015 Ozone Transport Rulemakings, Docket No. EPA-HQ-OAR-2021-0668, EPA’s historical approach to implementation of the Clean Air Act has been inconsistent with the goals of environmental justice because “mobile sources are the most significant contributors to the only remaining nonattainment monitors in the East, not emissions from power plants and industrial facilities.”

pollution from highway heavy-duty vehicles and engines, including ozone, particulate matter, and greenhouse gases.” 87 Fed. Reg. 17,414. EPA expects the standards in the proposed Options 1 and 2 to result in meaningful reductions in emissions of NO_x, VOC, CO and PM_{2.5}. “ 87 Fed. Reg. 17,581. Also, EPA predicts, “The proposal would reduce 8-hour ozone design values significantly in 2045.” Id. at 17,582. These observations support the known impact of mobile sources on ozone ambient air quality.

As stated earlier in these comments, aligning the obligations to control significant sources of ozone precursors with the upwind and downwind ozone attainment obligations is the only path that leads to successful state implementation plan development as guided by the Clean Air Act. EPA’s failure to recognize the impact of the timing of mobile source controls on implementation of the Good Neighbor provisions and the disapprovals being proposed is arbitrary and capricious and exceeds EPA’s authority under the CAA.

9. **The 60-day comment period is too short to allow review and analysis of the proposed denials for multiple states.**

EPA proposed Good Neighbor SIP disapprovals would result in disapproval of Good Neighbor SIPs submitted by states regarding interstate transport for the 2015 8-hour ozone national ambient air quality standard. Significantly, EPA established a comment period of only 60 days that applies to all proposals.

MOG has been an active participant in transport rule development since the 1997 NO_x SIP Call and continues to be keenly interested in the development of air pollution regulations that are based on sound science. MOG has undertaken independent modeling and verification of EPA modeling in the past and offered comments on how to improve the accuracy and completeness of those efforts in prior comments on various transport rules.

As a result of its continued interest in the transport issue, MOG has developed technical

capabilities that allow it to analyze and verify the science behind both Good Neighbor SIPs proposed by states and EPA actions to approve or disapprove them. MOG is acutely aware that preparation of proper technical analyses of Good Neighbor SIPs involves the use of complicated dispersion models that take substantial execution time.

The totality of these pending rulemakings necessitates a period substantially longer than the allowed 63 days to allow stakeholders, including MOG, to analyze the proposed rules in parallel and prepare comprehensive comments that will better inform the rulemaking process, and EPA has utterly failed to allow sufficient time for that to happen.

10. Conclusion

For the reasons set forth in these comments, the Midwest Ozone Group urges that EPA withdraw the subject proposed SIP disapprovals in favor of correcting the legal and technical errors that have been identified in its analysis and proposing an appropriate opportunity for states to address any deficiencies EPA may find in any Good Neighbor Plans implementing the 2015 ozone NAAQS.