ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1406 (and consolidated cases)

STATE OF WISCONSIN, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and E. SCOTT PRUITT, Administrator, United States Environmental Protection Agency,
Respondents.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

PROOF REPLY BRIEF OF PETITIONER CONSERVATION GROUPS AND PETITIONER STATE OF DELAWARE

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

2016 Transport Rule	81 Fed. Reg. 74,504 (Oct. 26, 2016)
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
ppb	parts per billion
TSD	Technical Support Document

STATUTES AND REGULATIONS

One newly cited statutory provision appears in the addendum to this brief.

SUMMARY OF ARGUMENT

The Environmental Protection Agency ("EPA") does not dispute that the 2016 Transport Rule, 81 Fed. Reg. 74,504 (Oct. 26, 2016), fails to eliminate ozone precursor emissions that significantly contribute to downwind nonattainment of the 2008 ozone standard and interfere with maintenance of the standard. Nor does EPA dispute that the Clean Air Act requires the elimination of those emissions. EPA's defense is that the agency need not comply with the attainment deadlines Congress established in 42 U.S.C. §7511(a)(1), even though EPA concedes it must comply with that provision's requirement to eliminate the offending emissions "as expeditiously as practicable." EPA's flouting of the statutory deadlines is irreconcilable with the language of the Act and binding court precedent.

Because the Clean Air Act's attainment deadlines leave no room for claims of technical or economic infeasibility, EPA's rejection of available emission-reduction measures was unlawful. Further, despite EPA's admission that it must require reductions as expeditiously as practicable, EPA's brief confirms that its decision not to require additional emission reductions was motivated by the agency's policy preferences, not the limits of practicability, and that EPA's reasoning was arbitrary and capricious.

EPA's brief also confirms that EPA acted unlawfully and arbitrarily by failing to craft a remedy consistent with Delaware's marginal-area deadline or tie the air-quality analysis to air quality at the time that designations were made.

ARGUMENT

I. EPA'S FAILURE TO PROHIBIT TRANSPORT EMISSIONS THAT SIGNIFICANTLY CONTRIBUTE TO NONATTAINMENT OR INTERFERE WITH MAINTENANCE IS UNLAWFUL AND ARBITRARY.

A. EPA's Lawyers' Claim that There is No Firm Deadline for Good Neighbor Emission Reductions is Foreclosed by the Clean Air Act and Binding Precedent.

Although EPA concedes that its Good Neighbor plans must comply with §7511(a)(1)'s requirement that signficant contributions and interference with maintenance be eliminated "as expeditiously as practicable," EPA's lawyers claim that the agency need only consider the Clean Air Act's fixed attainment deadlines, not comply with them. EPA Br. 26, 27-28, 36-37. This reading—in addition to being a post hoc rationale, *infra* 12-13—is barred by the Act's plain language and by binding court precedent.

EPA must prohibit emissions that significantly contribute to downwind nonattainment (or interfere with maintenance). 42 U.S.C. §7410(a)(2)(D)(i). EPA must do so, moreover, "consistent with the provisions of [Title I]" of the Clean Air Act. *Id.*; *accord North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir.), *rev'd on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008). The "provisions of Title I"

include §7511(a)(1), which requires attainment of the 2008 ozone standard "as expeditiously as practicable but not later than" the deadlines in Table 1. 42 U.S.C. §7511(a)(1); *North Carolina*, 531 F.3d at 911-13. Under the plain language of the statute, therefore, EPA's Good Neighbor plan must be "consistent" with the attainment deadlines. "[T]he Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Further, even if there were "any ambiguity" in the language of §7410(a)(2)(D), "an examination of the relevant language in the context of the whole [Clean Air Act] dispels any doubts as to its meaning," *North Carolina*, 531 F.3d at 912, confirming that §7410(a)(2)(D) unambiguously "requires EPA to consider all provisions in Title I … and to formulate a rule that is consistent with them." *Id.* (emphasis added).

EPA's counter-textual reading finds no support in *North Carolina*. Contrary to EPA's claim (Br. 27, 32-33), *North Carolina*'s conclusion that "ignor[ing]" the attainment deadlines violated the Act, 531 F.3d at 912, does not establish the converse, i.e., that merely considering the deadlines would be legally sufficient. To the contrary, *North Carolina* holds expressly that the Clean Air Act requires more: It requires EPA both "to consider all provisions in Title I"—including the attainment deadlines—"and to formulate a rule that is consistent with them." *Id.* (emphasis added). EPA also misreads *North Carolina*'s recitation of the

"expeditiously as practicable" requirement in its discussion of remedy. *See* EPA Br. 31-32 (citing 531 F.3d at 930). That summary discussion does not purport to comprehensively describe EPA's legal obligations on remand, and cannot override the Court's clear holding that EPA is also bound by the attainment deadlines. *North Carolina*, 531 F.3d at 913 ("EPA must determine what level of emissions constitutes an upwind state's significant contribution to a downwind nonattainment area 'consistent with the provisions of [Title I],' which include the deadlines for attainment …, and set the emissions reduction levels accordingly." (quoting §7410(a)(2)(D)(i)) (emphasis added)).[1] In the face of this clear precedent, EPA's lawyers' claim that the Clean Air Act does not "require Good Neighbor emission reductions by a particular deadline," Br. 27, must be rejected.

Nor is there any ambiguity in §7511(a)(1) as to whether attainment is required by fixed deadlines. That section provides "the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1," 42 U.S.C. §7511(a)(1) (emphasis added), and Table 1 then lists the "primary standard attainment date[s]" as 3, 6, 9, 15, or 20 years from

[1] *North Carolina* also forecloses EPA's argument (Br. 27) that the Act is ambiguous as to whether EPA's Good Neighbor plan must comply with the deadlines merely because the answer turns on the interplay of two statutory provisions. In fact, *North Carolina* considered the interplay of the very same provisions at issue here and pronounced their requirements unambiguous. 531 F.3d at 912.

the date of designation. *Id.* These dates, therefore, constitute deadlines for attainment, with which EPA must comply. *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) ("[Section] 7511(a)(1)[] as written sets a deadline without an exception"); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 64-65 (1975) (Congress "required" attainment of air quality standards "within a specified period of time").

Further, that EPA (Br. 26) concedes it is bound by the requirement to eliminate significant contributions "as expeditiously as practicable"—i.e., the first part of the relevant sentence in §7511(a)(1)—confirms that EPA is also bound by the attainment deadlines. The statute simply cannot be read to impose the former requirement without the latter. To the contrary, by its use of the words "but not later than," Congress established the attainment deadlines as an express limit on EPA's discretion to secure reductions "as expeditiously as practicable." In the face of this clear language, EPA's claim of authority to fully implement the Good Neighbor provision "as expeditiously as practicable" and later than the deadlines is an exercise in rewriting the statute, not interpreting it. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("[EPA] may not rewrite clear statutory terms").

Supreme Court precedent confirms that §7511(a)(1) means what it says. In *Union Electric Co. v. EPA*, the Court interpreted §7511(a)(1)'s predecessor, which

provided that air quality standards be met "as expeditiously as practicable but … in no case later than three years." 427 U.S. 246, 249-50 (1976) (quoting Clean Air Act §110(a)(2)(A) (1970)). The Court held that this language imposed a "deadline" whose "clear import" was that attainment of air quality standards was required by the deadline "even if attainment does not appear feasible." *Id*. 259-60. Indeed, the Court held, the addition of the "expeditiously as practicable" language made the provision more stringent, not less, by requiring attainment "in less than three years if possible." *Id*.; *accord id*. 259 ("the conferees strengthened the Senate version" that already imposed a firm "three-year mandate").

EPA's lawyers' claim that EPA need only "consider" the attainment deadlines is incompatible with Congress's choice to impose a deadline. It also deprives the deadlines of independent force and collapses two requirements of §7511(a)(1)—"expeditiously as practicable" and "not later than" the express deadlines—into one. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) ("[an agency] must comply with all of its statutory mandates"); *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) ("The existence of two conditions does not authorize EPA to disregard one of them."). Congress itself rejected a House bill that lacked an attainment deadline, and that instead would have required attainment only "within a reasonable time." *Union Elec.*, 427 U.S. at 258-60 (citation omitted). By attempting to convert the Act's attainment

deadlines into mere suggestions, leaving only the requirement to achieve reductions as expeditiously as practicable, EPA's lawyers seek to undo Congress's choice and enact a weaker approach akin to the 1970 House bill's "reasonable time" standard.

EPA's lawyers' attempt to demote the deadlines to a mere "factor" to be "consider[ed]" (EPA Br. 26, 37) also overlooks that the Act's authors knew full well how to provide for factors to be "consider[ed]," and did so in other provisions. *See, e.g.*, 42 U.S.C. §7502(a)(2)(A) (EPA may grant extension of certain nonattainment areas' deadline, if EPA determines, "considering" specified factors, that extension is appropriate); *id.* §§7502(a)(1)(A), 7511b(f)(1)(B). Congress chose different language here, requiring that significant contributions be prohibited "consistent" with the provisions of Title I, including its deadlines. *See Russello v. United States*, 464 U.S. 16, 23 (1983). *See also United States v. Taylor*, 743 F.3d 876, 878-79 (D.C. Cir. 2014) (statute requiring sentence to be "consistent with" policy statement rendered policy statement "binding" (citation omitted)). *Cf. Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1272-73 (D.C. Cir. 2004) (rejecting interpretation at *Chevron* step two where interpretation effectively converted "consistent with" into "inconsistent with").

In another attempt to create ambiguity where there is none, EPA's lawyers seize on provisions of §7511 that authorize EPA to grant extensions of the

attainment deadlines under certain circumstances. EPA Br. 28 (citing 42 U.S.C. §7511(a)(5)). But EPA does not claim that any of them apply here, and Congress' decision to include specific exemptions undermines rather than supports EPA's attempt to evade compliance. *See Sierra Club*, 294 F.3d at 160 ("We cannot but infer from the presence of these specific exemptions that the absence of any other exemption for the transport of ozone was deliberate … .").[2]

There is likewise no merit to EPA's lawyers' claim that provisions establishing remedies for an area's failure to attain the standard by the deadline—which EPA calls "bump-ups"—somehow negate or diminish the deadline. EPA Br. 28-29. To the contrary, these provisions are in addition to the deadlines: they impose more stringent obligations intended to speed progress toward attainment in the event that a deadline is missed. 42 U.S.C. §7511(b)(2); *see Nat. Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995) ("the attainment deadlines remain intact, complete with additional program obligations in the event of nonattainment").

EPA's lawyers' claim (Br. 30) that the deadlines conflict with other statutory timeframes fares no better. The Act authorizes EPA to provide a shorter deadline

[2] Justice Breyer's *Whitman v. American Trucking Associations* concurrence refutes, rather than supports, EPA's claim (Br. 28-29) that it need not comply with the deadlines. 531 U.S. 457, 493-94 (2001) (holding that, if additional time is needed beyond the extensions expressly provided by statute, "Congress"—not EPA—"can change those statutory limits").

for submission of state plans, 42 U.S.C. §7410(a)(1), and directs EPA to promulgate a federal plan "at any time within 2 years" after finding a state has missed the deadline. *Id.* §7410(c)(1); *see also id*. §7410(k)(1)-(2) (likewise imposing only outside time limits for the finding). "EPA is not obliged to wait two years or postpone its action even a single day." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014).[3]

EPA's lawyers' arguments are not only meritless on their own terms, but would, if accepted, undermine the statutory requirement for attainment of health-based air quality standards by deadlines—a "central" requirement that is the "heart" of the Act. *Union Elec.*, 427 U.S. at 249, 258; *Train*, 421 U.S. at 66-67. But Congress "does not alter the fundamental details of a regulatory scheme"—including the longstanding, core obligation to comply with the attainment deadlines—"in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

[3] Nor did litigation over the prior transport rule make it "impossible" to comply with the deadlines, as EPA's lawyers' suggest in passing (Br. 31). EPA was not required to await the conclusion of that litigation to issue this rule, and could have moved more expeditiously throughout. Nor has EPA shown this rule could not be finalized more quickly than the approximately two years and six months that elapsed from the date of the Supreme Court's decision, on April 29, 2014. *EME Homer City*, 134 S. Ct. 1584. Thus EPA would fall far short of the "heavy burden to demonstrate the existence of an impossibility," even if the agency had made the claim. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 168 (D.C. Cir. 2017) (citation omitted).

B. EPA's Interpretation is Unlawful at *Chevron* Step Two.

If the Court does not reject EPA's lawyers' statutory interpretation at *Chevron* step one, it should do so at *Chevron* step two. First, even if the Act were ambiguous, EPA's lawyers' interpretation "goes beyond the limits of what is ambiguous," *id.* 481, for the same reasons given above in Part I.

Second, EPA's claim that the Act's attainment deadlines are not binding on the agency is unlawful at *Chevron* step two because it will "frustrate the policy that Congress sought to implement," *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (internal quotation marks and citation omitted)—namely, timely attainment of clean air standards.

As multiple Supreme Court decisions recognize, Congress's core objective in enacting the Clean Air Act Amendments of 1970, as well as subsequent amendments, was ensuring timely attainment of clean air standards. *Train*, 421 U.S. at 64 (Congress reacted to "disappointing" progress "by taking a stick to the States"); *Union Elec.*, 427 U.S. at 256 (Clean Air Act is "a drastic remedy to … [the] problem of air pollution"); *Whitman*, 531 U.S. at 484 (deadlines impose "carefully designed restrictions on EPA discretion"). The Act's attainment deadlines are not only "central to the … regulatory scheme," *Sierra Club*, 294 F.3d at 161 (quoting *Union Elec.*, 427 U.S. at 258), they are the very "heart" of the Act. *Train*, 421 U.S. at 66-67.

By empowering EPA to avoid prohibiting interstate emissions that contribute significantly to downwind air quality problems, EPA's lawyers' statutory interpretation will frustrate timely attainment, "forcing" some downwind areas "to make greater reductions" than the Clean Air Act requires, *North Carolina*, 531 F.3d at 912, and may leave other areas unable to attain healthy air quality at all. EPA does not dispute that interstate transport emissions account for a very large percentage of ambient ozone levels in downwind nonattainment areas, or that the reductions in transported pollution secured by the Rule are miniscule in comparison. Pets. Br. 10-11. EPA's modeling shows that pollution transported from a single upwind state accounts for more than 10 parts per billion ("ppb") of ambient ozone in several downwind nonattainment and maintenance areas. *Id.* (reproducing data from 81 Fed. Reg. at 74,537 tbl.V.E-1, JA____).[4] Due in part to this transported pollution, ambient ozone levels in downwind nonattainment areas covered by the Rule are projected to exceed the 2008 ozone standard by an average of 3.1 ppb (1.9 ppb for maintenance areas). 81 Fed. Reg. at 74,520/2, JA____. Yet EPA estimates the Rule will secure an ambient ozone reduction of only 0.28

[4] EPA also says that, in addition to these large (> 10 ppb) contributions from individual upwind states, "much of the ozone nonattainment problem" in downwind states also results from "the collective impacts of relatively small contributions from many upwind states." 81 Fed. Reg. at 74,518/2, JA____ (emphasis added).

ppb in the average downwind nonattainment area covered by the Rule (0.29 ppb in the average maintenance area). Pets. Br. 10-11 (quoting Regulatory Impact Analysis 3-10, JA____); *accord* EPA Br. 108-09.[5]

Thus EPA's approach has led—directly, in this very rule—to the "frustrat[ion]" of Congress's objective. *See Shays*, 528 F.3d at 925. Because Congress did not intend to confer authority on EPA to allow these violations of clean air standards to persist after the attainment deadlines, EPA's lawyers' claim that the agency need only "consider[]" the attainment deadlines, or "tak[e them] into account," Br. 26, 28, should be rejected at *Chevron* step two.

Finally, EPA failed to explain how its approach is consistent with the Clean Air Act and failed to consider statutory requirements in a "detailed and reasoned fashion." *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) (citation omitted). EPA's lawyers' claim that the agency need only consider the attainment deadlines, not comply with them, appears nowhere in the agency

[5] Industry Intervenors, but not EPA, attempt to deny, as mere "conjectur[e]" by Petitioner Conservation Groups, that the Rule falls short of prohibiting all interstate transport emissions that significantly contribute to nonattainment or interfere with maintenance. Br. 3-4, 13-15. Because EPA itself determined that the Rule falls short, Intervenors' argument must be rejected. *BP Energy Co. v. FERC*, 828 F.3d 959, 966-67 (D.C. Cir. 2016). EPA modeled the effects of the rule, *see* 81 Fed. Reg. at 74,551/1, JA____, and concluded that "the emissions reductions required by this rulemaking do not fully resolve most of the air quality problems identified in this rule." *Id.* at 74,536/2, JA____; *accord id*. at 74,520/2, JA____. "EPA expects that a full resolution of upwind transport obligations would require … [further emission] reductions." *Id.* at 74,522/2, JA____.

decision. Nor do EPA's lawyers' new claims about alleged ambiguity in §7410(a)(2)(D) and §7511(a)(1). These post hoc rationalizations should be rejected. *See BP Energy*, 828 F.3d at 966-67. The agency's statutory justification for its decision not to prohibit transport emissions was based on §7410(c)(1), but the requirement to prohibit significant contributions by the attainment deadlines is contained in §7410(a)(2)(D) and §7511(a)(1). Pets. Br. 27. By focusing in its responsive brief on §7410(a)(2)(D) and §7511(a)(1), and abandoning its claim that its approach is justified by §7410(c), EPA effectively concedes that it failed in its obligation to consider, "in a detailed and reasoned fashion," whether its action was consistent with statutory requirements and to provide a reasoned explanation for why it chose its interpretation. *See Rettig*, 744 F.2d at 151 (citation omitted).

C. EPA Unlawfully and Arbitrarily Rejected Available Emission Reductions.

Because EPA is required to comply with the Clean Air Act's attainment deadlines in implementing the Good Neighbor provision, *supra* parts I-A and I-B, EPA's refusal to adopt more stringent emission budgets is unlawful. The Clean Air Act's attainment deadlines "leave[ ] no room for claims of technological or economic infeasibility." *Sierra Club*, 294 F.3d at 161 (citation omitted); *accord Union Elec.*, 427 U.S. at 258 (deadlines are "intended to foreclose the claims of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within

the specified time."), 259 (Congress "determined that existing sources of pollutants either should meet the standard of the law or be closed down" (quoting S. Rep. No. 91-1196, pp. 2-3 (1970))).

Even if the Court accepts EPA's claim that it need only prohibit interstate transport emissions "as expeditiously as practicable," EPA's refusal to adopt more stringent budgets is unlawful and arbitrary on this record.

1. EPA Unlawfully and Arbitrarily Rejected Emission Reductions Available Through Better Use of Controls and Generation Shifting.

EPA's brief confirms that the agency chose not to incorporate emissions reductions achievable by coal-fired power plants with installed catalytic technology. EPA does not claim it would be "impracticable" for these plants to match the lower emissions of other units with the same control technology, let alone substantiate such a claim. Indeed, EPA's response effectively concedes that operators could do so by using better components, performing more frequent maintenance, or more frequently replacing their catalyst. *See* EPA Br. 39 (lenient emission rate warranted to ensure operators do not have to use "new layers of catalyst" or improve upon "broken-in components and routine maintenance" (citation omitted)); Mitigation TSD 5-6, JA____-__ (lenient rate warranted to ensure operators do not have to adopt "highly aggressive catalyst replacement schedule"). Because EPA did not consider whether these reductions are

"practicable," the agency's reasoning is "untethered to Congress's approach." *See Nat. Res. Def. Council v. EPA ("NRDC")*, 777 F.3d 456, 469 (D.C. Cir. 2014) (citation omitted) (holding such reasoning unlawful at *Chevron* step two). Further, EPA acted arbitrarily, offering no reasoned explanation reconciling its failure to require these reductions with its admitted obligation to eliminate significant contributions "as expeditiously as practicable." *See Mountain Commc'ns v. FCC*, 355 F.3d 644, 648-49 (D.C. Cir. 2004).

In addition, EPA still does not dispute that its fleet-wide average emissions data reflects elevated emissions from units that chose not to engage their controls, or chose to operate them poorly—a widespread problem due to the allowance glut that developed under the Cross-State Air Pollution Rule. Pets. Br. 33, 37. EPA acknowledged this problem in the proposed rule, and did not claim otherwise in the final rule. *Id.* 33. Yet EPA admits that it adopted the fleet-wide average emission rate as the "achievable" reduction for these units in the emission budgets, except for units for which EPA had specific, certified historic emissions data. EPA Br. 39; Mitigation TSD 5 n.6, JA____. EPA does not explain, in the Rule or in its brief, how this fleet-wide average emission rate could both (1) reflect units with idled or poorly operated controls and (2) reasonably estimate the greatest reduction that is achievable for those units. EPA's brief thus confirms that EPA failed to "address contrary evidence in more than a cursory fashion," *Transmission Agency*

of Northern California v. FERC, 628 F.3d 538, 543-44 (D.C. Cir. 2010), and that the agency's reasoning was "internally inconsistent and therefore arbitrary." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011).

EPA likewise does not deny that greater emission reductions are available through shifting generation from higher-emitting to lower-emitting plants. Rather than claim that greater reductions are not "practicable," EPA claims only that, because of purportedly "reasonable" choices made in designing the Rule, greater reductions from generation-shifting "would [not] occur." EPA Br. 40-41. But EPA must, at a minimum, comply with the undisputed statutory requirement to prohibit significant contributions "as expeditiously as practicable," "even if its … choice would [be] otherwise reasonable." *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 644 (D.C. Cir. 2016). EPA does not claim—let alone explain why—the generation-shifting reductions that will occur are the only reductions that are "practicable." EPA's reasoning is therefore divorced from the statute and arbitrary. *See NRDC*, 777 F.3d at 468; *Mountain Commc'ns*, 355 F.3d at 648-49.

Further, EPA's lawyers' claim that the generation shifting EPA predicts will occur is "highly cost-effective" (Br. 40) says nothing about whether the agency may decline to provide for additional reductions through generation shifting. The agency never claimed that the emissions reductions required by the Good Neighbor provision are limited to those that are "highly cost-effective." EPA Br. 90

(rejecting this very argument as "false"). To the contrary, although EPA claims that it required a level of control that is "highly cost-effective," EPA concedes that the budgets only "partially" satisfy the Good Neighbor provision, 81 Fed. Reg. at 74,540/2, JA____, and that additional reductions are needed, *id.* at 74,522/2, JA____.[6]

2. EPA Unlawfully and Arbitrarily Authorized Operators to Exceed the Emission Budgets Through Banked Allowances.

Having already established emission budgets too lenient to eliminate significant contributions to downwind air quality problems, EPA then authorized operators to emit in excess of those lenient budgets using allowances banked under the trading regime for a different standard. EPA's decision to authorize these additional emissions is unlawful and arbitrary because the agency's policy

[6] Further, any claim that EPA's obligation to fully prohibit transport emissions is overridden by "cost-effectiveness" would be contrary to the Clean Air Act, which leaves EPA no room to defer attainment on grounds of technological or economic feasibility, *supra* 13-14, and which undisputedly requires prohibition of transport emissions as expeditiously as "practicable." In addition, if any decisions of this Court had authorized EPA to avoid complete control of interstate transport emissions on grounds of cost—which they did not—they were overruled on that point by the Supreme Court. *Compare EME Homer City Generation, L.P., v. EPA*, 696 F.3d 7, 21 (D.C. Cir. 2012) (holding that cost is a one-way ratchet that "EPA may consider … only to … lower" Good Neighbor pollution control obligations, not to increase them), *with EME Homer City*, 134 S. Ct. at 1609 ("*EME Homer City*") ("while EPA has a statutory duty to avoid over-control, the Agency also has a statutory obligation to avoid 'under-control'"). *See also EME Homer City*, 134 S. Ct. at 1610 (Scalia, J., dissenting) (pronouncing EPA's attempt to justify cost-consideration based on "farfetched meaning of the word 'significantly'" "so feeble that [the] majority does not even recite it").

justifications cannot override the obligation to prohibit significant contributions as expeditiously as practicable, and no later than the statutory deadlines.

EPA touts the purported policy benefits of banked allowances. EPA Br. 42, 44. But markets in air pollution, such as the trading and banking of emission allowances, must comply with the statutory requirement that Good Neighbor plans be "consistent with the provisions of this subchapter," §7410(a)(2)(D)(i)—including the requirement that attainment occur as expeditiously as practicable and no later than the applicable statutory deadlines for attainment of the 2008 air quality standard. *Supra* parts I-A and I-B. Banking of allowances is not mandated by the statute, and is unlawful where (as here) the result is continued significant contributions to downwind nonattainment. Policy arguments—such as EPA's quest for an (allegedly) "balanced" approach or industry's desire for regulatory certainty (EPA Br. 42-44), cannot trump the statute. *See Ams. for Clean Energy v. EPA*, 864 F.3d 691, 712 (D.C. Cir. 2017).

These attempts to defend banked allowances in the abstract miss the point for another reason also. Whether or not such banked allowances are per se unlawful, here Petitioners are challenging EPA's decision to authorize operators to use banked allowances to emit pollution at levels that will contribute significantly to downwind air quality problems. EPA might be able to achieve its policy aims—including maintaining incentives for early emission reductions (Br. 42)—by

designing a lawful emissions trading program incorporating banked allowances. But to be lawful, such a program would (among other things) have to ensure that the sum total of allowances (new allowances plus banked allowances) is not so high that it authorizes operators to continue emitting pollution that significantly contributes to downwind air quality problems beyond the attainment deadlines. By its own admission, EPA failed to do that here. *Supra* n.5.

In any event, EPA has provided neither reasoned explanation nor substantial record support for the notion that banked allowances serve the policy goal of fostering emission reductions. On the contrary, EPA itself notes that "[b]etween 2011 and 2015, the power sector responded to increases in natural gas supply, declines in natural gas prices, and increasing penetration of wind and other low- or zero-emitting renewable energy resources." 81 Fed. Reg. at 74,558/3, JA____. Under these economic conditions, operators emitted less nitrogen oxide—and thus accrued allowances—without regard to whether banking was available. *See id*. Thus, it was economic conditions that led to a glut of banked allowances, not industry's desire to earn allowances.

As with its decisions regarding optimization of installed controls and generation shifting, EPA has not even claimed it would be impracticable to eliminate the excess emissions authorized through conversion of banked allowances. Because EPA has failed to reconcile its approach to banked

allowances with its undisputed statutory obligation to eliminate transported pollution as expeditiously as practicable, its decision is unlawful and arbitrary. *See NRDC*, 777 F.3d at 468; *Mountain Commc'ns*, 355 F.3d at 648-49.

Industry quotes selectively from Delaware's rulemaking comments in an attempt to demonstrate that these comments broadly support allowance banking. In fact, Delaware's approach, as presented in its Comments, is sharply qualified. Delaware "recommends that EPA does not allow the use of these allowances" until EPA develops a better method of calculating the conversion, or surrender, ratio of banked allowances. Delaware Comments 6, JA____; *see also id*. 7, JA____ ("Delaware does not believe the rule will achieve the required reductions if it allows the use of banked allowances unless this issue is addressed."). Given EPA's failure to adopt Delaware's position in its Rule, and the other shortcomings of EPA's action described herein, Delaware has joined Conservation Groups in opposing EPA's use of banked allowances.

II. PETITIONERS' CHALLENGE IS NOT LIMITED TO AREAS WITH DEADLINES IN 2018.

There is no merit to EPA's argument that Petitioners' challenge is "waived" as to areas that faced attainment deadlines in 2015 and 2016. EPA Br. 37. Timely comments expressly objected to EPA's failure to "fully resolve interstate contributions." Conservation Groups' Comments 8, JA____. This objection was not limited to downwind areas with particular attainment deadlines. To the

contrary, the comments recognize that the attainment requirements for downwind areas are "laid out in the timeline in Table 1," which establishes deadlines for both moderate areas (in 2018) and marginal areas (in 2015 and 2016). *Id.* 9, JA____; 42 U.S.C. §7511(a)(1) & tbl. 1. The comments observed—correctly—that §7511(a)(1) requires "full resolution" of all significant contributions "by upwind states to downwind states" by July 2018, and that "the [proposed Rule] would not do this." Comments 9, JA____. There is no basis to read this objection as excluding the downwind areas subject to earlier attainment deadlines in 2015 and 2016, as EPA was well aware that "full resolution" of significant contributions would require the Transport Rule to address those areas too. *See All Am. Tel. Co. v. FCC*, 867 F.3d 81, 93 (D.C. Cir. 2017) (review "permitted so long as the issue is necessarily implicated by the argument" (quotation marks omitted)).

Because Petitioners' objection applied equally to areas with impending deadlines and those that already had failed to attain, the comments satisfy the Clean Air Act's requirement of "reasonable specificity." 42 U.S.C. §7607(d)(7)(B); *see Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1139-40 (D.C. Cir. 2002) ("the word 'reasonable' should not be read out of the statute in favor of a hair-splitting approach" (some quotation marks omitted)).

III. EPA'S FAILURE TO PROHIBIT UPWIND STATES' SIGNIFICANT CONTRIBUTIONS OF POLLUTION TO DELAWARE IS UNLAWFUL AND ARBITRARY.

A. EPA's Significant Contribution Analysis for Delaware is Inconsistent with Statutory Timelines and Unlawful.

State plans implementing the 2008 ozone standard, including the Good Neighbor provisions, were due March 12, 2011. 78 Fed. Reg. 2882, 2884 (Jan. 15, 2013). After states failed to adopt adequate plans, EPA eventually issued the rule challenged here on October 26, 2016—well after the attainment dates for many areas, including Delaware's marginal nonattainment area date of July 20, 2015.[7] 77 Fed. Reg. 30,160, 30,166 (May 21, 2012). Further, EPA based the 2016 Transport Rule on projections of air-quality data and controls in 2017, after the marginal nonattainment areas' attainment dates.

EPA's lawyers misconstrue Delaware's position. Delaware contends that EPA should have acted promptly when states failed to adopt Good Neighbor provisions and tied its analysis of significant contribution to the air quality at the time that designations were made. Pets. Br. 42, 43. Delaware further argues that EPA was required to couple its analysis and remedy with the attainment deadlines

[7] In Delaware, Sussex County and New Castle County were designated as marginal nonattainment under the 2008 ozone standard, with attainment dates of July 20, 2015; New Castle County's date was later extended to July 20, 2016 (81 Fed. Reg. 26,697 (May 4, 2016)), although this Court has not ruled on the validity of that extension.

for downwind areas, as argued above, including Delaware's attainment dates in 2015, not just with attainment dates for moderate areas in 2018. *Id.* 42-46.

In *North Carolina* and *EME Homer City*, the Court held that EPA could fashion federal plans that rely on projections of air-quality data and attainment status. Here, however, EPA promulgated federal plans without regard to the statutory deadline for attainment. EPA has crafted a process that *entirely* takes place after Delaware's attainment dates—at which point EPA concludes that Delaware does not need any reductions of out-of-state transported pollution in order to attain and maintain the NAAQS.

EPA claims that it aligned its modeling analysis and implementation of the Rule (in 2017) with relevant attainment dates for moderate nonattainment areas by choosing a date that will provide some reductions in the last year before their attainment dates in 2018. EPA Br. 48. While EPA could not have tied its 2017 implementation of the Rule to the attainment dates for marginal nonattainment areas like Delaware which had already passed (in 2015), EPA could still have addressed the need for Good Neighbor reductions relative to marginal nonattainment by aligning modeling analysis for those states to a timeframe prior to their 2015 marginal attainment deadlines. EPA's failure to do so completely divorces the 2016 Transport Rule from the statutory requirements relevant to marginal nonattainment areas, including Delaware.

By uncoupling the Good Neighbor reductions from marginal nonattainment dates, EPA fails to craft a remedy consistent with statutory directive. Had EPA based its contribution analysis on the marginal area 2015 attainment dates, it would have followed judicial precedent and would have required states to reduce their contribution to Delaware. EPA, however, based its air-quality projections on the year 2017, after Delaware's attainment dates. EPA offers as its only rationale the fact that the projections are based on the year the Rule would have gone into effect and that it would provide one year of partial reductions for moderate nonattainment areas. 81 Fed. Reg. at 74,507, JA____. The Rule ignores marginal area attainment dates. Given the tight timeframe for attainment and the exacting deadlines built into the Clean Air Act intended to address prior failures of EPA and the states to reduce air pollution, EPA's rationale is unlawful.

B. EPA's Refusal to Require Upwind States to Reduce their Pollution Significantly Contributing to Delaware Based on Emissions Projections for a Single Year that is After the Attainment Date is Unreasonable and Arbitrary.

EPA's action is also unreasonable and arbitrary. In its brief, Delaware describes the practical difficulties in following Clean Air Act mandates to redesignate an area to attainment, in the absence of permanent, enforceable restrictions. Pets. Br. 47-48. EPA's 2017 air-quality projections included unusual weather conditions and economic market forces that have, likely temporarily, shifted electric generation towards units that emit less pollution. Neither the

market forces nor the weather are permanent, enforceable factors upon which a maintenance plan can be based—as required by 42 U.S.C. §7407(d)(3)(E)(i)—and when weather shifts back to more ordinary patterns and market forces shift, Delaware will be left on its own to try to achieve healthy air quality despite being overwhelmed by transported air pollution. EPA's failure to provide any explanation for why it did not couple the 2016 Transport Rule in any way to the attainment dates for marginal areas is unreasonable. EPA's failure to reduce the transported pollution that overwhelms Delaware's ability to provide clean air for its citizens and to attain and maintain the NAAQS is likewise unreasonable. EPA's failure to couple its air-quality modeling to timeframes prior to marginal attainment dates means that EPA failed to fulfill the statutory purpose of the Good Neighbor provision, which is EPA's only statutory basis for the 2016 Transport Rule, and acted unreasonably.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Court to remand the Rule to EPA without vacatur, with instructions to promulgate federal implementation plans free from the defects identified above within six months, and to vacate the authorization to use allowances banked prior to the 2017 ozone season for compliance.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with the Order Setting the Briefing Format and Schedule entered on September 6, 2017, the foregoing **Proof Reply Brief of Petitioner Conservation Groups and Petitioner State of Delaware** contains 5,989 words, as counted by counsel's word processing system, and thus complies with the 6,000 word limit established by the Court's Order.

Further, this document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) & (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 using 14-point Times New Roman font.

DATED: March 19, 2018

/s/ Neil Gormley
Neil Gormley

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2018, I have served the foregoing **Proof Reply Brief of Petitioner Conservation Groups and Petitioner State of Delaware,** including the Addendum thereto, on all registered counsel through the Court's electronic filing system (ECF).

/s/ Neil Gormley
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STATUTORY ADDENDUM

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42 U.S.C.A. § 7511b

§ 7511b. Federal ozone measures

Currentness

(a) Control techniques guidelines for VOC sources

Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines, in accordance with section 7408 of this title, for 11 categories of stationary sources of VOC emissions for which such guidelines have not been issued as of November 15, 1990, not including the categories referred to in paragraphs (3) and (4) of subsection (b) of this section. The Administrator may issue such additional control techniques guidelines as the Administrator deems necessary.

(b) Existing and new CTGS

(1) Within 36 months after November 15, 1990, and periodically thereafter, the Administrator shall review and, if necessary, update control technique guidance issued under section 7408 of this title before November 15, 1990.

(2) In issuing the guidelines the Administrator shall give priority to those categories which the Administrator considers to make the most significant contribution to the formation of ozone air pollution in ozone nonattainment areas, including hazardous waste treatment, storage, and disposal facilities which are permitted under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]. Thereafter the Administrator shall periodically review and, if necessary, revise such guidelines.

(3) Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines in accordance with section 7408 of this title to reduce the aggregate emissions of volatile organic compounds into the ambient air from aerospace coatings and solvents. Such control techniques guidelines shall, at a minimum, be adequate to reduce aggregate emissions of volatile organic compounds into the ambient air from the application of such coatings and solvents to such level as the Administrator determines may be achieved through the adoption of best available control measures. Such control technology guidance shall provide for such reductions in such increments and on such schedules as the Administrator determines to be reasonable, but in no event later than 10 years after the final issuance of such control technology guidance. In developing control technology guidance under this subsection, the Administrator shall consult with the Secretary of Defense, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration with regard to the establishment of specifications for such coatings. In evaluating VOC reduction strategies, the guidance shall take into account the applicable requirements of section 7412 of this title and the need to protect stratospheric ozone.

(4) Within 3 years after November 15, 1990, the Administrator shall issue control techniques guidelines in accordance with section 7408 of this title to reduce the aggregate emissions of volatile organic compounds and PM-10 into the ambient air from paints, coatings, and solvents used in shipbuilding operations and ship repair. Such control techniques guidelines shall, at a minimum, be adequate to reduce aggregate emissions of volatile organic compounds and PM-10 into the ambient air from the removal or application of such paints, coatings, and solvents to such level as the Administrator determines may be achieved through the adoption of the best available control measures. Such control techniques guidelines shall provide for such reductions in such increments and on such schedules as the Administrator determines to be reasonable, but in no event later than 10 years after the final issuance of such control technology guidance. In developing control techniques guidelines under this subsection, the Administrator shall consult with the appropriate Federal agencies.

(c) Alternative control techniques

Within 3 years after November 15, 1990, the Administrator shall issue technical documents which identify alternative controls for all categories of stationary sources of volatile organic compounds and oxides of nitrogen which emit, or have the potential to emit 25 tons per year or more of such air pollutant. The Administrator shall revise and update such documents as the Administrator determines necessary.

(d) Guidance for evaluating cost-effectiveness

Within 1 year after November 15, 1990, the Administrator shall provide guidance to the States to be used in evaluating the relative cost-effectiveness of various options for the control of emissions from existing stationary sources of air pollutants which contribute to nonattainment of the national ambient air quality standards for ozone.

(e) Control of emissions from certain sources

(1) Definitions

For purposes of this subsection--

(A) Best available controls

The term "best available controls" means the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

(B) Consumer or commercial product

The term "consumer or commercial product" means any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds. The term

does not include fuels or fuel additives regulated under section 7545 of this title, or motor vehicles, non-road vehicles, and non-road engines as defined under section 7550 of this title.

(C) Regulated entities

The term "regulated entities" means--

(i) manufacturers, processors, wholesale distributors, or importers of consumer or commercial products for sale or distribution in interstate commerce in the United States; or

(ii) manufacturers, processors, wholesale distributors, or importers that supply the entities listed under clause (i) with such products for sale or distribution in interstate commerce in the United States.

(2) Study and report

(A) Study

The Administrator shall conduct a study of the emissions of volatile organic compounds into the ambient air from consumer and commercial products (or any combination thereof) in order to--

(i) determine their potential to contribute to ozone levels which violate the national ambient air quality standard for ozone; and

(ii) establish criteria for regulating consumer and commercial products or classes or categories thereof which shall be subject to control under this subsection.

The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990.

(B) Consideration of certain factors

In establishing the criteria under subparagraph (A)(ii), the Administrator shall take into consideration each of the following:

(i) The uses, benefits, and commercial demand of consumer and commercial products.

(ii) The health or safety functions (if any) served by such consumer and commercial products.

(iii) Those consumer and commercial products which emit highly reactive volatile organic compounds into the ambient air.

(iv) Those consumer and commercial products which are subject to the most cost-effective controls.

(v) The availability of alternatives (if any) to such consumer and commercial products which are of comparable costs, considering health, safety, and environmental impacts.

(3) Regulations to require emission reductions

(A) In general

Upon submission of the final report under paragraph (2), the Administrator shall list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone. Credit toward the 80 percent emissions calculation shall be given for emission reductions from consumer or commercial products made after November 15, 1990. At such time, the Administrator shall divide the list into 4 groups establishing priorities for regulation based on the criteria established in paragraph (2). Every 2 years after promulgating such list, the Administrator shall regulate one group of categories until all 4 groups are regulated. The regulations shall require best available controls as defined in this section. Such regulations may exempt health use products for which the Administrator determines there is no suitable substitute. In order to carry out this section, the Administrator may, by regulation, control or prohibit any activity, including the manufacture or introduction into commerce, offering for sale, or sale of any consumer or commercial product which results in emission of volatile organic compounds into the ambient air.

(B) Regulated entities

Regulations under this subsection may be imposed only with respect to regulated entities.

(C) Use of CTGS

For any consumer or commercial product the Administrator may issue control techniques guidelines under this chapter in lieu of regulations required under subparagraph (A) if the Administrator determines that such guidance will be substantially as effective as regulations in reducing emissions of volatile organic compounds which contribute to ozone levels in areas which violate the national ambient air quality standard for ozone.

(4) Systems of regulation

The regulations under this subsection may include any system or systems of regulation as the Administrator may deem appropriate, including requirements for registration and labeling, self-monitoring and reporting, prohibitions, limitations, or economic incentives (including marketable permits and auctions of emissions rights) concerning the manufacture, processing, distribution, use, consumption, or disposal of the product.

(5) Special fund

Any amounts collected by the Administrator under such regulations shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available until expended, subject to annual appropriation Acts, solely to carry out the activities of the Administrator for which such fees, charges, or collections are established or made.

(6) Enforcement

Any regulation established under this subsection shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such regulation shall be treated as a violation of a requirement of section 7411(e) of this title.

(7) State administration

Each State may develop and submit to the Administrator a procedure under State law for implementing and enforcing regulations promulgated under this subsection. If the Administrator finds the State procedure is adequate, the Administrator shall approve such procedure. Nothing in this paragraph shall prohibit the Administrator from enforcing any applicable regulations under this subsection.

(8) Size, etc.

No regulations regarding the size, shape, or labeling of a product may be promulgated, unless the Administrator determines such regulations to be useful in meeting any national ambient air quality standard.

(9) State consultation

Any State which proposes regulations other than those adopted under this subsection shall consult with the Administrator regarding whether any other State or local subdivision has promulgated or is promulgating regulations on any products covered under this part. The Administrator shall establish a clearinghouse of information, studies, and regulations proposed and promulgated regarding products covered under this subsection and disseminate such information collected as requested by State or local subdivisions.

(f) Tank vessel standards

(1) Schedule for standards

(A) Within 2 years after November 15, 1990, the Administrator, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall promulgate standards applicable to the emission of VOCs and any other air pollutant from loading and unloading of tank vessels (as that term is defined in section 2101 of Title 46) which the Administrator finds causes, or contributes to, air pollution that may be reasonably anticipated to endanger public health or welfare. Such standards shall require the application of reasonably available control technology, considering costs, any nonair-quality benefits, environmental impacts, energy requirements and safety factors associated with alternative control techniques. To the extent practicable such standards shall apply to loading and unloading facilities and not to tank vessels.

(B) Any regulation prescribed under this subsection (and any revision thereof) shall take effect after such period as the Administrator finds (after consultation with the Secretary of the department [1] in which the Coast Guard is operating) necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period, except that the effective date shall not be more than 2 years after promulgation of such regulations.

(2) Regulations on equipment safety

Within 6 months after November 15, 1990, the Secretary of the Department in which the Coast Guard is operating shall issue regulations to ensure the safety of the equipment and operations which are to control emissions from the loading and unloading of tank vessels, under section 3703 of Title 46 and section 1225 of Title 33. The standards promulgated by the Administrator under paragraph (1) and the regulations issued by a State or political subdivision regarding emissions from the loading and unloading of tank vessels shall be consistent with the regulations regarding safety of the Department in which the Coast Guard is operating.

(3) Agency authority

(A) The Administrator shall ensure compliance with the tank vessel emission standards prescribed under paragraph (1)(A). The Secretary of the Department in which the Coast Guard is operating shall also ensure compliance with the tank vessel standards prescribed under paragraph (1)(A).

(B) The Secretary of the Department in which the Coast Guard is operating shall ensure compliance with the regulations issued under paragraph (2).

(4) State or local standards

After the Administrator promulgates standards under this section, no State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions from tank vessels subject to regulation under paragraph (1) unless such standard is no less stringent than the standards promulgated under paragraph (1).

(5) Enforcement

Any standard established under paragraph (1)(A) shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such standard shall be treated as a violation of a requirement of section 7411(e) of this title.

(g) Ozone design value study

The Administrator shall conduct a study of whether the methodology in use by the Environmental Protection Agency as of November 15, 1990, for establishing a design value for ozone provides a reasonable indicator of the ozone air quality of ozone nonattainment areas. The Administrator shall obtain input from States, local subdivisions thereof, and others. The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990. The results of the study shall be subject to peer and public review before submitting it to Congress.

(h) Vehicles entering ozone nonattainment areas

(1) Authority regarding ozone inspection and maintenance testing

(A) In general

No noncommercial motor vehicle registered in a foreign country and operated by a United States citizen or by an alien who is a permanent resident of the United States, or who holds a visa for the purposes of employment or educational study in the United States, may enter a covered ozone nonattainment area from a foreign country bordering the United States and contiguous to the nonattainment area more than twice in a single calendar-month period, if State law has requirements for the inspection and maintenance of such vehicles under the applicable implementation plan in the nonattainment area.

(B) Applicability

Subparagraph (A) shall not apply if the operator presents documentation at the United States border entry point establishing that the vehicle has complied with such inspection and maintenance requirements as are in effect and are applicable to motor vehicles of the same type and model year.

(2) Sanctions for violations

The President may impose and collect from the operator of any motor vehicle who violates, or attempts to violate, paragraph (1) a civil penalty of not more than $200 for the second violation or attempted violation and $400 for the third and each subsequent violation or attempted violation.

(3) State election

The prohibition set forth in paragraph (1) shall not apply in any State that elects to be exempt from the prohibition. Such an election shall take effect upon the President's receipt of written notice from the Governor of the State notifying the President of such election.

(4) Alternative approach

The prohibition set forth in paragraph (1) shall not apply in a State, and the President may implement an alternative approach, if--

(A) the Governor of the State submits to the President a written description of an alternative approach to facilitate the compliance, by some or all foreign-registered motor vehicles, with the motor vehicle inspection and maintenance requirements that are--

(i) related to emissions of air pollutants;

(ii) in effect under the applicable implementation plan in the covered ozone nonattainment area; and

(iii) applicable to motor vehicles of the same types and model years as the foreign-registered motor vehicles; and

(B) the President approves the alternative approach as facilitating compliance with the motor vehicle inspection and maintenance requirements referred to in subparagraph (A).

(5) Definition of covered ozone nonattainment area

In this section, the term "covered ozone nonattainment area" means a Serious Area, as classified under section 7511 of this title as of October 27, 1998.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 183, as added Pub.L. 101-549, Title I, § 103, Nov. 15, 1990, 104 Stat. 2443; amended Pub.L. 105-286, § 2, Oct. 27, 1998, 112 Stat. 2773.)

Notes of Decisions (3)

Footnotes

1 So in original. Probably should be capitalized.

42 U.S.C.A. § 7511b, 42 USCA § 7511b
Current through P.L. 115-132.