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Re: Public Interest Organization Comments on Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States [EPA-HQ-OAR-2021-0668]

Clean Air Task Force, Earthjustice, Environmental Defense Fund, and the Sierra Club (collectively “Public Interest Commenters” or “Commenters”) submit the following comments on EPA’s interim final rule (“IFR”) “Federal ‘Good Neighbor Plan’ for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States,” 88 Fed. Reg. 67,102 (September 29, 2023) (the “Second IFR”).

As explained in more detail below, it is vital that EPA take steps now to ensure that states are restored to the Good Neighbor Plan as soon as possible following resolution of individual challenges to the SIP Disapproval Rule as to those states.

Background

Millions of people across the country experience unsafe and unhealthy levels of ground-level ozone pollution, also known as smog.¹ Ground-level ozone is a corrosive air pollutant that inflames the lungs, constricts breathing, and likely kills people.² Ozone-induced health problems can force people to change their ordinary activities, requiring children to stay indoors and forcing people to take medication and miss work or school.³ Ground-level ozone is not emitted directly

¹ See, e.g., U.S. EPA, 8-Hour Ozone (2015) Nonattainment Areas by State/County/Area, at <https://www3.epa.gov/airquality/greenbook/jncty.html>.

² See American Lung Association, *State of the Air: 2022 Report* 24 (2022) (EPA-HQ- OAR-2021-0668-0270); EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants, at ES-5-10 (2020) (EPA-HQ-OAR-2021-0668-0078); 80 Fed. Reg. 65,292, 65,308 (Oct. 26, 2015); EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants, at 2-20 to -24, tbl.2-2 (Feb. 2013) (EPA-HQ-OAR-2008-0699-0405) (“Science Assessment”).

³ See, e.g., U.S. EPA, Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards, at 3-18, 3-26 to -29, 3-32 to - 35 (Aug. 2014) (EPA-HQ- OAR-2008-0699-0404) (“Policy Assessment”); Science Assessment at 2-16 to -18, 2-20 to -24, tbl.2-2.

into the air by polluters, but forms from precursor air pollution, such as oxides of nitrogen (“NOx”) emitted by sources such as cars, power plants, and industrial boilers.⁴

Such air pollution is “heedless of state boundaries” and “often transported . . . over hundreds of miles, to downwind States.” *EPA v. Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). When this happens, “upwind States are relieved of the associated costs” which “are borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution.” *Id.* All too often, downwind states find their efforts to timely achieve attainment hindered by emissions from upwind states. *See, e.g., State of Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir. 2019) (“For downwind States, upwind emissions of these ozone precursors can pose a significant problem. According to a study referenced by EPA, on average, over three-quarters of the ground-level ozone in downwind States comes from upwind emissions.”).

In October 2015, EPA finalized a new 70 parts per billion (“ppb”) ozone National Ambient Air Quality Standard (“NAAQS”), triggering a requirement for states to submit state implementation plans (“SIPs”) within three years. *See* 42 U.S.C. §§ 7410(a)(1). SIPs must provide for, among other things, compliance with the Clean Air Act’s “Good Neighbor” provision, consistent with statutory deadlines for downwind attainment. Specifically, areas in marginal nonattainment must come into attainment “as expeditiously as practicable” and no later than the 2021 attainment deadline; areas in moderate nonattainment must come into attainment no later than 2024; areas in serious nonattainment no later than 2027, and so on. *See* 80 Fed. Reg. 65,292 (Oct. 26, 2015); 42 U.S.C. §§ 7410(a)(2)(D)(i)(I), 7511(a)(1). EPA was then obligated to take action to disapprove SIPs that failed to fulfill the Clean Air Act’s requirements, or approve those that did, within 18 months of states’ submissions. 42 U.S.C. § 7410(k). However, EPA did not timely act on the SIP submittals. *See* Complaint, *Downwinders at Risk, et al. v. Regan*, No. 4:21-cv- 03551-DMR (N.D. Cal. May 12, 2021).

Ultimately, in February 2023 EPA did take unified national action to disapprove, in whole or in part, 21 states’ good neighbor SIP submittals under the 2015 ozone NAAQS. 88 Fed. Reg. 9,336 (Feb. 13, 2023) (the “SIP Disapproval Rule”). Uniformly, the disapproved SIPs failed to include any “permanent and enforceable emissions controls” to address the states’ good neighbor obligations, and accordingly would not actually reduce ozone-causing pollution. *See* 88 Fed. Reg. at 9,355-60. This SIP Disapproval Rule triggered both EPA’s authority and obligation to promulgate a replacement federal implementation plan (“FIP”) for the disapproved SIPs. 42 U.S.C. § 7410(c); *see also Homer City Generation*, 572 U.S. at 509 (noting EPA’s 2-year time limit, and observing that “EPA is not obliged to wait two years or postpone its action even a single day”). Similarly, EPA also found that certain states had failed to submit a SIP at all; this finding likewise and independently triggered EPA’s authority and obligation to issue a FIP. *See* 84 Fed. Reg. 66,612 (Dec. 5, 2019) (noting that the finding set “a 2-year deadline for the EPA to promulgate [FIPs] to address these interstate transport requirements . . . unless, prior to the EPA promulgating a FIP, the state submits, *and the EPA approves*, a SIP”) (emphasis added); 42

⁴ EPA, Ground-level Ozone Basics, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics>.

U.S.C. § 7410(c)(1). Like state plans, EPA’s federal plan must provide for attainment as expeditiously as practicable and not later than downwind attainment deadlines.

Several months later, EPA finalized the Good Neighbor Plan (“GNP”), a further iteration of previous ozone transport rules, applicable to the 21 states that failed to submit approvable SIPs, and to another 2 states that failed to submit SIPs by the deadline. 88 Fed. Reg. 36,654 (June 5, 2023). The GNP requires some emissions reductions starting in ozone season 2023, and more extensive reductions in 2026, in alignment with downwind attainment deadlines. *See* 88 Fed. Reg. at 36,657 (requiring emissions reductions “by the next applicable nonattainment dates for downwind areas”). EPA projects that the GNP, when fully implemented, will have enormous public health benefits: annually preventing 1,300 premature deaths, reducing hospital and emergency room visits for thousands of people with asthma and other respiratory problems, preventing hundreds of thousands of children and adults from missing school and work due to respiratory illness, and decreasing asthma symptoms for millions of Americans.⁵

However, the implementation of parts of the GNP has stalled in the wake of challenges to the SIP Disapproval Rule filed by upwind states, polluter industries, and industry groups in regional Circuit Courts of Appeals across the country. Many of these courts have issued temporary stays as to certain states and in response EPA issued an interim final rule, the “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. 49,295 (July 31, 2023) (the “First IFR”) (acknowledging stays applicable to Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas). Subsequent to EPA’s promulgation of the First IFR, courts issued additional stays of the SIP Disapproval Rule for Alabama, Minnesota, Nevada, Oklahoma, and Utah; the Fourth Circuit Court of Appeals also issued a temporary administrative stay concerning West Virginia pending an October 27, 2023 hearing. Second IFR, 88 Fed. Reg. at 67,103. EPA’s Second IFR now removes these additional states from the GNP.

Substantive Comments

A. EPA Must Ensure that States Are Returned to the GNP As Individual SIP Disapproval Rule Challenges Are Resolved in EPA’s Favor.

As Public Interest Commenters stated in their August 30, 2023, comments on the First IFR, EPA should clarify that it intends to restore a state to the GNP as soon as practicable after a stay is lifted as to that state.⁶ In both the First IFR and the Second IFR, EPA states that the revisions to the GNP made in the rule are “in response to the stay orders” in the various regional Circuit Court challenges to the SIP Disapproval Rule, and thus the revisions are “being made on an interim basis” such that they will only “remain in place while the judicial proceedings in which the stay orders were issued remain pending.” First IFR, 88 Fed. Reg. at 49,297; *accord*

⁵ U.S. EPA, EPA’s “Good Neighbor” Plan Cuts Ozone Pollution – Overview Fact Sheet at 4, *at* https://www.epa.gov/system/files/documents/2023-03/Final%20Good%20Neighbor%20Rule%20Fact%20Sheet_0.pdf.

⁶ Public Interest Organization Comments on First IFR (Aug. 30, 2023) (EPA-HQ-OAR-2021-0668-1209)

Second IFR, 88 Fed. Reg. at 67,103. As such, EPA indicated that its intent was to “take further action” once “the courts have reached final determinations on the merits in these proceedings (or possibly in the case of West Virginia, a final determination to deny the stay motion or to grant the motion to transfer venue or dismiss).” Second IFR, 88 Fed. Reg at 67,103. Given the critical importance of the GNP to resolving significant contributions by upwind states to downwind ones, it is vital that EPA act promptly to restore states to the GNP as soon as each SIP Disapproval Rule challenge is resolved in EPA’s favor. EPA should not defer such action until *all* such challenges are resolved or inject other unnecessary delay. To ensure that states are restored to the GNP as quickly as possible, EPA should not wait until after individual judicial decisions, but instead provide now for states’ automatic return to the GNP upon the dissolution of judicial stays. Specifically, EPA should include language in 40 C.F.R. § 52.40(c) providing:

For any state listed in paragraph (4) for which the judicial stay of EPA’s disapproval of the state’s implementation plan as to the Good Neighbor Provision is lifted, the administrative stay of paragraph (4) shall expire 60 days after the lifting of such judicial stay.

Similarly, EPA should include language in 40 C.F.R. §52.38(b)(2)(iii) providing:

This stay shall expire for any state listed in the prior sentence, including for Indian country located within the borders of such state, 60 days after the lifting of the judicial stay of EPA’s disapproval of the state’s implementation plan as to the Good Neighbor Provision.

Alternatively, EPA could amend the regulations to provide that, within 60 days of the lifting of a judicial stay of EPA’s disapproval of a state’s implementation plan, EPA will finalize a rule restoring that state to the GNP.

This approach is important for both practical and legal reasons.

First, failing to provide now for the restoration of states to the GNP could result in substantial delays after stays are lifted. As EPA is well aware, while all the different SIP Disapproval Rule challenges before the various regional Circuit Courts of Appeal are moving forward rapidly, they are doing so on different timetables.⁷ As of the date of these comments, merits briefing is complete in the 5th and 10th Circuits, but still underway in other Circuits, with EPA’s brief due in November for the cases in the 11th and 8th Circuits, and December for the 6th and 9th Circuits. Moreover, as of the date of these comments, while the 4th Circuit has not set a schedule for merits briefing of the SIP Disapproval Rule challenge in that court, the stay there

⁷ Although the speed at which any particular case proceeds is of course unique to that case, the different Circuits also have very different average intervals between case initiation and case completion. See, e.g., U.S. Courts of Appeals, Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2022, at https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2022.pdf (showing an average interval across the Circuit courts of 9.8 months, but wide ranges among Circuits, such as 13.2 months in the 9th, and 4.6 in the 8th).

may be lifted following a recent hearing. Accordingly, the different cases before the different courts are very likely to produce final determinations on the merits and/or lift stays at very different times. If the restoration of each state depended on the undertaking of a discretionary rulemaking, the agency might wait until the last case is resolved or delay action for other reasons, unnecessarily and unfairly burdening downwind states suffering from upwind state pollution that could and should be resolved sooner. This situation would only be compounded if, as is likely, some number of the regional Circuit challenges result in dismissals or venue transfers to the D.C. Circuit under 42 U.S.C. § 7607(b)(1), which could result in further delays in reaching determinations on the merits.

Second, in the absence of approvable SIPs providing for elimination of significant contributions to interstate ozone, EPA is legally required to issue a FIP that ensures that downwind states are able to meet their attainment deadlines. *See Wisconsin*, 938 F.3d at 315, 318 (“[T]he Good Neighbor Provision calls for the elimination of upwind States’ significant contributions on par with the relevant downwind attainment deadlines,” “even if the outer limit of the statutory timeframe gives EPA more time to formulate the [federal plan].”); 42 U.S.C. § 7511(a), (b)(1) (setting deadline of 6 years from designation for moderate nonattainment areas); 83 Fed. Reg. 25,776 (June 4, 2018) (designating nonattainment areas). If and when a Circuit Court determination removes the barrier to EPA’s FIP authority, EPA must accordingly take prompt action to restore the implicated states to the GNP, even if other challenges are still unresolved; otherwise, EPA would be threatening the ability of downwind states to attain the NAAQS by the statutory attainment dates, contrary to Clean Air Act requirements.

B. 2023 Ground Level Ozone Concentrations Are Worse Than EPA Projected.

It is particularly important that EPA promptly restore the GNP in states subject to stays because preliminary monitoring data shows that EPA significantly underestimated ozone levels when designing the GNP: many of EPA’s modeled projections of 2023 ozone concentrations are much lower than the real 2023 ozone concentrations are turning out to be. For example, even with some 2023 ozone season data still unavailable, nearly all of the monitors EPA modeled to be in nonattainment, maintenance, or assessed to be actually violating based on 2021 and 2022 data (*see* 88 Fed. Reg. at 9,352) have recorded 4th-highest daily maximums exceeding EPA’s 2016v3 modeling “Max DV” projections, including by as much as 18.3 ppb, or over 26% of the NAAQS.

Table 1: Ozone Monitor Data⁸

Site ID	State	County	2023 Max DV projection	Monitor Status	Preliminary 2023 Actual	Delta with 2023 Max DV
40070010	AZ	Gila	69.5	V	76	6.5

⁸ *See* U.S. EPA, Data File with Ozone Design Values and Contributions, [EPA-HQ-OAR-2021-0663-0070](https://www.epa.gov/air-quality-data/2021-0663-0070); 2023 Actual data taken from U.S. EPA, Monitor Values Report (as of October 23, 2023), at <https://www.epa.gov/outdoor-air-quality-data/monitor-values-report> (noting “Annual statistics for 2023 are not final until May 1, 2024”), and Texas Commission on Environmental Quality, Eight-Hour Ozone High Value Days for 2023 (as of October 23, 2023), at https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_exceed.pl.

40130019	AZ	Maricopa	70.0	V	75	5.0
40131003	AZ	Maricopa	70.7	V	75	4.3
40131004	AZ	Maricopa	70.8	V	70	-0.8
40131010	AZ	Maricopa	69.2	V	79	9.8
40132001	AZ	Maricopa	64.1	V	75	10.9
40132005	AZ	Maricopa	70.5	V	75	4.5
40133002	AZ	Maricopa	65.8	V	72	6.2
40134004	AZ	Maricopa	66.6	V	65	-1.6
40134005	AZ	Maricopa	62.3	V	73	10.7
40134008	AZ	Maricopa	66.5	V	75	8.5
40134010	AZ	Maricopa	66.9	V	74	7.1
40137021	AZ	Maricopa	70.1	V	79	8.9
40137022	AZ	Maricopa	69.1	V	79	9.9
40137024	AZ	Maricopa	67.9	V	73	5.1
40139702	AZ	Maricopa	68.1	V	77	8.9
40139704	AZ	Maricopa	66.2	V	66	-0.2
40139997	AZ	Maricopa	70.5	V	83	12.5
40218001	AZ	Pinal	69.0	V	75	6.0
40278011	AZ	Yuma	72.1	M	72	-0.1
60650016	CA	Riverside	73.1	N	62	-11.1
60651016	CA	Riverside	92.2	N	99	6.8
80013001	CO	Adams	63.0	V	67	4.0
80050002	CO	Arapahoe	68.0	V	67	-1.0
80310002	CO	Denver	64.8	V	65	0.2
80310026	CO	Denver	64.8	V	69	4.2
80350004	CO	Douglas	71.9	N	71	-0.9
80590006	CO	Jefferson	73.5	N	73	-0.5
80590011	CO	Jefferson	74.1	N	73	-1.1
80690011	CO	Larimer	72.1	M	67	-5.1
90010017	CT	Fairfield	72.2	N	72	-0.2
90013007	CT	Fairfield	73.8	N	72	-1.8
90019003	CT	Fairfield	73.6	N	78	4.4
90079007	CT	Middlesex	69.0	V	68	-1.0
90099002	CT	New Haven	72.6	M	75	2.4
90110124	CT	New London	67.0	V	60	-7.0
170310001	IL	Cook	71.9	M	82	10.1
170310032	IL	Cook	69.8	V	83	13.2
170311601	IL	Cook	64.5	V	81	16.5
170314201	IL	Cook	71.5	M	86	14.5

170317002	IL	Cook	71.3	M	81	9.7
181270024	IN	Porter	64.6	V	77	12.4
260050003	MI	Allegan	67.4	V	75	7.6
261210039	MI	Muskegon	68.4	V	74	5.6
320030043	NV	Clark	69.4	V	68	-1.4
350011012	NM	Bernalillo	66.0	V	63	-3.0
350130008	NM	Dona Ana	66.3	V	64	-2.3
350130021	NM	Dona Ana	72.1	M	67	-5.1
350151005	NM	Eddy	74.1	M	72	-2.1
350250008	NM	Lea	72.2	M	69	-3.2
361030002	NY	Suffolk	68.0	V	74	6.0
390850003	OH	Lake	64.6	V	72	7.4
480290052	TX	Bexar	67.8	N	76	8.2
480391004	TX	Brazoria	72.5	M	82	9.5
480850005	TX	Collin	66.0	V	82	16.0
481130075	TX	Dallas	66.5	V	80	13.5
481210034	TX	Denton	71.6	M	78	6.4
481211032	TX	Denton	67.7	V	81	13.3
481671034	TX	Galveston	72.8	N	81	8.2
482010024	TX	Harris	76.7	N	78	1.3
482010051	TX	Harris	66.3	V	80	13.7
482010055	TX	Harris	71.9	M	87	15.1
482010416	TX	Harris	70.4	V	85	14.6
482011035	TX	Harris	71.3	M	82	10.7
484390075	TX	Tarrant	64.7	V	81	16.3
484391002	TX	Tarrant	65.7	V	84	18.3
484392003	TX	Tarrant	65.9	V	80	14.1
484393009	TX	Tarrant	68.1	V	84	15.9
490110004	UT	Davis	74.2	N	73	-1.2
490353006	UT	Salt Lake	74.2	N	72	-2.2
490353013	UT	Salt Lake	73.8	N	68	-5.8
490571003	UT	Weber	70.3	V	70	-0.3
550590019	WI	Kenosha	71.7	M	80	8.3
550590025	WI	Kenosha	70.7	V	79	8.3
550890008	WI	Ozaukee	65.8	V	75	9.2
551010020	WI	Racine	71.5	M	76	4.5
551170006	WI	Sheboygan	73.6	N	78	4.4

These and other locations with highly elevated ozone levels urgently need reductions in ozone-causing NOx emissions, yet a majority of the states covered by the GNP have their inclusion in the rule stayed, meaning that pollution reductions required for those states are in regulatory limbo. The power sector ozone season NOx emissions from states with stays comprise over two-thirds of the total power sector emissions the GNP would otherwise cover as a whole.

Table 2: GNP State Power Sector Ozone Season NOx Emissions, 2022⁹

State	Year	NOx Mass (short tons)	Stay
AL	2022	7,224.80	Y
AR	2022	8,400.68	Y
KY	2022	12,366.77	Y
LA	2022	11,610.38	Y
MN	2022	5,232.65	Y
MO	2022	13,995.90	Y
MS	2022	6,821.75	Y
NV	2022	2,011.25	Y
OK	2022	10,559.66	Y
TX	2022	44,877.04	Y
UT	2022	13,238.07	Y
WV	2022	11,719.92	Y
IL	2022	9,160.32	
IN	2022	14,337.33	
MD	2022	1,306.23	
MI	2022	12,347.82	
NJ	2022	1,101.88	
NY	2022	3,994.79	
OH	2022	9,266.98	
PA	2022	7,121.92	
VA	2022	3,889.83	
WI	2022	4,960.69	
Total Stayed States		148,058.86	69%
Total All States		215,546.64	100%

⁹ Data taken from U.S. EPA, Clean Air Markets Program Data, at <https://campd.epa.gov/data/custom-data-download>.

As such, while reductions from the states remaining in the rule are significant and beneficial, it is unlikely that downwind states will be able to meet attainment deadlines absent emission reductions from the states whose participation in the GNP is currently delayed. All of this underscores the need to move quickly to address upwind states' unresolved significant contributions to downwind ozone problems.

C. EPA Must Not Toll GNP Obligations During SIP Disapproval Rule Stays.

As noted above, EPA is required to ensure that FIPs it issues to address good neighbor obligations are timed consistent with downwind state attainment deadlines. As a result, EPA must make clear that stays in the GNP's applicability due to litigation over the SIP Disapproval Rule do not toll the compliance deadlines in the GNP. Instead, EPA must explicitly require now that, when states are re-incorporated in the GNP, they are subject to the same compliance deadlines as the states already in the GNP. This will serve the interest of equity among states and ensure that polluter industry decisionmakers are properly incentivized to continue moving forward with compliance planning measures. Particularly as a result of the GNP's phased-in regulatory structure, whereby most NOx emissions reductions begin in the 2026 and 2027 ozone seasons, it is very likely that all of the SIP Disapproval Rule litigation will be fully resolved well in advance of those compliance deadlines.

Given the years during which inequitable burdens have been placed on downwind states and downwind communities by cross-state ozone pollution, it is vital that polluters not be further rewarded with compliance extensions (and downwind populations not be further harmed with concomitant pollution extensions) based on temporary stays of the SIP Disapproval Rule.

Sincerely,

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