

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 20, 2019

No. 19-1019 and consolidated cases

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

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Petitions for Review of Final Action of
the United States Environmental Protection Agency**

**SUPPLEMENTAL BRIEF OF
INDUSTRY RESPONDENT-INTERVENORS**

Rae Cronmiller
Environmental Counsel
National Rural Electric Cooperative
Association
4301 Wilson Blvd.
Arlington, VA 22203
(703) 907-5791
rae.cronmiller@nreca.coop

Robert J. Meyers
Richard Lehfeldt
Elizabeth B. Dawson
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2967
rmeyers@crowell.com

*Counsel for Respondent-Intervenor
National Rural Electric Cooperative Association*

*Counsel for Respondent-Intervenors
Homer City Generation, L.P. and
National Rural Electric Cooperative Association*

Dated: September 18, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

Petitioners: State of New York, State of Connecticut, State of Delaware, State of Maryland, Commonwealth of Massachusetts, State of New Jersey, and City of New York; Downwinders at Risk, Appalachian Mountain Club, Sierra Club, and Chesapeake Bay Foundation, Inc.; and Texas Environmental Justice Advocacy Services, Air Alliance Houston, and Clean Wisconsin.

Respondents: United States Environmental Protection Agency (“EPA”) and Andrew Wheeler, in his official capacity as Administrator of EPA.

Respondent-Intervenors: State of Texas and Texas Commission on Environmental Quality; Homer City Generation, L.P.; and National Rural Electric Cooperative Association (“NRECA”).*

Amici Curiae: The Institute for Policy Integrity at New York University School of Law is an *amicus curiae* in support of Petitioners. The Commonwealth of Kentucky, Energy and Environment Cabinet is an *amicus curiae* in support of Respondents.

B. Ruling Under Review

The agency action under review is a final rule entitled “Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard,” 83 Fed. Reg. 65,878 (Dec. 21, 2018).

* This Court granted NRECA’s motion for leave to intervene on August 13, 2019 (Doc. 1801994).

C. Related Cases

State of Wisconsin, et al. v. EPA, No. 16-1406 and consolidated cases, 2019 WL 4383259 (D.C. Cir. Sept. 13, 2019), involves some issues that are in certain respects relevant to issues in the present consolidated cases.

RULE 26.1 DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Industry Respondent-Intervenors make the following statements:

Homer City Generation, L.P. is a subsidiary of HCG GP, LLC and Homer City Holdings LLC. No publicly held company has a 10% or greater interest in Homer City Generation, L.P.

NRECA has no parent corporation. No publicly held corporation owns any portion of NRECA, and it is not a subsidiary or affiliate of any publicly owned corporation.

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
RULE 26.1 DISCLOSURE STATEMENTS	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v
GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS	vi
INTRODUCTION	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. The Court’s Ruling in <i>Wisconsin</i> Concerning the Relationship Between Downwind States’ Attainment Deadlines and Upwind States’ Obligations Raises Questions Regarding EPA’s Selection of an Analytic Year.	3
II. Other Rulings in <i>Wisconsin</i> Reinforce the Conclusion that this Court Should Uphold EPA’s Factual, Scientific, and Technical Conclusions in the Close-Out Rule.....	4
III. Judicial Review of the Close-Out Rule Is Premature Because <i>Wisconsin</i> May Be Subject to Further Proceedings and Because EPA Should First Be Given an Opportunity to Consider <i>Wisconsin</i> ’s Implications for the Close-Out Rule.....	6
CONCLUSION	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n</i> , 988 F.2d 146 (D.C. Cir. 1993)	7
<i>North Carolina v. EPA</i> , 531 F.3d 896 (D.C. Cir. 2008)	3
<i>State of Wisconsin, et al. v. EPA</i> , No. 16-1406, 2019 WL 4383259 (D.C. Cir. Sept. 13, 2019)	1, 2, 3, 4, 5, 6, 7
Federal Statutes	
42 U.S.C. § 7410(a)(2)(D)(i)(I)	1
42 U.S.C. § 7426(b).....	8
Federal Register Notices	
81 Fed. Reg. 74,504 (Oct. 26, 2016).....	1, 4, 5, 7
83 Fed. Reg. 65,878 (Dec. 21, 2018)	1, 7

GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

Act	Clean Air Act
Agency	United States Environmental Protection Agency
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	Section 110(a)(2)(D)(i)(I) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I)
Homer City	Homer City Generation, L.P.
JA	Joint Appendix
Update Rule	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)

INTRODUCTION

On September 13, 2019, this Court issued a per curiam opinion granting in part and denying in part petitions for review of the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (“Update Rule”), JA073-219. *State of Wisconsin, et al. v. EPA*, No. 16-1406 (consolidated) (“*Wisconsin*”), 2019 WL 4383259 (D.C. Cir. Sept. 13, 2019). The Update Rule established emission limits to address upwind states’ obligations to downwind States under the “Good Neighbor Provision” of the Clean Air Act (“the Act”).¹ The Update Rule did not definitively determine that these emission limits would fully address upwind states’ Good Neighbor obligations. EPA accomplished that task in the rule under review here, concluding that the Update Rule fully satisfies upwind states’ obligations. 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”), JA026-072.

The same day the Court ruled in *Wisconsin*, this Court issued an Order in these consolidated petitions for review of the Close-Out Rule directing the parties to concurrently file supplemental briefs and to be prepared to discuss at oral argument

¹ Clean Air Act § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I).

the effect of the Court's opinion in *Wisconsin* "on the related issues in the instant cases, including the discussion at slip op. at 26-27" (Doc. 1806402).

Industry Respondent-Intervenors respectfully submit this brief in compliance with the Court's Order.

SUMMARY OF ARGUMENT

This Court's decision in *Wisconsin* does not resolve the petitions for review of the Close-Out Rule, but determining its precise effect may require consideration by EPA prior to this Court's review. While the *Wisconsin* Court ruled against EPA's statutory interpretation in one respect, the Court also upheld a wide range of EPA's substantive conclusions regarding such issues as emission rate assumptions, use of banked emission allowances, emission control costs, modeling, and emission control installation timeframes.

Before this Court reaches any conclusions about the effects of *Wisconsin* on the Close-Out Rule, EPA and other parties in that litigation should have the opportunity, in the first instance, to determine whether to seek panel or en banc rehearing of that judgment. If rehearing is sought, this Court should hold its review of the Close-Out Rule in abeyance pending disposition of the rehearing petition or petitions. Absent a timely rehearing request or a rehearing grant, the Court should remand the record of the Close-Out Rule so EPA can determine whether it comports or conflicts with the Court's rulings in *Wisconsin* and make any necessary adjustments. The Court would thus retain jurisdiction to allow prompt review of the remand result.

ARGUMENT

I. The Court’s Ruling in *Wisconsin* Concerning the Relationship Between Downwind States’ Attainment Deadlines and Upwind States’ Obligations Raises Questions Regarding EPA’s Selection of an Analytic Year.

In *Wisconsin*, the Court ruled that “the Good Neighbor Provision calls for elimination of upwind States’ significant contributions on par with the relevant downwind attainment deadlines.” 2019 WL at *6, Slip Op. at 16 (citing *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.) (per curiam), *modified in other respects on reb’g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam)). However, the Court also explained that EPA “retains some flexibility in administering the Good Neighbor Provision.” 2019 WL at *11, Slip Op. at 26. Specifically, the Court noted the Act provides EPA “a measure of latitude in defining which upwind contribution amounts count as significant and thus must be abated,” that “the Supreme Court has indicated that EPA can take into account, among other things, the magnitude of upwind States contributions and the cost associated with eliminating them,” and that EPA retains authority, “in certain circumstances,” to “grant one-year extensions of the nonattainment deadlines to downwind states.” *Id.* (internal quotation marks, alterations, and citations omitted) (noting also that such extensions are granted “fairly commonly”). Indeed, the Court expressly did not “foreclose the possibility” that the Act’s requirement for consistency between the Good Neighbor Provision and the remainder of Title I could “allow some deviation between the upwind and downwind deadlines” if any such divergence

is “rooted in Title I’s framework . . . and . . . provide[s] a sufficient level of protection to downwind States.” 2019 WL at *11, Slip Op. at 26-27 (internal quotation marks and citations omitted).

In the Close-Out Rule, EPA determined it was not feasible for additional emission controls—beyond those required by the Update Rule—to be implemented to further reduce upwind states’ emissions by the last full ozone season (*i.e.*, the 2020 ozone season) before the 2021 attainment deadline for areas in downwind states. 83 Fed. Reg. at 65,908, JA056. EPA determined that such controls could not feasibly be implemented before 2023, two years after that attainment deadline. *Id.* EPA therefore selected 2023 as its “analytic year” for purposes of its assessment in the Close-Out Rule. Given the *Wisconsin* Court’s holdings regarding temporal deviation but also EPA’s administrative flexibility, EPA should, in the first instance, be able to evaluate whether, and to what extent, the Close-Out Rule’s selection of an analytic year remains valid after *Wisconsin*. Industry Respondent-Intervenors would not presume to anticipate the scope of EPA’s review or any resulting conclusions.

II. Other Rulings in Wisconsin Reinforce the Conclusion that this Court Should Uphold EPA’s Factual, Scientific, and Technical Conclusions in the Close-Out Rule.

Although the *Wisconsin* Court agreed with petitioners’ challenge to EPA’s interpretation of the Good Neighbor Provision, the Court rejected every other challenge to the Update Rule, including challenges to EPA’s factual, scientific, and

technical conclusions. Several of these issues parallel issues petitioners have raised in challenging the Close-Out Rule.

For example, in *Wisconsin* the Court concluded that EPA adequately explained the emissions rate level it chose to assume for turning on idled selective catalytic reduction controls, rejecting environmental groups' and the State of Delaware's arguments that the emission-rate assumption was unreasonably high. 2019 WL at *12, Slip Op. at 27-28. Challengers to the Close-Out Rule take issue with EPA's decision not to revisit that conclusion. *E.g.*, Environmental Pet. Opening Br. 32. Additionally, the *Wisconsin* Court deferred to EPA's conclusions concerning, for instance, the appropriate cost-per-ton threshold for controls on sources of emissions, 2019 WL at *14, Slip Op. at 31-32, air quality modeling choices, 2019 WL at *18, Slip Op. at 41-43, and the time it would take to install certain controls, 2019 WL at *20, Slip Op. at 46. Petitioners levied similar arguments against the Close-Out Rule. *E.g.*, State Pet. Opening Br. 30-45 ; *see also* Homer City Comments 10, JA445 (explaining process of installing controls).

If the Court reaches the merits of the Close-Out Rule (which, for the reasons below, we suggest it should not at this time), the Court should, for reasons presented in the record and in EPA and Respondent-Intervenors' briefs, affirm EPA's substantive conclusions in that rule as it did in the Update Rule.

III. Judicial Review of the Close-Out Rule Is Premature Because *Wisconsin* May Be Subject to Further Proceedings and Because EPA Should First Be Given an Opportunity to Consider *Wisconsin*'s Implications for the Close-Out Rule.

The Court ordered the parties to file supplemental briefs concurrently. As such, Industry Respondent-Intervenors have not had the benefit of reviewing and considering EPA's or Petitioners' responses to the rulings in *Wisconsin*. While supporting EPA's determinations in the Close-Out Rule, Industry Respondent-Intervenors understand that EPA may determine it should revisit aspects of that rule in light of *Wisconsin*.

EPA (and other parties in *Wisconsin*) may consider seeking rehearing of *Wisconsin*. The deadline for EPA to seek rehearing is 45 days after this Court's judgment in *Wisconsin*, well after oral argument will have occurred in this case. Fed. R. App. P. 35, 40(a)(1); D.C. Cir. R. 35(a), 40. EPA may also consider moving for a voluntary remand of the Close-Out Rule to address potential effects of the decision. Accordingly, Industry Respondent-Intervenors respectfully suggest that this Court refrain from issuing any decisions on the petitions for review of the Close-Out Rule until at least the time to request rehearing in *Wisconsin* passes. Regardless of the path *Wisconsin* takes, EPA should be allowed time to evaluate how to proceed in light of that decision.

Should the Court determine that more expeditious disposition of the Close-Out Rule petitions is necessary, Industry Respondent-Intervenors suggest the Court

remand the record to EPA but retain jurisdiction, so EPA may in the first instance address any effects of *Wisconsin* on the Close-Out Rule, and then return to the Court for any further briefing the Court may require. D.C. Cir. R. 41(b); *see* D.C. Cir. Handbook of Practice and Internal Procedures at 35 (Dec. 1, 2018).

If the Court decides that *Wisconsin* is dispositive of the issues raised here and that the petitions for review of the Close-Out Rule should be granted, then Industry Respondent-Intervenors submit that the same remedy the Court ordered in *Wisconsin* should obtain here; *i.e.*, remand without vacatur. 2019 WL at *26. Slip Op. at 59-60. “[T]here is at least a serious possibility that [EPA] will be able to substantiate its decision on remand” given EPA’s findings and record in the Close-Out Rule. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993).

The Update Rule has achieved large reductions in upwind states’ ozone-forming emissions. EPA Br. 9-10 (explaining that the Update Rule “has proven highly effective at reducing [nitrogen oxide] emissions,” reducing such emissions from upwind states by 21 percent in its first year of implementation) (citing 83 Fed. Reg. at 65,893, JA041). Indeed, Homer City, like many other facilities, has made numerous investments, at an extremely high cost, that have limited nitrogen oxide (and sulfur dioxide) emissions. Industry Respondent-Intervenors’ Br. 26. As such, any assumption that EPA will be required to alter its substantive conclusions regarding the necessity of any additional emission controls under either the Update Rule or the Close-Out Rule is unwarranted.

Maryland and Delaware claim the Update Rule's emission reductions have not been enough, and have petitioned EPA under Clean Air Act section 126(b), 42 U.S.C. § 7426(b), to determine that numerous electric generating units, including Homer City's, significantly contribute to nonattainment in those States, and thus require *even more* controls than Homer City and others have already implemented. Homer City Comments 1, JA436. Vacatur of the Close-Out Rule would introduce unwarranted uncertainty regarding EPA's denial of those petitions. *See* State Pet. Opening Br. 17.

CONCLUSION

For the foregoing reasons, the Court should defer resolution of the petitions for review of the Close-Out Rule, pending additional proceedings in or related to *Wisconsin*.

Respectfully submitted,

/s/ Robert J. Meyers

Robert J. Meyers

Richard Lehfeldt

Elizabeth B. Dawson

Crowell & Moring LLP

1001 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2595

(202) 624-2967

rmeyers@crowell.com

Counsel for Respondent-Intervenors

Homer City Generation, L.P. and

National Rural Electric Cooperative Association

Rae Cronmiller

Environmental Counsel

National Rural Electric Cooperative

Association
4301 Wilson Blvd.
Arlington, VA 22203
(703) 907-5791
rae.cronmiller@nreca.coop

*Counsel for Respondent-Intervenor
National Rural Electric Cooperative Association*

Dated: September 18, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order requesting supplemental briefing because it contains 1,765 words. This brief also complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Word 2010 in 14-point proportionally spaced Garamond typeface.

/s/ Robert J. Meyers

Robert J. Meyers

Dated: September 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2019, the foregoing Supplemental Brief of Industry Respondent-Intervenors was electronically filed and hand delivered to the Clerk of the United States Court of Appeals for the District of Columbia Circuit, and served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Robert J. Meyers

Robert J. Meyers