

ORAL ARGUMENT NOT YET SCHEDULED

Case 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 Agency Action of the
United States Environmental Protection Agency

**BRIEF OF THE STATE OF TENNESSEE AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and Amici.

All parties, intervenors, and *amici* appearing in this court are listed in the Brief for Petitioners, *State of New York v. EPA*, No. 17-1273, at i–ii (D.C. Cir. Doc. No. 1731043, filed May 15, 2018), except that Andrew Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, is substituted for E. Scott Pruitt.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners, *State of New York v. EPA*, No. 17-1273, at i–ii (D.C. Cir. Doc. No. 1731043, filed May 15, 2018).

C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court. There are no related cases within the meaning of D.C. Cir. R. 18(a)(1)(C).

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GLOSSARY

CSAPR Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS
EPA	Environmental Protection Agency
Lb/MMBtu	Pounds per million British thermal units
NAAQS	National Ambient Air Quality Standard
NO _x	Nitrogen Oxides
Transport Region.....	Ozone Transport Region
TVA.....	Tennessee Valley Authority
VOC	Volatile Organic Compounds

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Addendum to Respondents' Brief. Doc. No. 1743496, filed August 1, 2018.

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF
AUTHORITY TO FILE**

The State of Tennessee submits this brief under Fed. R. App. P. 29(a)(2) as *amicus curiae* in support of Respondents, United States Environmental Protection Agency and Andrew Wheeler¹ (collectively, EPA). The case is before the Court on a petition for review of EPA's denial of a petition to expand the Ozone Transport Region (Transport Region) by adding several states, including Tennessee. Expanding the Transport Region as requested would impose significant pollution controls on facilities across the State and force Tennessee to inventory and regulate many additional facilities. Tennessee thus has a direct and substantial interest in the outcome of this case.²

¹ Petitioners initially named E. Scott Pruitt as a respondent in this matter as the Administrator of the EPA at the time the petition was filed. Andrew Wheeler replaced E. Scott Pruitt as Acting Administrator on July 9, 2018. Pursuant to Fed. R. Civ. P. 25(d), Andrew Wheeler is automatically substituted as a party.

² Pursuant to D.C. Cir. R. 29(b) and the guidance set forth in Section IX(A)(4) of this Court's Handbook of Practice and Internal Procedures, Tennessee notified this Court of its intent to file an *amicus curiae* brief on March 20, 2018.

SUMMARY OF ARGUMENT

EPA properly exercised its discretion under Section 176A of the Clean Air Act, 42 U.S.C. § 7506a, to deny the petition to add nine states, including Tennessee, to the Transport Region. The progress made as a result of EPA's efforts in Tennessee illustrates the reasonableness of EPA's conclusion that other Clean Air Act mechanisms provide a more effective means of addressing any remaining air-quality problems identified by the petition. EPA has utilized such other pollution-control mechanisms, targeting the emission of nitrogen oxides (NO_x), to resolve Tennessee's significant contribution to nonattainment of the 2008 ozone National Ambient Air Quality Standards (NAAQS) within the Transport Region.

In light of the effectiveness of these other EPA control measures, expansion of the Transport Region is simply not necessary. It would place additional, more stringent controls on both NO_x *and* volatile organic compounds (VOCs), and thus prevent Tennessee and other states from expending resources and focusing enforcement where it has proven to have the most benefit: targeting NO_x emissions.

This Court should therefore affirm EPA's denial of the petition, so that EPA may continue to work with states to craft tailored responses to unique interstate air-pollution problems without imposing the mandatory controls dictated by expansion of the Transport Region.

ARGUMENT

EPA has thoroughly discussed the statutory and regulatory background governing interstate ozone transport. Br. Respondents at 3-16. Since 1998, when EPA issued its first regional rule to address interstate ozone pollution, EPA has continued to refine its approach to controlling ozone transport. The Clean Air Act’s “good neighbor” provision is an important part of the regulatory scheme, and EPA currently enforces that provision through the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update). 81 Fed. Reg. 74,504 (Oct. 26, 2016).

EPA’s primary reason for denying the petition to expand the Transport Region to include additional states was that the use of “existing and expected control programs,” like the Clean Air Act’s good neighbor provision, “is a more effective means of addressing regional ozone pollution . . . than expanding the [Transport Region] as requested.” 82 Fed. Reg. 51,238-01, 51239 (Nov. 3, 2017). The emissions reductions achieved in Tennessee illustrate that this determination was eminently reasonable—EPA has successfully utilized the good neighbor provision and other Clean Air Act mechanisms to significantly reduce Tennessee’s contribution to interstate ozone transport. Rather than force states to implement

inefficient statewide emissions controls by expanding the Transport Region, EPA properly exercised its discretion to deny the petition.

The Substantial Reduction in Tennessee’s Contribution to Interstate Ozone Transport Demonstrates the Reasonableness of EPA’s Denial of the Petition to Expand the Transport Region.

A. Utilization of Clean Air Act NO_x controls has worked to resolve Tennessee’s significant contribution to ozone nonattainment in the Transport Region.

EPA highlighted the emissions reductions achieved by the utilization of existing pollution-control measures. 82 Fed. Reg. at 51,239. EPA noted in particular that Tennessee will no longer significantly contribute to ozone nonattainment in the Transport Region. *See* 82 Fed. Reg. at 51,243 n.17 (“EPA determined that the emissions reductions required by the CSAPR Update would fully address the state’s significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in other states”).³

EPA achieved these emissions reductions primarily by targeting NO_x emissions, and as a result, Tennessee has reduced its annual ozone-season NO_x emissions by 83.4% since 2003. State of Tennessee Comments, EPA-HQ-OAR-

³ EPA also cited preliminary interstate ozone transport modeling data indicating that Tennessee will not significantly contribute to nonattainment of the 2015 ozone NAAQS in any state by 2023. 82 Fed. Reg. at 51,244 n.18 (citing 82 Fed. Reg. 1,733 (Jan. 6, 2017)). EPA’s recent data indicates that controls under the good neighbor provision will effectively control ozone from Tennessee, even under stricter ambient air quality requirements.

2016-0596-0031, at 10, *available at* regulations.gov (Tennessee Comments). In 2003, ozone-season NO_x emissions for Tennessee were 55,376 tons. *Id.* By 2010, that number had been reduced to 18,164. *Id.* And in 2015, emissions were 9,201 tons. *Id.*

The nature of Tennessee's electricity industry contributed to this success. The Tennessee Valley Authority (TVA), a quasi-federal agency, generates virtually all the electricity used within Tennessee. As a result of several EPA actions, including a 2011 consent decree,⁴ TVA has substantially reduced NO_x emissions from its electrical generation fleet. State of Tennessee Comments on Proposed CSAPR Update, EPA-HQ-OAR-2015-0500-0324, at 2, *available at* regulations.gov (Tennessee CSAPR Comments).⁵

The 2011 consent decree between TVA, EPA, and several states required TVA to install emissions-reductions technology and to take steps to cut its NO_x emissions from its coal-fired plants. As part of the decree, TVA committed to retire four coal-fired units at its Johnsonville Fossil Plant by the end of 2017. Tennessee CSAPR Comments at 2. It also committed to install selective catalytic reduction

⁴ Consent Agreement and Final Order, *In re Tenn. Valley Auth.*, Docket No. CAA-04-2010-1528(b) (EPA June 15, 2011).

⁵ Numerous EPA rules contributed to TVA's reduction of NO_x emissions, including: Acid Rain Program NO_x reductions, the NO_x Budget Trading Program, Clean Air Interstate Rule ozone season NO_x trading program, and NO_x trading programs under CSAPR and the CSAPR Update. Tennessee Comments at 13.

controls, which greatly reduce NO_x emissions from coal-fired plants, at its Gallatin Fossil Plant by the end of 2017. *Id.* TVA also committed to replace the coal-fired Allen Fossil Plant with a natural-gas combined cycle plant in the same location by the end of 2018. *Id.*

Together, these changes to TVA's electrical generation fleet nearly met EPA's requirements for NO_x emission reductions. *Id.* Before TVA reduced NO_x emissions from its coal plants, Tennessee's statewide NO_x emission rate was 0.094 pounds per million British thermal units (lb/MMBtu). Tennessee CSAPR Comments at 2. While developing the CSAPR Update, EPA set a statewide NO_x emission rate of 0.056 lb/MMBtu for Tennessee. *Id.* The changes TVA made in response to the 2011 consent decree decreased Tennessee's statewide NO_x emission rate to about 0.06 lb/MMBtu. *Id.*

EPA then utilized the Clean Air Act's good neighbor provision to bring Tennessee under the threshold for significant contribution to ozone nonattainment in the Transport Region. Under the CSAPR Update cited above, EPA imposed "cost-effective NO_x emissions reductions" on Tennessee and 21 other states. 82 Fed. Reg. at 51,243. Beginning with the 2017 ozone season, electrical generating units within Tennessee may together emit an aggregate of only 7,736 tons of NO_x during the ozone season before purchasing credits to cover excess emissions. 81 Fed. Reg. at 74,508. (By contrast, Tennessee's original ozone-season NO_x emission

budget under CSAPR was 14,908 tons. *See* 76 Fed. Reg. 48,208, 48,269 (Aug. 8, 2011)).

B. Successfully reducing ozone transport problems using other Clean Air Act mechanisms shows that expanding the Transport Region is unnecessary.

As the success in Tennessee illustrates, and as EPA has learned through decades of interstate ozone transport enforcement, targeted NO_x controls are more effective in reducing emissions than broad, statewide controls on major sources emitting NO_x and VOCs. The requested expansion of the Transport Region is therefore unnecessary.

Although emission of NO_x and VOCs both lead to the formation of ozone, NO_x is the primary contributor to long-distance ozone transport problems. EPA has noted that “for reducing regional scale ozone transport, a NO_x control strategy is most effective, whereas VOC reductions are generally most effective locally, in more dense urbanized areas.” 76 Fed. Reg. 48,208, 48,222 (Aug. 8, 2011). Statewide controls on major sources of VOCs, like those imposed by Transport Region requirements, are therefore unlikely to reduce regional ozone transport with the same efficiency as the targeted NO_x controls that have proved successful in Tennessee.

Inclusion in the Transport Region would not allow states such as Tennessee to use only targeted NO_x emissions reductions to resolve their significant

contribution to ozone nonattainment. States within the Transport Region are subject to the same controls for VOC and NO_x emissions as moderate nonattainment areas for ozone. *See* 42 U.S.C. § 7511c(b)(2) (requiring stationary sources within the Transport Region emitting at least 50 tons per year of VOCs to comply with moderate nonattainment ozone requirements); 42 U.S.C. § 7511a(f)(1) (providing that requirements for major stationary sources of VOCs in ozone nonattainment areas apply to major stationary sources of NO_x). These broad measures force both state and federal regulators to expend resources regulating all major sources of NO_x and VOCs within a state rather than focusing enforcement where it will provide the most benefit. And Tennessee's experience shows that targeting enforcement on NO_x emissions provides the most benefit. EPA's decision to deny the petition, so that it could continue the targeted enforcement that produced positive results in Tennessee⁶ and other upwind states, was reasonable and thus a proper exercise of its discretion.

⁶ Because Tennessee will no longer significantly contribute to nonattainment, subjecting it to the Transport Region's mandatory statewide NO_x and VOC controls would also amount to prohibited "over-control" by EPA. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1608-09 (2014).

CONCLUSION

For the reasons stated, EPA's denial of the petition to expand the Transport Region should be affirmed.

Respectfully submitted,

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Dated: August 8, 2018

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CERTIFICATE OF COMPLIANCE

1. This document complies with the length limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Fed. R. App. P. 27(a)(2)(B), this document contains 1509 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

Dated: August 8, 2018

/s/ J. Peter Murrey _____
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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2018, a true and correct copy of the foregoing Brief of *Amicus Curiae* was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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