

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1285 (and consolidated cases)

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

STATE OF MARYLAND,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
83 Fed. Reg. 50,444 (Oct. 5, 2018)

OPENING PROOF BRIEF FOR CITIZEN PETITIONERS

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DATED: March 29, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), and updating the certificate filed November 19, 2018 (Doc. No. 1760681), the undersigned counsel of record certifies as follows:

A. Parties

Petitioners

The following parties appear as petitioners: State of Maryland, State of Delaware, Chesapeake Bay Foundation, Inc., Adirondack Council, Chesapeake Climate Action Network, Clean Air Council, Environmental Defense Fund, Environmental Integrity Project, and Sierra Club.

Petitioner Physicians for Social Responsibility, Chesapeake, Inc. filed a Motion to Withdraw as Petitioner on March 22, 2019 (Doc. No. 1778913). As of the date of this filing, the Court has not ruled on the Motion to Withdraw.

Respondents

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

Intervenors

The following parties have been permitted to intervene in support of petitioners: State of New Jersey, State of New York, and City of New York (Doc. No. 1763115).

The following parties have been permitted to intervene in support of respondents: Utility Air Regulatory Group, Duke Energy Indiana, LLC, and Duke Energy Kentucky, Inc. (Doc. No. 1763115).

B. Ruling Under Review

Citizen Petitioners seek review of the final agency action by EPA as published in the Federal Register and titled: “Response to Clean Air Act Section 126(b) Petitions from Delaware and Maryland.” 83 Fed. Reg. 50,444 (Oct. 5, 2018).

C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court. There are no related cases (other than those consolidated herein: Case Nos. 18-1285 and 18-1301) within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, petitioners Chesapeake Bay Foundation, Inc., Adirondack Council, Chesapeake Climate Action Network, Clean Air Council, Environmental Defense Fund, Environmental Integrity Project, and Sierra Club (collectively, Citizen Petitioners) make the following disclosures:

Chesapeake Bay Foundation, Inc.

Chesapeake Bay Foundation is a non-profit corporation organized under the laws of the State of Maryland. The Chesapeake Bay Foundation is dedicated to protecting the Chesapeake Bay and its tributary rivers and streams by improving water quality and reducing pollution.

The Chesapeake Bay Foundation does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Chesapeake Bay Foundation.

Adirondack Council

Adirondack Council is a non-profit corporation organized under the laws of the State of New York. Adirondack Council is dedicated to ensuring ecological integrity and wild character of New York's six-million-acre Adirondack Park.

Adirondack Council does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Adirondack Council.

Chesapeake Climate Action Network

Chesapeake Climate Action Network is a grassroots non-profit organization dedicated to raising awareness about the health and environmental impacts of global warming and promoting the transition to clean energy generation in the mid-Atlantic region.

Chesapeake Climate Action Network does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Chesapeake Climate Action Network.

Clean Air Council

Clean Air Council is a non-profit environmental organization, organized under the laws of the Commonwealth of Pennsylvania. Clean Air Council's mission is to protect and defend everyone's right to breathe clean air.

Clean Air Council does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Clean Air Council.

Environmental Defense Fund

Environmental Defense Fund is a national non-profit organization, organized under the laws of the State of New York, that links science, economics, and law to create innovative, equitable, and cost-effective solutions to urgent environmental problems.

Environmental Defense Fund does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Environmental Defense Fund.

Environmental Integrity Project

Environmental Integrity Project is a national non-profit corporation dedicated to ensuring the effective enforcement of state and federal environmental laws in order to protect public health and the environment, with a specific focus on the Clean Air Act and large stationary sources of pollution, like coal-fired power plants.

Environmental Integrity Project does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in the Environmental Integrity Project.

Sierra Club

Sierra Club is a non-profit corporation organized under the laws of the State of California. Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Sierra Club does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in Sierra Club.

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GLOSSARY

Act	Clean Air Act
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
JA	Joint Appendix
lb/MMBtu	Pounds of air pollution emitted when burning one million British Thermal Units' worth of fuel
ppb	Parts per billion

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(i), Citizen Petitioners hereby adopt the Jurisdictional Statement in the State of Maryland's Brief at 2, and supplement it as follows: Citizen Petitioners petitioned for review of EPA's final action, 83 Fed. Reg. 50,444 (Oct. 5, 2018), on October 19, 2018, within the 60-day period provided by 42 U.S.C. § 7607(b)(1).¹

ISSUES PRESENTED

1. Whether EPA's reliance on projected ozone levels in 2023, well beyond Delaware's attainment date for the 2015 ozone air quality standard, to deny Delaware's Section 126(b) petitions is contrary to the Clean Air Act, precluded by D.C. Circuit precedent, and arbitrary and capricious where Delaware continues to fail to attain the 2015 ozone standard.

2. Where Maryland and Delaware are both failing to attain or maintain applicable ozone air quality standards and where electric generating units identified in Maryland's and Delaware's Section 126(b) petitions are failing to

¹ Citizen Petitioners' petition for review included the three Delaware petitions for the following sources: Conemaugh Generating Station, Homer City Generating Station, and Harrison Power Station. Arguments and references herein to Delaware's petitions refer only to these three petitions. Due to their focus on the State of Maryland, Petitioners Environmental Integrity Project and Chesapeake Climate Action Network seek review only of EPA's denial of Maryland's petition.

achieve emission reductions consistent with optimization of already installed pollution controls, whether it is arbitrary, capricious, and contrary to the Clean Air Act for EPA to conclude, based on the Cross-State Air Pollution Rule Update, that all cost-effective control strategies and emission reductions at these units have already been implemented and achieved.

3. Whether EPA's denial of the Section 126(b) petitions is arbitrary and unlawful in light of the larger pattern of EPA's persistent delays and denials in implementing and enforcing the Good Neighbor Provision and regulating the interstate transport of ozone pollution.

STATUTES AND REGULATIONS

All applicable statutory provisions are contained in the Addendum accompanying the Brief for Petitioner State of Maryland.

STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 28(i), Citizen Petitioners hereby adopt the Statement of the Case in the State of Maryland's Brief and Section I of the Statement of the Case in the State of Delaware's Brief, supplemented as follows:

I. Factual Background

A. Impacts of Ground-Level Ozone on Human Health

Ground-level ozone, or smog, forms when the ozone precursor pollutants volatile organic compounds and nitrogen oxides react together in the presence of sunlight. Exposure to ozone causes real and significant harm to human health as it impairs lung function, aggravates asthma, increases the risk of heart attacks and other cardiovascular conditions, and is linked to premature mortality. *See* 80 Fed. Reg. 65,292, 65,302-11 (Oct. 26, 2015).

Ozone is a noxious gas that eats away at solid materials, therefore “it comes as no surprise that ozone can also have serious adverse health effects on the more vulnerable human lung.” Chesapeake Bay Foundation, *et al.* Comments (EPA-HQ-OAR-2018-0295-0080) at 4 (July 23, 2018) [hereinafter “Citizen Comments”], JA ___. Exposure has been likened to “getting a sunburn on your lungs.” *Id.* Ozone pollution disproportionately harms those with pre-existing respiratory diseases, children, the elderly, and outdoor workers. *See* 80 Fed. Reg. 65,310-11.

Ozone pollution imposes high health and economic costs on states downwind from pollution sources. Citizen Comments included an expert report from Dr. George Thurston using EPA’s Environmental Benefits Mapping and Analysis Program model. Citizen Cmts., Attach. A, JA ___. Dr. Thurston’s analysis quantified the numbers, and dollar valuation, of negative health outcomes that

could have been avoided if the 36 electric generating units identified in Maryland's 126(b) petition had fully optimized their pollution controls throughout the ozone season. *Id.* at 13, JA ___. Taking account of hospital admissions, asthma events, school loss days, and mortalities, the analysis found that the health impacts that could be avoided in Washington, D.C., Northern Virginia, Maryland, and Delaware would have a combined valuation of over \$750 million per year. *Id.* at 13-14. EPA's denial of Maryland's and Delaware's 126(b) petitions ignores the actual health harms suffered by citizens in downwind states.

B. Impacts of Ozone and Precursor Nitrogen Oxides on Ecosystems and Water Quality

Ozone and its precursor pollutants also damage natural resources, including plants, trees, and aquatic systems. Citizen Cmts. at 6, JA ___. Nitrogen oxides transform and fall to the Earth's surface in a process called nitrogen deposition, causing serious ecological harm, particularly in aquatic systems. Excess nitrogen in surface waters can cause harmful algal blooms and dead zones where fish and other aquatic species cannot survive. *Id.*

Nitrogen deposition from power plants poses a significant threat to the EPA-established federal-state partnership to restore the Chesapeake Bay. *See* Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment (Dec. 2010), *available at* <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>. Atmospheric deposition contributes about

one-third of the total nitrogen loads to the Bay. *Id.* at 4-33. Air modeling shows that in 2016, nitrogen oxides emitted by just three of the power plants identified in the petitions contributed 2.6 million pounds of nitrogen to the land, tributary streams, and rivers within the Chesapeake Bay watershed, and 57,600 pounds of nitrogen directly into the Chesapeake Bay. Citizen Cmts. at 8, JA ___. EPA's denial of the 126(b) petitions ignores the significant environmental harm these upwind emissions pose to environmental resources downwind.

STANDARD OF REVIEW

Pursuant to Fed. R. App. P. 28(i), Citizen Petitioners hereby adopt the Standard of Review in the State of Maryland's Brief at 16.

SUMMARY OF THE ARGUMENT

EPA denied Section 126(b) petitions submitted by Maryland and Delaware based on the Agency's projection that Delaware will meet all applicable air quality standards in 2023 and its conclusion that, based on its implementation of the Cross-State Air Pollution Rule Update (Cross-State Update), no additional cost-effective emission reductions are achievable from the units identified in the petitions. Both bases are arbitrary and unlawful.

EPA's reliance on modeled 2023 air quality to deny Delaware's 126(b) petitions under the 2015 ozone standard is precluded by the plain language of the Clean Air Act and controlling D.C. Circuit precedent. EPA must consider

Delaware's present nonattainment, which is the best evidence of Delaware's ongoing inability to meet the 2015 standard; and in no event can it look beyond Delaware's relevant 2021 attainment date to deny Delaware relief.

EPA's conclusion that additional cost-effective emission reductions are unachievable from the units identified in the Section 126(b) petitions is belied by the actual recent emissions data from those units, which show that numerous units continue to emit nitrogen oxides at rates that exceed both their demonstrated actual past performance and EPA's generic assumptions regarding optimized performance. EPA's observation that the Cross-State Update has resulted in pollution reductions at *other* units has no bearing on an evaluation of the Maryland and Delaware petitions because EPA nowhere claims these emission reductions resolve attainment and maintenance issues in Maryland and Delaware by their applicable attainment dates. Allowing EPA to rely on emission reductions occurring at other units as a basis to deny the 126(b) petitions in this situation would fatally undermine Section 126(b) as an independent tool for downwind states to obtain relief from upwind pollution.

EPA's denial of the 126(b) petitions is just the most recent move in the Agency's ozone transport shell game, in which it repeatedly justifies denials by pointing to separate regulations—which EPA later delays and denies—thus

foreclosing downwind states' ability to obtain relief from out-of-state ozone pollution using any of the statutory tools provided by the Act.

STANDING

Citizen Petitioners meet applicable standing requirements. Article III requires petitioners to establish: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992). An organization has associational standing when one or more of its members would independently have standing, the interests the lawsuit seeks to protect are germane to the organization's purpose, and the litigation does not require participation of individual members. *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Citizen Petitioners are public interest, non-profit environmental and health organizations representing members across the country, including areas harmed by ground-level ozone pollution and the excess emissions from the sources identified in the Section 126(b) petitions. Declaration of Huda Fashho ¶ 6; Declaration of Lisa Feldt ¶ 4; Declaration of Mark Kresowik ¶ 4; Declaration of John Stith ¶¶ 3, 9; Declaration of Michael Tidwell ¶¶ 3, 9–10; Declaration of Joseph O. Minott ¶¶ 3, 6; attached as Addendum to Citizen Petitioners' Opening Brief. Citizen Petitioners have devoted significant organizational resources to understanding air

pollution and its consequences and advocating policies to abate it, Feldt Decl. ¶¶ 13–18; Kresowik Decl. ¶¶ 7, 8; Declaration of Eric Schaeffer ¶¶ 5–8; Stith Decl. ¶¶ 5, 7; Tidwell Decl. ¶¶ 4–8; Minott Decl. ¶ 4, and expend resources on restoration and conservation projects to improve air and water quality. Feldt Decl. ¶¶ 6, 7.

EPA’s denial of Maryland’s and Delaware’s Section 126(b) petitions has caused and will continue to cause concrete, particularized harm to Citizen Petitioners’ members. These members enjoy recreating outdoors, or must be outdoors for work or community events, and are concerned about their own exposure to air pollution. Declaration of Elizabeth Brandt ¶¶ 9, 12; Declaration of Christina Browning ¶¶ 4, 9; Declaration of Barbara Einzig ¶ 7; Declaration of James Alfred Tyler Frakes ¶¶ 3, 5; Declaration of Rodette Jones ¶¶ 4, 11; Declaration of Nicholas Zuwiala-Rogers ¶ 3; Declaration of Sharman Stephenson ¶¶ 2, 5; Declaration of William Temmink ¶¶ 6, 9. Many members suffer from respiratory illnesses and as a result cannot be outside when air quality is poor, without suffering adverse symptoms. Browning Decl. ¶¶ 5, 7; Einzig Decl. ¶¶ 4–8; Frakes Decl. ¶¶ 4, 5; Jones Decl. ¶ 5; Zuwiala-Rogers Decl. ¶ 4; Stephenson Decl. ¶¶ 4, 6; Temmink Decl. ¶ 6. These members miss work and incur medical expenses to seek treatment, limiting their earning potential and affecting their overall economic security. Browning Decl. ¶ 7; Einzig Decl. ¶ 9; Jones Decl. ¶ 5. Other members refrain from going outdoors when air quality is poor to limit their

exposure to harmful pollution. Brandt Decl. ¶ 12; Stephenson Decl. ¶ 6; Temmink Decl. ¶ 6. *See Friends of the Earth*, 528 U.S. at 184–85 (recognizing reasonable fear of harm from pollution as an injury in fact). Citizen Petitioners seek to protect interests that are germane to their purpose, and neither the claims asserted, nor the relief requested requires individual members’ participating in the lawsuit. *Hunt*, 432 U.S. at 343.

EPA’s decision harms Citizen Petitioners and their members, and a reversal would redress their injuries. *Lujan*, 504 U.S. at 560–61.

ARGUMENT

I. The Court Should Vacate EPA’s Unlawful and Arbitrary Denial of Delaware’s Ability to Seek Relief Through Section 126(b) under the 2015 Ozone Standard

In denying Delaware’s 126(b) petitions under the 2015 ozone standard,² EPA ignored Delaware’s present nonattainment of this standard in favor of arbitrary speculation that Delaware will attain this standard in 2023, two years beyond its current attainment date. This approach is contrary to the plain language of the Clean Air Act and controlling case law. EPA’s shifting rationales for

² EPA denied Delaware’s petitions under the 2015 ozone standard at the first step of its four-step transport framework. 83 Fed. Reg. at 50,458-63; *see also id.* at 50,449-50 (describing framework).

choosing this date and ignoring Delaware's current nonattainment and relevant attainment date are unavailing.

The Court should enforce the plain language of Section 126(b) and reject EPA's proposed reliance on 2023 modeled air quality as a basis for denying Delaware relief. Section 126(b) authorizes a state to petition EPA to make a finding where a source "*emits* or would emit" in violation of Section 110(a)(2)(D)(i).³ 42 U.S.C. § 7426(b) (emphasis added). That cross-referenced provision, commonly called the "Good Neighbor Provision," requires state implementation plans to contain provisions "prohibiting . . . any source . . . within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State" with respect to an air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Despite the statute's use of the present tense—"emits"—in Section 126(b), EPA latches onto the word "will" in section 110(a)(2)(D)(i) to claim that it can evaluate impacts to Delaware in 2023, the year immediately preceding what EPA incorrectly claims is "the relevant 2024 attainment date" for Delaware. 83 Fed. Reg. at 50,459. This approach has multiple fatal defects.

³ The cross-reference, which reads "110(a)(2)(D)(ii)," is a scrivener's error and should be "110(a)(2)(D)(i)." See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001).

First, EPA's proposed approach, which ignores current nonattainment in favor of hypothesized attainment in a future year, is directly inconsistent with the present tense language of Section 126(b), and would effectively eliminate the word "emits" from that section of the Act. *See North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008) ("All the policy reasons in the world cannot justify reading a substantive provision out of a statute.").

EPA itself has previously recognized that upwind contributions to *current* nonattainment in downwind states are susceptible to relief through Section 126(b). EPA granted New Jersey's 126(b) petition regarding the Portland Generating Station in Pennsylvania based on significant *current* pollution contributions despite not even having promulgated any designations under the relevant 2010 sulfur dioxide air quality standard (meaning that there necessarily was no relevant attainment date for the downwind area). *See* 76 Fed. Reg. 19,662 (Apr. 7, 2011) (proposed response); 76 Fed. Reg. 69,052 (Nov. 7, 2011) (final response); 78 Fed. Reg. 47,191 (Aug. 5, 2013) (promulgating first designations under 2010 sulfur dioxide air quality standard for a limited number of areas); *see also GenOn REMA v. EPA*, 722 F.3d 513, 520–22 (3d Cir. 2013) (affirming EPA's timing for addressing New Jersey's Section 126(b) petition).

Second, even if EPA were somehow authorized to ignore the plain, present-tense language of Section 126(b) and look to a future attainment date, 2024 is *not*

the relevant attainment date for Delaware, which EPA elsewhere acknowledges is August 2, 2021. 83 Fed. Reg. at 50,461. EPA’s rationale for relying on air quality projections in 2023 has been a moving target, but in every variation unlawful. In its proposed denial, EPA claimed that it could rely on air quality modeling for 2023 because it was only obligated to use modeled air quality concentrations “for a year that *considers* the relevant attainment deadlines for the [air quality standard].” 83 Fed. Reg. 26,666, 26,676 (June 8, 2018) (emphasis added). As commenters pointed out, Citizen Cmts. at 10–11, this approach is flatly precluded by *North Carolina*, 531 F.3d at 911-12. In its final denial, EPA offers a different and even more tortured interpretation of the Good Neighbor Provision. EPA now claims that it can rely on air quality modeling for 2023 because 2023 is the final ozone season before 2024, which would be Delaware’s attainment date if Delaware, which is classified as “Marginal” nonattainment,⁴ failed to attain the 2015 ozone standard by its actual 2021 attainment date and then were immediately bumped up by EPA to a higher classification of nonattainment, thereby establishing a new nonattainment date. *See* 83 Fed. Reg. at 50,461. This novel attempt to avoid the *North Carolina* holding also fails.

⁴ For ozone, unlike other criteria air pollutants, the Act establishes classifications of nonattainment (Marginal, Moderate, Serious, Severe), with areas in more severe nonattainment having more time to attain the standard. *See* 42 U.S.C. § 7511(a).

As an initial matter, 2024 could only become an attainment date for Delaware if the state failed to attain by its current 2021 deadline. But if Delaware is not on track to attain by 2021, EPA has no basis for denying Delaware's petitions at the first step of its analysis.

This Court should decline EPA's invitation to render meaningless attainment dates for Marginal nonattainment areas. In *North Carolina*, this Court remanded EPA's Clean Air Interstate Rule—an earlier regulation addressing transported ozone—in part because “EPA did not make any effort to harmonize [the Clean Air Interstate Rule's] . . . deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas.” 531 F.3d at 912. The Court based this conclusion on the section 110(a)(2)(D) requirement that implementing provisions be consistent with Title I of the Act, finding that a plan must be consistent with both the substance and procedural requirements of air quality standard compliance. *Id.* EPA's position that it may ignore applicable attainment dates in favor of future dates that could theoretically *become* attainment dates if a series of uncertain events occurs is untenable and directly contrary to *North Carolina's* holding that the Act requires EPA to take seriously the urgent need to attain health-based air quality standards (and the real-world health harms caused by failing to do so).

EPA also contends that, even though Delaware established that it was not attaining the 2015 standard at the time it filed its 126(b) petitions, and continued to be out of attainment of the 2015 standard through the time the agency belatedly acted on the petitions, Delaware had an obligation to demonstrate that it would remain in nonattainment through its 2021 attainment date. 83 Fed. Reg. at 50,461. But EPA acknowledges that there are no data available for years between 2017 and 2023 that could support such a demonstration, making EPA's request essentially impossible to meet. *See* 83 Fed. Reg. at 50,461. And even if Delaware had the capacity to obtain those data and undertake the relevant modeling, it could not have known with certainty what its attainment date would be when it filed the 126(b) petitions. Indeed, EPA missed *its* statutory deadline to designate all nonattaining areas under the 2015 ozone standard and only promulgated those designations after being sued (twice) by states and environmental groups, resulting in an attainment date of 2021 rather than 2020.⁵ EPA should not be able to benefit from its pattern of unlawful delay.

As a last resort, EPA claims that its 2023 modeling is better evidence of Delaware's 2021 ozone attainment than current ozone levels. 83 Fed. Reg. at 50,461. This is arbitrary. As set forth in Delaware's brief at section I.B.ii, monitor

⁵ *Am. Lung Ass'n v. EPA*, Case No. 17-1172, 2019 U.S. App. LEXIS 34 * (D.C. Cir. Jan. 2, 2019); *In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082 (N.D. Cal. 2018).

data post-dating implementation of the Cross-State Update, the rule that EPA's rationale rests upon, do *not* show Delaware monitors uniformly attaining the 2015 standard. Moreover, EPA's 2023 modeling is deeply flawed, failing, for example, to account for any of the current EPA efforts to weaken or roll back rules providing significant ozone benefits to East Coast states (*e.g.*, EPA's proposal to dramatically roll back federal vehicle emission standards and strip states of existing authority to enforce more stringent standards, 83 Fed. Reg. 42,986 (Aug. 24, 2018)). *See* Citizen Cmts. at 11–13, JA ___.

The Court should give effect to Section 126(b)'s present tense language as written and vacate EPA's arbitrary denial of Delaware's petitions at the initial step in light of Delaware's ongoing nonattainment under the 2015 ozone standard.

II. EPA's Rejection of the Maryland and Delaware Petitions on the Basis that No Cost-Effective Emission Reductions are Available at the Petition Units is Unlawful and Arbitrary

Although EPA has backpedaled from its proposed finding that Maryland's petition was technically deficient, 83 Fed. Reg. at 50,457, EPA nevertheless denied Maryland's petition and independently denied Delaware's petitions on the basis that, following implementation of the Cross-State Update, no cost-effective emission reductions remain at the units targeted by the Section 126(b) petitions.⁶ EPA's denial, however, rests on a flawed proposition. EPA insists that, because its

⁶ Step 3 of EPA's four-step transport framework. *See supra* note 2.

Cross-State Update was based on a control strategy approximating optimization of generic Selective Catalytic Reduction controls across the coal fleet equipped with these controls, all cost-effective emission reductions from optimizing these controls at the Petition Units⁷ must have already occurred. *See* 83 Fed. Reg. at 50,464-65. This is false.

As the 2017 ozone season emission data from the Petition Units plainly demonstrate, the Cross-State Update did not, in fact, result in all those units optimizing operation of their installed controls, whether measured against their demonstrated past performance or EPA's generic optimized control performance rate.

EPA claims that the Cross-State Update is "generally achieving" the emission reductions Maryland's petition seeks, 83 Fed. Reg. at 50,465, pointing to the fact that the units identified in Maryland's petition, on average in the 2017 ozone season, when the Cross-State Update was in effect, emitted nitrogen oxides at a rate of 0.115 lb/MMBtu. 83 Fed. Reg. at 50,465. But this collective emission rate exceeds EPA's generic emission rate for optimized Selective Catalytic Reduction control performance (0.10 lb/MMBtu) by 15 percent.

⁷ "Petition Units" is used herein to denote the 34 units identified in Maryland's and Delaware's Section 126(b) petitions that are equipped with Selective Catalytic Reduction controls. This is all of the units except those at Grant Town and Cambria Cogen, which are equipped with Selective Non-Catalytic Reduction controls.

Moreover, EPA's analysis understates the actual underperformance of the Petition Units in several ways. First, by aggregating the emission rate data across all of the Petition Units, EPA obscures the significant underperformance of a number of the individual units. As summarized in the table below, which was submitted by Citizen Commenters, JA___, 13 of the 34 Petition Units emitted at rates higher than EPA's generic optimized control rate of 0.10 lb/MMBtu and seven of those units emitted at rates at least 50 percent higher than a generic optimized Selective Catalytic Reduction control. Second, when the Petition Units' 2017 ozone season performance is compared to their respective *actual* capabilities, the deficiency is even greater, with 17 of the 34 Petition Units emitting at levels more than 25 percent greater than their best demonstrated ozone season performance. *See* Table, *infra*, p. 19. EPA's disregard for unit-specific capabilities is arbitrary and capricious. Citizen Comments provided technical analysis by Dr. Ranajit Sahu and empirical evidence confirming that numerous unit-specific attributes about the boiler and Selective Catalytic Reduction device significantly affect control efficiency, and units equipped with Selective Catalytic Reduction controls are fully capable of regaining best historic performance. Citizen Cmts. at 16–18 and Attach. C (Sahu), JA___. EPA offered no unit-specific rebuttal, but instead relied on the generality that “the average capacity factor of the coal fleet has declined,” EPA Resp. to Cmts. at 57, JA___, entirely failing to examine whether

the capacity factors of *the units at issue in Maryland's petition* have declined or account for the numerous units that during the 2017 ozone season managed to regain or even exceed best historic performance. Citizen Cmts. at 16–18, JA__.

When compared either to EPA's generic control rate for Selective Catalytic Reduction or to actual past performance, it is clear that cost-effective⁸ emission reductions remain at many of the Petition Units.

⁸ Although EPA in its final denial declined to specify a dollar-per-ton threshold for cost-effectiveness, in the Cross-State Update EPA previously found optimization of Selective Catalytic Reduction controls to achieve a rate of 0.10 lb/MMBtu to be cost-effective at a cost threshold of \$1,400/ton of nitrogen oxide reduced. *See* 83 Fed. Reg. at 50,445 n.3.

Table: Nitrogen Oxide Emission Rate Data for Underperforming Petition Units

Facility Name	Unit ID	State	Maximum actual 30-day average NOx rate from best historic ozone season (lb/MMBtu) ⁹	Actual 2017 ozone season average emission rate for nitrogen oxides rate (lb/MMBtu) ¹⁰	Percent 2017 rate is above past actual rate
Gibson	5	IN	0.084	0.146	74%
East Bend	2	KY	0.067	0.107	60%
Paradise	3	KY	0.120	0.223	86%
Killen	3	OH	0.120	0.264	120%
W.H. Zimmer	1	OH	0.094	0.193	105%
Cheswick	1	PA	0.097	0.156	61%
Homer City	1	PA	0.072	0.176	144%
Homer City	2	PA	0.093	0.179	92%
Homer City	3	PA	0.105	0.115	10%
Montour	1	PA	0.100	0.144	44%
Montour	2	PA	0.088	0.153	74%
Harrison	1	WV	0.066	0.105	59%
Pleasants	2	WV	0.045	0.132	193%

(From Citizen Cmts. at 19)

⁹ This is the emission rate that Maryland requested that EPA impose on the Petition Units. As described in Appendix A to Maryland's 126(b) Petition, it represents the highest actual 30-day rolling average nitrogen oxide emissions from a unit during the ozone season when it did the best job optimizing performance of its installed Selective Catalytic Reduction control.

¹⁰ EPA, 2011-2017 NOx Emission Rates from Petition Units, JA __.

EPA attempts to deflect concerns about underperformance at the Petition Units by asserting that additional emission reductions are occurring at other *non-Petition* Units. 83 Fed. Reg. at 50,466. This effort is misplaced and would fatally undercut Section 126(b) as an independent remedy for downwind states. To be clear, the Cross-State Update that EPA relies upon was not calibrated to fully resolve Good Neighbor obligations under the 2008 ozone standard and EPA nowhere in this record claims it does.¹¹ Indeed, EPA does not dispute that Maryland continues to have a maintenance monitor for the 2008 standard linked to emissions from states in which the petition sources are located. 83 Fed. Reg. at 50,463. EPA nevertheless points to emission reductions occurring at non-Petition Units to demonstrate that no additional cost-effective emission reductions are available at the *Petition* Units. *See* 83 Fed. Reg. at 50,468. This is irrational. Having conceded there is a nonattainment or maintenance issue linked to the upwind state, EPA cannot ignore cost-effective emission reductions at Petition Units because other non-Petition Units have reduced their emissions in some measure that does not fully resolve downwind attainment and maintenance. Section 126(b) loses any independent function if EPA, in this situation, can claim that

¹¹ EPA acknowledges that the Cross-State Update was based around control strategies that could be implemented quickly and inexpensively, 83 Fed. Reg. at 50,464, and described most of the state budgets as a “partial remedy” for interstate ozone transport under the 2008 ozone standard.

admittedly insufficient emission reductions occurring at non-Petition Units alleviate its responsibility to ensure that all cost-effective emission reductions are also occurring at the Petition Units.

III. EPA's Denial of the Section 126(b) Petitions is Arbitrary and Unlawful in Light of the Larger Pattern of EPA's Persistent Delays and Denials in Implementing and Enforcing the Good Neighbor Provision and Regulating the Interstate Transport of Ozone Pollution

EPA's denial of the 126(b) petitions occurs within a larger pattern of agency delay and failure to effectively address interstate ozone transport, despite the clear directive of the Clean Air Act. *See Maryland Br.* at 16 (standard of review).

EPA and Congress have recognized the persistent problem of interstate ozone pollution for decades. Congress has provided at least three statutory tools in the Act to address the problem. The Good Neighbor Provision requires states to ensure their pollution does not travel into neighboring states and impair their ability to attain or maintain air quality standards. 42 U.S.C.

§ 7410(a)(2)(D)(i)(I). Section 126(b) is an enforcement tool for downwind states who are suffering from upwind states' failure to comply with the Good Neighbor Provision. 42 U.S.C. § 7426(b). The Ozone Transport Region includes eleven Northeast states that, in order to address ozone pollution within and without the region, implement heightened control measures to reduce ozone precursor pollutants. *See* 42 U.S.C. §§ 7511a, 7511c(a)-(b). States can petition EPA to

expand the Transport Region to add states when the Administrator “has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the [ozone standard] in the transport region.” 42

U.S.C. § 7506a(a)(1); *see also* Maryland Br. at 7.

Congress designed these statutory tools to provide timely action to address ozone pollution. In particular, “Congress intended Section 126(b) as a means for EPA to take immediate action when downwind states are affected by air pollution from upwind sources.” *GenOn REMA*, 722 F.3d at 522. EPA must implement the Good Neighbor Provision consistent with the timeline for attaining ozone standards: “as expeditiously as practicable but not later than” the specified attainment deadlines. 42 U.S.C. § 7511(a)(1); *see also North Carolina*, 531 F.3d at 911–913. Contrary to this clear intent for quick action, EPA has demonstrated a pattern of delay and inaction in addressing interstate transport of ozone pollution.

In December 2013, Northeastern states, including Maryland and Delaware, petitioned EPA under section 176A to expand the Ozone Transport Region to include eight upwind states and require those states to implement more stringent controls to reduce ozone precursor pollutants. EPA denied that petition in November 2017 primarily based on the availability of “other, more effective means of addressing the impact of interstate ozone transport,” namely the Good Neighbor Provision and Section 126(b) petitions. 82 Fed. Reg. 51,238, 51,242–45 (Nov. 3,

2017).¹² However, while EPA pointed to these other provisions, it failed to mention the Agency's long history of delay in implementing the Good Neighbor Provision¹³ or its failure to respond to pending 126(b) petitions within the statutory deadlines.¹⁴

In the face of continuing nonattainment, and EPA's denial of other avenues of relief, Maryland and Delaware turned to Section 126(b) petitions to seek relief from upwind pollution sources. Using this targeted approach, EPA had recommended, the 126(b) petitions identified specific sources in upwind states that are contributing to downwind nonattainment. EPA denied the Section 126(b) petitions and based its denial on the existence of the Cross-State Update, 83 Fed. Reg. at 50,444, even though that rule admittedly does not fully resolve significant contribution to downwind nonattainment, and, as discussed above, is an

¹² A legal challenge to the denial of the 176A petition is currently pending before this Court. *State of New York v. EPA*, Case No. 17-1273.

¹³ See, e.g., *New York v. Pruitt*, Case No. 18-cv-00406-JGK, 2018 U.S. Dist. LEXIS 99240 * (S.D.N.Y. June 12, 2018) (finding that EPA failed to meet deadline to promulgate federal plans to address interstate ozone transport); *Sierra Club v. Pruitt*, Case No. 15-cv-04328, 2017 U.S. Dist. LEXIS 79133 *, Order Re Partial Consent Decree and Summary Judgment (N.D. Cal. May 23, 2017) (finding that EPA failed to meet deadline to promulgate federal plan after belatedly disapproving Kentucky's Good Neighbor plan).

¹⁴ See, e.g., *State of Maryland v. Pruitt*, 320 F. Supp. 3d 722, 732 (D. Md. 2018) (entering summary judgment compelling EPA to respond to Maryland's 126(b) petition and noting that the "Court is troubled by EPA's apparent unwillingness or inability to comply with its mandatory statutory duties within the timeline set by Congress").

insufficient tool to address the specific underperforming coal-fired units identified in the petitions. Thus, for each attempt by the downwind states, EPA's denials pointed to a separate provision, only to reject later attempts to utilize those same provisions. EPA's actions frustrate Congress' clear intent that interstate ozone transport be resolved in a timely manner.

In its denials of the 126(b) and 176A petitions, EPA proposed narrow justifications, ignoring the cumulative result: ineffective reductions of transported air pollution resulting in nonattainment of air quality standards and unhealthy air for residents and the environment in downwind states. However, the Act requires EPA to ensure that upwind pollution does not interfere with downwind states' air quality. EPA has failed in its duty to protect states from the chronic problem of pollution from beyond their borders.

CONCLUSION

For the foregoing reasons, and those set out in the State's respective briefs, this Court should hold unlawful and set aside the EPA's denial of Maryland's and Delaware's petitions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies that in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing order dated February 28, 2019 (Doc. No. 1775438), this document contains 5,277 words, exclusive of the sections excluded by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1). Combined with the Petitioner State of Maryland's and State of Delaware's briefs, the cumulative word total is below the 21,000 words allotted in this Court's briefing order. Doc. No. 1775438.

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DATED: March 29, 2019

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CERTIFICATE OF SERVICE

I certify that on March 29, 2019 the foregoing Opening Proof Brief of Citizen Petitioners was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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