COMMENTS OF MIDWEST OZONE GROUP
APRIL 11, 2017
OTC STAKEHOLDERS MEETING
WASHINGTON, D.C.

I am Skipp Kropp of Steptoe & Johnson in Indianapolis, Indiana, and appear today as legal counsel for the Midwest Ozone Group (MOG) whose members operate some 90,000 MW of fossil-fuel fired electric generating capacity in the Midwest. I am pleased to have this opportunity to bring to your attention our on-going concerns about the need to address two critical timing issues related to our on-going discussions of the modeling used by EPA to determine responsibility for the interstate transport of air pollutants. The heart of this concern is that states are facing a fall 2018 deadline for the submittal of Good Neighbor SIPs (GNS) to address the 2015 ozone NAAQS and that many states need to rely on modeling data provided by EPA to address both the extent to which there are downwind nonattainment areas and the extent to which upwind states are significant contributors to those areas.

The first of our timing concerns centers on the fact there are many broken parts of the SIP modeling process that need to be fixed; however, EPA is forcing itself to complete its NODA in support of the development of GNS by the fall of 2017, rendering it impossible to for EPA to create a modeling platform that provides the accuracy needed to assess the complex issues of interstate transport. This is best illustrated by the recently published NODA on the 2015 ozone NAAQS in which the agency was forced to rely on the 2011 NEI (rather than more appropriate 2014 NEI) because it did not believe it had time to wait. In the litigation involving the Kentucky GNS, Sierra Club et al v. EPA, US District Court for the Northern District of California, Case No. 3:15-cv-04328-JD (JSC), EPA addresses this very point in its February 22, 2017 brief:

> EPA must choose the appropriate modeling platform in order to avoid over- or under-controlling upwind state emissions. McCabe Decl. ¶¶135-36. Using a more recent modeling platform than the 2011 base year used in the CSAPR Update would allow EPA to "re-anchor" the projected design values and contributions to more recently measured data. Re-anchoring to a more recent base year will allow the EPA to include the more updated emissions inventories from the 2014 NEI and more accurate data on non-EGU emissions. Dunham Decl. ¶15.

To address this point, we ask the OTC to join us in urging that EPA provide the states and stakeholders with appropriate modeling data and that to the extent that time does not permit the development of such data, EPA should issue guidance to the states about its plans to provide that data at a future date and the options available to states to take advantage of that more accurate data.

The second of our timing concerns relates to EPA's obligation to align the dates for development of GNS's with the date for the imposition of legally mandated controls. EPA's brief in the same litigation stated that "...EPA is mindful of the need to align implementation of emission reductions in upwind states with the applicable attainment dates in downwind areas, as instructed by the court in North

Carolina v. EPA, 531 F.3d 896, 911-12 (D.C. Cir. 2008)." EPA adds with respect to upwind state controls that it "is similarly limited by the second part of the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i), 'to reduce only by 'amounts' that 'interfere with maintenance,' i.e., by just enough to permit an already-attaining State to maintain satisfactory air quality."

MOG urges alignment of implementation of GNS's with the date by which states are required to demonstrate attainment with the applicable NAAQS. As the focus on attainment of the 2015 ozone NAAQS continues, there must be an official recognition that air quality will continue to improve between the 2018 due date for GNS's and the 2023 attainment deadline as a result of CAA programs including Federal Measures, federally mandated state RACT rules, nonattainment infrastructure SIPs, HEDD, Tier 3, aftermarket catalysts, lightering, and SmartWay. While these will all significantly improve air quality in the Ozone Transport Region (OTR), they will all be implemented after the GNS's are due, which means that states will need to carefully consider how best to address those air quality improvements as part of their GNS submittals.

Failure to include the benefits of these programs in GNS's will result in the over-control of upwind states, which is illegal given the Supreme Court decision in EPA v. EME Homer City Generation which stands for the proposition that EPA cannot require an upwind state to reduce its output of pollution by more than necessary to achieve attainment in every downwind state. The GNS is a "down payment" on attainment and not a stand-alone attainment program. The GNS's due in 2018 must take into account the impact of legally mandated controls on air quality by the attainment date to avoid violating the CAA prohibition against over-control.

MOG therefore also asks the OTC to join us in urging EPA to undertake new modeling work to address the many concerns that exist with respect to the data which is the subject of the NODA and provide for adequate time to allow that modeling to be accomplished. There are important matters of significant scientific complexity that cannot be accomplished quickly. MOG has identified numerous flaws in EPA's analysis. Even more significant is the fact that we have identified numerous other flaws that must also be investigated and for which there is inadequate time, under the current schedule.

As EPA itself noted in the Sierra Club litigation, "[a]lthough the deadlines for the EPA to promulgate these additional FIPs will not pass until 2017 and 2018, the EPA expects these deadlines will pass during the period in which we will be conducting the analysis necessary to address its FIP obligation as to Kentucky. Accordingly, conducting the necessary regional analysis to address Kentucky will also permit the Agency to address the outstanding FIP obligations for these 23 other states. If the EPA were to instead focus its analysis on developing a FIP for Kentucky alone – if that were even possible given the regional, interconnected nature of ozone transport – the EPA would necessarily need to delay action to address its FIP obligation as to these 23 other states, thereby missing a number of additional statutory deadlines....The EPA therefore believes it is necessary to conduct air quality modeling to project air quality levels in an appropriate future year that is later than 2017 in order to identify the extent of remaining downwind nonattainment and maintenance problems in that future year (CSAPR framework step 1). The results of this analysis could show, for example, that the nonattainment and maintenance problems projected to persist in 2017 are either diminished or resolved in a later year because of

emissions reductions expected to occur between 2017 and that future year. Similarly, the EPA believes we must conduct air quality modeling to evaluate upwind state contributions to downwind nonattainment and maintenance problems in that future year, the results of which could show a change in the level of contribution from Kentucky relative to the one percent screening threshold (CSAPR framework step 2)." (emphasis supplied)

MOG urges that EPA conduct additional modeling and analysis to address the deficiencies we have identified, delaying the process as necessary to make the assessment correctly rather than promptly.