ORAL ARGUMENT NOT YET SCHEDULED

Case No. 19-1231 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*,

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)

PROOF BRIEF OF RESPONDENT-INTERVENORS

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Dated: March 5, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici

All parties and intervenors appearing in this Court are listed in the Opening Proof Brief for Petitioners. The Commonwealth of Kentucky, Energy and Environment Cabinet has submitted a notification to the Court indicating it intends to file a brief as *amicus curiae* in support of Respondent United States Environmental Protection Agency ("EPA").

B. Rulings Under Review

References to the rulings at issue appear in EPA's brief. EPA Br. i.

C. Related Cases

Respondent-Intervenors adopt the statement as to related cases in EPA's brief. EPA Br. i.

Respectfully submitted this 5th day of March 2020.

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RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Circuit Rule 26.1, Respondent-Intervenors make the following statements:

Midwest Ozone Group ("MOG") is a "trade association" within the meaning of Circuit Rule 26.1(b) and promotes the general interests of its membership on matters related to air emissions and air quality. MOG has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although certain members of MOG have done so.

The Air Stewardship Coalition is an unincorporated nonprofit association of businesses and organizations formed to address issues related to interstate transport under the Clean Air Act. Because it is a continuing association of numerous businesses and organizations operated to promote the general interests of its membership, no listing of its members that have issued shares or debt securities to the public is required under Circuit Rule 26.1(b).

GenOn Holdings, LLC ("GenOn"), is an independent power producer, delivering electricity to wholesale customers, primarily in the Northeast and Mid-Atlantic. GenOn is a wholly owned subsidiary of GenOn Holdings, Inc.; no publicly held company owns 10% or greater ownership interest in GenOn.

The National Association of Manufacturers ("NAM") has no parent companies, and no publicly held company has a 10% or greater interest in NAM.

The Chamber of Commerce of the United States of America (the "Chamber") has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Chamber.

Dominion Energy, Inc. has no parent companies, and no publicly held company owns 10% or more of its stock.

Big Rivers Electric Corporation ("Big Rivers") is a wholesale generation and transmission electric cooperative that is organized under the electric cooperative laws of the Commonwealth of Kentucky and is wholly-owned by its three member electric distribution cooperatives, none of which has issued stock or is otherwise publicly traded. Big Rivers has no parent company and has issued no stock, and no publicly held company owns a 10% or greater ownership interest in Big Rivers.

The Peoples Gas Light and Coke Company ("Peoples Gas") is a regulated natural gas utility that purchases, stores, distributes, sells and transports natural gas to residential users, commercial and industrial users, and transportation accounts. Peoples Gas is a wholly owned subsidiary of Peoples Energy, LLC, which is a wholly owned subsidiary of Integrys Holding, Inc., which in turn is a wholly owned subsidiary of WEC Energy Group, Inc. ("WEC"), which is a publicly traded holding company. Through this ownership structure, WEC holds a 10% or greater ownership interest in Peoples Gas.

Respectfully submitted this 5th day of March 2020.

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Act	Clean Air Act
Cross-State Air Pollution Rule	76 Fed. Reg. 48,208 (Aug. 8, 2011)
Cross-State Update Rule	81 Fed. Reg. 74,504 (Oct. 26, 2016)
EPA	United States Environmental Protection Agency
Final Rule	EPA Final Action on the Petition, 84 Fed. Reg. 56,058 (Oct. 18, 2019)
Good Neighbor Provision	Clean Air Act § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I)
NOx	Nitrogen oxide or nitrogen oxides
Petition or New York Petition	New York § 126(b) Petition
SCCT	Simple cycle and regenerative combustion turbine (a term used in New York rules)
Standard(s)	National Ambient Air Quality Standard(s)

INTRODUCTION

Invoking section 126(b) of the Clean Air Act (the "Act"), 42 U.S.C. § 7426(b), the State of New York petitioned the Environmental Protection Agency ("EPA") to find emissions from some 350 facilities in nine upwind states "contribute significantly" to New York's purported inability to meet or maintain the 2008 and 2015 National Ambient Air Quality Standards ("Standards") for ozone ("Petition" or "New York Petition")[1] in violation of Clean Air Act section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (the "Good Neighbor Provision").

EPA correctly denied the Petition, finding New York failed to meet its burden of proof. EPA found New York failed to demonstrate "cost-effective controls" are available for the hundreds of disparate facilities named in the Petition. 84 Fed. Reg. 56,058 (Oct. 18, 2019) ("Final Rule"), JA __-__. In making its decision, EPA invoked its well-established, four-step interstate transport framework, *id.* at 56,062–65, JA___, and concluded that New York failed to analyze cost and air quality factors as necessary to meet its burden of proof under Step 3 of EPA's framework as to both the 2008 and 2015 Standards. *Id.* at 56,082–92, JA___. EPA also found (at Step 1) that New York failed to demonstrate that Chautauqua County would not attain the 2008 or 2015 Standards and failed to demonstrate that the New York

[1] New York State Petition for a Finding Pursuant to Clean Air Act, Section 126(b), EPA-HQ-OAR-2018-0170-0004, at JA __–___.

Metropolitan Area would not attain the 2008 Standard. *Id.* at 56,070–81, JA ___–___.

Petitioners argue that EPA, not the petitioning state, must bear the burden of demonstrating that "cost-effective controls" are available – a demonstration integral to any determination that emissions "contribute significantly" to downwind nonattainment. New York's attempt to shift this burden to EPA should be rejected. As this Court has held, and EPA has consistently determined in response to multiple section 126 petitions, the petitioning state seeking the extraordinary remedies available under section 126 – not EPA – must prove the elements of a violation of the Good Neighbor Provision. Here, EPA properly concluded that New York failed to meet that burden.

Moreover, the Court should affirm EPA's decision on a related ground: the Petition fundamentally misconstrued – and exceeded – the scope of section 126(b). Congress designed section 126 to allow a state to identify an individual "source" or a "group" of sources that contribute significantly to that state's air quality attainment problems – *not* to allow a state to target every source within a sweeping, nine-state area that emits above a particular quantitative threshold. Section 126 provides EPA only 60 days (with the possibility of a six-month extension) to grant or deny a petition; if it grants the petition, EPA then has only three months to determine any

required new controls at all of the identified sources, or else any sources for which it has not identified controls must shut down. 42 U.S.C. § 7426(b)–(c).

Petitioners claim the right under section 126 to obtain relief that is equivalent in nature and scope to the regional rulemakings EPA develops and establishes over a period of years; but they also demand that EPA itself perform all the investigation required to support such a rulemaking within the 60 days provided by section 126(b). This is impossible. Petitioners cannot have it both ways: they cannot demand that the scope of section 126 be expanded to encompass a broad regional rulemaking, and then absolve themselves of the burden of proving that such a rulemaking is justified and supported.

For the reasons stated herein, and in the Final Rule, and EPA's brief, EPA's denial of the Petition is lawful and reasonable and should be affirmed.

STATEMENT OF ISSUES

Respondent-Intervenors adopt EPA's Statement of Issues. EPA Br. 3.

STATUTES AND REGULATIONS

Applicable statutes and regulations are in addenda to Petitioners' and EPA's briefs.

STATEMENT OF THE CASE

EPA's brief explains the legal and factual history. EPA Br. 4-15. Briefly, the Act establishes a multi-step process for ensuring sources in one state do not emit

pollutants in amounts that contribute significantly to air quality in other states that violate the Good Neighbor Provision. Each state must develop a State Implementation Plan prohibiting emissions from in-state sources in amounts that "contribute significantly" to a downwind state's failure to attain or maintain the National Ambient Air Quality Standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I). EPA then must review and approve each State Implementation Plan to ensure this criterion is met. *Id.* 7410(k). If the state's plan does not satisfy this requirement, and the state does not timely correct its deficiency, EPA must adopt a Federal Implementation Plan within two years after disapproving the state's plan. *Id.* 7410(c)(1).

A downwind state may petition EPA to find that a source in an upwind state is violating the Good Neighbor Provision. Specifically, a state like New York 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. *Id.* § 7426(b). EPA then "shall" review the petition, conduct a public hearing, and make the requested finding or deny the petition within 60 days, subject to a potential six-month extension. *Id.*; *id.* § 7607(d)(10). If EPA makes the finding, the source or group of sources targeted by the petition must cease all operation within three months, unless EPA adopts new emissions limits and a compliance schedule within three months. *Id.* § 7426(c).

SUMMARY OF ARGUMENT

This Court should affirm the Final Rule. First, the Petition improperly seeks to use section 126 to require EPA to impose a regional transport rule to address emissions from hundreds of disparate sources across multiple upwind states spanning hundreds of thousands of square miles. As Petitioners themselves assert, Congress adopted section 126 for targeted, source-specific relief – not to impose a broad regional solution such as that sought by the Petition, as reflected by the short timeline in section 126.

Second, EPA properly denied the Petition because, as this Court has held, the section 126 petitioner, not EPA, bears the burden to prove it is entitled to relief, and because New York failed to meet that burden in its Petition. The Petition merely alleged a link between emissions from upwind states and ozone in New York (Step 2 of the four-step interstate transport framework); New York never established (at Step 3) that upwind sources emit pollutants in amounts that violate the Good Neighbor Provision. That is, New York never showed the named sources' emissions "contribute significantly" to downwind nonattainment or maintenance problems in New York by demonstrating that cost-effective controls are available and feasible at each source after considering air quality and emission-control cost factors at the source, and without resulting in proscribed "over-control" of upwind states' emissions.

Petitioners complain the burden is too great and cannot be placed on a petitioner. However, if that is a problem here, it is a problem of New York's own making. Having sought a "regional NOx solution" through its Petition,[2] New York had an obligation to submit sufficient proof to support the sweeping result requested.

Finally, although the Court need not reach this issue – given the other reasons for affirming EPA's action – it may also deny the petition for review on the grounds that, at Step 1 of EPA's four-step framework, New York did not show its air quality would fail to attain or maintain either the 2008 or 2015 Standard in any relevant future analytic year. As to the 2008 Standard, lacking proof showing nonattainment in a future year, Petitioners cite current monitor data. Yet, the only data showing current violations of the 2008 Standard are at monitors in Connecticut (not New York), a circumstance that cannot properly form the basis for a New York section 126 petition. As the record demonstrates, New York itself is the principal source of Connecticut's ozone concentrations; it should not be heard to base its section 126 claim on Connecticut air quality.

STANDARD OF REVIEW

Respondent-Intervenors adopt EPA's statement of the standard of review. EPA Br. 17-18.

[2] New York State Department of Environmental Conservation Detailed Comments at 10, EPA-HQ-OAR-2018-0170-0084, JA ___ ("New York Comments").

ARGUMENT

I. Section 126 Is Not a Proper Mechanism to Compel EPA to Adopt a Regional Transport Rule to Address Ozone.

What Petitioners really seek here is a regional transport rule to address nitrogen oxide ("NOx") emissions from hundreds of disparate sources across multiple states spanning hundreds of thousands of square miles. That, EPA correctly argues, "is an improper use" of section 126(b) and should be left to EPA's consideration of regional NOx regulations now on remand to EPA. EPA Br. 45.

New York's Petition effectively asked EPA to do the impossible. Congress did not intend – indeed, could not have intended – section 126 to be used to compel sweeping regional relief addressing a purported "group" of 350 disparate sources in the 60 days in which EPA "shall" act on a petition, while also allowing time for a "public hearing" to consider stakeholder input. 42 U.S.C. § 7426(b). The section 110 processes, in contrast, accommodate that degree of regional planning and rulemaking, with longer timelines that suit an undertaking of that scope and magnitude. This does not mean section 126 has no independent role; to the contrary, it only means *this* section 126 Petition sought to stretch section 126 beyond any fair reading. Properly construed, section 126 gives states a tool to obtain – where adequately supported by the petitioning state – discrete, "targeted," "tailored," "source-specific relief [as] contemplated by Section 126." Pet. Br. 54, 57.

In short, the section 126 framework is inconsistent with the broad relief New

York sought. For this alternative reason, the Court should uphold EPA's decision to deny New York's expansive Petition.

A. The text of section 126 does not contemplate the broad regional rulemaking demanded by the Petition.

Section 126(b) authorizes a state to file a petition based on emissions from "any major source or group of stationary sources." 42 U.S.C. § 7426(b). That provision does not contemplate the broad scope – regulation of 350 disparate sources spread across nine states – encompassed by this Petition.

Section 126(b)'s original language authorized a petition addressing "any major source," not "sources." *See, e.g.*, H.R. Rep. 101-490 at 274 (1990) (Section 126 originally authorized petitions "only" to address emissions from "a single major source"). And many section 126 petitions have targeted only one individual source. *See, e.g.*, 76 Fed. Reg. 69,052 (Nov. 7, 2011) (one plant); 83 Fed. Reg. 16,064 (Apr. 13, 2018) (one plant); 83 Fed. Reg. 50,444 (Oct. 5, 2018) (with respect to petitions filed by Delaware, addressing one plant named in each of four petitions).

When Congress amended section 126(b) to add the phrase "or group of stationary sources," it did not expand the scope of section 126(b)'s authority to encompass a petition like New York's. A "group" refers to "a number of individuals assembled together or having some unifying relationship," an "assemblage of objects regarded as a unit," Merriam-Webster's Ninth New Collegiate Dictionary (1990) (as contemporaneously defined), or to a "number of … things that are located

close together or are considered or classed together," Lexico.com (Dictionary.com & Oxford Univ. Press), https://www.lexico.com/en/definition/group (last visited Mar. 3, 2020). *See U.S. v. Cook*, 594 F.3d 883, 886 (D.C. Cir. 2010) (undefined terms should be given their ordinary meaning). In the context of the Act, that "unifying relationship" must relate to air pollution control in some manner – such as a characteristic of sources being located geographically close to one another, or of sources classified within the same industrial category that use similar operations and thus can use similar emissions controls.

Prior section 126 determinations where a "group" was targeted support this conclusion. For example, a 2016 Maryland petition targeted 36 electricity-generating units, all of which were in the same source category. 83 Fed. Reg. 50,444. Similarly, in *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1038 (D.C. Cir. 2001), the section 126 petitions each identified a comparatively limited source category (electricity-generating units and fossil-fuel fired industrial boilers and turbines), a geographic limit, or other defined classification, and each group had already been addressed through an EPA regional transport rule (the "NOx SIP Call"), with the section 126 petitions effectively piggybacking onto that EPA rulemaking. *See* 64 Fed. Reg. 28,250, 28,254–55 Table I-1 (May 25, 1999); *Appalachian Power*, 249 F.3d at 1038. In all events, interpretation of the proper scope of "group" was not

presented to this Court or any other court for decision in any prior case.[3]

The 350 disparate sources identified in the Petition can in no way be deemed a "group." They are not geographically close; indeed, they are spread across hundreds of thousands of square miles and nine different states. They do not use similar operations or make similar products, as they involve multiple sectors – electricity-generating units, petroleum refineries, natural gas compressors, and manufacturers of cement, pulp and paper, steel, glass, lime, chemicals, and carbon, to name a few. Pet. Appx. B, JA___-___. Different sources are, moreover, subject to a variety of different requirements under the different state and federal standards that apply to their different operations.[4] There is, therefore, no commonality of operation or equipment that may allow similar controls to be applied to all, or that could allow for a common evaluation of cost-effective controls across all 350 sources.

The *only* "unifying" aspect that New York alleges is source emissions of at least 400 tons per year of NOx. *See* New York Comments at 10, EPA-HQ-OAR-

[3] *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988), addressed EPA's denial of section 126 petitions that named multiple sources, *see id.* at 577, but those petitions were filed, and the case was decided, before Congress added the phrase "or group of stationary sources" to section 126(b); thus, interpretation of that term's scope was not at issue.

[4] *See* Air Stewardship Coalition Initial Comments at 31–33, EPA-HQ-OAR-2018-0170-0087, JA___-___ (describing requirements); *id.* at Att. B, Table 1, JA___-___ (identifying state Reasonably Available Control Technology requirements).

2018-0170-0084, JA__ (sources named "based on the amount of NOx emitted"). This so-called "grouping" is arbitrary. The mere fact that the named sources emit NOx above a given threshold amount is not a common denominator in any meaningful sense. How emissions are produced differs among different types of sources, and the tools to limit emissions vary in type, effectiveness, and cost based on the source.

New York's only justification for selecting 400 tons per year to define the "group" is its claim that these facilities were "expected to have the greatest impact." Pet. at 10, JA___. That begs the question. By definition, section 126(b) authorizes relief only against a "group" of sources that is "in violation of the prohibition" of 42 U.S.C. § 7410(a)(2)(D)(i)(I), *i.e.*, that have emissions in amounts that "contribute significantly" to any inability by New York to attain or maintain the Standards within its borders. Defining the "group," as New York's Petition does, as "all sources that the State thinks might significantly contribute" is circular and would write "group" out of the statute.

B. The context of section 126 does not support the broad regional rulemaking demanded by the Petition.

The statutory framework further confirms that Congress did not contemplate that section 126 would be used to impose sweeping regional NOx regulations. It is fundamental "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Grp. v.*

EPA, 573 U.S. 302, 321 (2014). Here, section 126 as a whole – the stringent statutory timeline, coupled with the default mandatory "hammer" of a compulsory, legally enforceable shutdown of all named sources – is, in contrast to the measured timeframes in section 110, entirely inconsistent with a regional rulemaking.

Section 126(b) prioritizes speed: "*Within 60 days after receipt* of any petition under this subsection and *after public hearing*, the Administrator *shall* make such a finding or deny the petition." 42 U.S.C. § 7426(b) (emphases added). Congress intended an expeditious process, requiring "that the Administrator take final action on a section 126(b) petition very quickly." *New York*, 852 F.2d at 578; *see GenOn REMA LLC v. EPA*, 722 F.3d 513, 520 (3d Cir. 2013); *Appalachian Power*, 249 F.3d at 1047; *Connecticut v. EPA*, 656 F.2d 902, 907 (2d Cir. 1981).

In contrast, when Congress in the Act directs EPA and states to implement wide-ranging requirements that may affect multiple states and hundreds of sources, it provides EPA ample time for information-gathering and analysis. After a new or revised Standard is established, section 110 gives each state three years to develop and submit a State Implementation Plan – including plan provisions that comply with the Good Neighbor Provision. 42 U.S.C. § 7410(a)(1), (a)(2)(D). Once that plan is submitted, EPA has up to six months to determine the plan is "complete" – that is, that it includes all required elements; EPA then has another full year to evaluate the substance of that plan. *Id.* § 7410(k)(1)(B), (2). If EPA determines that

any portion of that plan is incomplete, inadequate, or unapprovable, the state has a full two years to revise that portion before EPA must develop and promulgate a Federal Implementation Plan in lieu of a state plan. 42 U.S.C. § 7410(c)(1), (k)(3)–(6). At each step in the process, members of the public and interested stakeholders that will be affected by the plan have a meaningful opportunity to be heard. *E.g.*, *id.* § 7410(a)(2), (*l*) (plans and plan revisions submitted by state "after reasonable notice and public hearing").

Congress provided EPA and the states years to address these issues, because investigating the source and extent of the problem and identifying appropriate regional solutions is complex. "[I]nterstate air pollution poses a complex challenge for environmental regulators." *EPA v. EME Homer City Generation, LP*, 572 U.S. 489, 496 (2014). Evaluation of emissions transported across hundreds of miles requires consideration of thousands of "overlapping and interwoven linkages" among sources and downwind receptors, with such detailed consideration demanding "complex modeling to establish the combined effect" in downwind states. *Id*. at 497, 501. Hence, section 110's timelines reflect that "[t]he realities of interstate air pollution … are not so simple." *Id.* at 516. States and EPA must be able to fashion an approach based on thorough analysis of available alternatives at each source – a complex task, given that available control technology and its effectiveness vary source to source.

Congress understood that developing wide-ranging regulatory programs takes time. As such, when it directed EPA and states to undertake actions with this broad scope, it provided sufficient time to do so. Section 126(b), on the other hand, does *not* provide time to develop and implement the "regional NOx solution" New York sought. New York Comments at 10, JA__. Having provided EPA and states significant time to investigate and develop remedies in proceedings on regional air pollution issues – and for the public to participate in those proceedings – Congress could not have contemplated that EPA would be required to conduct the same analysis, provide for public notice and comment and make a well-founded, rational decision in the 60 days allowed by section 126.[5]

This conclusion is buttressed by the immediate and extreme remedies specified by section 126. Where EPA grants a petition, Congress mandated that "it *shall be a violation*" of the Act "for any major existing source to operate more than three months after" EPA has made a section 126 finding, unless EPA develops "emission limitations and compliance schedules" for the affected source within that short three-month timeframe. 42 U.S.C. § 7426(c) (emphasis added); *see Appalachian Power*, 249 F.3d at 1040 ("the ability of such a source or group of

[5] Even the discretionary six-month extension allowed by the Act in section 7607(d)(10) would be insufficient for the regional rulemaking New York demanded. S. Rep. No. 101-228, at 20 (1989) (even "nine months is not adequate time" for a state to prepare an implementation plan). Ultimately, Congress allowed states three years to develop implementation plans. 42 U.S.C. § 7410(a)(1).

sources to operate is severely constrained once such a finding is made").

This draconian mandatory hammer – a default shutdown of every single named source if EPA does not adopt and implement appropriate, source-specific controls for each such source within three months – is also inconsistent with the consequences Congress imposed for failure to comply with other regional requirements. For example, if EPA finds that a state with a nonattainment area has failed to submit a required State Implementation Plan and does not correct that deficiency within 18 months, EPA will impose either highway-funding sanctions or an increased two-for-one emission offset ratio for emissions from new sources; if the state still does not comply within another six months, then EPA will impose both sanctions. 42 U.S.C. § 7509(a)–(b). Even in states with the most serious ozone problems ("Severe" and "Extreme" nonattainment areas), the consequences for failing to attain the Standard include fees on emissions, other economic incentives to achieve more emission reductions, and the like, *id.* §§ 7511a(g)(3)–(5), 7511d(a)–(b) – but not, as under section 126, the forced closure of sources.

Moreover, these consequences are imposed only after years of planning and regulatory failures. And even then, the noncompliant state retains authority to design and implement its own program, and, as noted, sources may continue to operate. Yet, section 126(c) requires EPA to directly take over regulation of sources and compels mandatory shutdowns absent swift EPA action. Given the speed and

extreme severity of the consequences associated with any section 126(b) finding, the scope of that authority must be more circumscribed.

Here, if EPA could not identify appropriate controls for all 350 disparate sources within the three months prescribed by section 126(c), and did not act with extraordinary dispatch to impose emission control requirements and a compliance schedule for each, this result could cause extraordinary disruption. If the power plants named in New York's Petition were shut down, that could create serious consequences for businesses and employees and cause blackouts affecting schools, hospitals, governments, and other essential services, causing economic impacts and threatening public health and safety. *See, e.g.*, Am. Pub. Power Ass'n Comments at 11-13, EPA-HQ-OAR-2018-0170-0085, JA___-___; Tennessee Valley Authority Comments at 3, EPA-HQ-OAR-2018-0170-0068, JA__. Shutting down the disparate named manufacturing sources would cause economic harm to source owners and operators, employees (including widespread job losses), customers, surrounding communities, and supply chains. Air Stewardship Coalition Comments at 3, EPA-HQ-OAR-2018-0170-0087, JA__.

Congress could not have intended these drastic consequences to unfold on the timeline and with the limited public process provided in section 126. Rather, Congress must have intended section 126 as a scalpel to address a "discrete" problem, not as a means to effect the sprawling approach New York demands.

In sum, section 126 does not provide authority to establish the broad regional remedy Petitioners envision. If, however, this Court finds that it does, then the breadth of the Petition only further underscores that the petitioner must bear the burden to prove a violation.

II. New York Failed to Meet the Burden of Proving a Violation of the Good Neighbor Provision.

EPA properly based its denial of the Petition "on New York's failure to meet its statutory burden to demonstrate that the group of sources identified in the petition emits or would emit in violation of the good neighbor provision." 84 Fed. Reg. at 56,058, JA___; 42 U.S.C. §§ 7410(a)(2)(D)(i)(I), 7426(b). A section 126 petitioner bears the burden of proving that the emissions identified by its petition "will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any … national … ambient air quality standard," 42 U.S.C. § 7410(a)(2)(D)(i)(I), and must satisfy that burden to prevail under section 126. *See* 84 Fed. Reg. at 56,084, JA___ (citing *New York*). EPA may choose to undertake a separate, independent analysis to make its finding but has no obligation to do so.

Section 126(b)'s express language presents EPA with a binary choice: either approve the petition or deny it. 42 U.S.C. § 7426(b). It is axiomatic that an affirmative section 126(b) finding made without adequate support would be arbitrary, capricious, and unlawful. 42 U.S.C. § 7607(d)(6), (9)(A); *id.* §

7607(d)(1)(N) (providing that "action of the Administrator under [section126]" is subject to § 7607(d)). Accordingly, if no sufficient basis is presented for making such a finding, EPA "*shall* … deny the petition." *Id.* (emphasis added).

Moreover, EPA has discretion in declining to make the requested finding. The text "does not … identify a specific methodology or specific criteria for [EPA] to apply when making a § 126(b) finding or denying a petition." 84 Fed. Reg. at 56,067, JA___. Although EPA, in exercising its section 126(b) discretion, may choose to undertake independent analysis to support a finding, section 126(b) does not obligate or direct EPA to do so. Of course, if EPA *does* elect to undertake additional analysis, it may cite that analysis as a basis on which to determine that adequate grounds do *not* exist for making an affirmative finding, if that analysis supports that conclusion.

This Court has recognized that receipt of a section 126 petition does not obligate EPA to discharge "investigative duties" to assess whether the requested finding should be made. In 1988, this Court held EPA need not undertake the "array of investigative duties" that Petitioners demanded EPA discharge, including "data-gathering and research" and air quality "modeling." *New York*, 852 F.2d at 578 ("Congress did not intend that the Administrator be required to perform all these duties").

The compressed timeframe to act on section 126 petitions reinforces that

Congressional intent does not require independent EPA production or analysis of information, but instead puts the burden on the petitioner to establish an adequate factual foundation for the requested finding. The notion that the statute requires EPA to independently analyze assertions made in section 126(b) petitions is especially untenable here, because the Petition targeted 350 different emission sources in diverse industrial source categories, located across nine states. section I, *supra*. The fact that EPA may, in a given case, take more than 60 days to complete its review of a section 126(b) petition does not change this analysis; indeed, this Court in *New York* specifically found that Petitioners held the burden of proof, even though EPA took *more than three years* to deny their petition. *See id.* at 577.

EPA has long applied this burden-of-proof principle. In its 2011 rulemaking on a New Jersey section 126 petition, EPA reaffirmed that the petition "standing alone" must establish the basis for the petition, because section 126 "does not require EPA to conduct an independent technical analysis…" 76 Fed. Reg. 19,662, 19,666 (Apr. 7, 2011) ("EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face"), *cited in* 84 Fed. Reg. at 56,070, JA___ (citing 83

Fed. Reg. at 50,452 (denying Delaware and Maryland section 126 petitions);[6] 83 Fed. Reg. at 16,070 (denying Connecticut section 126 petition)).[7]

Reinforcing this burden-of-proof principle is the nature of the default remedy established by section 126(c) when EPA makes a section 126(b) finding for existing sources: a requirement to cease all operations within three months. 42 U.S.C. § 7426(c)(2). As discussed above, the consequences of this default remedy would be devastating and widespread in a matter such as that presented here, where hundreds of sources in the nation's industrial heartland are targeted. *See* Argument I, *supra*. Hence, it stands to reason that any section 126 petitioner must justify a finding with such a draconian remedy by providing robust factual and technical support.

Because New York failed to satisfy its burden of providing adequate technical and analytical support for the Petition, its criticism of information (including EPA modeling data) cited in the record as offering *additional, independent* grounds for denying the Petition is beside the point. Though not obligated to do so, EPA in this case exercised its discretion to consider available, pre-existing information created for previous rulemakings, and concluded that information did not support New York's Petition. *See* 84 Fed. Reg. at 56,059 n.1, JA___ ("Th[e] basis for denial

[6] Petitions for review of EPA's rule denying Delaware and Maryland's petitions are pending in this Court. *Maryland v. EPA*, No. 18-1285 (D.C. Cir.) and consolidated cases.

[7] No petition for review of EPA's rule denying Connecticut's petition was filed.

based on Petitioner's failure to meet its burden is independent and severable from any portion of the denial based on EPA's discretionary evaluation of downwind air quality in New York using the Agency's 2023 modeling data."). Petitioners may not, in an effort to breathe new life into unsupported petitions, seek to dispute and pick apart any available information EPA cites as additional and independent bases for denial. section 126 petitioners must come forward with adequate, convincing support in the first instance.

Petitioners contend that "EPA's articulation of Petitioners' burden would effectively require them to conduct an entire regional transport rulemaking, … includ[ing] the collection of information from hundreds of sources outside of Petitioners' States." Pet. Br. 24; *see also* Pet.-Int. Br. 23–24. But *EPA* has never required New York to do that. To the contrary, the burden imposed on New York flows directly from the nature and scale of the Petition that New York chose to submit.

Petitioners claim that New York lacked access to information needed to support its Petition, and that only EPA could obtain that information. Pet. Br. 58–63; *see also* Pet.-Int. Br 12, 27–30.[8] In reality, a wide variety of information

[8] Petitioner-Intervenors argue that EPA could have collected more information pursuant to its information-gathering powers under the Act. Pet.-Int. Br. 28–29. That is not a simple process – and could not be done in 60 days. EPA Br. 26; 44

regarding emissions and controls is available on publicly-accessible databases.[9] For example, existing, published monitoring or modeling data could be used to evaluate attainment of the Standard. Publicly available, source-specific emissions data could be used to model the impact of each source's emissions on New York air quality. Each source's air quality permits are available, online or via a Freedom of Information Act request, and could be used to determine what emissions limits and control equipment have been installed at each facility. And each State Implementation Plan identifies any applicable upcoming new requirements. New York also could have reviewed EPA's "RACT/BACT/LAER Clearinghouse," which is a website maintained by EPA as a central database for air pollution control technology information, to identify available emissions controls that have been applied, successfully and cost-effectively, at emission sources within a variety of categories. Finally, New York certainly had the capability to conduct the complex

U.S.C. §§ 3506, 3507(a) (requiring multiple public comment periods before information collection requests may be issued).

[9] *See, e.g.*, EPA, Clean Air Markets Data Resources website, *available at* https://www.epa.gov/airmarkets/clean-air-markets-data-resources (providing source emission data, power sector modeling, and air quality monitoring data); EPA, Air Markets Program Data, *available at* https://www.epa.gov/airmarkets/power-plant-data-highlights (providing facility-level emissions and controls); National Emissions Inventory, *available at* https://www.epa.gov/air-emissions-inventories/national-emissions-inventory-nei (providing state emissions inventory data); RACT/BACT/LAER Clearinghouse, *available at* https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information (available controls for different source types).

technical analyses involved in interstate emissions transport, as New York must already do so for New York emissions to satisfy its obligations under the Good Neighbor Provision in its own State Implementation Plan. *See EME Homer City*, 572 U.S. at 508–10 & n.13.

New York's difficulty here is of its own making: in its Petition, it elected to target hundreds of facilities in diverse industrial categories across nine states. The difficulties associated with supporting such a broad petition do not provide a legal basis to absolve New York of its obligation to prove the allegations in its Petition, including its obligation at Step 3 to make an adequate demonstration of significant contribution. *See id.* at 507–10; *id.* at 509 ("practical difficulties … do not justify departure from the Act's plain text"). Petitioners' arguments for shifting the burden of proof to EPA are meritless.

III. New York Did Not Meet Its Burden at Step 3 for Either the 2008 or 2015 Standards.

EPA properly denied the Petition at Step 3 as to both the 2008 and 2015 Standards, because New York failed to identify upwind emissions that "contribute significantly" to nonattainment or interfere with maintenance at a downwind-state ozone air quality receptor. 84 Fed. Reg. at 56,062, JA___. To show that emissions "contribute significantly," a section 126 petition must do more than merely allege (at Step 2) that an upwind-state-to-downwind-state link exists; it must consider air quality data, costs, and other relevant factors to demonstrate that the alleged upwind

emissions can be eliminated through cost-effective controls (Step 3). New York failed to do so.

A. New York failed to show that upwind emissions "contribute significantly" to the alleged downwind nonattainment.

Under section 126(b), a petitioner must show that emissions from the upwind source or group of sources named in the petition violate section 7410(a)(2)(D)(i), which prohibits emissions in "amounts which will … contribute significantly" to nonattainment or interfere with maintenance in a downwind state. The Supreme Court and this Court have upheld EPA's determination that a petitioner must show *both* that an upwind state's NOx emissions interfere with downwind attainment (Steps 1 and 2) *and* the "cost-effective" controls to address those emissions (Step 3), using a multi-factor approach. *EME Homer City*, 572 U.S. at 518–20 (upholding EPA interpretation of "contribute significantly" in Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011)); *Appalachian Power*, 249 F.3d at 1049–50 (upholding EPA interpretation of "contribute significantly" in reviewing denial of section 126(b) petitions); 64 Fed. Reg. at 28,285 (EPA adopted "multi-factor approach to assess whether there is a significant contribution," concluding that "whether some amount of emissions is significant depends, in part, upon the availability of highly cost-effective controls" for the named sources).

Evaluating the availability of "cost-effective" controls at Step 3 requires assessment of feasible emission control strategies available at the named sources,

the costs of implementing those control strategies, the amount of potential emissions reductions from implementing those control strategies at upwind sources, the potential downwind air quality improvements from such emissions reductions, and whether the reductions would resolve – or would do more than necessary to resolve (i.e., entail prohibited over-control for) – the asserted downwind air quality problem. 84 Fed. Reg. at 56,082–83, JA___-___ (describing "cost and air quality factors" considered at Step 3). These are key for assessing the amount of emissions that could be eliminated without controlling any source more than is needed to address significant contributions. *Id.*; *EME Homer City*, 572 U.S. at 521-22 ("over-control" is prohibited); *see id.* at 522 (requiring upwind emission "reductions unnecessary to downwind attainment" constitutes proscribed "over-control")

Within this framework, EPA correctly denied the Petition. New York named sources that allegedly emitted at least 400 tons of NOx per year and purported to show how upwind-state emissions contributed to downwind air quality (Step 2), but New York made no attempt to demonstrate the amount of alleged emissions that would "contribute significantly" to nonattainment of either the 2008 or 2015 Standards (Step 3). 84 Fed. Reg. 22,787, 22,803 (May 20, 2019), JA___; Pet. at 14–17, JA __-___. New York claimed certain controls should be used, but never assessed whether they were cost-effective, as New York did not quantify the amounts of emissions the controls would eliminate, the cost to do so, or the existence

and amount of any downwind-state ozone air quality benefits that would result from installing and operating such controls.

Petitioners now challenge EPA's Step 3 approach. First, Petitioners contend EPA unreasonably transformed the Petition at Step 3 to require New York to conduct a regional rulemaking. Pet. Br. 55-58; Pet.-Int. Br. 22-24. This is baseless. New York elected to submit a petition demanding broad-scale regional relief. Pet. at 17, JA___ (demanding a remedy for the "identified sources in each of the nine named states"); New York Comments, *supra* (New York seeks "regional NOx solution"). New York thus assumed the burden – EPA did not impose it.

Second, Petitioners assert EPA "conflated" section 126(b) with a remedy to be imposed under section 126(c), arguing New York's petition only needed to address air quality – leaving cost-effectiveness for EPA to address when fashioning relief under subsection (c). Pet. Br. 63-64; Pet.-Int. 24-27.[10] Petitioners offer no support for their claim. Nor could they, as it conflicts with the settled interpretation of sections 110 and 126, upheld in *EME Homer City* and *Appalachian Power*. Indeed, commenters raised the same argument regarding the section 126 petitions

[10] Contrary to Petitioners' contention, EPA's approach does not require (or, for that matter, permit) New York to establish any remedy that may be authorized pursuant to section 126(c). If the section 126(b) petitioner first presents proof that a source or group of sources "contribute[s] significantly," then EPA can fashion appropriate relief, such as controls, a trading program, or similar requirements, pursuant to section 126(c).

that were submitted in connection with EPA's NOx SIP Call. 64 Fed. Reg. at 28,284 (noting that commenters were "critical of the use of the availability of cost-effective control measures … in the test for determining significant contribution"). EPA rejected the comments, expressly determining section 7410(a)(2)(D)(i)(I) allows consideration of "factors other than air quality" when determining "significant contribution" – "including cost." *Id.* at 28,285. This Court affirmed EPA's interpretation in *Michigan v. EPA*, 213 F.3d 663, 677–79 (D.C. Cir. 2000), and *Appalachian Power*, 249 F.3d at 1050, as did the Supreme Court in *EME Homer City*. Indeed, as the Supreme Court recognized, "[u]sing costs … makes good sense" as it helps produce "an efficient and equitable solution" to the interstate transport question. *EME Homer* City, 572 U.S. at 519.

In applying Step 3, EPA here followed a longstanding interpretation that has repeatedly been affirmed by this Court and the Supreme Court. EPA's decision to deny the Petition should be affirmed.

B. The record cited by Petitioners provides no basis for their challenge.

Petitioners cobble together information from the record to argue EPA had enough data to grant the Petition at Step 3. Pet. Br. 50-54, Pet.-Int. Br. 35-39. This attempt fails, principally, because the cited information has a fatal flaw: It does not provide Step 3 information, as it does not establish how the amounts of emissions

"contribute significantly" by showing how the emissions at issue could be addressed through cost-effective controls – without over-control.

For example, Petitioners assert data show emissions linked from certain upwind states to downwind receptors. Pet. Br. 52. Yet, that is Step 2; these data say nothing about whether the sources of those linked emissions "contribute significantly" to alleged downwind nonattainment. Petitioners also claim some electricity-generating units operate controls to achieve an average NOx emissions rate above 0.15 pound per million British thermal units, which they assert is the Reasonably Available Control Technology requirement that New York imposes on its sources. Pet. Br. 52–53.[11] Yet, Reasonably Available Control Technology is a state program, *see* EPA Br. 31, and that program's requirements for NOx emission control vary widely across states and across source categories.[12] Petitioners offer no explanation why New York's chosen emission rate is even germane in the context of a section 126 petition targeting *other* states' sources. New York also says nothing about how that rate, if applied, would – or would not – be cost-effective for controlling emissions from hundreds of other facilities in other states with different equipment and different operating constraints – or whether it would address the

[11] New York applies a NOx emission rate of more than 0.15 pound per million British thermal units for certain of its sources. NY 6 CRR-NY 227-2.4.

[12] *See* Air Stewardship Coalition Initial Comments, Att. B, JA__ (compiling differing state Reasonably Available Control Technology rules).

emissions that allegedly contribute to downwind attainment concerns, and do so without over-controlling.

Lastly, Petitioners assert reductions can be achieved in some cases at some sources by fully operating certain controls. Pet. Br. 53-54. But, implementation of control technologies is technically complex and resource-intensive and varies by industrial sector and the type and size of the facility, source, or unit in question. Petitioners provide no analysis to show that further operation of these controls would be "cost-effective" to address emissions "in amounts" that will contribute significantly. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Nor does New York demonstrate that operating those controls would address the alleged downwind nonattainment problem.

Petitioner-Intervenors' argument likewise fails. They assert information in the record shows certain of the named sources can cost-effectively reduce emissions based on EPA findings in the Cross-State Update Rule, 81 Fed. Reg. 74,504 (Oct. 26, 2016). Pet.-Int. Br. 36–39.[13] This is a red herring. If the Cross-State Update Rule identified and imposed cost-effective controls on sources named in the Petition,

[13] There are a range of technical concerns presented in the record suggesting the asserted controls are not – and were not proven to be in the record here – cost-effective across the named sources for the emissions at issue. *E.g.*, Air Stewardship Coalition Initial Comments at 32–33, JA__-___; Duke Energy Comments, EPA-HQ-OAR-2018-0170-0063 at 3, JA __; Midwest Ozone Group Comments at 33–34, JA__-___.

then those controls are already required under the rule.[14] Regardless, the Petition could conceivably obtain relief only for "amounts"[15] of emissions that would "push" downwind monitors above the Standards. *EME Homer City*, 572 U.S. at 514 ("task is to reduce upwind pollution, but only in 'amounts' that push a downwind State's pollution concentrations above the relevant [National Ambient Air Quality Standard]") (footnote omitted). Merely asserting that EPA found cost-effective measures to reduce certain sources' emissions under the Cross-State Update Rule does not mean that finding necessarily applies here. It does not establish that the controls demanded by New York would be cost-effective for the named sources for the "amounts" of emissions contributing to the specific downwind nonattainment or maintenance receptors at issue. 84 Fed. Reg. at 56,083, JA___. Moreover, such an assessment "is essential" to make the required showing that the controls Petitioners seek will not result in "over-control" of upwind sources. *Id.* The Act does not authorize EPA to impose more controls than necessary to achieve attainment in the downwind state. *EME Homer City*, 572 U.S. at 517 n.19, 521–22. Merely citing *possible* controls ignores this bar.

[14] Measures found cost-effective in the Cross-State Update Rule remain in effect under *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019), which did not vacate that rule, *see id.* at 336.

[15] 42 U.S.C. § 7410(a)(2)(D)(i).

IV. New York Did Not Meet Its Step 1 Burden for the 2008 or 2015 Standards.

This Court should also affirm EPA's decision on the independent grounds that New York failed to meet its burden at Step 1 for either the 2008 or 2015 Standards. "[W]hether there will be a downwind nonattainment or maintenance" problem under section 126 is based on "observed and modeled future air quality concentrations for a relevant future analytic year." 84 Fed. Reg. at 56,080, JA ___. Here, EPA properly found that New York failed to offer any relevant, future-year air quality analysis. *Id.* at 56,074, 56,079-80, JA ___, ___-___. For this reason as well, the Final Rule should be affirmed.

A. Step 1 requires proof of a downwind air quality problem in a future analytic year.

EPA has long construed the Good Neighbor Provision's reference to emissions that "will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any" standard, 42 U.S.C. § 7410(a)(2)(D)(i), as referring to projected emissions in a relevant future year.

In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), this Court upheld this construction. In that case, "EPA interpreted 'will' to indicate sources that presently *and at some point in the future 'will'* contribute to nonattainment." *Id.* at 914 (emphasis partly added). The Court held that "because 'will' can … indicate the future tense," EPA's interpretation was reasonable. *Id.*

Moreover, as detailed *supra*, the Supreme Court held in *EME Homer City* that under the Good Neighbor Provision, "EPA cannot require" over-control of upwind emissions. 572 U.S. at 521. Indeed, on remand, this Court found ozone-season NOx emission budgets for several states "invalid" because those budgets, which would have taken effect in 2014, were unsupported by record evidence *for that future year*. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 130 (D.C. Cir. 2015) ("*EME Homer City II*"). Quite simply, EPA in regional ozone interstate transport rulemakings – and states in section 126(b) petitions concerning ozone standards – must make sound projections of air quality *in the future year in which any new emission controls would go into effect*. Otherwise, when those controls *do* go into effect in that future year, prohibited over-control may result.

B. The Petition failed to establish any nonattainment issue with respect to the 2008 Standard.

1. The Petition provided no evidence of nonattainment in any future analytic year.

Notwithstanding the decisions of the Supreme Court and this Court, New York provided absolutely no information supporting the existence of any future nonattainment or maintenance problems with the 2008 standard. 84 Fed. Reg. at 56,079, JA___. Rather, New York relied on outdated and erroneous data from 2011 and 2014 to estimate 2017 emissions even though public data on actual emissions were already available at the time New York submitted its petition in March 2018.

Air Stewardship Coalition Initial Comments, EPA-HQ-OAR-2018-0170-0087, JA ___. The data New York submitted significantly overstated even current emissions; for example, for just one Respondent-Intervenor, Dominion Energy, New York's "projected" 2017 emissions from seven electric generating facilities overstated NOx emissions by 25% and ozone-season NOx by 63%; the comparable figures for four compressor stations overstated emissions by 13%–97%. Dominion Energy Comments, EPA-HQ-OAR-2018-0170-0077, JA___. Moreover, even if these figures *did* accurately reflect 2017 emissions, they did not and could not demonstrate violations of the 2008 Standard, Pet. Br. 32, as EPA explained in the Final Rule. 84 Fed. Reg. at 56,080, JA _____.

2. Petitioners cannot rely on air quality data from Connecticut.

Lacking any proof of attainment issues with the 2008 Standard in a future analytic year, Petitioners now apparently claim EPA should have considered data from within the New York Metropolitan Area allegedly showing current violations of the 2008 Standard at monitors in Connecticut. Pet. Br. 34–35. As EPA correctly responds, a section 126(b) petitioning state may not seek a finding from EPA with respect to air quality in a state other than the petitioner's. EPA Br. 50; 84 Fed. Reg. at 56,080, JA___.

Petitioners nonetheless urge that the current data from Connecticut are sufficient because the data are from within the New York Metropolitan Area and a

nonattainment finding in that area will impact New York. Pet. Br. 40-41. This argument is misplaced. EPA guidance provides that designated nonattainment areas will include not only the area where the violation occurs but also nearby areas that contribute to that violation. EPA, *Area Designations for the 2015 Ozone National Ambient Air Quality Standards*, EPA-HQ-OAR-2018-0170-0107, JA___; 42 U.S.C. §7407(d)(1)(A)(i). However, as EPA explains and Petitioners neglect to mention, New York is in this situation because of its own emissions – *New York's own contribution* to Connecticut's air quality problems *caused* New York to be included in that nonattainment area. EPA Br. 50; *see* Responses to Comments at 32, JA___ ("Portions of New York were included in the [New York Metropolitan Area] nonattainment area because the EPA determined that those portions were themselves contributing to air quality problems in Connecticut.") EPA-HQ-OAR-2018-0170-0128, JA___.

New York's contributions are large. As this Court recognized in *Wisconsin*, of the 53.82 parts per billion of ozone in Fairfield County, Connecticut, that EPA modeling attributed to U.S. sources, "only 3.89 [parts per billion] of that 53.82" came from Connecticut; "[t]he rest … c[a]me from upwind contributions, with a significant share from one State alone (New York, which is projected to contribute 17.22 ppb)." *Wisconsin*, 938 F.3d at 316–17. In contrast, New York's own analysis indicates four of the nine states named in its Petition (Illinois, Indiana, Kentucky,

and West Virginia) are not linked to nonattaining monitors in Connecticut for the 2008 Standard. Pet. at 15, JA___(listing only Maryland, Michigan, Ohio, Pennsylvania, and Virginia as linked to a Connecticut monitor). Indeed, with proper corrections of the projections, the record establishes that New York's data showed eight of the nine states were not linked. Air Stewardship Coalition Initial Comments at 23, EPA-HQ-OAR-2018-0170, JA___.

New York recognizes its own emissions are a major contributor to Connecticut's air quality. When New York proposed to regulate certain in-state NOx emission sources (simple cycle and regenerative combustion turbines, which New York referred to as "SCCTs"), the accompanying Regulatory Impact Statement issued by New York explained: "*Older SCCTs have adverse impacts on [New York Metropolitan Area] air quality and make it difficult, if not impossible, for New York to meet air quality goals and [Clean Air Act] requirements*," with New York's modeling showing "that old SCCTs" in New York "*alone* have the ability and potential to significantly impact attainment of the ozone [National Ambient Area Quality Standards]." Midwest Ozone Group Comments at 22-23, EPA-HQ-OAR-2018-0170-0075, JA ____ (quoting

https://www.dec.ny.gov/regulations/116131.html) (first emphasis in original; second emphasis added).[16]

Under these circumstances, the Court should not grant relief to New York[17] with respect to a section 126 petition on the basis of the very air quality problem New York itself has caused.

C. The Petition failed to establish an actionable nonattainment issue for the 2015 Standard.

New York also did not provide any forward-looking data demonstrating that any New York monitor will fail to attain or maintain the 2015 Standard in the relevant analytic year (2023) or any other future attainment year. Although EPA exercised its discretion to consider additional data, the Petition's failure to provide future analytic-year data provides further grounds to affirm EPA's action.

Moreover, EPA properly relied on its available 2023 modeling at Step 1 as a *conservative* predictor of future-year air quality with respect to the 2015 Standard.

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[16] After the Midwest Ozone Group filed these comments, New York, in an attempt to minimize the significance of its statement, revised its Regulatory Impact Statement to read: "Older SCCTs have adverse impacts on [New York Metropolitan Area] air quality and make it difficult, if not impossible, for New York to meet air quality goals and [Clean Air Act] requirements *when coupled with ozone transport*." (emphasis added to show language New York added to its statement). The original version of New York's statement can be found at http://www.midwestozonegroup.com/files/New_York_Proposed_Ozone_Season_Oxides_of_Nitrogen_Emission_Limits_for_Simple_Cycle_Combustion_Turbines.pdf .

[17] Connecticut – the state whose air quality is at issue – is not a Petitioner, and thus seeks no relief, here.

EPA properly selected 2023 for that more restrictive Standard "because the 2023 ozone season aligns with the attainment year for Moderate ozone nonattainment areas." 84 Fed. Reg. at 22,799 (footnote omitted), JA____. Aligning upwind-state emission reductions with applicable downwind-state attainment dates is consistent with this Court's directive. *North Carolina*, 531 F.3d at 911–12 (EPA to align timeline for implementation of Good Neighbor Provision obligations with date by which states must demonstrate attainment with the relevant National Ambient Air Quality Standard).

As New York failed to offer any future-year analysis of air quality, EPA considered the results of its own modeling from its Cross-State Air Pollution Rule proceedings, using a modified version of its 12-kilometer grid cell approach. 84 Fed. Reg. at 56,071, JA___. EPA used this modified approach to address monitoring sites in coastal areas, eliminating from ozone calculations modeling data in grid cells dominated by water bodies. *Id*. EPA's modeling was conservative, *id*. at 56,077, 56,079, JA ___, ___, and concluded that while there were no relevant air quality concerns related to the 2008 Standard, two monitors in New York were predicted to have attainment problems for the 2015 Standard. *Id*. at 56,080–81 & n.69. JA ___.

More-refined future-year modeling confirms the reasonableness of EPA's decision to deny the Petition. To address any concerns about EPA's modeling at coastal receptors, Respondent-Intervenor the Midwest Ozone Group placed in the

record results of state-of-the-science modeling that used the same data and assumptions EPA used, except that the Midwest Ozone Group's modeling used a finer 4-kilometer grid (compared to EPA's 12-kilometer grid). Midwest Ozone Group Comments at 9, JA___.

Modeling of this type, using a finer grid, is specifically recommended by EPA: "The use of grid resolution finer than 12 [kilometers] would generally be more appropriate for areas with a combination of complex meteorology, strong gradients in emissions sources, *and/or land-water interfaces in or near the nonattainment area(s)*." EPA, Modeling Guidance for Demonstrating Air Quality Goals for Ozone, PM2.5 and Regional Haze, EPA-HQ-OAR-2018-0170-0111, JA___ (emphasis added).

Applying the more refined modeling to EPA's data and assumptions resulted in projections that all monitors in New York, New Jersey, and Connecticut will attain the 2008 and 2015 Standards in 2023.[18] Midwest Ozone Group Comments at 11-14, 16-18, JA ___-___, ___-___. These more refined projections confirm the

[18] "Maintenance" monitors would be eliminated when these modeling results are applied to EPA's guidance on maintenance monitors: EPA, Considerations for Identifying Maintenance Receptors for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, EPA-HQ-OAR-2018-0170-0026, JA ____.

conservative nature of EPA's modeling, thereby reinforcing that EPA's denial of the Petition should be affirmed.

CONCLUSION

For the foregoing reasons, and those stated in the Final Rule and EPA's brief, the Court should deny the petition for review.

Respectfully submitted this 5th day of March 2020.

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Circuit Rule 32(e)(2)(B)(i) and this Court's Order of December 20, 2019 (ECF Doc. 1821221) because it contains 8,884 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

/s/ David M. Flannery
David M. Flannery

Dated: March 5, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2020, the foregoing Proof Brief of Respondent-Intervenors was electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the CM/ECF system.

/s/ *David M. Flannery*
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Dated: March 5, 2020