ORAL ARGUMENT NOT YET SCHEDULED

Case No. 19-1231

UNITED STATES COURT OF APPEALS

for the DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, STATE OF NEW JERSEY, CITY OF NEW YORK,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

84 Fed. Reg. 56,058 (Oct. 18, 2019)

FINAL BRIEF OF COMMONWEALTH OF KENTUCKY, ENERGY AND ENVIRONMENT CABINET AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE OF RESPONDENTS

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Dated: March 5, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties

All parties, intervenors, and *amici* appearing in this Court are listed in the Briefs for Petitioners (Doc. 1824155), Petitioner-Intervenors (Doc. 1824164), and Respondents (Doc. 1830717).

B. Rulings Under Review

References to the rulings at issue appear in the Briefs for Petitioners (Doc. 1824155), Petitioner-Intervenors (Doc. 1824164), and Respondents (Doc. 1830717).

C. Related Cases

The final agency action under review has not previously been before this Court or any other court. However, the pending case of *Maryland v. EPA* (D.C. Cir., No. 18-1285 and consolidated cases) may involve issues potentially pertinent to this case. That case involves a challenge to EPA's denial of petitions from Maryland and Delaware seeking findings under 42 U.S.C. § 7426(b) for certain upwind pollutant sources also at issue in New York's petition. That case involves several of the same parties involved here (State of New York, City of New York, and State of New Jersey as Petitioner-Intervenors; and Sierra Club, Environmental Defense Fund, and Adirondack Counsel as Petitioners).

DATED: March 5, 2020

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GLOSSARY

CSAPR	Cross-State Air Pollution Rule
CSAPR Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
EGU	Electric Generating Unit
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
lbs/MMBtu	Pounds per million British thermal units
MMBtu	Million British thermal units
NAAQS	National Ambient Air Quality Standards
NO_x	Nitrogen oxide
ppb	Parts per billion
tpy	Tons per year
VOCs	Volatile organic compounds

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Commonwealth of Kentucky, Energy and Environment Cabinet submits this brief under Federal Rule of Appellate Procedure 29(a)(2) as *amicus curiae* in support of the Respondent—Environmental Protection Agency ("EPA"). The source of the Energy and Environment Cabinet's authority to file this brief is Kentucky Revised Statute 224.10-100(5), which states that the Energy and Environment Cabinet is the Kentucky agency charged with administering and enforcing the statutes, regulations, and rules providing for the prevention, abatement, and control of all water, land, and air pollution in the Commonwealth.

Section 126(b) of the Clean Air Act allows any state or political subdivision to petition EPA for a finding that any major source or group of stationary sources emits or would emit in amounts that violate the Good Neighbor Provision, *i.e.* contribute significantly to nonattainment in, or interfere with maintenance by, any other state. 42 U.S.C. § 7426(b); 42 U.S.C. § 7410(a)(2)(D)(i)(I). This Petition for Review concerns a final rulemaking in which EPA denied New York's Petition under Section 126(b) of the Clean Air Act. 84 Fed. Reg. 56,058 (Oct. 18, 2019). New York's Petition asserted that seventeen electric generating units ("EGUs") and twelve non-EGU sources in Kentucky emit or will emit in violation of the Good Neighbor Provision and should be subject to the remedial provisions of Section 126(c). If the Court grants the Petition, these twenty-nine sources would be required

to stop operating within three months unless emissions limitations and compliance schedules extended the operating time for a maximum period of three years. 42 U.S.C. § 7426(c)(2).

SUMMARY OF ARGUMENT

This Court should uphold EPA's denial of New York's Petition because the Petition lacked a proper technical analysis. EPA appropriately exercised its duty to review all of the information rather than relying on outdated and inaccurate data. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1991). New York used outdated modeling and failed to account for reduced emissions from federally enforceable unit retirements when determining which sources to name in the Petition. Relying on systematically flawed foundational data risks subjecting otherwise ineligible sources to the stringent remedy of 42 U.S.C. § 7426(c): shutdown within three months or operation under a compliance schedule for a maximum of three years.

Because this Court chose to remand the Cross State Air Pollution Rule ("CSAPR") Update, rather than vacate it, the emission limitations contained within the Update remain enforceable until EPA determines the appropriate remedy. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (quoting *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015)). Petitioners' argument fails to acknowledge that the budgets established by the CSAPR Update remain

enforceable. Petitioners' concerns may be addressed by a subsequent rule promulgated by EPA to address the CSAPR Update, and vacatur of EPA's denial of New York's Petition now would risk disruptive consequences by imposing an interim change that may itself be changed after promulgation of a final rule. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir.1993)) (internal quotations omitted). Additionally, this Court's decision to remand the CSAPR Update moots Petitioners' argument. EPA appropriately relied on the emissions limitations contained in the Update because they remain enforceable.

New York's failure to recognize or address the impacts of local sources attempts to shift its regulatory burden to Kentucky and ignores New York's statutory obligation to control local sources first. 42 U.S.C. § 7407(a). Mobile sources (such as vehicles) and peak demand generators operating on high energy demand days contribute to ground level ozone. The New York Department of Environmental Conservation found that peaking units used on high energy demand days were a significant contributor to NO_x emissions: they can contribute 4.8 ppb of ozone on high ozone days.

For the foregoing reasons, EPA's decision to deny New York's Petition was not arbitrary, capricious, or unreasonable. The Court should affirm.

ARGUMENT

I. The Court Should Affirm EPA's Denial Because the Petition Lacks a Proper Technical Analysis

Courts have historically afforded controlling weight to an administering agency's construction of an ambiguous statute. *EPA v. Homer City Generation, L.P.*, 572 U.S. 489, 512-13 (2014) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). EPA has consistently followed the same four-step process when rulemaking under the Good Neighbor Provision and Courts have consistently blessed this process. *E.g.*, *Homer City*, 572 U.S. at 518-20; *Wisconsin*, 938 F.3d at 312. As EPA explained in its denial, it evaluated New York's Petition by applying the same four-step regional analytic framework utilized in previous interstate transport rulemaking. 84 Fed. Reg. at 56,058.

EPA correctly determined that "material elements in New York's assessment of step three are insufficient, such that EPA cannot conclude that any source or group of sources in any of the named states will significantly contribute to nonattainment or interfere with maintenance in Chautauqua County or the [New York Metropolitan Area] relative to the 2008 and 2015 ozone [National Ambient Air Quality Standards]." 84 Fed. Reg. at 56,092. EPA's analysis is sound: the Petition's bare technical assessment utilized outdated emissions inventories, inconsistently included sources without sufficient rationale, and failed to consider the retirements of some sources. Although Petitioners and Petitioner-Intervenors challenge EPA's

determination that New York was required to provide additional information regarding cost-effective emissions reductions at step three, the systematic inaccuracies extend beyond this analysis and directly affect which sources were named in the Petition. Opening Proof Brief for Petitioners at 58, New York v. EPA, No. 19-1231 (D.C. Cir. Jan. 14, 2020).

Approving the Petition based on this faulty foundational data would risk over-control in violation of *Homer City*. EPA had an obligation to consider the more recent and accurate emissions data and modeling that appeared in the record instead of merely relying on the outdated and inaccurate data and modeling presented by New York. *Am. Iron & Steel Inst.*, 115 F.3d at 1007. Had EPA simply taken New York's word for it, it would have failed in its duty to use the "best information available." *Catawba County, N.C. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009). For these reasons, the Petitioners have not met their burden of establishing that EPA's denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). The Court should uphold EPA's decision and deny the petition for review.

A. The Petition Relies on Inaccurate and Outdated Emission Inventories

The technical analysis underlying the Petition relied on outdated emissions inventories as the baseline and failed to account for significant emission rate decreases. This decision inflated upwind emissions and projected 2017 emissions,

which caused otherwise ineligible sources to be included in the Petition and may subject them to closure or unnecessary emissions limitations.

First, New York attempted to identify which states were projected to contribute at least .75 parts per billion ("ppb") to New York Metro Area ozone monitors in 2017. New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b), EPA-HQ-OAR-2018-0170-0004, at 9-10 [hereinafter State Petition]. To do this, New York used EPA's ozone contribution modeling for the 2008 ozone National Ambient Air Quality Standards ("NAAQS"), released in September 2016, instead of the corrected ozone modeling EPA released in October 2017. State Petition at 10.

Between the releases, EPA worked to ensure that it applied the best available scientific information in the updated 2017 modeling. On January 6, 2017, EPA issued a Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS). 82 Fed. Reg. 1733 (Jan. 6, 2017). In response, Kentucky's Division for Air Quality noted "that EPA['s initial modeling] grew NO_x and VOC emissions from nonpoint oil/gas productions in Kentucky by 25,195 and 13,954 tons respectively from 2011 levels" despite the Division's research, which indicated "a decrease in future gas production and a more modest increase in oil production from 2011 to 2023." Comment by Sean Alteri, Director,

Kentucky Energy and Environment Cabinet, EPA-HQ-OAR-2016-0751-0083, at 3. The Division requested that EPA review the oil and gas information and "work with the Division to ensure that the nonpoint oil and gas production emissions are accurate for Kentucky." *Id*. EPA subsequently addressed the error and updated the 2011 modeling platforms through version 6.3. U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT (TSD) ADDITIONAL UPDATES TO EMISSIONS INVENTORIES FOR THE VERSION 6.3, 2011 EMISSIONS MODELING PLATFORM FOR THE YEAR 2023 (2017), https://www.epa.gov/sites/production/files/2017-11/documents/2011v6.3_2023en_update_emismod_tsd_oct2017.pdf [hereinafter Version 6.3 Emissions Inventories TSD]. However, New York chose to use the older, less accurate emissions inventories to identify which states were projected to significantly contribute. State Petition at 10.

Importantly, the Petition's Appendix B, which provides the list of named sources, includes the least amount of information on how New York selected the non-EGU sources. State Petition, at App. B. The EGU list includes multiple columns: State, Plant ID, Plant Name, Projected 2017 NO_x (in tons), 2014 NO_x emissions (in tons), 2014 heat input (in MMBtu), 2014 NO_x rate (in lbs/MMBtu), 2015 NO_x emissions (in tons), 2015 heat input (in MMBtu), 2015 NO_x rate (lbs/MMBtu), 2016 NO_x emissions (in tons), 2016 heat input (in MMBtu), 2016 NO_x rate (lbs/MMBtu), 2014-16 average NO_x (in tons), and 2014-16 average NO_x rate

(lbs/MMBtu). *Id*. In stark contrast, the non-EGU list includes only four columns: State, Plant ID, Plant Name, and Projected 2017 NO_x (in tons). *Id*. New York's failure to use the updated non-EGU emissions inventories is particularly important in light of the scarce data New York provided to justify its inclusion of these sources.

New York argues that the older emissions inventories were appropriate because the updated modeling incorporated an expectation that uncontrolled EGUs would reduce their emission rates in the absence of enforceable limits. State Petition at 10. This argument ignores the enforceable limits generated by the CSAPR Update, which were incorporated into the updated modeling. Version 6.3 Emissions Inventories TSD at 98. These federally enforceable limits applied when EPA issued its updated emission inventories in October 2017 and when New York petitioned EPA in March 2018. 40 C.F.R. § 52.940. Although this Court subsequently invalidated EPA's use of the 2023 analytic year, the limits generated by the CSAPR Update remain enforceable today because the rule was remanded without vacatur. *Wisconsin*, 938 F.3d at 336; *see Allied-Signal*, 988 F.2d at 150-51. New York's choice to use outdated and inaccurate data provides a valid basis for EPA's denial.

B. The Petition Fails to Account for Declining Kentucky NO_x Emissions and Source Retirements

The Petition also fails to account for source retirements and unit conversions from coal to natural gas, which reduces NO_x emissions. After identifying the particular upwind states, the Petition named any source projected to emit 400 tons

per year ("tpy") or more of NO_x in each of those states that New York previously identified as significantly contributing to nonattainment. State Petition at 11. New York used the 2017 Beta 2 projection inventory developed by the Mid-Atlantic Regional Air Management Association and the Eastern Regional Technical Advisory Committee tool to identify facilities projected to emit 400 tpy or more of NO_x in 2017. State Petition at 10. Additionally, New York included any source that emitted 400 tpy or more of NO_x in 2014, based on its review of the National Emissions Inventory. State Petition at 9-10.[1] However, many named Kentucky sources have closed completely, retired coal-fired units, and/or switched to natural gas, which significantly reduced their emissions and New York's failure to consider this information risks over-control of all Kentucky sources. The data provided by New York fails to account for these significant changes.

According to the data accompanying the Petition, East Kentucky Power Cooperative's William C. Dale Station emitted 41.6 tons of NO_x in 2014, 102.1 tons of NO_x in 2015, and "N/A" during 2016. State Petition at App. B.[2] "N/A"

[1] New York explained that it chose the 400 tpy threshold because these "highest-emitting facilities" were "expected to have the greatest impact on the ability of the [New York Metro Area] and Chautauqua County to attain and maintain the 2008 and 2015 NAAQS, and therefore [could] reasonably be retrofitted with control equipment or [could] operate existing control more frequently." State Petition at 9-10. Although New York's threadbare justification for the 400 tpy threshold is very unclear, this brief will only focus on the selection of sources, not the rationale.

[2] The data in Appendix B of the State Petition represents the data reported by EPA's Air Markets Program and the United States Energy Information Administration. State Petition at App. B; U.S. Envtl. Prot. Agency, *Air Markets Program Data*, https://ampd.epa.gov/ampd/; U.S. Energy Info.

appropriately describes this plant's emissions because it retired all units effective April 16, 2016, and subsequently demolished the entire plant. East Kentucky Power Company reported no emissions to EPA or to the United States Energy Information Administration in 2017. U.S. Envtl. Prot. Agency, AIR MARKETS PROGRAM DATA, *Query*, https://ampd.epa.gov/ampd/; U.S. Energy Info. Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

Beyond relying on inaccurate data to support the Petition, Petitioners attempt to argue that EPA erroneously assumed that power plants would reduce emissions and that any conversions to natural gas would be unenforceable. Opening Proof Brief for Petitioners at 2. However, the closures and conversions are federally enforceable. East Kentucky Power Company no longer has authority to burn coal by an operating permit issued by the Kentucky Division for Air Quality at the William C. Dale Station. Therefore, if this source burned coal it would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. However, New York projected that this retired, completely demolished plant would emit 1,359.8 tons of NO_x in 2017. This projection is plainly impossible.

The Petition also includes Louisville Gas and Electric Company's Cane Run Station, despite projecting 2017 NO_x emissions of 89.4 tpy. State Petition at App.

Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

B. Eighty-nine tpy is dramatically lower than the 400 tpy threshold. The Petition likely included this source because it the data included indicated over 400 tpy of NO_x in 2014. State Petition at App. B. However, the Cane Run Station had retired all of its coal-fired units as of June 16, 2015, and subsequently demolished the units. Similarly, Louisville Gas and Electric Company reported no emissions from coal-fired units to EPA in 2017, and only reported NO_x emissions of 317.3 tpy. U.S. Envtl. Prot. Agency, AIR MARKETS PROGRAM DATA, *Query*, https://ampd.epa.gov/ampd/; U.S. Energy Info. Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

None of the coal-fired units at this facility are permitted to operate under Kentucky's Division for Air Quality's program and doing so would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. These sources no longer burn coal, which significantly reduces their emissions. Additionally, other named sources have retired some, but not all, of their coal-fired units. For example, Kentucky Utilities' E.W. Brown station retired two of its three coal-fired units on March 1, 2019. This source no longer has an operating permit to burn coal at these units. Therefore, doing so would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. Clearly, the inclusion of these sources must be further scrutinized before imposing the remedy sought by New York's Petition.

In light of the best information available, EPA's denial of New York's Section 126(b) Petition was not arbitrary, capricious, or unreasonable. This Court should deny the petition for review and affirm EPA's denial.

II. The Current Status of the Cross-State Air Pollution Rule Update Forecloses New York's 126(b) Petition

Petitioners argue that this Court's recent remand of the CSAPR Update in *Wisconsin v. EPA* forecloses EPA's reliance on the trading allowances established therein. Opening Proof Brief for Petitioners at 2 (citing *Wisconsin*, 938 F.3d at 315), 23 ("The Denial's continued reliance on these now-invalidated rules requires its vacatur."), 26. However, this Court upheld the CSAPR Update in all respects except one: EPA's reliance on the 2023 analytic year at step one of its analysis. *Wisconsin*, 938 F.3d at 320. Instead of vacating the rule, this Court remanded it because "[v]acatur of the Update Rule 'could cause substantial disruption to the [allowance] trading markets that have developed.' . . . [a]nd 'some good neighbor obligations [imposed by the Rule] may be appropriate for some of the relevant upwind States.'" *Id*. at 336 (quoting *Homer City*, 795 F.3d at 132). This follows the Court's precedent in other cases under the Good Neighbor Provision and the Clean Air Act because vacatur "would risk significant harm to the public health or the environment." *Id*. Therefore, the NO_x limits established under the CSAPR Update remain federally enforceable. Petitioners' argument thus rests upon vacatur of a rule that was not

vacated. For this reason, the Court should affirm EPA's denial of New York's petition.

A. Petitioners' Argument Risks Disruption

First, Petitioners argue that EPA's "[d]enial inappropriately relied on the adequacy of the control measures required under the now-invalidated portions of the Update." Opening Proof Brief for Petitioners at 29-30. EPA reasonably and appropriately relied on the limitations imposed by the CSAPR Update when it denied the Petition because such limitations are still federally enforceable.

Although this Court held in *Wisconsin* that EPA must align the analytic year with the Title I statutory deadlines, the Court chose to remand the case without vacatur in part because some obligations may remain appropriate for some upwind states. *Wisconsin*, 938 F.3d at 336 (quoting *Homer City*, 795 F.3d at 132). Therefore, the limits imposed by the rule remain in place as EPA determines the appropriate replacement. Petitioners' inappropriate and premature argument assumes that the limitations will no longer apply and faults EPA for relying on them. However, EPA's reliance on the CSAPR Update when it denied the petition was appropriate in light of this Court's remand.

Petitioners risk wasting judicial resources and causing unnecessary disruption by attacking EPA's reliance on the remanded CSAPR Update before the agency can determine the appropriate limitations. "The decision whether to vacate depends on

the seriousness of the order's deficiency ... and the disruptive consequences of an interim change that may itself be changed." *Advocates for Highway & Auto Safety*, 429 F.3d at 1151 (quoting *Allied–Signal*, 988 F.2d at 150–51 (internal quotations omitted)). Similarly, here, Petitioners ask the Court to effectively impose an interim change "that may itself be changed" depending on EPA's ultimate determination.

B. The CSAPR Update Moots Petitioners' Argument

The federally enforceable limits imposed by the CSAPR Update moot Petitioners' arguments. Petitioners fault EPA for relying on the CSAPR Update. Opening Proof Brief for Petitioners, at 26. However, the NO_x trading budgets established in the CSAPR Update were enforceable at the time of the denial and remain federally enforceable today.

As required by the CSAPR Update and 40 C.F.R. § 52.940(b)(1) and (b)(2), the owner and operator of each source, including all of those named in the Petition, must comply with the CSAPR NO_x Ozone Season Budget. 40 C.F.R. § 52.940(b)(1), (2). The requirements under the CSAPR NO_x Ozone Season Group 2 Trading Program are set forth in 40 C.F.R. § 97 Subpart EEEEE with regard to emissions occurring in 2017 and in each subsequent year. In 2015 and 2016, EPA allocated a NO_x ozone season budget of 36,167 tons to Kentucky through CSAPR. 40 C.F.R. § 97.510(a)(8)(i). As a result of the CSAPR Update, EPA reduced

Kentucky's 2017 NO_x ozone season budget to 21,115 tons, a forty-two percent reduction. 40 C.F.R. § 97.810(a)(8).

This Court appropriately and wisely remanded the CSAPR Update without vacating it because "the rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule." *North Carolina v. E.P.A.*, 550 F.3d 1176, 1178–79 (D.C. Cir. 2008) (Rogers, concurring in part and dissenting in part) (remanding CAIR without vacatur). Indeed, the budget program implemented by the Update is working: emissions of NO_x from EGUs have decreased by more than 2.28 million tpy since 1998, the year EPA began promulgating rules to budget NO_x emissions. U.S. Envtl. Prot. Agency, *Power Plant Emission Trends*, CLEAN AIR MARKETS, https://www.epa.gov/airmarkets/power-plant-emission-trends (last visited June 20, 2019). Because this Court in *Wisconsin* remanded the CSAPR Update, the reductions required by the Update are still federally enforceable and Petitioners' argument fails. The Court should affirm EPA.

III. Petitioners Attempt to Shift the Burden to Upwind States by Ignoring Significant Impacts From New York Sources

Notably absent from the Petitioners' brief is any discussion of local factors contributing to the purported ozone nonattainment. Under the Clean Air Act, each state has the "primary responsibility" to ensure the air quality within their own state

before looking to other states' good neighbor obligations. 42 U.S.C. § 7407(a). New York must first address local contributing factors, such as mobile sources and peak demand EGUs, before petitioning for stricter controls on EGUs across nine other upwind states.

The data demonstrates that the condition of New York's air quality stems from emissions within its own jurisdictional boundaries rather than from upwind states. Mobile sources create the most significant impact on ozone concentrations at problem monitors. In 2014, the total vehicle miles traveled in the New York Metro Area was estimated to be over 120 billion, and mobile source emissions constituted more than 42 percent of all NO_x emissions in the New York – Northern New Jersey – Long Island Nonattainment area. U.S. ENVTL. PROT. AGENCY, FINAL AREA DESIGNATIONS FOR THE 2015 NATIONAL AMBIENT AIR QUALITY STANDARDS TECHNICAL SUPPORT DOCUMENT (TSD), at 21 (2018), https://www.epa.gov/sites/production/files/2018-05/documents/ny_nj_ct_new_york-northern_new_jersey-long_island_tsd_final.pdf; KY. ENERGY AND ENV'T CABINET, KY. DIV. FOR AIR QUALITY, FINAL KENTUCKY INFRASTRUCTURE STATE IMPLEMENTATION PLAN 2015 OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS, at 35 (2019), https://eec.ky.gov/Environmental-Protection/Air/Documents/2019-01-11%202015%20O3%20ISIP%20Final%20Submittal.pdf [Hereinafter Kentucky

2015 Ozone Infrastructure SIP]. The 2014 National Emissions Inventory data clearly demonstrates that on-road emissions contributed the highest amount of NO_x emissions in the New York-Northern New Jersey-Long Island nonattainment area. *Id*. By comparing violating ozone monitors with heavily congested corridors, there is a consistent pattern of violating monitors located along the I-95 corridor. *Id*. at 36. Neither the Petition nor the Petitioners' brief acknowledges or addresses this relationship.

Another contributing factor is the number of peak demand generators operating during high electric demand days, which occur on the hottest days of the summer due to the increased demand of electricity, primarily from air conditioning. *Id*. at 38. The operation of peak demand generators during high electric demand days coincides with days that have the highest monitored ozone levels. *Id*. As New York explained in its attainment demonstration for the New York Metro Area, "[high electric demand day] units include EGUs that typically operate on peak ozone days when demand for electricity is very high. These peak-demand units can be among the dirtiest in the region." NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE IMPLEMENTATION PLAN FOR OZONE (8-HOUR NAAQS) ATTAINMENT DEMONSTRATION FOR NEW YORK METRO AREA, at 9-14, (2008), http://www.dec.ny.gov/docs/air_pdf/nymaozonesipfinal.pdf.

In fact, the New York Department of Environmental Conservation found that peaking EGUs used on high energy demand days were a significant contributor to NO_x emissions. *Id*. at 13-3. New York performed an emissions analysis on peaking units and found that they can contribute 4.8 ppb of ozone in the New York Metro Area on high ozone days. Kentucky 2015 Ozone Infrastructure SIP, at 39; Again, the Petitioners' brief fails to acknowledge these localized impacts from peak demand electric generators. Additional emission reductions beyond existing and planned controls are not required to mitigate any upwind state contributions and to comply with the Clean Air Act. Therefore, EPA's denial was not arbitrary, capricious, or unreasonable and the Court should affirm.

CONCLUSION

This Court should affirm EPA's final rulemaking and deny the Petition for judicial review.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,226 words (as counted by counsel's word processing system) excluding those portions exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), which is less than one-half of the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: March 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I filed the foregoing Final Brief of Commonwealth of Kentucky, Energy and Environment Cabinet as Amicus Curiae in Support of Affirmance of Respondents 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, which effected service upon counsel of record through the Court's system. Eight copies and the original were mailed to the Clerk's Office and two copies were served on each party separately represented in accordance with D.C. Cir. R. 31(b).

Dated: March 5, 2020

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All parties, intervenors, and *amici* appearing in this Court are listed in the Briefs for Petitioners (Doc. 1824155), Petitioner-Intervenors (Doc. 1824164), and Respondents (Doc. 1830717).

B. Rulings Under Review

References to the rulings at issue appear in the Briefs for Petitioners (Doc. 1824155), Petitioner-Intervenors (Doc. 1824164), and Respondents (Doc. 1830717).

C. Related Cases

The final agency action under review has not previously been before this Court or any other court. However, the pending case of *Maryland v. EPA* (D.C. Cir., No. 18-1285 and consolidated cases) may involve issues potentially pertinent to this case. That case involves a challenge to EPA's denial of petitions from Maryland and Delaware seeking findings under 42 U.S.C. § 7426(b) for certain upwind pollutant sources also at issue in New York's petition. That case involves several of the same parties involved here (State of New York, City of New York, and State of New Jersey as Petitioner-Intervenors; and Sierra Club, Environmental Defense Fund, and Adirondack Counsel as Petitioners).

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GLOSSARY

CSAPR	Cross-State Air Pollution Rule
CSAPR Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
EGU	Electric Generating Unit
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
lbs/MMBtu	Pounds per million British thermal units
MMBtu	Million British thermal units
NAAQS	National Ambient Air Quality Standards
NO_x	Nitrogen oxide
ppb	Parts per billion
tpy	Tons per year
VOCs	Volatile organic compounds

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Commonwealth of Kentucky, Energy and Environment Cabinet submits this brief under Federal Rule of Appellate Procedure 29(a)(2) as *amicus curiae* in support of the Respondent—Environmental Protection Agency ("EPA"). The source of the Energy and Environment Cabinet's authority to file this brief is Kentucky Revised Statute 224.10-100(5), which states that the Energy and Environment Cabinet is the Kentucky agency charged with administering and enforcing the statutes, regulations, and rules providing for the prevention, abatement, and control of all water, land, and air pollution in the Commonwealth.

Section 126(b) of the Clean Air Act allows any state or political subdivision to petition EPA for a finding that any major source or group of stationary sources emits or would emit in amounts that violate the Good Neighbor Provision, *i.e.* contribute significantly to nonattainment in, or interfere with maintenance by, any other state. 42 U.S.C. § 7426(b); 42 U.S.C. § 7410(a)(2)(D)(i)(I). This Petition for Review concerns a final rulemaking in which EPA denied New York's Petition under Section 126(b) of the Clean Air Act. 84 Fed. Reg. 56,058 (Oct. 18, 2019). New York's Petition asserted that seventeen electric generating units ("EGUs") and twelve non-EGU sources in Kentucky emit or will emit in violation of the Good Neighbor Provision and should be subject to the remedial provisions of Section 126(c). If the Court grants the Petition, these twenty-nine sources would be required

to stop operating within three months unless emissions limitations and compliance schedules extended the operating time for a maximum period of three years. 42 U.S.C. § 7426(c)(2).

SUMMARY OF ARGUMENT

This Court should uphold EPA's denial of New York's Petition because the Petition lacked a proper technical analysis. EPA appropriately exercised its duty to review all of the information rather than relying on outdated and inaccurate data. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1991). New York used outdated modeling and failed to account for reduced emissions from federally enforceable unit retirements when determining which sources to name in the Petition. Relying on systematically flawed foundational data risks subjecting otherwise ineligible sources to the stringent remedy of 42 U.S.C. § 7426(c): shutdown within three months or operation under a compliance schedule for a maximum of three years.

Because this Court chose to remand the Cross State Air Pollution Rule ("CSAPR") Update, rather than vacate it, the emission limitations contained within the Update remain enforceable until EPA determines the appropriate remedy. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (quoting *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015)). Petitioners' argument fails to acknowledge that the budgets established by the CSAPR Update remain

enforceable. Petitioners' concerns may be addressed by a subsequent rule promulgated by EPA to address the CSAPR Update, and vacatur of EPA's denial of New York's Petition now would risk disruptive consequences by imposing an interim change that may itself be changed after promulgation of a final rule. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir.1993)) (internal quotations omitted). Additionally, this Court's decision to remand the CSAPR Update moots Petitioners' argument. EPA appropriately relied on the emissions limitations contained in the Update because they remain enforceable.

New York's failure to recognize or address the impacts of local sources attempts to shift its regulatory burden to Kentucky and ignores New York's statutory obligation to control local sources first. 42 U.S.C. § 7407(a). Mobile sources (such as vehicles) and peak demand generators operating on high energy demand days contribute to ground level ozone. The New York Department of Environmental Conservation found that peaking units used on high energy demand days were a significant contributor to NO_x emissions: they can contribute 4.8 ppb of ozone on high ozone days.

For the foregoing reasons, EPA's decision to deny New York's Petition was not arbitrary, capricious, or unreasonable. The Court should affirm.

ARGUMENT

I. The Court Should Affirm EPA's Denial Because the Petition Lacks a Proper Technical Analysis

Courts have historically afforded controlling weight to an administering agency's construction of an ambiguous statute. *EPA v. Homer City Generation, L.P.*, 572 U.S. 489, 512-13 (2014) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). EPA has consistently followed the same four-step process when rulemaking under the Good Neighbor Provision and Courts have consistently blessed this process. *E.g.*, *Homer City*, 572 U.S. at 518-20; *Wisconsin*, 938 F.3d at 312. As EPA explained in its denial, it evaluated New York's Petition by applying the same four-step regional analytic framework utilized in previous interstate transport rulemaking. 84 Fed. Reg. at 56,058.

EPA correctly determined that "material elements in New York's assessment of step three are insufficient, such that EPA cannot conclude that any source or group of sources in any of the named states will significantly contribute to nonattainment or interfere with maintenance in Chautauqua County or the [New York Metropolitan Area] relative to the 2008 and 2015 ozone [National Ambient Air Quality Standards]." 84 Fed. Reg. at 56,092. EPA's analysis is sound: the Petition's bare technical assessment utilized outdated emissions inventories, inconsistently included sources without sufficient rationale, and failed to consider the retirements of some sources. Although Petitioners and Petitioner-Intervenors challenge EPA's

determination that New York was required to provide additional information regarding cost-effective emissions reductions at step three, the systematic inaccuracies extend beyond this analysis and directly affect which sources were named in the Petition. Opening Proof Brief for Petitioners at 58, New York v. EPA, No. 19-1231 (D.C. Cir. Jan. 14, 2020).

Approving the Petition based on this faulty foundational data would risk over-control in violation of *Homer City*. EPA had an obligation to consider the more recent and accurate emissions data and modeling that appeared in the record instead of merely relying on the outdated and inaccurate data and modeling presented by New York. *Am. Iron & Steel Inst.*, 115 F.3d at 1007. Had EPA simply taken New York's word for it, it would have failed in its duty to use the "best information available." *Catawba County, N.C. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009). For these reasons, the Petitioners have not met their burden of establishing that EPA's denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9). The Court should uphold EPA's decision and deny the petition for review.

A. The Petition Relies on Inaccurate and Outdated Emission Inventories

The technical analysis underlying the Petition relied on outdated emissions inventories as the baseline and failed to account for significant emission rate decreases. This decision inflated upwind emissions and projected 2017 emissions,

which caused otherwise ineligible sources to be included in the Petition and may subject them to closure or unnecessary emissions limitations.

First, New York attempted to identify which states were projected to contribute at least .75 parts per billion ("ppb") to New York Metro Area ozone monitors in 2017. New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b), EPA-HQ-OAR-2018-0170-0004, at 9-10 [hereinafter State Petition]. To do this, New York used EPA's ozone contribution modeling for the 2008 ozone National Ambient Air Quality Standards ("NAAQS"), released in September 2016, instead of the corrected ozone modeling EPA released in October 2017. State Petition at 10.

Between the releases, EPA worked to ensure that it applied the best available scientific information in the updated 2017 modeling. On January 6, 2017, EPA issued a Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS). 82 Fed. Reg. 1733 (Jan. 6, 2017). In response, Kentucky's Division for Air Quality noted "that EPA['s initial modeling] grew NO_x and VOC emissions from nonpoint oil/gas productions in Kentucky by 25,195 and 13,954 tons respectively from 2011 levels" despite the Division's research, which indicated "a decrease in future gas production and a more modest increase in oil production from 2011 to 2023." Comment by Sean Alteri, Director,

Kentucky Energy and Environment Cabinet, EPA-HQ-OAR-2016-0751-0083, at 3. The Division requested that EPA review the oil and gas information and "work with the Division to ensure that the nonpoint oil and gas production emissions are accurate for Kentucky." *Id*. EPA subsequently addressed the error and updated the 2011 modeling platforms through version 6.3. U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT (TSD) ADDITIONAL UPDATES TO EMISSIONS INVENTORIES FOR THE VERSION 6.3, 2011 EMISSIONS MODELING PLATFORM FOR THE YEAR 2023 (2017), https://www.epa.gov/sites/production/files/2017-11/documents/2011v6.3_2023en_update_emismod_tsd_oct2017.pdf [hereinafter Version 6.3 Emissions Inventories TSD]. However, New York chose to use the older, less accurate emissions inventories to identify which states were projected to significantly contribute. State Petition at 10.

Importantly, the Petition's Appendix B, which provides the list of named sources, includes the least amount of information on how New York selected the non-EGU sources. State Petition, at App. B. The EGU list includes multiple columns: State, Plant ID, Plant Name, Projected 2017 NO_x (in tons), 2014 NO_x emissions (in tons), 2014 heat input (in MMBtu), 2014 NO_x rate (in lbs/MMBtu), 2015 NO_x emissions (in tons), 2015 heat input (in MMBtu), 2015 NO_x rate (lbs/MMBtu), 2016 NO_x emissions (in tons), 2016 heat input (in MMBtu), 2016 NO_x rate (lbs/MMBtu), 2014-16 average NO_x (in tons), and 2014-16 average NO_x rate

(lbs/MMBtu). *Id*. In stark contrast, the non-EGU list includes only four columns: State, Plant ID, Plant Name, and Projected 2017 NO_x (in tons). *Id*. New York's failure to use the updated non-EGU emissions inventories is particularly important in light of the scarce data New York provided to justify its inclusion of these sources.

New York argues that the older emissions inventories were appropriate because the updated modeling incorporated an expectation that uncontrolled EGUs would reduce their emission rates in the absence of enforceable limits. State Petition at 10. This argument ignores the enforceable limits generated by the CSAPR Update, which were incorporated into the updated modeling. Version 6.3 Emissions Inventories TSD at 98. These federally enforceable limits applied when EPA issued its updated emission inventories in October 2017 and when New York petitioned EPA in March 2018. 40 C.F.R. § 52.940. Although this Court subsequently invalidated EPA's use of the 2023 analytic year, the limits generated by the CSAPR Update remain enforceable today because the rule was remanded without vacatur. *Wisconsin*, 938 F.3d at 336; *see Allied-Signal*, 988 F.2d at 150-51. New York's choice to use outdated and inaccurate data provides a valid basis for EPA's denial.

B. The Petition Fails to Account for Declining Kentucky NO_x Emissions and Source Retirements

The Petition also fails to account for source retirements and unit conversions from coal to natural gas, which reduces NO_x emissions. After identifying the particular upwind states, the Petition named any source projected to emit 400 tons

per year ("tpy") or more of NO_x in each of those states that New York previously identified as significantly contributing to nonattainment. State Petition at 11. New York used the 2017 Beta 2 projection inventory developed by the Mid-Atlantic Regional Air Management Association and the Eastern Regional Technical Advisory Committee tool to identify facilities projected to emit 400 tpy or more of NO_x in 2017. State Petition at 10. Additionally, New York included any source that emitted 400 tpy or more of NO_x in 2014, based on its review of the National Emissions Inventory. State Petition at 9-10.[1] However, many named Kentucky sources have closed completely, retired coal-fired units, and/or switched to natural gas, which significantly reduced their emissions and New York's failure to consider this information risks over-control of all Kentucky sources. The data provided by New York fails to account for these significant changes.

According to the data accompanying the Petition, East Kentucky Power Cooperative's William C. Dale Station emitted 41.6 tons of NO_x in 2014, 102.1 tons of NO_x in 2015, and "N/A" during 2016. State Petition at App. B.[2] "N/A"

[1] New York explained that it chose the 400 tpy threshold because these "highest-emitting facilities" were "expected to have the greatest impact on the ability of the [New York Metro Area] and Chautauqua County to attain and maintain the 2008 and 2015 NAAQS, and therefore [could] reasonably be retrofitted with control equipment or [could] operate existing control more frequently." State Petition at 9-10. Although New York's threadbare justification for the 400 tpy threshold is very unclear, this brief will only focus on the selection of sources, not the rationale.

[2] The data in Appendix B of the State Petition represents the data reported by EPA's Air Markets Program and the United States Energy Information Administration. State Petition at App. B; U.S. Envtl. Prot. Agency, *Air Markets Program Data*, https://ampd.epa.gov/ampd/; U.S. Energy Info.

appropriately describes this plant's emissions because it retired all units effective April 16, 2016, and subsequently demolished the entire plant. East Kentucky Power Company reported no emissions to EPA or to the United States Energy Information Administration in 2017. U.S. Envtl. Prot. Agency, AIR MARKETS PROGRAM DATA, *Query*, https://ampd.epa.gov/ampd/; U.S. Energy Info. Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

Beyond relying on inaccurate data to support the Petition, Petitioners attempt to argue that EPA erroneously assumed that power plants would reduce emissions and that any conversions to natural gas would be unenforceable. Opening Proof Brief for Petitioners at 2. However, the closures and conversions are federally enforceable. East Kentucky Power Company no longer has authority to burn coal by an operating permit issued by the Kentucky Division for Air Quality at the William C. Dale Station. Therefore, if this source burned coal it would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. However, New York projected that this retired, completely demolished plant would emit 1,359.8 tons of NO_x in 2017. This projection is plainly impossible.

The Petition also includes Louisville Gas and Electric Company's Cane Run Station, despite projecting 2017 NO_x emissions of 89.4 tpy. State Petition at App.

Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

B. Eighty-nine tpy is dramatically lower than the 400 tpy threshold. The Petition likely included this source because it the data included indicated over 400 tpy of NO_x in 2014. State Petition at App. B. However, the Cane Run Station had retired all of its coal-fired units as of June 16, 2015, and subsequently demolished the units. Similarly, Louisville Gas and Electric Company reported no emissions from coal-fired units to EPA in 2017, and only reported NO_x emissions of 317.3 tpy. U.S. Envtl. Prot. Agency, AIR MARKETS PROGRAM DATA, *Query*, https://ampd.epa.gov/ampd/; U.S. Energy Info. Admin., ELECTRICITY, *Emissions by plant and by region*, https://www.eia.gov/electricity/data/emissions/.

None of the coal-fired units at this facility are permitted to operate under Kentucky's Division for Air Quality's program and doing so would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. These sources no longer burn coal, which significantly reduces their emissions. Additionally, other named sources have retired some, but not all, of their coal-fired units. For example, Kentucky Utilities' E.W. Brown station retired two of its three coal-fired units on March 1, 2019. This source no longer has an operating permit to burn coal at these units. Therefore, doing so would violate 401 KAR 52:020 and 42 U.S.C. § 7661a. Clearly, the inclusion of these sources must be further scrutinized before imposing the remedy sought by New York's Petition.

In light of the best information available, EPA's denial of New York's Section 126(b) Petition was not arbitrary, capricious, or unreasonable. This Court should deny the petition for review and affirm EPA's denial.

II. The Current Status of the Cross-State Air Pollution Rule Update Forecloses New York's 126(b) Petition

Petitioners argue that this Court's recent remand of the CSAPR Update in *Wisconsin v. EPA* forecloses EPA's reliance on the trading allowances established therein. Opening Proof Brief for Petitioners at 2 (citing *Wisconsin*, 938 F.3d at 315), 23 ("The Denial's continued reliance on these now-invalidated rules requires its vacatur."), 26. However, this Court upheld the CSAPR Update in all respects except one: EPA's reliance on the 2023 analytic year at step one of its analysis. *Wisconsin*, 938 F.3d at 320. Instead of vacating the rule, this Court remanded it because "[v]acatur of the Update Rule 'could cause substantial disruption to the [allowance] trading markets that have developed.' . . . [a]nd 'some good neighbor obligations [imposed by the Rule] may be appropriate for some of the relevant upwind States.'" *Id*. at 336 (quoting *Homer City*, 795 F.3d at 132). This follows the Court's precedent in other cases under the Good Neighbor Provision and the Clean Air Act because vacatur "would risk significant harm to the public health or the environment." *Id*. Therefore, the NO_x limits established under the CSAPR Update remain federally enforceable. Petitioners' argument thus rests upon vacatur of a rule that was not

vacated. For this reason, the Court should affirm EPA's denial of New York's petition.

A. Petitioners' Argument Risks Disruption

First, Petitioners argue that EPA's "[d]enial inappropriately relied on the adequacy of the control measures required under the now-invalidated portions of the Update." Opening Proof Brief for Petitioners at 29-30. EPA reasonably and appropriately relied on the limitations imposed by the CSAPR Update when it denied the Petition because such limitations are still federally enforceable.

Although this Court held in *Wisconsin* that EPA must align the analytic year with the Title I statutory deadlines, the Court chose to remand the case without vacatur in part because some obligations may remain appropriate for some upwind states. *Wisconsin*, 938 F.3d at 336 (quoting *Homer City*, 795 F.3d at 132). Therefore, the limits imposed by the rule remain in place as EPA determines the appropriate replacement. Petitioners' inappropriate and premature argument assumes that the limitations will no longer apply and faults EPA for relying on them. However, EPA's reliance on the CSAPR Update when it denied the petition was appropriate in light of this Court's remand.

Petitioners risk wasting judicial resources and causing unnecessary disruption by attacking EPA's reliance on the remanded CSAPR Update before the agency can determine the appropriate limitations. "The decision whether to vacate depends on

the seriousness of the order's deficiency ... and the disruptive consequences of an interim change that may itself be changed." *Advocates for Highway & Auto Safety*, 429 F.3d at 1151 (quoting *Allied–Signal*, 988 F.2d at 150–51 (internal quotations omitted)). Similarly, here, Petitioners ask the Court to effectively impose an interim change "that may itself be changed" depending on EPA's ultimate determination.

B. The CSAPR Update Moots Petitioners' Argument

The federally enforceable limits imposed by the CSAPR Update moot Petitioners' arguments. Petitioners fault EPA for relying on the CSAPR Update. Opening Proof Brief for Petitioners, at 26. However, the NO_x trading budgets established in the CSAPR Update were enforceable at the time of the denial and remain federally enforceable today.

As required by the CSAPR Update and 40 C.F.R. § 52.940(b)(1) and (b)(2), the owner and operator of each source, including all of those named in the Petition, must comply with the CSAPR NO_x Ozone Season Budget. 40 C.F.R. § 52.940(b)(1), (2). The requirements under the CSAPR NO_x Ozone Season Group 2 Trading Program are set forth in 40 C.F.R. § 97 Subpart EEEEE with regard to emissions occurring in 2017 and in each subsequent year. In 2015 and 2016, EPA allocated a NO_x ozone season budget of 36,167 tons to Kentucky through CSAPR. 40 C.F.R. § 97.510(a)(8)(i). As a result of the CSAPR Update, EPA reduced

Kentucky's 2017 NO_x ozone season budget to 21,115 tons, a forty-two percent reduction. 40 C.F.R. § 97.810(a)(8).

This Court appropriately and wisely remanded the CSAPR Update without vacating it because "the rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule." *North Carolina v. E.P.A.*, 550 F.3d 1176, 1178–79 (D.C. Cir. 2008) (Rogers, concurring in part and dissenting in part) (remanding CAIR without vacatur). Indeed, the budget program implemented by the Update is working: emissions of NO_x from EGUs have decreased by more than 2.28 million tpy since 1998, the year EPA began promulgating rules to budget NO_x emissions. U.S. Envtl. Prot. Agency, *Power Plant Emission Trends*, CLEAN AIR MARKETS, https://www.epa.gov/airmarkets/power-plant-emission-trends (last visited June 20, 2019). Because this Court in *Wisconsin* remanded the CSAPR Update, the reductions required by the Update are still federally enforceable and Petitioners' argument fails. The Court should affirm EPA.

III. Petitioners Attempt to Shift the Burden to Upwind States by Ignoring Significant Impacts From New York Sources

Notably absent from the Petitioners' brief is any discussion of local factors contributing to the purported ozone nonattainment. Under the Clean Air Act, each state has the "primary responsibility" to ensure the air quality within their own state

before looking to other states' good neighbor obligations. 42 U.S.C. § 7407(a). New York must first address local contributing factors, such as mobile sources and peak demand EGUs, before petitioning for stricter controls on EGUs across nine other upwind states.

The data demonstrates that the condition of New York's air quality stems from emissions within its own jurisdictional boundaries rather than from upwind states. Mobile sources create the most significant impact on ozone concentrations at problem monitors. In 2014, the total vehicle miles traveled in the New York Metro Area was estimated to be over 120 billion, and mobile source emissions constituted more than 42 percent of all NO_x emissions in the New York – Northern New Jersey – Long Island Nonattainment area. U.S. ENVTL. PROT. AGENCY, FINAL AREA DESIGNATIONS FOR THE 2015 NATIONAL AMBIENT AIR QUALITY STANDARDS TECHNICAL SUPPORT DOCUMENT (TSD), at 21 (2018), https://www.epa.gov/sites/production/files/2018-05/documents/ny_nj_ct_new_york-northern_new_jersey-long_island_tsd_final.pdf; KY. ENERGY AND ENV'T CABINET, KY. DIV. FOR AIR QUALITY, FINAL KENTUCKY INFRASTRUCTURE STATE IMPLEMENTATION PLAN 2015 OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS, at 35 (2019), https://eec.ky.gov/Environmental-Protection/Air/Documents/2019-01-11%202015%20O3%20ISIP%20Final%20Submittal.pdf [Hereinafter Kentucky

2015 Ozone Infrastructure SIP]. The 2014 National Emissions Inventory data clearly demonstrates that on-road emissions contributed the highest amount of NO_x emissions in the New York-Northern New Jersey-Long Island nonattainment area. *Id*. By comparing violating ozone monitors with heavily congested corridors, there is a consistent pattern of violating monitors located along the I-95 corridor. *Id*. at 36. Neither the Petition nor the Petitioners' brief acknowledges or addresses this relationship.

Another contributing factor is the number of peak demand generators operating during high electric demand days, which occur on the hottest days of the summer due to the increased demand of electricity, primarily from air conditioning. *Id*. at 38. The operation of peak demand generators during high electric demand days coincides with days that have the highest monitored ozone levels. *Id*. As New York explained in its attainment demonstration for the New York Metro Area, "[high electric demand day] units include EGUs that typically operate on peak ozone days when demand for electricity is very high. These peak-demand units can be among the dirtiest in the region." NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE IMPLEMENTATION PLAN FOR OZONE (8-HOUR NAAQS) ATTAINMENT DEMONSTRATION FOR NEW YORK METRO AREA, at 9-14, (2008), http://www.dec.ny.gov/docs/air_pdf/nymaozonesipfinal.pdf.

In fact, the New York Department of Environmental Conservation found that peaking EGUs used on high energy demand days were a significant contributor to NO_x emissions. *Id*. at 13-3. New York performed an emissions analysis on peaking units and found that they can contribute 4.8 ppb of ozone in the New York Metro Area on high ozone days. Kentucky 2015 Ozone Infrastructure SIP, at 39; Again, the Petitioners' brief fails to acknowledge these localized impacts from peak demand electric generators. Additional emission reductions beyond existing and planned controls are not required to mitigate any upwind state contributions and to comply with the Clean Air Act. Therefore, EPA's denial was not arbitrary, capricious, or unreasonable and the Court should affirm.

CONCLUSION

This Court should affirm EPA's final rulemaking and deny the Petition for judicial review.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,226 words (as counted by counsel's word processing system) excluding those portions exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), which is less than one-half of the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: March 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I filed the foregoing Final Brief of Commonwealth of Kentucky, Energy and Environment Cabinet as Amicus Curiae in Support of Affirmance of Respondents 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, which effected service upon counsel of record through the Court's system. Eight copies and the original were mailed to the Clerk's Office and two copies were served on each party separately represented in accordance with D.C. Cir. R. 31(b).

Dated: March 5, 2020

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