

# CIBO Meeting Clean Air Act Status Report

Kathy G. Beckett  
Steptoe & Johnson PLLC  
December 12, 2023

# Good Neighbor Litigation: Regional Federal Courts

- SIP Disapproval Litigation
  - 5<sup>th</sup> Circuit (State of Texas v. EPA (5<sup>th</sup> Cir. 23-0-60069))
    - Oral argument scheduled for December 4, 2023
      - Texas: EPA missed the deadline for approval/disapproval of the Texas SIP and fails to acknowledge the Texas unique factors the SIP addresses. The four-factor test was a yardstick to disapprove the SIP. EPA fails to allow weight of evidence. EPA graded the SIP based upon information provided, after the test.
      - DOJ:
        - This case is nationwide in scope as ozone is a national transport issue. The statute designates the D.C. Circuit for national issues like ozone. Uniquely, ozone requires a centralized national assessment because of transport.
        - Texas significance determination is wrong. EPA rejected the TX SIP not because of the four-factor test (an organizational tool), but because of the improper support for Texas' significance determination.
        - The remedy was to seek a deadline suit against EPA for missing the deadline, but no one did that.
        - Under every iteration of data [old or new], the states were contributing and they took no additional analysis that was required and expected as clearly explained in the proposal and then the disapproval.
      - Louisiana: EPA summarily dismissed the LA SIP and offered no technical basis.
      - Mississippi: only one receptor was at 1%, at .79 ppb so a judgement call was it was not a significant contributor to other states nonattainment. The Mississippi SIP was based on reasonable judgement.
      - Who gets to claim reasonableness, EPA or the States?
      - EPA's overarching theme seems to be, well, contribution may be small, but in the aggregate there is a problem
  - 10<sup>th</sup> Circuit (State of Wyoming v. EPA (10 Cir. 23-9529))
    - Oral argument scheduled for January 17, 2024

# Good Neighbor Litigation: Transfer from Regional to D.C. Circuit

- **7th Circuit Order 11.6.23 transferred FIP appeal to D.C. Cir.**
  - The 7th Circuit ordered transfer of the Energy Transfer FIP appeal to the D.C. Circuit **without additional comment** on November 6, 2023.

# Good Neighbor Litigation: Transfer from Regional to D.C. Circuit

- **6th Circuit Order 11.9.23 transferred FIP appeal to D.C. Cir.**
- Concerning the previous holding that the SIP appeals were appropriately filed in the regional circuits:
  - [T]he Commonwealth of Kentucky and the Kentucky Energy and Environment Cabinet petitioned for review of the EPA's disapproval of Kentucky's SIP. [*Kentucky v. EPA, Nos. 23-3216/3225 (6th Cir. July 25, 2023) (order)*] at 1. The EPA moved to transfer the actions to the D.C. Circuit. A panel of this court denied the motion, determining that **the SIP disapproval "affect[ed] only Kentucky" and thus was "locally and regionally applicable."** *Id. at \*5.*
- Justification for treating the FIP appeals as different from the SIP appeals, and finding transfer to the D.C. Circuit is appropriate:
  - The stated purpose of the *Good Neighbor Plan* is "to protect public health and the environment by reducing interstate transport of certain air pollutants," which "can be transported over hundreds of miles." 88 Fed. Reg. at 36,658. That purpose is achieved primarily through interrelated FIPs, and, critically, the FIPs are designed to work together. The FIPs impose "emissions control strategies on a uniform basis *across all linked upwind states*," *id.* at 36,741 (emphasis added), relying on "emissions reductions [that] are *assessed collectively* across ... hundreds of EGU and non-EGU industrial sources," *id.* (emphasis added), and "apportion[ing] the reduction responsibility *among collectively contributing upwind states*," *id.* at 36,719 (emphasis added), to achieve "*cumulative improvements* in ozone levels at downwind receptors," *id.* at 36,741 (emphasis added). . . . **Because the Good Neighbor Plan seeks to tackle a nationwide issue by regulating states across the country, based on a national analysis and uniform standards, and because it does more than simply install FIPs in the states whose SIPs were disapproved, it is nationally applicable. As such, venue lies in the D.C. Circuit.** 42 U.S.C. § 7607(b)(1).

## D.C. Circuit Order to Consolidate (November 15, 2023)

- On the Court's own motion the four recently transferred cases with the Utah consolidated cases. Case Nos. 23-1314 (Commonwealth of KY, Energy and Environment Cabinet), 23-1315 (Commonwealth of KY), 23-1316 (Energy Transfer), and 23-1317 (Buckeye Power) are now consolidated with 23-1157.

# Appeal of FIP

## 88 Fed. Reg. 36,654 (June 5, 2023)

- **US Supreme Court Emergency Stay Applications**
  - **23A351: American Forest & Paper Association, MOG, et al.**
    - **October 13** – Application for Stay submitted.
    - **October 30** – Response to Application filed by EPA.
    - **October 30** – Response to Application filed by New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and District of Columbia, City of New York, and Harris County, Texas
    - **October 30** – Response to Application filed by Public Interest Respondents
    - **November 1** – Reply filed by American Forest & Paper Association, et al.

# Appeal of FIP

## 88 Fed. Reg. 36,654 (June 5, 2023)

- **US Supreme Court Emergency Stay Applications**
  - **23A349: Ohio, et al.**
    - **October 13** – Application for Stay submitted.
    - **October 30** – Response to Application filed by EPA.
    - **October 30** – Response to Application filed by New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and District of Columbia, City of New York, and Harris County, Texas
    - **October 30** – Response to Application filed by Public Interest Respondents
    - **November 1** – Reply filed by Ohio, et al.

# Appeal of FIP

## 88 Fed. Reg. 36,654 (June 5, 2023)

- US Supreme Court Emergency Stay Applications
  - **23A350: Kinder Morgan, Inc., et al.**
    - **October 13** – Application for Stay submitted.
    - **October 20** – Amicus Curiae filed by Energy Infrastructure Council
    - **October 30** – Response to Application filed by EPA.
    - **October 30** – Response to Application filed by New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and District of Columbia, City of New York, and Harris County, Texas
    - **October 30** – Response to Application filed by Public Interest Respondents
    - **November 1** – Reply filed by Kinder Morgan, Inc., et al.



# Appeal of FIP

## 88 Fed. Reg. 36,654 (June 5, 2023)

- US Supreme Court Emergency Stay Applications
  - 23A384: United States Steel Corporation
    - **October 26** – Application for Stay submitted
    - **November 2** – Response to Application filed by EPA
    - **November 2** – Response to Application filed by New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and District of Columbia, City of New York, and Harris County, Texas
    - **November 2** – Response to Application filed by Environmental Defense Fund
    - **November 3** – Reply filed by United States Steel Corporation.

# Merits Litigation Briefing

(consolidated cases before the D.C. Circuit No. 23-1157)

- December 4, 2023 Order of the D.C. Circuit on briefing:
- Due January 26, 2024:
  - Brief of Petitioners Indiana, Nevada, Ohio, Utah, West Virginia, Kentucky and the Kentucky Energy and Environment Cabinet (not to exceed 10,400 words)
  - Brief of Industry Petitioners (not to exceed 15,600 words to be divided between up to two briefs).
  - Brief of Petitioner Wisconsin (not to exceed 10,400 words).
- Due February 14, 2023:
  - Brief of Intervenor City Utilities of Springfield (not to exceed 7,800 words)
  - Brief of Intervenor Sierra Club (not to exceed 7,280)
- Due April 10, 2024
  - Brief of Respondent EPA (no to exceed 36,400 words)
- Due April 29, 2024
  - Brief of Environmental Groups and Government Intervenors (not to exceed 13,000 words, to be divided between up to two briefs)
  - Brief of Intervenor Midwest Ozone Group (not to exceed 7,280 words)

# Merits Litigation Briefing

(consolidated cases before the D.C. Circuit No. 23-1157)

- December 4, 2023 Order of the D.C. Circuit on briefing:
- Due May 20, 2024:
  - Reply Brief of Petitioners Indiana, Nevada, Ohio, Utah, West Virginia, Kentucky, and the Kentucky Energy and Environment Cabinet (not to exceed 5,200 words)
  - Reply Briefs of Industry Petitioners (not to exceed 7,800 words, to be divided between up to two briefs)
  - Reply Brief of Petitioner Wisconsin (not to exceed 5,200 words)
- Due May 31, 2024:
  - Reply Brief of Intervenor City Utilities of Springfield (not to exceed 3,640 words)
  - Reply Brief of Intervenor Sierra Club (not to exceed 3,640 words)
- Due June 6, 2024:
  - Deferred Appendix
- Due June 13, 2024
  - Final Briefs
    - Due June 13, 2024

# Interim Final Rules

July 31, 2023 and September 29, 2023

- **First Interim Final rule** - EPA's Interim Rule published on July 31 extends its stay of the FIP to the following states where the SIP disapprovals have been stayed: Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas.
  - MOG Comments Filed 8/30/2023
  - Petition for Review Filed 9/29/2023
    - Consolidated cases No. 23-1275 (NMA, et al.) and 23-1321 (Kinder Morgan, et al.)
  - EPA Dispositive Motion seeking dismissal or in the alternative abeyance Filed 12/8/2023
- **Second Interim Final rule** – The Environmental Protection Agency (EPA) is taking interim final action to stay, for emissions sources in Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia only, the effectiveness of the Federal Implementation Plan (FIP) requirements established to address the obligations of these and other States to mitigate interstate air pollution with respect to the 2015 national ambient air quality standards (NAAQS) for ozone (the Good Neighbor Plan).
  - MOG Comments Filed 10/30/2023
  - Petition for Review Filed 11/28/23

# Proposed PM2.5 NAAQS (January 1, 2023)

EPA October 31, 2023 DC Circuit Motion to Continue to Hold Cases in Abeyance: Requests the case be held in abeyance until January 2, 2024 to allow EPA to time to reconsider its December 18, 2020 Particulate Matter NAAQS Decision. EPA has confirmed its commitment to issue a final rule likely tightening the PM2.5 NAAQS by the end of the year, amid significant opposition.

U.S. Chamber Report (November 9, 2023) <https://protect-us.mimecast.com/s/e75EC5yWPzfxL8O5szgrza?domain=uschamber.com> –

This U.S. Chamber of Commerce report highlights how the Environmental Protection Agency's (EPA) proposed fine particulate matter (PM2.5) air quality standards will cause permitting gridlock across our economy. Moreover, the Chamber analysis reveals that the EPA ignored the 2023 wildfires in its proposed rule, as this season's wildfires alone would increase the number of counties impacted by 50%, consequently imposing strict new penalties on American businesses—large and small—and their communities....

Since the CAA's inception in 1970, the U.S. has reduced air pollution by almost 80%—with a 42% reduction since 2000—moving concentrations of PM2.5 closer to background levels. A proposed NAAQS of 10.0 µg/m<sup>3</sup> or lower would have significant adverse economic impacts across most of the United States. Additional reductions of PM2.5 are becoming incrementally more difficult to attain and 2023 wildfire emissions are expected to increase the number of counties in nonattainment by as much as 50 percent. We strongly urge the Administration to suspend this discretionary rule and urgently consider the unintended consequences and unnecessary burdens this rule would place on all Americans sector despite fires being the main PM2.5 source.

# New Review of Ozone NAAQS

- August 21, 2023
  - EPA announced a new review of the ozone NAAQS.
  - The new review will allow EPA to consider fully the information about the latest ozone science and potential implications for the ozone NAAQS provided by the CASAC and the Ozone Review Panel. EPA will conduct the review according to well-established best practices and processes that embrace scientific integrity and the role of the public to provide input at multiple steps along the way.
  - Progress is under way, ozone trends show improvement, new car and truck standards, oil and gas emissions reduction programs, other actions addressing industrial and power sector.....

# EPA Response to CASAC Recommendation

- August 18, 2023 EPA Response to CASAC Recommendation:
  - Note taken of CASAC advice that the draft policy assessment is missing important analyses and information that the draft policy assessment “does not provide sufficient information to adequately consider alternative for and level combinations.”
  - CASAC also advised “. . .that the EPA incorporate the information available from the epidemiological studies in the risk assessment.”
  - Note taken of several new studies that were published recently and were not included in the 2020 Integrated Science Assessment and CASAC’s reliance on this new literature in recommending revisions to the studies.
  - Given the scope of these issues and the five-year review obligation, the best path is to initiate a new statutory review of the ozone NAAQS.

# Ozone NAAQS: Next Steps

- Issuing a call for information in the Federal Register in the next few days . . .
- convening a public science and policy workshop in spring 2024 to gather input from the scientific community and the public;
- in summer 2024, EPA will summarize the proceedings of the workshop to consider how the information gathered can be used to inform the next review, including specific areas of science that warrant particular focus and analytic enhancements;
- in fall 2024 the agency plans to release its Integrated Review Plan, Volume 2 to guide CASAC consideration and development of the Integrated Science Assessment.



# Air Emission Reporting Requirements (AERR)

## August 9, 2023

- EPA proposes to require:
  - certain sources report information regarding emission of **hazardous air pollutants (HAP)**;
  - certain sources to report **criteria air pollutants**, their precursors and HAPs
  - the proposed revisions would also define a new approach for **optional collection by air agencies of such information on HAP** by which State, local and certain tribal air agencies may implement requirements and report emissions on behalf of owners/ operators.
  - The proposed revisions would also **make the requirements for point sources consistent** for every year;
    - phase in earlier deadlines for point source reporting;
    - and add requirements for **reporting fuel use data for certain sources of electrical generation associated with peak electricity demand**.
  - The proposed revisions include further changes for reporting on **airports, rail yards, commercial marine vessels, locomotives, and nonpoint sources**.
  - For owners/operators of facilities that meet criteria described in this proposal, the proposed revisions would require reporting of **performance test and performance evaluation data** to the EPA for all tests conducted after the effective date provided in the final rulemaking.
  - The EPA also proposes to clarify that information the EPA collects through the AERR is emission data that is not subject to confidential treatment.” (88 Fed Reg 54,118)

# Air Emission Reporting Requirements (AERR)

## August 9, 2023

- EPA has grossly underestimated the time for adding in the “initial” data requested in Table 2A and the time for reporting elements listed in Tables 2B and 2C.
- The EPA implementation schedule is not achievable.
- EPA has failed to assess the security risk resulting from the release of the additional information that will be made public under the rule revisions.
- The EPA proposal leaves much unclear because of the failure to exempt de minimus sources from the reporting requirements.
- MOG requests clarification regarding use of emission factors for HAPs that do not exist in AP-42 and WebFIRE.

# Air Emission Reporting Requirements (AERR)

## August 9, 2023

- EPA should not release EPRI Emission Factor and other confidential or proprietary documents that are not publicly available.
- The conflict between the revised definition of point source (e.g., inclusion of mobile and portable sources) and the reporting requirements of the revised AERR, TRI, and Green House Gas programs is unreasonable.
- EPA should not impose source testing obligations on sources beyond those obligations already being undertaken.
- EPA should not require submission of data to CEDRI.

# Air Emission Reporting Requirements (AERR)

August 9, 2023

- EPA should not require mandatory HAP reporting under both Combined Air Emissions Reporting System (CAERS) and State & Local Emissions Inventory System (SLEIS).
- PFAS should not be included as a required constituent because unless and until there is a final EPA approved test method.
- The proposed rule is unreasonable given that EPA has not and cannot provide a single dollar of benefit resulting from rule implementation versus the \$477.9 million annual cost.
- EPA should implement any final AERR revisions in phases.

Kathy G. Beckett  
Steptoe & Johnson PLLC  
Kathy.beckett@steptoe-johnson.com