

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Clerk

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Filed: August 07, 2023

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41 S. High Street  
Suite 2400  
Columbus, OH 43215

Ms. Jessica O'Donnell  
U.S. Department of Justice  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, DC 20044

Re: Case No. 23-3647, *Buckeye Power, Inc., et al v. EPA, et al*  
Originating Case No.: EPA-HQ-OAR-2021-0668

Dear Counsel,

This case has been docketed as number **23-3647** with the caption that is enclosed on a separate page. Please check the caption for accuracy and notify the Clerk's Office if any corrections should be made.

Before preparing any documents to be filed, counsel are strongly encouraged to read the Sixth Circuit Rules at [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov). If you have not established a PACER account and registered with this court as an ECF filer, you should do so immediately.

The following forms should be downloaded from the web site and filed with the Clerk's office by **August 21, 2023**. If payment did not accompany the petition for review, the \$500 filing fee should also be paid by this date.

Petitioner: Appearance of Counsel  
Disclosure of Corporate Affiliations  
Application for Admission to 6th Circuit Bar (if applicable)

Respondent: Appearance of Counsel

More specific instructions are printed on each form. These deadlines are important - if the initial forms are not timely filed and necessary fees paid, the case will be dismissed for want of prosecution. If you have questions after reviewing the forms and the rules, please contact the Clerk's office for assistance.

Sincerely,

s/Antoinette Macon  
Case Manager  
Direct Dial No. 513-564-7015

Enclosure

**OFFICIAL COURT OF APPEALS CAPTION FOR 23-3647**

BUCKEYE POWER, INC.; OHIO VALLEY ELECTRIC CORPORATION

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN,  
Administrator, United States Environmental Protection Agency

Respondents

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

BUCKEYE POWER, INC. and	)	
	)	
OHIO VALLEY ELECTRIC	)	
CORPORATION,	)	
	)	Case No. _____
Petitioners,	)	
	)	
v.	)	
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, and MICHAEL S.	)	
REGAN, Administrator, United States	)	
Environmental Agency,	)	
	)	
Respondents.	)	

**PETITION FOR REVIEW**

Buckeye Power, Inc. (“Buckeye”) and Ohio Valley Electric Corporation (“OVEC”) (collectively referred to as “the Ohio Utilities”) hereby petition this court, pursuant to Rule 15 of the Federal Rules of Appellate Procedure and Circuit Rule I.O.P. 15, the Administrative Procedures Act, and Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), for review of the final action the Respondent United States Environmental Protection Agency (“EPA”) and Administrator Michael S. Regan promulgating the rule titled “Federal ‘Good Neighbor Plan’ for the 2015 Ozone National Ambient Air Quality Standards”, 88 Fed. Reg. 36654 (June 5, 2023). A copy of EPA’s final rule is attached as Exhibit A.

**VENUE IS PROPER UNDER 42 U.S.C. § 7607(b)(1)**

This Court has jurisdiction and is the proper venue for this action, under 42 U.S.C. § 7607(b)(1), because Buckeye and OVEC are petitioning for review of only the portion of the final rule imposing requirements for emission sources in Ohio.

42 U.S.C. § 7607(b)(1) provides that any action, including the approval/disapproval of a SIP, “which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.” It is only if the action is based on a determination of “nationwide scope or effect” that the action must be published in the DC Circuit. *Id.*

In October 2015, EPA revised the national ambient air quality standards (“NAAQS”) for ozone downward from 75 parts per billion (ppb) to “a level within a range from 65 to 70 ppb.” *National Ambient Air Quality Standard for Ozone*, 80 Fed. Reg. 65292, 65301 (Oct. 26, 2015). Thus, each state was obligated to update their state implementation plans (“SIP”). § 7410(a)(1). Under this “Good Neighbor” provision, upwind States must make sure that their emissions do not contribute significantly to nonattainment of a NAAQS, or interfere with maintenance of a NAAQS, in downwind States. *See* § 7410(a)(2)(D)(i)(I).

In 2018, Ohio EPA submitted its revised SIP to address the Good Neighbor provision. The Clean Air Act provides EPA 18 months to either approve or disapprove a SIP. *Id.* at §§ 7410(k)(1)(B), (k)(2). However, it was not until February 22, 2022 that EPA issued a proposed rule to disapprove Ohio’s, and relevant here, Kentucky’s SIPs.

*Air Plan Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin; Air Plan Disapproval; Region 5 Interstate Transport of Air Pollution for the 2014 8-Hour Ozone National Ambient Air Quality Standards*, 87 Fed. Reg. 9838 (Feb. 22, 2022); *Air Plan Disapproval; Kentucky; Interstate Transport Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standards*, 87 FR 9498 (Feb. 22, 2022).

These proposed disapprovals were finalized on February 13, 2023. *Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 9336 (Feb. 13, 2023). Several states moved for a stay of the SIP disapproval. Many of these states have a stay in place of their SIP disapproval, including Kentucky. *Commonwealth of Kentucky v. EPA*, Case No. 23-3216/3225 (July 25, 2023).

On April 6, 2022, just months after proposing disapproval of the states' SIPs, U.S. EPA proposed a federal implementation plan ("FIP"), which requires emission reductions in 23 states, including Ohio and Kentucky. *Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, 87 Fed. Reg. 20036 (April 6, 2022). This was finalized on June 5, 2023. *Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 36654 (June 5, 2023). On July 31, 2023, EPA issued an interim final rule staying the implementation of the FIP for six states including Kentucky. *Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States*, 88 Fed. Reg. 49295 (July 31, 2023). Subsequently,

on August 2, 2023, EPA announced its intent to respond to the four additional states with judicial stays of their SIP disapproval. *See* Memo. from Joseph Goffman, *Notice of Forthcoming EPA Action to Address Additional Judicial Stay Orders* (Aug. 2, 2023), [https://www.epa.gov/system/files/documents/2023-08/23-02403-OAR-OAP%20\\_\\_Memo%20from%20J.%20Goffman%20re%20Response%20to%20Further%20Stay%20Orders%20\\_JG%20Signed%20%282%29.pdf](https://www.epa.gov/system/files/documents/2023-08/23-02403-OAR-OAP%20__Memo%20from%20J.%20Goffman%20re%20Response%20to%20Further%20Stay%20Orders%20_JG%20Signed%20%282%29.pdf).

Currently, there is no stay of the disapproval of the SIP in Ohio. Thus, Ohio emission sources, including Buckeye and OVEC, are now subject to the implementation of the FIP. Further, the stay of Kentucky's SIP disapprovals and the stay of the FIP for Kentucky removes Kentucky from the states relevant to the emission limitations set by the FIP. Now, two neighboring state emission sources, within this Circuit, are meant to follow two plans that controvert each other.<sup>1</sup>

This Court recently held that whether a final action was “nationally applicable” or “locally or regionally applicable,” falls upon on the “legal impact” of the final action and “focuses on the ‘location’ of the state or entity that the final action regulates.” *Commonwealth of Kentucky v. EPA*, Case No. 23-3216/3225 (July 25, 2023) citing *Texas v. EPA*, 829 F.3d 405, 419 (5<sup>th</sup> Cir. 2016) (citation omitted).

This juxtaposition between Kentucky and Ohio creates a legal impact for Ohio emission sources at the regional level. The FIP was promulgated to address downwind

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<sup>1</sup> *See* Petitioners' Motion for Stay for additional information regarding this issue.

impacts of ozone from 23 upwind states. On its face, the FIP was designed to have national applicability. However, because a stay of the disapproval of Kentucky's SIP and the stay of the applicability of the FIP on Kentucky, but Ohio remains regulated by the FIP, this has now become an issue of regional scope. *Commonwealth of Kentucky*, Case No. 23-3216/3225 ("We do not defer to an agency's interpretation of a venue statute," citing *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 928 (6<sup>th</sup> Cir. 2014)). Because there are disparate obligations between two states within this Circuit, Buckeye and OVEC ask this Court to review venue, de novo, and find it proper in this Circuit. *Texas*, 983 at 833.

Respectfully submitted,



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Michael E. Born

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Krystina E. Garabis

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*Counsel for Petitioners Buckeye Power, Inc. and the  
Ohio Valley Electric Corp.*



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UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, and MICHAEL S.	)	
REGAN, Administrator, United States	)	
Environmental Agency,	)	
	)	
Respondents.	)	

**RULE 26.1 DISCLOSURE STATEMENT OF PETITIONER BUCKEYE  
POWER, INC. AND OHIO VALLEY ELECTRIC CORPORATION**

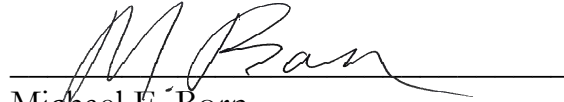
Pursuant to Federal Rules of Appellate Procedure and Circuit Rule 26.1,  
BUCKEYE POWER, INC. AND OHIO VALLEY ELECTRIC CORPORATION,  
petitioners file the following statement:

*Buckeye Power, Inc.* is an Ohio nonprofit corporation operating on a cooperative basis, a so-called generation and transmission electric cooperative or G&T, that provides wholesale electric service to its twenty-five members constituting all of the electric distribution cooperatives engaged in the retail sale of electricity within the State of Ohio, twenty-four of which are also Ohio nonprofit corporations operating on a cooperative basis. Buckeye owns or controls the output of natural gas-fired and

coal-fired power plants to supply the wholesale power requirements of its members. It is wholly owned by its twenty-five member electric distribution cooperatives, none of which are publicly traded. Buckeye Power, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock or other membership interests.

*Ohio Valley Electric Corporation* is not a publicly-held corporation.

Respectfully submitted,



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*Counsel for Petitioners Buckeye Power, Inc. and the  
Ohio Valley Electric Corp.*

### CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 15(c), Fed. R. App. P. 25, and 40 CFR 23.12(a), on this date, I hereby certify that a true copy of the foregoing Petition for Review and Disclosure Statement was served via certified mail to the following:

Hon. Michael S. Regan  
Office of the Administrator (1101A)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Hon. Merrick B. Garland  
Attorney General for the United States United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Office of General Counsel (2310A)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

  
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Michael E. Born  
*An Attorney for Petitioners Buckeye Power, Inc. and  
the Ohio Valley Electric Corporation*