

Supreme Court to Consider Request to Stay EPA's Good Neighbor Interstate Air Pollution Rule

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On February 21, 2024, the Supreme Court is scheduled to hear argument on [applications](#) to postpone implementation of the U.S. Environmental Protection Agency's (EPA's) "[Good Neighbor Plan](#)," a rule addressing interstate transport of ozone pollution. The Good Neighbor Plan is intended to satisfy the Clean Air Act's (CAA's) "good neighbor" provision ([42 U.S.C. § 7410\(a\)\(2\)\(D\)](#)), which requires upwind states to ensure that their emissions do not interfere with the ability of downwind states to meet federal air-quality standards. After EPA revised the federal [standards for ozone](#), states were required to submit updated plans showing how they would comply with the new standard. In 2023, EPA [disapproved](#) 21 of those state plans and [issued](#) the Good Neighbor Plan in their place. The Good Neighbor Plan covers 23 states, establishes an emissions trading program for power plants, and imposes requirements on certain other industrial sources.

Various parties have filed lawsuits challenging EPA's disapproval of states' plans as well as the Good Neighbor Plan. While regional courts of appeals have stayed EPA's disapprovals of 12 state plans, the U.S. Court of Appeals for the D.C. Circuit declined to stay the Good Neighbor Plan while litigation is pending. No court has issued a final ruling on the validity of EPA's state plan disapprovals or its Good Neighbor Plan, and the Supreme Court has taken the case following the stay applications and without briefing on the merits. The complicated posture of the case raises difficult questions regarding the appropriate standard for the Supreme Court to grant emergency relief and how that analysis might be affected by the partial stay of EPA's actions in the lower courts.

The Clean Air Act's Good Neighbor Provision

The CAA [directs](#) EPA to issue national ambient air quality standards (NAAQS) for several air pollutants, including ozone. [Section 110](#) of the CAA requires states to adopt [state implementation plans](#) (SIPs) to attain or maintain each NAAQS. States must then submit their SIPs to EPA for approval. SIPs must specify what mix of federal, state, and local air pollution control measures the state will implement in order to reach or maintain the NAAQS. The CAA requires a SIP to include a long list of elements, including enforceable emission limitations, timetables for compliance, and air quality monitoring. If EPA

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determines that a SIP does not meet applicable requirements, it must disapprove the SIP in full or in part. If EPA disapproves a SIP or finds that a state failed to submit a complete SIP, it must issue a [federal implementation plan](#) (FIP) within two years.

In many states, air quality is so affected by emissions from other states that it is difficult or impossible for the downwind state to attain federal standards. In particular, some pollutants can remain in the atmosphere and travel long distances from the point of emission. These pollutants include nitrogen oxides (NO_x) and volatile organic compounds, which react in sunlight to form [ground-level ozone](#), the main component of smog. Ozone precursor emissions as well as ozone can travel [hundreds of miles](#) through the atmosphere and, when transported, can constitute a significant fraction of the concentrations of those pollutants in downwind states, particularly in the eastern United States.

The CAA contains several provisions to address transported air pollution. [Section 110\(a\)\(2\)\(D\)](#), the “Good Neighbor” provision, requires that a state prohibit stationary sources within its borders from emitting air pollutants in amounts that will “contribute significantly” to NAAQS nonattainment or “interfere with maintenance” of a NAAQS in any other state. States must include such measures in the SIPs they submit to EPA. When EPA determines that existing SIPs must be revised to satisfy the good neighbor provision (or other CAA requirements), it issues a “SIP call,” sometimes to many states at once.

Since the 1990s, EPA and states have implemented Good Neighbor requirements in compliance with each revised federal ozone standard. Prior EPA rules addressing states’ Good Neighbor obligations have included the 1998 [NO_x SIP Call](#), which the D.C. Circuit [largely upheld](#) and the Supreme Court declined to review; the 2005 [Clean Air Interstate Rule](#), which the D.C. Circuit [remanded](#); and the 2011 [Cross-State Air Pollution Rule \(CSAPR\)](#), which the Supreme Court largely [upheld](#) in 2014, and which has been updated several times.

In general, EPA follows a [four-step framework](#) for implementing the CAA’s Good Neighbor provision. The agency (1) identifies downwind areas that are expected to have trouble attaining or maintaining the relevant air quality standard, (2) determines which upwind states contribute more than a threshold fraction of the air quality standard to ambient concentrations of the relevant pollutant in those downwind areas, (3) identifies emissions in those upwind states that significantly contribute to downwind nonattainment or interfere with downwind maintenance of the air quality standard, and (4) imposes enforceable control measures to bring about compliance with the CAA’s good neighbor obligations. The Supreme Court [approved](#) EPA’s use of this framework in 2014.

EPA’s 2023 SIP Disapprovals and Good Neighbor Regulations

In 2015, EPA [revised](#) the ozone NAAQS. States were then required to submit revised SIPs by 2018 to comply with the new, more stringent standards. EPA took two actions in 2023 to address states’ Good Neighbor obligations under the 2015 NAAQS. First, in February 2023, EPA [disapproved](#) 21 states’ submissions. Each of those states proposed to take no action to revise their SIPs, having concluded that existing controls were adequate or that they did not contribute significantly to nonattainment or interfere with maintenance of federal ozone standards in other states. Second, on March 15, EPA issued a FIP—the [Good Neighbor Plan](#)—covering those 21 states, as well as two additional states that had not submitted any revisions to their plans.

The Good Neighbor Plan applies the same [four-step framework](#) used in previous rules and [imposes requirements](#) on fossil fuel-fired power plants in 22 states and other industrial sources in 20 states. As in [previous rules](#), the Good Neighbor Plan establishes an allowance-based NO_x [emissions trading program](#) for power plants. Beginning in 2024, each covered state is to receive a budget of permissible emissions. Individual power plants are not subject to specific emissions limits under the Good Neighbor Plan but are instead allocated allowances that authorize emissions at a given level. The total allowances across all

sources authorize emissions up to the covered states' combined budgets. Power plants can buy, sell, and bank emissions allowances by trading with sources in any covered state.

The initial budgets are based on the level of reductions that were achievable through immediately available measures, including consistent use of emissions controls that are already installed at power plants. The budgets then become more stringent over time based on the level of reductions that are achievable through phased installation of additional emissions controls. The Good Neighbor Plan's trading program also includes some new elements, which EPA describes as "[enhancements](#)," to maintain the stringency of the program. EPA is to [annually recalibrate](#) the size of the unused emissions allowance bank to limit the accumulation of allowance surpluses. In the future, EPA is also to annually update emissions budgets through a [dynamic procedure](#) to account for changes in the composition of the power plant fleet. The rule also imposes [unit-specific emissions limitations](#) that apply in certain circumstances based on the overall emissions of that unit and the state in which it is located.

The Good Neighbor Plan also imposes [industry-specific NO_x emissions requirements](#) for specific industries that EPA found were significantly contributing to nonattainment or interfering with maintenance of the ozone NAAQS in downwind states. The industry-specific requirements apply to new and existing sources in [several categories](#), including natural gas pipelines, cement kilns, steel industry rehear furnaces and boilers, solid waste combustors and incinerators, paper industry boilers, and boilers in certain manufacturing and mining industry sectors. Some of these categories were not explicitly subject to emissions limits under previous interstate transport rules.

EPA [stated](#) when it issued the Good Neighbor Plan that it intended to further assess its modeling for six states to determine if it needed to address those states' Good Neighbor obligations through additional federal regulation. In December 2023, EPA [approved Wyoming's SIP](#) and found that the state did not significantly contribute to air quality problems in downwind states. The agency's [supplemental proposal](#) to address remaining interstate transport obligations recently underwent [review](#) by the Office of Management and Budget.

Recent Litigation

Various parties have filed lawsuits challenging the SIP disapprovals, the Good Neighbor Plan, or both. The CAA [provides](#) for review of locally or regionally applicable SIP disapprovals and FIPs in the U.S. Court of Appeals for the appropriate circuit and for review of rules with nationwide scope or effect exclusively in the U.S. Court of Appeals for the D.C. Circuit. The lawsuits challenging the SIP disapprovals are currently proceeding in regional circuit courts, and the suits challenging the Good Neighbor Plan are proceeding in the D.C. Circuit.

A significant question is whether EPA's SIP disapprovals and the Good Neighbor Plan will go into effect while the various cases are pending or whether they will be stayed (maintaining the status quo) until the courts reach a final decision. If a lower court denies a stay, the party seeking the stay can often seek review of that decision in a higher court. Meanwhile, the lower court retains jurisdiction to make a final decision on the merits, although the higher court's ruling on the stay issue can sometimes influence the subsequent litigation. Only the applications to stay the Good Neighbor Plan, which arose out of challenges to that rule, are currently before the Supreme Court.

Lawsuits Challenging EPA's SIP Disapprovals

Lawsuits challenging the SIP approvals are currently pending in the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. EPA has sought to transfer the petitions for review of the SIP disapprovals to the D.C. Circuit. Four courts have denied EPA's motions to transfer or dismiss the SIP disapproval petitions. The remaining courts have not ruled on the motions.

All [seven circuit courts](#) with pending cases have stayed EPA's SIP disapprovals for a total of twelve states: Alabama, Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia. To date, no court has ruled on the merits of the SIP disapprovals. Because an effective SIP disapproval is required before EPA can implement the Good Neighbor Plan in a state, EPA issued an [interim final rule](#) on July 31 to stay the Good Neighbor Plan's requirements for emissions sources in states that were subject to stay orders at that time. On September 29, EPA issued [another interim final rule](#) extending its stay of the Good Neighbor Plan to several states for which courts stayed EPA's SIP disapprovals after the first interim final rule.

The Good Neighbor Plan's requirements for power plants are [currently in effect](#) in ten states that are not subject to judicial stays or EPA's interim final rules (Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin). The requirements for non-power plant industrial sources are slated to take effect in the 2026 ozone season in those ten states as well as California, which was not subject to the power plant requirements in the rule as EPA issued it in March 2023.

Lawuits Challenging the Good Neighbor Plan

Several states, trade associations, and individual companies [challenged](#) the Good Neighbor Plan in the D.C. Circuit. Some states and industry groups also challenged the federal rule in the regional circuits, two of which—the Sixth Circuit and the Seventh Circuit—transferred those suits to the D.C. Circuit. Groups of litigants including nine downwind states, the District of Columbia and other local governments, and environmental organizations intervened in support of EPA in the D.C. Circuit proceedings. The Good Neighbor Plan cases have not yet been briefed on the merits or argued in the D.C. Circuit.

Various petitioners asked the D.C. Circuit to stay the federal Good Neighbor Plan pending judicial review. On September 25, 2023, a divided panel of the court [denied](#) the stay motions without analysis. The court later unanimously denied an additional motion by a separate industry petitioner.

Supreme Court Proceedings

After the D.C. Circuit denied their stay motions, the [states, natural gas pipeline companies, various industry associations](#), and a [steel producer](#) sought an emergency stay from the [Supreme Court](#). The parties' arguments focus on the [four factors](#) courts consider in deciding whether to issue a stay pending judicial review: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant would be irreparably injured absent a stay, (3) whether issuance of the stay would substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.

The applicants argue that the Good Neighbor Plan is [no longer valid](#) because it was conditioned on the participation of all 23 covered upwind states. According to the applicants, the regional circuits' stays of EPA's SIP disapprovals and EPA's interim final rules partially staying implementation of the Good Neighbor Plan [undermined](#) EPA's authority to impose a FIP as to the states that are covered by a stay. The applicants also contend that the SIP disapprovals underlying the FIP, as well as several features of the Good Neighbor Plan itself, [were flawed](#). These errors, the applicants [argue](#), result in unlawful "[over-control](#)" of emissions by requiring states to reduce their outputs of pollution by more than is necessary to eliminate their significant contributions to downwind pollution. In addition to these technical arguments, [some stay applicants](#) also [argue](#) that the Good Neighbor Plan violated the [Administrative Procedure Act's](#) notice and comment requirements. The applicants identify numerous ways in which the implementation of the rule would harm them, including by imposing significant [compliance burdens](#), [destabilizing](#) electricity generation and power grids, interrupting [natural gas supplies](#), and impeding [state sovereignty](#).

EPA and the intervenor-respondents oppose the stay applications. The agency argues that the applicants have not established that they are entitled to “extraordinary relief” following a lower court’s denial of a stay, in part because the Supreme Court is unlikely to grant certiorari if the D.C. Circuit upholds the Good Neighbor Plan and because the applicants’ fact-specific challenges to the rule do not merit Supreme Court review. EPA and the intervenor state and local governments also argue that the applicants’ merits arguments amount to an improper collateral attack on EPA’s SIP disapprovals. On the merits of the Good Neighbor Plan, EPA argues that its analysis was reasonable. EPA and the intervenor-respondents argue that the regional circuits’ stays of EPA’s SIP disapprovals did not retroactively invalidate the entire Good Neighbor Plan, that the rule did not become arbitrary by virtue of its implementation in a more limited number of states, and that the Good Neighbor Plan is severable and can continue to be implemented in states where it has not been stayed.

With respect to harm and the public interest, EPA and the intervenor-respondents argue that compliance deadlines that would require retrofits or the installation of new control technologies are far enough into the future that short-term compliance costs would not result in irreparable harm. They also argue that delays in implementation would unfairly shift economic burdens to downwind states and would delay emissions reductions, resulting in harms to the environment and public health.

On December 20, 2023, the Supreme Court issued an order setting the stay applications for oral argument and deferring a decision on the applications. The Court particularly directed the parties to be prepared to address at argument “whether the emissions controls imposed by the Rule are reasonable regardless of the number of States subject to the Rule.” Oral argument is scheduled for February 21. The Supreme Court’s December order did not pause the lower court’s merits briefing schedule, but on January 4, the D.C. Circuit extended the parties’ filing deadlines until after the Supreme Court hears argument on the stay applications.

Considerations for Congress

The Supreme Court’s decision to hold argument on the Good Neighbor Plan stay applications represents a somewhat unusual use of the Court’s non-merits or motions docket, which some commentators call the “shadow docket.” The Court typically decides matters on its non-merits docket after limited briefing and without argument, often in a summary order without legal analysis or information about how the Justices voted. For the Court to hear oral argument on such an application is unusual: The most recent prior instance was in January 2022, when the Court considered argument on applications to stay two agency rules related to COVID-19 vaccination and issued a decision within a week.

The significance of the case will likely depend on how much reasoning the Supreme Court reveals when making its decision on the stay applications. The Court’s ruling may be of interest to Congress in three main areas.

First, the Court’s ruling could clarify the standard for obtaining emergency relief, including whether a stay applicant must establish that the Court would be likely to grant certiorari, which is a matter of dispute among the parties. The intervenor state and local governments have argued that the stay applications constitute an improper use of the Supreme Court’s non-merits docket to obtain a preview of the Court’s views of the merits outside the normal course of judicial review. (For additional information on the non-merits docket, see CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe.)

Second, the Court’s decision could influence the process of judicial review of complex rulemaking, particularly when an agency takes several related actions. Although the CAA provides a single forum in the D.C. Circuit for “nationally applicable” rules such as the Good Neighbor Plan, the legal predicate for that action was EPA’s SIP disapprovals, which are being litigated in regional circuit courts. This case therefore provides an opportunity for the Court to evaluate the continued viability of a partially stayed or

vacated rule, whether a partial stay can itself invalidate a rule as a whole, and when courts may allow an agency to treat a rule as severable.

Finally, EPA's regulation of interstate air pollution has been a frequent topic of interest to Congress. The Senate Committee on Environment and Public Works held a [hearing](#) on the Good Neighbor Plan, and some Members have issued statements [supporting](#) or [opposing](#) EPA's approach. Some Members in both chambers introduced [joint resolutions of disapproval](#) of the Good Neighbor Plan under the Congressional Review Act.

The Good Neighbor Plan is part of a [larger effort](#) to regulate emissions from power plants and comes at a time when those emission levels are shifting. According to EPA, NO_x emissions [decreased](#) in 2023 both in the states implementing the Good Neighbor Plan and nationwide. This decrease was driven largely by a reduction in coal-fired power generation unrelated to the Good Neighbor Plan, leading some to [speculate](#) that court rulings limiting the reach of the Good Neighbor Plan may not significantly affect air quality. To address concerns regarding the scope of the interstate transport problem or the impact of new regulations on industry, Congress could provide additional direction to EPA, such as how to identify which states significantly contribute to downwind air pollution or how to weigh cost-effectiveness of emissions reductions. Regardless of the outcome of the SIP disapproval and Good Neighbor Plan litigation, however, numerous other proposed and final CAA regulations address both emissions of additional pollutants from sources [covered by the Good Neighbor Plan](#) and NO_x emissions from sources [not covered](#) under the plan.

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