ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1273

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

STATE OF NEW YORK, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

PROOF BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing in this case are listed in the Brief for Petitioners, except that, Andrew Wheeler, in his official capacity as Acting Administrator of the United States Protection Agency, is substituted for E. Scott Pruitt.

B. Rulings Under Review

Petitioners challenge EPA's final action entitled "Response to December 9, 2013, Clean Air Act Section 176A Petition from Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont," published at 82 Fed. Reg. 51,238 (Nov. 3, 2017).

C. Related Cases

This case was not previously before this or any other court. There are no related cases.

s/ Sonya J. Shea
SONYA J. SHEA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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* Authorities chiefly relied upon are marked with an asterisk.

STATUTES

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

FEDERAL REGISTER

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LEGISLATIVE HISTORY

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
CAIR	Clean Air Interstate Rule
CSAPR	Cross-State Air Pollution Rule
CSAPR Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standard
NO_X	Oxides of nitrogen
NO_X SIP Call	EPA rule published at 63 Fed. Reg. 57,356 (Oct. 27, 1998)
Region	Ozone Transport Region as established under 42 U.S.C. § 7511c
SIP	State implementation plan

STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

Petitioners challenge the final action of Respondent Environmental Protection Agency ("EPA" or the "Agency") denying Petitioners' administrative petition ("Petition") under Section 176A of the Clean Air Act ("CAA"), 42 U.S.C. § 7506a, seeking to expand the Ozone Transport Region ("Region"). EPA's final action is titled "Response to December 9, 2013, Clean Air Act Section 176A Petition from Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont" ("Denial"), published at 82 Fed. Reg. 51,238 (Nov. 3, 2017).

The issues raised are:

1. In light of EPA's past work to address ozone transport problems, generally improving air quality, and insufficient evidence in the record to show that imposing the Region's mandatory suite of controls on additional states would be appropriate, did EPA reasonably conclude that use of other CAA provisions, particularly the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), would more effectively and efficiently address any remaining interstate ozone pollution problems in the Ozone Transport Region?

2. Did EPA reasonably find that it lacked a compelling justification for expansion of the Ozone Transport Region, based in part on EPA's consideration of up-to-date information showing reduced emissions and improving air quality trends and EPA's concerns that expanding the Ozone Transport Region would not be warranted under the circumstances?
3. Did EPA adequately consider equity among states in denying the Petition?

STATUTES AND REGULATIONS

Pertinent statutes, regulations, and legislative history excerpts are reproduced in the separately bound addendum to this brief.

STATEMENT OF THE CASE

EPA appropriately declined to grant Petitioners' request to add nine states to the Ozone Transport Region. Granting the Petition would have required implementation of the Region's suite of mandatory controls throughout a vast geographic area. EPA appropriately exercised its discretion in concluding that adding states to the Region was unnecessary and inappropriate under the circumstances. EPA concluded that other provisions of the CAA provide flexibility to craft a more tailored approach to address any remaining interstate ozone transport problems in the Region. Air quality information showed that interstate ozone pollution had been greatly reduced from historical levels, and few areas in the Region were projected to continue to have problems under the relevant ozone standard. EPA also reasonably considered that expanding the Region would have consequences for the added states

in the form of costly, but potentially unnecessary, controls, while any interstate equity concerns could be addressed through continued use of the good neighbor provision.

A. Statutory Background

In the Clean Air Act, Congress provided EPA and the states with several mechanisms to address interstate pollution problems generally, as well as specific provisions aimed at addressing ozone pollution in particular. Ground-level ozone is not emitted directly into the air, but is created by chemical reactions between ozone precursors—primarily oxides of nitrogen ("NO_X") and volatile organic compounds—in the presence of sunlight. 82 Fed. Reg. at 51,239/2. In the eastern United States, ozone forms and is transported throughout a large geographic region. 82 Fed. Reg. 6509, 6511/3-12/2 (Jan. 19, 2017). Ozone levels in a given area depend on a multitude of factors. *Id.* Thus, as the Supreme Court has recognized, allocating each state's responsibility for interstate ozone pollution presents a "thorny causation problem." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014). The Court explained that:

> [I]dentifying the upwind origin of downwind air pollution is no easy endeavor. Most upwind States propel pollutants to more than one downwind State, many downwind States receive pollution from multiple upwind States, and some States qualify as both upwind and downwind . . . . The overlapping and interwoven linkages between upwind and downwind States with which EPA [has] to contend [in developing interstate air pollution rules] number in the thousands . . . .

Id. at 1593-94.

1. States Must Submit State Implementation Plans that Address Interstate Transport of Pollutants.

For ozone and several other criteria air pollutants, EPA establishes National Ambient Air Quality Standards ("NAAQS") that set the maximum level of outdoor air concentrations of a pollutant that are determined to be protective of human health and welfare. 42 U.S.C. §§ 7408(a)(1), 7409(a)-(b). In 2008, EPA revised the ozone NAAQS, lowering the standard to 75 parts per billion. 73 Fed. Reg. 16,436 (Mar. 27, 2008) ("2008 ozone NAAQS"). EPA most recently revised the ozone NAAQS in 2015, lowering the standard to 70 parts per billion. 80 Fed. Reg. 65,292 (Oct. 26, 2015) ("2015 ozone NAAQS"). Within two to three years after promulgation of the NAAQS, EPA is required to designate areas within each state as attainment, nonattainment, or unclassifiable for each NAAQS. *Id.* § 7407(d). Areas designated nonattainment for ozone are further classified, based on the severity of the violation, as marginal, moderate, serious, severe, or extreme. *Id.* § 7511. If such areas fail to attain the ozone NAAQS by their attainment date, they are reclassified to a more stringent classification. *Id.*

Each state, regardless of its area designations, is required to submit a state implementation plan ("SIP") to EPA to implement, maintain, and enforce the NAAQS. *Id.* § 7410(a)(1). States have three years from promulgation of the NAAQS to submit such SIPs. *Id.* The CAA's "good neighbor provision," § 7410(a)(2)(D)(i)(I), requires that each SIP contain adequate provisions to prohibit emissions that

"will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* § 7410(a)(2)(D)(i)(I). To meet planning requirements, states with areas designated as nonattainment must submit additional SIP revisions by certain deadlines following the designations. *Id.* §§ 7511-7511a. After a state submits a SIP, EPA must then approve or disapprove it in full or in part. *Id.* § 7410(k)(1)-(4). If EPA disapproves a SIP or finds it incomplete, EPA must issue a federal implementation plan within two years, unless EPA approves a SIP correcting the deficiency. *Id.* § 7410(c)(1).

The CAA also provides an independent process for states to petition for a finding that an out-of-state source or group of sources emits or would emit any air pollutant in violation of the good neighbor provision. *Id.* § 7426(b).[1] If EPA makes such a finding, a source must cease operating within three months or EPA may allow it to continue operating for up to three years while it works toward compliance. *Id.* § 7426(c).

2. EPA May Create and Modify the Geographic Scope of Interstate Transport Regions.

As another means of addressing interstate pollution, Congress gave EPA the authority to establish transport regions and associated transport commissions for

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

particular pollutants. 42 U.S.C. § 7506a. Section 7506a allows EPA to add—or remove—states from any existing transport region, including the congressionally-established Ozone Transport Region comprised of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the District of Columbia, and parts of Virginia. *Id.* §§ 7506a, 7511c(a). EPA "may" add a state to a transport region "whenever [EPA] has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region."[2] *Id.* § 7506a(a)(1). EPA may take such action on its own or upon petition from a state or transport commission. *Id.* If a state is added to the Region, it must submit a revised SIP within nine months to implement § 7511c's requirements. *Id.* § 7511c(b)(1).

3. States in the Ozone Transport Region are Subject to Statutory Requirements, Including a Mandatory Suite of Controls.

The Ozone Transport Region's states and EPA participate in a transport commission to assess interstate ozone pollution within the Region and may recommend control measures necessary to bring areas in the Region into attainment by the applicable attainment dates. *Id.* § 7511c(a), (c). If EPA approves the

[2] While § 7506a(a)(1) and the good neighbor provision refer to a state that "contributes significantly" and "significantly contributes" respectively, § 7506a(a)(1)'s language lacks any consideration of "interfere[nce] with maintenance," and speaks only in terms of "a violation of the [NAAQS]." *Compare id.* § 7506a(a)(1) *with id.* § 7410(a)(2)(D)(i)(I).

recommended control measures, then EPA would find relevant states' SIPs inadequate and the states would have one year after EPA's finding to include the control measures in revised SIPs. *Id.* § 7511c(c)(5). States in the Region must also implement a set of mandatory control requirements, imposing strict controls for ozone precursors. *See id.* § 7511c(b). Regardless of a state's attainment status, § 7511c requires that states within the Region include in their SIPs: (1) enhanced vehicle inspection and maintenance programs for metropolitan statistical areas with a population of 100,000 or more;[3] (2) implementation throughout the state of reasonably available control technology for all sources of volatile organic compounds covered by a control techniques guideline;[4] and (3) implementation of vehicle refueling controls for vapor recovery[5] or comparable control measures. 42 U.S.C.

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[3] Section 7511c(b)(1)(A)'s reference to § 7511a(c)(2)(A) as "pertaining to enhanced vehicle inspection and maintenance programs" appears to be a scrivener's error. The reference should be to § 7511a(c)(3).

Enhanced vehicle inspection and maintenance programs cover all light-duty vehicles subject to standards under 42 U.S.C. § 7521, and generally must include annual emission testing, on-road testing, restrictions on waivers, enforcement through denial of vehicle registration, and other program requirements. *Id.* § 7511a(c)(3)(B)-(C). Outside the Region, such programs are only required in serious nonattainment areas with a 1980 population of 200,000 or more. 42 U.S.C. § 7511a(c)(3)(A).

[4] Outside the Region, reasonably available control technology is required in nonattainment areas classified as moderate or worse for sources of volatile organic compounds covered by a control techniques guideline. 42 U.S.C. § 7511a(b)(2).

[5] Outside the Region, gasoline vapor recovery controls are generally required in nonattainment areas classified as moderate or worse for facilities that sell more than 10,000 gallons of gasoline per month. 42 U.S.C. §§ 7511a(b)(3).

§ 7511c(b). Additionally, § 7511c(b)(2) requires statewide implementation of moderate nonattainment area permitting and reasonably available control technology requirements to "major stationary sources" that emit at least 50 tons per year of volatile organic compounds, regardless of an area's attainment status.[6] *Id.* § 7511c(b)(2).

Because § 7511a(f) generally applies the requirements for major sources of volatile organic compounds to major sources of NO_X, the reasonably available control technology and major source permitting requirements also apply to major sources of NO_X throughout the Ozone Transport Region. *See* 82 Fed. Reg. at 51,240/1-2.

EPA has no discretion to alter the above requirements of § 7511c—they apply to all states within an ozone transport region regardless of when or how states became part of such a region. 42 U.S.C. § 7511c(b)(1) (requiring "each State included within a transport region established for ozone" to implement the control measures required by § 7511c(b)). Thus, while EPA may add to these requirements through the process under § 7511c(c), EPA may not tailor the mandatory "suite" of control measures

[6] Outside the Region, major stationary sources are defined as those that emit at least 100 tons per year of volatile organic compounds and are only subject to such requirements if located within a designated nonattainment area. 42 U.S.C. § 7602(j); *see id.* § 7511a(a)(2)(C), (b).

under subsection (b) to fit the circumstances of a particular state or the nature of its contribution to the interstate ozone problem.[7]

B. Regulatory Background

In light of the interconnected nature of interstate ozone pollution, EPA has primarily addressed the problem under the good neighbor provision through a series of regional rules. Generally, each of these rules have quantified required reductions of NO_X in upwind states, finding that such reductions are more effective at addressing long-range ozone transport than volatile organic compound reductions, and provided a regional allowance trading program to implement the reductions.

EPA's regional rules, in association with other regulatory and economic factors, have resulted in a dramatic reduction of ozone pollution over the last several decades. *See, e.g., infra* Graph 1 (showing that power plant emissions of NO_X in 2016 were roughly a sixth of their emissions in 1990). This is especially true within the Region. When EPA issued its first regional rule for ozone in 1998, EPA was confronted with 13 nonattainment areas (containing dozens of individual monitoring sites) within the Region under the 1979 ozone NAAQS. 63 Fed. Reg. 57,356, 57,359 (Oct. 27, 1998). In 2005, when EPA issued its next regional rule addressing interstate ozone transport, EPA faced 29 monitoring sites in nonattainment in the Region under the more

[7] One limited exception is that EPA may provide certain waivers for NO_X. 42 U.S.C. § 7511a(f)(1)(B).

stringent 1997 ozone NAAQS. 70 Fed. Reg. 25,162, 25,254 (May 12, 2005). By the time of EPA's most recent rule addressing the even more stringent 2008 ozone NAAQS, only two monitoring sites were expected to be in nonattainment within the Region, both located in a single nonattainment area. 81 Fed. Reg. 74,504, 74,533 (Oct. 26, 2016).

1. The NO_X SIP Call and EPA's Related Action on § 7426 Petitions

EPA's first regional rule to address interstate ozone pollution was the "NO_X SIP Call," issued in 1998. 63 Fed. Reg. 57,356. That rule required 22 states and the District of Columbia to amend their SIPs to limit emissions of NO_X that contributed to ozone nonattainment (under the 1979 ozone NAAQS of 120 parts per billion, based on one-hour averaging time) at 23 downwind nonattainment areas, 13 of which were located in the Region. *Id.* at 57,359. As in subsequent regional rulemakings, EPA focused on NO_X, rather than volatile organic compounds, as the precursor that would be most effective to reduce long-range interstate ozone pollution. *See id.* at 57,381-82. While this Court largely upheld the NO_X SIP Call, the Court vacated and remanded certain portions of the rule. *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

In coordination with the NO_X SIP Call, EPA addressed § 7426 petitions submitted by eight northeastern states. 64 Fed. Reg. 28,250 (May 25, 1999). Initially, EPA determined that the NO_X SIP Call would fully address and remedy the petitions'

claims. *Id.* at 28,252. However, prolonged litigation over the NO_X SIP Call led EPA to grant portions of the § 7426 petitions. *See Appalachian Power Co. v. EPA*, 249 F.3d at 1039. In doing so, EPA promulgated state budgets for NO_X for certain large sources in those upwind states and coordinated the remedy with an allowance trading program made available to implement the emission reductions under the NO_X SIP Call. 65 Fed. Reg. 2674 (Jan. 18, 2000).

2. The Clean Air Interstate Rule ("CAIR")

Next, EPA developed and issued the Clean Air Interstate Rule ("CAIR") to address states' good neighbor obligations for ozone (under the 1997 ozone NAAQS of 80 parts per billion, based on an eight-hour averaging time) and the 1997 fine particulate matter NAAQS. 70 Fed. Reg. 25,162. CAIR established SIP requirements for 28 states and the District of Columbia requiring, *inter alia*, emission reductions of NO_X from electric generating units and enabling states to implement these reductions through a regional allowance trading program. *Id.* at 25,162, 25,256-57. The program addressed the impact of upwind emissions to ozone nonattainment at 40 downwind monitoring sites, 29 of which were located in the Region. *Id.* at 25,254. This Court held that CAIR was inconsistent with the statute and remanded it to EPA to be replaced. However, because the rule achieved some of the health benefits envisioned by Congress, the Court allowed EPA to implement CAIR in the interim. *North Carolina v. EPA*, 531 F.3d 896, 929, *modified on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008).

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

In 2011, EPA issued the Cross-State Air Pollution Rule ("CSAPR"), in part to address the remand of CAIR. 76 Fed. Reg. 48,208 (Aug. 8, 2011). Among other things, CSAPR identified states that would significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS and required electric generating units in those states to reduce their NO_X emissions through a regional allowance trading program. *Id.* at 48,209-16. By the time of CSAPR, there were seven downwind sites expected to be in nonattainment of the 1997 ozone NAAQS, none of which were located in the Region. *Id.* at 48,236. CSAPR was subject to four years of litigation and the rule was stayed during much of that time. *See EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (*EME Homer City I*), *rev'd and remanded*, 134 S. Ct. 1584 (2014); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015) (ruling on remaining issues) (*EME Homer City II*). While this Court's decision in 2015 largely upheld EPA's approach to addressing interstate pollution, the Court also remanded CSAPR so that EPA could reconsider whether the emission restrictions placed on several states may have over-controlled emissions. *EME Homer City II*, 795 F.3d at 124, 138.

4. The Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS ("CSAPR Update")

Most recently, EPA published the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS ("CSAPR Update"). 81 Fed. Reg. 74,504.[8] That rule promulgated federal implementation plans for 22 states—including all of the states named in the Petition except for North Carolina[9]—to address their good neighbor obligations for the eight-hour 2008 ozone NAAQS. 81 Fed. Reg. at 74,504. The CSAPR Update established an emissions trading program for electric generating units in 22 states to reduce their impact on downwind air quality problems, including at six downwind monitoring sites expected to be in nonattainment of the 2008 ozone NAAQS, two of which are in the Region. 81 Fed. Reg. at 74,504, 74,533. To obtain reductions by the 2018 attainment date for moderate nonattainment areas, the CSAPR Update focused on "the immediately available and cost-effective emission reductions that are achievable by the 2017 ozone season." *Id.* at 74,521/2. Accordingly, EPA determined that the emission reductions required by the CSAPR Update "may not be all that is needed" to fully resolve violations of the good neighbor provision under the 2008 ozone NAAQS. 81 Fed. Reg. at 74,522. Since issuing the CSAPR Update, EPA has continued its work to address any remaining good neighbor obligations for the

[8] The CSAPR Update is currently the subject of litigation in this Court. *See Wisconsin v. EPA*, No. 16-1406 (D.C. Cir. filed Nov. 23, 2016).

[9] In the CSAPR Update, EPA found that North Carolina does not violate the good neighbor provision under the 2008 ozone NAAQS. 81 Fed. Reg. at 74,506/2.

2008 ozone NAAQS. EPA now plans to issue a rule by December 6, 2018, to address such obligations, and has proposed to find that the CSAPR Update is a complete remedy. *See* Determination Regarding Good Neighbor Obligations for the 2008 Ozone NAAQS, Proposed Rule, 83 Fed. Reg. 31,915 (July 10, 2018).

EPA and the states are in the early stages of planning for implementation of the 2015 ozone NAAQS. States are not required to submit good neighbor SIPs for that standard until October of this year. EPA is working with states to facilitate the submittal of approvable good neighbor SIPs to resolve interstate transport issues for the 2015 standard.[10]

5. EPA's Four-Step Approach in Its Regional Good Neighbor Rulemakings

In each of EPA's regional rulemakings, EPA applied a four-step approach to identify states that would "contribute significantly" to nonattainment (or interfere with maintenance) of the NAAQS in downwind states and to implement necessary emission reductions in those states. *See* 81 Fed. Reg. at 74,507/2-3. At the first step of EPA's approach, EPA identifies downwind "receptors" (air quality monitoring

[10] *See* EPA, March 2018 Memo and Supplemental Information Regarding Interstate Transport SIPs for the 2015 Ozone NAAQS, https://www.epa.gov/airmarkets/march-2018-memo-and-supplemental-information-regarding-interstate-transport-sips-2015 (last visited Aug. 1, 2018).

sites) that will not attain the NAAQS or will struggle to maintain the NAAQS based on air quality modeling projections.[11] *Id.* at 74,532.

Second, EPA determines which upwind states contribute to each identified downwind air quality problem. For the CSAPR Update, EPA set the threshold for an upwind state's modeled contribution at one percent of the 2008 ozone NAAQS at a downwind receptor, or 0.75 parts per billion. *Id.* at 74,537/2-3. Therefore, if an upwind state impacts a downwind receptor at or above the threshold, then the upwind state was deemed to contribute to that receptor and to be "linked" to the downwind state. Additional analysis is then required under step three. Unlinked states are excluded from analysis in the next two steps and are not required to make emission reductions.

EPA's third step has typically involved a multi-factor evaluation to determine the amount of emission reductions, if any, necessary to address downwind air quality problems. It then apportions emission reductions among the upwind states linked to downwind problems. EPA has in past rules determined which sources to evaluate. It then evaluated the amount of emissions that could be eliminated by applying controls available at different cost thresholds (measured as marginal cost per ton of emissions

[11] For the 2008 NAAQS, EPA identified nonattainment receptors as having a 2013-2015 monitored design value of 76 parts per billion or more *and* an average projected design value of 76 parts per billion or more in 2017. Maintenance receptors have a maximum projected design value of 76 parts per billion or more in 2017. *See* 81 Fed. Reg. at 74,532, 74,551-52.

reduced) compared to the improvement in downwind air quality that would result from implementing those controls. *See, e.g.*, 81 Fed. Reg. at 74,539/3-53/3. EPA has then selected a multi-state, uniform cost-per-ton level of control that maximizes cost-effectiveness in light of these factors and that does not impermissibly "over-control" emissions. Next, EPA has set budgets for the identified sources in each state that reflect this uniform level of control, and are designed to eliminate the amount of each state's contribution that is considered "significant" or which will "interfere with maintenance." *See id.* at 74,508/1-2, 74,552/1-53/3.

At step four, EPA has typically implemented the budgets through a multi-state allowance trading program. *See id.* at 74,553/3-54/2. EPA allocates to sources within each state a share of allowances from the state's budget. Sources can use allowances to permissibly emit NO_X during the ozone season and can buy, sell, or bank allowances.

In upholding this framework under CSAPR, the Supreme Court found that EPA's approach to implementing the good neighbor provision was both efficient and equitable. *EME Homer City*, 134 S. Ct. at 1607.

C. Procedural Background

1. Petitioners' § 7506a Petition

Petitioners (and the State of New Hampshire) submitted their Petition to EPA on December 9, 2013[12]—before litigation concluded on CSAPR and EPA's promulgation of the CSAPR Update. Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont, EPA-HQ-OAR-2016-0596-0003, JA__. The Petition requested that EPA add nine states to the Ozone Transport Region: Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and the portion of Virginia not already included in the Region, (the "Upwind States"). *Id.* Petitioners submitted information and analysis with the Petition that purported to show that the Upwind States were contributing to violations of the 2008 ozone NAAQS in the Region. Technical Support Document for the Petition (Dec. 9, 2013), EPA-HQ-OAR-2016-0596-0002, JA__ [hereinafter "Petition TSD"]. At that time, CSAPR had been vacated by this Court, *EME Homer City I*, 696 F.3d at 37, and the rule's future was uncertain.

Before EPA acted on the Petition, CSAPR was largely upheld by the Supreme Court and this Court on remand, and the rule took effect in 2015. *See supra* Statement of the Case, Section B.3. Additionally, a new rule—the CSAPR Update—was

[12] Pennsylvania joined the Petition later. December 17, 2013, CAA Section 176A Petition Amendment Letter, EPA-HQ-OAR-2016-0596-0007, JA__.

promulgated to achieve further reductions of NO_X, starting in 2017, to address good neighbor obligations under the 2008 ozone NAAQS. *See id.* Section B.4.

2. EPA's Denial of the Petition

EPA proposed to deny the Petition on January 19, 2017. 82 Fed. Reg. 6509 ("Proposal"). After public comment and a hearing, EPA took final action to deny the Petition on November 3, 2017. 82 Fed. Reg. 51,238. By that time, CSAPR and then the CSAPR Update were effectively reducing ozone emissions. Up-to-date analysis in emission trends and air quality modeling showed that additional reductions were expected in the future, even without further regulatory actions. Although EPA did not determine at the time it denied the Petition whether the CSAPR Update would fully resolve all states' good neighbor obligations for the 2008 ozone NAAQS, there was no question that the Region's interstate ozone pollution problem had been greatly reduced from the time the Petition was filed. EPA determined that, considering the circumstances, § 7511c's mandatory controls would not be appropriate to require of the Upwind States. EPA reasoned that other CAA mechanisms, particularly the good neighbor provision, would provide a more effective and tailored remedy for any remaining interstate ozone transport problems from the Upwind States under the 2008 ozone NAAQS. 82 Fed. Reg. at 51,239/1-2. EPA found that the use of the good neighbor provision had historically resulted in, and could continue to achieve, cost-effective reductions in ozone precursors from the sources with the most impact

on downwind ozone problems. *Id.* at 51,239/2, 51,243-46; *see also* 82 Fed. Reg. at 6516-19.

EPA reasoned that declining ozone pollution levels in the eastern United States as a result of other on-the-books rules and economic trends further counselled against expansion of § 7511c's requirements. 82 Fed. Reg. at 51,244/3. Rather than divert EPA's and the Upwind States' resources to the new regulatory infrastructure that would be necessary to impose § 7511c's mandatory suite of controls over the Upwind States' large geographic area, EPA concluded that its continued use of the good neighbor provision through its proven, effective, and tailored approach would better utilize limited resources. *Id.* at 51,244/3-46/1, 51,248/1.

SUMMARY OF ARGUMENT

This case challenges EPA's Denial of several states' Petition for expansion of the Ozone Transport Region, the kind of decision this Court has held deserves the highest level of deference. Petitioners argue that EPA acted unlawfully in denying the Petition. They assert that EPA's basis for the Denial is impermissible under the Clean Air Act and is arbitrary and capricious. Petitioners also argue that EPA unlawfully placed the burden on Petitioners to show that expansion of the Region is justified and that EPA failed to consider inequities between states within and outside of the Region. Petitioners are wrong.

1. EPA reasonably relied on other CAA mechanisms in denying the Petition. Section 7506a(a)(1) provides EPA with discretion to add a state or portion

of a state to a transport region. The provision uses the permissive term "may," thereby providing EPA with discretion *not* to grant a petition to expand the Region *even if* the Agency "has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of [the NAAQS] in the transport region." 42 U.S.C. § 7506a(a)(1). If Congress intended to require addition of a state upon such a showing, it would have used the mandatory term "shall" to compel EPA's action. But Congress did not. EPA reasonably justified its denial of the Petition by considering its historical and continuing use of the good neighbor provision to more efficiently resolve ozone transport problems.

The Petitioners ignore the dramatic progress that EPA's rules have made in reducing emissions and the overall trend in improvement of air quality. EPA did not deny the petition "solely" because other provisions of the CAA are available. Pet. Br. at 23. The Denial was based on EPA's successful use of the good neighbor provision through four regional rulemakings spanning two decades and the flexibility this provision provides to target the sources and ozone precursors that have the most impact on air quality in downwind areas. In contrast to this approach, requiring the Upwind States to uniformly adopt the mandatory suite of Ozone Transport Region requirements across a huge geographic area—significant parts of which are far from the Region—has not been shown to be necessary, efficient, or cost-effective to resolve any remaining 2008 ozone NAAQS violations in the Region. EPA articulated reasonable and justifiable concerns regarding the appropriateness of imposing the

mandatory suite of controls across the Upwind States in light of both the nature of the remaining interstate ozone problem and the questionable effectiveness of these controls to address the problem. EPA was not then required to conduct further analysis to deny the Petition. EPA's denial of the Petition is consistent with the Clean Air Act, and EPA sufficiently explained its rationale.

2. Petitioners failed to show why expansion of the Ozone Transport Region is warranted. Petitioners argue that they "had established that the statutory criteria for expansion of the Transport Region had been met." Pet. Br. at 24. But at most, Petitioners may have demonstrated that some emissions from some of the Upwind States impacted some downwind areas violating the NAAQS within the Region. Petitioners had notice of EPA's concerns that granting the Petition would not be warranted under the circumstances. Yet they failed to establish that imposition of § 7511c's suite of mandatory requirements is appropriate or necessary for addressing any remaining interstate ozone pollution problems in the Region to which the Upwind States may still contribute. Petitioners did not provide anything like the kind of data or analysis that EPA would use were it to evaluate potential imposition of the Region's suite of controls as an action under the good neighbor provision. Nor did Petitioners analyze—in any but the most cursory and incomplete fashion—the air quality effects in the Region that would result from imposing the Region's controls in the Upwind States. Information submitted by Petitioners, both in the Petition and in comments, failed to adequately address or assuage EPA's concerns. Additionally,

EPA reasonably determined that addressing interstate transport for the 2015 ozone NAAQS was outside the scope of its action on the Petition, since the Petition was submitted before promulgation of and did not even mention (or provide analysis regarding) that NAAQS.

3. In the absence of a showing that § 7511c's suite of controls were necessary, EPA reasonably declined to impose these controls on the Upwind States to address Petitioners' perceived interstate equity concern. EPA reasonably found that it would be more efficient and cost-effective for EPA and the states to continue to use the good neighbor provision—which the Supreme Court has found can be equitably applied—to address any remaining interstate ozone pollution problems under the 2008 ozone NAAQS. Petitioners complain that EPA did not consider that the costs of reducing ozone pollution are higher and controls are more stringent for states in the Region than for the Upwind States. But even if the Upwind States could implement more cost-effective controls on some sources, Petitioners have not shown that implementation of all of § 7511c's controls for the entirety of the geographic area spanned by the Upwind States would be more cost-effective than other solutions. The CAA's requirements that states both attain the NAAQS themselves and eliminate their significant contributions to downwind states' pollution problems may well result in disparate control stringency and control costs among states. But Congress itself created such a disparity by subjecting the Region's states to § 7511c's mandatory suite of controls. Having determined that granting the Petition was not otherwise

warranted, EPA reasonably declined to add the Upwind States to the Region to remedy Petitioners' perceived inequities.

STANDARD OF REVIEW

EPA's denial of the Petition should not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Judicial review of an agency's denial of a petition for discretionary rulemaking is "at the high end of the range of levels of deference" a court gives under arbitrary and capricious review. *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987)) (internal quotation marks omitted). Such review is "very narrow," "extremely limited[,] and highly deferential." *WildEarth Guardians v. EPA*, 751 F.3d 649, 653, (D.C. Cir. 2014). The record on review "need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition." *Defs. of Wildlife*, 532 F.3d at 919 (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817-18 (D.C. Cir. 1981)) (internal quotation marks omitted). An agency's denial will be upheld if the agency has a "reasonable explanation" for the denial that "conform[s] to the authorizing statute," "adequately explain[s] the facts and policy concerns it relied on," and ensures that "those facts have some basis in the record." *WildEarth Guardians*, 751 F.3d at 653 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981)) (internal quotation marks omitted). An agency's denial will

be overturned only for "compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Id.* (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989)) (internal quotation marks omitted); *see also Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 743 (D.C. Cir. 2017).

ARGUMENT

I. EPA Reasonably Concluded that Expanding the Ozone Transport Region Was Neither Required Nor Appropriate.

EPA denied the Petition because it found that imposing the Region's mandatory suite of controls on the Upwind States was not appropriate under the circumstances. 82 Fed. Reg. at 51,239/1-2, 51,241/3-46/1. Other, more flexible CAA provisions—particularly the good neighbor provision—would allow for a more tailored and flexible approach. EPA found that continued use of the good neighbor provision would address any remaining interstate ozone pollution problems under the 2008 ozone NAAQS more efficiently than requiring the Upwind States to adopt the suite of controls mandated by § 7511c. 82 Fed. Reg. at 51,245/3-46/1. EPA considered positive trends in air quality, showing that ozone problems within and outside of the Region have been decreasing and are projected to continue to decrease. EPA also raised serious concerns (unaddressed by Petitioners) that imposing the Region's mandatory suite of controls on the Upwind States would not be appropriate, and the record shows that such concerns were justified. Thus, contrary to Petitioners'

suggestion, *see* Pet. Br. at 33-34, EPA based the Denial on more than "the availability" of the good neighbor provision.

A. EPA's Denial of the Petition Is Consistent with the Clean Air Act and Congressional Intent.

1. EPA Appropriately Exercised Its Discretion to Deny the Petition.

The plain language of § 7506a shows that adding states to a transport region is discretionary. Section 7506a(a)(1) provides that EPA "may" "add any State or portion of a State to any region established under this subsection whenever [EPA] has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region." This Court has previously acknowledged that § 7506a's use of "may" is a discretionary term. *Michigan v. EPA*, 213 F.3d at 671-73 (contrasting § 7506a(a)'s discretionary "may" for establishing a transport region with § 7506a(b)'s mandatory "shall" for establishing a transport commission once a transport region is established). If Congress had intended to compel EPA to add states to a transport region whenever EPA "has reason to believe" that states "significantly contribute[]" to violations of the NAAQS, Congress would have used the mandatory term "shall." *See id.* Indeed, this Court found that use of "shall" in other provisions in § 7506a shows that Congress intended to specify and distinguish between mandatory and discretionary duties. *Id.*; *see also* 42 U.S.C. § 7506a(a) (providing that EPA "shall" approve or disapprove a petition within

a specified time and "shall" establish appropriate proceedings for public participation).

Thus, although § 7506a's prerequisite threshold for adding a state to a region is met when EPA "has reason to believe that the interstate transport of air pollutants [from one or more states] significantly contributes to a violation of the [NAAQS] in the transport region," that alone may not warrant granting a petition. EPA's discretion under § 7506a is in contrast with other provisions of the CAA in which Congress intended to cabin the Agency's discretion once a threshold is established. *Compare* 42 U.S.C. § 7506a *with e.g.*, *id.* § 7411(b)(1)(A) (providing that EPA "shall" list a source category if, "in [EPA's] judgment it causes, or contributes significantly to, air pollution"), *id.* § 7661d(b)(1) (providing that EPA "shall" object to the issuance of a Title V operating permit if it contains provisions determined by EPA to be "not in compliance with the applicable requirements" of the CAA), *and id.* § 7521(a)(1) (providing that EPA "shall" regulate new motor vehicles for emissions of any air pollutant "which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

Here, EPA appropriately exercised its discretion to deny the Petition. EPA based its decision primarily on the grounds that, in light of improving air quality and its continued use of other, more flexible and effective measures, expansion of the Region to address any remaining interstate ozone problems for the 2008 ozone NAAQS would not be appropriate. This approach conforms to the language of

§ 7506a. The statute does not require granting a petition whenever a significant contribution has been established. Rather, it states that EPA "may" grant the petition. And contrary to Petitioners' argument, *see* Pet. Br. at 51-52, in denying the Petition, EPA stated its preference to use limited resources on more effective measures. 82 Fed. Reg. at 51,244/3, 51,248/1-3 (noting that continuing EPA's existing efforts is a better use of its and the states' limited resources). EPA's policy considerations are adequately stated, and the facts that EPA relies upon are supported by the record. Congress did not require more. *See WildEarth Guardians*, 751 F.3d at 653, 55-56 (finding that EPA's explanation that it preferred to use its limited resources to continue its work to most cost-effectively address emissions was reasonable and conformed to the authorizing statute); *Defs. of Wildlife*, 532 F.3d at 921 (finding an agency's policy decision to focus resources on a comprehensive strategy was reasoned and adequately supported by the record).

2. EPA's Denial of the Petition Is Consistent with Congressional Intent.

Contrary to Petitioners' argument, *see* Pet. Br. at 58, Congress's decision to apply § 7511c's suite of controls to the states originally included in the Region does not necessarily mean that it is appropriate to impose such controls on additional states whenever § 7506a's threshold is met. When Congress drafted §§ 7506a and 7511c, regional ozone pollution was significantly worse than it is today. Ozone pollution "pervade[d] the atmosphere" in eastern states, S. Rep. No. 101-228 at 263 (1989),

reprinted in 1990 U.S.C.C.A.N. 3385, 3647, ADD111 and was so severe that Congress, in creating the Region and mandating the § 7511c controls, found that "the risk of over-control is negligible." *Id.* at 51, 1990 U.S.C.C.A.N. at 3437, ADD108. Testimony indicated that violations of ozone NAAQS in several of the Region's states increased between 1987 and 1988. *Id.* at 2, 1990 U.S.C.C.A.N. at 3388, ADD104. And many states in the Region were not only contributing to interstate ozone pollution, but were themselves exceeding the one-hour 1979 ozone NAAQS of 120 parts per billion. *See id.* at 50 Fig. 1-1, 1990 U.S.C.C.A.N. at 3436, ADD107 (showing widespread nonattainment throughout the Northeast). Thus, § 7511c's suite of controls addressed air quality problems both within and outside the borders of the states in the Region.

However, by the time that EPA denied the Petition, ozone concentrations in the Region had significantly declined and the need for additional emission reductions from the Upwind States was uncertain. The only areas within the Region that measured violations of the 2008 ozone NAAQS for the most recent period of monitoring data available at the time of Denial (2014 through 2016) were the New York City and Philadelphia nonattainment areas. Status of Designated Areas for the Ozone-8Hr (2008) NAAQS, EPA-HQ-OAR-2016-0596-0148, JA__ [hereinafter "Designated Areas Status Chart"]. EPA's air quality modeling for 2017 identified only two nonattainment receptors in the Region before implementation of the CSAPR Update, both at Connecticut monitors in the New York City nonattainment area, and

EPA determined that only one would remain after implementation.[13] Air Quality Modeling TSD for the CSAPR Update, at 14, EPA-HQ-OAR-2016-0596-0144, JA__; AQAT Final Calibrated Spreadsheet, "summary DVs" tab, cell U9, EPA-HQ-OAR-2016-0596-0151, JA__ [hereinafter "AQAT Spreadsheet"]. Both of the projected nonattainment receptors in Connecticut are far more heavily impacted by emissions from within the Region than from the Upwind States. *See infra* Graph 2.

With implementation of the CSAPR Update, EPA projected average ozone levels in areas with the worst air quality in the Region (i.e., both nonattainment and maintenance receptors) of 75.3 parts per billion, which hovers at attainment of the 2008 ozone NAAQS. AQAT Spreadsheet, "summary DVs" tab, rows 7-10, 12, 14-15, and 17, column U, JA __. Region-wide, ozone levels would be lower, averaging only 64.2 parts per billion for all areas in the Region excluding Virginia. *Id.* "1400 eng EB" tab, column BO, JA__. Compared with when Congress created the Region, this represents a dramatic decline in both ozone levels across the Region and the geographic expanse of remaining ozone attainment problems in the Region. *See* S. Rep. No. 101-228 at 50 Fig. 1-1, 1990 U.S.C.C.A.N. at 3436, ADD107. Further, nearly all areas in the Upwind States previously designated nonattainment were, by the

[13] For the 2008 NAAQS, EPA identified nonattainment receptors as having a 2013-2015 monitored design value of 76 parts per billion or more *and* an average projected design value of 76 parts per billion or more in 2017. *See* 81 Fed. Reg. at 74,532, 74,551-52.

time of EPA's Denial, already measuring attainment of the 2008 ozone NAAQS. *See* 82 Fed. Reg. at 51,247/1-2 (citing Designated Areas Status Chart, EPA-HQ-OAR-2016-0596-0148, JA__).

Thus, unlike the severe regional ozone pollution problem Congress faced when it codified the Region's requirements in 1990, by the time of the Denial, overall air quality had improved dramatically and was expected to continue to improve—both in the Region and in the Upwind States. Neither the statute nor legislative history suggests that EPA is required to grant the Petition, particularly in light of the facts here.

B. EPA's Rationale for Denying the Petition Is Reasonable.

1. EPA Reasonably Relied on Its Use of the Good Neighbor Provision to Address Any Remaining Interstate Ozone Pollution Problems.

EPA has applied and refined its approach to addressing the problem of interstate ozone transport under the good neighbor provision over two decades. 82 Fed. Reg. at 51,245/2. EPA explained that it has a long, successful history of applying the good neighbor provision, primarily through a series of four regional rulemakings. *Id.* at 51,245/2. *See also id.* at 51,243/1-44/1; *id.* at 6516/3-19/1. Through those rulemakings, EPA has analyzed the nature of the air quality problem and implemented cost-effective controls to obtain necessary reductions of intestate ozone pollution. *Id.* at 51,243/1-44/1; *id.* at 6516/3-19/1; *see also supra* Statement of the Case, Section B. These rules have resulted in significant reductions of ozone precursor emissions and

corresponding public health benefits. Further, EPA's use of the good neighbor provision is flexible, allowing EPA to focus on sources that can cost-effectively reduce their emissions. *See EME Homer City*, 134 S. Ct. at 1607; 82 Fed. Reg. 51,243/1.

At the time of the Denial, EPA had recently promulgated the CSAPR Update to address states' good neighbor obligations under the 2008 ozone NAAQS, starting with emission reductions in the 2017 ozone season. EPA described the CSAPR Update as a "first step" toward fulfilling states' good neighbor obligations under the 2008 ozone NAAQS because EPA did not have enough information at that time to determine whether, and to what extent, additional reductions would be needed. 82 Fed. Reg. at 51,243/3-44/1. Nonetheless, the CSAPR Update's impacts on air quality and public health are substantial. The rule reduced power sector NO_X emissions approximately 60,000 tons from baseline levels, setting a 22-state budget of 316,464 tons. *See* 81 Fed. Reg. at 74,553. This resulted in region-wide air quality improvements. *See* AQAT Spreadsheet, "summary DVs" tab, cells O27-O32, JA__. EPA also estimated that the CSAPR Update would result in annualized public health benefits of $460 to $810 million and total annualized benefits of $530 to $880 million. *See* CSAPR Update Regulatory Impact Analysis, Table ES-7, EPA-HQ-OAR-2016-0596-0149, JA__. The CSAPR Update is just the latest in EPA's series of regional good neighbor rules that provide substantial public health benefits. *See* 76 Fed. Reg. at 48,215 (estimating CSAPR's monetizable net benefits at $110 to $250 billion (in

2007 dollars) from roughly 5 million tons of NO_X and sulfur dioxide emission reductions); 63 Fed. Reg. at 57,429, 57,434, 57,478 (estimating the NO_X SIP Call's monetizable net benefits as up to $2.5 billion (in 1990 dollars) from approximately 1 million tons of ozone-season NO_X emission reductions). Thus, given EPA's proven, successful history of effectively reducing emissions through its use of the good neighbor provision and EPA's expertise gained in using that provision, EPA reasonably concluded that use of the good neighbor provision could effectively address any remaining interstate ozone pollution problems under the 2008 ozone NAAQS.

EPA considered that other CAA mechanisms are also available to address specific interstate transport problems, such as § 7426, though Petitioners and Amici misconstrue the nature of EPA's consideration of § 7426. *See* Pet. Br. at 44-45; Am. Br. at 20-24. In the Denial, EPA acknowledged the flexible and tailored approach that the § 7426 petition process provides for addressing states' concerns about the impacts of interstate pollution from individual sources or groups of sources. *See* 82 Fed. Reg. at 51,245/2 (noting that, in addition to the good neighbor provision, § 7426 provides a mechanism "to mitigate the specific sources that contribute to interstate pollution"); *id.* at 51,245/3-46/1 (noting that "if appropriate" emission reductions may be achieved from EPA's action on § 7426 Petitions). Thus, contrary to Petitioners' suggestion, Pet. Br. at 45, EPA adequately described its consideration of § 7426 as another available mechanism that provides for more efficient reduction of

ozone pollution than expanding the Region. Whether relief may be provided under § 7426 depends on whether states petition EPA and whether such petitions support the requested remedy. The Agency has granted § 7426 petitions addressing ozone transport in the past, including transport to states in the Region. *See* 65 Fed. Reg. 2674; *Appalachian Power Co. v. EPA*, 249 F.3d at 1039.

This Court should reject Petitioners' and Amici's claims that delays in past actions EPA has taken under the good neighbor provision and § 7426 show that EPA unreasonably relied on its continued use of these provisions. What matters is that successful, proven emission reduction programs under these provisions have been implemented. Moreover, delays were often from events beyond EPA's control. For example, all of EPA's regional good neighbor rules to address interstate ozone were subject to protracted litigation. The implementation schedules for the NO_X SIP Call and CSAPR were both affected by judicial stays of those rules. *See* Order, *Michigan v. EPA*, No. 98-1497 (D.C. Cir. Aug. 30, 2000) (extending deadline of NO_X SIP Call implementation from May 1, 2003, to May 31, 2004); 79 Fed. Reg. 71,663 (Dec. 3, 2014) (tolling CSAPR implementation schedule after stay was lifted). Further, a remedy for missed deadlines is available under the CAA's citizen suit provision to enforce nondiscretionary duties. 42 U.S.C. § 7604(a)(2).

EPA's rationale here cannot properly be rendered unreasonable by EPA's actions or events that transpired *after* the date of Denial. EPA's decision on the § 7506a Petition is the only action now before the Court. It should be evaluated

based on the reasonableness of EPA's rationale on the record. *See Defs. of Wildlife*, 532 F.3d at 919 (declining to take judicial notice of events that occurred after the agency denied a rulemaking petition even if they "may cast doubt on the reasoning put forward in that denial"). For example, Petitioners and Amici imply that EPA's actions after the time of the Denial related to § 7426 petitions are somehow relevant to the issue in this case. *See* Pet. Br. at 16-17, 45 & n.15; Am. Br. at 2, 5, 21-24. They are not, and are not properly before this Court.[14]

Petitioners mischaracterize EPA's statement concerning the timeframes of implementing the good neighbor provision and § 7511c's requirements. Pet. Br. at 49. EPA was unpersuaded by commenters' suggestion that air quality improvements resulting from § 7511c's requirements would necessarily be realized faster than under the good neighbor provision. EPA observed that although states newly added to the Region would be required to submit amended SIPs within nine months, going forward, new SIP submissions are tied to attainment planning. 82 Fed. Reg. at 51,248/3. That happens later in time than good neighbor SIP submissions. In any case, the actual implementation of § 7511c's controls in those states would take longer than nine months. Moreover, EPA noted that the experience gained through its prior regional rules (and their subsequent litigation) positioned the Agency and states to

[14] Although not before the Court, EPA submits that Amici's characterization of EPA's action on Connecticut's § 7426 petition (*see* Am. Br. at 21-24) is seriously flawed.

implement the good neighbor provision in a timelier fashion. *Id.* at 51,248/3-49/1. Thus, EPA found that timing under § 7511c was not demonstrably more efficient than under the good neighbor provision.

EPA was not obligated to grant the Petition on the basis that there might still be some limited nonattainment in the Region after a relevant attainment date. Nor was EPA obligated in responding to the Petition to identify exactly when all downwind areas will come into attainment. EPA already takes account of downwind attainment dates when implementing upwind emission reductions under the good neighbor provision. *See North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008). Thus, it is sufficient for EPA to have considered that it already has an effective method to deal with precisely this concern, and in any case, the air quality information showed improving trends, *see infra* Section I.B.2, not worsening nonattainment. 82 Fed. Reg. at 51,239/1-2; *see WildEarth Guardians*, 751 F.3d at 653; *Defs. of Wildlife*, 532 F.3d at 919. To the extent that Petitioners assert that EPA has not adequately accounted for attainment dates through its action on SIPs or other rules, such challenges are not appropriately before this Court.

2. EPA Reasonably Relied on the Continued Trend of Improving Air Quality.

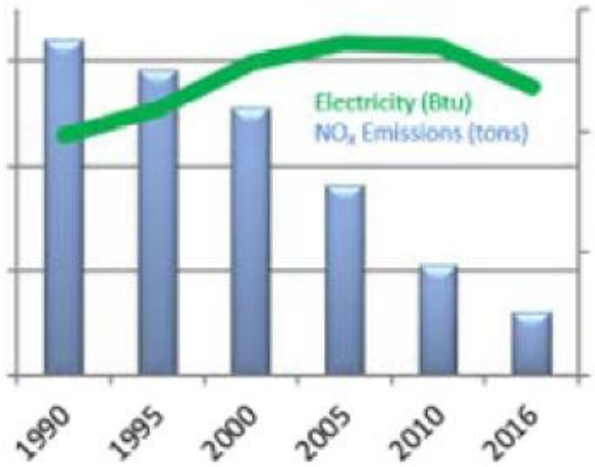
Air quality in the Region, as well as air quality in the Upwind States and throughout the country, has improved overall and is expected to continue to improve. The improving trend in air quality, and its projected continuation, was largely

undisputed by Petitioners and commenters. *See* 82 Fed. Reg. at 51,246/3. EPA described the trend of improving air quality, including measured improvements since the Petition was submitted, and considered that additional improvements could be expected. 82 Fed. Reg. at 51,239/1-2, 51,244/1-45/3, 51,246/2-47/2. EPA generally discussed other CAA rules that contribute to the trend, as well as state and local actions, and economic trends. *Id.* at 51,244/1-3.

The record here contains ample factual support for EPA's reliance on a general trend of improving air quality and the projected continuation of that trend. By the time that EPA denied the Petition, measured nonattainment in 2014 through 2016 was limited to the New York and Philadelphia nonattainment areas, and the CSAPR Update modeling projected only two nonattainment areas in the Region by 2017, both in the Connecticut portion of the New York City nonattainment area. Designated Areas Status Chart, EPA-HQ-OAR-2016-0596-0148, JA__; Air Quality Modeling TSD for the CSAPR Update, at 14, JA__. The record also shows improvement in the Upwind States' air quality. *See, e.g.*, Designated Areas Status Chart, EPA-HQ-OAR-2016-0596-0148, JA__ (showing that only the Chicago area measured nonattainment in the Upwind States); CSAPR Update Design Values and Contributions Spreadsheet, EPA-HQ-OAR-2016-0596-0152, JA__ [hereinafter "Contributions Spreadsheet"] (projecting 2017 attainment in nearly all areas within the Upwind States).

The general trend in improving air quality is driven by the decline of ozone precursor emissions from the biggest sources over time, resulting from both regulatory change and economic trends. 82 Fed. Reg. at 51,247/1-2. For example, Graph 1 below shows NO_X emissions from power plants decreasing over time, even when electric generation increased. Power Plant Emission Trends, EPA-HQ-OAR-2016-0596-0147, JA__.

Graph 1



Across the continental United States, overall NO_X emissions declined by roughly one third, from 13.7 to 9.9 million tons from 2011 to 2017. 2011, 2017, and 2015 NEI Summary Spreadsheet, row 52, columns B and C, EPA-HQ-OAR-2016-0596-0133, JA__.[15] Looking forward to 2025, emissions estimates showed that, taking into account relevant state and federal regulations already on the books, as well as larger economic trends, NO_X emissions in the Region and Upwind States were

[15] The title of this document contains a typographical error; "2015" should be "2025."

estimated to decline by roughly 720,000 tons, (an approximate 20-percent reduction) and volatile organic compounds would decline by roughly 380,000 tons (an approximate 11-percent reduction). *Id.* cells C60-H60, JA__.

Contrary to Petitioners' arguments, Pet. Br. at 45-47, in listing CAA rules other than the good neighbor rules in the Denial, EPA did not rely on each rule's specific quantitative effects on air quality. EPA generally considered that such rules, in combination with other rules and other factors, further show why the overall positive trend in reducing ozone levels could reasonably be expected to continue.[16] *See id.* at 51,244/3-46/1; Response to December 9, 2013 Clean Air Act Section 176A Petition (Oct. 27, 2017) at 3, EPA-HQ-OAR-2016-0596-0150, JA__ [hereinafter "Response to Comments"]. EPA need not analyze the specific effects of each individual rule that it identified as supporting those trends. *See* Pet. Br. at 45-46.

The underlying trend in improving air quality supported EPA's conclusions here—that expansion of the Region was unwarranted because continued use of the good neighbor provision would adequately address any unresolved good neighbor obligations under the 2008 ozone NAAQS.

[16] EPA's omission of some rules named in the Proposal merely indicates that those rules were not part of EPA's rationale for the Denial. The listed rules still support EPA's finding that air quality improvements would continue.

3. EPA Reasonably Concluded that Imposing § 7511c's Requirements on the Upwind States Would Not Be Appropriate.

In contrast to the flexibility provided by the good neighbor provision, EPA found that adding states to the Region would impose rigid requirements that could not be tailored to address any remaining problems. Imposing § 7511c's suite of controls on the Upwind States would risk implementing both *ineffectual* controls—some controls might have minimal effect on attainment in the Region—and *excessive* controls—some controls might be more than what would be necessary to eliminate the states' significant contribution. Absent information showing that imposing § 7511c's suite of controls on the Upwind States would be appropriate, especially in light of the questionable effectiveness of some of these controls at reducing ozone problems at a large regional scale and costs of implementation, EPA reasonably concluded that granting the Petition would not be warranted under the circumstances. 82 Fed. Reg. at 51,245/3-46/1, 51,248/1.

EPA's longstanding expert view, reaffirmed in each of the good neighbor rulemakings, is that long-range ozone transport problems in the eastern part of the country are most efficiently addressed through reducing emissions of NO_X, while reductions in volatile organic compounds emissions are generally most effective at controlling ozone locally. 82 Fed. Reg. at 51,248/1-2 & nn.42-43 (citing CSAPR, discussion in Proposal, and ozone studies); 82 Fed. Reg. at 6517/1-18/3 (noting conclusion of work groups of the Ozone Transport Assessment Group, and

collecting relevant citations from the NO_X SIP Call, CAIR, CSAPR, and the CSAPR Update).

If EPA were to grant the Petition, the Upwind States would be required to implement § 7511c's inflexible suite of controls throughout their large geographic area, regardless of their attainment status. EPA considered that some of § 7511c's controls—such as reasonably available control technology requirements for sources of volatile organic compounds and enhanced vehicle inspection and maintenance programs—if implemented throughout the Upwind States, may have little effect on violations of NAAQS within the Region. 82 Fed. Reg. at 51,248/1-2 & nn.42-43. Thus, EPA identified a very real concern of *ineffectual* control.

Although some of § 7511c's controls may reduce the Upwind States' emissions, there is no evidence in the record that § 7511c's controls would effectively address remaining ozone problems in the Region. For example, Maryland's comments refer to "analyses" purportedly showing that adding controls in the Upwind States will reduce ozone problems in the Region. *See* Maryland Comments at 1, EPA-HQ-OAR-2016-0596-0101, JA__. But such analyses were not provided to EPA. And Petitioners do not tie § 7511c's suite of controls to projected reductions in the Region. *See, e.g.*, Delaware Report by Archer, EPA-HQ-OAR-2016-0596-0121, JA__ (assessing ozone concentrations in Delaware if certain states were to reduce their ozone precursor emissions by 10 or 20 percent, but not evaluating whether imposing § 7511c's controls on Upwind States could achieve such reductions). Further, the

record here indicates that such controls may not be needed. Because the Upwind States were largely measuring attainment with the 2008 ozone NAAQS, the primary ozone transport problem that § 7511c's controls might address was in the existing Region. However, the remaining problems in the Region were relatively isolated and largely impacted by emissions from within the Region. *See supra* Section I.B.2; *infra* Section II.B.

Implementing the full suite of mandatory controls in the Upwind States would potentially be very costly, requiring significant investment of resources. 82 Fed. Reg. at 51,247/3-48/1. Petitioners provide no information on the cost-effectiveness of imposing the Region's suite of mandatory controls on the Upwind States with respect to either the cost-per-ton of emissions reduced or air quality improvements in the Region. At best, Petitioners offer conclusory cost-per-ton comparisons to show that Upwind States have comparatively lower control costs. *See infra* Section III.B. But such submissions say nothing about the cost or effectiveness of implementing § 7511c's full suite of controls throughout the Upwind States. In the absence of such an evaluation, and given the more limited nature of the interstate pollution problem, EPA reasonably concluded that its proven, cost-effective approach to implementing the good neighbor provision is well suited to address any remaining interstate ozone problem. Expanding the Region, and applying rigid mandatory controls of unknown cost and effect, is not.

EPA was not obligated to do more. The standard for denial of a petition for rulemaking is exceedingly deferential. "[W]here the agency decides not to proceed with rulemaking, the 'record' . . . need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition." *Defs. of Wildlife*, 532 F.3d at 919 (internal quotation marks omitted)). EPA articulated its reasons for denying the Petition and its reasons are supported by the record.

In light of the factors upon which EPA based its decision, and the lack of evidence to the contrary, EPA reasonably chose not to dedicate its resources to conduct a more exacting analysis of the costs and benefits of adding the Upwind States to the Region and imposing § 7511c's suite of controls on them. It is sufficient that EPA concluded that imposing those controls would not be appropriate when EPA has identified more efficient mechanisms to address any remaining problem and the effectiveness of § 7511c's suite of controls had not been established by Petitioners.

II. Petitioners Failed to Show that Granting the Petition Would Be Appropriate, Especially in Light of EPA's Concerns.

Petitioners attempt to place a greater analytical burden on EPA than the law requires and allege other defects in EPA's decision making. Their arguments lack merit. Although EPA provided ample notice, neither Petitioners nor commenters provided information to address EPA's concerns that granting the Petition would be

unwarranted. EPA found that up-to-date air quality information and the questionable benefit of imposing § 7511c's controls on the Upwind States to address the Region's problems supported denying the Petition. 82 Fed. Reg. at 51,246/2-49/3. Further, the Agency permissibly considered that the 2015 ozone NAAQS was beyond the scope of the Petition.

A. Petitioners Had Notice of EPA's Proposed Rationale for the Denial and EPA's Concerns that It Lacked Sufficient Justification to Expand the Region Were Unaddressed.

In the Proposal, EPA provided ample notice explaining why it considered granting the Petition to be inappropriate. EPA described the flexibility, efficiency, and cost-effectiveness of its preferred approach to resolving any remaining ozone transport pollution problems, and described the inflexibility inherent in expanding the Region. *See, e.g.*, 82 Fed. Reg. at 6520/3 (stating that continued use of the good neighbor provision is appropriate to address the problem "without the need to implement the additional requirements that inclusion in the [Region] would entail"); *id.* at 6521/1 ("[I]t does not appear that adding states to [the Region] under [§ 7506a] will afford the states and EPA with the flexibility to focus on specific sources and ozone precursor emissions tailored to address the downwind state's [sic] current air quality"); *id.* at 6521/1-2 ("EPA does not believe that the requirements imposed upon states added to the [Region] would be the most effective means of addressing any remaining interstate transport concerns . . . ."). EPA stated its belief that "expansion of the [Region] is unnecessary at this time and would not be the most efficient way to

address the remaining interstate transport issues for the 2008 ozone NAAQS in states currently included in the [Region]." *Id.* at 6515/2. And EPA explained that it had reviewed the Petition "in light of required control strategies for ozone transport regions and the other statutory tools available." *Id.* at 6521/2. Thus, Petitioners had ample notice that EPA considered that its continued use of the good neighbor provision—which allows for tailored selection of the most efficient controls for the precursor emissions that would be most effective at reducing long-range ozone pollution—would address any remaining problem more efficiently than expanding the Region.

Commenters could have attempted to respond to these considerations by, for instance, tying implementation of § 7511c's controls in the Upwind States to projected reductions of violations in the Region, or providing information on the effectiveness of imposing those controls. Petitioners seem to have understood EPA's concerns, but did not provide such information. *See* Maryland Comments at 4, JA__ (acknowledging that EPA was considering cost effectiveness and efficiency of controls); Multistate Comments, EPA-HQ-OAR-2016-0596-0106, at 3, JA__ (same); Delaware (Amirikian) Testimony, EPA-HQ-OAR-2016-0596-0120, at 3, JA__ (acknowledging EPA's consideration of efficiency). In any event, EPA had good reason to doubt that imposing § 7511c's controls could be justified given the circumstances. *See supra* Section I.B.3. Petitioners were aware of those concerns, and

nothing in the comments addressed EPA's concerns that the record did not support granting the Petition.

EPA's statement that it reviewed Petitioners' submitted information and found "analytical gaps," 82 Fed. Reg. at 51,239/2, is in no way a new rationale, *see* Pet. Br. 57-59. Rather, it indicates that Petitioners and commenters did not provide information that would show that granting the Petition would be appropriate. 82 Fed. Reg. at 51,247/2-3. EPA's consideration that such evidence was lacking is a reasonable basis on which it relied in denying the Petition. Accordingly, EPA reasonably based its Denial on the reasons it articulated in the Proposal, coupled with the absence of contrary evidence submitted in response to the Proposal.

B. EPA Reasonably Relied On Up-to-Date Air Quality Information.

EPA assessed the technical information submitted with the Petition, considered more recent air quality information, and provided sufficient information in the record to support EPA's rationale for the Denial. Thus, contrary to Petitioners' argument, *see* Pet. Br. at 55, EPA sufficiently "grapple[d] with" the merits of the Petition. Unlike in *Flyers Rights*, where the agency declined to act in the face of a worsening problem (decreasing seat size and pitch on airplanes) and its finding of "no effect" on emergency egress was unsupported by the record, 864 F.3d at 744, here, EPA found that the ozone air quality problem is already improving under existing programs and EPA provided ample factual support in the record.

Information supporting EPA's finding of improving air quality, much of which became available after the Petition was submitted and before the Proposal, contrasted sharply with the air quality information submitted by Petitioners. *See* 82 Fed. Reg. at 51,246/2-47/2. Petitioners' air quality information was outdated, not simply because of the time that had elapsed between the submission of the Petition and EPA's decision, but because conditions had changed since that time.

The information submitted with the Petition, some of it dating back to 2005, was developed prior to the implementation of either CSAPR or the CSAPR Update. Thus, Petitioners' air quality information did not show the effects of these two rules, nor did it capture more recent economic trends driving further declines in ozone-precursor emissions. *See* 82 Fed. Reg. at 51,246-47 (explaining that the Petition TSD relied on CAIR modeling (from 2005) and CSAPR *base case* modeling, which showed conditions prior to implementation of CSAPR and other rules and changes in emission trends). In reviewing more up-to-date air quality information, EPA found positive trends in air quality—the regional ozone problem was shrinking and was expected to continue to do so. 82 Fed. Reg. at 51,244/3, 51,246/2-47/2. Thus, any remaining violations would not be as severe as Petitioners' data suggested. EPA found that more recent information contradicted Petitioners' assumptions that several designated nonattainment areas would continue to violate the NAAQS. *Id.* at 51,247/1-2; *compare* Petition TSD at 13, JA__ (purporting to show 83 of the Region's monitors in nonattainment for the 2008 ozone NAAQS) *with* AQ Modeling TSD for

CSAPR Update, at 14 JA__ (showing two of the Region's monitors in nonattainment before implementation of the CSAPR Update). Further, even before the CSAPR Update was implemented, Delaware was projected to have no nonattainment or maintenance receptors, *see* Contributions Spreadsheet, rows 242-47, columns G and H, JA___, calling into question the relevance of any contribution analysis for that state, *see* Response to Comments at 5. And for two of the Upwind States, the Petition's merits were particularly questionable: North Carolina was not included in the CSAPR Update because it is not linked to any downwind receptors, 81 Fed. Reg. at 74,506, and Tennessee's obligations were found to be fully resolved with implementation of the CSAPR Update, *id.* at 74,551. This is why EPA found that Petitioners' air quality information was "dated"—not merely because the information was several years old, but because ozone levels had materially improved. *Id.* at 51,246/2-47/2. Thus, Petitioners' allegation that EPA waited to act on the Petition until the information became stale is unmeritorious, *see* Pet Br. 57 n.20. Faced with this trend in improving air quality, EPA reasonably relied on the most up-to-date information available to it. Conversely, had EPA ignored more recent air quality information, such disregard of relevant information would have been highly questionable.[17]

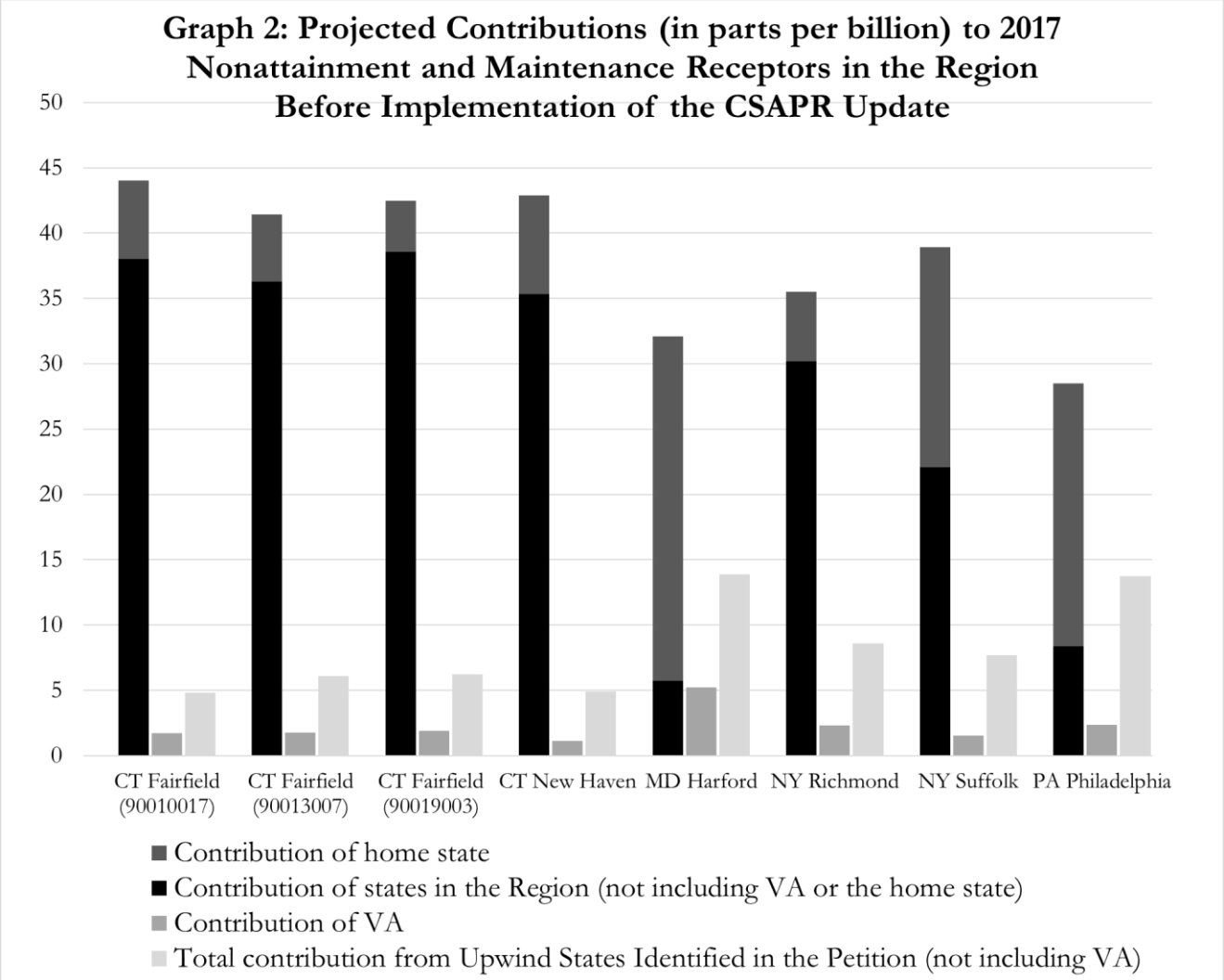
[17] Petitioners also contend that EPA relied on more recent information without providing that information in the record. Pet. Br. at 62 n.21. However, EPA *did* include more recent air quality information in the record. *See, e.g.*, 2011, 2017, and

Petitioners nonetheless argue that pollution from the Upwind States would be in "large part" responsible for some areas in the Region continuing to miss attainment dates for the 2008 ozone NAAQS. Pet. Br. at 40-41. However, such general assertions omit specific information about the degree of the remaining problems, the direction they are trending, or each Upwind State's contribution compared to other states. In fact, the majority of contributions to remaining nonattainment areas in the Region come from within the Region itself. Baseline modeling for the CSAPR Update projected that emissions from the Region's states accounted for well over 50 percent of all states' anthropogenic contributions to nonattainment and maintenance receptors in the Region, and over 80 percent to the nonattainment receptors in Connecticut. Response to Comments at 4, JA__.

Graph 2 below shows that the Region's states comparatively contribute much more of the ozone at the Region's nonattainment and maintenance receptors identified in the CSAPR Update than the Upwind States.[18]

2015 NEI Summary Spreadsheet, JA__; Kentucky AMPD 2003 and 2016 Summary Spreadsheet, EPA-HQ-OAR-2016-0596-0132, JA__; Air Quality Modeling TSD for the CSAPR Update, JA__; AQAT Spreadsheet, JA__; Contributions Spreadsheet, JA__.

[18] All underlying information for the Graph is contained in the Air Quality Monitoring TSD for the CSAPR Update, at C-3 to C-4, JA__- __ and the Contributions Spreadsheet, JA__. Virginia is shown separately because the Spreadsheet does not distinguish between the amounts that the portions of Virginia within and outside of the Region contribute.



Indeed, this would be true even if all of Virginia's contributions were included with the Upwind States' contributions. But such a scenario would not reflect reality because the parts of Virginia included in the Region are within the greater Washington, D.C. metropolitan area and comprise a large portion of Virginia's contributions to the Region. Thus, EPA reasonable found that more recent air quality information supported denying the Petition.

C. EPA Rationally Treated the 2015 Ozone NAAQS As Outside the Scope of Its Action on the Petition.

Petitioners have failed to show why consideration of the 2015 ozone NAAQS would be appropriate or how EPA could have evaluated the new standard, especially when the Petition itself dealt with the 2008 ozone NAAQS and EPA and the states were only in the early stages of implementing the 2015 ozone standard. Indeed, the Petition was submitted in 2013, prior to the promulgation of the 2015 ozone NAAQS. Thus, the Petition could not have considered the newer standard.

Contrary to Petitioners' arguments, Pet. Br. at 60, the statutory basis on which EPA could act *is* tied to a particular NAAQS. Section 7506a(a)(1) provides that EPA may add a state to a transport region whenever EPA "has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of *the standard* in the transport region." *Id.* § 7506a(a)(1) (emphasis added). "[T]he standard" in § 7506a(a)(1) refers to § 7506a(a)'s "a national ambient air quality standard." Thus, to add states to a transport region, EPA must, as a threshold matter, have reason to believe that a state significantly contributes to a violation of a specific NAAQS. The Petition did not purport to show that the statute's threshold would be met for the 2015 ozone NAAQS. And EPA made no such finding.

Petitioners assume that because the 2015 standard is more stringent (by 5 parts per billion), more violations will occur under that standard. But the general trend of decreasing emission levels and improving air quality does not necessarily make such

claims a certainty. At the time of the Denial, the planning process for the standard was just getting underway. Indeed, EPA had not even completed designations for the new NAAQS, and states were in the process of developing implementation plans. *See* 82 Fed. Reg. at 51,249/3-50/1. SIPs addressing the good neighbor provision under the 2015 ozone NAAQS are not due until October of this year.

Petitioners claim that EPA inconsistently considered some new information while ignoring the revised NAAQS. But promulgation of a revised NAAQS is not the kind of new information that warrants EPA's consideration here. The 2015 ozone NAAQS is a regulatory standard separate from the 2008 NAAQS and it is in the early stages of implementation. Unlike the newer air quality information that EPA considered, a more stringent NAAQS is not a sufficient basis to grant the Petition. It would have been premature to consider the 2015 standard absent further information about the degree of nonattainment in the Region and the effectiveness of implementation plans still under development for that standard. Petitioners remain free to submit a new petition to request that EPA expand the Region based on the 2015 ozone NAAQS. *See* 82 Fed. Reg. at 51,246/1.

III. EPA Appropriately Declined to Grant the Petition to Address Petitioners' Alleged Interstate Inequities.

EPA appropriately declined to give concerns about perceived interstate inequities controlling weight in the absence of evidence that expansion of the Region would be otherwise justified. *See* 82 Fed. Reg. at 51,249/2.

A. EPA's Use of the Good Neighbor Provision Is Equitable.

EPA's reasoning concerning interstate equity does not conflict with EPA's analysis under the good neighbor provision. Rather, it reflects EPA's determination that expanding the mandatory controls under § 7511c is a poor method for achieving a balanced and equitable approach to solving the problem of long-range ozone transport. To determine a state's significant contribution (i.e., required reductions) under the good neighbor provision, EPA has applied a four-step framework that considers a uniform level of control stringency, represented by cost, and the effect of controls on downwind pollution problems. *See supra* Statement of the Case Section B.5. The Supreme Court has found that this approach is "[e]quitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution." *EME Homer City*, 134 S. Ct. at 1607.

Notably the Supreme Court was reviewing an application of the good neighbor provision that used a uniform-cost threshold to allocate emission reduction obligations, rather than forcing a specific set of mandatory controls across all states. EPA reasonably concluded that continued use of the provision could better address interstate equity (to the extent it is relevant) than application of § 7511c's rigid requirements. 82 Fed. Reg. at 51,249.

B. Petitioners' Disparate Control Cost Claims Were Unsupported and EPA Appropriately Declined to Grant the Petition Based on Perceived Inequities.

Petitioners' appeal to comparative costs of controls and interstate disparities in different regulatory approaches is unavailing. *See* Pet. Br. at 65-66 & n.23. Supporting information for Petitioners' comparative cost submissions is absent from the record. Petitioners' comments contained conclusory comparative cost information that lacked documentation showing how the costs were calculated.[19] *E.g.*, Maryland Comments at 3, JA__ (estimating costs to comply with "recent regulatory actions in Maryland" at $5,000 per ton and stating that costs "for controls in upwind states are sometimes as low as $500 to $1,000 per ton"); Connecticut Comments at 2, EPA-HQ-OAR-2016-0596-0041, JA__ (estimating cost of removing an additional ton of pollution in Connecticut and other downwind states at $10,000 to $40,000 per ton and estimating the cost of removing the same amount of pollution in upwind states at $500 to $1,200 per ton). Even assuming that costs of controlling additional ozone precursor emissions within the Region are higher than outside of the Region for some controls applied to some sources, EPA noted that it would be "highly doubtful" that the suite

[19] In their Brief, Petitioners cite comments submitted in the CSAPR Update rulemaking to show that their costs are higher than EPA's cost threshold in that rulemaking. *See* Pet. Br. at 64 n.22. But even if those comments were part of the record here (and they are not), those comments are also conclusory and lack supporting information.

of controls mandated by § 7511c could be applied at the dollar-per-ton level of cost effectiveness commenters claimed. 82 Fed. Reg. at 51,249/2.

Nor could such interstate disparities in control costs or control stringency alone justify imposing § 7511c's mandatory controls on the Upwind States. Under the CAA, each state has the primary responsibility to attain the NAAQS. A state with nonattainment areas may well be required to establish more stringent and costly controls than a state that must control only its significant contribution to other states. By statutory design, the Region's mandatory controls may be more stringent, and costly, than what is required of states outside the Region. Section 7506a grants EPA discretion to add states to the Region when they significantly contribute to violations. It does not, however, require addition of states to level the playing field to equalize the stringency of controls or reallocate economic or environmental burdens.

Contrary to Petitioners' contention, *see* Pet. Br. at 63, EPA never claimed that it lacked authority to consider regulatory disparities. Nor did EPA "refuse" to consider or address such disparities. *See* Pet. Br. at 65. EPA expressed serious doubt that imposing the cost associated with § 7511c's controls on the Upwind States would be warranted. *See, e.g.*, 82 Fed. Reg. at 51,249/2; Response to Comments at 9. EPA also found that air quality is generally improving and that more cost-effective approaches would best address any remaining problems. EPA's approach under the good neighbor provision could do so equitably. EPA thus reasoned that where, as here, it has otherwise concluded that expansion of the Region is not appropriate, Congress

would not have intended for EPA to grant the Petition solely to resolve any alleged "inequities" inherent in § 7511c's application of more stringent requirements to the Region's states. *See* 82 Fed. Reg. at 51,249/2. Thus, EPA found that extending § 7511c's controls to the Upwind States would not be appropriate.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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AUGUST 2018
90-5-2-3-21235

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

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,898 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), according to the count of Microsoft Word.

s/ Sonya J. Shea
SONYA J. SHEA

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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