



ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION

WASHINGTON, D.C. 20460

August 5, 2024

MEMORANDUM

SUBJECT: Policy Concerning U.S. Supreme Court Grant of Applications to Stay the Good Neighbor Plan and Continuing Requirements for Emissions Sources Covered by the CSAPR Update and Revised CSAPR Update

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On June 27, 2024, the United States Supreme Court issued an opinion¹ granting emergency applications brought by four sets of parties for a stay of the Good Neighbor Plan² pending completion of judicial review. This memorandum provides the EPA's current plans for how it intends to comply with the Court's order. This memorandum also addresses the next steps the Agency intends to undertake to ensure that states' obligations to address interstate ozone pollution under two prior rules, the CSAPR Update³ and the Revised CSAPR Update,⁴ continue to be met.

Background

In March 2023, the EPA promulgated the Good Neighbor Plan (the Plan), a rule identifying the obligations of 23 states under Clean Air Act section 110(a)(2)(D)(i)(I), commonly referred to as the "good neighbor" provision, with respect to the 2015 national ambient air quality standards (NAAQS) for ozone and establishing federal implementation requirements for the states' emissions sources to address those obligations by reducing emissions of nitrogen oxides (NO_x), an ozone precursor. Following the Plan's promulgation, in response to judicial orders partially staying a separate EPA action as to several states, the EPA issued two interim final rules staying the Plan's implementation for

¹ *Ohio v. EPA*, 144 S. Ct. 2040 (2024).

² Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 FR 36654 (June 5, 2023).

³ Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 FR 74504 (October 26, 2016).

⁴ Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 FR 23054 (April 30, 2021).

emissions sources in those states pending further EPA rulemaking.⁵ As modified by the interim final rules, the Plan then applied to electricity generating units (EGUs) in Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin and to non-EGU industrial sources in nine of the same ten states (all except Wisconsin) as well as California. For EGUs, the Plan as promulgated requires the sources to participate in the CSAPR NO_x Ozone Season Group 3 Trading Program as amended by the Plan starting with the 2023 ozone season (the period from May 1 through September 30 of each year). For non-EGU sources, the Plan establishes source-specific compliance requirements that generally take effect starting with the 2026 ozone season.

Scope of the Supreme Court’s Stay Order

The Supreme Court’s June 27 opinion provides,

Enforcement of EPA’s rule [the Good Neighbor Plan] against the applicants shall be stayed pending the disposition of the applicants’ petitions for review in the United States Court of Appeals for the D. C. Circuit and any petition for writ of certiorari, if such writ is timely sought. Should the petition for certiorari be denied, this order will terminate automatically. If the petition is granted, this order shall terminate upon the sending down of the judgment of this Court.

144 S. Ct. at 2058 (“Stay Order”). Consistent with that language, an appendix to this memorandum lists each of the parties to the four stay applications brought before the Supreme Court against whom the Stay Order stays the Plan’s enforcement.

While the Plan does not regulate any states, the EPA interprets the Stay Order as applying to all EGUs and non-EGU sources meeting the Plan’s applicability criteria that are located in the three states that were applicants for a stay – Ohio, Indiana, and West Virginia. (Sources in West Virginia are already under an administrative stay pending judicial review of the EPA’s disapproval of West Virginia’s state implementation plan, *see* footnote 5.)

With respect to EGUs and non-EGU sources meeting the Plan’s applicability criteria and located in states other than Ohio, Indiana, and West Virginia, the appendix to this memorandum identifies the applicants covered by the Stay Order. The industry applicants for a stay include several owners of affected EGUs or non-EGU sources and several trade associations, including some trade associations whose listed members include other trade associations. The set of applicants encompasses applicant trade associations’ members, which in turn would include members of trade associations that are applicants by virtue of their membership in other applicant trade associations.⁶

⁵ 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 FR 49295 (July 31, 2023); 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 FR 67102 (September 29, 2023). These interim final rules stay implementation of the Plan for EGUs and non-EGU sources in Alabama, Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia.

⁶ *See New York State Club Ass’n v. City of New York*, 487 U.S. 1, 9-10 (1988).

The EPA's planned response to the Stay Order

Through the applicant trade associations, the Stay Order applies to a broad range, but not all, of the EGUs and non-EQU sources that would otherwise be subject to the Plan's requirements in states where the Plan has not been stayed as to all sources. Given the extreme administrative complexity of implementing the Plan as to some but not all sources based on the applicability criterion of whether the sources are or are not owned or operated by a member of an applicant trade association, the EPA plans to comply with the Stay Order by administratively staying implementation of the Plan as to all sources in the geography of the Good Neighbor Plan as promulgated. An administrative stay of the Plan as a whole also recognizes that the grounds on which the Court stayed the Plan would have applied to any applicant who sought relief.

The EPA expects to take rulemaking action to implement such an administrative stay in the near future. As discussed below, the rulemaking action will also address what requirements will apply to EGUs to ensure that states' good neighbor obligations identified in the CSAPR Update and Revised CSAPR Update with respect to the 2008 ozone NAAQS will continue to be met while the stay of the Plan for the 2015 ozone NAAQS is in effect.

The Supreme Court's basis for granting the stay applications was its finding that the EPA had failed to adequately respond in the Good Neighbor Plan final rule to a comment concerning severability. The EPA is asking the United States Court of Appeals for the D.C. Circuit to partially remand the Good Neighbor Plan to enable the Agency to take a supplemental final action addressing the record deficiency identified by the Supreme Court.

Near-term requirements for non-EQU sources regulated under the Good Neighbor Plan

The Good Neighbor Plan's substantive compliance requirements for non-EQU sources generally do not take effect before May 1, 2026, the start of the 2026 ozone season. However, the regulations establish several procedural deadlines before that date, including deadlines of August 5, 2024, for owners and operators of steel reheat furnaces regulated under the Plan to submit work plans and for owners and operators of all types of non-EQU sources regulated under the Plan to submit optional requests for case-by-case emissions limits. In light of the Stay Order and the Agency's plan to respond by administratively staying the Plan as to all sources, the EPA will not enforce these procedural deadlines.

Near-term requirements for EGUs regulated under the Good Neighbor Plan, and the EPA's plan for ensuring that previously established good neighbor obligations continue to be met

The Good Neighbor Plan's requirements for EGUs take the form of requirements to participate in the CSAPR NO_x Ozone Season Group 3 trading program as amended by the Plan. Before issuance of the Stay Order, in addition to partially addressing the good neighbor obligations of Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin with respect to the 2015 ozone NAAQS, participation of the states' EGUs in this trading program also was serving as a

compliance mechanism to address the states' preexisting good neighbor obligations identified in the CSAPR Update or the Revised CSAPR Update with respect to the 2008 ozone NAAQS.⁷

The EPA anticipates taking rulemaking action in the near future to clarify ongoing regulatory requirements and ensure that states' preexisting good neighbor obligations with respect to the 2008 ozone NAAQS will continue to be met while the CSAPR NO_x Ozone Season Group 3 Trading Program as amended by the Plan cannot be implemented. The EPA expects that the upcoming action will reestablish the participation of EGUs in the ten states in the CSAPR NO_x Ozone Season Group 2 Trading Program starting with the 2024 ozone season and for future ozone seasons while the administrative stay of the Good Neighbor Plan remains in place. This is the same general approach taken with respect to EGUs in other states in the two interim final rules referenced earlier in this memorandum. The EPA expects the amounts of the state emissions budgets and unit-level allowance allocations provided under the upcoming rulemaking action to match the amounts that would have been provided in the absence of the Plan either under the CSAPR Update, in the case of EGUs in Wisconsin, or under the Revised CSAPR Update, in the case of EGUs in Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Virginia.

Until the future rulemaking action is in effect, EGUs in all ten of these states should continue to comply with the emissions monitoring and reporting requirements that would have applied to them under the CSAPR Update or the Revised CSAPR Update in the absence of the Plan, which match the emissions monitoring and reporting requirements under the Plan except for a small set of additional data reporting elements added by the Plan.

⁷ See 88 FR at 36844. In some cases, participation of a state's EGUs in the CSAPR NO_x Ozone Season Group 3 Trading Program was addressing the state's good neighbor obligations as to earlier NAAQS as well. *Id.*

Appendix: List of Applicant Parties

Ohio Application for Stay (No. 23A349)

- Ohio
- Indiana
- West Virginia

Kinder Morgan Application for Stay (No. 23A350)

- Kinder Morgan, Inc.
- Enbridge (U.S.) Inc.
- TransCanada PipeLine USA Ltd.
- Interstate Natural Gas Association of America
- American Petroleum Institute

AFPA Application for Stay (No. 23A351)

- American Forest & Paper Association*
- America's Power
- Associated Electric Cooperative, Inc.
- Deseret Power Electric Cooperative
- Midwest Ozone Group*
- National Mining Association*
- National Rural Electric Cooperative Association*
- Ohio Valley Electric Corporation
- Portland Cement Association
- Wabash Valley Power Alliance

US Steel Application for Stay (No. 23A384)

- United States Steel Corporation

* Listed members include additional trade associations.