ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-1285 and consolidated cases

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

STATE OF MARYLAND, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Action by the U.S. Environmental Protection Agency

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RESPONDENT EPA'S INITIAL BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

All parties and intervenors appearing in this case are accurately identified in each of the three opening briefs for Petitioners. In addition to those parties, the Institute for Policy Integrity at New York University School of Law has filed an amicus brief in support of Petitioners.

B. Rulings Under Review

The agency action under review is EPA's denial of petitions under Section 7426 of the Clean Air Act (the "Act"), 42 U.S.C. § 7426(b), from Maryland and Delaware. *See* 83 Fed. Reg. 50,444 (Oct. 5, 2018) ("Denial").

C. Related Cases

The final agency action under review in these consolidated cases has not previously been before this Court or any other court. However, two pending cases involve issues that are also pertinent to this case.

Wisconsin v. EPA (D.C. Cir. No. 16-1406, and consolidated cases) was argued on October 3, 2018. That case involves a challenge to EPA's related rule entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS," 81 Fed. Reg. 74,504 (Oct. 26, 2016) ("CSAPR Update") and involves several of the same parties involved here (Delaware, Sierra Club, and Utility Air Regulatory Group as petitioners;

and Maryland, the State of New York, and Environmental Defense Fund as intervenors).

New York v. EPA (D.C. Cir. No. 19-1019, and consolidated cases) is currently being briefed. That case is a challenge to EPA's rule entitled "Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard," 83 Fed. Reg. 65,878 (Dec. 21, 2018) ("Close-Out Rule") and involves many of the same parties involved here (Delaware, Maryland, Chesapeake Bay Foundation, Sierra Club, State of New York, City of New York, and New Jersey as petitioners; Utility Air Regulatory Group as intervenors; and the Institute for Policy Integrity at New York University School of Law as amicus).

s/ *Samara M. Spence*
SAMARA M. SPENCE

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GLOSSARY

CSAPR	Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (also formerly known as the "Transport Rule")
CSAPR Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
Close-Out Rule	Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018)
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
NAAQS	National Ambient Air Quality Standard
NO_X	Nitrogen Oxides
NO_X SIP Call	EPA rule published at 63 Fed. Reg. 57,356 (Oct. 27, 1998)
Catalytic controls	Selective Catalytic Reduction Controls
Non-catalytic controls	Selective Non-Catalytic Reduction Controls
SO_2	Sulfur Dioxide
lb/mmBtu	Pounds per million British thermal units

INTRODUCTION

Under § 7426(b) of the Clean Air Act (the "Act"), states may seek—and bear the burden to prove—a finding that upwind sources of pollutants violate what is known as the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Good Neighbor Provision requires upwind states to issue implementation plans to eliminate emissions that "will" "contribute significantly" to downwind air quality problems or interfere with maintenance of clean air. At issue here are petitions from Maryland and Delaware requesting § 7426 findings that certain upwind power plants violate the 2008 (both States) and 2015 (Delaware only) air quality standards for ground level ozone. These petitions asked EPA to impose emission limits on upwind sources beyond what the Act requires, and EPA denied them. 83 Fed. Reg. 50,444 (Oct. 5, 2018) ("Denial").

EPA has previously addressed the Good Neighbor obligations at issue for the 2008 ozone standards in a regional rule known as the Cross-State Air Pollution Rule Update ("CSAPR Update"). There—using a longstanding four-step framework, assessing things like downwind air quality problems, upwind contributions, and available emission control strategies—EPA implemented an emission allowance trading program to eliminate emissions deemed to "contribute significantly" to downwind air quality problems. The CSAPR Update has been extremely effective at reducing oxides of nitrogen ("NO_X"), an ozone precursor. In 2017, the first year the

trading program was in effect, upwind NO_X emissions fell by nearly 44,000 tons from the five states at issue and 77,500 tons (21 percent) from all covered states.

In assessing the petitions at issue here, EPA used the same four-step framework and found that the States did not meet their burdens under § 7426(b). Under Step One, Delaware did not prove that it will have a downwind air quality problem at all. And EPA's independent analysis showed Delaware is already attaining and maintaining the 2008 standard and will meet the more stringent 2015 standard by 2023 without any further upwind emission limits. Under Step Three, neither Delaware nor Maryland showed emissions could be further reduced from the identified sources through cost-effective control strategies because they did not propose anything new that was not previously addressed. In light of the inadequacies in the State petitions, the analysis and remedy from the pre-existing CSAPR Update, and EPA's additional findings, EPA's Denial was reasonable and should be upheld.

JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

States seeking a 42 U.S.C. § 7426(b) finding bear the burden to prove that identified upwind sources violate the Good Neighbor Provision absent the emission limits they seek. EPA uses a four-step framework to determine upwind Good Neighbor obligations.

1. Under Step One, EPA found Delaware did not prove it has an air quality problem under the 2008 ozone standard, nor that it "will" have one under the 2015 standards.

    a. This Court has affirmed EPA's approach under the Good Neighbor Provision of considering whether downwind areas "will" have an air quality problem in the future. Did EPA reasonably conclude Delaware did not meet its burden where Delaware relied only on current and pre-CSAPR Update air quality data and did not attempt to support a finding of a future air quality problem in Delaware?

    b. EPA's independent analysis relied on preexisting air quality modeling showing Delaware would attain the 2015 ozone standards by 2023, without further upwind controls. Did EPA reasonably rely on its 2023 modeling where this was the best available data and where Delaware would not incur an obligation to impose additional controls within the state before 2023?

2. Under Step Three, EPA considered whether the upwind sources will "significantly contribute" to downwind air quality problems absent the requested controls.

    a. Did EPA reasonably conclude that sources had already implemented the requested optimization strategy for selective catalytic reduction

controls where EPA's allowance trading program set emission budgets based on that strategy?

b. Where EPA had previously considered and rejected the requested optimization strategy for selective non-catalytic controls because it achieves minimal air quality benefits in comparison to costs, did EPA reasonably affirm its prior decision?

c. Did EPA appropriately decline to impose emission limits requiring Brunner Island to use natural gas where the facility is already doing so and record evidence indicates this will continue?

3. Did EPA reasonably consider Maryland's § 7426(b) petition only under the 2008 ozone standard where Maryland's petition did not request a finding under the subsequent and distinct 2015 standard?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not in Petitioners' addenda are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Maryland and Delaware petitioned EPA to find, under 42 U.S.C. § 7426(b), that certain upwind power plants contribute to creation of downwind ozone in their states in a manner that violates the Act. The States further asked EPA to impose specific emission limits on those facilities, beyond what EPA has already imposed through other rulemakings.

EPA's Denial of these petitions occurred against a complex statutory regime and a lengthy regulatory history.

I. Statutory Background

A. Under the Good Neighbor Provision, states must adopt implementation plans addressing downwind air pollution.

The Act, 42 U.S.C. §§ 7401-7671q, directs EPA to set National Ambient Air Quality Standards ("NAAQS") for ozone and other widely-occurring pollutants by setting maximum levels of permissible outdoor air concentrations. 42 U.S.C. §§ 7408(a)(1), 7409(a)-(b). Within two to three years after promulgation of a NAAQS, EPA must designate areas within each state as in attainment, nonattainment, or unclassifiable for each air pollutant. *Id.* § 7407(d). Areas designated nonattainment for ozone are further classified based on the severity of the violation—as Marginal, Moderate, Serious, Severe, or Extreme—each with progressively more stringent control requirements and more time to attain. *Id.* §§ 7511, 7511a. If an area fails to attain by the date associated with its classification, the area is reclassified—or "bumped up"—to the next most stringent classification. *Id.*

Each state, regardless of its area designations, must adopt a plan to implement, maintain, and enforce the NAAQS; states with nonattainment areas must also include a plan to bring areas within their states into attainment. *Id.* §§ 7410(a), 7502, 7511-7511a. If states fail to adopt adequate implementation plans, EPA must adopt a federal implementation plan to address any deficiencies. *Id.* § 7410(c)(1).

However, certain states may have problems attaining and maintaining the NAAQS due, in part, to emissions transported from other states. This is particularly true for ozone. Ozone is created by chemical reactions between ozone precursors—primarily NO_X and volatile organic compounds—in the presence of sunlight. 83 Fed. Reg. at 50,445.

That is where the "Good Neighbor Provision" comes in. 42 U.S.C. § 7410(a)(2)(D)(i)(I). It requires that each state implementation plan also prohibit emissions transported beyond the state's borders that "will" "contribute significantly" to downwind nonattainment or "interfere with maintenance" in downwind areas. *Id.* This Court held in *North Carolina v. EPA* that EPA reasonably interprets the Good Neighbor Provision to ask, in part, whether the downwind state has a present non-attainment problem and will continue to have one in the future, assuming all presently required or expected federal measures are implemented. 531 F.3d 896, 913-14 (D.C. Cir. 2008), *modified on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008).

B. States may petition EPA under Section 7426(b) for controls on upwind sources.

The Act also provides an independent process for states to 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.]"[1] 42 U.S.C. § 7426(b). If EPA makes such a finding for an existing source, the source must cease operating within three months or EPA may instead impose emission limitations and allow the source to continue operating while it works toward compliance. 42 U.S.C. § 7426(c).

II. Regulatory Background

EPA has issued or revised the NAAQS for ozone four times: in 1979, 1997, 2008 and 2015. Relevant here, in 2008, EPA revised the ozone NAAQS to 75 parts per billion. 73 Fed. Reg. 16,436 (Mar. 27, 2008) ("2008 ozone NAAQS"). EPA again revised the ozone NAAQS in 2015, this time to 70 parts per billion. 80 Fed. Reg. 65,292 (Oct. 26, 2015) ("2015 ozone NAAQS").

A. EPA has developed a regional approach to implementing the Good Neighbor Provision.

Ozone is a regional pollutant. As the Supreme Court has recognized, identifying each state's responsibility for interstate ozone pollution presents a "thorny causation problem." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 514 (2014).

> [I]dentifying the upwind origin of downwind air pollution is no easy endeavor. Most upwind States propel pollutants to more than one downwind State, many downwind States receive pollution from multiple upwind States, and some States qualify as both upwind and downwind . . . . The overlapping and interwoven linkages between upwind and

[1] This Court has held that § 7426(b) incorporates § 7410(a)(2)(D)(i), the Good Neighbor Provision; the cross-reference to § 7410(a)(2)(D)(ii) is a scrivener's error. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001).

> downwind States with which EPA [has] to contend [in developing interstate air pollution rules] number in the thousands.

Id. at 496-97.

EPA has found that focusing on regional NO_X reductions in upwind states is most effective at addressing long-range ozone transport. Since 1998, therefore, EPA has addressed Good Neighbor obligations for various ozone NAAQS through a series of regional rules addressing NO_X. *See* 63 Fed. Reg. 57,356 (Oct. 27, 1998) (the "NO_X SIP Call"); 70 Fed. Reg. 25,162 (May 12, 2005) (the "Clean Air Interstate Rule"); 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the "Cross-State Air Pollution Rule" or "CSAPR"); 81 Fed. Reg. 74,504 (Oct. 26, 2016) (the "CSAPR Update"). In each rule, EPA has either allowed or required use of an interstate allowance trading program to reduce NO_X emissions in upwind states.

EPA has also used regional solutions in the context of § 7426(b) petitions. Not long after EPA issued its first regional rule in the NO_X SIP Call, EPA also addressed a few states' related petitions for § 7426(b) findings. 64 Fed. Reg. 28,250 (May 25, 1999). EPA found that the regional allowance trading program in the NO_X SIP Call would fully address the concerns raised by these states. *Id.* at 28,252. However, after a stay in then-pending litigation over the NO_X SIP Call delayed implementation of the regional rule, EPA ultimately granted portions of the § 7426(b) petitions. *See Appalachian Power*, 249 F.3d at 1039. In doing so, EPA promulgated state NO_X budgets for certain large sources in the named upwind states and coordinated the

remedy with the trading program created under the NO_X SIP Call. 65 Fed. Reg. 2674 (Jan. 18, 2000).

B. EPA uses a four-step framework to assess Good Neighbor obligations.

Over time, EPA has developed a four-step framework to determine the Good Neighbor obligations of upwind states. This framework has been shaped over the years by this Court and the Supreme Court through litigation surrounding earlier regional rules. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (reviewing NO_X SIP Call); *North Carolina*, 531 F.3d at 910-11 (reviewing Clean Air Interstate Rule); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (*EME Homer City I*) (reviewing CSAPR), *rev'd and remanded*, 572 U.S. 489 (2014); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015) (*EME Homer City II*) (addressing CSAPR on remand).

Under its framework, EPA first identifies downwind receptors (i.e., air quality monitoring sites) that "will" either not attain or struggle to maintain[2] the NAAQS based on air quality modeling projections ("Step One"). 83 Fed. Reg. 65,878, 65,886 (Dec. 21, 2018). This requires that EPA first determine the "analytic year" in which it will assess air quality. EPA selects the analytic year to match the year when emission

[2] This framework is applied to both prongs of the Good Neighbor Provision: significant contributions to nonattainment and interference with maintenance of the ozone standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I). This brief occasionally refers to downwind nonattainment as shorthand to describe both.

reductions will be implemented, considering downwind attainment dates and other relevant factors. *Id.* at 65,889; *see North Carolina*, 531 F.3d at 913-14 (upholding EPA's use of a future analytic year).

At Step Two, EPA determines which upwind states will "contribute" to each identified downwind air quality problem. A state is "linked" to a downwind ozone problem if its share of downwind pollution at a receptor in the analytic year is at or above a chosen contribution threshold. *E.g.*, 81 Fed. Reg. at 74,537 (using a threshold of one percent of the 2008 ozone NAAQS, or 0.75 parts per billion).

Next, at Step Three, EPA evaluates which emissions contributing to downwind air quality problems are "significant" and must be prohibited. EPA considers, on a regional basis, the total tons of upwind NO_X that could be eliminated by applying controls available at different cost thresholds, alongside the improvement in downwind air quality that would result from implementing those controls at certain sources in the analytic year. 83 Fed. Reg. at 65,886. EPA selects the cost-per-ton control level that maximizes cost-effectiveness given these factors. *Id.* Emissions that cannot be reduced at that control level are not considered "significant." EPA then calculates the emission budget for each state, taking into account which sources are able to implement the selected controls and the expected rate of improvement from those sources. *Id.* In the context of § 7426(b) petitions seeking a finding that particular sources violate the Good Neighbor Provision under ozone standards, EPA has used the same statewide cost threshold determination to evaluate whether

individual sources' contributions are "significant." *Appalachian Power*, 249 F.3d at 1048-49 (upholding EPA's incorporation of the regional cost-threshold determination into a § 7426(b) finding); 83 Fed. Reg. at 50,454-55 (regional analysis is appropriate under § 7426(b) because downwind nonattainment results from the cumulative impacts of contributions from numerous sources across several upwind states).

Finally, at Step Four, EPA has typically imposed federally-enforceable emission reductions by implementing the budgets through a multistate allowance trading program. *See* 81 Fed. Reg. at 74,553-54. EPA allocates states' budgets among in-state sources; sources may buy, sell, or bank their emission allowances. 83 Fed. Reg. at 65,886. In this way, the end result should be an overall emission reduction consistent with the state budgets, regardless of individual sources' actual emissions. The Supreme Court upheld this approach to implementing the Good Neighbor Provision as consistent with the statute, workable, efficient, and equitable. *EME Homer City*, 572 U.S. at 519.

This Court and the Supreme Court have established guardrails for EPA's implementation of the Good Neighbor Provision. In particular: (1) EPA may reasonably consider the cost-effectiveness of controls to determine which upwind contributions are "significant," *Michigan v. EPA*, 213 F.3d 663 (upholding NO_X SIP Call's uniform cost threshold); *EME Homer City*, 572 U.S. at 512-24 (upholding CSAPR's cost-threshold approach); (2) EPA does not have authority under the Good Neighbor Provision to "over-control" upwind states' emissions by eliminating more

pollution than necessary to bring into attainment all of the downwind receptors to which that upwind state contributes, *EME Homer City*, 572 U.S. at 521; *see EME Homer City II*, 795 F.3d at 129-38; and (3) the requirement in the Good Neighbor Provision that states achieve emission reductions "consistent with the provisions of [the Act's Title I]" includes giving consideration to all procedural and substantive provisions of Title I, *North Carolina*, 531 F.3d at 911-12.

C. EPA has addressed Good Neighbor obligations under the 2008 ozone NAAQS through regional rules.

Both Maryland's and Delaware's § 7426(b) petitions requested findings of Good Neighbor violations of the 2008 ozone NAAQS. EPA has previously addressed Good Neighbor obligations under the 2008 NAAQS through a regional strategy.

1. The Cross-State Air Pollution Rule Update ("CSAPR Update")

In 2016, EPA addressed the emissions of 22 eastern states that contribute significantly to nonattainment or interfere with maintenance of the 2008 ozone NAAQS through the regional Cross-State Air Pollution Rule Update—or "CSAPR Update." 81 Fed. Reg. at 74,504, 74,533.[3] EPA analyzed Good Neighbor obligations using its four-step framework and determined, among other things, that the 22 upwind states, including Maryland, would contribute significantly to nonattainment of

[3] The CSAPR Update is currently the subject of litigation in this Court. *See Wisconsin v. EPA*, No. 16-1406 (D.C. Cir.) (argued Oct. 3, 2018).

the 2008 ozone NAAQS at nineteen downwind areas. 81 Fed. Reg. at 74,506. Like in EPA's past regional rules, EPA set state-specific budgets for emissions of NO_X from power plants and implemented them through a cap-and-trade program. *Id.* at 74,507-09.

However, the CSAPR Update was issued under tight timeframes. It was delayed until challenges to EPA's interstate transport framework in the context of the original CSAPR were finally resolved in 2015. *See EME Homer City II*, 795 F.3d at 118. EPA proposed the CSAPR Update less than 5 months after the *EME Homer City II* decision. 80 Fed. Reg. 75,706 (Dec. 3, 2015). EPA then finalized it eight months later pursuant to EPA's obligation to promulgate federal implementation plans. 42 U.S.C. § 7410(c); *see also, e.g.*, 81 Fed. Reg. 47,040 (July 20, 2016) (finding that Maryland failed to submit an implementation plan).

Due to time constraints, the CSAPR Update focused on certain "immediately available" controls. 81 Fed. Reg. at 74,521. By the time of the CSAPR Update, the Marginal attainment date for the 2008 ozone NAAQS had passed and the Moderate attainment date of 2018 was imminent. EPA therefore structured the rule around those NO_X controls that could be implemented before the 2017 ozone season (May through September)—the last period for measuring compliance with the 2018 attainment date. *Id.* at 74,521-22. Specifically, EPA focused on emission reductions from upwind power plants and analyzed four types of control strategies that could be feasibly implemented by 2017. *Id.* at 74,540-42. These included optimizing existing

selective catalytic reduction controls ("catalytic controls") and selective non-catalytic reduction controls ("non-catalytic controls"). *Id.* EPA's Step Three analysis set the cost threshold for "significant contributions" based on the control level associated with optimizing existing catalytic controls ($1,400 per ton). *Id.* at 74,550. EPA concluded that optimizing existing non-catalytic controls (at $3,400 per marginal ton of NO_X reduced) would achieve only minimal reductions and air quality improvement, and so was insufficiently cost-effective for addressing Good Neighbor obligations under the 2008 ozone NAAQS. *Id.* EPA then modeled the amount of reductions that could be achieved using the cost-effective controls and set the emission budgets to be consistent with those reductions. *Id.*

However, EPA acknowledged that it would need additional time to determine whether the emission reductions required by the CSAPR Update would fully resolve Good Neighbor obligations under the 2008 ozone NAAQS. *Id.* at 74,521-22. EPA stated that additional emission reductions "may" be required upon further analysis of control strategies not already considered and committed to considering the matter in a separate rulemaking. *Id.* at 74,521-22, 74,552.

The CSAPR Update has proven highly effective at reducing NO_X emissions. In 2017, the CSAPR Update's first year, ozone season NO_X emissions from covered units dropped more than 77,500 tons, or 21 percent. Altogether, the upwind states addressed by the CSAPR Update emitted 294,394 tons of NO_X—well below the rule's

cap of 316,464 tons. 83 Fed. Reg. at 65,893. Preliminary data from 2018 confirms these results. *Id.* at 65,893 n.70.

2. The CSAPR "Close-Out Rule"

EPA has since completed its analysis that was outstanding in the CSAPR Update and issued a Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, known as the "Close-Out Rule." 83 Fed. Reg. 65,878.[4] Based on new modeling and other technical analyses under the four-step framework, EPA determined the regional emission controls imposed through the CSAPR Update fully resolve Good Neighbor violations under the 2008 ozone NAAQS.[5] *See id.* at 65,878.

As part of picking an appropriate analytic year for EPA's Step One analysis, EPA assessed the feasibility of implementing various additional control strategies. These included long-term control strategies EPA had been unable to assess in the CSAPR Update, as well as short-term strategies EPA has not previously found to be cost-effective. *Id.* at 65,892-910. As to strategies previously assessed, EPA concluded that power plants' existing catalytic controls were already fully optimized under the CSAPR Update. EPA also reaffirmed its 2016 conclusion that optimizing existing

[4] The Close-Out Rule is the subject of current litigation in this Court. *See New York v. EPA*, No. 19-1019 (D.C. Cir.) (filed Jan. 30, 2019).

[5] While the Close-Out Rule was issued after the Denial at issue here, it is a related rulemaking undertaken concurrently with the Denial and it relied on the same air quality modeling that is a part of the administrative record in this case.

non-catalytic controls was insufficiently cost-effective. *See id.* at 65,893-94. Therefore, the emissions that could be eliminated with these controls did not constitute a "significant contribution." *See id.*

EPA determined that 2023 was the appropriate year in which to assess attainment and spent several months modeling air quality based on comprehensive emissions inventories for that year from all sources of NO_X, including natural, mobile, international, and industrial sources. *Id.* at 65,912. For power plants, EPA used 2016 emissions data as a starting point, and then made adjustments to reflect announced fleet changes (retirements, retrofits, conversions, upgrades, and new units) and "on-the-books" state and federal control measures, including the CSAPR Update, expected to occur between 2016 and 2023. *Id.* at 65,912-13. The modeling identified how emissions from each source would interact in the atmosphere and predicted the concentrations of ozone in downwind locations in 2023. *Id.* at 65,911. It ultimately showed that *all* downwind areas in the CSAPR Update region would attain the 2008 ozone NAAQS by 2023. *Id.* at 65,917.

D. EPA is in the early stages of planning for the 2015 ozone NAAQS.

Delaware's § 7426(b) petition also sought findings of Good Neighbor violations of the 2015 ozone NAAQS.

EPA and the states are in the early stages of planning for implementation of the 2015 ozone NAAQS. States were required to submit Good Neighbor state implementation plans for this standard in October 2018, and EPA is in the process of

reviewing these to determine if they meet their Good Neighbor obligations. *E.g.*, 84 Fed. Reg. 7854 (Mar. 5, 2019) (proposing to approve Oregon's state plan). And EPA has published modeling data intended to assist the states in developing their plans. Memo and Supplemental Information Regarding Interstate Transport SIPs for the 2015 Ozone NAAQS, *available at* memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs.

III. Procedural Background: The Action Under Review

A. The States' classifications under the relevant NAAQS.

In 2012, EPA issued area designations and classifications for Maryland and Delaware for the 2008 ozone NAAQS. 77 Fed. Reg. 30,088, 30,111, 30,127-28 (May 21, 2012). Various counties in Maryland were designated nonattainment as part of three nonattainment areas: the Baltimore nonattainment area (Moderate), the Philadelphia-Wilmington-Atlantic City nonattainment area (Marginal), and the Washington, D.C. nonattainment area (Marginal). *Id.* at 30,127-28. One county in Delaware—Sussex—was designated Marginal nonattainment. *Id.* at 30,111. A second—New Castle—was also designated Marginal nonattainment as part of the Philadelphia-Wilmington-Atlantic City nonattainment area. *Id.*

The designations were issued before EPA implemented the CSAPR Update in 2016. Even before the CSAPR Update, EPA issued a determination that the Baltimore nonattainment area attained the 2008 standard. 80 Fed. Reg. 30,941 (June 1, 2015). Later, in 2017, EPA determined that the Philadelphia-Wilmington-Atlantic

City nonattainment area had reached attainment.[6] 82 Fed. Reg. 50,814, 50,815 (Nov. 2, 2017). The Washington, D.C. nonattainment area was redesignated to attainment earlier this year. 84 Fed. Reg. 15,108 (Apr. 15, 2019). And Sussex County in Delaware was also determined to be in attainment. 81 Fed. Reg. 26,697 (May 4, 2016). Record data indicated that all monitors in Delaware are attaining and will continue to attain the 2008 standard, 83 Fed. Reg. at 50,456, and Maryland was projected to have a maintenance problem in only one County in 2017. *Id.* at 50,464/1.

In 2018, EPA issued nonattainment area designations and classifications for Delaware under the 2015 ozone NAAQS.[7] 83 Fed. Reg. 25,776, 25,794 (June 4, 2018). New Castle County in Delaware was designated Marginal nonattainment as part of the Philadelphia-Wilmington-Atlantic City nonattainment area. *Id.* at 25,794. Delaware was grouped into this multistate nonattainment area because EPA found that Delaware emissions contribute to nonattainment in Philadelphia. 83 Fed. Reg. at 50,460/2; Philadelphia-Wilmington-Atlantic City Nonattainment Area Final Designations for 2015 Ozone [NAAQS], JA[EPA-HQ-OAR-2018-0295-0173] at

[6] The Philadelphia-Wilmington-Atlantic City nonattainment area has experienced exceedances of the 2008 ozone NAAQS since EPA's determination, but it will not be bumped up to a more stringent classification due to EPA's determination. 82 Fed. Reg. at 50,814. The area thus will remain classified as Marginal until it is redesignated to attainment. 42 U.S.C. § 7407(d)(3).

[7] Areas in Maryland were also designated nonattainment for the 2015 ozone NAAQS, but Maryland's § 7426(b) petition did not address this standard. *See infra* 83-84.

JA[39] ("Multistate Designations for 2015 Ozone NAAQS"). EPA's recent modeling data shows that the Philadelphia-Wilmington-Atlantic City nonattainment area is projected to attain the 2015 standard by 2023. 83 Fed. Reg. at 50,460 n.50.

B. Maryland's and Delaware's Section 7426(b) petitions

In 2016, Maryland and Delaware submitted five petitions under § 7426(b) of the Act. Maryland Petition, JA[EPA-HQ-OAR-2018-0295-0014]; Delaware Conemaugh Petition, JA[EPA-HQ-OAR-2018-0295-0017]; Delaware Homer City Petition, JA[EPA-HQ-OAR-2018-0295-0018]; Delaware Brunner Island Petition, JA[EPA-HQ-OAR-2018-0295-0019]; Delaware Harrison Petition, JA[EPA-HQ-OAR-2018-0295-0020]. They each asked EPA to find that certain named upwind sources are in violation of the Good Neighbor Provision, i.e., that the sources emit or would emit pollutants that "will" "significantly contribute" to downwind nonattainment or interfere with maintenance of NAAQS in their states. 83 Fed. Reg. at 50,446; *see also* 42 U.S.C. §§ 7410(a)(2)(D)(i)(I), 7426(b). Based on the requested findings, the States asked EPA to impose specified pollution controls on those sources.

The petitions were all filed before the May 2017 implementation of the trading program in the CSAPR Update, 81 Fed. Reg. at 74,554, and well before the Close-Out Rule was finalized in December 2018, 83 Fed. Reg. 65,878. *See* Maryland Petition, JA___ (submitted November 16, 2016); Delaware Harrison Petition, JA___ (submitted August 8, 2016); Delaware Brunner Island Petition, JA___ (submitted July

7, 2016); Delaware Homer City Petition (submitted November 10, 2016); Delaware Conemaugh Petition, JA___ (submitted November 28, 2016).

Maryland's petition alleged Good Neighbor violations of the 2008 ozone NAAQS by 36 electric generating units in five states—Pennsylvania, West Virginia, Kentucky, Ohio, and Indiana. *See* 83 Fed. Reg. at 50,444; Maryland Petition, JA___ at JA[1-2]. Maryland alleged, based on data from the 2015 ozone season, that these units were not running their installed emission controls effectively. Maryland Petition, JA___ at JA[4]. Maryland requested that EPA impose more stringent emission limitations in order to force these units to operate and optimize their existing controls. *Id.* Maryland amended its petition in June 2018 to include data from the 2016 ozone season and the first quarter of 2017. Maryland Petition Supp., JA[EPA-HQ-OAR-2018-0295-0015]. Maryland acknowledged that the CSAPR Update had resulted in "some significant reductions," but alleged that "there are still units identified in the petition that can further reduce NO_X by running controls in a manner consistent with manufacturer specifications." *Id.* at JA[1].

Delaware's four petitions alleged Good Neighbor violations of both the 2008 and 2015 ozone NAAQS by four power plants in Pennsylvania and West Virginia. *See* 83 Fed. Reg. at 50,444. Two of the facilities in Delaware's petitions (Homer City and Harrison) are also at issue in Maryland's petition; Delaware identified two additional electric generating units from the Conemaugh facility, as well as three units at the Brunner Island facility. *Compare* Delaware Harrison Petition, JA___, Delaware Homer

City Petition, JA___, Delaware Brunner Island Petition, JA___ at JA[14], and Delaware Conemaugh Petition, JA___ at JA[20] *to* Maryland Petition, JA___ at JA[2]. Delaware requested, in effect, that EPA impose more stringent emission limitations to force three of the facilities to operate and optimize their existing controls and to force the other, Brunner Island, to burn natural gas rather than coal. *See* 83 Fed. Reg. at 50,444. The Brunner Island petition was submitted before Brunner Island had installed natural gas firing capability, Delaware Brunner Island Petition, JA___ at JA[20], and before the owner of Brunner Island entered into a court-approved consent decree requiring it to cease burning coal by specified dates. 83 Fed. Reg. at 50,471 n.79.

C. EPA's Denial of the petitions

EPA took final action to deny the petitions on October 5, 2018. 83 Fed. Reg. 50,444. By that time, the CSAPR Update had been implemented for two years, and was effectively reducing ozone emissions, including from the 41 named sources.

EPA assessed Good Neighbor violations alleged in each petition under the same four-step framework EPA uses in its regional Good Neighbor rulemakings. *Id.* at 50,454-55.

In Step One, EPA found Delaware did not meet its burden to demonstrate a current and anticipated future nonattainment or maintenance problem in Delaware. *Id.* at 50,456. In doing so, EPA rejected various factual data submitted by Delaware as not supporting a finding of nonattainment and noted that Delaware did not make a

case for future nonattainment in *any* future year. *Id.* EPA also considered its own monitoring data and modeling. *Id.* at 50,546-63. As to the 2008 ozone NAAQS, EPA's data showed that Delaware would be in attainment by the 2017 ozone season—the last season before the July 2018 attainment date. *Id.* at 50,458. With respect to the 2015 ozone NAAQS, EPA had already completed modeling of projected ozone concentrations, including in Delaware, for the 2023 ozone season—the last season before the 2024 attainment date for Moderate nonattainment areas—in the context of preparing the Close-Out Rule. *Id.* at 50,459. 2023 is near in time to when Delaware could conceivably incur an obligation to impose additional controls if attainment would not be reached absent further controls.[8] EPA considered this modeling as part of EPA's obligation to avoid over-control, recognizing that it constitutes the best available data on future attainment in Delaware. *Id.* The modeling data showed that no air quality monitors in Delaware were projected to be in nonattainment of the 2015 ozone NAAQS by 2023. *Id.*

Maryland's petition met its burden to show under Step One that Maryland may have difficulty maintaining the 2008 ozone NAAQS in 2017 (the last ozone season before its July 2018 attainment date) and under Step Two that the named upwind states were "linked" to Maryland. *Id.* at 50,464/1.

[8] Delaware's planning obligations are controlled by its attainment designation. The earliest that Delaware would likely have to implement additional controls if it cannot demonstrate attainment would be around the beginning of 2023. *See infra* 44-46.

Even though Delaware's petitions failed at Step One, EPA analyzed both States' petitions under Step Three and concluded that the States did not prove that the sources will "contribute significantly" to downwind nonattainment or interfere with maintenance under the Good Neighbor Provision absent the requested controls. At the 34 named electric generating units that have catalytic controls, EPA found that the appropriate optimization had already been implemented through the regional rule in the CSAPR Update. 83 Fed. Reg. at 50,464. At the four electric generating units (at two named facilities) that have non-catalytic controls, EPA had already found in the CSAPR Update that optimization was not a cost-effective way to address NO_X reductions. *Id.* at 50,469-70. And EPA found that Brunner Island was already operating using primarily natural gas. EPA therefore concluded, using the same approach approved in *EME Homer City*, 572 U.S. at 512-24, that no further cost-effective controls are available at the named sources.

SUMMARY OF ARGUMENT

In assessing the § 7426(b) petitions, EPA considered whether the States had shown that the named upwind sources "violate" the Good Neighbor Provision. EPA applied its longstanding four-step framework for determining upwind Good Neighbor obligations, taking into account its previous analysis of the same obligations in the CSAPR Update, as well as new data. After a robust review of the allegations in the petitions, EPA reasonably concluded that the States did not meet their burdens.

First, EPA reasonably concluded under Step One that Delaware did not show that it will have a downwind air quality problem under either the 2008 or 2015 ozone NAAQS. EPA has long interpreted the Good Neighbor Provision as being concerned with future air quality problems, which this Court has affirmed. Yet Delaware made no attempt to prove that it would have an attainment or maintenance problem in *any* future year, and the data Delaware submitted does not, as a technical matter, support a finding of a future air quality problem in Delaware. EPA also conducted its own analysis and determined based on modeling from the CSAPR Update, new air quality monitoring data, and modeling from the recent Close-Out Rule that Delaware is attaining the 2008 ozone NAAQS and will attain the 2015 ozone NAAQS by 2023 without any further upwind control strategies. EPA's 2023 modeling provided the best available data on whether Delaware would achieve the 2015 standard by an applicable future date. 2023 was also an appropriate analytic year for EPA's analysis in light of EPA's obligation to avoid over-control because it is near in time to when Delaware would likely incur an obligation to impose its own additional controls if it cannot demonstrate attainment.

Second, EPA reasonably concluded under Step Three that the States did not propose any cost-effective control strategies beyond those already implemented. EPA necessarily considered the CSAPR Update because that rule assessed the same alleged Good Neighbor obligations at issue here. While the CSAPR Update was "partial" in the sense that EPA then intended to assess additional control strategies, EPA never

indicated a need to revisit the same control strategies already assessed, much less already implemented. As for the proposed optimization of catalytic controls, EPA correctly found that it had already implemented this strategy through the allowance trading program, and Petitioners' arguments to the contrary are mere policy disagreements or factually incorrect assertions about emission reductions under the trading program. EPA also already found the proposed optimization for non-catalytic controls to not be cost-effective in light of small associated emission benefits. EPA appropriately determined that Maryland provided no new basis to undermine its previous conclusion. And Delaware did not meet its burden to show that the requested natural gas requirement for Brunner Island was appropriate because the record shows that the facility is already, and is likely to continue, burning natural gas.

Finally, EPA was only required to assess Maryland's petition under the 2008 ozone NAAQS, which is what Maryland's petition asked EPA to do.

STANDARD OF REVIEW

The applicable standard of review is contained in 42 U.S.C. § 7607(d)(9) of the Act: the Court may reverse EPA's action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(N), (d)(9)(A), (C). This standard is narrow, and the Court does not substitute its judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980) ("That the evidence in the record may also support other conclusions, even those that are inconsistent with the [EPA] Administrator's, does not prevent [the Court] from concluding that his decisions were rational and supported by the record."); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013). This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (internal quotation marks omitted). "The task of the reviewing court is to apply [this] . . . standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (internal citation omitted).

Judicial deference also extends to an agency's interpretation of a statute it administers. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). Under *Chevron* step one, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. *Id.* at 842-43. However, under *Chevron's* second step, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also EME Homer City*, 572 U.S. at 513-14. To uphold EPA's interpretation, the Court need not find that EPA's is the only permissible construction, or even the reading the Court would have reached, but

only that EPA's interpretation is reasonable. *Chevron*, 467 U.S. at 843 n.11; *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985).

ARGUMENT

Petitioners challenge EPA's conclusion that the named sources will not significantly contribute to downwind ozone nonattainment or interfere with maintenance in Maryland and Delaware under the ozone standards identified in their petitions. Specifically, they challenge Step One of EPA's four-step analysis as to Delaware's petitions, EPA's Step Three analysis as to both States' petitions, and EPA's decision to consider Maryland's petition only under the NAAQS identified in the petition.

A state seeking a § 7426(b) finding bears the initial burden of proving that the named upwind sources would be in violation of the Good Neighbor Provision absent the controls that they seek. *See* 83 Fed. Reg. at 50,452/2; *see also New York v. EPA*, 852 F.2d 574, 578 (D.C. Cir. 1988) (Congress did not give EPA an affirmative investigatory duty in order to respond to a § 7426(b) petition). EPA reasonably concluded that the States did not meet their burdens. *See* 83 Fed. Reg. at 50,455.

I. EPA Reasonably Concluded that Delaware Will Not have Trouble Attaining or Maintaining the Ozone NAAQS Absent Further Upwind Controls.

Delaware and Environmental Petitioners challenge EPA's finding under Step One of EPA's framework that Delaware did not establish that it "will" have problems

attaining and maintaining the 2008 or 2015 ozone NAAQS by a relevant future date. Envtl. Br. 9; DE Br. 12-13, 15. These claims lack merit.

EPA found that Delaware's allegations of future nonattainment were not supported by Delaware's petitions. Delaware submitted only past and extremely outdated data that did not support a finding of even current nonattainment of the 2008 standard or of future nonattainment of the 2015 standard. 83 Fed. Reg. at 50,456-57. Despite Delaware's failure, which provided a sufficient basis for the Denial, EPA went on to conduct an independent analysis. *Id.* at 50,458-63. Based on modeling projections EPA had prepared for the CSAPR Update and the Close-Out Rule, as well as air quality monitoring data, EPA determined that Delaware would attain both the 2008 and 2015 ozone NAAQS without further upwind controls. *Id.* at 50,458-59, 50,461. Therefore, EPA could not conclude that Delaware "will" either not attain or struggle to maintain the NAAQS in the future. *See infra* 33-37.

EPA's analysis was precisely the kind of "evaluation of scientific data within [EPA's] technical expertise" to which this Court routinely defers. *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150 (internal quotations omitted).

A. Delaware did not meet its burden to show it would have an attainment or maintenance problem by a relevant future date.

As an initial matter, Environmental Petitioners and Petitioner-Intervenors appear to argue that EPA has the burden to show that Delaware would attain and maintain the 2015 ozone NAAQS by their preferred future date. *See* Envtl. Br. 14;

NY Br. 38-39 (arguing there is "no evidence to support" EPA's supposition that Delaware very well may be in attainment by their preferred date of 2021). This turns the relevant burdens upside down.

The petitioning state, not EPA, bears the burden to establish a technical basis for a requested finding under § 7426(b). *See* 83 Fed. Reg. at 50,452/2 (listing examples of EPA's historical practice of evaluating § 7426(b) petitions for whether they establish a sufficient basis for the requested finding). This Court agreed in *New York*. 852 F.2d at 578. There, petitioners challenging a § 7426(b) denial argued that EPA was the party obligated to take investigatory steps necessary to support a finding. *Id.* Taking into account the implication of the limited statutory 60-day deadline for EPA action on such petitions,[9] the Court held that Congress did not intend for EPA to incur obligations such as data gathering, modeling, or affirmatively proving or disproving allegations of a Good Neighbor violation. *Id.*

1. Delaware did not attempt to prove that it would be in nonattainment by *any* future attainment date.

Under Step One of EPA's four-step framework, EPA considers whether downwind areas "will" attain and maintain the relevant NAAQS in a future analytic

[9] Petitioners' reference to EPA's failure to meet certain statutory deadlines, Envtl. Br. 14, is not relevant to the question before the Court. Whether or not EPA has successfully met its statutory deadlines says nothing about the substance of EPA's underlying duty.

year. *See* 83 Fed. Reg. at 50,449, 50,454-55; 83 Fed. Reg. at 65,886, 65,889; *North Carolina*, 531 F.3d at 913-14.

Delaware submitted only past, outdated data—from before implementation of the CSAPR Update—and "did not identify any projected air quality violations in a future year" associated with any relevant attainment dates. 83 Fed. Reg. at 50,456-57. As discussed further in Part I.B.1, Petitioners' briefs include various arguments suggesting that 2021 or some other future date is the appropriate future analytic year for EPA's Step One analysis. DE Br. 20-22; Envtl. Br. 11-13; NY Br. 33-39. But Delaware's petition did not identify or make a case for *any* future analytic year that it believed should apply. *See* 83 Fed. Reg. at 50,456.

Delaware is not excused from its burden to support a § 7426(b) petition, as Environmental Petitioners suggest, Envtl. Br. 14, based on whether it has the capacity to model future nonattainment. *See New York*, 852 F.2d at 578 (petitioning states bear the burden to perform technical analyses under § 7426(b)). Delaware also did not propose any other means of proving future nonattainment.

Nor does it matter that Delaware submitted its petition before knowing its attainment date. *See* Envtl. Br. 14. Petitioners do not have to wait for a NAAQS designation or attainment date in order to submit a § 7426(b) petition. *See*, *e.g.*, *Appalachian Power*, 249 F.3d at 1048-49; *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 520–23 (3d Cir. 2013) (EPA need not wait for other NAAQS processes to conclude before acting on § 7426(b) petitions). Regardless of when it submitted its petition,

Delaware was on notice that EPA interprets the Good Neighbor Provision to be forward looking, *North Carolina*, 531 F.3d at 913–14, and bore the burden to substantiate its petition with data that supports a finding of future nonattainment and interference. *New York*, 852 F.2d at 578. Delaware's problem was not that it made the wrong assumptions about its attainment date or what future analytic year should apply. The problem was that Delaware made no case about any future date at all.

EPA reasonably concluded that Delaware did not submit any information indicating that Delaware would have trouble attaining and maintaining the 2015 ozone NAAQS in the future. *See* 83 Fed. Reg. at 50,461/2-3.

2. The monitoring data submitted does not establish that Delaware is currently in nonattainment of the 2008 ozone standard or that it will remain in nonattainment of the 2015 standard in the future.

Petitioners suggest that Delaware could have met its burden to show that it would remain in nonattainment in the future by showing current nonattainment. *See* DE Br. 16 n.6, 22-24; Envtl. Br. 14-15; NY Br. 34. But Delaware's petition did not even support a finding of current nonattainment, and the data submitted by Delaware was particularly unhelpful.

Delaware's petitions identified air quality monitoring data from 2011 through 2016, alleging individual exceedances of the 2008 ozone NAAQS and hypothetical exceedances of the 2015 ozone NAAQS had that standard been in effect during those years. 83 Fed. Reg. at 50,456.

As to the 2008 ozone NAAQS, EPA concluded that this did not establish a future violation for any relevant analytic year or, indeed, a current one. *Id.* (Neither Delaware nor commenters "provided evidence of a current or anticipated future violation of the 2008" standard.). This was in part because data from those years did not speak to likely ozone concentrations after implementation of the CSAPR Update in 2017. *Id.* Additionally, individual exceedances of the ozone standard and NAAQS violations are not the same thing. "[E]xceedances represent . . . an 8-hour measurement above the level of the NAAQS." *Id.* at 50,456/2. Violations, on the other hand, indicate whether an area is attaining the standard and "are determined based on the fourth-highest daily maximum ozone concentration, averaged across [three] consecutive years." *Id.* The exceedances identified were thus not enough to show nonattainment of the 2008 standard.

Delaware's brief includes a chart that purports to update this data. DE Br. 23. Delaware's chart includes non-record data from 2018 that was not available at the time of the Denial and cannot be properly considered here. *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (judicial review is based "on the materials that were before the [agency] at the time its decision was made"). But the remaining data shows, if anything, that all air quality monitors in Delaware were in attainment with the 2008 ozone NAAQS by 2017. *See* DE Br. 23 Tbl.1 (showing design values for 2015 through 2017 three-year average to be below 75 parts per billion at each Delaware monitor).

As to the 2015 ozone NAAQS, commenters did ultimately identify current violating monitors in Delaware. 83 Fed. Reg. at 50,456. While the fact that Delaware is in nonattainment now may inform the question of whether it is likely to remain so by a relevant future attainment date, it does not answer it. Current regulatory regimes, anticipated controls, power plant retirements, even meteorology can all affect whether ozone levels are likely to change by a future date. *See* 81 Fed. Reg. at 74,513-14; 2014 Program Progress, JA[EPA-HQ-OAR-2018-0295-0165] at JA[28-29]. It was reasonable for EPA to decline to infer future nonattainment where Delaware did not identify any projected future air quality violations, particularly where, as further discussed below, EPA's independent analysis showed that NO_X emissions and ozone levels have been trending downward. *See* 83 Fed. Reg. at 50,456, 50,463.

3. In *North Carolina v. EPA*, this Court upheld EPA's interpretation of the Good Neighbor Provision as being concerned with future nonattainment.

Environmental Petitioners argue that EPA should have considered only whether Delaware is in current nonattainment, not whether Delaware would remain so by a future date. Envtl. Br. 10-11. Making a *Chevron* step one argument, they point to the "emits or would emit" language in § 7426(b) and assert that this presents only a present-tense question. *Id.* at 10 (emphasis omitted).

Petitioners' reading fails to give effect to § 7426(b)'s incorporation of the Good Neighbor Provision. Section 7426(b) directs EPA to determine whether the source emits or would emit a pollutant "in violation of the prohibition of" the Good

Neighbor Provision. 42 U.S.C. § 7426(b) (incorporating the Good Neighbor Provision, § 7410(a)(2)(D)(i)(I)). This Provision is forward looking, instructing states to prohibit emissions "which will" significantly contribute to downwind nonattainment or interfere with maintenance of a NAAQS. *Id.* § 7410(a)(2)(D)(i). Read together, these provisions ask whether the source emits a pollutant—either now or in the future ("emits or will emit")—in a manner that "will" significantly contribute to downwind nonattainment. *See* 83 Fed. Reg. at 50,449. In other words, a source "violates" the Good Neighbor Provision if its (current or anticipated future) emissions "will" significantly contribute to downwind nonattainment at a relevant future date.

EPA has long interpreted the Good Neighbor Provision to be forward looking. *See, e.g.,* 81 Fed. Reg. at 74,523/3; 83 Fed. Reg. at 65,889. And this Court affirmed EPA's forward-looking approach in *North Carolina*, rejecting an argument nearly identical to the one Petitioners raise here. 531 F.3d at 913–14. There, in challenging an earlier regional rule implementing Good Neighbor obligations under an earlier ozone standard, North Carolina argued that EPA should have considered only whether upwind states contributed to nonattainment at the time EPA promulgated the regional rule rather than projecting future nonattainment. *Id.* at 913. The Court concluded that EPA reasonably interpreted "will" in the Good Neighbor Provision to implicate upwind sources that presently—*and* at the relevant future date will—contribute to nonattainment. *Id.* at 913-14. The Court upheld EPA's exclusion of

upwind states that merely contributed to present day violations if the violations were expected to be cured by a relevant future date.[10] *Id.* at 914.

EPA's reading of the Act also accords with EPA's duty to avoid "over-control" of upwind state emissions. *See EME Homer City*, 572 U.S. at 522 (EPA lacks authority to require upwind states to reduce emissions beyond the amount necessary to achieve attainment in linked downwind states). Under the *EME Homer City* line of cases, EPA would over-step its authority by imposing controls on upwind sources if the linked downwind area would attain and maintain the relevant NAAQS regardless of the contemplated upwind emission reductions. *EME Homer City II*, 795 F.3d at 128. Given this edict, EPA reasonably considered first whether Delaware would achieve attainment with the ozone NAAQS, without any further upwind controls, by an applicable future analytic year date.

Environmental Petitioners argue that EPA has changed its position since granting New Jersey's § 7426(b) petition under sulfur dioxide ("SO2") standards in 2011. Envtl. Br. 11. It has not. There, like here, EPA explained that it would

[10] The Court suggested in dicta that the holding did "not mean that EPA may ignore present-day violations for which there may be another remedy, such as relief pursuant to section [7426]." *North Carolina*, 531 F.3d at 914. That language is not binding or persuasive here because § 7426 was not then before the Court. *Id.* at 930 n.12. The Court did not have occasion to interpret the § 7426(b) incorporation of the Good Neighbor provision or the relevance of EPA's duty to avoid over-control, as instructed by the Supreme Court in a later opinion. *See EME Homer City*, 572 U.S. at 522.

consider modeling (which the petitioner there provided) of a source's current and anticipated emissions (i.e., "emit or would emit") to determine whether there would be a Good Neighbor violation in the neighboring state. 76 Fed. Reg. 19,662, 19,671 (Apr. 7, 2011). But EPA there developed a method to address the "specific allegations" of a Good Neighbor violation in New Jersey's petition, which were factually distinguishable from the ones here. *Id.*

First, SO2 functions differently in the atmosphere than ozone. *See also Michigan*, 213 F.3d at 674 ("[G]iven EPA's finding as to the cumulative effects of the pollutants that generate ozone, EPA might well be able to distinguish this case from the sulfur dioxide cases."). SO2 nonattainment is typically caused by one or a few sources near the air quality problem. *See*, *e.g.*, 80 Fed. Reg. 51,052, 51,057 (Aug. 21, 2015). This is unlike ozone, which is transported over long distances and is impacted by meteorology. Ozone is known to decline over time due to the many factors impacting its formation, while SO2 transport problems are likely to reoccur in the future absent a change in emissions. So EPA could effectively use then-current SO2 emissions as a proxy for future nonattainment because SO2 emissions, and hence air quality, were likely to remain the same. EPA did not need the sort of complex modeling typically involved in ozone analyses.

Second, at the time, no downwind area designation or SO2 attainment date had been identified. *See* Envtl. Br. 11 (acknowledging timeline). EPA found that modeling a future year was less relevant because the modeled magnitude of SO2

emissions from the units at issue would result in concentrations seven times the applicable NAAQS. 76 Fed. Reg. at 19,672. EPA was able to conclude that the source was single-handedly contributing significantly to nonattainment in New Jersey and "would" continue to do so absent emission controls at the source. As EPA explained, the methodology used there "d[id] not speak to how EPA might evaluate petitions that raise different interstate transport issues," like the ones here. *Id.* at 19,666-67.

4. EPA reasonably disregarded Delaware's allegations of nonattainment outside Delaware.

Delaware's contention that EPA should have assessed whether air quality monitors outside Delaware will have trouble attaining or maintaining the NAAQS is unsupported. *See* DE Br. 17-19.

Delaware's allegations pertain to monitors outside Delaware but within the Philadelphia-Wilmington-Atlantic City nonattainment area. As explained above, *supra* 17-19, one county in Delaware was designated Marginal nonattainment for the 2008 standard as part of this multistate nonattainment area, 77 Fed. Reg. at 30,111, but that area has since been determined to have attained the NAAQS. 82 Fed. Reg. at 50,815. New Castle County was also designated Marginal nonattainment under the 2015 ozone NAAQS as part of the same multistate nonattainment area because EPA found that sources in Delaware were contributing to violations in Philadelphia. 83 Fed. Reg. at 25,794.

In reviewing Delaware's petition under Step One, EPA considered whether air quality monitors *in Delaware* would have an air quality problem. EPA declined to conclude that data from air quality monitors located outside Delaware but within the multistate nonattainment area supported a § 7426(b) finding for Delaware. 83 Fed. Reg. at 50,460. EPA interpreted the § 7426 process as being available only "to states . . . seeking to address interstate transport of pollution impacting downwind receptors within their geographical borders." *Id.* In light of the text, context, and legislative history of § 7426(b), this was a reasonable interpretation under *Chevron* step two. Section 7426(b) authorizes states to petition EPA for a finding that upwind sources would contribute to a violation of the Good Neighbor Provision, but it does not say that a state may petition for a finding that a source is impacting downwind receptors in a state other than the petitioning state. 42 U.S.C. § 7426(b).

Making a *Chevron* step one argument, Delaware claims that § 7426(b) requires EPA to consider air quality monitors outside Delaware because it authorizes "any state" to file a petition and does not "explicitly bar" a state from seeking a finding concerning other states. DE Br. 17. While "any state" may petition EPA, this language is ambiguous about the scope of that petition. Nothing in the Act authorizes or bars a state from seeking a finding related to another state, placing the matter squarely under *Chevron* step two. As this Court has noted, the meaning of the phrase "any state" depends on statutory context. *Delaware Dep't of Nat. Res. v. EPA*, 895 F.3d 90, 97-99 (D.C. Cir. 2018) (concluding based on textual context that "any

state" under 42 U.S.C. § 7511(a)(5) did not require all states in a multi-state nonattainment area to apply for an extension of the area's attainment date).

The statutory context also indicates that this is a *Chevron* step two issue and that EPA's interpretation was reasonable. *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (Under *Chevron* step two, the Court may consider traditional tools of statutory construction, including text, structure, and purpose of the statute.). Section 7426 as a whole is directed toward moderating interstate transport concerns between affected states and upwind contributors. Section 7426(a), for example, requires upwind states to notify affected downwind states of potential air quality impacts; it does not require upwind states to notify *all* states. 42 U.S.C. § 7426(a). Additionally, § 7426(b) only authorizes states and political subdivisions to file petitions, whereas other parts of the Act authorize "any person" to petition EPA. *E.g.*, *id.* § 7661d(b)(2) ("any person" may petition EPA to object to certain permits). EPA reasonably concluded that § 7426(b) was intended to apply more narrowly to states and political subdivisions seeking to protect their own jurisdictions from upwind contributions. 83 Fed. Reg. at 50,460. Nothing in the Act required EPA read it to allow states to act in the role of citizen attorneys general on behalf of other states. *Id.*

Delaware and Petitioner-Intervenors are wrong that Delaware's obligations as a member of the multistate nonattainment area should affect EPA's interpretation here. *See* DE Br. 17-19; NY Br. 30-31. Delaware is included in the Philadelphia nonattainment area because *Delaware* is contributing to air quality problems in

Philadelphia. 83 Fed. Reg. at 50,460; Multistate Designations for 2015 Ozone NAAQS, JA___ at JA[39]; *see also* 42 U.S.C. § 7407(d)(1)(A)(i) (requiring EPA to designate as nonattainment "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet)" the NAAQS). Petitioner provides no reason why EPA should interpret § 7426(b) in a manner that would relieve Delaware of its own obligation to address its impacts within the nonattainment area.[11]

Delaware and Petitioner-Intervenors are also incorrect that Delaware will suffer a harm if the multistate nonattainment area remains in nonattainment with the ozone NAAQS, even if all ozone monitors in Delaware attain and maintain them. DE Br. 19; NY Br. 28-29. The multistate area was deemed to have attained the 2008 standard in 2017; the area's classification therefore remains Marginal, which does not impose any control obligations on existing sources. 82 Fed. Reg. at 50,815; *see* 42 U.S.C. § 7511a(a). And EPA's recent air quality modeling shows that the Philadelphia-Wilmington-Atlantic City nonattainment area is projected to be in attainment of the 2015 standard by 2023. 83 Fed. Reg. at 50,460 n.50; *see also* 40 C.F.R. § 51.1118 (EPA may suspend state planning obligations upon a determination that the nonattainment

[11] Petitioner-Intervenors' arguments based on a 2015 EPA guidance document were not raised in comments and have therefore been waived. 42 U.S.C. § 7607(d)(7)(B) ("Only an objection . . . raised with reasonable specificity during the period for public comment . . . may be raised during judicial review."); *EME Homer City*, 572 U.S. at 512 (requirement in § 7607(d)(7)(B) is a "mandatory" procedural requirement).

area has reached attainment). In any case, the allegations regarding monitors outside Delaware did not change EPA's conclusion that neither Delaware nor the multistate area would have trouble attaining or maintaining the 2015 ozone NAAQS by 2023. 83 Fed. Reg. at 50,460/3.

B. The Court should defer to EPA's independent analysis of future air quality in Delaware, which reasonably relied on EPA's pre-existing air quality modeling projections.

Petitioners next challenge EPA's independent analysis determining that Delaware would attain and maintain the ozone NAAQS by a relevant future attainment date, without further upwind controls. DE Br. 20-22; Envtl. Br. 11-13; NY Br. 33-39.

The Court need not reach these claims because Delaware's failure to meet its burden under Step One of EPA's framework was an independent and sufficient basis to deny Delaware's § 7426(b) petition. Nevertheless, EPA's own analysis relied on the best available data from which EPA could evaluate whether Delaware would reach attainment and reasonably concluded that it would.

Specifically, EPA's data (modeling projections for 2017 from the CSAPR Update and air quality monitoring data for 2014 through 2017) showed Delaware "is attaining and will maintain the 2008 ozone NAAQS." 83 Fed. Reg. at 50,456, 50,458. Delaware raises no plausible basis to dispute this conclusion. Therefore, the remainder of this section focuses on the claims regarding EPA's analysis of attainment of the 2015 ozone NAAQS.

With respect to the 2015 ozone NAAQS, EPA considered its CSAPR Update modeling, recent air quality monitoring data, and new modeling projections completed in conjunction with the Close-Out Rule. *Id.* at 50,459. EPA concluded that its modeling from the Close-Out Rule, which projected ozone concentrations in Delaware for the 2023 ozone season (the last season before the 2024 attainment date for Moderate nonattainment areas), was the best available data of whether Delaware would be in attainment in a future attainment year. *Id.* at 50,461/3. Based on this, EPA reasonably concluded that "no air quality monitors in Delaware" would have nonattainment or maintenance problems under the 2015 ozone NAAQS by a relevant future analytic year. *Id.* at 50,459.

1. EPA reasonably used the best available data—2023 modeling projections prepared in conjunction with the Close-Out Rule—to determine whether Delaware will attain and maintain the 2015 ozone NAAQS without further controls

In independently evaluating whether Delaware would attain and maintain the 2015 standard, EPA considered whether its recently completed modeling from the Close-Out Rule would be suitable for this purpose. EPA found that, of the information available to it, this modeling was the best available data that projected future air quality in Delaware in *any* future analytic year. 83 Fed. Reg. at 50,461/3.

The specific year used in that model—2023—coincides with the last ozone season before the 2024 attainment date for Moderate nonattainment areas under the 2015 ozone NAAQS. EPA noted the Good Neighbor Provision's requirement that

upwind states achieve emission reductions "consistent with the provisions of [the Act's Title I]," *see* 42 U.S.C. § 7410(a)(2)(D)(i), and this Court's precedent that this includes consideration of downwind attainment dates. 83 Fed. Reg. at 50,461 (discussing *North Carolina*, 531 F.3d. at 911–12). But this precedent does "not speak to which attainment date should influence the EPA's evaluation when there are several potentially relevant attainment dates." *Id.* So EPA then interpreted the Good Neighbor Provision to allow it to consider "the timeframe within which downwind states are required to implement specific emissions control measures in nonattainment areas relative to the applicable attainment dates." *Id.* In other words, in determining upwind obligations under the Good Neighbor Provision, EPA determined it was appropriate to evaluate downwind nonattainment "in a year aligned with an area classification in [which] downwind states are also required to implement controls on existing sources." *Id.*

Here, EPA found that, although a portion of Delaware is currently classified as Marginal, the timeframe within which Delaware might be required to implement specific control measures at existing sources in the area would coincide with the Moderate attainment date, not the Marginal one. *Id.* EPA's use of 2023 projections was thus a valid and practical approach to EPA's independent analysis, which EPA was under no obligation to affirmatively perform. *See New York*, 852 F.2d at 578.

2. EPA's use of its 2023 modeling was particularly appropriate in light of EPA's obligation to avoid over-control because 2023 is consistent with the timeframe when Delaware could conceivably be required to impose controls on its own facilities.

Delaware, Environmental Petitioners, and Petitioner-Intervenors nevertheless challenge EPA's use of the 2023 modeling, arguing primarily that EPA should have used 2021 as the analytic future year, instead of 2023.[12] DE Br. 20-22; Envtl. Br. 11-13; NY Br. 33-39. Petitioners ignore that 2023 is the earliest likely time period when Delaware would conceivably incur its own obligation to impose controls on in-state sources.

Understanding the reason for this requires an explanation of how the NAAQS program impacts Delaware's control obligations. Delaware has one county designated Marginal nonattainment for the 2015 standard as part of the multistate nonattainment area. *See* 83 Fed. Reg. 10,376 (Mar. 9, 2019); 83 Fed. Reg. at 25,795. It therefore has an August 2021 attainment deadline. However, due to reductions expected through pre-existing regulations, Marginal nonattainment areas typically are not required to

[12] Environmental Petitioners and Petitioners-Intervenors both suggest that EPA made an affirmative finding about 2021 or the available data for that year. *See* Envtl. Br. 14 ("EPA acknowledges that there are no data available for years between 2017 and 2023 that could support such a demonstration."); NY Br. 38 ("[T]here is no evidence to support EPA's supposition that Delaware might be able to come into compliance by the statutory 2021 deadline."). EPA's only finding as to 2021 was that neither Delaware nor commenters submitted data indicating an air quality problem in 2021. 83 Fed. Reg. at 50,461/2-3. EPA made no statement about the availability of data to support a finding and made no affirmative finding about air quality that year. *Id.*

implement specific emission controls at existing sources in order to come into compliance. *See* 42 U.S.C. § 7511a(a); 83 Fed. Reg. at 50,461 (historical analysis shows that for 1979 ozone NAAQS and 2008 ozone NAAQS, 85% and 64% of Marginal nonattainment areas, respectively, reached attainment without additional local controls). EPA has until February 2022 to determine whether the multistate nonattainment area has reached attainment by the attainment date. 42 U.S.C. § 7511(b)(2). If EPA finds that the area has not reached attainment, then it will be bumped to Moderate nonattainment status by operation of law and be subject to a 2024 attainment deadline. 42 U.S.C. § 7511; 83 Fed. Reg. 10,376. As a Moderate nonattainment area, Delaware would have to submit a plan demonstrating how the area will attain the NAAQS no later than August 2024, providing for all "reasonably available control measures" if they are needed for attainment. 42 U.S.C. §§ 7502(c); 7511a(b)(1). Due to applicable statutory deadlines and EPA's historical practice, Delaware would likely not have to submit this plan until early 2023.[13] *See, e.g.*, 81 Fed. Reg. at 26,697 (setting deadline of January 2017, the start of the last calendar year

[13] Delaware is also part of a 13-state ozone transport region established by Congress. 42 U.S.C. § 7511c(a). States within ozone transport regions must implement certain emission control measures regardless of their area designation or classification. *Id.* § 7511c. Those include reasonably available control technology for certain sources. *Id.* §§ 7511c(b)(1)(B); 7511a(b)(2). As a member of the ozone transport region, Delaware is also under a requirement to implement reasonably available control technology for some existing sources by January 1, 2023, independent of its classification. 40 C.F.R. § 51.1316(b)(3)(i) (reasonably available control technology must be implemented by January of the fifth year after designation).

before 2018 attainment date for 2008 ozone NAAQS, to submit Moderate area nonattainment plan).

Petitioners' arguments should be rejected in light of this Court's precedent. First, as EPA noted, EPA must evaluate upwind Good Neighbor obligations "consistent with the provisions of [the Act's Title I]," *see* 42 U.S.C. § 7410(a)(2)(D)(i), which includes giving consideration to the procedural and substantive provisions of Title I, *North Carolina*, 531 F.3d at 911-12. Title I includes attainment dates for all nonattainment classifications as well as substantive requirements for each. *See* 42 U.S.C. §§ 7511, 7511a. In the context of the States' § 7426(b) petition, EPA reasonably interpreted the Good Neighbor Provision "consistent" with these requirements, including the timeframe in which downwind states would be required to implement emission controls if they cannot otherwise demonstrate attainment. 83 Fed. Reg. at 50,461. Environmental Petitioners' argument that EPA's approach is inconsistent with *North Carolina*, Envtl. Br. 12-13, reads too much into that case. *North Carolina* holds that EPA must consider attainment dates when establishing compliance timeframes for upwind reductions under the Good Neighbor Provision. 531 F.3d at 911-12, 930. But it says nothing about which analytic year EPA should use when selecting among multiple potentially relevant attainment dates to use in determining whether a Good Neighbor violation exists. *Id.*

Second, EPA's consideration of the date when Delaware could be required to implement additional controls is consistent with the guardrails set in the *EME Homer*

City line of cases instructing EPA to avoid over-control.[14] *See EME Homer City*, 572 U.S. at 522-23; *EME Homer City II*, 795 F.3d at 128. In *EME Homer City*, the Supreme Court held that EPA lacks authority to require an upwind state to reduce emissions beyond the amount necessary to achieve attainment in downwind states to which is it linked. 572 U.S. at 522-23. On remand, this Court added further gloss, interpreting the Supreme Court's decision to require an inquiry into "whether a downwind location would still attain its NAAQS if linked upwind States were subject to less stringent emissions limits." *EME Homer City II*, 795 F.3d at 127-28. If a downwind area would attain and maintain the NAAQS regardless of the upwind emission controls, then EPA would "overstep[] its authority" by imposing controls on the upwind states. *Id.* at 128.

The consequence of Petitioners' suggestion that EPA should have used 2021 rather than 2023 is that they seek to require controls on upwind sources even if Delaware is otherwise on track to reach attainment without imposing additional controls on its own sources.[15] Where EPA's use of 2023 was consistent with EPA's

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[14] While EPA did not expressly address the *EME Homer City* cases in the context of its decision to consider the 2023 model, these cases are nonetheless relevant to Petitioners' claims because Petitioners seek a holding that is potentially in conflict with precedent. *But see* 83 Fed. Reg. at 50,453 (discussing *EME Homer City* admonition against over-control in context of why past attainment designations are not sufficient to infer a Good Neighbor violations).

[15] Petitioner-Intervenors suggest in a footnote that the Act contemplates that upwind states will be required to install controls before downwind states because upwind state

Cont.

obligation to avoid over-control and Petitioners' preferred date would arguably be in conflict with it, EPA was certainly reasonable to use 2023. Delaware's lament that it will be obligated to *plan* for compliance by 2024 if it is not in attainment by 2021, DE Br. 21, does not undermine the rational basis for EPA's decision.

Finally, Petitioner-Intervenors' argument that EPA should have used the earlier attainment date because 42 U.S.C. § 7426(c) requires "swift action when a violation of the Good Neighbor provision is established," NY Br. 37-38, overlooks the condition precedent of action under § 7426(c): a finding of a violation of the Good Neighbor Provision. 42 U.S.C. § 7426(b). Nothing in § 7426 clarifies which future attainment date EPA should analyze when determining whether a Good Neighbor violation has occurred. And if EPA were to find a Good Neighbor violation, the analytic year used in reaching that finding would not prevent EPA from imposing a remedy in an earlier year consistent with § 7426(c).

EPA's use of a 2023 analytic year was reasonable, and the Court should defer to EPA's reconciliation of these "complicated provisions of the Clean Air Act." *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150.

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plans for ozone transport are due earlier than state plans for nonattainment. *See* NY Br. 36 n.18. This argument was not raised in comments and has therefore been waived. 42 U.S.C. § 7607(d)(7)(B); *EME Homer City*, 572 U.S. at 511-12. In any event, that upwind ozone transport plans are submitted earlier does not mean that upwind controls are *implemented* before the controls under downwind attainment plans.

3. EPA's modeling showed that Delaware will be in attainment by 2023 with no further upwind controls.

Petitioners' argument that EPA's model is flawed should be rejected.[16] DE Br. 22-24; Envtl. Br. 15. EPA explained the 2023 modeling developed in conjunction with the Close-Out Rule in a technical support document. Air Quality Modeling Technical Support Document for the 2015 Ozone NAAQS Preliminary Interstate Transport Assessment, JA[EPA-HQ-OAR-2018-0295-0032] ("2023 Modeling"); *see also* 83 Fed. Reg. at 50,459, 50,462-63. EPA used data and the modeling platform previously used in the CSAPR Update, updated with new information. 2023 Modeling, JA___ at JA[2]. This is the same modeling platform used by EPA in the original CSAPR and upheld by this Court in *EME Homer City II*. *See* 795 F.3d at 135. The model is based on a spatial simulation of the formation and transport of ozone precursors, taking into account meteorological data and the manner in which chemicals distribute themselves through the atmosphere. 2023 Modeling. JA___ at JA[4], JA[6-7]. EPA also checked its modeling inputs for power plants against the change in actual emission rates since the CSAPR Update was issued. *See* 2015 vs 2016 vs 2017 NO_X Comparisons, Ozone Season, JA[EPA-HQ-OAR-2018-0295-0028].

Petitioners raise no arguments that could plausibly overcome the "extreme degree of deference" the Court gives to this kind of exercise of EPA's technical

[16] EPA's 2023 modeling is also being challenged in the Close-Out Rule litigation. *New York v. EPA*, No. 19-1019, EPA Br., Doc. No. 1792965, at 58-73.

expertise. *See Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150. Delaware merely states that available monitoring data for 2017 and 2018 indicates that EPA's model is "overly optimistic," without explaining how or why. DE Br. 22-24. EPA responded to this argument in the Denial by double checking its work. 83 Fed. Reg. at 50,462-63. EPA reviewed the analyses in, and emission reductions required by, the CSAPR Update, as well as monitoring data from after the CSAPR Update was issued. *Id.* EPA concluded that "[n]ot only were the anticipated reductions realized generally from [units] in the upwind states," but that reductions exceeded EPA's expectations. *Id.* "[E]missions in 2017 dropped by 21 percent from 2016 levels and were seven percent below the collective CSAPR Update budgets for the 22 affected states." *Id.* at 50,462/2. After only minor further progress, EPA's 2023 projections predict power plant emissions in the 22 states will be 10 percent below the CSAPR Update budgets. *Id.* EPA went on to explain that emissions have historically trended downward and that EPA expects this trend to continue based on increasing use of natural gas and renewable energy (like wind and solar) due to market forces, state policies, and technology advancements. 83 Fed. Reg. at 50,563. This explanation is more than sufficient to survive arbitrary and capricious review.

Environmental Petitioners argue that EPA's 2023 modeling does not account for a proposed change to vehicle emission standards. Envtl. Br. 15 (citing 83 Fed. Reg. 42,986 (Aug. 24, 2018)). However, the "roll back" Petitioners refer to is merely a proposal that has not been finalized, and Petitioners have not indicated how such a

change would affect downwind ozone concentrations. EPA's modeling reasonably accounted only for emissions affected by regulations currently in place because changes that have merely been proposed are speculative. A possible, future change in the regulatory landscape does not present a basis to find that EPA's projections at the time of the Denial were arbitrary or capricious.[17]

II. EPA's Conclusion that Upwind Sources Will Not Significantly Contribute to Downwind Non-Attainment in Delaware and Maryland Was Reasonable and Supported by Record Evidence.

All three Petitioner groups challenge EPA's conclusion that neither Maryland nor Delaware established that the named upwind sources will "significantly contribute" to or interfere with maintenance of downwind nonattainment without the source-specific controls they requested. MD Br. 20-33; DE Br. 24-31; Envtl. Br. 15-24. The Court should reject these claims.

Once a § 7426(b) petitioner has met its burden to show under Steps One and Two that a downwind state will have a future air quality problem and that the particular upwind state is "linked" to that problem, EPA considers under Step Three whether the petitioners have shown that emissions from the named sources are "significant" within the meaning of the Good Neighbor Provision. *New York*, 852 F.2d at 577-78 (petitioners bear burden under § 7426(b)).

[17] If a change occurs that would actually impact the result of EPA's projections, Delaware would have the opportunity to file another § 7426(b) petition demonstrating that the change resulted in a Good Neighbor violation.

In light of the "thorny causation problem" associated with ozone transport, *see EME Homer City*, 572 U.S. at 514, EPA uses several factors on a regional basis to help determine what is "significant." These include the kinds of control strategies available to reduce NO_X emissions, the cost per ton of NO_X removed from each strategy, the total tons of upwind NO_X that could be eliminated, and the improvements in downwind air quality that could result from implementation. 83 Fed. Reg. at 50,449. In EPA's regional rulemaking, EPA selects the control level that maximizes cost-effectiveness of controls relative to downwind air quality improvement and then implements the emission reductions associated with that level of control on a regional basis through calculating state-level emission budgets and, typically, creating an emission allowance trading program. *Id.*; *see also Michigan*, 213 F.3d at 675-79 (upholding EPA's cost-threshold approach to determining what upwind contributions are "significant"); *EME Homer City*, 572 U.S. at 513-24 (same). Because of the cumulative nature of ozone transport, EPA uses—and this Court has upheld use of—the same statewide regional cost threshold determination to evaluate which sources' contributions are "significant" under § 7426(b). *Appalachian Power*, 249 F.3d at 1048-49; 42 U.S.C. § 7426(b); 83 Fed. Reg. at 50,454-55.

Here, the States collectively asked EPA to impose emission limits representing optimization of catalytic controls at 34 electric generating units, optimization of non-

catalytic controls at four units,[18] and the use of natural gas rather than coal at three units at the Brunner Island facility. As explained below, after taking into account the pre-existing regional analysis and remedy already addressing Good Neighbor obligations under the 2008 ozone NAAQS in the CSAPR Update, EPA found that the States did not meet their burdens to demonstrate that a finding was justified under § 7426(b). This is because the requested control strategies were already addressed.

In light of the inter-related nature of the CSAPR Update and the remedies sought here, EPA reasonably concluded that it had already imposed all cost-effective emissions reductions achievable using the requested controls.

A. Petitioners inaccurately characterize the CSAPR program and how the CSAPR Update was used in EPA's Denial.

In one form or another, Petitioners all claim that EPA should not have relied on the CSAPR Update in its analysis of the States' petitions because, they allege, the CSAPR Update was a "partial" remedy to Good Neighbor violations under the 2008 ozone NAAQS that did not fully resolve Maryland's ozone problem. MD Br. 20-21; DE Br. 25 (adopting Maryland's arguments); Envtl. Br. 21-24; *see also* NY Br. 40-44. Petitioners inaccurately characterize what EPA said in the CSAPR Update, ignore EPA's later findings in the Close-Out Rule, and misconstrue applicable standards.

[18] This breaks down to 32 catalytic control units and four non-catalytic control units at two facilities in Maryland's petition, and 2 unique catalytic control units in Delaware's petitions.

The CSAPR Update was "partial" in the sense that EPA had not then completed its analysis. *See* 81 Fed. Reg. at 74,521. But that did not imply a promise about what further analysis would show. *See id.* Whether additional controls would in fact be necessary to resolve Good Neighbor obligations was deferred to future decision-making. Because the CSAPR Update was prepared under tight timeframes due to delays caused by earlier challenges to EPA's interstate transport framework, *see EME Homer City II*, 795 F.3d at 118, EPA structured that rule around the most "immediately available" NO_X emission reductions from power plants that could be implemented before the 2017 ozone season, the last period for measuring compliance with the 2018 attainment date. 81 Fed. Reg. at 74,521-22. This involved analyzing operation and optimization of existing emission control technologies such as catalytic and non-catalytic controls, as well as other controls not at issue here. *Id.* at 74,541, 74,550. EPA did "not attempt[] to quantify the ozone season NO_X reductions that may be necessary to eliminate all significant contribution to nonattainment." *Id.* at 74,521.

While "EPA acknowledge[d] that [these controls] *may* not be sufficient to fully address these states' good neighbor obligations," EPA did not conclude that additional controls *would* be required. *Id.* (emphasis added). Rather, EPA explained that it would need to conduct a future analysis to consider control strategies not already considered (e.g., from non-power plant sources) and a later timeframe for compliance. *Id.* at 74,521-22. Indeed, each page of the CSAPR Update that Maryland

cites to support its contentions includes another sentence indicating that potential additional reductions would depend on future analysis. *See, e.g.*, *id.* at 74,520 ("EPA will need to evaluate *whether*" the upwind states' emission reduction should be more stringent.), 74,521 (emission reductions required by the rule "*may* not be sufficient to fully address" the upwind good neighbor obligations), 74,522 (emission reductions "*may* not be all that is needed") (emphasis added to all).

While EPA's analysis was "partial" at the time of the CSAPR Update, it is not partial now. In the recent Close-Out Rule, EPA conducted a new analysis, relying on new air quality modeling and assessing control strategies and sources not already addressed (i.e., technologies that take longer to implement and controls for sources other than power plants). 83 Fed. Reg. at 65,885-86 (Dec. 21, 2018). EPA determined that the CSAPR Update fully addressed Good Neighbor obligations under the 2008 ozone NAAQS because, under Step One, its modeling showed that all downwind air quality monitors would attain and maintain the 2008 ozone NAAQS by 2023 absent any further controls. *Id.* In other words, the emission reductions implemented in the CSAPR Update, combined with other already existing regulatory and economic influences on emission sources, are expected to result in full attainment. *Id.*

EPA did not, as Maryland contends, MD Br. 2, treat the CSAPR Update as a *de facto* "complete solution" to the States' § 7426(b) petitions. In evaluating the petitions, EPA relied *in part* on the analyses in and the remedies imposed by the CSAPR

Update. 83 Fed. Reg. at 50,464-69. It is difficult to see how EPA could have avoided this because the CSAPR Update is a regional remedy for the same Good Neighbor violations alleged in the States' § 7426(b) petitions. *See, e.g.*, *North Carolina*, 531 F.3d at 915 ("[W]hether North Carolina is linked with Illinois by [the Clean Air Interstate Rule] under [the Good Neighbor Provision] is likely to affect related remedies that North Carolina may have against Illinois, for example, pursuant to section [7426]."); *see also Appalachian Power*, 249 F.3d at 1048-49 (upholding EPA's incorporation of aspects of the regional Good Neighbor determination into § 7426(b) finding). But EPA's Denial also rests on an independent analysis of the States' petitions. This includes a review of available data since the CSAPR Update and an assessment of whether the petitions provided data or sought anything not already addressed in the CSAPR Update.

Maryland's contention seems to be more that "the State continues to have problems maintaining the 2008 ozone NAAQS" since the CSAPR Update was issued rather than that EPA could not reasonably take the CSAPR Update into account. MD Br. 21. But Maryland misunderstands the applicable standard. A Good Neighbor violation exists only if the named upwind sources "contribute significantly" to downwind nonattainment or interfere with maintenance. *See Michigan*, 213 F.3d at 674-79; *EME Homer City*, 572 U.S. at 512-24 (same). Maryland bears the burden of proving *both* that it has a future downwind attainment problem *and* that the upwind sources are contributing significantly to (or interfering with) that problem. *Id.*

Nothing in the Good Neighbor Provision requires upwind sources to entirely eliminate their downwind contributions or for upwind implementation plans to ensure downwind attainment and maintenance.[19] They merely have to eliminate "significant" contributions and interference with maintenance. 42 U.S.C. § 7410(a)(2)(D)(i)(I). An upwind state or source can have eliminated its "significant contribution" even when a downwind state still has an attainment problem due to in-state emissions or upwind emissions from other states.

Maryland and Environmental Petitioners also raise a range of grievances against EPA's ozone program as a whole, accusing EPA of playing a "shell game" by denying Maryland's requests under § 7506a of the Act, and of "persistent delays" in addressing the 2008 ozone NAAQS. MD Br. 1-2; Envtl. Br. 21-24. Any challenge to other EPA actions outside of the Denial, or any allegation of unreasonable delay, are not properly before the Court.[20] *See* Maryland Petition for Review, Doc. No. 1755727, Case No. 18-1285 (challenging only the Denial); Envtl. Petition for Review, Doc. No. 1756674, Case No. 18-1287 (same). In any event, EPA has addressed Good Neighbor obligations by implementing significant emission reductions through the CSAPR Update. This resulted in nearly 44,000 tons of NO_X reductions between 2016 and

[19] It would not be possible to completely eliminate upwind contributions without eliminating virtually all of the upwind emissions because emissions will always flow downwind.

[20] Notably, this court recently rejected Maryland's and Delaware's challenges to EPA's denial of their § 7506a petitions. *New York v. EPA*, 921 F.3d 257 (D.C. Cir. 2019).

2017 from the five states at issue in the petitions alone. 83 Fed. Reg. at 50,465; *see also* 83 Fed. Reg. at 65,893 (between 2016 and 2017, total ozone season NO_X emissions from all power plants covered by the Update fell by 21 percent (77,512 tons)). That hardly constitutes a shell game. And while EPA has experienced numerous delays over the past two decades as the parameters of EPA's authority were honed by this Court, *supra* 13-14, EPA acted expeditiously to address the 2008 ozone NAAQS following the clarifying *EME Homer City* litigation.

B. The CSAPR Update already set emission limits based on optimization of catalytic controls at thirty-four named units.

All Petitioners raise various challenges to EPA's conclusion that it has already implemented the requested catalytic control strategy through the CSAPR Update's allowance trading program. MD Br. 22-31; DE 25-29; Envtl. Br. 15-21; *see also* NY Br. 41-42, 45, 47. These claims should fail.

Thirty-four of the named upwind units at issue have already installed catalytic controls.[21] *See* 83 Fed. Reg. at 50,464. All of these sources are subject to the federal implementation plans promulgated as part of the CSAPR Update, and are required to participate in the CSAPR NO_X Ozone Season Group 2 allowance trading program. *Id.* at 50,464 n.58. In the regional rule, EPA analyzed a range of achievable controls,

[21] This includes 32 units from Maryland's petition, including six units at two facilities (Homer City and Harrison) also included in Delaware's petitions, and two units from Delaware's Conemaugh petition. *See* 83 Fed. Reg. at 50,464.

including optimizing existing catalytic controls. 81 Fed. Reg. at 74,540-42. Based on its analysis of several factors, EPA found that the control level representing optimizing catalytic controls (plus other controls not at issue here) maximized cost-effectiveness relative to other levels of control considered. 81 Fed. Reg. at 74,508; 83 Fed. Reg. at 50,464. EPA then calculated the amount of emission reductions that could be achieved at this control level and set the state emission budgets based on those reductions. *Id.* at 74,508. Each year, states allocate facilities covered by the program a subset of the ozone season budget in the form of allowances, which can be used, traded, or banked for future use. *See id.* at 74,550. The facilities may either reduce their own emissions consistent with their allowances or purchase allowances from other facilities that reduce theirs instead. *See id.* In this way, individual sources have compliance flexibility but the state budgets and assurance levels (levels above which state-wide emissions from covered sources trigger penalties) ensure that overall emissions will be reduced by the amount associated with catalytic control optimization at the named sources. *See id.* at 74,566-67.

In their § 7426(b) petitions, the States merely requested that EPA impose on a source-specific basis the same control strategy—catalytic control operation and optimization—already addressed in the CSAPR Update. *See* 83 Fed. Reg. at 50,464. EPA determined that the emission budgets in the CSAPR Update already reflect the emission reductions sought and that those reductions are in fact being achieved through the trading program. *Id.* at 50,464-65. EPA therefore concluded that the

States did not meet their burdens to show that further cost-effective emission reductions are achievable at these sources. *Id.* This was reasonable and well-supported.

1. Petitioners' arguments are primarily a policy disagreement with EPA's regional cap-and-trade approach to addressing Good Neighbor obligations.

Petitioners raise various arguments as to why they believe EPA should impose catalytic control optimization requirements on a source-specific basis rather than through the emissions trading program in the CSAPR Update. According to Maryland, EPA is required to impose source-specific controls because § 7426(b) is a separate statutory authority from the Good Neighbor Provision. MD Br. 24-25; *see also* Envtl. Br. 20-21; NY Br. 45. Delaware claims it is because the trading program does not "ensure that the named sources reduce NO_X emissions each day of the ozone season." DE Br. 26-29. Intervenors add the observation that the CSAPR Update's trading program only imposes a cap at the state level. NY Br. 41-42.

At heart, these claims come down to a policy disagreement about how best to implement emission reductions necessary to address Good Neighbor obligations for ozone. In both the CSAPR Update and reviewing the States' petitions, EPA was faced with the same question: is there a Good Neighbor violation? In other words, do the upwind sources "contribute significantly" to nonattainment of the NAAQS in downwind states within the meaning of the Good Neighbor Provision? *Compare* 81 Fed. Reg. at 74,550 (imposing emissions trading program as necessary to address

Good Neighbor obligations) *to* 42 U.S.C. § 7426(b) (incorporating the Good Neighbor Provision). True enough, § 7426(b) provides independent statutory authority for EPA to resolve those violations resulting from specific facilities. But if EPA has already addressed the state's overall Good Neighbor obligations by issuing federal implementation plans in the CSAPR Update, then nothing in § 7426(b) requires EPA to find that upwind sources emit or would emit pollutants "in violation of" the same Good Neighbor Provision after implementation of the plan. *Id.* § 7426(b).

In EPA's longstanding view, ozone is best addressed through regional solutions because ozone is a regional pollutant. It is formed from NO_X and volatile organic compound emissions from hundreds, and sometimes thousands, of different sources in multiple states and is then transported over long distances by shifting weather patterns. *See* 83 Fed. Reg. at 50,454; 81 Fed. Reg. at 74,513-14. As the Supreme Court has recognized, downwind air quality problems are not typically caused by any single source; they are the result of the collective contribution of a number of sources. *See EME Homer City*, 572 U.S. at 496-97. To resolve this, EPA has found that it generally does not matter which specific sources in the upwind states reduce NO_X, so long as the overall amount of NO_X flowing downwind under the conditions necessary to form ozone is reduced. *See*, *e.g.*, 83 Fed. Reg. at 50,454-55. This is why in the § 7426(b) context for ozone, EPA uses—and this Court has affirmed the use of—the

same statewide cost threshold determination to evaluate which sources' contributions are "significant." *Appalachian Power*, 249 F.3d at 1048-49.

EPA's finding that the Good Neighbor obligations of the named sources have already been resolved through a cap-and-trade program does not, as Environmental Petitioners suggest, Envtl. Br. 21-22, deprive § 7426(b) of independent meaning . If EPA had not previously addressed Good Neighbor obligations in the relevant upwind states—or even at these named sources—a § 7426(b) petition could be a viable means to address an interstate transport problem. *See*, *e.g.*, 76 Fed. Reg. 19,662 (granting § 7426(b) petition from New Jersey to address Good Neighbor violations from SO2 emissions, before any state or federal implementation plan remedy was in place). Or, if the petitions had proposed control strategies that had not already been addressed in the CSAPR Update, a § 7426(b) petition might be suitable. But nothing in the Act or anything else Petitioners cite requires EPA to revisit controls it has already considered and either imposed or rejected through a previous action addressing the same alleged violations. Petitioners point to no authority suggesting that it is unreasonable for EPA to determine its pre-existing regional remedy resolved the Good Neighbor obligations for these named sources. This is particularly true here. These petitions merely revisit the same catalytic control strategies already considered and imposed through an allowance trading program. *See* 81 Fed. Reg. at 74,521-22 (anticipating in CSAPR Update that the analysis left for later was control strategies not already

considered); 83 Fed. Reg. at 65,885-86 (assessing in Close-Out Rule control strategies and sources not already addressed in the CSAPR Update).

Nor does it undermine EPA's findings that individual sources covered by the CSAPR Update could potentially emit above the amount assumed in developing the budgets. *See* DE Br. 26-29. That is simply how a cap-and-trade system works. While it is possible that the named facilities will purchase allowances to operate their catalytic controls at a rate higher than assumed in setting the budgets, the region as a whole is still required to achieve the same level of reductions that it would have achieved had those controls been fully optimized. So long as the source purchases allowances, then someone in the region is achieving those emission reductions, even if it is not the named source. *See* 81 Fed. Reg. at 74,507-09.

Finally, Maryland argues that EPA could not consider the seasonal emissions reductions achieved under the CSAPR Update because Maryland requested source-specific emission limits that would result in short-term daily reduction. MD Br. 26-28; *see also* NY Br. 45-46. Maryland relies on the relief available under § 7426(c) for this proposition, incorrectly asserting this requires source-specific controls. MD Br. 27-28 (citing 42 U.S.C. §§ 7602(k), 7426(c)). This statutory argument was not raised in comments and has therefore been waived.[22] 42 U.S.C. § 7607(d)(7)(B); *EME Homer*

[22] Although the Court need not reach this issue, EPA does not agree that remedies available under § 7426(c) are limited to continuous rate limits. That provision allows sources for which there has been a § 7426(b) finding to continue operating if EPA

Cont.

City, 572 U.S. at 512. If EPA had been given the opportunity to respond to this argument, EPA would have explained that the Good Neighbor Provision is incorporated into § 7426(b), which controls whether EPA even has authority to implement a remedy under § 7426(c). *See* 42 U.S.C. §§ 7426(b) (EPA must determine whether the source emits or would emit a pollutant "in violation of the prohibition" in the Good Neighbor Provision), 7426(c)(1) (applying only if EPA has made a finding under subsection (b)). EPA need not impose an additional remedy at all if it does not find a Good Neighbor violation. Indeed, EPA has previously crafted a remedy under § 7426 by promulgating state NO_X budgets in coordination with an allowance trading program. 65 Fed. Reg. 2674. In reviewing that decision, this Court confirmed that § 7426(b) is intertwined with the Good Neighbor Provision. *Appalachian Power*, 249 F.3d at 1048-49.

2. Petitioners did not otherwise meet their burdens to prove that the named sources will "significantly contribute" to downwind nonattainment after implementation of the CSAPR Update.

EPA reasonably concluded that Petitioners did not meet their burden under § 7426(b) because (a) EPA had already analyzed the same Good Neighbor obligations

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imposes "emission limitations." 42 U.S.C. § 7426(c). The referenced "emission limitation" is defined as a requirement that "limits the quantity, rate, *or* concentration of emissions of air pollutants on a continuous basis." *Id.* § 7602(k) (emphasis added). This does not require a daily rate limitation, and the CSAPR Update "limits the quantity" of ozone "on a continuous basis" throughout the ozone season.

of the same upwind states under the same 2008 ozone NAAQS at issue here, and (b) the States merely requested that EPA implement the same catalytic control optimization that EPA already implemented through an allowance trading program. *See* 83 Fed. Reg. at 50,464-65 (because strategy has already been implemented, conclusion was the same for both ozone standards).

Petitioners attempt to show that although they seek emission rates associated with the same catalytic control optimization addressed in the CSAPR Update, they are actually seeking something new. The supposed new controls are daily emission limits, rather than the seasonal trading program in the CSAPR Update, *see* MD Br. 25-28; DE Br. 26-29, based on a lower catalytic control emission rate than the one EPA used to calculate the state budgets, *see* MD Br. 22-23. Petitioners are reviving debates from the CSAPR Update, which EPA has already considered and rejected. But after additional analysis, EPA again reasonably rejected the idea that the Good Neighbor obligations require daily limits or a lower emission limit to optimize catalytic controls.

First, commenters to the CSAPR Update raised the same suggestion that EPA use a daily emission limit instead of, or in addition to, the seasonal trading program. *See* 81 Fed. Reg. at 74,523. EPA rejected this because "NO_X ozone season trading programs are effective at reducing peak ozone concentrations." *Id.*; *see also* Response to Comments on the Proposed Action on Section [7426(b)] Petitions from Delaware and Maryland, JA[EPA-HQ-OAR-2018-0295-0185] at JA[38-40] ("Response to Comments"). No party (including Delaware and Maryland) challenged EPA's

decision to use a seasonal cap in the subsequent litigation. *Wisconsin*, No. 16-1406, EPA Br., Doc. No. 1725799. Nothing in § 7426(b) requires EPA to revisit its prior conclusion if the petition raises no new information. Nonetheless, EPA again considered the States' assertions that short-term limits are necessary to prevent units from turning controls off intermittently on days with high ozone. 83 Fed. Reg. at 50,466/2-3. Based on reported emissions data, EPA found that this was not typically occurring. *Id.* Instead "[catalytic]-controlled units generally operated with lower emission rates during high generation hours, suggesting [catalytic controls] generally were in better operating condition—not worse, let alone idling—during those days/hours." *Id.* EPA concluded that "the data do not support the notion that units are reducing [catalytic control] operation on high demand days." *Id.*; *see also* Discussion of Short-term Emission Limits, JA[EPA-HQ-OAR-2018-0295-0171] (discussing technical basis for EPA's conclusion that short-term emission limit would not meaningfully improve efficiency of catalytic controls).

Second, Maryland's claim that each individual source is capable of achieving NO_X emission rates of lower than 0.10 pounds per one million British thermal units ("lb/mmBtu")—an average used by EPA in the CSAPR Update to represent catalytic control optimization at sources not already fully optimized—MD Br. 22-23, was likewise twice considered and twice rejected. *See* 83 Fed. Reg. at 50,467 (EPA determined in the CSAPR Update that the same rates Maryland proposed here "were not representative of current or future operating conditions.").

As a preliminary matter, Petitioners do not accurately explain how EPA used the 0.10 lb/mmBtu average in the CSAPR Update.[23] In the CSAPR Update, EPA used this rate to represent the average emission rate that older units that had not already optimized catalytic controls could likely achieve. *See* 81 Fed. Reg. at 74,543-44. EPA calculated this rate by reviewing the past performance of all electric generating units nationwide that had catalytic controls. *Id.* at 77,543-44. EPA determined that 0.10 lb/mmBtu was a reasonable representation of optimized performance for broken-in catalytic controls, based on an average of the third-lowest ozone-season NO_X rates achieved by units with catalytic controls between 2009 and 2015. *Id.* EPA declined to use the lowest rate ever achieved, as Maryland again proposes here, *see* MD Br. 22-23, or even the second-lowest rate because those rates may represent newly-installed catalytic controls, emitting at rates not consistently achievable. 81 Fed. Reg. at 74,543-44. EPA also declined to use emission rates from before 2009, as Maryland again here suggests, *see* MD Br. 22-23 (relying on emission data from 2005 through 2014). 81 Fed. Reg. at 74,543-44. The year 2009 is when many sources changed their operation and maintenance schedules to comply with another trading program that required NO_X emission reductions on an annual basis in addition to a seasonal basis. *Id.* Instead, EPA focused on emission rates that were

[23] EPA's use of the 0.10 lb/mmBtu average is also before this Court in the pending challenge to the CSAPR Update. *See Wisconsin*, No. 16-1406, EPA Br., Doc. No. 1725799 at 38-40, 85-88.

routinely achievable to arrive at the average. For units already below 0.10 lb/mmBtu, EPA's emission budgets were set based on those units' actual, better emission rates. *Id.*

Here, EPA relied on its prior conclusion that the third-best seasonal rate is most representative of catalytic control optimization. *See* Response to Comments, JA___ at JA[57-58] (explaining technical basis for selecting the third-best seasonal rate as most representative of catalytic control optimization). Whether or not Petitioners agree with EPA's technical conclusions, the fact that EPA considered the exact same arguments in the CSAPR Update underscores why it was reasonable for EPA to conclude that the proposed controls were already sufficiently addressed in that rulemaking. Absent data showing that additional emission reductions ostensibly achievable at the lower emission rates are feasible, let alone cost-effective, which the States did not present, it was reasonable for EPA to conclude that the States did not meet their burdens under Step Three.

Lastly, as a technical matter, EPA does not agree with Maryland's contention about the ozone improvements that are supposedly achievable with the controls Maryland proposes. *See* MD Br. 29-30. Maryland based its calculations on the emission rates from the best ozone season at these facilities and the assumption that limits based on these emission rates would have the effect of lowering total emissions. As explained *supra* 67-68, EPA does not believe these rates represent the rates that are consistently achievable. While some sources have shown they can operate at rates

better than the average EPA used to calculate the CSAPR budgets, these sources are already achieving those rates under the trading program. *See* 81 Fed. Reg. at 74,543-44. Additionally, almost half of the emission reductions achieved through the CSAPR Update in the five upwind states at issue came from the 34 named units with catalytic controls. 83 Fed. Reg. at 50,465 Tbl. 1 (Out of nearly 44,000 tons of NO_X reductions in the five upwind states between 2016 and 2017, over 21,000 came from these 34 units.). There would be no obvious utility in imposing source-specific limits to enforce rates they are already incentivized to achieve. Maryland thus did not demonstrate that the requested catalytic control optimization would result in a greater downwind benefit than the CSAPR Update.

3. On average, the sources with catalytic controls are operating their controls as anticipated in the CSAPR Update.

After assessing the States' data and conducting an independent analysis, EPA also correctly concluded that the States failed to show that the improvements that the CSAPR Update was intended to achieve have not already been realized.

EPA reviewed whether the emission reductions anticipated in the CSAPR Update have actually occurred. The CSAPR Update was found to be extremely effective at reducing NO_X emissions both at the named sources and in their upwind states. *See* 83 Fed. Reg. at 50,465. The average and overall emission rates at these facilities fell dramatically in the 2017 ozone season. *Id.* (noting a 50% decline in the average emission rate and a 46% decline in overall emissions at these units). The five

upwind states at issue collectively reduced their emissions by 32% in the 2017 season. *Id.* In fact, upwind states performed *even better* than anticipated in the CSAPR Update. *Compare* 81 Fed. Reg. at 74,508 (setting budgets of 99,707 tons in total NO_X emissions from covered sources in Pennsylvania, West Virginia, Kentucky, Ohio, and Indiana—the five states named in the petitions), *to* 83 Fed. Reg. at 50,465 (reporting only 92,189 tons of actual NO_X emissions from the five states in the 2017 ozone season).

This trend continued when EPA looked at the emission rates and emissions at the specific facilities. *Id.*; *see also* Daily NO_X Emissions Rates for Identified [Catalytic]-controlled Sources for Each Day of the Ozone-Season, JA[EPA-HQ-OAR-2018-0295-0170] ("Daily Emission Rates Analysis"). This suggested that most of the sources are operating and optimizing their catalytic controls without the unit-specific emission limits proposed by the States. *Id.* EPA assessed emission rates from all 274 coal-fired electric generating units equipped with catalytic controls in the contiguous United States. 83 Fed. Reg. at 50,466. Of these, EPA found that only four units located in the upwind states subject to the § 7426(b) petitions were not operating their catalytic controls in the 2017 ozone season. *Id.* But one of these has since been retired entirely, and preliminary data suggested that three others were operating their controls by 2018. *Id.* For the 34 catalytic control units at issue in the States' petitions, EPA found that both emission rates and NO_X emissions for these sources were, collectively, significantly lower in 2016 than in 2017. *Id.* at 50,465; Daily Emission Rates Analysis, JA___.

While EPA found that some individual electric generating units subject to the regional trading program are emitting above the average fleet-wide rate EPA used for higher-emitting units to calculate the emission budgets (0.10 lb/mmBtu), *see id.*, overall reductions above and beyond what EPA anticipated are being achieved through the trading program. *See* 83 Fed. Reg. at 50,465. Downwind areas are thus seeing the same ozone improvements from the CSAPR Update that they would achieve through source-specific controls, while upwind areas are able to efficiently achieve the reductions in the manner the market dictates.

Ignoring that the allowance trading program is working as intended on a regional basis, Petitioners raise various technical arguments. They primarily claim that individual sources or groups of sources are not reducing emissions at the rate associated with optimizing catalytic controls. MD Br. 28-31; Envtl. Br. 15-21; DE Br. 28; *see also* NY Br. 47. Petitioners' focus is too narrow.

Delaware points to the Homer City and Harrison facilities' emission rates, which were generally low enough to indicate catalytic control operation (i.e., below 0.2 lb/mmBtu) during the 2017 ozone season but indicated that catalytic controls may not have been operational during certain days. DE Br. 27-28; 83 Fed. Reg. at 50,466 (rates below 0.20 lb/mmBtu indicates controls were operational). As EPA explained in the Denial, a facility might have valid operational and engineering reasons to turn off their catalytic controls on individual days, such as to avoid damage to the units or when the facility generates too little energy for the controls to function properly. 83

Fed. Reg. at 50,466-67; *see also* Discussion of Short-term Emission Limits, JA___ at JA[1-2]. Notably, when a facility turns off catalytic controls due to the facility generating less energy, the actual emissions are likely to be lower even though the *rate* is higher. The cap (the statewide assurance levels) used in the CSAPR Update to address overall allowable emissions is agnostic to the rate at which the emissions are generated. It is also a more meaningful way to reduce contributions to downwind ozone.

The remaining parties point to EPA's observation that the average 2017 ozone NO_X emissions from the named sources in the States' petitions was 0.116 lbs/mmBtu.[24] MD Br. 29; Envtl. Br. 16; NY Br. 47 (citing Denial, 83 Fed. Reg. at 50,445). Because this average is higher than the 0.10 lb/mmBtu average used to represent catalytic control optimization at sources not already optimized in calculating the CSAPR Update budgets, Petitioners allege that sources are not currently optimizing their controls. Petitioners take EPA's observation out of context.

As explained in the previous section, *supra* 67-68, the 0.10 lb/mmBtu average was used by EPA in the CSAPR Update to represent catalytic control optimization at sources not already fully optimized. *See* 81 Fed. Reg. at 74,543-44. It was merely a

[24] The number cited by Petitioners is an average for all 41 named units, including those that do not have catalytic controls. *See* 83 Fed. Reg. at 50,445. The average for only the 34 named units that do have catalytic controls was 0.115 lb/mmBtu in the 2017 season. *Id.* at 50,465 Tbl. 1.

calculated average based on the third-best rate that each catalytic control-equipped unit had achieved between 2009 and 2015. *Id.* It is unsurprising that some catalytic control sources or a subgroup of sources would operate at a rate above the average. That is what "average" means. Some units necessarily emit above the calculated average while others emitted at a lower rate. To illustrate the point, the third-lowest historical emission rate was above the 0.10 lb/mmBtu average for all 34 units at issue here:

State	Facility Name/Unit ID	Third-Lowest Ozone Season NO_X Rate, 2009-2015 (lbs/mmBtu)[25]	2016 Ozone Season NO_X Rate (lbs/mmBtu)[26]	2017 Ozone Season NO_X Rate (lbs/mmBtu)
IN	Alcoa Allowance Management/4	0.1377	0.295	0.080
	Clifty Creek/1	0.1869	0.261	0.074
	Clifty Creek/2	0.1895	0.257	0.073
	Clifty Creek/3	0.1889	0.251	0.072
	Gibson/3	0.1376	0.173	0.083
	Gibson/5	0.1299	0.169	0.146
	Petersburg/2	0.1341	0.148	0.084
	Petersburg/3	0.1229	0.190	0.077
KY	East Bend/2	0.1384	0.119	0.107

[25] This data is primarily drawn from Table 6 in Maryland's comment letter. Comment submitted by Ben Grumbles, Secretary, Maryland Department of the Environment (MDE), JA[EPA-HQ-OAR-2018-0295-0068] at JA[25-26] ("MD Comment Letter") (compiled historical rates data). The Conemaugh units identified in Delaware's petitions were added.

[26] The 2016 and 2017 ozone season NO_X rates are drawn from the record document entitled "2015, 2016, 2017, and partial 2018 NO_X Rates for 274 SCR Coal Units." JA[EPA-HQ-OAR-2018-0295-0177].

	Elmer Smith/1	0.3198	0.246	0.095
	Paradise/3	0.1556	0.188	0.223
OH	Killen/2(retired in 2018)[27]	0.1965	0.229	0.264
	Kyger Creek/1	0.1535	0.181	0.060
	Kyger Creek/2	0.1566	0.190	0.060
	Kyger Creek/3	0.1650	0.195	0.063
	Kyger Creek/4	0.1593	0.179	0.064
	Kyger Creek/5	0.1571	0.187	0.064
	W H Zimmer	0.2186	0.199	0.193
PA	Bruce Mansfield/1 (retired in 2019)	0.1221	0.135	0.065
	Cheswick	0.2535	0.394	0.156
	Conemaugh[28]/1	N/A	0.177	0.072
	Conemaugh/2	N/A	0.097	0.074
	Homer City/1	0.1762	0.248	0.176
	Homer City/2	0.2239	0.358	0.179
	Homer City/3	0.1986	0.285	0.115
	Keystone/1	0.1750	0.154	0.085
	Keystone/2	0.1788	0.160	0.070
	Montour/1	0.3092	0.387	0.144
	Montour/2	0.3159	0.378	0.153
WV	Harrison/1	0.1951	0.109	0.105
	Harrison/2	0.2598	0.240	0.087
	Harrison/3	0.2149	0.185	0.072
	Pleasants/1	0.1386	0.186	0.084
	Pleasants/2	0.1279	0.163	0.132

[27] The claims regarding Killen and Bruce Mansfield are moot because those units have now been retired. *See* U.S. Energy Information Administration, Preliminary Monthly Electric Generator Inventory (March 2019), "Retired" tab, *available at* https://www.eia.gov/electricity/data/eia860m/.

[28] Because the catalytic controls at Conemaugh were newly installed in November 2014, they did not have 3 years of emissions data at the time EPA finalized the CSAPR Update and their rates did not inform the 0.10 lb/mmBtu average rate.

Keeping in mind that this chart represents only 34 units out of the 274 catalytic control-equipped units subject to the trading program, *see* 83 Fed. Reg. at 50,466, by definition EPA would expect some or all of these units to emit above the average.[29] Notably, however, most of these units achieved rates in 2017 better than the 0.10lb.mm/Btu average and even better than their third-best rate (used to calculate the fleet-wide average), not worse as Petitioners contend. This means those units even *exceeded* the expectations in the CSAPR Update.

Moreover, the nature of a trading program is that a subset of sources—indeed all sources—can emit above the average *rate* used to set the budget even while the region as a whole stays under the cap in terms of total emissions. Even if some units are not optimizing operation of their catalytic controls, the reductions in the overall atmospheric contributions are still achieved in the region, regardless of whether the unit reduces total emissions through generating less energy or purchases allowances from someone else.

Nothing in the States' § 7426(b) petitions showed that any individuals units' operation above the 0.10 lb/mmBtu average has a meaningful impact downwind or contradicts EPA's conclusion that the CSAPR Update is expected to result—and is

[29] The chart in Environmental Petitioners' brief also demonstrates this: even using their data, the best-ever emission rate for several units was above 0.10 lb/mmBtu. *See* Envtl. Br. 19.

resulting—in the same reductions that would be required if the named sources all emitted at the rate of 0.10 lb/mmBtu.

The Court should affirm EPA's conclusion that the States did not meet their burdens to show that the named sources would significantly contribute to downwind nonattainment absent source-specific emission limits representing the same catalytic control optimization already implemented in the CSAPR Update.

C. EPA reasonably determined it was not cost-effective to require additional control strategies at the two named sources with non-catalytic controls.

Maryland also challenges EPA's conclusion that Maryland did not prove that the non-catalytic control sources "significantly contribute" to downwind nonattainment absent emission limits representing optimization of non-catalytic controls.[30] MD Br. 31-33; *see also* Amicus Br. 6-14.

Four units at two of the named sources at issue are equipped with non-catalytic rather than catalytic controls. 83 Fed. Reg. at 50,469. Maryland's § 7426(b) petition asked EPA to impose emission limits that would require these sources to operate their non-catalytic control systems during the ozone season. *Id.* at 50,464.

[30] In the Close-Out Rule, EPA reaffirmed its 2016 conclusion that optimizing existing non-catalytic controls was insufficiently cost-effective and that the emissions that could be eliminated therefore did not constitute "significant contribution." *See* 83 Fed. Reg. at 65,893-94. That decision is being challenged in *New York v. EPA*. No. 19-1019, EPA Br., Doc. No. 1792965, at 46-50.

EPA found that, in the CSAPR Update, it had already considered the same controls to determine whether emission reductions associated with their operation and optimization are part of upwind Good Neighbor obligations. *See Id.* at 50,469. There, after considering the cost of optimizing non-catalytic controls, emission reductions achievable, and associated anticipated downwind air quality improvements, EPA concluded that optimizing existing non-catalytic controls (at $3,400 per marginal ton of NO_X reduced) would achieve substantially fewer reductions than other controls and result in only minimal air quality improvement. 81 Fed. Reg. at 74,550. This, EPA found to be insufficiently cost-effective for addressing Good Neighbor obligations under the 2008 ozone NAAQS, particularly as compared to other available control strategies. *Id.* Notably, although EPA noted it would need to conduct an additional analysis in a later rulemaking to assess control strategies not already assessed in the CSAPR Update, EPA did not suggest that it intended to reassess control strategies such as non-catalytic controls that were found to be insufficiently cost-effective. *Id.* at 74,520-21.

Having already considered these same controls, EPA here reviewed the specific emission levels of the named sources to determine if anything had changed. 83 Fed. Reg. at 50,469-70. EPA found that these two facilities "are relatively small in size and have low emission levels, indicating that the units have a relatively limited ability to substantially reduce NO_X emissions and, thereby, improve air quality downwind." *Id.* at 50,470. EPA therefore concluded that Maryland provided no basis for EPA to

change its earlier finding that the emissions that could be reduced through non-catalytic control optimization do not significantly contribute to or interfere with downwind nonattainment of the 2008 standard. *Id.* While EPA's original determination was in the context of the regional rule, it was appropriate for EPA to rely on it here because EPA was presented with the same question. *See* 83 Fed. Reg. at 50,454-55 (same Step Three analysis applies under § 7426(b) because downwind air quality problems result from the cumulative impacts of upwind contributions); *Appalachian Power*, 249 F.3d at 1048-49 (EPA may incorporate previous regional cost-threshold determination into a § 7426(b) finding).

Maryland challenges this conclusion based on a number of incorrect premises. *See* MD Br. 31-33. First, EPA's finding was not, as Maryland suggests, MD Br. 31, based solely on EPA's finding in the CSAPR Update. Although in addressing the States' petitions, EPA found that it had already addressed this very issue in the CSAPR Update, EPA also reviewed the specific sources at issue. 83 Fed. Reg. at 50,469-70. Only after this analysis did EPA conclude that Maryland did not satisfy Step Three of EPA's framework. *Id.* at 50,470.

Second, Maryland incorrectly implies that EPA made no previous finding about the cost-effectiveness of non-catalytic controls. *See* MD Br. 31-32 (arguing the CSAPR Update did not conclude that only controls below the $1,400 cost threshold were cost-effective). EPA did make such a finding in the CSAPR Update. After determining that non-catalytic controls cost $3,400 per ton of NO_X removed, EPA

concluded that "more stringent emission budget levels (e.g., emission budgets reflecting $3,400 per ton or greater) yielded fewer additional emission reductions and fewer air quality improvements relative to the increase in control costs." 81 Fed. Reg. at 74,550. In other words, non-catalytic control optimization is less cost-effective because such controls cost more relative to their limited benefits. Other controls used to address the same alleged Good Neighbor obligations achieve far greater results for less than half the cost per ton. *See also* 83 Fed. Reg. at 50,469. Amicus is simply wrong to suggest this analysis was not comparative. *See* Amicus Br. 6-11. And Maryland presented no basis to dispute this comparative analysis, nor did Maryland propose any controls not previously found to be insufficient.

Third, Maryland's argument that non-catalytic controls are nonetheless cost-effective because they are widely used to satisfy the Act's "reasonably available control technology" requirements ignores an important statutory distinction. MD Br. 32. Under the Act, reasonably available control technology is mandatory for sources located in certain nonattainment areas. *E.g.*, 42 U.S.C. § 7511a(b)(2). Determinations about what constitute reasonably available control technology "evaluat[es] whether implementation of certain controls within a nonattainment area will be effective at addressing a local air quality problem relative to the cost of such controls." 83 Fed. Reg. at 50,470. What controls are required *locally* in nonattainment areas is a different question from whether emissions from upwind states, which travel longer distances and have different downwind impacts, "significantly contribute" to downwind

nonattainment under the Good Neighbor Provision. Moreover, Maryland seems to argue that just because these controls *can* limit NO_X, they should do so. *See* MD Br. 32. This is simply not the standard for § 7426(b) petitions or the Good Neighbor Provision.

Fourth, the source-specific data that Maryland claims show that the named sources can operate non-catalytic controls efficiently, MD Br. 33 (citing Table 8 from its comment letter), is more than 10 years old. MD Comment Letter, JA___ at JA[25] (best available rates taken from 2005 from 2009), JA[29-30] Tbl. 8. EPA reasonably found those outdated numbers to be insufficiently persuasive. And regardless, the cost per ton of operating non-catalytic controls, combined with EPA's determination that few emission reductions could be achieved from these small sources, render EPA's Step Three conclusion reasonable. *See* 83 Fed. Reg. at 50,470.

The additional arguments raised in the Amicus Brief are entirely inconsistent with this Court's precedent and EPA's decision. The position that EPA may not use cost as a basis to categorize emissions as significant as opposed to insignificant, Amicus Br. 6-11, is foreclosed by precedent. EPA may reasonably consider the cost-effectiveness of controls to determine which upwind contributions are "significant." *Michigan v. EPA*, 213 F.3d 663 (upholding the NO_X SIP Call's uniform cost threshold); *EME Homer City*, 572 U.S. at 512-24 (upholding CSAPR's cost-threshold approach).

Finally, the Amicus suggestion that EPA should consider all relief relative to the goal of achieving attainment, Amicus Br. 11-14, makes little sense. EPA found in the Close-Out Rule that *all* downwind areas in the CSAPR Update region, including Maryland, would be in attainment by 2023, without any additional controls. 83 Fed. Reg. at 65,917. If Maryland will attain and maintain the 2008 ozone NAAQS without further upwind controls, then there is no problem that needs to be addressed by additional upwind controls.

D. Brunner Island is already using natural gas, which is the relief Delaware seeks.

Delaware challenges EPA's Step Three analysis of Delaware's proposed emission control strategy for the Brunner Island facility. DE Br. 29-31; NY Br. 48-49. The Court need not reach this claim if it concludes that EPA reasonably rejected Delaware's petitions at Step One. *See supra*, 27-51. Nevertheless, EPA's analysis was supported by the record.

In its § 7426(b) petition, Delaware requested that EPA implement a control strategy for Brunner Island requiring it to operate by burning natural gas instead of coal. 83 Fed. Reg. at 50,470; *see also* Delaware Brunner Island Petition, JA___ at JA[20-22] (submitted July 7, 2016). EPA found that in May 2017, several months after Delaware's petition, Brunner Island completed construction of a natural gas pipeline connection and began burning natural gas. 83 Fed. Reg. at 50,470. Based on its analysis of market drivers, fuel prices, and projections from the natural gas and

power sectors, EPA determined that Brunner Island would likely continue to burn natural gas. *Id.* This is partly because the facility is participating in the CSAPR Update allowance trading program and is able to sell emission allowances due to its own substantial emission reductions. *Id.* at 50,470-71. EPA also considered Brunner Island's business strategy, noting that the capital investment in a natural gas pipeline was part of a broad strategy to take advantage of low natural gas prices, which EPA's market analysis indicates will continue. *Id.* at 50,471. The record also shows that, under a settlement reached with the Sierra Club, Brunner Island entered into a court-approved consent decree requiring it to cease burning coal entirely by specified dates. *Id.* n.79; *see also* Press Release, JA[EPA-HQ-OAR-2018-0295-0002]. In light of the facility's recent natural gas operations and indications this would continue, EPA reasonably concluded the facility "has already implemented the emission reductions consistent with what Delaware" requested. 83 Fed. Reg. at 50,471.

Delaware objects that only an enforceable regulatory requirement can constitute an acceptable emission reduction strategy. DE Br. 31. Delaware is conflating the strategies available once EPA has made a finding under § 7426(b), *see* 42 U.S.C. § 7426(b)-(c), with a state's obligation to provide a factual basis for a finding in the first place. Delaware's assertion of the need for any additional reduction strategy was not supported because all the record evidence indicates that Brunner Island is primarily burning natural gas and will continue to do so. Delaware takes issue with EPA's consideration of market forces, while providing no reason why EPA cannot

consider all of the known conditions affecting the facility, and fails to grapple with other information in the record, such as Brunner Island's consent decree. *Id.* And Delaware provides no information suggesting a return to coal is likely other than a hypothetical decision by Brunner Island that would be inconsistent with the business and legal strategy documented in the record. Petitioner-Intervenors' suggestion that EPA was obligated to find Brunner Island "emits or would emit" in violation of the Good Neighbor Provision simply because the use of natural gas was not enforceable under an EPA regulation, NY Br. 48-49, is equally unsupported. On this record, EPA reasonably concluded that Brunner Island does not "emit[]" and "would [not] emit" in a manner that violates the Good Neighbor Provision. *See* 42 U.S.C. § 7426(b).

III. EPA Reasonably Considered Maryland's Petition Only with Respect to the Ozone Standard Maryland Identified in its Petition.

Lastly, Maryland's claim that EPA acted arbitrarily and capriciously by not assessing Maryland's § 7426 petition under an ozone NAAQS not identified in Maryland's own petition is completely meritless. *See* MD Br. 33-35.

Maryland's petition specifically requested findings under the 2008 ozone NAAQS. Maryland Petition, JA___ at JA[1] (entitled "Petition to [EPA] Pursuant to Section [7426] of the Clean Air Act for Abatement of Emissions from 36 Coal-Fired Electric Generating Units at 19 Plants in Five States that Significantly Contribute to Nonattainment of, and Interfere with Maintenance of, the 2008 Ozone [NAAQS] in the State of Maryland."). The content of the petition requests findings under the 2008

ozone NAAQS. *E.g.*, *id.* at JA[1]. The petition mentions the 2015 ozone NAAQS once in passing, *id.* at JA[9], and once in a comment that the proposed remedy addressing the 2008 ozone NAAQS would provide an additional benefit of assisting Maryland attain the 2015 ozone NAAQS, *id.* at JA[13-15]. Nothing about this language suggests Maryland was seeking a finding under the 2015 ozone NAAQS, and Maryland recognized as much. *See* MD Comment Letter, JA___ at JA[48] ("Maryland submitted its petition specific to the 2008 standard"). Therefore, EPA did what Maryland asked it to do: evaluated the petition under the 2008 ozone NAAQS. *See* 83 Fed. Reg. at 50,463.

Nothing in the petition requests that EPA make an affirmative finding under the later standard. While the statute indeed requires no magic words, *see* MD Br. 35, neither does it require EPA to read Maryland's mind. EPA was entitled to rely on Maryland's representation in its petition that it was seeking a finding under the 2008 ozone NAAQS. It is no excuse that Maryland believes a request under the 2015 standard would have been premature because it did not have an attainment designation at the time of the petition. *See* MD Br. 34. Maryland could have amended its petition or filed a second petition once it believed it had enough information but did not do so.[31]

[31] Maryland asserts in a footnote that it would not have been a logical outgrowth problem for EPA to finalize a finding under the 2015 ozone NAAQS. *See* MD Br. 35 n.11. Maryland's vague reference to EPA's proposal does not acknowledge that

Cont.

CONCLUSION

For these reasons, the petitions should be denied.

Respectfully submitted,

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nothing in the Proposed Denial proposed a finding on Maryland's petition under the 2015 ozone NAAQS. *See* 83 Fed. Reg. 26,666 (June 8, 2018). The Court need not decide whether EPA hypothetically could have finalized such a finding without another proposal because EPA reasonably made a finding only under the standard identified in Maryland's petition.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the word limitation in this Court's Order of February 28, 2019 because it contains 20,855 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Circuit Handbook of Practice and Internal Procedures Section IX.A.7, according to the count of Microsoft Word.

DATED: June 26, 2019

s/ *Samara M. Spence*
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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, I electronically filed the above brief using the Court's CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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STATUTORY AND REGULATORY ADDENDUM

ADDENDUM CONTENTS

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

42 U.S.C.A. § 7502

§ 7502. Nonattainment plan provisions in general

Currentness

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if--

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date

applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 172, as added Pub.L. 95-95, Title I, § 129(b), Aug. 7, 1977, 91 Stat. 746; amended Pub.L. 95-190, § 14(a)(55), (56), Nov. 16, 1977, 91 Stat. 1402; Pub.L. 101-549, Title I, § 102(b), Nov. 15, 1990, 104 Stat. 2412.)

Notes of Decisions (51)

42 U.S.C.A. § 7502, 42 USCA § 7502
Current through P.L. 116-21.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart AA. Provisions for Implementation of the 2008 Ozone National Ambient Air Quality Standards (Refs & Annos)

40 C.F.R. § 51.1118

§ 51.1118 Suspension of SIP planning requirements in nonattainment areas that have air quality data that meet an ozone NAAQS.

Effective: April 6, 2015
Currentness

Upon a determination by EPA that an area designated nonattainment for the 2008 ozone NAAQS, or for any prior ozone NAAQS, has attained the relevant standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures for failure to attain or make reasonable progress and other planning SIPs related to attainment of the 2008 ozone NAAQS, or for any prior NAAQS for which the determination has been made, shall be suspended until such time as: The area is redesignated to attainment for that NAAQS or a redesignation substitute is approved as appropriate, at which time the requirements no longer apply; or EPA determines that the area has violated that NAAQS, at which time the area is again required to submit such plans.

Credits
[80 FR 12314, 12317, March 6, 2015]

AUTHORITY: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Current through June 20, 2019; 84 FR 29027.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart CC. Provisions for Implementation of the 2015 Ozone National Ambient Air Quality Standards (Refs & Annos)

40 C.F.R. § 51.1316

§ 51.1316 Requirements for an Ozone Transport Region.

Effective: February 4, 2019
Currentness

(a) In general. CAA sections 176A and 184 apply for purposes of the 2015 ozone NAAQS.

(b) RACT requirements for certain portions of an ozone transport region.

(1) The state shall submit a SIP revision that meets the RACT requirements of CAA section 184(b) for all portions of the state located in an ozone transport region.

(2) SIP submission deadline.

(i) For a RACT SIP required pursuant to initial nonattainment area designations, the state shall submit the RACT SIP revision no later than 24 months after the effective date of designation for a specific ozone NAAQS.

(ii) For a RACT SIP required pursuant to reclassification, the SIP revision deadline is either 24 months from the effective date of reclassification, or the deadline established by the Administrator in the reclassification action.

(iii) For a RACT SIP required pursuant to the issuance of a new CTG under CAA section 183, the SIP revision deadline is either 24 months from the date of CTG issuance, or the deadline established by the Administrator in the action issuing the CTG.

(3) RACT implementation deadline.

(i) For RACT required pursuant to initial nonattainment area designations, the state shall provide for implementation of RACT as expeditiously as practicable, but no later than January 1 of the fifth year after the effective date of designation.

(ii) For RACT required pursuant to reclassification, the state shall provide for implementation of such RACT as expeditiously as practicable, but no later than the start of the attainment year ozone season associated with the area's new attainment deadline, or January 1 of the third year after the associated SIP revision submittal deadline, whichever is earlier; or the deadline established by the Administrator in the final action issuing the area reclassification.

(iii) For RACT required pursuant to issuance of a new CTG under CAA section 183, the state shall provide for implementation of such RACT as expeditiously as practicable, but either no later than January 1 of the third year after the associated SIP submission deadline or the deadline established by the Administrator in the final action issuing the CTG.

Credits
[83 FR 63033, Dec. 6, 2018]

AUTHORITY: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Current through June 20, 2019; 84 FR 29027.

End of Document