

**Comments of the Power Generators Air Coalition
on the U.S. Environmental Protection Agency’s Proposed
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. 42,295 (July 31, 2023)
Docket ID No. EPA-HQ-OAR-2021-0668**

August 30, 2023

The Power Generators Air Coalition (PGen) respectfully submits these comments to the U.S. Environmental Protection Agency (EPA or the Agency) on its interim final rule entitled “Federal ‘Good Neighbor Plan’ for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States,” which was published in the Federal Register on July 31, 2023 (hereinafter Interim Final Rule).¹

The Interim Final Rule stays EPA’s federal implementation plans (FIPs) with regard to the 2015 national ambient air quality standards for ozone (commonly known collectively as the Good Neighbor Plan) for six states (Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas) where U.S. Courts of Appeals have stayed EPA’s disapproval of those states’ implementation plans (SIPs).² Since the EPA Administrator signed the Interim Final Rule on June 29, 2023, six more states (Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia) have also had their SIP disapprovals stayed by various U.S. Courts of Appeals, bringing the total number of states where the underlying SIP disapproval—which is a legal prerequisite to a FIP for each state—is not in effect to 12.

PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—with a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.³ PGen’s members include leaders in the fundamental transition to cleaner energy that is currently occurring in the industry. PGen as an organization does not participate in legislative lobbying or litigation. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation.

PGen members own and operate electric generating units that are covered by the Good Neighbor Plan. As such, PGen has an interest in the Interim Final Rule and offers the following comments on that rule for EPA’s consideration.

¹ 88 Fed. Reg. 42,295 (July 31, 2023).

² *Id.*

³ Additional information about PGen and its members can be found at <https://pgen.org/>.

I. EPA Needs to Stay the Good Neighbor Plan in its Entirety.

The Good Neighbor Plan has been completely decimated by the stays of the underlying SIP disapprovals and no longer resembles what EPA originally published. More than half of the states are no longer subject to a FIP. More than half of the Courts of Appeals in the United States (the Fourth,⁴ Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits) have found that there is a likelihood that the foundational SIP disapprovals that are a legal prerequisite to issuing FIPs like those in the Good Neighbor Plan were unlawful.

Under these circumstances, EPA needs to stay the entire Good Neighbor Plan pending judicial review. This is the correct course of action given the events that have transpired.

EPA has not analyzed the effect of the stays on the viability of the Good Neighbor Plan, including the effect on significant contribution and cost-effectiveness as required by section 110(a)(2)(D)(i) of the Clean Air Act. There is no evidence that the Good Neighbor Plan can be justified under these current conditions. It would be arbitrary, capricious, unlawful, and contrary to due process and the Clean Air Act to allow for the implementation of a rule that has been modified so dramatically following promulgation.

II. EPA Must, at a Minimum, Stay the Good Neighbor Plan in States Where EPA's Disapproval of the Underlying SIP Has Been Stayed.

While the Interim Final Rule properly and formally stays the Good Neighbor Plan with respect to Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas, it does not include the six additional states that have also had their SIP disapprovals stayed. Because EPA cannot implement a FIP without an effective disapproval of a state's SIP, EPA must also stay the effectiveness of the Good Neighbor Plan in Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia. The Agency should take this step immediately.

In addition, even with respect to the states where the Interim Final Rule stays the effectiveness of the Good Neighbor Plan, the Interim Final Rule fails to “preserve status quo requirements established in previous [Good Neighbor] rulemakings.”⁵ Under the “status quo” prior to the Good Neighbor Plan, Alabama, Arkansas, Mississippi, Missouri, Oklahoma, and Texas participated in the Group 2 allowance trading market with states like Wisconsin. But under the Interim Final Rule, this is not the case—meaning the status quo has not been restored. Under the Interim Final Rule, Wisconsin is being subjected to the Group 3 allowance market. And states like Kentucky and Louisiana are being relegated to their own group instead of being allowed to trade with other states in Group 3. These distinctions matter because, under basic economic principles of supply and demand, the size of a market has a direct correlation with the market price of an allowance.

⁴ The Fourth Circuit's stay of the disapproval of West Virginia's SIP is pending that court's hearing on West Virginia's stay motion on October 27, 2023. *West Virginia v. EPA*, No. 23-1418 (4th Cir. Aug. 10, 2023).

⁵ 88 Fed. Reg. at 49,297.

The only way for EPA to truly restore the states that have stays of their SIP disapprovals to the status quo is for the Agency to stay the Good Neighbor Plan in its entirety, which would restore the allowance markets for all states back to their pre-Good Neighbor Plan status. Otherwise, the status quo—which is required in those states with stays—cannot be achieved.

Finally, the Good Neighbor Plan has several requirements that do not begin until 2026, and EPA acknowledged in the final Good Neighbor Plan that actions toward meeting the 2026 deadline need to begin now.⁶ Under the law, those states with stayed SIP disapprovals do not need to take *any* steps toward meeting the 2026 deadline. EPA does not state this explicitly in the Interim Final Rule and should do so. If the Good Neighbor Plan and the SIP disapprovals are ultimately upheld, then, at a minimum, the deadlines for the rule in the stayed states will need to be recalibrated, as has been done with other EPA rules that were stayed pending judicial review. And this provides yet more reason for EPA to stay the entire Good Neighbor Plan: to avoid having states in the program with differing compliance deadlines in the event the rule is upheld.

For all these reasons, PGen requests that EPA stay the effectiveness of the entire Good Neighbor Plan pending judicial review.

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⁶ 88 Fed. Reg. 36,654, 36,755 (June 5, 2023) (noting “the publication of the proposed [Good Neighbor Plan] provided roughly an additional year of notice to ... source owners and operators that they should begin engineering and financial planning ... to be prepared to meet” the 2026 deadline).