ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Respondents.	Consolidated Case Nos. 23-1157, 23-1181, 23-1183

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

LETITIA JAMES
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
State Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

JUDITH N. VALE
Deputy Solicitor General
ELIZABETH A. BRODY
Assistant Solicitor General
MORGAN A. COSTELLO
CLAIBORNE E. WALTHALL
Assistant Attorneys General
Of Counsel

Dated: July 20, 2023

Counsel for Proposed Intervenor State of New York
Counsel for Additional Proposed Intervenors Listed on Signature Page

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the States of New York, Connecticut, Delaware, Illinois, Maryland, New Jersey, and Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, the City of New York, and Harris County, Texas (Proposed Intervenors) hereby move for leave to intervene as respondents with respect to all petitions challenging the final rule entitled "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) (Good Neighbor Plan or Plan), except for any petitions filed challenging the Plan as insufficiently stringent, for the reasons set forth below:

1. EPA promulgated the Good Neighbor Plan to reduce the interstate transport of air pollutants from "upwind" sources that significantly contribute to harmful levels of ozone in "downwind" areas, such as the New York-Northern New Jersey-Long Island, NY-NJ-CT Area (New York Metropolitan Area), the Chicago, IL-IN-WI Area, the Houston-Galveston-Brazoria, TX Area, the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE Area (Philadelphia Metropolitan Area), and the Greater Connecticut Area, among others.

2. The Plan addresses EPA's statutory obligation under the "Good Neighbor Provision" of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), to promulgate federal implementation plan requirements for 23 upwind States that did not include adequate provisions to prohibit such pollutants in their state implementation plans, *see id.* § 7410(c)(1).

3. Proposed Intervenors—downwind States and localities that receive harmful levels of ozone-forming pollution emitted from sources in upwind States—meet the standards for intervention under Federal Rule of Appellate Procedure 15(d) or, in the alternative, the standards under Federal Rule of Civil Procedure 24, because they have Article III standing, possess direct and substantial interests in the outcome of this litigation, and have interests that are distinct from EPA's interests.

4. Specifically, upholding and promptly implementing the Good Neighbor Plan is critical to protecting the public health and welfare in Proposed Intervenors' jurisdictions. The Plan is also crucial to Proposed Intervenors' ability to timely attain or maintain the 2015 national ambient air quality standards for ozone within their own jurisdictions. *See* Declaration of Robert Bielawa, P.E., dated July 20, 2023 (Bielawa

Decl.) ¶¶57-60; Declaration of Glenn Keith, dated July 19, 2023 (Keith Decl.) ¶¶26-30; Declaration of Gail E. Good, dated July 18, 2023 (Good Decl.) ¶¶14-20; Declaration of Diana Ramirez, dated July 20, 2023 (Ramirez Decl.) ¶¶9-11.

5. In addition, several of Proposed Intervenors are also upwind States whose own compliance with the Clean Air Act is determined by the Good Neighbor Plan. Bielawa Decl. ¶61. Any order affecting the validity of the Plan would thus compromise these Proposed Intervenors' ability to meet their own statutory obligations under the Clean Air Act.

6. Proposed Intervenors consulted with all parties and proposed intervenors in the cases, which stated the following positions: Petitioner in Case No. in 23-1157 State of Utah takes no position on the motion, but reserves the right to file a response in opposition after reviewing the motion. Petitioners in Case No. 23-1183 Ohio, West Virginia and Indiana do not oppose. Petitioner in Case No. 23-1181 Kinder Morgan, Inc. takes no position. Proposed Environmental and Health intervenor-respondents Air Alliance Houston, et al. do not oppose. Respondents EPA and Administrator Regan take no position.

Statutory and Regulatory Background

7. The Clean Air Act requires EPA to set nationwide air quality standards for several air pollutants, including ozone. *See, e.g.*, 42 U.S.C. § 7409(a); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014); *Maryland v. Envtl. Prot. Agency*, 958 F.3d 1185, 1189 (D.C. Cir. 2020). These standards, known as the national ambient air quality standards, "'define [the] levels of air quality that must be achieved to protect public health and welfare.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 469 (2004) (quoting R. Belden, Clean Air Act 6 (2001)).

8. For each pollutant covered by a national ambient air quality standard, EPA classifies each county across the nation as one of the following: (1) an attainment area, if the level of the pollutant in the air is at or below the standard; (2) a nonattainment area, if the level of the pollutant exceeds the standard; or (3) an unclassifiable area, if insufficient data is available to determine if the level of the pollutant meets or exceeds the standard. 42 U.S.C. § 7407(d)(1)(A)-(B). EPA may also classify a county as a maintenance area, if it has previously been in nonattainment but has narrowly reached attainment by a specified date.

See North Carolina v. E.P.A., 531 F.3d 896, 910-11 (D.C. Cir. 2008) (describing maintenance areas as those that "find themselves barely meeting attainment" and are still "struggling to meet" the relevant air quality standard).

9. Under the Clean Air Act, States are primarily responsible for ensuring that the air quality within their respective jurisdictions meets the national ambient air quality standards. 42 U.S.C. § 7407(a); Bielawa Decl. ¶33. Accordingly, whenever EPA promulgates or revises one of the national standards, the Act requires each State to submit a state implementation plan consisting of air pollution regulations or other requirements that ensure that it will achieve and maintain compliance with the national standards. *See* 42 U.S.C. § 7410(a)(1); *EME Homer City Generation*, 572 U.S. at 498.

10. Air pollution, however, does not heed state boundaries. Instead, pollutants generated by upwind sources are "often transported by air currents, sometimes over hundreds of miles, to downwind States." *Id.* at 496. To address this interstate problem, the Clean Air Act's "Good Neighbor Provision" requires each state implementation plan to contain adequate provisions to limit emissions that will contribute significantly

to nonattainment or interfere with maintenance of the national ambient air quality standards in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i)(I). State implementation plans must be structured to allow downwind States to attain the national standards by the requisite statutory deadlines. *Wisconsin v. EPA*, 938 F.3d 308, 314 (D.C. Cir. 2019).

11. If EPA determines that a state implementation plan is inadequate to prohibit emissions that contribute significantly to downwind States' nonattainment or interfere with downwind States' maintenance, EPA must disapprove that state implementation plan and issue a substitute federal implementation plan. 42 U.S.C. § 7410(c)(1).

12. One of the pollutants for which EPA sets national ambient air quality standards is ozone. Ground-level ozone, a major component of smog, forms when other pollutants, such as nitrogen oxides, react in the presence of sunlight. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). People who are exposed to elevated levels of ozone often experience significant negative health effects, including coughing, throat irritation, and lung tissue damage, as well as aggravation of existing conditions, such as asthma, bronchitis, heart disease, and emphysema. *Id.* at 65,302-11.

13. In 2015, EPA strengthened the standards for ozone by lowering the permissible concentration of ambient ozone from 75 parts per billion to 70 parts per billion. *Id.* at 65,452-53.

14. Proposed Intervenors have each promulgated some of the strictest air quality control regulations in the country. *See, e.g.*, Bielawa Decl. ¶¶7-8, 21-23; Keith Decl. ¶¶18-19; Good Decl. ¶13. In response to the 2015 revised ozone standards, Proposed Intervenors have imposed even more stringent requirements on in-state sources. Nonetheless, due in large part to emissions of pollutants from sources in upwind States, many Proposed Intervenors have not fully attained or have struggled to maintain the 2015 ozone standards nearly eight years after they were promulgated. Bielawa Decl. ¶¶24-27; Keith Decl. ¶¶20-22, 26-27, 29-30; Ramirez Decl. ¶¶9-11.

15. These upwind States include petitioners Ohio, Indiana and West Virginia, which EPA identified as significantly contributing to nonattainment or interference with maintenance at one or more locations in Proposed Intervenors' jurisdictions in 2023. *See* EPA, Air Quality Modeling Final Rule Technical Support Document, 2015 Ozone NAAQS Good Neighbor Plan, EPA-HQ-OAR-2021-0668-1157 at C-2 to -5

(showing projected significant contributions to locations in Connecticut, Illinois, New York, Wisconsin and others downwind States), https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-1157.

16. For example, EPA has identified the Fairfield County, Connecticut monitor (located in the tri-state New York Metropolitan Area) as impacted by numerous upwind States' emissions. Bielawa Decl. ¶¶25, 48-49. All of New Jersey remains in nonattainment of the 2015 ozone standards. And other Proposed Intervenors in the multi-state Philadelphia Metropolitan Area and Greater Connecticut Area receive meaningful levels of cross-border ozone from upwind States that contribute to nonattainment. *See* 42 U.S.C. § 7511(b)(2); 87 Fed. Reg. 60,897 (Oct. 7, 2022). Other Proposed Intervenors, even if they are formally in attainment, continue to measure unhealthy spikes in ozone levels, in part due to cross-border emissions. *See*, *e.g.*, Keith Decl. ¶¶20-22, 25-27; *see* https://www3.epa.gov/region1/airquality/ma_over.html (noting exceedances of the ozone standards at eight different monitors across Massachusetts in 2021).

Procedural History

17. On June 20, 2023, the State of Utah filed a petition for review of the Good Neighbor Plan, initiating Case No. 23-1157. *See* ECF No. 2004277.

18. On July 14, 2023, Kinder Morgan, Inc. filed a petition for review in Case No. 23-1181, ECF No. 2008233, and on July 17, 2023, the States of Ohio, West Virginia, and Indiana filed a joint petition for review in Case No. 23-1183. ECF No. 2008188. By order of the Clerk of the Court, Cases Nos. 23-1157, 23-1181 and 23-1183 were consolidated. ECF Nos. 2008222, 2008267.

19. Proposed Intervenors seek to intervene in all consolidated cases as respondents, except for any petitions filed challenging the Good Neighbor Plan as insufficiently stringent. *See* Circuit Rule 15(b).

ARGUMENT

Proposed Intervenors Have Standing

20. "To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732–33 (D.C. Cir. 2003). Prospective intervenors may establish standing

"by affidavit or other evidence [of] specific facts." *Id.* at 733. In addition, prospective intervenors must establish that their interests in the litigation fall within the "zone of interests protected by" the relevant statute. *See Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (internal quotations omitted).

21. Here, Proposed Intervenors are injured by upwind sources emitting significant levels of ozone precursors into their jurisdictions. Such emissions both threaten the health and safety of Proposed Intervenors' residents and, for reasons stated *infra*, increase regulatory burdens on Proposed Intervenors. *See* Bielawa Decl. ¶¶53-55, 59-60; *see also* Decl. of Rona Birnbaum, Director, Clean Air Markets Div., Envtl. Protection Agency ¶94, *Commonwealth of Ky. v. EPA*, No. 23-3216 (6th Cir. June 16, 2023), ECF No. 32-3 (observing that continued upwind emissions negatively affects "industrial expansion, economic development, and tax base in [downwind] nonattainment areas").

22. Proposed Intervenors' injuries are also fairly traceable to the subject of the Good Neighbor Plan at issue in this litigation. Using photochemical modeling, EPA has established that emissions from upwind State sources significantly affect Proposed Intervenors' ability to

attain or maintain the 2015 national ambient air quality standards for ozone and cause elevated levels of ozone pollution in Proposed Intervenors' jurisdictions. 88 Fed. Reg. at 36,708-36,712, 36,717. By the same token, a court order upholding the Good Neighbor Plan would redress Proposed Intervenors' injuries by enforcing corresponding emissions limitations on these upwind State sources. *See Fund for Animals*, 322 F.3d at 733; *cf. Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023) (to satisfy redressability, relief must provide "legally enforceable protection from the allegedly imminent harm"). Conversely, a court order invalidating the Plan would perpetuate Proposed Intervenors' injuries.

23. Finally, Proposed Intervenor's interests fall squarely within the zone of interests protected by the Clean Air Act and the Good Neighbor Provision specifically. *See Ass'n of Battery Recyclers*, 716 F.3d at 674. Congress enacted the Good Neighbor Provision for the express purpose of protecting downwind States from pollution originating outside their borders as well as ensuring that such pollution would not prevent them from meeting the national ambient air quality standards. *See EME Homer City Generation*, 572 U.S. at 495.

Proposed Intervenors Meet the Rule 15(d) Standard

24. Federal Rule of Appellate Procedure 15(d) requires that a party moving to intervene set forth its interest and the grounds for intervention. Fed. R. App. P. 15(d). Intervention under this rule should be granted as long as the moving party's interests in the outcome of the action are direct and substantial. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15(d) because petitioners were "directly affected by" agency action); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"). The decision to allow intervention is guided by the "need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 700, 702 (D.C. Cir. 1967).

25. Proposed Intervenors satisfy this standard because they have direct and substantial interests in the outcome of this litigation. Indeed, in recognition of downwind States' important interests in cross-border ozone transport rules, this Court has granted similar motions to intervene in prior challenges to such rules. *See, e.g.,* Order, *EME Homer City v. EPA*, No. 11-1302 (D.C. Cir. Jan. 5, 2012) (granting downwind

States' motions to intervene in defense of 2011 Cross-State Air Pollution Rule); Order, *State of Wisconsin v. EPA*, No. 16-1406 (D.C. Cir. Jan. 31, 2017), ECF No. 1658440 (granting downwind States' motion to intervene in defense of 2016 Cross-State Air Pollution Rule Update).

26. As downwind States and localities, Proposed Intervenors depend on the Good Neighbor Plan's scheduled reductions in ozone precursors emitted by upwind sources to attain or maintain the national ambient air quality standards in their own jurisdictions. If Proposed Intervenors fail to attain the standards in their own jurisdictions by the applicable statutory deadlines, they risk having EPA reclassify their nonattainment areas to more severe levels of nonattainment. 42 U.S.C. § 7511(b)(2). Higher classifications require States to implement correspondingly more stringent emissions-reduction measures, which can be burdensome and costly. *See* Bielawa Decl. ¶60.

27. For decades, Proposed Intervenors have struggled to meet or maintain the national ambient air quality standards for ozone in certain areas, including in the multi-state New York Metropolitan Area, Chicago, IL-IN-WI Area, the Houston-Galveston-Brazoria, TX Area, and the Philadelphia Metropolitan Area, because of pollution emitted by sources

in upwind States. *See, e.g.,* Bielawa Decl. ¶¶52-53; Good Decl. ¶¶16-20, Ramirez Decl. ¶¶9-11. To work toward attainment, Proposed Intervenors have imposed stringent in-state emissions standards for nitrogen oxides on power plants and other emissions sources, including motor vehicles, that are stricter than those required by the federal government and many other States. But these stringent measures have been insufficient due in large part to emissions of nitrogen oxides by upwind sources—emissions that the Plan is critical to reducing. *See* Bielawa Decl. ¶¶21-27; Keith Decl. Decl. ¶¶18-20, 25-27.

28. Proposed Intervenors' participation in this litigation is also particularly critical given upcoming statutory deadlines for attainment of the 2015 ozone standards. *See, e.g.,* Good Decl. ¶¶17-18. Specifically, New York, New Jersey, and Connecticut face an August 2024 deadline to attain and maintain the 2015 ozone standards in the New York Metropolitan Area and other nonattainment areas. *See* Bielawa Decl. ¶19, 26. Delaware, Maryland and Pennsylvania face the same deadline for certain nonattainment areas in their States, *see* EPA, Green Book: 8-Hour Ozone (2015) Designed Area/State Information, https://www3.epa.gov/airquality/greenbook/jbtc.html. Attainment status

for this 2024 deadline will be determined by averaging ozone levels measured in the 2021, 2022 and 2023 ozone seasons. Any order in this litigation that delays or otherwise affects the Good Neighbor Plan's needed reductions from upwind States would result in increased pollution during the 2023 season, which is already underway.

29. Proposed Intervenors also have a direct and substantial interest in ensuring that they are not inequitably burdened by upwind States' significantly contributing emissions. When upwind States do not reduce their emissions as the Good Neighbor Provision requires, downwind States and localities like Proposed Intervenors are forced to implement more costly in-state emissions reductions to meet their attainment deadlines. Here, EPA based the Plan in part on a finding that upwind sources were not fully operating certain emissions control equipment that they had already installed, even though such equipment consists of established technologies, is commonplace in Proposed Intervenors' jurisdictions, and has been required by prior regional transport rules. *See* 88 Fed. Reg. at 36,687, 36,720. Proposed Intervenors have a substantial interest in ensuring that they do not bear disproportionate costs to remedy ozone pollution when easier and more

cost-effective methods of emissions reduction are available at upwind sources.

30. Proposed Intervenors also have a direct and substantial interest in preventing harms to public health and the environment that the Good Neighbor Plan is intended to prevent. Each day of excess ozone pollution from upwind States subjects millions of people in Proposed Intervenors' jurisdictions to substantial health risks, and subjects Proposed Intervenors to health-related costs. Bielawa Decl. ¶¶14, 32, 54, 57; Ramirez Decl. ¶¶12-15. Although even relatively low levels of ozone can cause health effects, high-ozone days present particularly acute risks for vulnerable populations, including children, elderly people, and people with compromised immune systems. Bielawa Decl. ¶32. Proposed Intervenors' forests, parks, and other public lands are also harmed by excess ozone. Bielawa Decl. ¶¶15, 55; Keith Decl. ¶24; *see also* U.S. Forest Service, U.S. Dep't of Ag. & N.J. St. Forestry Services, *New Jersey's Forests 2008: Resource Bulletin NRS-59* 37-39 (Nov. 2011), *available at* https://www.nrs.fs.usda.gov/pubs/rb/rb_nrs59.pdf (showing that plants at more than half of sampled sites in New Jersey exhibited foliar injury from ozone).

31. Proposed Intervenors also have a direct and substantial interest in the proper standard for determining significant contribution and associated Good Neighbor Provision obligations. For example, several upwind States have challenged EPA's continuing use of a threshold of 1% of the national ambient air quality standards for ozone to determine which upwind States are "linked" to downwind nonattainment areas—despite the fact that EPA has long used that same threshold. *See* 88 Fed. Reg. at 36,712.

32. The use of a less-stringent screening level could mean that fewer upwind States would be held responsible for the downwind impacts of their pollution. Bielawa Decl. ¶58. As downwind areas, the Proposed Intervenors have an interest in a nationally consistent and protective threshold for holding upwind States responsible for such impacts.

Proposed Intervenors Also Meet the Standard for Intervention Under Federal Rule of Civil Procedure 24

33. In determining whether to allow intervention under Rule 15(d), this Court has sometimes looked to whether the movant would satisfy Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right in the district courts. *See Building & Constr.*

Trades Dep't v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Considerations relevant to intervention under this provision include:

> (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether . . . disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties.

Fund for Animals, 322 F.3d at 731 (citations and quotation marks omitted).

34. Here, all four factors support granting Proposed Intervenors' motion. First, Proposed Intervenors' motion for intervention is timely. Utah's petition for review of the Good Neighbor Plan was filed on June 20, 2023, and the most recent petition to date was filed on July 17, 2023. Proposed Intervenors' motion was filed and served within thirty days, on July 20, 2023. *See* Fed. R. App. P. 15(d); Circuit Rule 15(b).

35. Second, Proposed Intervenors have significant interests in the subject matter of this litigation, as set forth above. Proposed Intervenors need the Good Neighbor Plan's scheduled emissions reductions from sources in upwind States to attain or maintain the ozone standards, including meeting upcoming statutory deadlines for the 2015 ozone standards. Reducing emissions of ozone precursors is also critical to

protecting the health of residents and ecosystems in Proposed Intervenors' jurisdictions. See *supra* at ¶30.

36. Third, the disposition of these consolidated cases could impair or impede Proposed Intervenors' ability to protect their interests. A decision staying or invalidating the Good Neighbor Plan would require Proposed Intervenors and their residents to endure prolonged, unlawful excess ozone pollution, and would make it even more difficult for Proposed Intervenors to attain and maintain the 2015 ozone standards by the statutory deadlines. Conversely, a decision upholding the Plan would further Proposed Intervenors' interests by implementing emissions reductions to which downwind States are entitled under the Clean Air Act.

37. Finally, as downwind States and localities directly affected by upwind ozone precursors, Proposed Intervenors have interests in defending the Good Neighbor Plan that are distinct from EPA's interests. Proposed Intervenors are directly responsible for the health and welfare of their residents and have independent legal obligations to attain and maintain the 2015 ozone standards under the Clean Air Act. These interests are distinct from EPA's interests in ensuring that

implementation plans under the Clean Air Act adequately prohibit cross-border ozone transport, in satisfaction of the Good Neighbor Provision.

38. As shown above, Proposed Intervenors have unique and significant interests in ensuring that the Good Neighbor Plan challenged by these petitions for review is upheld. Thus, Proposed Intervenors satisfy the standards for intervention under Federal Rule of Appellate Procedure 15(d), and, in the alternative, also satisfy the standards for intervention as of right under Federal Rule of Civil Procedure 24(a)(2).

Conclusion

39. For the reasons stated above, Proposed Intervenors respectfully request that the Court grant their motion to intervene as respondents with respect to all petitions challenging the Good Neighbor Plan, except for any petitions filed challenging the Plan as insufficiently stringent.

Dated: July 20, 2023

Respectfully submitted,

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General

/s/Claiborne E. Walthall[1]
CLAIBORNE E. WALTHALL
Assistant Attorney General
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
ELIZABETH A. BRODY
Assistant Solicitor General
MORGAN A. COSTELLO
Assistant Attorney General
of Counsel

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut

/s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250
Jill.Lacedonia@ct.gov

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of Delaware

/s/ Christian Douglas Wright
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 683-8899
Christian.wright@delaware.gov

[1] Counsel for the State of New York certifies that the other parties listed in the signature blocks consent to this filing.

FOR THE DISTRICT OF COLUMBIA

BRIAN L. SCHWALB
Attorney General of the District of Columbia

/s/ Caroline S. Van Zile
CAROLINE S. VAN ZILE
Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street N.W., Ste 8100
Washington, D.C. 20001
Tel. (202) 724-6609
caroline.vanzile@dc.gov

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General

/s/ Elizabeth Dubats
ELIZABETH DUBATS
Supervising Attorney
JASON E. JAMES
Assistant Attorney General
MATTHEW DUNN
Chief, Environmental Enforcement/ Asbestos Litigation Division
Illinois Office of the Attorney General
69 W. Washington, Suite 1800
Chicago, IL 60602
(312) 814-2069
elizabeth.dubats@ilag.gov

FOR THE STATE OF MARYLAND

ANTHONY G. BROWN
Attorney General of Maryland

/s/ Joshua M. Segal
JOSHUA M. SEGAL
Special Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6446
jsegal@oag.state.md.us

FOR THE COMMONWEALTH OF MASSACHUSETTS

ANDREA JOY CAMPBELL
Attorney General of Massachusetts

/s/ Jillian M. Riley
JILLIAN M. RILEY
JOHN S. CRAIG
JULIA JONAS-DAY
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2424
jriley@mass.gov

FOR THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
Attorney General of New Jersey

/s/Lisa Morelli
LISA MORELLI
Deputy Attorney General
Division of Law
25 Market St., P.O. Box 093
Trenton, NJ 08625
Telephone: (609) 376-2735
Email:
lisa.morelli@law.njoag.gov

FOR THE COMMONWEALTH OF PENNSYLVANIA

MICHELLE A. HENRY
Attorney General

/s/ Ann R. Johnston
ANN R. JOHNSTON
Assistant Chief Deputy Attorney General
Office of the Attorney General
Civil Environmental Enforcement Unit
Strawberry Square
14th Floor
Harrisburg, PA 17120
ajohnston@attorneygeneral.gov
717-497-3678

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53702-7857
Telephone: (608) 267-8904
Fax: (608) 267-2223
johnsonkarpg@doj.state.wi.us

FOR THE CITY OF NEW YORK

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York

/s/Christopher Gene King
CHRISTOPHER GENE KING
Senior Counsel, Environmental Law Division
New York City Law Department
100 Church Street
New York, NY 10007
cking@law.nyc.gov

FOR HARRIS COUNTY, TEXAS

CHRISTIAN MENEFEE
Harris County Attorney
JONATHAN FOMBONNE
First Assistant County Attorney
TIFFANY BINGHAM
Managing Counsel

/s/ Sarah Jane Utley
SARAH JANE UTLEY
Environmental Division Director
State Bar No. 24042075
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5124
Fax: (713) 437-4211
Email:
sarah.utley@harriscountytx.gov

CERTIFICATE AS TO PARTIES AND AMICUS CURIAE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), proposed intervenors-respondents New York, Connecticut, Delaware, the District of Columbia, Illinois, Massachusetts, Maryland, New Jersey, Pennsylvania, Wisconsin, the City of New York, and Harris County, Texas (Proposed Intervenors) submit the following certificate as to parties, intervenors, and amici curiae in the consolidated petitions for review in Case Nos. 23-1157, 23-1181, 23-1183.

District Court

This case involves consolidated direct petitions for review of a rulemaking by EPA entitled "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023). There were accordingly no district court proceedings.

The Proceedings Before This Court

Petitioners

The petitioners in these consolidated actions are:

Case No. 23-1157: State of Utah

Case No. 23-1181: Kinder Morgan, Inc.

Case No. 23-1183: State of Ohio, State of West Virginia, State of Indiana

Respondents

The respondents in these consolidated petitions for review are the U.S. Environmental Protection Agency (EPA) and Michael Regan, in his official capacity as Administrator of EPA.

Intervenors

As of the date of this filing, the following parties have moved to intervene in the consolidated cases:

As respondents, except as to any petitions challenging the Plan as insufficiently stringent: Air Alliance Houston, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Clean Wisconsin, Downwinders at Risk, Environmental Defense Fund, Louisiana Environmental Action Network, Sierra Club, Southern Utah Wilderness Alliance, and Utah Physicians for a Healthy Environment (ECF Doc. 2007135).

Amici Curiae

Proposed Intervenors are unaware of any entities that have given notice of, asked for leave to appear, or have been granted leave to appear as amicus curiae.

Dated: July 20, 2023

/s/Claiborne E. Walthall
Claiborne E. Walthall
Assistant Attorney General
New York State Office of
the Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Claiborne E. Walthall, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document contains 3,602 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 27(d)(1)(E) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

Dated: July 20, 2023

/s/ *Claiborne E. Walthall*
Claiborne E. Walthall
Assistant Attorney General
New York State Office of
the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Leave to Intervene, with attachments, was filed on July 20, 2023 with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: July 20, 2023

/s/ Claiborne E. Walthall
Claiborne E. Walthall
Assistant Attorney General
New York State Office of
the Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents.	Consolidated Case Nos. 23-1157, 23-1181, 23-1183

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

DECLARATION OF ROBERT BIELAWA, P.E. IN SUPPORT OF MOTION FOR INTERVENTION

I, Robert D. Bielawa, P.E., declare as follows:

1. I am the Chief of the State Implementation Plan (SIP) Planning Section in the Bureau of Air Quality Planning in the Division of Air Resources of the New York State Department of Environmental

Conservation (DEC), where I oversee all aspects of SIP planning for the State of New York.

2. I am familiar with the facts and circumstances of this matter, in which States "upwind" of New York and others seek to challenge EPA's final rule "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) (Good Neighbor Plan or Plan). The Good Neighbor Plan promulgates federal implementation plan (FIP) requirements for 23 States that address outstanding obligations under the "Good Neighbor Provision" of the federal Clean Air Act (Act). The Act requires these upwind States to prohibit interstate transport of air pollution that significantly contributes to nonattainment or interferes with maintenance of the 2015 ozone national ambient air quality standards (ozone standards) in "downwind" States, including New York.

3. I submit this declaration in support of the motion of New York and other States to intervene as respondents with respect to all petitions challenging the Good Neighbor Plan, except for any petitions filed challenging the Plan as insufficiently stringent.

BACKGROUND AND QUALIFICATIONS

4. I received my Bachelor of Science degree in Chemical Engineering from Clarkson University in 1986.

5. I have worked at DEC since May 10, 1990. In addition to my current position, which I have held since September 25, 2014, I have held the position of Professional Engineer 1 in the Division of Hazardous Substances Regulation from May 10, 1990 – 1994, and in the Division of Air Resources from 1994 – September 24, 2014.

6. As Chief of the SIP Planning section, I oversee DEC's development of state implementation plans for criteria pollutants, including ozone, regulated by EPA under the Act. These plans detail how DEC will assure that, among other things, the air quality in New York will come into and maintain compliance with the standards for ozone.

7. As part of my job responsibilities, I have worked on efforts within New York to adopt feasible control programs that could meaningfully reduce emissions of nitrogen oxides (NOx) and volatile organic compounds (VOCs), pollutants known as "ozone precursors" that lead to the formation of ozone. These control programs have included the NOx Budget Trading Programs, 6 New York Codes, Rules & Regulations

(NYCRR) Subpart 227-3 and subsequent Part 204 in the past; and the current Clean Air Interstate Rule (CAIR) and Cross-State Air Pollution Rule (CSAPR) trading programs, 6 NYCRR Parts 243, 244 and 245. I also have knowledge of emissions inventories, photochemical modeling, and rule development that are included as part of the SIP development process.

8. Many DEC regulations have placed emission reduction requirements on in-state power plants and other emissions sources that are more stringent than those required by the federal government and many other States. DEC also regulates motor vehicles and their associated emissions to the full extent allowed by law, in accordance with the Environmental Conservation Law and applicable regulations under Title 6, Chapter III, of New York Codes, Rules, and Regulations.

9. Nonetheless, those requirements have been insufficient to fully address ozone nonattainment and maintenance issues in New York in part due to the continued contribution of ozone-forming pollution from upwind States.

10. New York has struggled to meet or maintain the ozone standards in certain areas, including the multi-state New York-N. New

Jersey-Long Island, NY-NJ-CT Nonattainment Area (New York Metropolitan Area). Based on 2022 data (the most recent certified data available), 7 monitors in this tri-state area have 2022 design values[1] indicating nonattainment for the 2015 ozone standards.

OZONE FORMATION AND HEALTH AND WELFARE EFFECTS

11. Ground-level ozone, the principal component of "smog," is not emitted directly into the air, but is a secondary air pollutant that forms in the atmosphere through a series of complex chemical reactions involving NOx and VOCs in the presence of sunlight and warm temperatures.

12. Peak ozone concentrations in New York typically occur from May to September, known as the ozone season, when temperatures are highest.

13. NOx and VOC emissions from local urban sources over successive hot days combine with high-level concentrations of ozone and

[1] A "design value" is "a statistic that describes the air quality status of a given location relative to the level of the [national ambient air quality standards]." https://www.epa.gov/air-trends/air-quality-design-values#definition . For the 2015 ozone standards, EPA calculates a design value for a given site by averaging over three consecutive years the annual fourth-highest daily maximum eight-hour average ozone concentration. *See* 40 C.F.R. § 50.15(b).

ozone precursors that have been transported into the area from sources located outside and upwind of New York by westerly to southerly winds.

14. Breathing ozone can trigger a variety of health problems, including chest pain, coughing, throat irritation, and airway inflammation. It can also reduce lung function and harm lung tissue. Ozone can worsen bronchitis, emphysema, and asthma, leading to increased medical costs. Studies also link ozone exposure to early deaths. People most at risk from breathing air containing ozone include people with asthma, children, older adults, and people who are active outdoors, especially outdoor workers. High ozone levels impose higher health-related costs on New York and its citizens and result in other economic harms from missed school and work days. Ozone pollution has also been linked to increased risk of illness or death from acute respiratory diseases.

15. In addition to its health effects, ozone interferes with the ability of plants to produce and store nutrients, which makes them more susceptible to disease, insects, harsh weather, and other pollutants. This impacts annual crop production throughout the United States, including in New York, resulting in significant losses and injury to native

vegetation and ecosystems. Furthermore, ozone damages the leaves of trees and other plants, ruining the appearance of parks and recreation areas owned by the State and New York municipalities. Ozone can also damage certain human-made materials, such as textile fibers, dyes, rubber products and paints.

OZONE AND AIR QUALITY IN NEW YORK

16. The Good Neighbor Plan seeks to require that sources in upwind States—nearly eight years after promulgation of the 2015 ozone standards—sufficiently control their emissions of ozone precursors.

17. Many of these sources' failure to adequately control their emissions contributes to the degradation of air quality in New York, particularly sources located in States that significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone standards in the New York Metropolitan Area.

18. The New York Metropolitan Area is a tri-state nonattainment area designated by EPA. It encompasses nine counties in New York, including all five of the New York City counties, twelve counties in New Jersey and three counties in Connecticut. Nonattainment of the ozone

standards at any monitor in the area will result in a nonattainment designation for all three States.

19. In 2015, EPA promulgated the current ozone standards, setting them at a level of 70 parts per billion (ppb), measured over an eight-hour period. EPA classified the New York Metropolitan Area as being in "moderate" nonattainment of the 2015 ozone standards. As a result, it faces an attainment deadline in August 2024, with attainment status to be determined by air quality measured in 2021, 2022 and 2023. *See* EPA, Fact Sheet- Final Rule: Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach at 1, *available at* https://www.epa.gov/sites/production/files/2018-03/documents/fs-2015-ozone-implementation-03012018.pdf.

20. The moderate classification required DEC to prepare and submit an attainment demonstration SIP for the 2015 ozone NAAQS to EPA by August 3, 2021. New York is subject to EPA's final Good Neighbor Plan because it did not submit an attainment demonstration SIP by the deadline and EPA did not approve the Good Neighbor provisions in DEC's

infrastructure SIP (Element D) submitted on September 25, 2018 for the 2015 ozone NAAQS.

21. Even though New York is subject to the Good Neighbor Plan, New York currently has some of the most stringent NOx and VOC control programs in the country, aggressively regulating power plants, factories, and motor vehicles. These programs include:

a. Stringent Reasonably Available Control Technology requirements for all major NOx and VOC stationary sources in New York, including power plants and major non-power plant sources such as Portland Cement Plants and Glass Plants, 6 NYCRR Parts 212-3, 220 and 227-2.

b. Adoption of California's motor vehicle emission standards, which place more stringent controls on the amount of NOx emitted from motor vehicles than federal emission standards. New York has adopted the Low Emission Vehicle III standards, which set emissions standards on all 2017 through 2025 model year vehicles up to 14,000 pounds gross vehicle weight rating, and recently adopted revisions to strengthen our aftermarket catalytic converter

standards. New York is also in the final stages of updating 6 NYCRR Part 218 again to include Advanced Clean Cars II and HD Omnibus/Phase II GHG provisions. 6 NYCRR Part 218.

c. Statewide Vehicle Inspection and Maintenance requirements for motor vehicles that include testing of older, high emitting vehicles to significantly reduce on-road mobile emissions. 6 NYCRR Part 217-6.

d. Adoption of regional measures to reduce VOC emissions from a variety of large source categories that have been recommended by the Ozone Transport Commission, including architectural and industrial maintenance coatings, solvent metal cleaning, adhesives and sealants, consumer products, portable fuel containers, and asphalt paving. 6 NYCRR Parts 205, 226, 228, 235, 239, and 241.

e. Lowest Achievable Emission Rate standards on all new major sources of NOx or VOCs, and on all existing sources that would undergo major modifications with emissions

above certain significant project thresholds. 6 NYCRR Part 231.

f. Regulation of certain oil- and natural gas-fired combustion turbines, referred to as "peaking units," to lower their allowable NOx emissions during the ozone season. 6 NYCRR Part 227-3.

22. New York's power plant sources are also subject to an overall state emissions budget set in EPA's prior transport rules such as the Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054 (Apr. 30, 2021) (Revised CSAPR Update), addressing earlier ozone standards.

23. Based on the latest national inventory, major power plants in New York reduced ozone-season NOx emissions by 75.9 percent between 2008 and 2022.[2] These reductions can largely be attributed to the strong NOx regulations adopted by New York.

---

[2] EPA, Air Markets Program Data, https://campd.epa.gov/. Data Type: Emissions, Data Subtype: Ozone Season Emissions, Aggregation: Facility. Filters: Time Period (2008 and 2022), State/Territory: New York. Manually subtract emissions from facilities that are not power plants.

24. Despite the significant emission reductions achieved through New York's in-state controls, air quality monitors in the New York Metropolitan Area continue to record ozone levels in excess of the 2015 ozone NAAQS. *See* N.Y. Dep't of Envtl. Conserv., *2022 Ozone Exceedances in New York State, available at* https://www.dec.ny.gov/docs/air_pdf/2022o3.pdf, attached as **Exhibit 1**; N.Y. Dep't of Envtl. Conserv., *2023 Ozone Exceedances in New York State, available at* https://www.dec.ny.gov/docs/air_pdf/2023o3.pdf, attached as **Exhibit 2**.

25. More specifically, in comparison to the 70 ppb ozone standards, annual fourth-highest values in 2022 for the New York Metropolitan Area were 81 ppb at the Westport (Fairfield County) monitor in coastal Connecticut, the highest value in the tri-state New York Metropolitan Area, and 74 ppb at the Babylon, New York monitor on Long Island. EPA, Ozone Design Values, 2022 (xlsx), *available at* https://www.epa.gov/air-trends/air-quality-design-values#report. Ozone levels in the New York Metropolitan Area have continued to exceed the standards due in part to transported ozone from upwind States.

26. These persistently elevated levels of ozone will make it extremely difficult for the New York Metropolitan Area to attain the 2015 ozone standards by the 2024 statutory deadline without significant, permanent, and enforceable reductions in emissions from upwind sources in 2023 and thereafter, i.e., the years covered by the challenged Good Neighbor Plan.

27. Additionally, the Dunkirk monitor in western New York, a separate area EPA previously determined was in attainment, measured a fourth-highest value in 2022 of 71 ppb, exceeding the 2015 ozone standards. Preliminary data already has the Dunkirk monitor with a fourth-highest value of 72 ppb in 2023.

TRANSPORTED OZONE POLLUTION AND THE GOOD NEIGHBOR PROVISION

28. Complicating the strategy to reduce ozone in the New York Metropolitan Area is the fact that the chemical reactions that create ozone can take place while the pollutants are being transported through the air by the wind. This means elevated levels of ozone can occur hundreds or thousands of miles away from the source of their original precursor emissions. The high concentrations of ozone that occur in New York are in large part the result of emissions from major stationary

sources of NOx located upwind in other States, such as Indiana, Illinois, Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia.

29. The formation and transport of ozone occurs on a regional scale over much of the eastern United States, with ozone precursors traveling hundreds of miles from upwind to downwind States.

30. EPA has known for decades of the regional nature of the ground-level ozone air quality problem. Pollution from sources located in multiple upwind States contributes to downwind States' problems attaining and maintaining the ozone standards, with those sources in upwind States routinely contributing to multiple downwind air quality problems in varying amounts.

31. Thus, EPA knows that downwind States such as New York cannot attain the ozone standards on their own, and that reducing ozone concentrations in downwind States requires a reduction in what EPA calls the "interstate transport" of ozone precursor emissions from upwind States.

32. New York has been involved for decades in efforts to mitigate interstate transport of ozone and its precursor emissions. Nevertheless,

over 13.1 million New Yorkers continue to breathe air with elevated ozone concentrations, with even higher numbers on the worst ozone days.[3] These high ozone days may cause or exacerbate health problems especially for vulnerable populations, including children, elderly, and those with compromised immune systems. Without an effective solution to the ozone transport issue, public health and welfare in New York remain at risk.

33. The Act requires each upwind State to submit a state implementation plan within three years of the promulgation or revision of an air quality standard that provides for the "implementation, maintenance, and enforcement" of the standard. 42 U.S.C. § 7410(a)(1). These state implementation plans must meet the requirements listed under 42 U.S.C. § 7410(a)(2), including the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I), referred to as the Good Neighbor Provision.

34. The Good Neighbor Provision requires that each state implementation plan contain adequate provisions to prohibit emissions

---

[3] *See* U.S. Dep't of Transp., Nonattainment Area – 8 hr Ozone (2015 Standard), USDOT BTS, ArcGIS Online, https://geodata.bts.gov/datasets/usdot::nonattainment-area-8-hr-ozone-2015-standard/explore?location=40.507889%2C-73.610600%2C8.68&showTable=true

that will significantly contribute to nonattainment of an air quality standard, or interfere with maintenance of an air quality standard, in a downwind State. *Id.*

35. Section 110(c)(1) of the Act, 42 U.S.C. § 7410(c)(1), requires EPA to promulgate a federal implementation plan as a "backstop" in the event that a State fails to submit a state implementation plan addressing Good Neighbor Provision requirements, or EPA disapproves a State's Good Neighbor Provision state implementation plan submission.

36. Section 110(c)(1) further requires EPA to promulgate a federal implementation plan to satisfy the Good Neighbor Provision obligation within two years of disapproving or issuing a finding of failure to submit a state implementation plan. *Id.*

EPA'S ACTIONS TO ADDRESS THE GOOD NEIGHBOR PROVISION FOR THE 2015 OZONE STANDARDS

37. For the 2015 ozone standards, many upwind States failed to submit state implementation plans that fully complied with the Good Neighbor Provision by the statutory deadline. When several States upwind of the New York Metropolitan Area did not timely submit state implementation plans, New York and other downwind States commenced deadline enforcement litigation. *New Jersey v. Wheeler*, Case No. 1:19-cv-

03247-ABJ (D.D.C.). EPA subsequently made the required findings of failure to submit for these States, among others. 84 Fed. Reg. 66,612 (Dec. 5, 2019) (effective Jan. 6, 2020).

38. EPA's findings of failure to submit set a statutory deadline of January 6, 2022, for the agency to promulgate federal implementation plans for States covered by the notice, unless they submitted state implementation plans that EPA approved in the meantime.

39. EPA missed its deadline to promulgate federal implementation plans for all States covered by these findings, which also did not submit EPA-approved state implementation plans in the meantime. Several citizen groups brought deadline enforcement litigation to obtain a court-ordered deadline for EPA's action. *Sierra Club v. Regan*, Case No. 4:22-cv-01992-DMR (N.D. Cal.).

40. Meanwhile, other upwind States, including Indiana, Kentucky, Michigan, Ohio, Texas and West Virginia, submitted state implementation plans, but EPA failed to approve or disapprove them within a year as required by the Act. After New York and other downwind States commenced deadline enforcement litigation, they reached agreement with EPA on a consent decree establishing deadlines for EPA

to act on these state implementation plans. *See* Consent Decree, *New York v. Regan*, Case No. 1:21-cv-252-ALC, Doc. 38 (S.D.N.Y. filed Nov. 15, 2021).

41. On January 31, 2023, EPA signed a final rule disapproving the state implementation plans for 21 states. *See* 88 Fed. Reg. 9336 (Feb. 13, 2023). Despite the inclusion of stringent measures for in-state sources in New York's infrastructure state implementation plan for the 2015 ozone standards submitted to EPA on September 25, 2018, EPA disapproved the submission. *Id.* As a result, the federal Good Neighbor Plan also applies to New York.

42. EPA signed a proposal for a regional transport rule on February 28, 2022. *See* 87 Fed. Reg. 20,036 (Apr. 6, 2022) (Proposed Plan). The Proposed Plan included federal implementation plan requirements for 26 States where EPA had made findings of failure to submit or had proposed disapproval of a state implementation plan in whole or in part.

43. The Proposed Plan analyzed upwind States' significant contribution to downwind States' ozone nonattainment or maintenance problems under the same four-step framework EPA had used in the 2011

Cross-State Air Pollution Rule and subsequent ozone transport rules, and set state emissions budgets for power plants and several industrial sectors.

44. New York joined with other States in submitting comments generally supportive of the Proposed Plan, while also calling for EPA to strengthen its requirements. *See* Comments of the Attorneys General of New York, et al. on Proposed Rule "Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard," 87 Fed. Reg. 20,036 (Apr. 6, 2022) Docket ID No. EPA–HQ–OAR–2021-0668-0007 (June 21, 2022), *available at* https://downloads.regulations.gov/EPA-HQ-OAR-2021-0668-0367/attachment_1.pdf.

45. On March 15, 2023, EPA signed the final Good Neighbor Plan under review here, which included federal implementation plan requirements for 23 States. EPA did not finalize federal implementation plan requirements for Delaware and deferred final actions on proposed federal implementation plan requirements for Tennessee and Wyoming.

46. Using EPA's air quality modeling and emissions data, the Good Neighbor Plan identified upwind States that were significantly

contributing to downwind monitors in areas projected to not attain or maintain the ozone standards.

47. The Plan defined ozone-season NOx emissions performance obligations for power plants, establishing a cap-and-trade program beginning with the 2023 ozone season. The Plan also established emissions limitations beginning in 2026 for certain other industrial stationary sources outside of the power sector.

48. For the New York Metropolitan Area, the Plan identified three monitors located in the Connecticut portion of the area that were projected to not attain or maintain the 2015 ozone standards in 2023. *See* Plan, 88 Fed. Reg. at 36,706, Table IV.D-1, IV.D-2.

49. EPA also identified other locations that its modeling did not project as exceeding the ozone standards, but which actual measured data predicted would be violating the ozone standards in 2023. *See id.* Table IV.D-3. EPA used these additional "violating" monitors to confirm the upwind States that were "linked" to downwind States for determining significant contribution. These included two additional monitors in Connecticut (including one in the New York Metropolitan Area) and one in Suffolk County, New York, also in the New York Metropolitan Area.

50. EPA's contribution modeling, combined with analysis under its four-step framework, determined that several upwind States significantly contributed to nonattainment or interference with maintenance in the New York Metropolitan Area and should therefore be required to reduce their ozone precursor emissions.

51. The Good Neighbor Plan further concluded that upwind States could reduce these emissions by operating existing pollution control equipment in the near term and installing new pollution control equipment—of the type already installed in most sources in downwind States such as New York and in many sources in upwind States—in future years. *See* Plan, 88 Fed. Reg. at 36,744 n. 241, 242 (citing comments and regulations detailing required installation of selective catalytic reduction equipment in northeastern States).

HARM TO NEW YORK FROM UPWIND OZONE PRECURSOR EMISSIONS ADDRESSED BY THE GOOD NEIGHBOR PLAN

52. For decades, New York has struggled to meet or maintain the ozone standards in certain areas, including the multi-state New York Metropolitan Area, due in large part to ozone precursor pollution from sources in upwind States. These upwind States include petitioners Ohio,

Indiana, and West Virginia, which EPA identified as significantly contributing to nonattainment monitors in the New York Metropolitan Area in 2023. *See* EPA, Air Quality Modeling Final Rule Technical Support Document, 2015 Ozone NAAQS Good Neighbor Plan, EPA-HQ-OAR-2021-0668-1157, at C-2 to -5 (showing projected significant contributions to Fairfield and New Haven, CT and Suffolk, NY monitors), https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-1157.

53. Downwind areas such as New York continue to struggle with attainment and maintenance of the 2015 ozone standards. The citizens and residents of New York, including the New York Metropolitan Area, continue to breathe air with ozone levels exceeding these standards.

54. As a result, residents of New York face higher health and welfare risks from elevated levels of ozone pollution than would otherwise occur, which can result in medical costs, missed school and work days, and other economic burdens.

55. In addition, New York State and the City of New York own significant areas of public lands, where natural communities are threatened by ozone concentrations that exceed the ozone standards.

56. If the petitions for review here result in vacatur of the Good Neighbor Plan, the projected reductions in ozone at nonattainment monitors in the New York Metropolitan Area would not occur or could be delayed beyond 2023. *See* Plan, 88 Fed. Reg. at 36,743, Table V.D.1-2. The outcome of this case could therefore harm New York in several import respects.

57. First, the emissions reductions required by the Plan are necessary to protect public health and welfare in the New York Metropolitan Area. Without these reductions, millions of people in the New York Metropolitan Area would be harmed by continuing to endure significant levels of pollution from upwind, out-of-state sources. These harms are particularly acute at monitoring locations such as Suffolk County, New York, which is identified as "violating" the ozone standards in 2023 if no emissions reductions occur.

58. Based on comments on the Proposed Plan, *see* 88 Fed Reg. 36,714, several upwind States are likely to challenge EPA's continuing use of a threshold of 1 percent of the national ambient air quality standards for ozone for determining which upwind States are "linked" to downwind nonattainment areas—even though EPA has consistently

applied a uniform 1 percent-of-the-NAAQS contribution screening threshold to identify linked upwind States. *See* 88 Fed. Reg. at 36,677-78, 36,712. A less-stringent screening level could mean that fewer upwind States would be held responsible for the downwind impacts of their pollution.

59. Second, without reductions in transported emissions from upwind States beginning in 2023, particularly near monitoring locations in Connecticut and coastal New York within the New York Metropolitan Area, the nonattainment area will also likely miss its attainment deadline in 2024. Compliance with the ozone standards by 2024 will be based on ozone levels measured in 2021, 2022 and 2023, and therefore the reductions from the Good Neighbor Plan in 2023 are critical to New York's eventual attainment.

60. If the New York Metropolitan Area does not meet the ozone standards by August 2024, EPA can reclassify the area to a "serious" nonattainment classification. Reclassification will result in more stringent emissions control requirements, which can be more costly for New York sources. In addition, reclassification will also set a subsequent deadline by which the New York Metropolitan Area must attain the

ozone standards; if the area does not meet that deadline, the area may be subject to a higher (worse) classification and more stringent requirements.

61. In addition, New York is also an upwind State whose compliance with the Clean Air Act is determined by the Good Neighbor Plan. Any order affecting the validity of the Plan could impact and even undermine New York's planning and actions to meet its statutory obligations under the Good Neighbor Provision.

62. Third, New York has been engaged in regulatory and judicial proceedings related to the regional control of ozone emissions for years, including litigation over EPA's missed deadlines to act on state implementation plans required by the Act for compliance with the Good Neighbor Provision for the 2015 ozone standards.

63. In addition, New York participated in the regulatory comment period preceding EPA's final action on the Good Neighbor Plan. Thus, New York has a direct and substantial interest in the outcome of the litigation with respect to its participation in the regulatory process leading to EPA's final Plan, including a compelling interest in seeing these comments properly addressed by all sources through the final Plan

and ensuring that the final rulemaking reflects the proper legal and procedural standards.

64. Accordingly, the direct and substantial interests discussed above and the harms to New York that would result from successful challenges to the Good Neighbor Plan support granting the motion by New York and other states to intervene as respondents with respect to all petitions challenging the Plan, except for any petitions filed challenging the Plan as insufficiently stringent.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

So declared this 20th day of July, 2023.

Robert Bielawa

Robert Bielawa, P.E.

Exhibit 1

NEW YORK STATE | Department of Environmental Conservation

File Updated: 8/12/2022

2022 OZONE EXCEEDANCES IN NEW YORK STATE

Daily Max 8-Hour Averages

Values (in red) below are maximum daily 8-hour ozone concentrations measured in parts per million, exceeding the 2015 Federal standard of .070 parts per million.

Note: 4th Max. column indicates that the 4th highest 8-hr avg for all days to date, not just those listed

		ID	4th Max	21-Jun	22-Jun	25-Jun	30-Jun	1-Jul	13-Jul	20-Jul	22-Jul	23-Jul	2-Aug	4-Aug	11-Aug					
NYC, Lower Hudson Valley and LI	Babylon	5150-02	**0.074**	0.058	0.045	0.073	0.077	0.046	0.074	0.073	0.074	0.080	0.064	0.054	0.068					
	Holtsville	5151-10	0.069	0.050	0.044	0.067	0.069	0.044	0.070	0.071	0.066	0.077	0.061	0.053	0.057					
	Riverhead	5155-01	0.066	0.044	0.047	0.055	0.062	0.046	0.061	0.069	0.066	0.069	0.063	0.058	0.045					
	Flax Pond	5151-12	0.070	0.040	0.045	0.066	0.070	0.052	0.070	0.071	0.069	0.067	0.076	0.071	0.062					
	CCNY	7093-25	0.065	0.044	0.050	0.061	0.060	0.068	0.063	0.072	0.059	0.067	0.053	0.062	0.055					
	Pfizer Lab	7094-10	0.065	0.045	0.049	0.060	0.060	0.070	0.065	0.070	0.063	0.067	0.056	0.064	0.056					
	IS 52	7094-07	0.064	0.042	0.040	0.062	0.061	0.068	0.064	0.071	0.061	0.068	0.056	0.060	0.057					
	Queens College	7096-15	0.070	0.055	0.053	0.068	0.070	0.056	0.070	0.073	0.068	0.078	0.063	0.059	0.074					
	Fresh Kills West	7097-17	0.063	0.053	0.052	0.061	0.060	0.057	0.059	0.072	0.059	0.065	0.051	0.059	0.061					
	White Plains	5902-04	0.066	0.042	0.044	0.056	0.060	0.067	0.061	0.066	0.058	0.061	0.052	0.070	0.052					
	Rockland County	4353-02	0.062	0.044	0.042	0.046	0.053	0.061	0.048	0.052	0.050	0.048	0.043	0.062	0.048					
UPSTATE	Valley Central	3527-01	0.053	0.035	0.045	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A					
	Millbrook	1328-01	0.063	0.031	0.042	0.037	0.050	0.063	0.036	0.058	0.050	0.055	0.045	0.056	0.046					
	Mt. Ninham	3951-01	0.063	0.033	0.036	0.038	0.054	0.062	0.044	0.055	0.050	0.055	0.047	0.070	0.050					
	Loudonville	0101-33	0.058	0.033	0.042	0.051	0.052	0.062	0.045	0.051	0.050	0.050	0.043	0.056	0.045					
	Stillwater	4567-01	0.058	0.025	0.041	0.039	0.049	0.062	0.037	0.047	0.047	0.047	0.039	0.060	0.040					
	Whiteface Base	1567-04	0.058	0.035	0.044	0.032	0.058	0.060	0.030	0.047	0.043	0.053	0.038	0.047	0.035					
	Piseco Lake	2050-01	0.055	0.025	0.038	0.031	0.049	0.061	0.034	0.042	0.037	0.046	0.037	0.044	0.039					
	Perch River	2223-01	0.059	0.036	0.055	0.050	0.048	0.065	0.030	0.056	0.032	0.057	0.032	0.046	0.028					
	East Syracuse	3353-09	0.056	0.047	0.051	0.044	0.057	0.060	0.046	0.056	0.048	0.052	0.037	0.046	0.033					
	Fulton	3754-01	0.055	0.044	0.043	0.047	0.053	0.057	0.034	0.055	0.038	0.048	0.032	0.034	0.027					
	Rochester	2701-22	0.067	0.078	0.076	0.059	0.067	0.068	0.036	0.056	0.056	0.054	0.036	0.041	0.028					
	Williamson	5863-01	0.059	0.071	0.069	0.055	0.058	0.064	0.032	0.054	0.047	0.051	0.032	0.039	0.028					
	Pinnacle	5001-04	0.055	0.059	0.051	0.042	0.055	0.051	0.038	0.047	0.049	0.047	0.033	0.041	0.038					
	Amherst	1451-03	0.066	0.085	0.066	0.056	N/A	N/A	0.042	0.056	0.060	0.057	0.031	0.043	0.035					
	Middleport	3120-02	0.068	0.080	0.067	0.059	0.068	0.068	0.040	0.054	0.057	0.057	0.034	0.043	0.030					
	Dunkirk	0601-04	**0.071**	0.082	0.071	0.057	0.073	0.073	0.041	0.054	0.061	0.053	0.033	0.041	0.034					

Preliminary data: Data displayed on these pages are preliminary and subject to change.
For validated data, contact the Bureau of Air Quality Surveillance at (518) 402-8508 or go to EPA's Air Data webpage

DEC also provides an Air Quality Index (AQI) forecast for some pollutants that can be harmful to human health. Air Quality alerts are also available through DEC Delivers and other broadcast media.

File Updated: 8/12/2022

NEW YORK STATE Department of Environmental Conservation

To learn more about the forecasts and sign up to be notified when daily air quality reaches a level of your choice, please see our website.

2022 OZONE EXCEEDANCES IN NEW YORK STATE

Daily Max 8-Hour Averages

Values (in red) below are maximum daily 8-hour ozone concentrations measured in parts per million, exceeding the 2015 Federal standard of .070 parts per million.

Note: 4th Max. column indicates that the 4th highest 8-hr avg for all days to date, not just those listed

		ID																	
NYC, Lower Hudson Valley and LI	Babylon	5150-02																	
	Holtsville	5151-10																	
	Riverhead	5155-01																	
	Flax Pond	5151-12																	
	CCNY	7093-25																	
	Pfizer Lab	7094-10																	
	IS 52	7094-07																	
	Queens College	7096-15																	
	Fresh Kills West	7097-17																	
	White Plains	5902-04																	
	Rockland County	4353-02																	
UPSTATE	Valley Central	3527-01																	
	Millbrook	1328-01																	
	Mt. Ninham	3951-01																	
	Loudonville	0101-33																	
	Stillwater	4567-01																	
	Whiteface Base	1567-04																	
	Piseco Lake	2050-01																	
	Perch River	2223-01																	
	East Syracuse	3353-09																	
	Fulton	3754-01																	
	Rochester	2701-22																	
	Williamson	5863-01																	
	Pinnacle	5001-04																	
	Amherst	1451-03																	
	Middleport	3120-02																	
	Dunkirk	0601-04																	

Preliminary data: Data displayed on these pages are preliminary and subject to change.
For validated data, contact the Bureau of Air Quality Surveillance at (518) 402-8508 or go to EPA's Air Data webpage

NEW YORK STATE Department of Environmental Conservation

DEC also provides an Air Quality Index (AQI) forecast for some pollutants that can be harmful to human health. Air Quality alerts are also available through DEC Delivers and other broadcast media.

To learn more about the forecasts and sign up to be notified when daily air quality reaches a level of your choice, please see our website.

Exhibit 2

File Updated:7/14/2023

NEW YORK STATE | Department of Environmental Conservation

2023 OZONE EXCEEDANCES IN NEW YORK STATE

Daily Max 8-Hour Averages

Values (in red) below are maximum daily 8-hour ozone concentrations measured in parts per million, exceeding the 2015 Federal standard of .070 parts per million.

Note: 4th Max. column indicates that the 4th highest 8-hr avg for all days to date, not just those listed

		ID	4th Max	13-Apr	14-Apr	15-Apr	12-May	31-May	1-Jun	2-Jun	11-Jun	29-Jun	30-Jun	1-Jul	5-Jul	6-Jul	11-Jul	12-Jul	13-Jul
NYC, Lower Hudson Valley and LI	Babylon	5150-02	**0.074**	0.068	0.066	0.031	0.065	0.042	0.045	0.056	0.064	0.074	0.078	0.074	0.073	0.049	0.074	0.082	0.052
	Holtsville	5151-10	**0.071**	0.072	0.070	0.034	0.065	0.042	0.045	0.061	0.063	0.069	0.078	0.071	0.068	0.050	0.071	0.084	0.052
	Riverhead	5155-01	0.070	0.072	0.069	0.031	0.065	0.038	0.042	0.067	0.060	0.056	0.071	0.070	0.055	0.051	0.061	0.076	0.052
	Flax Pond	5151-12	**0.076**	0.076	0.072	0.029	0.070	0.039	0.052	0.078	0.065	0.063	0.074	0.076	0.055	0.053	0.062	0.080	0.054
	CCNY	7093-25	**0.073**	0.068	0.063	0.031	0.060	0.041	0.057	0.077	0.062	0.055	0.081	0.073	0.075	0.054	0.065	0.067	0.055
	Pfizer Lab	7094-10	**0.072**	0.070	0.067	0.030	0.061	0.044	0.060	0.073	0.064	0.053	0.082	0.075	0.064	0.058	0.063	0.072	0.056
	IS 52	7094-07	0.068	0.068	0.058	0.028	0.061	0.038	0.056	0.065	0.059	0.052	0.081	0.072	0.065	0.052	0.065	0.070	0.047
	Queens College	7096-15	**0.074**	0.075	0.064	0.037	0.066	0.039	0.041	0.066	0.065	0.063	0.083	0.074	0.068	0.051	0.074	0.079	0.054
	Fresh Kills West	7097-17	0.070	0.069	0.070	0.036	0.060	0.042	0.059	0.083	0.060	0.058	0.084	0.065	0.080	0.050	0.061	0.064	0.058
	White Plains	5902-04	**0.072**	0.070	0.072	0.033	0.059	0.048	0.068	0.074	0.067	0.052	0.086	0.074	0.056	0.059	0.054	0.062	0.057
	Rockland County	4353-02	**0.072**	0.067	0.080	0.040	0.061	0.052	0.069	0.060	0.071	0.045	0.086	0.074	0.042	0.072	0.048	0.056	0.064
UPSTATE	Valley Central	3527-01	**N/A**	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Millbrook	1328-01	0.067	0.062	0.073	0.044	0.056	0.053	0.058	0.058	0.065	0.036	0.080	0.075	0.038	0.065	0.049	0.054	0.067
	Mt. Ninham	3951-01	0.066	0.066	0.082	0.039	0.058	0.051	0.062	0.054	0.065	0.036	0.079	0.073	0.038	0.060	0.048	0.052	0.058
	Loudonville	0101-33	0.068	0.063	0.069	0.052	0.064	0.068	0.066	0.058	0.053	0.037	0.067	0.082	0.047	0.059	0.055	0.048	0.071
	Stillwater	4567-01	0.064	0.064	0.068	0.055	0.060	0.064	0.056	0.054	0.053	0.025	0.063	0.077	0.037	0.045	0.054	0.046	0.063
	Whiteface Base	1567-04	0.064	0.070	0.062	0.064	0.058	0.050	0.057	0.062	0.042	0.032	0.053	0.062	0.028	0.038	0.058	0.051	0.045
	Piseco Lake	2050-01	0.065	0.065	0.067	0.065	0.063	0.060	0.053	0.050	0.049	0.027	0.061	0.060	0.033	0.044	0.055	0.051	0.048
	Perch River	2223-01	0.064	0.064	0.071	0.064	0.070	0.062	0.063	0.057	0.037	0.042	0.057	0.055	0.045	0.047	0.067	0.038	0.042
	East Syracuse	3353-09	0.070	0.062	0.076	0.062	0.070	0.070	0.062	0.064	0.053	0.049	0.074	0.053	0.051	0.049	0.063	0.044	0.047
	Fulton	3754-01	0.064	0.061	0.070	0.066	0.072	0.064	0.057	0.060	0.044	0.039	0.063	0.050	0.050	0.040	0.061	0.036	0.044
	Rochester	2701-22	0.067	0.059	0.068	0.057	0.070	0.070	0.059	0.059	0.050	0.047	0.063	0.050	0.056	0.054	0.062	0.040	0.047
	Williamson	5863-01	0.065	0.061	0.073	0.056	0.072	0.074	0.059	0.059	0.048	0.045	0.061	0.046	0.058	0.040	0.063	0.038	0.049
	Pinnacle	5001-04	0.068	0.061	0.070	0.054	0.067	0.071	0.069	0.065	0.062	0.058	0.060	0.044	0.044	0.044	0.057	0.043	0.046
	Amherst	1451-03	0.067	0.060	0.069	0.063	0.067	0.068	0.060	0.067	0.062	0.062	0.061	0.065	0.050	0.056	0.058	0.047	0.047
	Middleport	3120-02	0.065	0.060	0.069	0.057	0.065	0.065	0.060	0.065	0.058	0.056	0.040	0.049	0.053	0.059	0.059	0.045	0.046
	Dunkirk	0601-04	**0.072**	0.066	0.070	0.073	0.065	0.064	0.072	0.080	0.062	0.056	0.076	0.064	0.048	0.055	0.058	0.049	0.046

Preliminary data: Data displayed on these pages are preliminary and subject to change.
For validated data, contact the Bureau of Air Quality Surveillance at (518) 402-8508 or go to EPA's Air Data webpage

DEC also provides an Air Quality Index (AQI) forecast for some pollutants that can be harmful to human health. Air Quality alerts are also available through DEC Delivers and other broadcast media.To learn more about the forecasts and sign up to be notified when daily air quality reaches a level of your choice, please see our website.

NEW YORK STATE | Department of Environmental Conservation

File Updated:7/14/2023

2023 OZONE EXCEEDANCES IN NEW YORK STATE

Daily Max 8-Hour Averages

Values (in red) below are maximum daily 8-hour ozone concentrations measured in parts per million, exceeding the 2015 Federal standard of .070 parts per million.

Note: 4th Max. column indicates that the 4th highest 8-hr avg for all days to date, not just those listed

		ID																	
NYC, Lower Hudson Valley and LI	Babylon	5150-02																	
	Holtsville	5151-10																	
	Riverhead	5155-01																	
	Flax Pond	5151-12																	
	CCNY	7093-25																	
	Pfizer Lab	7094-10																	
	IS 52	7094-07																	
	Queens College	7096-15																	
	Fresh Kills West	7097-17																	
	White Plains	5902-04																	
	Rockland County	4353-02																	
UPSTATE	Valley Central	3527-01																	
	Millbrook	1328-01																	
	Mt. Ninham	3951-01																	
	Loudonville	0101-33																	
	Stillwater	4567-01																	
	Whiteface Base	1567-04																	
	Piseco Lake	2050-01																	
	Perch River	2223-01																	
	East Syracuse	3353-09																	
	Fulton	3754-01																	
	Rochester	2701-22																	
	Williamson	5863-01																	
	Pinnacle	5001-04																	
	Amherst	1451-03																	
	Middleport	3120-02																	
	Dunkirk	0601-04																	

Preliminary data: Data displayed on these pages are preliminary and subject to change.
For validated data, contact the Bureau of Air Quality Surveillance at (518) 402-8508 or go to EPA's Air Data webpage

DEC also provides an Air Quality Index (AQI) forecast for some pollutants that can be harmful to human health. Air Quality alerts are also available through DEC Delivers and other broadcast media.To learn more about the forecasts and sign up to be notified when daily air quality reaches a level of your choice, please see our website.

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents.	Consolidated Case Nos. 23-1157, 23-1181, 23-1183

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

DECLARATION OF GLENN KEITH IN SUPPORT OF MOTION FOR INTERVENTION

I, Glenn Keith, declare as follows:

1. I am the Director of the Division of Air and Climate Programs in the Bureau of Air and Waste of the Massachusetts Department of Environmental Protection (MassDEP). I have held this position since October 2018.

2. As Director, I am responsible for administering air quality pollution control programs for the Commonwealth of Massachusetts.

3. I am familiar with the facts and circumstances of this matter, in which states "upwind" of Massachusetts and others seek to challenge EPA's final rule "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) (Rule). The Rule promulgates federal implementation plan (Federal Plan) requirements that address outstanding obligations under the "Good Neighbor Provision" of the federal Clean Air Act (Act). I am familiar with Section 110(a)(2)(D) of the Act that requires upwind states to prohibit interstate transport of air pollution that significantly contributes to nonattainment or interferes with maintenance of the 2015 ozone national ambient air quality standards (ozone standards) in "downwind" states, including Massachusetts.

4. I submit this declaration in support of the motion of Massachusetts, New York and other states to intervene as respondents with respect to all petitions challenging the Rule, except for any petitions filed challenging the Rule as insufficiently stringent.

BACKGROUND AND QUALIFICATIONS

5. Prior to my role as Director, I was a Deputy Director in the Division of Air and Climate Programs for 18 years. Prior to my role as a Deputy Director, I was a Branch Chief for Waste Planning for 3 years. Prior to my role as Branch Chief, I was a Regional Planner in the Bureau of Waste Site Cleanup for 9 years.

6. I have taken numerous technical and regulatory training courses sponsored by MassDEP, the U.S. Environmental Protection Agency (EPA), and the Northeast States for Coordinated Air Use Management (NESCAUM).

7. As Director of the Division of Air and Climate Programs, I oversee MassDEP's development of State Implementation Plans for criteria pollutants, including ozone.

8. As part of my job responsibilities, I ensure that MassDEP's programs adequately prevent emissions from Massachusetts sources from contributing significantly to nonattainment or interfering with maintenance in other states and meet all of the obligations mandated by CAA section 110(a)(2)(D) regarding interstate transport of emissions.

9. On March 9, 2018, MassDEP promulgated 310 CMR 7.34, Massachusetts NOx Ozone Season Program (MassNOx), which replaced the previous federally required Massachusetts Clean Air Interstate Rule (MassCAIR) summertime ozone season nitrogen oxide multi-state trading program with a state-only nitrogen oxide budget program. MassNOx retains the emissions reductions from the MassCAIR program to avoid backsliding under section 193 of the federal Clean Air Act.

10. Several MassDEP regulations have set NOx emission reduction requirements on in-state power plants and other emissions sources that are more stringent than those required by the federal government and many other states, but those requirements have been insufficient to fully address ozone exceedances in Massachusetts due to the continued contribution of ozone-forming pollution from upwind States.

OZONE FORMATION AND HEALTH AND WELFARE EFFECTS

11. Tropospheric, or ground level ozone, is created by chemical reactions between oxides of nitrogen (NOx) and volatile organic

compounds (VOC). This happens when pollutants emitted by cars, power plants, industrial boilers, chemical plants, and other sources chemically react in the presence of sunlight.

12. Ozone is most likely to reach unhealthy levels on hot sunny days in urban environments but can also be transported long distances by wind, so even rural areas can experience high ozone levels.

13. Ozone in the air we breathe can harm our health, especially on hot sunny days when ozone can reach unhealthy levels. People at greatest risk of harm from breathing air containing ozone include those with heart or lung disease such as asthma, older adults, and children.

14. Elevated exposures to ozone can affect sensitive vegetation and ecosystems, including forests, parks, wildlife refuges and wilderness areas. In particular, ozone can harm sensitive vegetation during the growing season.

OZONE AND AIR QUALITY IN MASSACHUSETTS

15. The Rule—nearly eight years after promulgation of the 2015 ozone standards—seeks to require that upwind sources sufficiently control their emissions of ozone precursors.

16. These sources' failure to adequately control their emissions degrades air quality in Massachusetts.

17. In 2015, EPA promulgated the current ozone standards, setting them at a level of 70 parts per billion (ppb), measured over an eight-hour period.

18. To meet these standards, Massachusetts has some of the most stringent NOx and VOC control programs in the country, aggressively regulating power plants, factories, and motor vehicles. These programs include:

a) Stringent Reasonably Available Control Technology requirements for all major NOx and VOC stationary sources in Massachusetts, including power plants and major non-power plant sources. 310 CMR 7.18, 7.19.

b) Adoption of California's motor vehicle emission standards, which place more stringent controls on the amount of NOx

emitted from motor vehicles than federal emission standards. 310 CMR 7.40.

c) Statewide comprehensive Vehicle Inspection and Maintenance requirements for motor vehicles designed to reduce ozone pollution and maintain clean air by ensuring that on-road vehicles meet emissions standards. 310 CMR 60.02.

d) Adoption of regional measures to reduce VOC emissions from a variety of large area source categories that have been recommended by the Ozone Transport Commission, including consumer products, architectural and industrial maintenance coatings, adhesives and sealants, and solvent metal cleaning processes. 310 CMR 7.25.

e) Lowest Achievable Emission Rate standards on all new major sources of NOx or VOCs, and on all existing sources that would undergo major modifications with emissions above certain significant project thresholds. 310 CMR 7.00: Appendix A.

19. Based on the latest national inventory, major power plants in Massachusetts reduced ozone-season NOx emissions by 86 percent between 2010 and 2022.[1] These reductions can largely be attributed to the strong NOx regulations adopted by Massachusetts.

20. Despite the significant emission reductions achieved through Massachusetts' in-state controls, on some days state air quality monitors continue to record ozone levels in excess of the 2015 ozone NAAQs.[2]

21. In the spring of 2023, there were widespread ozone exceedances in the Mid-Atlantic / Northeast region including Massachusetts on April 13 and 14. Out of the 18 ozone monitoring locations in the state, 5 stations recorded an exceedance of the 70 ppb 8-hour ozone standard on April 13, and 7 stations recorded an exceedance of that standard on April 14. This was unusual for April, which is early in the ozone season, and was due to near-record temperatures, favorable southwest air flow, and smoke from agricultural fires. There also was an exceedance at one station on May 12.

[1] EPA, Air Markets Program Data, https://campd.epa.gov/
[2] https://www3.epa.gov/region1/airquality/standard.html

22. In addition, June 1, 2, and 30 and July 1 saw widespread ozone exceedances in the Mid-Atlantic and Northeast regions of Massachusetts, with Chicopee reaching 150 ppb on July 1. Additional ozone exceedances occurred in Massachusetts on July 11 and July 12.

23. These exceedances indicate that ozone continues to be a health threat for Massachusetts. These high ozone days may cause or exacerbate health problems especially for vulnerable populations, including children, the elderly and those with compromised immune systems.

24. Massachusetts also owns significant areas of public lands, whose natural communities are threatened by ozone concentrations that exceed the ozone standards.

TRANSPORTED OZONE POLLUTION

25. The chemical reactions that create ozone can take place while the pollutants are being transported through the air by the wind. This means elevated levels of ozone can exist many miles away from the source of their original precursor emissions. The formation and transport of ozone occurs on a regional scale over much of the eastern

United States, with ozone precursors traveling hundreds of miles from upwind to downwind states.

26. The high concentrations of ozone that are transported into Massachusetts are largely the result of emissions from major stationary sources and mobile sources of NOx in upwind states.

27. Without an effective solution to the ozone transport issue, public health and welfare in Massachusetts remain at risk.

HARM TO MASSACHUSETTS FROM UPWIND OZONE PRECURSOR EMISSIONS ADDRESSED BY THE RULE

28. If the petitions for review here resulted in vacatur of the Rule, the projected reductions in ozone would not occur or could be delayed beyond 2023. *See* Rule, 88 Fed. Reg. at 36,706, Table V.D.1-2. The outcome of this case could therefore harm Massachusetts in several important respects.

29. The emissions reductions required by the Rule are necessary to protect public health and welfare in Massachusetts.

30. Without reductions in transported emissions from upwind states beginning in 2023, Massachusetts will continue to experience high ozone levels that adversely affect public health.

31. Massachusetts has been engaged in regulatory and judicial proceedings related to the regional control of ozone emissions for years, including litigation over EPA's missed deadlines to act on State Implementation Plans required by the Act for compliance with the Good Neighbor Provision for the 2015 ozone standards. *See, eg.,* New York v. Regan (S.D.N.Y. 1:21-cv-00252-ALC); Murray Energy Corp. v. EPA, 936 F.3d 597 (D.C. Cir. 2019).

32. In addition, Massachusetts participated in the regulatory comment period preceding EPA's final action on the Rule. Thus, Massachusetts has a direct and substantial interest in the outcome of the litigation with respect to its participation in the regulatory process leading to EPA's final Rule.

33. Accordingly, the direct and substantial interests discussed above, and the harms to Massachusetts that would result from successful challenges to the Rule, support granting the motion by Massachusetts and other states to intervene as respondents with respect to all petitions challenging the Rule, except for any petitions filed challenging the Rule as insufficiently stringent.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

So declared this 18th day of July, 2023.

Glenn Keith

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents.	Case Nos. 23-1157, 23-1181, 23-1183

On Petitions for Review of Final Action of the United States Environmental Protection Agency

DECLARATION OF GAIL E. GOOD

I, Gail E. Good, state and declare as follows:

I. Purpose of this declaration.

1. I am the Director for the Air Management Program of the Wisconsin Department of Natural Resources (DNR), which is the agency charged with implementation of the Clean Air Act in the state of Wisconsin. In my capacity, I am

responsible for oversight of DNR's programs related to SIP planning and ozone issues.

2. I am familiar with the facts and circumstances of this matter, in which States "upwind" of Wisconsin and others seek to challenge the United States Environmental Protection Agency (EPA's) final rule "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) (Rule).

3. I submit this declaration on behalf of the State of Wisconsin in support of a motion to intervene in this matter.

II. Experience and Qualifications.

4. This declaration is based upon my experience and professional background. I hold a bachelor's degree from Central Michigan University in Earth Science, with Meteorology Concentration. I also hold two master's degrees from the University of Wisconsin – Madison; one in Atmospheric Science and one in Land Resources Management, with certificate in Air Resources Management. I have more than 20 years of experience at DNR. My current responsibilities include statewide oversight of the air management program, including all air quality planning and implementation activities in accordance with the Clean Air Act (Act) and state law. I supervise staff working on, among many other things, ozone policy

issues, state implementation plan development and implementation, and ambient air quality monitoring.

III. The Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards

5. On June 5, 2023, the EPA finalized the Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards.

6. The Rule addresses 23 states' obligations to eliminate significant contributions to nonattainment, or interference with maintenance, of the 2015 ozone National Ambient Air Quality Standards (NAAQS) in other states.

7. According to the Rule, approximately 48 percent of the ozone measured in Wisconsin's nonattainment and maintenance areas is due to emissions originating in other states.

8. EPA predicts that the Rule will, by 2026, result in small improvements in ozone levels in Wisconsin's nonattainment and maintenance areas for the 2015 ozone NAAQS.

IV. Ozone and Air Quality in Wisconsin

9. Historically it has been challenging for Wisconsin to attain and maintain the NAAQS for ozone. This is due to a combination of emissions,

meteorology, and geography, as well as transported pollution originating from out of state, that can result in elevated ozone concentrations in the southeastern part of the state and along the Lake Michigan shoreline during the summer months.

10. Wisconsin currently has three areas that remain designated as nonattainment for the 2015 ozone NAAQS. In addition, Wisconsin has several areas that remain in maintenance for the 2015 ozone NAAQS as well as previous standards, including the 2008 and 1997 ozone NAAQS.

11. Both state law and the Act require Wisconsin to revise its State Implementation Plan (SIP) to ensure ozone nonattainment areas attain ozone NAAQS by the attainment dates specified in the Act, as well as maintain the NAAQS following attainment.

12. Ground-level ozone regulated by the NAAQS is not directly emitted by sources. Rather, it is formed when two precursor pollutants – nitrogen oxides (NOx) and volatile organic compounds (VOCs) – react chemically in the presence of sunlight. Therefore, to decrease ozone concentrations, emissions of NOx and VOCs must be reduced.

13. Federal and state control programs regulating NOx and VOC emissions have, over the past several decades, been successful in reducing ozone concentrations in Wisconsin. However, since ozone levels remain above the

NAAQS in several areas of the state, continued reductions are necessary to reduce ozone to attainment levels as required by the Act.

14. Downwind states such as Wisconsin continue to struggle to timely attain the health-based primary ozone NAAQS. As a result, Wisconsin residents located in ozone nonattainment areas continue to experience air quality that fails to meet the NAAQS, with the attendant consequences on the health and well-being of that population, including larger medical costs, higher asthma rates and hospital visits, missed school and work, and economic costs due to lost productivity.

15. In addition, by operation of law, areas that fail to attain by their attainment date are reclassified to the next higher classification specified in the Act. Each reclassification results in changes to emissions offset ratios and, at times, major source thresholds for nonattainment new source review permitting. These changes make it more challenging and costly for certain businesses to open, relocate to, or expand operations in these areas.

V. Conclusion

16. If petitions for review of the Federal 'Good Neighbor Plan' result in vacatur of the Rule, the projected reductions in ozone at nonattainment monitors in Wisconsin would not occur or could be delayed well beyond 2023 or even 2026.

17. Emissions reductions from upwind states beginning in 2023 are critical; without them, Wisconsin's nonattainment areas will miss their attainment deadlines in 2024 and be reclassified to "Serious" nonattainment.

18. Delays in emissions reductions from this Rule beyond 2023 would challenge Wisconsin's ability to achieve attainment in these areas by 2026, in which case these areas would miss their next attainment date in 2027 and be further reclassified to "Severe" nonattainment.

19. The emissions reductions from upwind states from this Rule, though small, are critical for protection of human health in nonattainment areas in Wisconsin.

20. In addition, Wisconsin needs more substantial upwind state emissions reductions than the Federal 'Good Neighbor Plan' requires, since the Rule, as finalized, does not fully resolve upwind state contributions to Wisconsin's nonattainment and maintenance areas by the attainment dates specified in the Act. Without the rule, this situation would be even more detrimental to Wisconsin.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

So declared this 18th day of July 2023.

Gail E. Good

Gail E. Good

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF UTAH, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents.	Consolidated Case Nos. 23-1157, 23-1181, 23-1183

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

DECLARATION OF DIANA RAMIREZ IN SUPPORT OF MOTION FOR INTERVENTION

I, Diana Ramirez, declare as follows:

1. I am the Interim County Administrator for Harris County, Texas (Harris County or the County), and am charged with the day-to day oversight of Harris County government and provide guidance and coordination to all County departments, including Harris County

Pollution Control Services Department (PCS) and Harris County Public Health (HCPH).

2. I have worked at Harris County since 2021 following 30 years of public service in various capacities with Travis County, the Texas General Land Office and Texas Health and Human Services.

3. I am familiar with the facts and circumstances of this matter, in which "upwind" states seek to challenge EPA's final rule "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) (Good Neighbor Plan or Plan). The Plan promulgates federal implementation plan (FIP) requirements that address outstanding obligations under the "Good Neighbor Provision" of the federal Clean Air Act (Act). The Act requires these upwind states to prohibit interstate transport of air pollution that significantly contributes to nonattainment or interferes with maintenance of the 2015 ozone national ambient air quality standards (ozone standards) in "downwind" states, including the State of Texas non-attainment areas of which Harris County is a part.

4. I submit this declaration in support of the motion of New York, Maryland, the District of Columbia, Harris County, and others to

intervene as respondents with respect to all petitions challenging the Good Neighbor Plan, except for any petitions filed challenging the Plan as insufficiently stringent.

OZONE IN HARRIS COUNTY

5. At a population of over 4.7 million residents,[1] Harris County is the most populous county in Texas and along the coast of the Gulf of Mexico, as well as the third most populous county in the nation. Harris County is home to the petrochemical capital of the nation, the Houston Ship Channel and the nation's largest port for waterborne tonnage.

6. Harris County has suffered from poor air quality for decades and ozone pollution is of particular concern. Based on the best available science, the four ozone national ambient air quality standards, established in 1979, 1997, 2008, and 2015 have set progressively lower permissible ozone levels of 120 parts per billion (ppb), 80 ppb, 75 ppb, and 70 ppb. Harris County, which is the largest county in the Houston-Galveston-Brazoria area (HGB area), has never met any of the ozone standards at the time of their initial implementation.

[1] U.S. Census Bureau, 2019 Population Estimates.

7. Harris County is experiencing an upward trend in ozone pollution.[2] During 2022, Harris County saw the highest numbers of days with high ozone levels in the past seven years and 2023 is expected to be the same or possibly even worse.[3] Ozone levels can reach unhealthy levels in cold and hot weather. However, ozone is more than likely to reach unhealthy levels on hot sunny days in urban environments.[4]

8. As Texas summers are hotter and lasting longer, Harris County is at greater risk for ozone pollution. HGB area ozone formation peaks from April through June and then again from August through October.[5]

---

[2] Air Alliance Houston, Hot weather and air pollution are driving unhealthy ozone season in Houston. https://airalliancehouston.org/hot-weather-and-air-pollution-are-driving-an-unhealthy-ozone-season-in-houston/

[3] *Id*.

[4] U.S. EPA, Ground-level Ozone Basics.

[5] TCEQ – Appendix B – Proposed Conceptual Model for the HGB Nonattainment Area for the 2015 Eight-Hour ozone NAAQS

9. The HGB area remains in nonattainment for the 2008[6] and 2015[7] ozone national ambient air quality standards. EPA recently reclassified the HGB area as a moderate nonattainment area for the 2015 Ozone national ambient air quality standards and as severe nonattainment area for the 2008 ozone national ambient air quality standards.[8] EPA notably denied Texas's request for a 1-year extension of the attainment date for 2008 ozone national ambient air quality standards for the HGB area, in part because EPA's consideration of air quality trends in the area indicated it would fail to timely attain by the extended date.[9] Additionally, EPA acknowledged that "communities residing and working near violating ozone monitors in the Houston area and the Houston Ship Channel are exposed to a significant and disproportionate burden of ozone pollution and other sources of pollution

[6] 75 parts per billion (ppb); *see also* 42 U.S.C. § 7511a(b); 40 C.F.R. § 51.1103(a) tbl. 1 (attainment dates for Texas).

[7] 70 ppb.

[8] 87 FR 60926 (October 7, 2022); 87 FR 60897 (October 7, 2022).

[9] 87 FR 60926, 60929-60930 (October 7, 2022).

(e.g., vehicle traffic and particulate matter emissions) compared to the greater Houston area and the U.S. as a whole."[10]

10. Modeling data prepared by the Texas Commission on Environmental Quality (TCEQ) indicates that the HGB area will fail to meet the moderate deadline of August 3, 2024 for the 2015 ozone national ambient air quality standards.[11] If so, the HGB area will be reclassified to serious for the 2015 ozone national ambient air quality standards.

11. The HGB area is impacted by emissions from various "upwind" states, including Louisiana, Mississippi, and Arkansas; the Good Neighbor Plan will significantly cut ozone forming pollution from these states and others and assist with badly needed reductions in ozone forming precursors that are transported into the HGB area.

OZONE IMPACTS TO HARRIS COUNTY OPERATIONS

12. The impact of ozone on human health and the environment is well established, as ozone can cause a plethora of problems including pain when taking a deep breath, inflammation/damage to airways, greater

[10] *Id.*

[11] TCEQ HGB Moderate Area Attainment Demonstration SIP Revision for the 2015 eight-hour ozone NAAQS at ES-3.

susceptibility of lungs to infection, aggravation of lung diseases, and increased frequency of asthma attacks.[12] HCPH is the Harris County Department designated with responsibility for providing comprehensive health services and programs to our community. HCPH programs include community outreach activities for disease prevention that are directly and indirectly related to environmental risks, including exposure to ozone. These programs engage the community with outreach, education, and initiatives, including asthma control programs and services (Open Airways & Kickin' Asthma; Breathe Well, Live Well; and Home Visits), Obesity Reduction (Eat, Play, Grow; CATCH; and Cooking Matters), and the Diabetes Prevention Program, all of which target health issues that have a positive association to ozone exposure. Elevated ozone levels in Harris County increase the need and costs for these HCPH programs and services.

13. PCS is the Harris County Department designated to inspect facilities in Harris County for compliance with air quality laws and regulations, review air permit applications, and submit comments to the

[12] U.S. EPA, Health Effects of Ozone Pollution. https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution

TCEQ and EPA on regulatory actions. As a part of its mission, PCS conducts investigations, both routine and complaint initiated, and, when appropriate, issues Violation Notices and refers cases to the Harris County Attorney's Office or District Attorney's Office for civil or criminal enforcement. Due to community concern about air pollution, including ozone, PCS implemented a Community Air Monitoring Program. The Community Air Monitoring Program measures pollution levels across Harris County, identifies emission sources that impact our community – including ozone precursors, and informs the public on priorities related to clean air. As ozone levels fail to reach attainment, Harris County will have an increased need for PCS and its role as regulator and enforcer of air quality regulations.

14. In addition to Harris County departmental impacts, continued ozone non-attainment can have impacts to Harris County's economy. Harris County public offering documents required for bonds by the Federal Securities and Exchange Commission note that continued nonattainment may result in additional permitting/regulatory restrictions and fees, which can create constraints on economic growth and development by increasing costs for new development in the HGB

area, impacting where people choose to live and work and what jobs are available.

15. The direct and substantial interests discussed above demonstrate the continued harm to Harris County from elevated ozone levels, which would continue if challenges to the Good Neighbor Plan are successful.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

So declared this 20th day of July, 2023.

Diana Ramirez

Diana Ramirez