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, AND THE CITY OF NEW YORK,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
84 Fed. Reg. 56,058 (Oct. 18, 2019)

OPENING PROOF BRIEF FOR PETITIONERS

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Dated: January 14, 2020

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to the Court's Order of October 30, 2019 (Doc No. 1813332), containing the information specified in D.C. Circuit Rule 28(a)(1), and updating the information in the certificate filed December 2, 2019 (Doc. No. 1818237), the undersigned counsel of record certifies as follows:

A. Parties and Amici

Petitioners

The following parties appear in this case as petitioners: New York, New Jersey, and the City of New York.

Respondents

The following parties appear in this case as respondents: United States Environmental Protection Agency and Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency.

Intervenors

The following parties have intervened in support of petitioners: Adirondack Council, Environmental Defense Fund, and Sierra Club (*see* Doc. No. 1819450).

The following parties have intervened in support of respondents: the Midwest Ozone Group; the Air Stewardship Coalition; the Chamber of Commerce of the United States of America; the National Association of Manufacturers; Big Rivers Electric Corporation; GenOn Holdings, LLC; The Peoples Gas Light and Coke Company; and Dominion Energy (*see* Doc. No. 1819450).

Amici

As of the date of this filing, no party has sought or been permitted to appear in this action as amicus curiae.

B. Ruling Under Review

Petitioners seek review of the final agency action by respondents entitled: "Response to Clean Air Act Section 126(b) Petition from New York," 84 Fed. Reg. 56,058 (Oct. 18, 2019).

C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court.

There is one related case currently pending in this Court, *State of Maryland v. EPA*, Case No. 18-1285 (and consolidated cases).

There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

DATED: January 14, 2020

Respectfully submitted,

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Act	Clean Air Act
AG Comments	Comments of the Attorneys General of the States of New York and New Jersey and the Corporation Counsel of the City of New York on the Proposed Denial, EPA-HQ-OAR-2018-0083
Cross-State Close-Out or Close-Out	Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018)
Cross-State Update or Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
JA	Joint Appendix
lb/mmBtu	pounds per million British thermal units
NYSDEC Comments and Detailed Comments	Comments of the New York State Department of Environmental Conservation on the Proposed Denial, EPA-HQ-OAR-2018-0081 and -0084

New York Metropolitan Area	New York-Northern New Jersey-Long Island, NY-NJ-CT Nonattainment Area for 2008 and 2015 ozone standards
2008 ozone standard	The national ambient air quality standards for ozone promulgated by EPA in 2008
2015 ozone standard	The national ambient air quality standards for ozone promulgated by EPA in 2015

PRELIMINARY STATEMENT

This proceeding challenges a decision by the Environmental Protection Agency and Administrator Andrew Wheeler (together, EPA) to deny a petition submitted by New York under section 126(b) of the Clean Air Act (Act), 42 U.S.C. § 7426(b) (Petition). Section 126 is one of several provisions in the Act that seek to remedy the interstate transport of air pollution from upwind to downwind States. Unlike other provisions, which are focused on state-level remedies, section 126 provides a source-specific remedy that allows for emission controls to be placed on particular sources to address their distinct contributions to cross-state pollution. Specifically, section 126 authorizes States to petition EPA to expeditiously abate emissions from upwind power plants and other large stationary sources whose pollution undermines a downwind State's ability to comply with national ambient air quality standards for ground-level ozone or "smog" (ozone standards).

Here, the Petition sought emission reductions from stationary sources in nine upwind States based on extensive evidence demonstrating that these sources emit ozone precursor air pollution that blows into New York. EPA denied the Petition based in large part on its

finding that emission reductions required by an earlier rule—the Cross-State Air Pollution Rule Update, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (Update)—had adequately resolved the problem and that no further emission reductions were required under the Act. But this Court recently held that the Update was inadequate, *Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019), and indeed vacated a related rule, Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018) (Close-Out), on the ground that EPA had unlawfully concluded that the Update satisfied EPA's statutory obligation to timely eliminate significant upwind contributions to downwind ozone pollution, *New York v. EPA*, 781 F. App'x 4, 6-7 (D.C. Cir. 2019). EPA's continued reliance on these legally inadequate rules in denying New York's Petition thus requires vacatur of the Denial.

Even setting aside EPA's express reliance on these now-invalidated rules, its denial of New York's Petition should still be vacated as unlawful and arbitrary and capricious. In concluding that the Petition failed to establish downwind air quality problems, EPA arbitrarily disregarded compelling evidence of current and ongoing nonattainment of the

applicable ozone standards, improperly found that evidence of air quality problems within a multistate nonattainment area was irrelevant, and relied on flawed modeling. And in concluding that the Petition also failed to demonstrate that additional, cost-effective emission reductions are available from upwind sources, EPA ignored the detailed information submitted in support of the Petition or available in the record and unreasonably placed the burden on petitioning States to provide information that EPA is uniquely able to collect—and, indeed, was statutorily obligated to collect years ago.

JURISDICTIONAL STATEMENT

Petitioners challenge EPA's final action, "Response to Clean Air Act Section 126(b) Petition from New York," 84 Fed. Reg. 56,058 (Oct. 18, 2019) (Denial), JA-____-____, which denied the "New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b,)" EPA-HQ-OAR-2018-0170-0004 (Petition), JA-____-____. EPA stated that its final action was based on a determination of "nationwide scope and effect," 84 Fed. Reg. at 56,093, one which the Clean Air Act (Act) gives this Court exclusive jurisdiction to review. 42 U.S.C. § 7607(b)(1). Petitioners timely filed their petition for review. *See id.*

ISSUES PRESENTED

1. Should EPA's Denial be vacated because it expressly relied on the reasoning of two earlier rules that this Court has now invalidated as inadequate under the Act?

2. Was EPA's Denial unlawful and arbitrary and capricious in finding that the Petition failed to establish downwind air quality problems, when EPA disregarded compelling evidence of current and ongoing nonattainment of the applicable ozone standards, improperly found that evidence of air quality problems within a multistate nonattainment area was irrelevant, and relied on flawed modeling?

3. Was EPA's Denial unlawful and arbitrary and capricious in finding that the Petition failed to demonstrate the availability of cost-effective controls from upwind sources, when the Petition provided extensive information and analysis on such controls, and it was EPA's responsibility, not Petitioners', to collect the information that the Denial claims was missing?

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are in the Addendum filed with this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. National Ambient Air Quality Standards for Ozone

The Clean Air Act requires EPA to establish and periodically revise national ambient air quality standards, setting maximum allowable concentrations for certain air pollutants, including ground-level ozone. 42 U.S.C. §§ 7408-7409. These standards "define [the] levels of air quality that must be achieved to protect public health and welfare." *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 469 (2004) (quotation marks omitted).

Ground-level ozone is a gas formed when ozone "precursors," such as nitrogen oxides and volatile organic compounds, react in the presence of sunlight. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). EPA has found that exposure to elevated ozone levels causes significant health harms, including coughing, throat irritation and lung tissue damage, and is linked to premature death. *Id.* at 65,302-11. Exposure also aggravates

existing conditions, including asthma, bronchitis, heart disease, and emphysema. *Id.* Children, the elderly, and those with existing lung disease are more vulnerable to ozone's harmful effects. *Id.* Ozone also makes plants more susceptible to disease and foliar injury, reduces plant growth, and causes crop yields to fall. 62 Fed. Reg. 38,856, 38,875 (July 19, 1997); 80 Fed. Reg. at 65,369-82.

In 2008, EPA promulgated an ozone standard of 75 parts per billion (ppb). 73 Fed. Reg. 16,436 (Mar. 27, 2008) (2008 ozone standard). In 2015, based on updated scientific information about the health risks of ozone at lower concentrations, EPA made the ozone standard more stringent, lowering it to 70 ppb. 80 Fed. Reg. at 65,292 (2015 ozone standard). Both the 2008 and 2015 standards remain in effect,[1] and both are at issue in this proceeding.

States have primary responsibility for ensuring that air quality within their borders meets these standards. *See* 42 U.S.C. § 7410(a). Within three years of EPA promulgating an ozone standard, each State must submit a state implementation plan that provides for the

[1] States are responsible for meeting both the 2008 and 2015 standards on a set of overlapping deadlines.

"implementation, maintenance, and enforcement" of the standard by the applicable attainment deadline. *Id.* § 7410(a)(1). A State that fails to develop a state plan that can demonstrate the likelihood of timely attainment of an ozone standard may be subject to sanctions under the Act. *Id.* § 7509.

States that are not in attainment with the ozone standards must take additional steps to attain "as expeditiously as practicable but not later than" statutory deadlines that depend on the degree of nonattainment, which EPA classifies by severity (from marginal, to moderate, to serious, to severe, to extreme). 42 U.S.C. § 7511(a)(1), (b)(1).[2] For example, as relevant to this proceeding, areas that are in "serious" nonattainment of the 2008 ozone standard have a statutory attainment deadline of 2021; and areas in "moderate" nonattainment of the more stringent 2015 standard have a statutory attainment deadline of 2024. *See* 84 Fed. Reg. 44,238 (Aug. 23, 2019); 83 Fed. Reg. 25,776, 25,821 (June 4, 2018).

2. Interstate Transport of Ozone

[2] EPA may also classify areas as "maintenance," meaning they have previously been in nonattainment but have reached attainment and are required to maintain compliance with applicable air quality standards.

The formation and transport of ozone occurs on a regional scale over much of the eastern United States. Ozone and ozone precursors transported from sources in upwind States are responsible for elevated ozone levels in many downwind States, including Petitioners. These levels are highest during the "ozone season."[3] Despite imposing stringent controls on sources within their jurisdictions, Petitioners have long suffered from ozone pollution in concentrations exceeding EPA's air quality standards, in large part due to emissions from upwind sources. Petition at 1-2, JA-___-___; AG Comments at 3-7, JA-___-____; NYSDEC Detailed Comments at 1, JA-___.

The Clean Air Act contains multiple mechanisms that operate in tandem to reduce interstate pollution transport. The Good Neighbor Provision requires that each State's implementation plan "prohibit" emissions that will "contribute significantly to" nonattainment of, or "interfere with maintenance" of, air quality standards in a downwind State. 42 U.S.C. § 7410(a)(2)(D)(i)(I). That prohibition must curb upwind

[3] An ozone season's beginning and ending dates vary by area. In New York and New Jersey, the EPA-designated season runs from March through October. 40 C.F.R. Part 58, App. D, § 4.1(i) (2016).

emissions in time to allow downwind States to attain the relevant national standards by the applicable statutory deadlines. *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir.), *amended in part on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008); *accord Wisconsin*, 938 F.3d at 314; *New York*, 781 F. App'x at 6.

EPA must determine if a State's plan meets the requirements of the Act, including the Good Neighbor Provision. 42 U.S.C. § 7410(k)(1). If EPA finds that a State has failed to submit a fully compliant plan, it must within two years of such a finding issue a federal implementation plan that will meet the requirements of the Act. *Id.* § 7410(c)(1).

Section 126, the statutory provision principally at issue here, provides States with a separate, expeditious remedy against specific sources of interstate pollution. *See* H.R. Rep. No. 95-294, at 331, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1410 (May 12, 1977). "Any State or political subdivision" may petition EPA "for a finding that any major source or group of stationary sources emits or would emit any air pollutant" in violation of the Good Neighbor Provision. 42 U.S.C. § 7426(b). EPA must resolve a section 126 petition "[w]ithin 60 days after receipt." *Id.* Any source for which EPA makes a positive finding of violation must cease

operating within three months, unless "such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance . . . as expeditiously as practicable, but in no case later than three years after the date of such finding." *Id.* § 7426(c).

States need not wait for the completion of state or federal implementation plans under the Good Neighbor Provision before petitioning EPA for relief under section 126. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1047-48 (D.C. Cir. 2001). Similarly, the statutory sixty-day deadline for EPA to act on section 126 petitions "demonstrates that the EPA must act quickly" upon receipt of the petition, without "wait[ing] the potential several years that it would take for states to fully adopt" state implementation plans. *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 520 (3d Cir. 2013).

B. Petitioners' Collective Nonattainment Designation

The New York-Northern New Jersey-Long Island, NY-NJ-CT Nonattainment Area (New York Metropolitan Area) is a multistate nonattainment area that includes nine counties in New York (including all of New York City), twelve counties in New Jersey, and three counties

in Connecticut. The Clean Air Act authorizes such regional designations. *See* 42 U.S.C. § 7407(d)(1)(A)(i) (allowing regional designation of areas not meeting a standard, encompassing any "nearby area" contributing to the problem).

EPA relies on several factors—including air quality, emissions, and metropolitan area boundaries—to determine whether it is warranted to collectively treat counties in different States as parts of a shared nonattainment area. *See* AG Comments Ex. E, Memorandum, Area Designations for the 2015 Ozone National Ambient Air Quality Standards (2015 Designations Guidance), at 5 & Attachment 3 at 1 (Feb. 25, 2016), JA-__, __. These regional boundaries reflect, *inter alia*, the "spatial and temporal" distribution of ozone, and the ability of the included jurisdictions to collaborate in "meaningful air quality planning and regulation." *Id.*, Attachment 3 at 3, 11, JA-__, __.

Once EPA determines that even a single monitor in a multistate area is in nonattainment, all of the States in the multistate area will face direct consequences and responsibilities under the Act to address that nonattainment status. 42 U.S.C. §§ 7407(d)(1)(A)(i) & 7511a. And all States with counties in a shared nonattainment area designated by EPA

are expected to work together to coordinate attainment efforts. *See id.* § 7511a(j)(1).

C. Efforts to Attain Ozone Standards and Current Nonattainment and Maintenance Problems

For decades, Petitioners have struggled to attain and maintain ozone standards, due in substantial part to significant contributions of ozone from upwind sources. AG Comments at 3-7, JA-___-___; NYSDEC Detailed Comments at 1, JA-___. In 2012, EPA designated the New York Metropolitan Area as being in "marginal" nonattainment of the 2008 ozone standard, 77 Fed. Reg. 30,088, 30,135 (May 21, 2012), requiring New York, New Jersey, and Connecticut to meet a July 2015 statutory attainment deadline. Despite considerable emissions reductions achieved through in-state controls, the New York Metropolitan Area did not attain the 2008 standard by the 2015 deadline and was reclassified to "moderate" nonattainment with a July 2018 statutory attainment deadline. 81 Fed. Reg. 26,697, 26,699 (May 4, 2016). Even after making further in-state reductions, the New York Metropolitan Area was not able

to attain the 2008 ozone standard by the 2018 deadline either. NYSDEC Detailed Comments at 1, JA-__.

EPA has now designated the New York Metropolitan Area as being in "serious" nonattainment of the 2008 ozone standard, a designation that imposes a 2021 attainment deadline on the affected States. 84 Fed. Reg. 44,238 (Aug. 23, 2019) (effective Sept. 23, 2019). Attainment by 2021 will be determined based on 2018-2020 ozone season monitoring data. 83 Fed. Reg. 56,781, 56,784 (Nov. 14, 2018); 42 U.S.C. § 7511(b)(2)(A). Under the more stringent 2015 ozone standard, EPA designated the New York Metropolitan Area as a "moderate" nonattainment area, with a 2024 attainment deadline. 83 Fed. Reg. at 25,821. Air quality monitoring data indicate that the New York Metropolitan Area is at serious risk of not attaining the 2008 standard by 2021, or the 2015 standard by 2024 due, in significant part, to ozone transported from sources in upwind States. NYSDEC Detailed Comments at 1, JA-___; AG Comments at 4 & Ex. A, JA-____, ____.

EPA classified New York's Chautauqua County (Jamestown) as in "marginal" nonattainment of the 2008 standard. Although it was deemed to have met the 2008 standard, 83 Fed. Reg. 49,492 (Oct. 2, 2018), it

remains at risk of nonattainment and has not been formally re-designated. *Id.* at 49,494 ("the designation status of the Jamestown Area will remain nonattainment for the 2008 8-hour ozone [standards] until such time as EPA takes final rulemaking action to determine that such Area meets the [Clean Air Act] requirements for redesignation to attainment"). Chautauqua County was classified as attaining the 2015 ozone standard, 83 Fed. Reg. at 25,821, but continues to struggle with elevated ozone levels. In 2018, the fourth-highest daily value measured was 71 ppb, above the 2015 standard. *See* AG Comments, Ex. A (Dunkirk Monitor; "4th Max 2018" column), JA-___.

D. EPA's Failure to Fully or Timely Address Interstate Ozone Transport

While downwind States have made significant, costly efforts to reduce in-state ozone pollution to satisfy the ozone standards, numerous upwind States failed to timely submit state plans compliant with the Good Neighbor Provision after EPA issued the 2008 ozone standard. 80 Fed. Reg. 39,961 (Jul. 13, 2015). That failure obligated EPA to promulgate federal plans for those States. *See* 42 U.S.C. § 7410(c)(1). In 2016, in partial satisfaction of this statutory duty, EPA promulgated the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS

(Update), 81 Fed Reg. 74,504 (Oct. 26, 2016). The Update provided limited emission reductions from upwind sources that EPA acknowledged were only a "partial remedy" under the Good Neighbor Provision because they would not fully address downwind States' nonattainment and maintenance problems. *Id.* at 74,508, 74,533 Tables V.D-1, -2.

Notwithstanding the concededly incomplete nature of the Update, EPA in 2018 promulgated the Close-Out, which concluded that the Update had fully remedied upwind States' good neighbor obligations under the 2008 ozone standard.[4] EPA's conclusion was based on its predictions that downwind States would satisfy that standard by 2023—two years *after* the statutory 2021 attainment deadline.

This Court has now partially invalidated and remanded the Update and vacated the Close-Out because neither rule satisfies EPA's obligations under the Act. On September 13, 2019, this Court held in *Wisconsin*, that the Update violates the Good Neighbor Provision because it "allows upwind States to continue their significant contributions to

[4] In its Denial, EPA calls the Close-Out the "Determination Rule." *See* 84 Fed. Reg. at 56,060.

downwind air quality problems beyond the statutory deadlines by which downwind States must demonstrate their attainment of air quality standards." 938 F.3d at 309. The Court rejected EPA's various justifications for allowing substantial upwind contributions to continue beyond downwind attainment deadlines, including EPA's claims of scientific uncertainty and administrative infeasibility. *Id.* at 318-19. The Court remanded the Update to EPA to modify the rule in a manner consistent with its opinion. *Id.* at 336-37.

Shortly after *Wisconsin*, on October 1, 2019, the Court vacated the Close-Out in *New York v. EPA*, holding that "the Close-Out Rule relied upon the same statutory interpretation of the Good Neighbor Provision that we rejected in *Wisconsin*." 781 Fed. App'x at 6 (quotation marks omitted).

EPA has not yet taken any action on remand to address the deficiencies of the Update or the Close-Out.

E. New York's Section 126 Petition

In March 2018, New York submitted its section 126 Petition to EPA. Petition, JA-__-__. The Petition requested that EPA make a finding that approximately 360 sources in nine upwind States significantly contribute

to nonattainment in the New York Metropolitan Area and elsewhere in New York, and/or interfere with maintenance of the 2008 or 2015 ozone standards, in violation of the Good Neighbor Provision. *Id.* at 1, 17, JA-__, __. The Petition provided EPA with extensive evidence that there are available, cost-effective emissions reductions that the named upwind sources could adopt to promptly reduce their significant contributions. *Id.* at 2, 8, 11-12 & App. B, JA-__, __, __-__ & ___-___. The Petition requested enforceable emission limits for the sources and an expeditious compliance schedule. *Id.* at 2, 17, JA-__, __.

EPA failed to take final action on the Petition within the statutory deadline of sixty days, instead granting itself a six-month extension. 83 Fed. Reg. 21,909 (May 11, 2018). When EPA missed even that extended deadline, New York sued to compel EPA's compliance with the statutory deadline. The United States District Court for the Southern District of New York directed EPA to take final action on New York's Petition by September 20, 2019.[5]

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[5] *New York v. Wheeler*, No. 1:19-cv-03287-JMF (Doc. No. 35) (S.D.N.Y. Sept. 5, 2019).

F. EPA's Denial of the Petition Under the Four-Step Cross-State Framework

EPA signed the Denial on September 20, 2019—one week after this Court invalidated the Update in *Wisconsin*—and published it on October 18, 2019—shortly after this Court vacated the Close-Out in *New York*. 84 Fed. Reg. at 56,058. Despite these decisions, EPA's Denial still relied on the Update and the Close-Out.

EPA evaluated the Petition under the four-step framework that it has used to promulgate regional ozone transport rules under the Good Neighbor Provision. Under that framework, EPA (1) identifies downwind areas with air-quality problems; (2) determines which upwind States are "linked" to downwind air-quality problems; (3) for linked States, identifies which upwind emissions significantly contribute to nonattainment or interfere with maintenance of a national ambient air quality standard in a downwind area; and (4) implements necessary emissions reductions within the upwind State. *See* 84 Fed. Reg. at 56,062.

Here, with respect to the 2008 ozone standard, EPA denied the Petition under both the first and third steps of this framework (known as "Cross-State Step One" and "Cross-State Step Three"). With respect to the 2015 ozone standard, EPA acknowledged that there would be

downwind air-quality problems in the New York Metropolitan Area and so denied the Petition under Cross-State Step Three alone.

Under Cross-State Step One, EPA concluded that New York had failed to demonstrate an air-quality problem under the 2008 ozone standard because EPA's modeling projected no such problems *in 2023*—two years after Petitioners' statutory 2021 attainment deadline for the 2008 standard. *Id.* at 56,072. In doing so, EPA expressly incorporated its now-invalidated analysis and reasoning from the Close-Out, which had also "used 2023 as the future analytic year." *Id.* EPA rejected the argument that reliance on 2023 modeling was unlawful because "it does not align with a particular attainment date" (i.e., the 2021 deadline), but noted that this precise issue was being considered in Petitioners' then-pending challenge to the Close-Out, *id.* at 56,074—a challenge that this Court has now resolved by vacating the Close-Out for failing to align its analysis with downwind States' statutory attainment deadlines. See *supra* at 15-16.

Because EPA's analysis under Cross-State Step One incorporated its earlier conclusion that the Close-Out had "fully eliminate[d] emissions that significantly contribute to nonattainment or interfere with

maintenance in a downwind state" for the 2008 ozone standard, the Denial faulted the Petition for failing to provide "new information" that "sources in the upwind state are emitting or would emit in violation of the [Good Neighbor Provision]." *Id.* at 56,068. The Denial also faulted Petitioners for not providing "additional information that was not previously considered by the EPA" in either the Update or Close-Out that would justify imposing additional control requirements on upwind sources. *Id.* at 56,069.

Under Cross-State Step Three, EPA concluded that New York had not identified significant contributions from upwind sources under either the 2008 or 2015 ozone standards. As with its Step One analysis, EPA again expressly relied on the Update and the Close-Out, reasoning that these rules "fully address the good neighbor requirements with respect to the 2008 ozone [standard] for all the States named in the petition," and EPA therefore rejected the need "to implement additional, source-specific, unit-level emissions limits at any of the sources named in the petition." *Id.* at 56,089.

EPA also found that the Petition had not identified cost-effective emission reductions and had thus failed to establish which contributions

from upwind sources were "significant." EPA reasoned that it was New York's burden to conduct a full Step Three analysis to identify such reductions for all of the sources identified in the Petition, and found that the Petition had not met that burden because New York had not conducted a litany of additional analyses. *Id.* at 56,084, 56,088-089.

STANDARD OF REVIEW

Under the Clean Air Act, this Court may reverse an action by EPA that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *Wisconsin*, 938 F.3d at 312. This standard is "the same" as the equivalently worded standard for reviewing general agency action in the Administrative Procedure Act. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995).

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "Where, as here,

Congress has delegated to an administrative agency the critical task of assessing public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning." *American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

For questions regarding statutory interpretation, this Court gives effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the meaning of the statute is ambiguous, then the Court will only defer to the agency's interpretation if that interpretation is reasonable. *Id.*

SUMMARY OF ARGUMENT

I. The Denial should be vacated because EPA expressly relied on reasoning in the Update and Close-Out that this Court has now found to be invalid under the Act. Specifically, the Denial is premised on the assumption that the Update fully and timely addresses upwind emissions of ozone and ozone precursors under the 2008 ozone standard. But this Court has now invalidated the Update because it did *not* fully remedy upwind emissions under the 2008 standard, and vacated the Close-Out

for finding otherwise. The Denial's continued reliance on these now-invalidated rules requires its vacatur.

II. Even setting aside the Denial's continued reliance on the Update and Close-Out, EPA's analysis at Step One of the Cross-State framework (under which EPA determines whether there are air quality problems in downwind areas) is still unlawful and arbitrary and capricious. EPA improperly relied exclusively on projections of air quality in a future year, disregarding data showing current and ongoing nonattainment in 2017, 2018, and 2019, even though data from two of those years will directly affect the New York Metropolitan Area's ability to attain the 2008 ozone standard by 2021. In addition, EPA's projections of future air quality relied on flawed modeling that was based on irrational and unlawful assumptions and that conflicted with EPA's own guidance.

III. EPA also acted unlawfully and arbitrarily and capriciously at Step Three of the Cross-State framework (under which EPA determines which sources significantly contribute to downwind air problems). New York's Petition provided extensive information and analysis demonstrating that the upwind sources identified in the Petition are significantly contributing to nonattainment in the New York

Metropolitan Area under both the 2008 and 2015 ozone standards. Nonetheless, EPA faulted the Petition for failing to include certain additional information that EPA claimed was Petitioners' burden to provide. But, among other errors, EPA's articulation of Petitioners' burden would effectively require them to conduct an entire regional transport rulemaking, which would include the collection of information from hundreds of sources outside of Petitioners' States. It was not reasonable for EPA to impose such a burden on Petitioners, and allowing it to do so would frustrate Congress's purpose of creating a source-specific remedy to provide downwind States with expeditious federal relief.

STANDING

Petitioners have standing to bring this proceeding. In section 126, Congress conferred on "[a]ny State or political subdivision," 42 U.S.C. § 7426(b), a "procedural right" to seek relief from EPA, *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). And Petitioners have been injured by EPA's denial of New York's Petition, particularly in light of the "special solicitude" that States receive in the standing analysis. *Id.* at 520.

Here, the Denial results in continuing levels of unlawfully elevated upwind ozone emissions that cause injury to the Petitioners. Specifically,

without relief from interstate transport of ozone and ozone precursors from the sources named in the Petition, New York, New Jersey, and New York City will continue to bear the ever-increasing regulatory burden of cutting emissions year-over-year to offset pollution from upwind sources. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (EPA action that makes it more onerous for State to address pollution causes injury that supports Article III standing).

In addition, Petitioners' residents will face increased public health risks from high ozone levels should EPA not require reductions of upwind ozone emissions. ECF Doc. No. 1817645, Sheehan Decl. ¶¶79-81; Davis Decl. ¶¶ 29, 35. These risks will impose increased public health care costs on Petitioners. Sheehan Decl. ¶80. And Petitioners' ecosystems will also see increased risk of ozone-induced harms. *See* 80 Fed. Reg. at 65,302-17, 65,369-79.

These injuries are sufficient to establish standing. *See Appalachian Power Co.*, 249 F.3d at 1066-67 (finding standing for Pennsylvania to challenge EPA's denial of portion of section 126(b) petition because "[i]f EPA's ground for refusing to crunch the data for Pittsburgh is illegal, Pennsylvania has been wrongly denied potential benefits").

ARGUMENT

POINT I

THE DENIAL'S RELIANCE ON THE NOW-INVALIDATED UPDATE AND CLOSE-OUT WAS UNLAWFUL AND ARBITRARY AND CAPRICIOUS

EPA's Denial expressly and extensively relied on the adequacy of two prior ozone rules—the Update and the Close-Out—that this Court has now determined to be legally insufficient to fully resolve the requirements of the Good Neighbor Provision under the 2008 ozone standard. Because this Court has now conclusively determined that both the Update and Close-Out are deficient—on grounds that directly undercut EPA's reasoning here—the Court should vacate the Denial. *See Solite Corp. v. EPA*, 952 F.2d 473, 493-94 (D.C. Cir. 1991) (vacatur is appropriate when a challenged rule rests on a prior rule that has been vacated).

Specifically, in denying the Petition, EPA concluded that it had already "fully address[ed]" significant contributions from upwind sources in the Update and the Close-Out, in part by incorporating those rules' adoption of a 2023 "future analytic year" that is two years after Petitioners' 2021 statutory attainment deadline for the 2008 ozone standard. 84 Fed. Reg. at 56,072, 56,089. In so doing, the Denial

expressly stated that EPA "disagrees . . . that the D.C. Circuit's *North Carolina* decision requires the EPA to only use the next relevant attainment date [i.e., 2021] in selecting its future analytic year," *id.* at 56,075, and denied that the Act "requires the compliance deadlines for good neighbor emissions reductions (and thus, the future analytic year) be identical to a specific attainment date in downwind areas, let alone the next upcoming date." *Id.*

This Court has now squarely rejected EPA's reasoning in *Wisconsin* and *New York*. Specifically, prior to EPA's Denial, this Court in *Wisconsin* held that the Update violated the Good Neighbor Provision by failing to eliminate upwind States' significant contributions to downwind air quality problems by downwind States' statutory attainment deadlines, and concluded that this result followed directly from the Court's earlier *North Carolina* decision. 938 F.3d at 315. Then, in *New York*, this Court vacated the Close-Out because that rule's conclusion that the Update fully addressed significant contributions under the 2008 ozone standard improperly presumed the adequacy and lawfulness of the portions of the Update struck down in *Wisconsin*. 781 F. App'x at 7.

Although the Denial at issue here was finalized after *Wisconsin* and published after *New York*, EPA nonetheless continued to rely on the asserted sufficiency of these now-invalidated rules to deny the Petition. Indeed, EPA relied on the specific portions of those rules that this Court had found invalid: EPA incorporated a future analytic year that was not in alignment with downwind States' statutory attainment deadlines, contrary to this Court's holding in *Wisconsin*; and EPA asserted that the Close-Out had fully eliminated emissions that significantly contribute to Petitioners' nonattainment with the 2008 ozone standard, contrary to this Court's holding in *New York*. EPA then faulted the Petition for failing to present *additional* information to show why the Update and Close-Out were not adequate to address good neighbor obligations under the 2008 ozone standard. But there was no need for the Petition to do so when this Court had already found as much.

EPA's only response to *Wisconsin* in the Denial (there is no response to *New York* aside from an acknowledgment that the dispute there is directly applicable, 84 Fed. Reg. at 56,074) is a footnote claiming, in conclusory terms, that EPA had an "independent and severable" basis for denying the Petition based on New York's asserted failure to meet its

burden of showing both (1) a nonattainment or maintenance problem "in a relevant future year," and (2) the availability of cost-effective emission reductions for the named sources. 84 Fed. Reg. at 56,069 n.1. But this purportedly "independent and severable" basis remains inextricably tied to the reasoning that this Court found inadequate in *Wisconsin* and *New York*. In particular, the Denial makes clear that the "appropriate future year" that EPA is relying on for assessing attainment of the 2008 ozone standard is still 2023. *Id.* at 56,070. For example, the Denial explains that "EPA's recent air quality projections for 2023" are the basis for its conclusion that "New York has not demonstrated that there will be a nonattainment or maintenance problem in the [New York Metropolitan Area] in a relevant future year" for the 2008 standard. *Id.* at 56,080. The Denial contains no analysis of ozone levels in the three years preceding the 2021 attainment deadline—the only ozone seasons that are relevant to whether Petitioners will attain the 2008 standard by that deadline.

Similarly, in determining that New York failed to demonstrate cost-effective emission reductions available at the named sources, the Denial inappropriately relied on the adequacy of the control measures required under the now-invalidated portions of the Update, and faulted New York

for failing to present "additional information" not already considered by EPA in the Update and Close-Out to demonstrate that additional control requirements were necessary. *Id.* at 56,089; *see also id.* at 56,083 (relying on cost levels set in Update); *id.* at 56,087-88 (pointing to Update cost levels as examples of analysis EPA asserts New York should have provided). However, in holding that the Update unlawfully allows upwind States' significant contributions to persist beyond downwind attainment deadlines, and in vacating the Close-Out because it also allowed those contributions to persist, this Court's decisions in *Wisconsin* and *New York* confirm that EPA is prohibited from continuing to rely solely on the adequacy of the Update's control measures, particularly where, as here, specific upwind sources continue to emit in violation of the Good Neighbor Provision.

EPA's purportedly independent grounds for denying the Petition therefore suffer from the same fatal defects as the Update and the Close-Out. Just as this Court rejected those prior rules, it should vacate this Denial as well.

POINT II

EPA ARBITRARILY IGNORED DATA SHOWING CURRENT AND ONGOING AIR QUALITY PROBLEMS IN DENYING THE PETITION AT CROSS-STATE STEP ONE

Even setting aside EPA's unlawful adoption of a 2023 future analytic year, EPA's Denial should be vacated because its analysis at Cross-State Step One for the 2008 ozone standard is fundamentally flawed. As discussed above, Step One involves EPA's identification of downwind air quality problems under the applicable national standard. Here, EPA found no downwind air quality problems in the New York Metropolitan Area for the 2008 ozone standard, but its analysis was fundamentally flawed in at least three ways.

First, EPA improperly looked only to projections of future air quality in 2023 and ignored data demonstrating current and ongoing nonattainment of the 2008 ozone standard in the New York Metropolitan Area in 2021—disregarding, among other things, the undisputed fact that attainment in *future* years is based on measurements of *present* pollution levels. Second, EPA unreasonably declined to consider nonattainment measured by monitors in Connecticut, despite the fact that those monitors are within the New York Metropolitan Area and are

determinative of all three States' attainment status. Finally, even assuming the relevancy of EPA's 2023 modeling, that modeling is fatally flawed because it relied on improper assumptions, failed to consider relevant factors, and included many technical errors.

A. EPA's Denial Improperly Disregarded Evidence of Current and Ongoing Nonattainment in 2021.

EPA assessed the Petition with respect to the 2008 ozone standard by looking only to future air quality projections for 2023, determining that its 2023 modeling conducted for the Close-Out was the "best available data regarding expected air quality in New York in any future year." 84 Fed. Reg. at 56,074. In doing so, EPA ignored certified air quality monitoring data for 2017 and 2018 and preliminary 2019 data presented to the agency, which showed ongoing exceedances of the 2008 standard throughout the New York Metropolitan Area. Petition at 12, 14-15, JA-__, ___-___; NYSDEC Detailed Comments at 1, JA-____; AG Comments at 4 & nn.19&21,[6] JA-___; *see also* Final 2018 Ozone Design

[6] Citing NYSDEC, *High Ozone Values During 2019*, *available at* https://www.dec.ny.gov/chemical/38377.html, JA-____, and New Jersey Dep't of Envtl. Protection (NJDEP), Ozone National Ambient Air Quality Health Standard Exceedances in 2019, *available at* https://www.nj.gov/dep/cleanairnj/airquality2019.html, JA-____.

Value Report, EPA-HQ-OAR-2018-0170-0116, tbl.5, Column W, Rows 296, 298, 299, 302, 304, 790, 802, 810, 816 & 820 ("2018 4th Highest Daily Max Values"), JA-___; Ozone Monitoring Site Design Values for 2008-2017 and 2023, EPA-HQ-OAR-2018-0170-0048, "O3 Design Values" tab, Column M, Rows 233-236, 639 & 643-644, JA-____. EPA's exclusively forward-looking approach is inconsistent with how EPA measures attainment by the Act's statutory deadlines and the plain language of section 126, which directs EPA to "expeditiously" remedy *present-day* air pollution.

Petitioners' attainment status in 2021[7] will be based on monitored ozone levels in 2018, 2019, and 2020. 83 Fed. Reg. at 56,784; 42 U.S.C. § 7511(b)(2)(A). EPA determines attainment based on a three-year "design value," which is calculated by taking the fourth-highest daily maximum ozone level measured in each of three prior ozone seasons and averaging

[7] When New York submitted the Petition in March 2018, air quality monitoring data from 2017 were the most recent data available directly relevant to the New York Metropolitan Area's then-2018 attainment deadline as a "moderate" nonattainment area, as well as indicative of an ongoing air quality problem. Based on the 2017 data, along with monitoring data from 2015 and 2016, the New York Metropolitan Area did not attain by the 2018 deadline and thus was reclassified to "serious" nonattainment.

those values. Because EPA determines the fourth-highest daily maximum for an entire ozone season, the last full ozone season before the July 20, 2021 attainment deadline (which falls in the middle of the 2021 ozone season) will be 2020. Thus, the "design value" used to determine attainment in 2021 will be calculated using the fourth-highest day's value from each of 2018, 2019, and 2020.

Because of EPA's delay in acting on the Petition, certified air quality monitoring data for 2018 and preliminary 2019 data were submitted and available to EPA prior to its Denial. This data, which EPA chose to ignore, directly affect New York's attainment status in 2021—indeed, such data would represent two of the three years relevant to the 2021 attainment deadline.[8] These data not only identify *current* nonattainment but also, demonstrate with near certainty that the New York Metropolitan Area will remain in nonattainment in 2021 unless EPA mandates upwind emission reductions beyond those required by the Update. Specifically, evidence in the record shows that 2018 ozone levels

[8] *See also* Declaration of Sharon C. Davis in Support of Petitioners' Motion to Expedite, Doc. No. 1817645, ¶¶ 25-26 & Ex. A (showing preliminary 2019 design values continue to exceed the 2008 and 2015 standards in the New York Metropolitan Area).

at the highest "design value" monitor measured 82 ppb, and EPA acknowledged that the 2016-2018 design value at a location in Connecticut within the New York Metropolitan Area was 83 ppb—both measurements far exceeding the 2008 standard of 75 ppb. 84 Fed. Reg. at 56,081. EPA also ignored its own projection in the Update that nonattainment in the New York Metropolitan Area would continue past the 2017 ozone season—that is, after implementation of the Update's emission budgets. *See* 81 Fed. Reg. at 74,506, 74,508, 74,520, 74,521-22, 74,533. Absent additional upwind reductions, all three States in the New York Metropolitan Area will have to make drastic, unheard-of reductions in ambient ozone levels from in-state sources to reach attainment by the 2021 deadline. EPA's disregard of current nonattainment data and exclusive reliance on its 2023 projections as the "best available data" regarding expected air quality, 84 Fed. Reg. at 56,074, thus "runs counter to the evidence before the agency," and is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

EPA's attempt to justify its approach under the Act is unavailing. EPA contends, *see* 84 Fed. Reg. at 56,073, that it is entitled to consider only projections of future nonattainment, and to exclude data regarding

current and ongoing nonattainment, because the Good Neighbor Provision prohibits upwind sources from "emitting any air pollutant in amounts which *will* . . . contribute significantly to nonattainment" downwind. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). But section 126 permits granting a petition where EPA finds that an upwind source "*emits* or *would emit* any air pollutant in violation of [the Good Neighbor Provision]." 42 U.S.C. § 7426(b) (emphasis added). Congress's deliberate choice of the present-tense "emits" as a basis for granting section 126 relief demonstrates that it intended for EPA to consider present pollution levels, not just future ones, in deciding petitions. EPA must give meaning to the separate words used by Congress in section 126. *See GenOn REMA*, 722 F.3d at 520-21 (recognizing, in interpretation of section 126, that "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

The relevance of current nonattainment is also consistent with section 126's "unambiguous" requirement that EPA implement particularly swift relief when a downwind State is suffering from air

pollution from upwind sources. *Id.* at 522. Congress required EPA to resolve section 126 petitions quickly—within sixty days of filing, 42 U.S.C. § 7426(b)—even if EPA has not otherwise made any attainment designations or approved any state or federal plans. S*ee Appalachian Power,* 249 F.3d at 1047-48*; GenOn,* 722 F.3d at 520. And Congress directed that sources in violation of their good neighbor obligations must shut down within three months unless the source complies with EPA-mandated emission limitations "as expeditiously as practicable, but in no case later than three years." 42 U.S.C. § 7426(c). EPA's position here that it can ignore evidence of current and ongoing nonattainment in reliance on faulty projections of future attainment more than five years after the Petition was submitted in March 2018 is flatly inconsistent with section 126's expedient deadlines and remedies.[9]

[9] Legislative history further demonstrates that Congress intended section 126 to provide a remedy for present air quality problems. As discussed in the House Report on the 1977 amendments to the Act, which added section 126, "[t]he Administrator's regulations shall also include authority for any State or political subdivision to petition the Administrator for a finding that any new, modified, or existing stationary source in any other State *is* (or would be) emitting pollutants which cause or contribute to impermissible interstate air pollution." *See* H.R. Rep. No. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1409 (May 12, 1977) (emphasis added).

In crafting section 126, Congress had compelling policy reasons to require that EPA enforce both immediate and future deadlines. EPA's ozone standards embody its expert conclusion that public health is harmed when ozone levels exceed them. Those harms are immediate, ongoing, and serious. See *supra* at 5-6, 25. In both sections 126 and 181, Congress was explicit that EPA and States both must act "as expeditiously as possible" to ensure compliance with these standards, 42 U.S.C. §§ 7426(c) and 7511(a)(1), precisely to ensure immediate action to prevent such harms. By deferring immediate action on the basis of much-belated future compliance, EPA has disregarded the very public health harms that Congress intended it to address immediately.

EPA's interpretation is also flawed because it is an unexplained and unreasonable change in policy. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA previously recognized that upwind contributions to *current* nonattainment in downwind states are a basis for relief through section 126(b). In 2011, EPA granted a section 126(b) petition from New Jersey with respect to sulfur dioxide emissions from the Portland Generating Station in Pennsylvania based on that plant's current and ongoing emissions. 76 Fed. Reg. 19,662, 19,665-66 (Apr. 7,

2011); 76 Fed. Reg. 69,052 (Nov. 7, 2011); *see also GenOn*, 722 F.3d at 520-22 (affirming EPA's timing for addressing New Jersey's section 126(b) petition).

EPA attempts to distinguish its action on New Jersey's petition by claiming that the current emissions it considered in granting that petition were also indicative of future emissions. 84 Fed. Reg. at 56,073-56,074. But the same is true here. As explained above, *see supra* at 33-35, emissions from 2018 and 2019 are part of the calculation of the New York Metropolitan Area's attainment status in 2021. And absent additional emissions limitations, EPA has provided no reasoned basis to believe that the upwind sources that have transported substantial amounts of ozone and ozone precursors into the New York Metropolitan Area for the last two years will cease to do so now. See *infra* Point I.C.1. EPA has thus failed to reasonably explain how its interpretation of section 126 here, which ignores present and ongoing downwind air quality problems and upwind emissions, is consistent with its prior approach.

B. EPA Unlawfully Deemed Irrelevant Downwind Nonattainment at Connecticut Monitors Located in the New York Metropolitan Area.

EPA's denial of the Petition at Cross-State Step One also unlawfully dismissed undisputed measurements of nonattainment of the ozone standards at Connecticut monitors located in the New York Metropolitan Area. *See* 84 Fed. Reg. at 56,081 & n.70, 56,077-078, 56,080n.69, 56,081. EPA claims that information about nonattainment in Connecticut is not "relevant to a petition submitted by New York" because section 126 "does not say that a state may petition the EPA for a finding that emissions from a source, or group of sources, is impacting downwind receptors in a state other than the petitioning state." *Id.* at 56,081.

This position improperly disregards the fact that the relevant Connecticut monitors here are part of a single, EPA-created multistate attainment area that also includes parts of New York (and New Jersey). An undisputed consequence of EPA's own decision to group numerous counties into a single nonattainment area is that nonattainment at any monitor in the area places the *entire* area—including those portions in other States—into nonattainment. 42 U.S.C. §§ 7407(d)(1)(A)(i), 7511a.

And the Act binds the States that are part of a single nonattainment area to coordinate a collective response to achieving attainment, regardless of which States' monitors are measuring ozone concentrations in excess of the standards. *See* 42 U.S.C. § 7511a(j)(1). EPA's position would lead to the untenable result that States like New York would face direct regulatory consequences under the Act for out-of-state measurements within a regional designation area, but then would be precluded from a remedy that Congress specifically made available to States facing such consequences.

These regulatory consequences reflect the practical reality that the spread of ozone pollution does not follow political boundaries. In designating multi-state nonattainment areas, EPA recognized that an "airshed" can cross state boundaries. *See* AG Comments, Ex. E, Attachment 3 at 10, JA-___. Monitors that register nonattainment anywhere within the airshed thus indicate air quality problems for all other areas (including areas in other States) in light of their shared meteorology and photochemical dynamics. Nothing in section 126 precludes States from seeking relief based on these types of regional harms. To the contrary, section 126(b) expressly permits "[a]ny state or

political subdivision" to petition EPA for a finding that any source "emits or would emit any air pollutant in violation of the prohibition of" the Good Neighbor Provision, without restricting such a petitioner to relying on evidence solely within its own boundaries. *See Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 97-100 (D.C. Cir. 2018) (holding that "any state" in section 181 of Act means any single State in a shared nonattainment area).

EPA wrongly concluded from legislative history that section 126 was intended to limit States to seeking relief for pollution impacting "downwind receptors within their geographical borders." 84 Fed. Reg. 56,080, 56,081 & n.71. EPA quotes the original Senate amendment adding section 126 to the Act in 1977, *see* 84 Fed. Reg. at 56,081 n.71, which would have limited section 126 relief to emissions that "adversely affect the air quality in the petitioning State." *Id.* But the enacted version does not contain this language. "[W]hen presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *cf. Appalachian Power,* 249 F.3d at 1048 (Court "should not defer to an agency's interpretation imputing a limiting provision to a

rule that is silent on the subject, lest we permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.") (internal quotations and citations omitted).

Nothing in section 126 thus supports EPA's position that New York is precluded from relying on nonattainment readings at Connecticut monitors that are part of the same multistate nonattainment area. EPA's contrary interpretation should be rejected as both unlawful and unreasonable.

C. The Denial's Reliance on Flawed 2023 Modeling Was Arbitrary and Capricious.

Even assuming that EPA's 2023 modeling were relevant here despite Petitioners' statutory attainment deadline of 2021 for the 2008 ozone standard, the Denial would nonetheless be arbitrary and capricious because EPA's modeling is flawed in several respects and thus fails to provide a reasonable basis to support its conclusion.

1. EPA's modeling erroneously projected attainment in 2023 based on unreasonable and unenforceable assumptions about regulated entities' voluntary behavior.

Because an agency's use of predictive modeling can be "imperfect and subject to manipulation," the usefulness of a model hinges on how closely its assumptions reflect reality. *Sierra Club v. Costle*, 657 F.2d 298,

332 (D.C. Cir. 1981). An agency must "explain the assumptions and methodology" it uses in its models, and must "provide a complete analytic defense" if the model's methodology is challenged. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (quotation marks omitted). The agency must demonstrate "a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions." *Sierra Club v. Costle*, 657 F.2d at 333.

EPA failed to do so here. In projecting future downwind air quality in 2023, EPA relied on the assumption that 2023 ozone-season emissions by power plants would be *ten percent lower* than required by federally enforceable emission limitations. 83 Fed. Reg. at 65,914. EPA assumed that upwind sources would continue to reduce emissions beyond the reductions required by law by making voluntary choices to burn fuels other than coal, retire plants, install new controls, and increase use of existing controls. But as Petitioners demonstrated both here and in the rulemaking record for the Close-Out (which involved the same 2023 modeling), EPA's assumptions are speculative and refuted by existing data. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265-66 (D.C. Cir.

1994) (rejecting models that lack a rational relationship to known behavior or rely on "speculative factual assertion[s]").[10]

In assuming that power plants will emit ten percent below required levels in 2023, EPA projected that each power plant equipped with selective catalytic reduction controls would emit at or below 0.10 lb/mmBtu beginning in 2017. 83 Fed. Reg. at 65,912. But the data before EPA showed that many plants continue to emit well above that rate: indeed, half of the power plants with catalytic controls in the region covered by the Update were not operating their controls sufficiently to meet EPA's assumed target, let alone engaging in voluntary reductions to push emission rates lower. *See* AG Comments at 12, JA-___; *see also id.* Ex. C at 36, JA-____. More recent data submitted to the record here reveal that emissions rates at many of the power plant sources named in the Petition continue to exceed EPA's assumed rate. *See* NYSDEC Detailed Comments at 3-6, JA-__-__.

[10] At the same time it speculated over-compliance with current law, EPA unreasonably refused to account for its own proposed deregulatory actions that directly impact ozone levels and undercut its model's narrow predictions of attainment. 84 Fed. Reg. at 56,079; AG Comments at 13-14, n.63, JA-__-__.

EPA's modeling also erroneously assumed that power plants would voluntarily reduce emissions by, for example, switching from coal to natural gas despite no federally enforceable mechanism to guarantee such switch. Actual experience demonstrates that this assumption was unjustified. For example, EPA assumed that the Brunner Island facility, which had primarily switched to natural gas in 2017 but retained the ability to burn coal, would continue to use natural gas. Instead, 2018 emissions data revealed that Brunner Island fired coal on approximately 32 days in the ozone season, nine of which were ozone exceedance days in New York. NYSDEC Detailed Comments at 3-4, JA-__-__.

EPA's reliance on speculation about polluters' voluntary behavior also contravenes the Clean Air Act, which requires that any implementation plan—including an EPA-promulgated federal plan—achieve necessary emission reductions through "*enforceable* emission limitations." 42 U.S.C. § 7410(a)(2)(A) (emphasis added); *id.* § 7410(a)(2)(C) (plans must contain an enforcement program); *id.* § 7502(c)(6) (nonattainment plans must include enforceable limitations). Notably, EPA may re-designate an area as in attainment only when "permanent and enforceable reductions in emissions" are in place to

assure continued attainment. 42 U.S.C. § 7407(d)(3)(E)(iii). Thus, the Act contemplates that no party may satisfy its obligation to address nonattainment by assuming that unenforceable reductions will occur. EPA's modeling violates this principle by assuming that private actors who are currently contributing to downwind nonattainment in significant amounts will voluntarily reduce their emissions.

Contrary to EPA's claim, 84 Fed. Reg. at 56,078, its own modeling to support a good neighbor analysis is not akin to initial attainment demonstrations based on actual measured air quality, where enforceability is irrelevant. The more apt comparison is to the rigorous demonstration a downwind State must make to show it will come into attainment by a future year. That showing requires enforceable limits and control measures, *see* 42 U.S.C. §§ 7410(a)(2)(A) & 7502(c)(6), so that the predicates necessary to reach attainment are assured, not merely assumed. Upwind sources should be subject to the same requirements. *See id.* § 7426(c) (a source for which a section 126 finding is made may continue operating only if such source complies with emission limitations and a compliance schedule).

2. EPA failed to account for the limits of its model, contrary to its guidance.

EPA's 2023 modeling also arbitrarily and capriciously failed to follow its own modeling guidance by refusing to consider additional data sources beyond a single set of projections, even where its modeling predicted attainment in the New York Metropolitan Area by only the narrowest of margins. Recognizing the uncertainty inherent in future modeling, EPA's modeling guidance directs it to act conservatively, and to use a "weight of evidence" assessment—incorporating observed air quality and "additional" available models—to verify a close attainment result. *See* AG Comments Ex. D, *Draft Modeling Guidance for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze* (Dec. 2014), at 180-83, JA-___-___.

Despite this admonition, EPA relied exclusively on results from one model and accorded no weight to results from another EPA-approved modeling platform that was submitted by the Ozone Transport Commission in comments on the Close-Out. This additional modeling, which proved more reliable when compared with actual measured ozone

concentrations at several critical monitors,[11] predicts continuing air quality problems in the New York Metropolitan Area in both 2020—relevant to New York's 2021 attainment deadline—and in 2023. Had EPA given any weight to these results, it could not have reached the same conclusion about full attainment in 2023 given the tiny 0.1 ppb margin by which its own modeling projected attainment in the New York Metropolitan Area. EPA's decision to disregard this more accurate modeling was arbitrary, and contrary to its own guidance instructing EPA to weigh all available evidence and to take a conservative approach when projecting possible attainment.

POINT III

EPA UNREASONABLY FOUND THE INFORMATION THAT NEW YORK PROVIDED INADEQUATE IN DENYING THE PETITION AT CROSS-STATE STEP THREE

For both the 2008 and 2015 ozone standards, EPA also denied the Petition under Cross-State Step Three (which involves identifying which

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[11] *See* EPA-HQ-OAR-2018-0170-0092 Attachment 1, Earthjustice Comments on Close-Out at 6, Tbl. 2, JA-___ (showing that EPA's model underestimated actual ozone concentrations at nine monitors); *see also* AG Comments, Exhibit C, Opening Proof Brief for State Petitioners in Case No. 19-1019, at 46-47, & Reply Proof Brief for State Petitioners in Case No. 19-1019, at 24-26, JA-__-__ & JA-__-__.

upwind sources significantly contribute to downwind nonattainment or interfere with maintenance) due to asserted inadequacies in the Petition's information regarding the availability of additional, cost-effective emission reductions at the named sources. 84 Fed. Reg. at 56,059 n.1. As a threshold matter, EPA's analysis here is also fatally infected by its continuing reliance on the now-invalidated Update and Close-Out. The Denial's Step Three analysis expressly found that it was not "necessary to implement additional, source-specific, unit-level emissions limits at any of the sources named in the petition" because EPA had already determined "that the emissions reductions required under the . . . Update fully address the good neighbor requirements" for the 2008 standard. 84 Fed. Reg. at 56,089. This Court should find the Denial's Step Three analysis invalid on this basis alone.

Even putting aside the Denial's continued reliance on already-invalidated rules, EPA's Step Three analysis was fundamentally flawed for other reasons. The evidence in the record was sufficient to grant the Petition, and to the extent EPA required additional information and analysis, that demand is unreasonable and not required by the Act. In particular, EPA arbitrarily disregarded evidence in the record, including

its own analysis, demonstrating that additional, cost-effective emission reductions are in fact available at named sources, thus rendering their contributions "significant" under the framework that EPA has chosen to adopt. *See* Petition at 9-16, Appendices A-D, JA-____-____, ____-____; NYSDEC Detailed Comments at 4-7, JA-____-____; AG Comments at 17-19, JA-___-___. EPA also unreasonably faulted the Petition for failing to provide information and analysis that, among other problems, are not required for relief under section 126 and are, as a practical matter, not accessible by any State and available only to EPA. These additional defects also render EPA's determinations at Step Three invalid and provide additional bases for vacatur of the Denial.

A. EPA Arbitrarily Determined That the Extensive Information and Analysis Submitted in Support of the Petition Were Insufficient for EPA to Make a Section 126(b) Finding and Craft a Section 126(c) Remedy.

New York's Petition provided extensive information and analysis demonstrating that the upwind sources identified in the Petition are significantly contributing to nonattainment in the New York Metropolitan Area under both the 2008 and 2015 ozone standards. New York showed that these sources can curb their emissions by adopting measures that are both reasonably available (and, indeed, often already

installed) and sufficiently cost-effective for downwind States to have already adopted them.

Specifically, New York identified the sources of emissions located in States that EPA itself had determined significantly contribute to nonattainment and/or maintenance of the ozone standards in New York. Petition at 6, 10-12 & App. B, JA-__, ___-____, ___-____. New York demonstrated that these sources are linked to downwind nonattainment because they meet the screening threshold for significant contribution (one percent of the ozone standards) that EPA has previously used for recent regional transport rules. Petition at 9-10, 13, JA-___-___, ___. New York also showed that upwind emission sources have average emission rates that exceed 0.15 lb/mmBtu, a rate that New York imposes on in-state sources as a reasonably achievable rate to limit ozone pollution. Petition at App. B (columns showing 2014, 2015, 2016 and 2014-2016 average nitrogen oxides (NOx) rates in lb/mmBtu for electric generating units), JA-____. And New York identified data (including from EPA) showing that specific sources were operating at greater than 0.15/lbmmBtu. *See, e.g.*, NYSDEC Detailed Comments at 5-6, tbls. 1&2, JA-___-_____; *see also* AG Comments at 18n.82, JA-__ (citing EPA, Clean

Air Markets Division, Air Markets Program Data, *available at* https://ampd.epa.gov/ampd/).

New York also quantified and described potentially available emissions reductions from the named sources. Petition at 11 & App. B, JA-___, ____-_____. In doing so, New York demonstrated that such emission reductions can be achieved in many cases simply by running existing, already-installed controls that EPA already deemed in the Update to be cost-effective to abate cross-state transport of ozone and ozone precursors. Petition at 17 & App. B, JA-___, ___-____; NYSDEC Detailed Comments at 4-6, JA-___,____. New York pointed EPA to data in the record for the Close-Out demonstrating that the identified sources are not fully operating controls. AG Comments at 18n.85, JA-___; Petition at App. B, JA-____-_____; *see* 83 Fed. Reg. at 65,898 (observing that 83 units covered by the Update that were equipped with selective catalytic reduction equipment but not fully operating that equipment were still not meeting the average emission rate in 2017 that would indicate full operation). Further, New York pointed to EPA's own more recent emissions data confirming that there are available and cost-effective emission reductions from the named sources. *See* NYSDEC

Detailed Comments at 4-6, tbls. 1&2, JA-___-____. And New York demonstrated the measurable impact these reductions would have on New York. *Id.*; Petition at 17, App. B, JA-___.

Further, EPA's own analysis of coal-fired power plants with selective catalytic reduction equipment—a control measure EPA had already determined cost-effective in the Update—demonstrated the availability of additional emission reductions from sources named by New York. *See, e.g.,* 2015 2016 2017 2018 Ozone Season Emissions Heat Input and NOx Rates for SCR Coal Units (SCR Coal Units Data), EPA-HQ-OAR-2018-0170-0098, at Rows 100, 180, 181, 188 & 192, JA-____. Indeed, some plants had emission rates that increased after implementation of the Update, or were higher in 2018 than 2017. *See id.* at Rows 181, 192, JA-___.

This information and analysis were sufficient for EPA to make the requested finding and provide the source-specific relief contemplated by section 126, such as enforceable daily emissions limits. New York proposed short-term emission limits to ensure that sources that were already meeting EPA's presumptively reasonable emission rates would continue to do so—and would do so daily throughout the ozone season.

This relief is warranted by the additional data New York provided demonstrating the critical need for enforceable daily emission limits, NYSDEC Detailed Comments at 5, tbl. 1, JA-____.

B. EPA's Reasons for Nonetheless Rejecting the Petition at Cross-State Step Three Were Invalid.

Despite the extensive information and analysis presented by the Petition, EPA denied *any* relief under the Petition—even short-term, source-specific relief—because it asserted that New York had not "sufficiently developed or evaluated the cost and air quality factors that the EPA has generally relied on in step 3," or provided "any alternative analysis that would support a conclusion at step 3 that the named sources will significantly contribute to nonattainment or interfere with maintenance." 84 Fed. Reg. at 56,088. However, EPA's reasons for finding the Petition's showing inadequate and denying any relief from upwind ozone emissions altogether are arbitrary and capricious, for several reasons.

1. EPA disregarded the fact that section 126 authorizes source-specific relief, including short-term relief, and is not limited to comprehensive regional transport remedies.

EPA purported to identify many deficiencies with the Petition's showing of significant contribution, but its criticism boils down to the

assertion that New York was required to conduct a comprehensive, comparative analysis of "emissions from a range of sources influencing regional-scale ozone transport, including sources not named in the petition[]," and the relative costs of available emissions reductions from those sources compared to other reductions from other sources. 84 Fed. Reg. at 56,076; *see also id.* at 56,089. Essentially, EPA faulted New York for not presenting a complete regional transport rulemaking that would fully resolve all good neighbor obligations for all upwind sources, including those not named in the Petition, across numerous States and sectors.

Notably, EPA itself has never conducted such an analysis for either the 2008 or 2015 ozone standard. The Update's regional transport rule for the 2008 standard was, by EPA's own admission, a partial remedy that this Court has now found to be unlawful. And the Denial concedes that EPA has never even attempted such an analysis for the 2015 standard. 84 Fed. Reg. at 56,067, 56,088. It is unreasonable for EPA to impose on New York an evidentiary burden that it has itself never satisfied.

More fundamentally, section 126 does not require a petitioning State to complete a comprehensive regional rulemaking to obtain relief. To the contrary, section 126 is by its terms a *source-specific* tool under which States can request, and EPA can establish, emission controls for particular sources or groups of sources, including short-term remedies. *See* 42 U.S.C. § 7426(c). Far from limiting EPA to comprehensive regional transport rules, section 126 allows EPA to impose more tailored remedies, including daily or other short-term emission limits for sources, that are narrower than the seasonal average ozone budgets established by EPA's regional rulemakings under the Good Neighbor Provision.

Congress plainly intended for section 126 to provide such targeted relief independent of more comprehensive rulemaking. Indeed, as this Court and others have recognized, EPA cannot delay action on section 126 petitions to await the completion of state or federal implementation plans separately required by the Good Neighbor Provision. *See Appalachian Power Co.*, 249 F.3d at 1047-48; *GenOn*, 722 F.3d at 520; *see also* H.R. Rep. No. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1410 (May 12, 1977) (petition process represents "a second and entirely alternative method and basis for preventing and abating interstate

pollution" that would "expedite, not delay, resolution of interstate pollution conflicts"). EPA's conflation of section 126 with its related but distinct authority to promulgate regional transport rules is thus "at odds with [section 126's] structure and manifest purpose." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001); *see also Illinois Commerce Comm'n v. ICC*, 749 F.2d 875, 880 (D.C. Cir. 1984) ("agency constructions that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement must be overturned as unreasonable.") (internal citations omitted).

2. EPA unreasonably faulted the Petition for not providing specific information that States cannot reasonably access and that EPA alone can obtain.

EPA also faulted the Petition for failing to provide EPA with "all of the information necessary to conduct" a Step Three analysis. 84 Fed. Reg. at 56,086. In particular, the Denial asserts that New York should have obtained and analyzed comprehensive information about every single one of the sources identified in the Petition, all of which are located outside of New York, including:

> the current operating status of each named facility, the magnitude of emissions from each emitting unit within each named facility, the existing controls on each of these emissions units, additional

> control options on each emissions unit, the cost of each potential control option, the emissions reductions potential resulting from the installation of controls, and potential air quality impacts of emissions reductions.

Id. at 56,086.

EPA's expectation that New York should have collected this information itself before filing the Petition was unreasonable. It is often difficult, and sometimes impossible, for a State to compel out-of-state sources to provide information when the State lacks direct regulatory authority over such sources. By contrast, EPA has express authority under the Act to compel emission sources to maintain records and produce them to EPA on demand. *See* 42 U.S.C. § 7414(a)(1); 84 Fed. Reg. at 56,084. Requiring States to collect information that is not practically available to them, but that is readily accessible by EPA, would eviscerate section 126 and undermine Congress's intent to provide the States with a meaningful remedy to compel federal action on out-of-state sources.

EPA complains that it has not yet "collected the needed data" to evaluate the Petition and that requiring it to do so would be overly burdensome. 84 Fed. Reg. at 56,084. That argument rings hollow in the specific context of ground-level ozone. What EPA's Denial fails to

acknowledge is that, with respect to the 2008 ozone standard, EPA itself was already obligated to collect the necessary information from sources to satisfy its mandatory obligations under the Good Neighbor Provision. Specifically, after EPA found in 2015 that numerous States had failed to submit state plans regarding the 2008 ozone standard that were fully compliant with the Good Neighbor Provision, 80 Fed. Reg. at 39,961, EPA was required to promulgate federal plans for those noncompliant States within two years. 42 U.S.C. § 7410(c)(1); *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014). In undertaking this duty, EPA should have collected and analyzed any information concerning upwind sources and potentially available controls necessary to determine whether all available cost-effective emission reductions would be achieved in time for States' upcoming 2021 attainment deadline. But EPA failed to do so.

"Having chosen not to" collect the appropriate data, despite its statutory obligation and authority to do so, "EPA cannot now rely on the resulting paucity of data" to deny the Petition. *North Carolina*, 531 F.3d at 920. It would be particularly egregious to allow EPA's own inaction to support the Denial here because one of the principal purposes of section

126 is to give downwind States a mechanism for compelling action by EPA when upwind States and EPA have failed to otherwise fully implement a remedy for interstate air pollution transport, which the Act requires. Here, the extensive source-specific information that the Denial faults New York for not submitting could only have been collected by EPA, and should have been collected by EPA years ago under its own good neighbor obligations. EPA cannot rely now on its own noncompliance to shift the burden onto a State to develop such information before petitioning under section 126.[12]

EPA further argues that section 126's sixty-day deadline for EPA to respond to a petition indicates that Congress did not intend for EPA to conduct any "detailed independent analyses before acting on" a petition. 84 Fed. Reg. 56,084. But the circumstances here foreclose EPA's reliance on such an argument. EPA did not respond to New York's Petition within

[12] EPA attempts to justify its failure to collect information by saying that "EPA has not needed this information to support any current EPA-initiated federal ozone rulemaking." 84 Fed. Reg. at 56,090. But this argument simply begs the question here, which is whether EPA is obligated to conduct a "federal ozone rulemaking" under section 126. And, since the Update unlawfully failed to provide downwind states a full remedy, EPA arguably did in fact need this information.

sixty days, instead delaying action for over a year[13] for the stated purpose of conducting more analysis and taking comment on the rulemaking. *See* 83 Fed. Reg. at 21,910/3 (extending deadline for action on the Petition to undertake, among other things, "the necessary technical review"). Nowhere in the Denial does EPA explain why this additional time was insufficient to conduct the analysis that the agency claimed it was conducting.

EPA also incorrectly reads *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988), an earlier section 126 petition case, as holding that section 126 places *no* burden on EPA to perform any independent substantive analysis of a petition. 84 Fed. Reg. at 56,084. The Court in *New York* rejected only a specific claim that EPA was required to engage in "an entire array of investigative duties" that would include "a full-scale investigation of the adequacy of the [state implementation plans] of all states named in the petition." 852 F.2d at 578. And the Court based its conclusion in part on the fact that the language of section 126 "focuses on

[13] *See* Mem. Op. & Order, *New York v. Wheeler*, No. 1:19-cv-03287-JMF, Doc. 32, at 4-5 (S.D.N.Y. Jul. 25, 2019).

'major sources,' not the validity of a state's" implementation plan. *Id.* Here, New York did not seek any EPA investigation of the adequacy of state implementation plans.[14] Instead, its Petition properly "focuse[d] on 'major sources,'" *id.*, and requested that EPA curb the emissions from named upwind sources that were harming New York.

In light of these arguments, it was unreasonable for EPA to cite the absence of comprehensive region-wide, source-specific information as a basis for denying the Petition.

3. EPA unreasonably conflated its obligations to make a finding of violation under section 126(b) with its separate remedial obligations under section 126(c).

Section 126(b) gives EPA sixty days from receipt of a petition to make a finding that emissions from a major source are in violation of the Good Neighbor Provision. But section 126(c) gives regulated sources a more extended timeline to comply with emissions controls imposed by EPA after a finding of violation—"as expeditiously as practicable, but in

[14] Such analysis was unnecessary with respect to the 2008 ozone standard because (a) EPA had already found the applicable state implementation plans inadequate in 2015, *see* 80 Fed. Reg. at 39,961, and (b) this Court has now found in *Wisconsin* that EPA's federal implementation plans in the Update also failed to fully eliminate significant contribution to downwind nonattainment by relevant attainment deadlines.

no case later than three years after the date of such finding." EPA acknowledges that it has the burden to develop and impose remedies under section 126(c). *See* 84 Fed. Reg. at 56,087 ("EPA acknowledges that the imposition of federally enforceable emissions limitations . . . is its own obligation under CAA section 126(c)").

Here, however, the Denial unreasonably faults the Petition for failing to provide information at the section 126(b) stage that EPA should be developing at the later section 126(c) remedial stage. Although EPA disputes that it is conflating these two stages, *see id.* at 56,087, its reasoning indicates otherwise. For example, the Denial objects that the Petition failed to "determine [the] appropriate level of control for the named sources." *Id.* at 56,089. And EPA's position that the Petition was required to conduct a full regional rulemaking—including "[a]pportioning responsibility for emissions reductions across many sources in many states," *id.* at 56,090—effectively and improperly shifts the burden to the States both to support a finding of "significant contribution" under section 126(b) and the development of a remedy under section 126(c).

For these reasons, EPA's Denial is also unreasonable and arbitrary and capricious at Cross-State Step Three and should be vacated.

POINT IV

THE COURT SHOULD IMPOSE A DEADLINE FOR EPA TO ISSUE A NEW RESPONSE TO THE PETITION

This Court has already recognized that expedited briefing and oral argument are necessary to provide meaningful relief in this case. *See* Order, Doc. No. 1821221 (Dec. 20, 2019). Petitioners demonstrated that emission reductions from upwind sources named in the Petition are needed as soon as possible and no later than the 2020 and 2021 ozone seasons to avoid exposing millions of people in downwind areas to unlawful and unhealthy levels of ozone pollution for additional ozone seasons. Therefore, upon vacatur and remand of the Denial, EPA must take swift action on the Petition. But EPA is unlikely to do so on its own given its history of missed deadlines, including its unlawful delay in responding to this Petition. Accordingly, Petitioners respectfully request that the Court exercise its inherent authority to impose a deadline for EPA to promulgate a new final decision on New York's Petition within

sixty days of the Court's mandate[15]—the same sixty-day timeframe under which EPA must respond to a section 126 petition, 42 U.S.C. § 7426(b).

The Court has inherent power to impose a deadline for agency action on remand. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *accord Nat. Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974) (court has "authority to set enforceable deadlines both of an ultimate and an intermediate nature . . . to vindicate the public interest); *see generally Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute"). Because the public interest is involved, the Court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398. This Court has previously imposed deadlines for EPA to issue a response on remand,

[15] For similar reasons, Petitioners respectfully request that the Court issue its mandate as expeditiously as practicable following a decision on the merits.

including in cases under the Clean Air Act. *See Nat. Res. Def. Council v. EPA*, 22 F.3d 1125, 1136-37 (D.C. Cir. 1994); *Sierra Club v. EPA*, 719 F.2d 436, 470 (D.C. Cir. 1983).

A sixty-day deadline would be reasonable because it aligns with the statutory deadline for EPA to respond initially to a section 126 petition, 42 U.S.C. § 7426(b). That deadline indicates that Congress unequivocally intended for EPA to act quickly on such petitions. This Court has previously looked to analogous statutory schedules in setting deadlines for EPA to act on remand. For example, in *Sierra Club*, the Court remanded rules issued past a statutory six-month deadline and imposed a new six-month deadline for EPA's action—the same as "the period originally specified by Congress." 719 F.2d at 470. And such a deadline is particularly appropriate where, as here, EPA has a history of delay and missed deadlines concerning a particular action. *See Envtl. Def. Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (noting EPA's past delay and setting six-month deadline for action on remand of regulations in accordance with statutory six-month deadline for initial action).

In accordance with these precedents and the Court's prior action on the motion for expedited consideration, the Court should impose a

deadline for EPA to promulgate final action on New York's Petition no later than sixty days from the issuance of the Court's mandate.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the petition for review, vacate the Denial, and remand to EPA for a new decision within sixty days.

Dated: January 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Claiborne E. Walthall, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's order dated December 20, 2019 setting a brief schedule (Doc. No. 1821221). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 12,964 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opening Proof Brief for Petitioners was filed on January 14, 2020 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

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