ORAL ARGUMENT SCHEDULED FOR MAY 7, 2020

Case No. 19-1231

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

STATE OF NEW YORK, STATE OF NEW JERSEY, and
THE CITY OF NEW YORK,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency,

Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
84 Fed. Reg. 56,058 (Oct. 18, 2019)

PROOF REPLY BRIEF FOR PETITIONER-INTERVENORS

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DATED: March 19, 2020

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), the undersigned counsel for Adirondack Council, Environmental Defense Fund, and Sierra Club (collectively "Petitioner-Intervenors") hereby certifies as follows:

A. Parties and Amici

All parties and intervenors were accurately identified in the certificate filed with Petitioner Intervenors' Opening Brief. On March 2, 2020, the Commonwealth of Kentucky Energy and Environment Cabinet filed a Notice of Intent to File an Amicus Brief in support of respondents (Doc. No. 1831230). The amicus brief was filed on March 5, 2020 (Doc. No. 1832071), and an amended brief was filed on March 6, 2020 (Doc. No. 1832378).

B. Ruling Under Review

Petitioners seek review of the final agency action by EPA as published in the Federal Register and titled: Response to Clean Air Act Section 126(b) Petition from New York, 84 Fed. Reg. 56,058 (Oct. 18, 2019).

C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court. In *Maryland v. Environmental Protection Agency*, No. 18-1285 (and consolidated cases), this Court is reviewing a different EPA action taken under the same statutory provision, titled: "Response to Clean

Air Act Section 126(b) Petitions from Delaware and Maryland," 83 Fed. Reg. 50,444 (October 5, 2018).

Dated: March 19, 2020

Respectfully submitted,

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GLOSSARY

Act	Clean Air Act
Cross-State Update	EPA's Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
Denial	Response to Clean Air Act Section 126(b) Petition from New York, 84 Fed. Reg. 56,058 (Oct. 18, 2019)
EPA or Agency	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
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INTRODUCTION AND SUMMARY OF ARGUMENT

In its brief, EPA affirms its commitment to eliminating Section 126(b) as an independent and usable tool for states and jurisdictions afflicted by transported ozone pollution. The Agency distracts from the arbitrariness of its response to New York's petition by belaboring the large number of sources New York identified. But under EPA's approach, New York's petition would have fared no better had it named only a single source. To satisfy the Agency, a petitioning jurisdiction must provide detailed, source-specific cost and air quality information about *all* sources of smog-forming pollution in *all* upwind states: submitting a complete transport rule in the mold EPA itself has promulgated. This is irrational and infeasible. And EPA identifies no discrete set of information, short of the delivery of a complete transport rule that it would accept.

In addition, brandishing the Act's 60-day response deadline (which, in practice, the Agency routinely extends to eight months and then flouts), the Agency attempts to impose burdens on petitioning jurisdictions that exceed the scope of Section 126 and are impossible to meet. The 60-day deadline was intended to ensure timely relief to states facing urgent dangers to public health and welfare; EPA's effort to redeploy the deadline as a barrier to relief turns the statute against itself.

Moreover, for the dozens of sources for which the record contains the cost and air quality information the Agency purports to require, the Agency disregards it or identifies novel demands to justify its dismissal. Notably, EPA offers no rational basis for denying New York's petition for numerous electric generating units for which EPA itself previously identified highly cost-effective available emission reductions.

Finally, while EPA urges the Court to ignore its Step 1 denial, the Court should reject this unlawful independent basis for denying New York's petition as it pertains to the 2008 ozone standard, and reject Industry Intervenors' impermissible and meritless efforts to extend the Step 1 denial to the 2015 standard.

ARGUMENT

I. New York's Petition Advances Beyond Step 1 for the 2008 and 2015 Ozone Standards

A. EPA Found New York's Petition Satisfies Step 1 for the 2015 Ozone Standard and Industry Intervenors' Separate Challenge Fails

EPA does not dispute that New York's petition advances beyond Step 1 when analyzing the New York Metropolitan Area for the 2015 ozone standard. EPA Br. at 45; 84 Fed. Reg. 56,058, 56,080–81 (Oct. 18, 2019), JA ___. While Industry Intervenors apparently disagree, Industry Intervenors' Br. at 31–39, the Court need not consider that argument; respondent-intervenors cannot raise what

amounts to a separate challenge to EPA's response. *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994).

Even if Industry Intervenors' argument regarding the 2015 standard were properly before the Court, it lacks merit. Industry Intervenors consider only New York's petition, ignoring the actual record. Industry Intervenors' Br. at 31. But it is textbook administrative law that agency action rises or falls on the record before the agency, and an agency cannot selectively consider record evidence. *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 346 (D.C. Cir. 2018). Indeed, there would be no reason for Congress to have required EPA to render decisions on Section 126 petitions "after public hearing," 42 U.S.C. § 7426(b), and to develop a rulemaking docket and accept written comments, *id.* § 7607(d)(1)(N), (d)(5), if EPA could simply disregard information adduced after the petition was filed.

The record contains, and EPA's response expressly addresses, the Agency's 2023 modeling, which (although understating air quality problems) demonstrated that the New York Metropolitan Area, including monitors in New York State, will not meet the 2015 ozone standard in 2023, the relevant ozone season for the 2015 Moderate attainment deadline. 84 Fed. Reg. at 56,080–81, JA ___; Memorandum from Stephen D. Page to Regional Air Division Directors (Oct. 27, 2017) (EPA-HQ-OAR-2018-0170-0025) JA ___. EPA therefore correctly concluded that New York's petition advances beyond Step 1 for the 2015 ozone standard.

B. New York's Petition Satisfies Step 1 for the 2008 Ozone Standard

With regard to the 2008 ozone standard, as Petitioner-Intervenors explained in their opening brief (at 13–21), the record demonstrates an actionable air quality problem for the New York Metropolitan Area entitling relief under Section 126(b). EPA's half-hearted defense (EPA Br. at 45–52) fails. First, EPA continues to lack a coherent explanation for how its exclusive consideration of future year attainment can be squared with the present tense language of Section 126(b). *Compare* Pet'r-Intervenors' Br. at 14–18 *with* EPA Br. at 46–48. EPA's claim that it "can assess either a source's current *or* its anticipated future emission levels," EPA Br. at 47, is flatly contradicted by Section 126(b)'s plain language, which requires EPA to make a finding and provide relief if *either* current or future emissions contribute to nonattainment. *See* 42 U.S.C. § 7426(b).

But even if EPA were correct that future year attainment is the relevant inquiry, New York *has* presented data relevant to its inability to attain the 2008 standard in 2020, the operative year given its July 2021 attainment date. Pet'r-Intervenors' Br. at 17 n.4; Pet'rs' Br. at 32–33. And EPA's 2023 modeling, which impermissibly looked out three years beyond the relevant design value (to 2023 rather than 2020), *Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019), and is itself flawed, Pet'r-Intervenors' Br. at 20–21; Pet'rs Br. at 43–49, does not rebut this evidence.

Finally, there is no merit to EPA's position that it can ignore monitors within the NY-NJ-CT nonattainment area that are located outside the borders of New York. Without support, EPA purports to invoke *Chevron* step two to cloak in deference its interpretation that "any State" in Section 126 means only a state with a nonattaining monitor within its borders. EPA Br. at 50. But EPA is entitled to no such deference. This Court previously concluded—at *Chevron* step one—that identical "any state" language in a functionally identical context (a state trying to limit the regulatory consequences of its nonattainment status) refers to any state in a multistate nonattainment area. *Del. Dept. of Nat. Res. and Envtl. Control (DNREC) v. EPA*, 895 F.3d 90, 97–100 (D.C. Cir. 2018). *DNREC* controls here, and EPA proffers no basis to distinguish it.

II. EPA's Denial of New York's Petition at Step 3 is Incompatible with the Text and Structure of the Clean Air Act as Well as D.C. Circuit Court Precedent

EPA arbitrary and irrationally claims that, in order to obtain relief under Section 126, New York must submit a complete transport rule mirroring those EPA has developed under section 110(a)(2)(D)(i)(I), accounting for all pollution sources in all upwind states. This requirement is incompatible with Congress's intent that Section 126 function as a separate and additional mechanism for downwind jurisdictions to address transported air pollution. To the extent EPA now backs away from its unreasonable position—suggesting that something less than an entire

transport rule would have sufficed, EPA Br. at 30—it provides no clear and consistent framework for its evaluation of New York's petition. That failure alone necessitates a remand to the Agency.

Moreover, EPA badly misreads this Court's decision in *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988) (*New York I*), which, correctly read, lends no support to EPA's Denial. The Agency continues to unlawfully assign New York the burden to craft a remedy where that burden is expressly assigned to the Agency. And EPA irrationally demands information from New York that no state or political subdivision is able to obtain.

A. EPA Imposed Obligations on New York that Effectively Turn Any Section 126(b) Petition into a Section 110 Transport Rule in which the Petitioning Jurisdiction Must Perform the Agency's Work

EPA maintains that the use of its preferred four-step framework does not deprive Section 126(b) of independent meaning. EPA Br. at 27. But simply acknowledging that Section 110(a)(2)(D)(i)(I), and Section 126(b) are distinct provisions is insufficient. To fulfill Congress' intent to "create a second and entirely alternative method and basis for preventing and abating interstate pollution," H.R. Rep. No. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1410 (1977), JA ___, EPA must treat the two sections differently in practice.

EPA's approach has the practical effect of eliminating the source-specific remedy provided to states under Section 126 by effectively requiring Section 126 petitioners to submit a complete regional transport rule to EPA. Pet'r-Intervenors' Br. at 22–24; 84 Fed. Reg. at 56,089, JA ___ (demanding information regarding "whether the sources named in the New York petition have available or cost-effective emissions reductions either as compared to one another *or as compared to other, unnamed sources in the same upwind states or in other states*") (emphasis added). EPA's comparative analysis would require detailed source-specific information regarding *all sources* in *all upwind states*, creating a burden on petitioners that is the same regardless of whether petitions name a single source or 1,000 sources.

This unreasonable interpretation of the Clean Air Act not only places an untenable burden on petitioning states and political subdivisions, but also reads Section 126 out of the Act by requiring states, despite their limited powers and technical capacities, to engage in the same regional rulemaking process that EPA utilizes in under Section 110.

B. Short of a Complete Transport Rule, EPA Has Arbitrarily Failed to Articulate What a State or Political Subdivision Must Establish in Order to Obtain Relief under Section 126

To the extent EPA now disclaims its position that New York was obligated to submit a complete regional transport rule, *see* EPA Br. at 30, the Agency has

failed to articulate any coherent standard by which a Section 126(b) petition is to be evaluated. This Court should remand EPA's Denial on this basis alone.

In EPA's Denial, the Agency claims that it uses a "multi-factor" analysis at Step 3, 84 Fed. Reg. at 56,087, JA ___, which involves the consideration of "cost and air quality factors," *id.* at 56,088, JA ___, to determine whether the identified sources "contribute significantly" to petitioner's nonattainment. But EPA nowhere articulates how those cost and air quality factors translate into a workable standard that could be implemented by a petitioning state or used to evaluate a source-specific Section 126 petition.

EPA equivocates about the information required to support a Section 126 petition. In its Denial, EPA identified an extensive list of source-specific technical, cost, and emission data it claimed to need for all of the named sources in a petition and for other sources not named in the petition, concluding that "[w]ithout this information, the EPA cannot determine whether the sources named in the New York petition have available or cost-effective emission reductions" vis-à-vis each other or other, unnamed sources. *Id.* at 56,090, JA ___. In its brief, EPA suggests that this was only "*one possible way* the State could have supported its petition" and that there may be other (still unidentified) methods for states to meet their burden under Section 126(b). EPA Br. at 36.

But it is not enough for EPA to simply claim that it will know a meritorious Section 126(b) petition when it sees it. EPA has established neither regulations nor guidance laying out concretely what states or local governments must show in order to secure relief under Section 126(b).[1] Failing to establish a clear standard runs counter to EPA's duty to help states protect human health and the environment, and leaves states unable to know how they can effectively enlist federal assistance to protect their citizens from serious harms originating outside their boundaries. And, contrary to EPA's assertion, States facing air quality problems seldom have the "luxury of time," EPA Br. at 24; they face the need to eliminate serious and ongoing public health hazards and to meet federal attainment deadlines.[2]

EPA tries to distract from its lack of a coherent standard by suggesting the issue was with New York's election to include a large number of sources in its petition. This is incorrect. As an initial matter, EPA has previously granted Section

[1] And where presented with information that the Agency has elsewhere intimated would be sufficient to sustain a Section 126(b) petition, EPA moves the goalposts. *See infra* Section II.D.

[2] The 60-day deadline for EPA decisions on Section 126(b) petitions was manifestly intended to provide timely relief in cases where interstate air pollution contributes to unhealthy air quality, and does not support EPA's buck-passing approach here. *See* Pet'r-Intervenors' Br. at 30–35. If anything, the deadline reinforces EPA's obligation to establish reasonable ground-rules that make clear the standards that petitioning states must satisfy and to marshal agency resources to resolve states' claims in a manner that honors Congress's objective of ensuring timely relief.

126(b) petitions addressing comparably large numbers of sources. *See, e.g.*, *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001) (affirming EPA's imposition of emission limits on all power plants and certain large industrial combustion sources in twelve states and the District of Columbia based on Section 126(b) petitions submitted by eight states). More fundamentally, as discussed in Section II.A, *supra*, because EPA is demanding comparative cost and air quality information regarding both sources in the petition and other non-petition upwind sources, the number of sources identified has no bearing on the ultimate burden EPA would place upon a petitioning state; a petitioner would be obligated to address all upwind sources regardless of the petition's scope.

C. EPA's Denial of New York's Petition Unlawfully Conflates Section 126(b) and Section 126(c) of the Clean Air Act

Petitioner-Intervenors explained that EPA's response to New York's petition impermissibly conflates Section 126(b) and 126(c) by placing the burden on New York to develop the remedy for sources that significantly contribute to its nonattainment—a burden which is expressly delegated to EPA under Section 126(c). Pet'r-Intervenors' Br. at 24–27.

EPA's response is circular. The Agency claims that Section 126(c) "only applies if a violation is found under subsection (b)." EPA Br. at 28. But it says that a finding under subsection (b) requires a showing of "what emission amounts at

what sources can be eliminated cost-effectively." EPA Br. at 28. In other words, a petitioning state would need to identify source-specific remedies (emission reductions) in its petition to trigger EPA's duty to identify specific remedies for the same sources.

EPA's response is all the more confounding because the Agency goes on to explain that the resulting remedy it would impose under Section 126(c) would likely be "an enforceable emission rate or an emission cap *across multiple sources*." EPA Br. at 28 (emphasis added). That is, even if New York identified source-specific remedies (to the impossible standards of the Agency), EPA would likely impose a non-source-specific remedy in the form of a generic rate (New York's actual petition request) or cap across multiple sources (EPA's approach in the Cross-State Rule and Cross-State Update), reflecting the fact that *downwind air quality benefits do not depend on which individual sources reduce emissions*. Indeed, given the availability of non-source-specific remedies—which effectively enables EPA to achieve emission reductions in accordance with its preferred cost-efficacy approach—EPA offers no rational basis for requiring New York to do more than it has already done: Identify a group of sources in linked states that collectively contribute significantly to its nonattainment.

D. EPA Irrationally and Arbitrarily Imposes Informational Burdens on Petitioning States that They Cannot Meet

Petitioner-Intervenors demonstrated that, in the context of ozone Section 126(b) petitions, EPA has unlawfully created evidentiary burdens of a nature and magnitude that cannot be met by a petitioning state or political subdivision. Pet'r-Intervenors' Br. at 27–30. In its response, EPA dangles false hope regarding New York's ability to generate the information the Agency claims to require, pointing to data sources New York could have drawn from and blaming feasibility issues on the number of sources identified in New York's petition. EPA Br. at 24–25. But where the record contains those very same types of data for specific sources, EPA identifies novel bases for finding deficiencies. Moreover, as discussed in Section II.A, *supra*, EPA's requirement that New York provide comparative cost and emission reduction data for sources beyond those identified in its petition is not feasible, and that infeasibility is not a function of the number of sources New York's petition actually identified.

Agency litigation counsel try to mitigate the arbitrariness of the evidentiary burdens EPA has created by suggesting that certain publicly available information would have been sufficient to satisfy the Agency. But where such information was actually provided, EPA sang a different tune. For example, in its brief, EPA suggests that New York could have relied on data in EPA's public databases, such

as "information on general performance and cost of [nitrogen oxide] control strategies." EPA Br. at 25. But for sources for which the record *contains* this very information—EPA's own data on the performance and cost of installing low-nitrogen oxide burners at electric generating units—EPA balked, faulting New York for failing to "present complete engineering and cost analysis that speaks to whether *these units* can, and cost-effectively, operate at the proposed level." 84 Fed. Reg. at 56,092, JA ___ (emphasis added). In other words, despite its overtures, EPA demands precisely the type of unit-specific engineering information that New York cannot obtain from sources beyond its borders and, as EPA acknowledged, would have required a Section 114 information collection request to obtain. *Id.* at 56,084, JA ___. EPA offers Section 126(b) petitioners no path forward.[3]

E. *New York I*, Properly Read, Does Not Support EPA's Denial

In its brief, EPA pervasively relies upon characterizations of this Court's decision in *New York I*, 852 F.2d 574. EPA Br. at 1, 3, 7, 20–23, 40, 44. But EPA

[3] Industry Intervenors part from EPA and contend that a Section 114 information collection request would not be needed because of information that is publicly available. Industry Intervenors' Br. at 21–22. For example, Industry Intervenors dangle the possibility that RACT/BACT/LAER Clearinghouse illustrates controls that can and have been implemented "cost-effectively." *Id.* at 22. However, as with EPA, their promise is illusory. Industry Intervenors subsequently claim that RACT controls have no bearing on what is cost effective in the context of a Section 126 petition. *Id.* at 28.

badly misreads the decision. In fact, *New York I,* correctly read, offers no support for EPA's denial here. The discussion in *New York I* cited repeatedly by EPA was not, as EPA claims, about the 38 sources in Pennsylvania's original Section 126 petition or how upwind State Implementation Plans treated those 38 sources. *Contra* EPA Br. at 20. Rather, this Court was addressing an issue—raised by petitioning states for the first time in comments on EPA's proposed denial—that "the filing of their section 126(b) petitions immediately obliged EPA to take the investigatory steps necessary to determine whether the SIPs in all named upwind states were in compliance with [the Good Neighbor Provision]." 852 F.2d at 578. This is a distinct and considerably broader task than what New York's petition here sought or required.

At issue in the EPA-cited passages of *New York I* was whether EPA had a "duty to review all existing [state implementation plans] and require revisions where necessary to conform to [the Good Neighbor Provision]." *Id.* at 579. As this Court noted, under petitioning states' theory, "the Administrator would be required to undertake a full-scale investigation of *the adequacy of the [state implementation plans] of all states named in the petition for all pollutants involved*." *Id.* at 578 (emphasis added). The Court reasoned that "[t]he language of § 126(b) is quite specific and focuses on 'major sources,' not the validity of a state's SIP." *Id*. The

Court in *New York I* did not even discuss the merits of the underlying Section 126 petitions until a subsequent section (II.B) of its opinion.[4]

EPA's extracts from *New York I* do not apply here. The duty to evaluate the sufficiency of upwind State Implementation Plans (and EPA's Federal Implementation Plan) is not at issue, having previously been resolved by EPA and this Court. EPA's Cross-State Update expressly determined that the relevant upwind State Implementation Plans are missing or deficient. *See* 81 Fed. Reg. 74,504, 74,506 (Oct. 26, 2016). And in *Wisconsin*, this Court held that the Cross-State Update—EPA's Federal Implementation Plan—is likewise deficient. 938 F.3d at 313. The only issue here is whether the sources identified in New York's petition, whose pollution is contributing greatly to the New York Metropolitan Area's persistent nonattainment, are amenable to relief under Section 126. On the record, they are.

III. EPA Fails to Confront Evidence of Highly Cost-Effective Emission Reductions from Dozens of Sources in New York's Petition

As shown in Petitioner-Intervenors' opening brief (at 35–39), the record contains precisely the type of source-specific data for dozens of electric generating

[4] And where it did, that discussion has no bearing on the viability of New York's petition here, which is not marred by the infirmities of the Maine or Pennsylvania petitions. *See* 852 F.2d at 579–80 (Maine petition not cognizable under Section 126; Pennsylvania failed to show an actual air quality violation, unlike New York, *see* Section I, *supra*).

units in New York's petition that EPA purports to require to demonstrate the existence of highly cost-effective emission reductions, including EPA's own analysis of these units to develop the Cross-State Update. EPA seeks to recast the basis for this Court's remand of the Cross-State Update and recant the Agency's prior conclusion that certain controls were highly cost-effective. The Court should reject these efforts.

EPA's focus on its purported lack of information regarding the 220 non-electric generating units in New York's Section 126(b) petition (EPA Br. at 22, 24, 32) obscures the fact that the Agency indisputably *had* sufficient information for the Petition's 130 electric generating units. Indeed, as Petitioner-Intervenors showed, for dozens of these units, EPA's own Cross-State Update analysis demonstrates that there are highly cost-effective emission reductions available from these units, Pet'r-Intervenors' Br. at 35–39, and EPA clearly considered this information sufficient to promulgate the Cross-State Update.

EPA responds that the Cross-State Update's cap-and-trade system for electric generating units remains in effect despite the *Wisconsin* remand, and sources emitting at an elevated rate or buying emission allowances instead of curtailing emissions are "an expected *feature* rather than a flaw of the emission trading program." EPA Br. at 34. But this is no response. The Court in *Wisconsin* confirmed that the Cross-State Update was an inadequate "partial remedy" that

failed to achieve downwind attainment or eliminate significant upwind contributions "by any date." 938 F.3d at 313. A deficient cap-and-trade system in no way precludes further relief from under-performing units.

EPA attempts to rewrite this Court's basis for remand in *Wisconsin*, erroneously suggesting "[t]he Update was remanded only because it had excluded assessment of other [non-electric generating unit] sources." EPA Br. at 38–39. This is incorrect. This Court found the Cross-State Update unlawful and remanded because the rule "does not require upwind States to eliminate their significant contributions to downwind ozone pollution by [2017]—or by any date, for that matter." *Wisconsin*, 938 F.3d at 313. To the extent EPA's policy preference is to address the inadequacies with the Cross-State Update by considering non-electric generating units, EPA could attempt to do so. But EPA has previously expressed its "'expect[ation] that a full resolution of upwind transport obligations would require emission reductions from sectors besides [electric generating units],' *along with 'further [electric generating unit] reductions that are achievable after 2017*.'" *Id.* (quoting Cross-State Update, 81 Fed. Reg. at 74,522) (emphasis added). Further emission reductions from electric generating units were fully contemplated by EPA.

Industry Intervenors attempt to save EPA by claiming that, despite EPA's prior acknowledgment that emission controls on electric generating units available

at $1,400 per ton or less were highly cost-effective, New York had not shown that imposing those controls would avoid "overcontrol." Industry Intervenors' Br. at 29–30. But EPA previously made exactly this finding. 81 Fed. Reg. at 74,508 (finding Cross-State Update would result in no "overcontrol" by any state). And the Cross-State Update was rejected precisely because EPA so assiduously avoided "overcontrol" that its final rule represented an inadequate "partial" remedy. *Wisconsin*, 938 F.3d at 313, 326–27. New York had no burden to redo EPA's overcontrol analysis for these same sources and same ozone standard.

IV. Petitioners' Arguments Regarding *Wisconsin* and *New York II* are Properly Before this Court

There is no merit to EPA's assertion (Br. at 36–37) that the Clean Air Act's administrative exhaustion provision bars petitioners from relying on this Court's decisions in *Wisconsin* and *New York v. EPA*, 781 F. App'x 4 (D.C. Cir. 2019) (*New York II*).

First, although the two cases were decided after the public comment period closed for New York's petition, commenters pointedly raised the underlying "objection[s]," 42 U.S.C. § 7607(d)(7)(B), for which petitioners now rely upon the two decisions. Among other things, Petitioners and intervenors' comments objected: (1) that the Cross-State Update did not fully eliminate upwind states' significant contributions to downwind states' nonattainment with the 2008 ozone

standard[5]; (2) that EPA could not lawfully treat the Cross-State Close-Out Rule as a complete remedy with respect to the 2008 ozone standard[6]; and (3) that, under the Act, EPA was obligated to eliminate upwind States' significant contributions to downwind air quality problems before the affected states' statutory attainment deadlines.[7] *Wisconsin* and *New York II* sustained these claims, but the underlying objections were presented to the Agency, and EPA had an opportunity "to bring its expertise to bear" on them. *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998).

Petitioners were not required to petition for (and await a decision on) administrative reconsideration before they could invoke directly pertinent, precedential decisions of this Court. Just as it would be inappropriate "to ignore relevant legal authority simply because it was not considered in the court below," *U.S. v. Rapone*, 131 F.3d 188, 197 (D.C. Cir. 1997) (citing *Elder v. Holloway*, 510 U.S. 510, 516 (1994)), it would be improper to disregard precedential decisions of this Court that speak directly to central legal premises underlying a challenged

[5] Envtl. Def. Fund and Adirondack Council Comments at 8 (July 15, 2019) (EPA-HQ-OAR-2018-0170-0089), JA ____; Sierra Club Comments at n.10 (July 15, 2019) (EPA-HQ-OAR-2018-0170-0088), JA ____.
[6] *See* Comments of the Attorneys General of the States of New York and New Jersey and the Corporation Counsel of the City of New York at 20, JA ____;
[7]Sierra Club Comments at 4–5, JA ____; Envtl. Def. Fund and Adirondack Council Comments at 9, JA ____.

agency decision.[8] Such a rule would encourage agencies to drag their feet when confronted with judicial decisions, and deny the public the benefit of timely implementation of the law.

[8] The Cross-State Update rule (at issue in *Wisconsin*) was cited no fewer than 72 times in the final Denial, and the Cross-State Close-Out rule (at issue in *New York II*), 52 times.

CONCLUSION

For the foregoing reasons, and those set out in the Petitioner-Intervenors' Opening Brief, this Court should hold unlawful and set aside the EPA's Denial of New York's Section 126(b) Petition.

Dated: March 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Counsel hereby certifies that in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing order dated December 20, 2019 (Doc. No. 1821221), this document contains 4,533 words, exclusive of the sections excluded by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1).

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 proportionally spaced 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I certify that on March 19, 2020 the foregoing Opening Brief of Petitioner-Intervenors was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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