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, ET AL.,

Petitioners,

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 BRIEF FOR PETITIONER, STATE OF DELAWARE, CASE NO. 18-1301

STATE OF DELAWARE,
DEPARTMENT OF JUSTICE

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Dated: March 29, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties:

Petitioners:

The following parties appear as petitioners in these consolidated cases: 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, Physicians for Social Responsibility, Chesapeake, Inc., and Sierra Club (Petitioners).

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.

The following parties have been permitted to intervene in support of Respondents: Utility Air Regulatory Group (UARG), Duke Energy Indiana, LLC, and Duke Energy Kentucky, Inc.

B. Ruling Under Review:

Petitioners seek review of the final agency action by EPA entitled "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 by this or any other court. There are no related cases (other than those consolidated herein) within the meaning of D.C. Circuit Rule 28(a)(1)(C).

STATE OF DELAWARE,
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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
mmBTU	One million British Thermal Units
NAAQS	National ambient air quality standards
NOx	Oxides of nitrogen
Philadelphia NAA	Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE Nonattainment Area
RACT	Reasonably available control technology
SCR	Selective catalytic reduction
Section 126	42 U.S.C. § 7426

STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions and legislative history excerpts are included in the Addendum filed with the State of Maryland's brief.

JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(i) ("Fed. R. App. P. 28(i)"), Delaware hereby adopts by reference the State of Maryland's "Jurisdictional Statement" at page 2 of its Opening Brief to avoid repetitious information, because the information detailed in Maryland's "Jurisdictional Statement" is applicable to Delaware. Delaware supplements Maryland's "Jurisdictional Statement" with the following Delaware specific information.

Delaware challenges EPA's final action, "Response to Clean Air Act Section 126(b) Petitions from Delaware and Maryland," 83 Fed. Reg. 50,444 (Oct. 5, 2018), which denied Delaware's four section 126(b) petitions (hereinafter referred to as the "denial decision"). Delaware timely filed its petition for review with this Court on November 5, 2018, within 42 U.S.C. § 7607(b)'s sixty-day period.

ISSUES PRESENTED

1. Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference Issue 1 presented in Maryland's Brief at page 3, which addresses errors in EPA's reliance on the CSAPR Update to deny Maryland's and Delaware's 126 petitions.

2. Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference Issues 1 through 3 presented in the Citizen Petitioners' Brief at page 14. Issue 1 addresses whether EPA's conclusion that Delaware's petitions failed to satisfy EPA's threshold requirements is arbitrary. Issues 2 and 3 address errors in EPA's reliance on the CSAPR Update to deny Maryland's and Delaware's 126 petitions.

3. Whether EPA's determination that Delaware failed to satisfy its threshold requirements for a section 126 petition was arbitrary and contrary to law where EPA based its determination on: (A) its unreasonably narrow interpretation of section 126(b), and (B) its arbitrary decision to ignore Delaware's actual attainment deadline of 2021 in favor of its overly optimistic future modeling.

4. Whether EPA's reliance on the CSAPR Update to deny Delaware's section 126 petitions was arbitrary where the CSAPR Update does not ensure that the sources Delaware identified will not emit NOx at rates that violate the Act's Good Neighbor Provision.

5. Whether EPA's denial of Delaware's Brunner Island petition was arbitrary and contrary to the Act where EPA based its denial solely on its belief that

the CSAPR Update and market forces will ensure that Brunner Island continues to burn natural gas in the absence of any regulatory provision prohibiting Brunner Island from burning coal in the future.

STATEMENT OF THE CASE

As an initial matter, throughout its Opening Brief, Delaware adopts portions of the State of Maryland's ("Maryland") and the Citizen Petitioners' Opening Briefs to avoid reciting repetitious information and arguments under Federal Rule of Appellate Procedure 28(i). Because EPA's denial decision addressed section 126 petitions filed by Delaware and Maryland, portions of Maryland's and the Citizen Petitioner's briefs recite information and address issues also involving EPA's denial of Delaware's petitions. Delaware supplements, as appropriate, these portions of Maryland's and Citizen Petitioners' briefs with Delaware specific information. (*See Hammond v. U.S.*, 880 A.2d 1066, 1088, n. 17 (D.C. Cir. Aug. 11, 2005)). Additionally, while Delaware notes in its brief where its arguments apply to EPA's denial of Maryland's petition, this brief focuses on EPA's denial of Delaware's petitions. For these reasons, Delaware recommends that the Court begin with reading Maryland's brief, followed by Delaware's and the Citizen Petitioners' briefs for clarity.

Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference the Citizen Petitioners' "Statement of the Case" at pages 15-17. In addition, Delaware hereby adopts by reference the "Preliminary Statement" and sections I.A., I.B., and II.B. of the "Statement of the Case" presented in Maryland's brief at pages 1-2; 3-7;

8-12. Delaware supplements these portions with the following Delaware specific information.

I. DELAWARE'S LOCAL EFFORTS TO ADDRESS OZONE.

Like Maryland, Delaware has done its part to control sources of ozone precursor emissions (predominately NOx) within its borders to improve Delaware's air quality, and to minimize its contributions of ozone to the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE Nonattainment Area ("Philadelphia NAA").[1] In addition to participation and compliance with various federal NOx emission control programs such as the OTC NOx budget Program in 1998, the EPA NOx SIP Call in 2002, and the EPA CAIR in 2006, Delaware has promulgated numerous regulations that control and limit NOx emissions from fossil fuel combustion sources that power electric generating units in the State. These regulations include:

- 7 Del. Admin. C. § 1112, Control of Nitrogen Oxides Emissions, which provides NOx RACT requirements for Delaware's EGUs;
- 7 Del. Admin. C. § 1142, Specific Emission Control Requirements, which provides NOx emission control requirements for large boilers, such as those used in co-generation applications;

[1] As discussed in Section I.A. of Delaware's Argument Section herein, Delaware's New Castle County is included in the multistate Philadelphia NAA, which is currently nonattainment for the 2008 and 2015 Ozone NAAQS.

- 7 Del. Admin. C. § 1144 Control of Stationary Generator Emissions, which provides NOx emission control requirements for small EGUs including those in distributed generation applications;
- 7 Del. Admin. C. § 1146 Electric Generating Unit (EGU) Multi-Pollutant Regulation, which provides NOx emission control requirements for Delaware's large coal fired and oil fired EGUs; and
- 7 Del. Admin. C. § 1148 Control of Stationary Combustion Turbine Electric Generating Unit Emissions, which provides NOx emission control requirements for combustion turbine powered EGUs.

These regulations, along with related consent decrees, have resulted in NOx reductions from Delaware's electric generator fleet in excess of those required by the EPA's various regional NOx emission reduction programs, including the CSAPR Update.

Despite Delaware's efforts to control its sources' emissions, upwind states have not made a commensurate effort to reduce emissions that continue to contribute to Delaware's and the Philadelphia NAA's nonattainment. Consequently, Delaware continues to endure the health effects of polluted air and the heavy costs of emission controls, while upwind sources reap the economic benefits of not optimizing the operation of their existing emission control technologies in accordance with good pollution control practices.

II. DELAWARE'S SECTION 126(b) PETITIONS & EPA'S DENIAL.

As discussed in Maryland's and Citizen Petitioners' briefs, Delaware and Maryland have tried to address these upwind sources' through other provisions of the Act to no avail.[2] Because of EPA's repeated failure to address interstate transport of ozone under the Act's other provisions, Delaware filed four separate petitions under 42 U.S.C. § 7426 ("section 126 petitions") asking EPA to determine whether the four named sources, all electing generating units, are violating the Act's Good Neighbor Provision. The four sources are: Brunner Island in Pennsylvania (filed July 7, 2016); Harrison Power Station in West Virginia (filed August 8, 2016); Homer City Generating Station in Pennsylvania (filed November 10, 2016); and Conemaugh Generating Station in Pennsylvania (November 28, 2016) (hereinafter the "named sources").[3] (Delaware's Petitions JA__). Delaware petitions requested only that EPA adopt sufficiently stringent short-term NOx emissions rate limits to ensure that the sources run their existing pollution control technologies every day of the ozone season. (*Id.*)

In its petitions and comment in response to EPA's proposed denial, Delaware explained that the named sources emit air pollutants in violation of the Act's Good

[2] For a further discussion of Maryland's and Delaware's efforts to have EPA address interstate transport of ozone, see Maryland's Preliminary Statement and Section II.B. of Maryland's Statement of the Case at pages 1-2; 8-12. Additionally, see Section III of Citizen Petitioners' Argument Section at pages 33-36.

[3] Maryland's petition also named Harrison Power Station and Homer City.

Neighbor Provision, because each source significantly contributes to Delaware's and the Philadelphia NAA's nonattainment of the 2008 and 2015 Ozone NAAQS. (Delaware's Petitions; Del. Cmts. JA_). To limit these sources' effects on Delaware and the Philadelphia NAA, Delaware requested only that EPA adopt short-term NOx emission rate limits of appropriate stringency and averaging periods to ensure that the named sources run their existing pollution control technologies every day of the ozone season.[4] (Delaware's Petitions; Del. Cmts. at 19-20; 22-25; 30 JA__-___). Additionally, for Brunner Island, Delaware requested that EPA impose a requirement that restricts Brunner to only burning natural gas in the future. (Delaware's Brunner Island Petition at 20; Del. Cmts. at 16-19 JA_).

On June 8, 2018, EPA proposed to deny Delaware's four petitions, as well as Maryland's petition. (83 FR 26666). On July 23, 2018, Delaware submitted comments in response to EPA's proposed denial. (Del. Cmts. JA_). Delaware summarizes its comments as follows:

(1) EPA's finding that Delaware failed to satisfy its threshold requirements was arbitrary, because it ignored actual data showing that monitoring receptors in

[4] For example, in its Homer City petition, Delaware requested that EPA "establish NOx emissions limits with appropriate magnitudes and averaging periods that ensure that the NOx emissions are adequately controlled during any particular time period." (*See* Delaware's Homer City Petition at 23-25 JA__ - ___).

Delaware and the Philadelphia NAA are currently failing to attain the 2008 and 2015 Ozone NAAQS.

(2) EPA's reliance on the CSAPR Update to deny Delaware's petitions is improper, because the CSAPR Update does not contain short-term NOx emissions limits or averaging periods that are protective of the 8-hour Ozone NAAQS. Consequently, the CSAPR Update does not ensure that the named sources will optimize their operation of their existing pollution control technologies in accordance with good pollution control practices every day of the ozone season. Therefore, the named source will continue to interfere with Delaware's and the Philadelphia NAA's ability to attain or maintain the 2008 and 2015 Ozone NAAQS following EPA's implementation of the CSAPR Update.

(3) EPA's reliance on the CSAPR Update and natural gas market predictions to deny Delaware's Brunner Island petition is improper, because passive market forces are not an enforceable "emissions limitation," as defined by the Act. Because market forces do not place any enforceable restrictions on Brunner Island's emissions rate on a continuous basis, EPA's reliance on market forces to deny Delaware's Brunner petition is wholly inconsistent with the Act and section 126. Despite Delaware's, and numerous others' comments opposing EPA's proposed denial, EPA finalized its denial decision on October 5, 2018. (83 FR 50444).

EPA denied Delaware's petitions for several reasons, some of which were specific to Delaware, and some of which EPA applied to Maryland's and Delaware's petitions. For the former, EPA specifically denied Delaware's petitions because it determined that Delaware did not satisfy its threshold requirements for a section 126(b) petition. (83 FR 50456-462).

Additionally, EPA denied Delaware's petitions at step 3 of its four-step framework. EPA denied Delaware's Harrison, Homer City, and Conemaugh petitions for the same reasons it denied Maryland's petition, its conclusion under step 3 that the CSAPR Update had already optimized emissions reductions from sources equipped with selective catalytic reduction ("SCR") controls.[5] (83 FR 50464-470). EPA also denied Delaware's Brunner Island petition at step 3, but relied on its assumptions about the natural gas market in addition to the CSAPR Update to support this denial. (83 FR 50470-473).

This is Delaware's Opening Brief in support of its Petition for Review requesting that the Court vacate EPA's denial decision.

[5] For a further discussion of EPA's denial of the section 126 petitions at step 3, see Section II.D. of Maryland's "Statement of the Case" at pages 14-15.

STANDARD OF REVIEW

Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference Maryland's "Standard of Review" at pages 16 of its brief, with the following Delaware specific supplement.

In addition to challenging EPA's denial decision under the arbitrary and capricious standard, as discussed in Maryland's "Standard of Review," Delaware also challenges EPA's interpretation of section 126(b). When EPA's statutory interpretation is challenged, this court follows the well-known *Chevron* two-step framework to evaluate the challenge. (*See Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 439 (D.C. Cir. 2018).

Under the *Chevron* two-step framework, the court first looks to the statute's plain language. Where the statute's text is unambiguous, its text controls. If, on the other hand, the statute is silent or equivocal, the Court then asks under step-two of the *Chevron* framework whether the agency's interpretation of the statute is reasonable. Where EPA's statutory interpretation is contrary to Congress's clear intent, or its interpretation produces an unreasonable result, a court should reverse EPA's statutory interpretation. (*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

SUMMARY OF THE ARGUMENT

As they relate to Delaware's Arguments that EPA improperly relied on the CSAPR Update and erroneously concluded that Delaware did not satisfy its threshold requirements to deny Delaware's petitions, pursuant to Fed. R. App. P. 28(i), Delaware adopts by reference Maryland's and the Citizen Petitioner's "Summary of the Argument," which appear at pages 17-18 and at pages 18-19 of their respective briefs. Delaware supplements Maryland's and Citizen Petitioners' "Summary of the Arguments" with the following Delaware specific information.

EPA's determination in its denial decision that Delaware failed to satisfy its threshold requirements for a section 126(b) petition is arbitrary and contrary to the Act for several reasons. First, EPA ignores Delaware's actual attainment deadline for the 2015 Ozone NAAQS as well as monitoring data that indicates that it is unlikely that Delaware will attain the 2015 NAAQS by 2021, the deadline for areas designated as marginal nonattainment under the 2015 Ozone NAAQS. (83 FR 50460-461). Instead, EPA relies on overly optimistic future modeling that predicts that Delaware, and the Philadelphia NAA, will attain the 2015 NAAQS by 2024 – the deadline for areas designated as moderate nonattainment – to support its conclusion that Delaware failed to satisfy its threshold requirements. (*Id.*) This Court should not permit EPA to continue delaying meaningful action on interstate ozone transport by endorsing EPA's "wait and see" approach.

Additionally, the Court should vacate EPA's unreasonably narrow interpretation of section 126(b) that enabled it to ignore monitoring data from monitors in the Philadelphia NAA when it evaluated Delaware's petitions. (83 FR 50460). Had EPA interpreted section 126(b) consistent with the statute's plain language and in a reasonable manner, it would have had to consider monitoring data from the Philadelphia NAA that demonstrates that there is an air quality problem linked to the named sources.

The Court should also reject EPA's reliance on the CSAPR Update as a basis to deny the petitions at step 3 of its four-step framework for evaluating transport obligations. EPA acknowledged that the CSAPR Update was an incomplete remedy under the Act's Good Neighbor Provision, yet it now relies solely on the CSAPR Update to claim that no further emissions reductions are necessary at the named sources. (83 FR 50464-472). Not only is EPA's reliance on the CSAPR Update to deny the petitions inconsistent with the CSAPR Update's purpose, but EPA also arbitrarily disregarded Delaware's comments that the CSAPR Update does not ensure that the named sources will optimally operate their pollution controls, or that Brunner Island will continue to burn natural gas.

For these reasons, this Court should vacate EPA's denial decision and remand Delaware's and Maryland's petitions for proper consideration.

STANDING

Delaware shares many of the same injuries EPA's denial decision causes Maryland and, pursuant to Fed. R. App. P. 28(i), adopts by reference Maryland's Standing section at pages 18-19, with the following Delaware specific supplement.

Delaware is the filer of four of the underlying section 126 petitions that are the subject of EPA's denial decision under review by this Court. EPA's improper denial decision thus adversely affects the State of Delaware directly. Therefore, under 42 U.S.C. § 7607, the State of Delaware has standing to seek judicial review of EPA's denial decision.

Delaware also emphasizes that, in addition to the harm its citizens and environment will continue to endure because of the continued interstate transport of ozone pollutants from less regulated upwind sources, EPA's denial decision also continues to unfairly place the burden of emissions reductions on Delaware. EPA's unlawful denial decision thus injures Delaware's sovereign and proprietary interests, because Delaware's citizens and industry will have to bear the increased regulatory and economic burdens of further in-state emissions reductions for the benefit of less regulated upwind sources.

ARGUMENT

I. THE COURT SHOULD VACATE EPA'S ARBITRARY DECISION THAT DELAWARE FAILED TO SATISFY ITS THRESHOLD REQUIREMENTS FOR A SECTION 126(b) PETITION.

EPA denied Delaware's petitions, in part, because it determined that the petitions failed to satisfy EPA's threshold requirements for a section 126(b) petition: (1) that there be an air quality problem within the petitioning state's borders; and (2) that the source(s) named in the petition contributes to the air quality problem. EPA concluded that Delaware's petitions did not satisfy its threshold requirements, because it claimed the petitions did not contain sufficient information enabling it to find, and its own independent analysis at step 1 of its four-step framework did not show, that there is either an air quality problem in Delaware or that the named sources contribute. (83 FR 50456-463).

EPA's conclusion that Delaware failed to satisfy its threshold requirements rests on its unreasonably narrow interpretation of section 126(b), and its arbitrary decision to ignore Delaware's actual attainment deadline of August 2, 2021, in favor of overly optimistic modeling that predicts that Delaware will attain the 2015 Ozone NAAQS by 2024. The Court should vacate EPA's unlawful conclusion that Delaware did not satisfy its threshold requirements.

A. EPA'S INTERPRETATION OF SECTION 126(b) IS CONTRARY TO THE TEXT AND UNREASONABLE.

To support its assertion that there is no air quality problem sufficient to support Delaware's 126(b) petitions, EPA adopted an unreasonably narrow interpretation that section 126(b)'s petition process is only available "to states . . . seeking to address interstate transport of pollution impacting downwind receptors within their geographical borders." (83 FR 50460). Consequently, EPA ignored Delaware's comments that EPA should also consider data from non-attaining monitoring receptors in the Philadelphia NAA when evaluating its 126 petitions. (Del. Cmts. at 3-4 JA__-__).[6]

EPA's interpretation of section 126(b) is arbitrary, because it bars states like Delaware that are included in a multistate nonattainment area from petitioning EPA for a determination that a source contributes to the area's nonattainment, simply

[6] In its comment on EPA's proposed denial, Delaware emphasized that EPA should consider monitoring data from monitors throughout the Philadelphia NAA to determine whether there is an air quality problem for purposes of acting on Delaware's petitions. Delaware wrote, "While Delaware's monitors are currently meeting the design value of the 2008 ozone NAAQS, other monitors in the Philadelphia NAA are exceeding the NAAQS (most notably the Bristol, PA monitor # 420170012 with a 2015-2017 design value of 79 parts per billion). Although the Philadelphia NAA has been declared by EPA to have officially attained the 2008 ozone NAAQS, the nonattainment area is currently NOT attaining the standard, as proven by the Bristol, PA monitor. The EPA should not presume that the Bristol monitor, and therefore the Philadelphia NAA, and subsequently Delaware will be attaining the 2008 ozone NAAQS by the modeled attainment date of 2023." (Del. Cmts. at 4 JA__).

because the non-attaining monitor(s) happen to be located outside of the petitioning state's borders. Nothing in section 126(b) or the Act supports EPA's unreasonably narrow interpretation.

Section 126(b) states, "Any State or political subdivision may petition the [EPA] Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section [7410(a)(2)(D)(i)].[7]" (Emphasis added). The language is clear, "Any State" may file a petition to determine whether a source is violating the Act's Good Neighbor Provision; and nothing in section 126(b) explicitly bars a state from petitioning EPA for a finding that a source is affecting downwind receptors in another state. *Chevron* directs courts to give effect to the statute's plain language, thus, this Court should vacate EPA's inconsistent interpretation of section 126(b).

Even if the Court finds that section 126 is ambiguous, *Chevron* instructs that the Court should reject EPA's statutory interpretation where it produces an absurd result. EPA's handling of Delaware's 126(b) petitions demonstrates the absurd result its interpretation produces.

EPA includes Delaware's most northern county, New Castle County, in the Philadelphia NAA, because it "determined that [New Castle County is] contributing

[7] 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).

to the air quality problems in Pennsylvania." (83 FR 50460, n. 48). Consequently, sources in Delaware are required to implement costly emission reductions, which they have done.

The Philadelphia NAA, however, does not include all upwind sources that contribute to the area's nonattainment of the 2008 and 2015 NAAQS. Upwind contributing sources outside of the Philadelphia NAA's boundaries are not required, and have no incentive, to reduce their emissions. This results in significant disparities in emissions reductions between sources inside the Philadelphia NAA and contributing sources outside of the Philadelphia NAA.[8]

Section 126(b) provides states one way to address this inequity. By petitioning EPA for a finding that a source outside of the nonattainment area is contributing to the nonattainment, the petitioning state can seek to have EPA impose

[8] Delaware has previously raised this disparity with EPA to no avail. In its proposal to EPA for area designations under the 2015 Ozone NAAQS, Delaware explained, "The establishment of nonattainment boundaries is critical because it is within these boundaries that the nonattainment provisions of the [Act] are applied. If the EPA again establishes small, metropolitan based nonattainment areas, Delaware's well controlled sources will undergo another round of costly regulation, and any additional emission reductions will come at a high costs, with control strategies generally being technology forcing. In contrast, very cost effective emissions reductions opportunities outside [the] small nonattainment area will not be realized, and the uncontrolled sources that are contributing to the problem will remain uncontrolled. This is unfair, and contrary to the CAA." (Delaware State Recommendations, at pg. 2 of Executive Summary (Sept. 23, 2016) (*available at* https://www.epa.gov/ozone-designations/ozone-designations-2015-standards-delaware-state-recommendations-and-epa-response)).

emission limitations on the source under section 126(c). EPA's arbitrary interpretation of section 126(b), however, precludes Delaware from availing itself of the 126(b) petition process to address this inequity, simply because EPA concluded that monitoring receptors within Delaware's borders are attaining, or are projected to attain, the NAAQS. Nothing in section 126(b) demands this absurd and unfair result.

By using the phrase, "Any State or political subdivision," it is evident that Congress authorized "Any State" to petition for a finding under section 126(b), regardless of whether air quality monitors within the petitioning state's borders are non-attaining. Congress's rationale for enabling "Any State" to file a 126(b) petition is particularly evident when the petitioning state is within a multistate nonattainment area. Using Delaware as an example, because Delaware is included in the Philadelphia NAA, it has to reduce its emissions, regardless of whether any monitoring receptors in Delaware are non-attaining. Therefore, it is only fair that Delaware also have the right to petition EPA for a finding that sources outside of the Philadelphia NAA are contributing to the area's inability to attain the NAAQS, regardless of whether any monitoring receptors in Delaware are non-attaining. To interpret section 126(b) as EPA has done arbitrarily bars Delaware, and states similarly situated, from being able to utilize section 126(b)'s petition process to address inequities in emissions reductions.

Consistent with its historically obstructionist approach to addressing interstate ozone transport, EPA tailored its interpretation of section 126(b) to support its denial decision. Had EPA considered data from non-attaining monitoring receptors in the Philadelphia NAA when evaluating Delaware's petitions, EPA would have found an air quality problem that satisfies its threshold requirements. Because EPA determined under the CSAPR Update that the Philadelphia NAA has a maintenance receptor(s) for the 2008 NAAQS, and that the upwind states that Delaware identifies in its petitions (Pennsylvania and West Virginia) contribute to that air quality problem, EPA would have had to conclude that Delaware's petitions satisfy its threshold requirements, as it did for Maryland.[9] By interpreting section 126(b) in an overly restrictive way, EPA was able to avoid this inconvenient analysis while inexplicably shielding the named sources from their Good Neighbor obligations. The Court, therefore, should reject EPA's unreasonable interpretation of section 126(b).

B. EPA'S DECISION TO IGNORE DELAWARE'S ACTUAL ATTAINMENT DEADLINE IS ARBITRARY.

Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference Section I of the Citizen Petitioner's "Argument Section" at pages 22-27, wherein Citizen Petitioners' persuasively argue that EPA's decision to ignore Delaware's

[9] EPA used this very same analysis to conclude that Maryland satisfied steps 1 and 2 of its four-step framework with respect to the 2008 NAAQS. (83 FR 50461).

actual marginal attainment deadline of August 2, 2021, to support its denial decision is arbitrary and contrary to the Act. Delaware supplements Citizen Petitioners' well-reasoned arguments as follows.

i. EPA Unfairly Burdens Delaware with Additional Emissions Reductions by Ignoring Delaware's Actual Attainment Deadline.

EPA's arbitrary decision to ignore Delaware's actual attainment deadline is not only inconsistent with the Act, as Citizen Petitioners address in their brief, but it also ignores the consequences that will follow if Delaware misses its marginal attainment deadline, which actual monitoring data demonstrates is likely. If Delaware, or the larger Philadelphia NAA, remain in nonattainment after 2021, Delaware will have to devote valuable resources to planning further emissions reductions in order to attain the 2015 Ozone NAAQS by 2024, while the named sources can continue to operate under the CSAPR Update's lax emissions standards.[10] By failing to consider whether the named sources are or will contribute to Delaware's nonattainment of the 2015 NAAQS by its marginal 2021 deadline, EPA purposely shields these sources from their Good Neighbor obligations in

[10] In its denial decision, EPA actually admits that its reason for ignoring Delaware's marginal attainment deadline is to avoid possibly having to impose emissions limitations on the named sources in the hope that Delaware will attain the Ozone NAAQS by the moderate nonattainment deadline of 2024. (83 FR 50461). The Court should not permit EPA to delay taking timely action on interstate ozone transport, because EPA hopes that Delaware will attain the NAAQS by some future date not aligned with Delaware's marginal nonattainment designation.

contravention of the Act's command that states meet the ozone NAAQS "as expeditiously as practicable." 42 U.S.C. § 7511(a)(1).

ii. Actual Monitoring Data from Receptors in Delaware and the Philadelphia NAA for 2017 and 2018 do not Support EPA's Reliance on its Future Modeling to Deny Delaware's Petitions.

EPA's arbitrary decision to ignore Delaware's actual attainment deadline, and its conclusion that Delaware failed to satisfy its threshold requirements in regards to the 2015 NAAQS, relies heavily on future modeling that predicts that monitors in Delaware and the Philadelphia NAA will attain the 2015 NAAQS by the moderate attainment deadline of 2024.[11] Delaware, however, argued in its comment on EPA's proposed denial that monitoring data for 2017, and the monitoring data that was available at that time for 2018 (through approximately July 2018), showed that it was unlikely that Delaware would attain the 2015 Ozone NAAQS by its 2021 deadline. (Del. Cmts. at 27-29 JA__-__). Delaware also noted that the available monitoring data indicated that EPA's future modeling was overly optimistic. (Del. Cmts. at 29 JA___). Delaware maintains that monitoring data for 2017 and 2018 undermines EPA's reliance on its future modeling and further demonstrates why EPA must consider Delaware's actual marginal attainment deadline.

[11] Delaware, along with several other states, are challenging EPA's future modeling in *State of New York, et al. v. EPA*, Case No. 19-1019 (D.C. Cir.).

Since EPA implemented the CSAPR Update, 12 monitors in the Philadelphia NAA have shown little to no improvement in their design values, with some monitors in Pennsylvania even exceeding the 2008 Ozone NAAQS, as detailed in the following table:[12]

TABLE 1: PHILADELPHIA NONATTAINMENT AREA MONITORS THAT EXCEEDED THE 2008 AND 2015 OZONE NAAQS[13]

State	Site Name	2015 4th Highest Daily Max Value	2016 4th Highest Daily Max Value	2017 4th Highest Daily Max Value	2018 4th Highest Daily Max Value	15-17 3YR Design Values	16-18 3YR Design Values
DE	BCSP	0.071	0.078	0.074	0.067	0.074	0.073
	BELLFNT2	0.069	0.074	0.070	0.072	0.071	0.072
	MLK	0.072	0.073	0.071	0.071	0.072	0.071
MD	Fair Hill	0.074	0.075	0.075	0.073	0.074	0.074
NJ	Camden Spruce St	0.079	0.076	0.076	0.075	0.077	0.075
PA	Clarksboro	0.076	0.074	0.073	0.077	0.074	0.074
	BRIS	0.082	0.080	0.079	0.084	0.080	0.081
	NEWG	0.068	0.080	0.071	0.065	0.073	0.072
	CHES	0.074	0.071	0.070	0.073	0.071	0.071
	NORR	0.073	0.067	0.076	0.073	0.072	0.072
	NEA	0.079	0.080	0.076	0.079	0.078	0.078
	NEW	0.078	0.076	0.076	0.076	0.076	0.076

[12] Delaware included a similar table (Table 8) in its comments on EPA's proposed denial, which indicated that there had been no improvement in the ambient ozone design value at that time. (Del. Cmts. at 29 JA___).

[13] All values are in parts per million ("ppm"). 2018 Data is currently in "draft" form, because the data will not be formally certified until May 1, 2019. Delaware does not anticipate that the 2018 Data will change between the filing of this Brief and May 1, 2019, and Delaware considers the 2018 Data reliable.

The actual monitoring data displayed in Table 1 is indicative that EPA was overly optimistic concerning the CSAPR Update's effects on ambient air quality, and undermines EPA's heavy reliance on its future modeling to deny Delaware's petitions.[14] Furthermore, that 12 monitors in the Philadelphia NAA, including three in Delaware, have shown little to no improvement in their design values since 2017 is a strong indication that Delaware and the Philadelphia NAA will not attain the 2015 NAAQS by the 2021 deadline. The Court, therefore, should reject EPA's reliance on its overly optimistic future modeling and require it to evaluate Delaware's petitions in relation to its marginal attainment deadline.

II. EPA'S RELIANCE ON THE CSAPR UPDATE TO DENY DELAWARE'S PETITIONS IS ARBITRARY AND CONTRARY TO THE ACT.

Pursuant to Fed. R. App. P. 28(i), Delaware hereby adopts by reference Section II of the Citizen Petitioners' "Argument Section" at pages 28-33.[15] In

[14] Delaware raised its concern that EPA's predictions maybe overly optimistic in its comment in opposition to EPA's proposed denial. Delaware wrote, "As an indication that [Delaware's] nonattainment designation [for the 2015 NAAQS] is appropriate and is likely to exist into the future, during the 2017 ozone season monitors in New Castle County Delaware continued to measure ambient ozone at levels exceeding the 2015 ozone standard. This may be an indication that EPA was overly optimistic concerning the impact of the CSAPRU on ambient air quality at any particular downwind location." (Del. Cmt. at 10 JA__).

[15] Delaware notes that Citizen Petitioners' Petition for Review only included three of Delaware's four petitions, Harrison Power Station, Conemaugh Generating Station, and Homer City Generating Station. Therefore, Delaware notes that Citizen Petitioners' Arguments were not intended to apply to Delaware's Brunner Island petition. *See* page 13, n. 1 of Citizen Petitioners' Brief.

addition, Delaware hereby adopts by reference Sections I. through I.D. of Maryland's "Argument Section" at pages 20-31. These portions of Maryland's and Citizen Petitioner's briefs reject EPA's inappropriate reliance on the CSAPR Update to deny the petitions at step 3 of its four-step framework for sources equipped with SCR controls. Three of Delaware's petitions named sources with SCR controls, two of which Maryland also named in its petition.[16] Maryland's and Citizen Petitioners' arguments that EPA's reliance on the CSAPR Update is arbitrary and unlawful are thus applicable to EPA's denial of Delaware's Homer City, Harrison, and Conemaugh petitions, which petitions EPA denied in conjunction with Maryland's petition at step 3. (83 FR 50464). Delaware supplements Maryland's and Citizen Petitioners' arguments as follows.

A. THE CSAPR UPDATE'S SEASONAL EMISSIONS LIMIT ALLOWS THE NAMED SOURCES TO CONTINUE VIOLATING THE ACT'S GOOD NEIGHBOR PROVISION.

EPA acknowledged at the time it adopted the CSAPR Update that it was not a complete remedy to the issue of interstate ozone transport, yet, it now relies on the CSAPR Update to deny Delaware's 126 petitions. EPA's step 3 analysis can be summarized as follows: because the CSAPR Update's cap and trade program with seasonal emissions limits is already achieving sufficient NOx emissions reductions,

[16] Homer City, Harrison, and Conemaugh all have SCR controls installed. Maryland's petition also named Homer City and Harrison.

more stringent emissions limitations at the named sources are unnecessary.[17] (83 FR 50465). The CSAPR Update's seasonal emissions limitation, however, does little to ensure that the named sources reduce NOx emissions each day of the ozone season, which is necessary if Delaware and the Philadelphia NAA are to attain the Ozone NAAQS. Therefore, the Court should not endorse EPA's circular logic, particularly where the CSAPR Update's lack of a sufficiently short-term NOx emissions limit allows the named sources to continue violating the Act's Good Neighbor Provision.

Delaware's petitions and comments argue that EPA must establish emissions limits that will control the named sources' NOx emissions rates every day of the ozone season to prevent the named sources from emitting NOx at rates that can interfere with a monitor's attainment of the 8-hour ozone NAAQS. (*See* Del. Cmts. at 30; JA__). Delaware thus recommended that EPA adopt a NOx emissions rate limit averaging period of no greater than 24-hours for the named sources in its petitions. (*See* Delaware's Harrison Petition at 24-25; JA__-__).

In contrast to Delaware's recommended 24-hour emissions rate limit averaging period, the CSAPR Update utilizes a NOx emissions rate limit averaged over the entire ozone season. (*See* Del. Cmts. at 20-25 JA_-_). Under this seasonal

[17] "Consequently, the EPA finds that CSAPR Update implementation is generally achieving the NOX reductions identified in the section 126(b) petitions for mitigation at these sources. The EPA, therefore, determines that these sources neither emit nor would emit in violation of the good neighbor provision." (83 FR 50465).

emissions rate limit, a source's daily NOx emissions rates can vary drastically while still complying with the CSAPR Update, provided the source's average seasonal NOx emissions rate is below the seasonal cap (or the source purchases emissions credits to cover any exceedances). (*Id.*) The seasonal emissions rate thus provides the named sources significant flexibility to reduce their SCR controls' effectiveness, or even turn their SCR controls off for periods of the ozone season. (*Id.*) Consequently, the named sources can continue to affect the downwind areas' ability to attain the 8-hour ozone NAAQS by emitting high levels of NOx on only a few days of the ozone season, while still complying with the CSAPR Update.

EPA acknowledged in the CSAPR Update that optimizing and continuously running already installed SCR controls is a cost effective emissions reduction strategy, yet it rejects Delaware's request that it adopt a sufficiently stringent NOx emissions rate limit that will ensure that the named sources are optimally operating their SCR controls every day of the ozone season. In its comment, Delaware notes that, when averaged over the ozone season consistent with the CSAPR Update, the named sources' emissions rates are below the 0.2 lb/mmBTU standard that EPA identifies in its denial decision is indicative that the sources are consistently operating their post-combustion controls.[18] (Del. Cmts. at 22-24 JA_-_). However,

[18] "In evaluating these petitions, the EPA analyzed ozone-season emission rates from all coal-fired units in the contiguous U.S. equipped with SCR and found that, based on 2017 emissions data reflecting implementation of the CSAPR Update, 261 of 274

Delaware also demonstrated that, when averaged over a 24-hour period, Homer City and Harrison's emissions exceeded the generous 0.2 lb/mmBTU standard on 27 days of the 2017 ozone season. (Del. Cmts. at 24, Table 5 JA__). EPA recognized in its denial decision that "units equipped with SCR that have emission rates above 0.20 lbs/mmBTU are likely not significantly utilizing their SCR." (83 FR 50466, n. 64). That Homer City and Harrison continued to have emissions rates above 0.2 lb/mmBTU during the 2017 ozone season, it is evident that the CSAPR Update does not provide sufficient incentives for sources to operate their SCR controls consistently throughout the ozone season.

It cannot be overstated why the CSAPR Update's seasonal emissions rate limit does not ensure that downwind areas will attain or maintain the 8-hour Ozone NAAQS. Attainment and maintenance of the 8-hour Ozone NAAQS depends on the fourth highest 8-hour ozone concentration for the year, thus it only takes a few days of high ozone concentration to affect an area's attainment or maintenance of

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units had ozone-season emission rates below 0.20 lb/mmBtu, indicating they were likely operating their post-combustion controls through most of the ozone season, including every unit with SCR named in Delaware's and Maryland's petitions." (83 FR 50466). Interestingly, EPA also acknowledges that, "in the CSAPR Update, [it found that] optimized operation of combustion controls and SCR typically results in NOX emission rates of 0.10 lb/mmBtu or below. . . . Therefore, units equipped with SCR that have emission rates above 0.20 lb/mmBtu are likely not significantly utilizing their SCR." (*Id.* at n. 62).

the NAAQS.[19] Because the seasonal emissions rate limit allows the named sources to continue emitting NOx at rates that affect downwind monitors' 8-hour ozone concentrations, the CSAPR Update is woefully inadequate at preventing the named sources from affecting Delaware's and the Philadelphia NAA's attainment of the NAAQS. Therefore, the Court should vacate EPA's denial decision.

B. EPA'S DENIAL OF DELAWARE'S BRUNNER ISLAND PETITION AT STEP 3 IS ARBITRARY.

EPA also relied on the CSAPR Update to deny Delaware's Brunner Island petition at step 3, but for different reasons. Brunner Island does not have SCR controls; instead, it upgraded its electric generating units in 2016 to burn natural gas, while also retaining the ability to burn coal. (83 FR 50470). In its denial decision, EPA found that, by burning natural gas, Brunner satisfied its Good Neighbor obligations, and Delaware acknowledged that Brunner's NOx emissions have

[19] Whether an area is attaining the NAAQS depends on the design value for each monitor in the area. A monitor's design value is calculated by taking that monitor's fourth-highest 8-hour ozone concentration for the year and averaging it with the monitor's fourth highest 8-hour ozone concentration for the previous two years. For example, using values from Table 1 above, the fourth-highest 8-hour ozone concentration for the BCSP monitor were 0.067 ppm in 2018, 0.074 ppm in 2017; and 0.078 ppm in 2016. The BCSP monitor's 2016-2018 design value is thus 0.073 ppm, which is nonattainment under the 2015 Ozone NAAQS's 0.070 ppm standard. Because just four high 8-hour ozone concentrations over the course of the ozone season can affect whether a monitor will attain the NAAQS, it is imperative that EPA establish emissions limits that will control the named sources' NOx emissions every day of the ozone season.

dropped following its addition of gas firing capability.[20] (Del. Cmts. at 17 JA__). However, Delaware maintained that as long as Brunner retained the ability to fire coal, it could still negatively affect Delaware's air quality. Delaware thus requested that, under section 126(c), EPA impose a regulatory requirement prohibiting Brunner Island from burning coal to ensure that Brunner's NOx reductions continue in the future. (Del. Cmts. at 16-17 JA__).

EPA, however, refused to prohibit Brunner from burning coal, and downplayed the need for such a restriction, because it "believes Brunner Island will continue to primarily use natural gas during future ozone seasons for economic reasons." (83 FR 50471). EPA's rests its belief on its assumptions that favorable natural gas prices, combined with the creation of a market for emissions credits under the CSAPR Update, will provide Brunner an economic incentive to continue burning natural gas to maximize the emissions credits it can sell to offset other sources' NOx emissions. (83 FR 50471-472). Ironically, EPA's Brunner denial reinforces why the CSAPR Update's cap and trade program will do little to ensure that sources will actually reduce NOx emissions every day of the ozone season, because EPA hopes that sources like Brunner will have ample emissions credits to sell at a low costs to cover other sources' emissions. (Del. Cmts. at 25-27 JA_-_).

[20] EPA noted in its denial decision that since upgrading to burn natural gas, Brunner's NOx emissions rate declined from 0.370 lbs/mmBtu in 2016 to 0.090 lbs/mmBtu in 2017. (83 FR 50470-471).

It is Delaware's position that passive market forces are an unacceptable emissions limitation under the Act. Any acceptable NOx reduction strategy is more than just the installation of a NOx control technology, such as upgrading an electrical generating unit to burn natural gas. To be an acceptable NOx reduction strategy, there must also be corresponding regulatory provisions requiring that the facility optimally operate the NOx control technology to prevent the facility from violating the Good Neighbor Provision in the future. Therefore, in the absence of any enforceable limitation prohibiting Brunner from burning coal in the future, the addition of gas firing capability alone does not reduce Brunner Island's potential future short-term NOx mass emissions that are critical to downwind 8-hour ozone NAAQS compliance. (Del. Cmts. at 17 JA__). The Court should therefore vacate EPA's denial decision.

CONCLUSION

As Citizen Petitioners address in Section III of its "Argument Section" at pages 33-36, which Delaware hereby adopts by reference under Fed. R. App. P. 28(i), EPA's denial decision is just one more example of how EPA has abdicated its responsibility under the Act to address interstate ozone transport. EPA's denial decision continues to burden Delaware with disproportionate emissions reductions, while leaving it to struggle to satisfy the ozone NAAQS due to pollution transported from the underperforming named sources.

The Court need not endorse EPA's continued refusal to take meaningful action on interstate ozone transport. Delaware's petitions only seek reasonable emissions limits to ensure that the named sources optimally operate their existing pollution controls every day of the ozone season. Rather than adopt such limits, EPA constructed its flawed denial decision based on its unreasonable interpretation of section 126(b); its arbitrary decision to ignore Delaware's actual attainment deadline; and its profoundly inconsistent claim that the CSAPR Update satisfies the named sources' Good Neighbor obligations, despite its prior acknowledgment that the CSAPR Update does not fully address interstate ozone transport. For these reasons, the Court should vacate EPA's denial decision and hold EPA accountable to address the problem of interstate ozone transport.

*Signature on following page.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMIT

The undersigned attorney hereby certifies:

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, the foregoing Opening Proof Brief of Petitioner the State of Delaware 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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