ORAL ARGUMENT NOT YET SCHEDULED

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)

OPENING BRIEF FOR PETITIONER-INTERVENORS

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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

Petitioners

The following parties appear as petitioners: State of New York, State of New Jersey, and the City of New York.

Respondents

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

Intervenors

The following parties have been permitted to intervene in support of petitioners: Adirondack Council, Environmental Defense Fund, and Sierra Club. (Doc. No. 1819450).

The following parties have been permitted to intervene in support of respondents: Midwest Ozone Group, National Association of Manufacturers, Chamber of Commerce of the United States of America, Air Stewardship Coalition, Dominion Energy, Inc., Peoples Gas Light and Coke Company, Big

Rivers Electric Corporation, GenOn Holdings, LLC, and Dominion Energy. (Doc. No. 1819450).

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) (scheduled for argument on January 16, 2020), 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).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Adirondack Council, Environmental Defense Fund, and Sierra Club (collectively, Petitioner-Intervenors) make the following disclosures:

Adirondack Council

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

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

Environmental Defense Fund

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

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

Sierra Club

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

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

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GLOSSARY

Act	Clean Air Act
Cross-State Update	EPA's Cross-State Air Pollution Rule Update, 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).
JA	Joint Appendix
lb/MMBtu	Pounds of an air pollutant emitted when burning one million British thermal unit's worth of fuel

PRELIMINARY STATEMENT

The importance of this case extends beyond the significant health and environmental impacts of the interstate pollution that has chronically affected the United States' largest metropolitan area. EPA's rationale for denying New York's petition for relief under Clean Air Act Section 126(b), 42 U.S.C. § 7426(b), would, if approved, greatly restrict that provision's practical utility as a remedy for states and other jurisdictions harmed by transboundary air pollution.

EPA discounts New York's demonstrated air quality problems based on a tenuous projection that air quality concerns will resolve themselves years beyond the relevant statutory deadlines (contrary to statutory text and decisions of this Court). And EPA's Denial would compel New York to make extensive and unreasonable threshold demonstrations, and secure nonpublic information from sources in other states, as a precondition to securing relief under Section 126. In both respects, EPA's decision disregards the Clean Air Act's "central object"—the timely attainment of air quality standards to reduce health and environmental harms—and abdicates the federal responsibility built into the Act to assist downwind states suffering from transboundary pollution. *See EPA v. EME Homer City Gen., L.P.*, 572 U.S. 489, 497–99 (2014). EPA's Denial of New York's petition is unlawful and unreasonable and should be set aside.

JURISDICTIONAL STATEMENT

Petitioners-Intervenors adopt Petitioners' Jurisdictional Statement.

ISSUES PRESENTED

1. Whether EPA, in relying on projected ozone levels beyond New York's relevant attainment date as a basis for its Denial of the Petition, unlawfully failed to honor the Act's requirements.

2. Whether EPA, in its Denial of the Petition, imposed unauthorized preconditions for relief under Section 126(b) of the Act; failed to honor the separate remedies Congress provided to downwind states to address transported air pollution through Section 126 and Section 110(a)(2)(D); conflated the statute's distinct provisions on violation and remedy; and imposed unreasonable evidentiary burdens upon states harmed by interstate pollution.

3. Whether EPA's Denial of the Petition was arbitrary and unlawful, including in its failure to consider the availability of cost-effective remedies covering less than all identified sources.

STATUTES AND REGULATIONS

Pertinent statutory provisions are contained in the Addendum accompanying the Opening Brief for Petitioners.

STATEMENT OF THE CASE

Ground-level ozone is a pervasive air contaminant that causes significant harm to public health and the environment. Formed when nitrogen oxides and volatile organic compounds interact in the presence of heat and sunlight, ozone can cause a range of acute and chronic health effects, including impairment of lung function, aggravation of asthma, and even premature death. Sierra Club Comments at 3 (July 15, 2019) (EPA-HQ-OAR-2018-0170-0088), JA ___; Envtl. Def. Fund and Adirondack Council Comments at 1 (July 15, 2019) (EPA-HQ-OAR-2018-0170-0089), JA ___. Exposure to ozone has been linked to increased emergency room visits, hospital admissions, and school absences. Sierra Club Comments at 3, JA ___. Children, the elderly, and people with respiratory impairments are the most vulnerable to ozone pollution. *Id.* And ozone impacts are inequitably distributed, with minority populations overrepresented in areas with elevated ozone levels. Envtl. Def. Fund and Adirondack Council Cmts. at 2, JA ___.

Pursuant to Section 109 of the Clean Air Act, EPA is required to establish uniform national health-based ambient air quality standards for a number of pollutants, including ground-level ozone. 42 U.S.C. § 7409(a), (d). Over the past four decades, EPA has promulgated a series of air quality standards for ozone and other photochemical oxidants, which have become progressively more protective over time as the scientific understanding of the public health harms from these

pollutants has improved. *See* 44 Fed. Reg. 8202 (Feb. 8, 1979) (1979 ozone standard); 62 Fed. Reg. 38,856 (July 18, 1997) (1997 ozone standard); 73 Fed. Reg. 16,436 (Mar. 27, 2008) (2008 ozone standard); 80 Fed. Reg. 65,292 (Oct. 26, 2015) (2015 ozone standard).

After EPA finalizes a new ambient air quality standard, it must designate areas as meeting ("attainment") or failing to meet ("nonattainment") the standard, typically within two years. 42 U.S.C. § 7407(d)(1). For ozone, the Act further classifies nonattainment areas based on how far out of attainment or how persistent the area's nonattainment is.[1] 42 U.S.C. § 7511(a). Areas designated as "nonattainment" are required to attain the new primary standard "as expeditiously as practicable" but not later than dates set forth in the Act that depend on the area's classification. *Id.*

New York State generally – and the New York Metropolitan Area in particular – has a long history of elevated ozone levels and persistent nonattainment of ozone standards, *e.g.*, 77 Fed. Reg. 30,088, 30,137 (May 21, 2012) (designating the counties in the New York Metropolitan Area and Chautauqua County "marginal" nonattainment for 2008 ozone standard); 83 Fed. Reg. 25,776, 25,821 (Jun. 4, 2018) (designating the counties in the New York

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[1] The classifications are Marginal, Moderate, Serious, Severe, and Extreme. 42 U.S.C. §7511(a).

Metropolitan Area "moderate" nonattainment for 2015 ozone standard). This impaired air quality endangers the health and welfare of the millions of people who live in and around New York City. Due to the New York Metropolitan Area's persistent failure to attain by the time frames set forth in the Act, its classification has recently been bumped up to "serious" nonattainment. 84 Fed. Reg. 44,238 (Aug. 23, 2019), triggering an obligation to attain the 2008 standard no later than July 2021. Because of its location downwind from a number of industry- and power plant-heavy states, much of the pollution that causes ozone in New York originates out of state. *E.g.*, New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b), at 14 (2018) (EPA-HQ-OAR-2018-0170-0004), JA ___ [hereinafter New York Petition] (Staten Island "often records the highest ozone concentrations in the area despite being upwind of New York City's central business district, indicating a heavy transport component . . .. EPA's 2016 transport modeling for the 2008 NAAQS attributed a mere 7.0 percent of the 2017 average design value to New York State.").

In recognition that air pollution is "heedless of state boundaries," *EME Homer City*, 572 U.S. at 496, the Clean Air Act provides two distinct and independent mechanisms to address transported pollution: Section 110(a)(2)(D)(i)(I) and Section 126(b), 42 U.S.C. §§ 7410(a)(2)(D)(i)(I), 7426(b). *See* 84 Fed. Reg. 56,058, 56,067 n.30 (Oct. 18, 2019), JA ___; *GenOn REMA, LLC*

v. EPA, 722 F.3d 513, 520–23 (3d Cir. 2013); *Appalachian Power v. EPA*, 249 F.3d 1032, 1047 (D.C. Cir. 2001).

Section 110(a)(2) sets forth planning provisions that apply to all states regardless of air quality. Within three years of finalization of a new air quality standard, all states must submit to EPA implementation plans that, among other things, "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State" regarding that air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I) . This provision is often referred to as the Good Neighbor Provision. Where a state fails to submit an adequate plan implementing the Good Neighbor Provision, EPA is required to promulgate a federal implementation plan. *Id*. § 7410(c)(1).

Section 126, by contrast, provides a source-specific tool to downwind states and localities to seek expeditious relief for ongoing nonattainment. Section 126(b) provides that "[a]ny state or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition in [the Good Neighbor

Provision]." *Id.* § 7426(b).[2] Upon receipt of a Section 126(b) petition, EPA is required to hold a hearing and make the requested finding or deny the petition within 60 days. *Id.* Where EPA grants a Section 126(b) petition with respect to a source, that source must cease operation within three months unless the source complies with an emission schedule established by EPA that brings about compliance with the Good Neighbor Provision within three years. *Id.* § 7426(c).

Although state good neighbor plans are due within three years of finalization of a new standard, *id.* § 7410(a) more than 11 years have elapsed since the effective date of the 2008 ozone standard, and there are no legally sufficient plans in place for most of the states that contribute to the New York Metropolitan Area's violation of this standard. EPA finalized a federal plan in 2016—the Cross-State Update—which took steps to address significant contributions from 22 states to Eastern nonattainment and maintenance of the 2008 standard. 81 Fed. Reg. 74,504 (Oct. 26, 2016). However, the Cross-State Update was, by its own terms, a "partial remedy" when promulgated, *id.* at 74,508, and was recently invalidated in part and remanded to EPA because the rule failed to require upwind states to eliminate their significant contributions in accordance with the attainment dates for downwind states. *Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019). EPA has taken no

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[2] This Court confirmed in *Appalachian Power Co.*, that the text of Section 126(b) was a scrivener's error and that the Good Neighbor Provision was the intended cross-reference. 249 F.3d at 1040–44.

formal action on remand to address the deficiencies with the Cross-State Update. And, to date, the Agency has taken no action to approve state implementation plans or to promulgate a federal implementation plan to address good neighbor obligations for the states significantly contributing to ozone nonattainment in the New York Metropolitan Area under the more protective 2015 ozone standard.

Lacking an adequate remedy for its persistent nonattainment through the state and federal implementation planning process, in March 2018, New York submitted a petition to EPA pursuant to Section 126(b) to address ongoing nonattainment of ozone air quality standards in the New York Metropolitan Area and portions of Upstate New York. JA ___. New York's petition identified 357 sources in nine upwind states that—as demonstrated by robust and sophisticated ozone source apportionment modeling conducted by the State—are contributing significantly to elevated ozone levels in the State's two nonattainment areas: the New York Metropolitan Area and Chautauqua County.

EPA proceeded to analyze New York's petition pursuant to a four-step framework the Agency had previously developed for multi-state transport ozone rules under the good neighbor planning provision. 84 Fed. Reg. at 56,062 & n.19, JA __, __. Pursuant to this four-step framework, EPA evaluates at Step 1 whether there are downwind air monitors that it expects to have problems attaining or maintaining the ozone air quality standards. *Id.* at 52,062, JA ___. At Step 2, EPA

determines which upwind states' emissions are linked (i.e., contributing significant quantities of ozone-forming pollutants) to the downwind nonattainment and maintenance monitors. *Id.* At Step 3, EPA identifies which upwind emissions (if any) are significantly contributing to nonattainment or interfering with maintenance in other downwind states. Although EPA did not reach Step 4 in evaluating New York's petition, at Step 4 the Agency "implement[s] the necessary emission reductions" for upwind states whose emissions contribute significantly to nonattainment or interfere with maintenance. *Id.*

Applying its four-step framework to New York's petition, EPA found that the petition advanced beyond Step 1 when analyzing the New York Metropolitan Area for the 2015 ozone standard, but denied New York's petition for the New York Metropolitan Area at Step 1 for the 2008 standard. *Id.* at 56,080, JA ___. The record showed that monitors in that nonattainment area were failing to attain the 2008 ozone standard at the time the petition was submitted and also when it was denied. *Id*. at 56,080-81, JA ___ (2015–2017 design value for controlling monitor in the New York Metropolitan Area was 83 parts per billion; 2016–2018 design value was 82 parts per billion, compared to standard of 75 parts per billion). EPA nevertheless found New York ineligible for relief under the 2008 standard at Step 1 because EPA projected that monitors in the New York Metropolitan Area would just barely attain the 2008 standard in 2023, two years after New York's "serious"

nonattainment deadline of July 20, 2021. *Id.* at 56,080, JA ___; Memorandum from Stephen D. Page to Regional Air Division Directors (October 27, 2017) (EPA-HQ-OAR-2018-0170-0025), JA ___ (projecting maximum design value for Fairfield, Connecticut monitor 90019003 of 75.9 parts per billion, technically meeting the standard of 75 parts per billion) [hereinafter 2008 Ozone Standard Supp. Info.]. The modeling EPA relied on was released in May 2018 and incorporated a number of rules EPA has taken steps to weaken or revoke. Sierra Club Comments at 6–7, JA. ___.

Although EPA found at Step 2 that emissions from "at least some of the named upwind states" were "linked to projected air quality problems" in the New York Metropolitan Area for the 2015 ozone standard, EPA denied New York's petition for the 2015 standard at Step 3 of its analysis. 84 Fed. Reg. at 56,082, JA ___. EPA found it lacked the information necessary to replicate the Step 3 analyses it had done for prior transport rules, and concluded that the time frames in the Clean Air Act for EPA to respond to Section 126(b) petitions implied it was New York's burden to provide this information. *Id*. at 56,084.

Specifically, EPA identified an extensive list of source-specific technical, cost, and emission data it claimed to need for all of the named sources in its 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 either as compared to one another or as compared to other, unnamed sources in the same upwind states or in other states." *Id.* at 56,090, JA ___. Collecting the relevant data, EPA observed, would likely require "efforts under a formal information collection request," *id.* at 56,084, JA ___, which EPA is authorized to undertake pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414, but EPA did not identify how New York was expected to obtain these data. This litigation followed.

STANDARD OF REVIEW

Petitioner-Intervenors adopt the Standard of Review set forth in Petitioners' Opening Brief.

SUMMARY OF THE ARGUMENT

EPA's Denial of New York's Section 126(b) petition contravened the plain language of the Clean Air Act (Act) and this Circuit's prior precedents at each relevant step of its analysis.

In evaluating whether New York had an air quality problem giving rise to relief under Section 126, EPA unlawfully ignored New York's ongoing nonattainment of air quality standards and instead looked exclusively at projected air quality in 2023, two years beyond New York's outside attainment date. But this approach conflicts with the plain, present tense language of Section 126(b) and is foreclosed by this Court's recent decisions in *Wisconsin v. EPA* and *New York v.*

EPA, which require EPA to give effect to the attainment time frames in the Act. *Wisconsin*, 938 F.3d 303; *New York v. EPA*, 781 F. App'x 4, 5 (D.C. Cir. 2019) (*New York II*).

Further, in evaluating whether the sources identified in New York's Section 126(b) petition contributed significantly to New York's nonattainment of the current ozone air quality standard, EPA faulted New York for failing to provide the complete suite of information and analysis that EPA has previously used to develop its multi-state transport rules. 84 Fed. Reg. at 56,090, JA ___. But these extra-statutory burdens on New York in the context of a Section 126(b) petition would impermissibly deprive Section 126 of any independent statutory function; unlawfully shift to New York, as the petitioner, EPA's express responsibility to craft the remedy under Section 126(c); and implausibly require New York to obtain information that is beyond its authority to request from out-of-state sources. EPA's allocation of burdens is also inconsistent with the time frames for addressing Section 126(b) petitions set forth in the Act.

Finally, even if EPA were correct (which it is not) that petitioning states bear the burden to provide abatement cost-related information of the type that EPA demands, EPA arbitrarily and unlawfully discounted the robust record evidence that dozens of sources identified in New York's petition have available emission

reductions at cost thresholds EPA has previously deemed highly cost-effective. On the record, EPA's Denial must be vacated.

ARGUMENT

I. EPA's Denial of New York's Section 126(b) Petition for the 2008 Ozone Standard at Step 1 Was Arbitrary and Unlawful

Petitioner-Intervenors adopt Points I and II in Petitioners' Opening Brief and supplement the Step 1 argument as follows:

The operative question at Step 1 of EPA's four-step Cross-State framework is whether a petitioning jurisdiction has an air quality problem that could support a remedy pursuant to Section 126. On the record, New York plainly does. Monitors in the New York Metropolitan Area, which dictate New York's attainment status, persist in nonattainment of the 2008 ozone standard. New York Dept. of Envtl. Conservation Comments at 1 (July 18, 2019) (EPA-HQ-OAR-2018-0170-0081), JA ___. Consistent with Section 126's plain language and this Court's prior case law, the New York Metropolitan Area's ongoing and persistent nonattainment gives rise to a remedy through Section 126. EPA's speculation, in response, that the New York Metropolitan Area will attain the 2008 ozone standard by 2023 is legally irrelevant and factually insufficient. New York's petition must advance beyond Step 1.

A. Section 126 Provides Downwind States Relief for Current and Ongoing Nonattainment and Maintenance

As the plain language of Section 126 demonstrates, and as this Court has previously stated, Section 126 authorizes petitioning states to obtain relief for current nonattainment or interference with maintenance of ambient air quality standards, which is determined based on data from relevant air quality monitors.

Section 126(b) authorizes downwind jurisdictions to request a finding that a major source or group of stationary sources "emits or would emit any air pollutant" in violation of the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I) .[3] By using the present tense—"emits"—and the disjunctive "or," Section 126(b) evidences an unmistakable intent to address emissions contributing to ongoing nonattainment and maintenance, not merely future emissions and future nonattainment. Indeed, this interpretation is consistent with EPA's prior provision of relief to New Jersey based on current impacts from the Portland Generating Station in Pennsylvania, which was affirmed by the Third Circuit in *GenOn REMA*, 722 F.3d 513. In affirming, the court explained that "[t]he plain language of the relevant portions of the statute and the context in which such language is used convey that Congress intended Section 126(b) as a means for the EPA to take

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[3] As cited above, the Good Neighbor Provision imposes a prohibition on emissions that "contribute significantly to nonattainment in, or interfere with maintenance by," any downwind state for any air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I) .

immediate action when downwind states are affected by air pollution from upwind sources." *Id.* at 522.

Here, the record shows that the New York Metropolitan Area persists in nonattainment of the 2008 ozone standard based on the most current monitor data at the time of EPA's Denial. 84 Fed. Reg. at 56,080–81, JA ___; New York Dept. of Envtl. Conservation Comments at 1, JA ___. Indeed, monitors in the New York Metropolitan Area had 2016–2018 design values as high as 82 parts per billion, 7 parts per billion above the 2008 ozone standard of 75 parts per billion. 84 Fed. Reg. at 56,080–81. New York's petition must therefore advance beyond Step 1 for the 2008 ozone standard.

The use of the word "will" in the cross-referenced Good Neighbor Provision does not alter the conclusion. As this Court previously explained, "will" "can mean either certainty or indicate the future tense." *North Carolina v. EPA*, 531 F.3d 896, 914 (D.C. Cir. 2008). In the context of Section 126(b), the former meaning must necessarily apply, as the *North Carolina* Court expressly recognized.

Although EPA deems it implausible that the Act would require the Agency "to interpret the 'prohibition' of [Clean Air Act] section 110(a)(2)(D)(i)(I) in two contrary ways depending on the statutory process," 84 Fed. Reg. at 56,073, JA ___, this result flows logically from the differences between Section 126 and the state and federal implementation planning process. In the Clean Air Interstate Rule

under review in *North Carolina*, the Good Neighbor Provision was functioning as a *planning* provision, governing the requirements of federal implementation plans that are, by their nature, forward-looking, addressing the future.

Section 126's function is different, providing a remedy for current emissions. Indeed, immediately after affirming EPA's interpretation of "will" as forward-looking in the context of the Clean Air Interstate Rule, this Court explained that EPA may not "ignore present-day violations for which there may be another remedy, *such as relief pursuant to section 126*." *North Carolina*, 531 F.3d at 914 (emphasis added). As the Third Circuit also affirmed, Section 126 provides a "means for the EPA to take immediate action when downwind states are affected by air pollution from upwind sources." *GenOn REMA*, 722 F.3d at 522. Requiring an expeditious response from EPA (60 days) and relief within three months, as Section 126 requires, 42 U.S.C. §§ 7426(b) & (c) , would make little sense if EPA could base its denial on projections of air quality many years in the future.

Fatally, EPA offers no coherent alternative account for the present tense language in Section 126, and the Agency's attempt to reconcile "emits" in Section 126 with its interpretation of "will" in Section 110(a)(2)(D)(i)(I) fails on its face. Despite "interpret[ing] the term 'emits' as referring to a source's *current* emission levels," 84 Fed. Reg. 56,073, JA ___ (emphasis added), EPA's Step 1 analysis exclusively evaluates "whether the downwind area in question will have an air

quality problem in a *relevant future year*," which EPA claims is 2023. *Id.* (emphasis added). EPA nowhere explains how a source's current emission levels contribute to air quality problems in 2023. And it cannot do so because present-day emissions have no bearing on whether the New York Metropolitan Area will attain in 2023, a calculation that will be based exclusively on *future* monitored air quality.[4]

It is not material to the analysis that the monitors in the New York Metropolitan Area measuring nonattainment are outside of New York State itself. New York's attainment status, and the obligations that attach to that status, flow directly from the highest-reading monitor in the New York Metropolitan Area. New York Dept. of Envtl. Conservation Comments at 1, JA ___; 42 U.S.C. § 7407(d)(1)(A)(i). Section 126(b) provides that "[a]ny State" may petition EPA for a finding that a source or group of sources is emitting in violation of the Good Neighbor Provision. 42 U.S.C. § 7426(b). In interpreting identical "any state" language in Section 181(a)(5), 42 U.S.C. § 7511(a)(5), this Court concluded at *Chevron* Step 1 that "any state" must refer to *any* state in a multi-state

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[4] By contrast, the New York Metropolitan Area's 2018 monitor data *do* have bearing on whether the area will attain by its actual attainment date of 2021 (since that calculation that will include monitor data from 2018, 2019 and 2020), and show persistent violations of the 2008 ozone standard, further undercutting the lawfulness of EPA's Step 1 denial. *See* Opening Brief for Petitioners at 32-33.

nonattainment area. *Del. Dept. of Nat. Res. and Envtl. Control (DNREC) v. EPA*, 895 F.3d 90, 97–100 (D.C. Cir. 2018). The same conclusion must obtain here.

In *DNREC*, this Court considered whether “any state” in a multi-state nonattainment area could request an extension of the applicable attainment date for the whole multi-state nonattainment area. 895 F.3d at 99–100. As relevant to both Section 181(a)(5) and Section 126, regulatory consequences attach to an individual state’s attainment status regardless of whether the controlling monitor for the nonattainment area is located within that state. Moreover, Section 126, like Section 181(a)(5), provides a tool for states to seek relief from those consequences. Faced with the same statutory language in a functionally equivalent context, the interpretation in *DNREC* must control. New York, as one of the states facing regulatory consequences due to its nonattainment status as part of the New York Metropolitan Area, must be authorized to seek relief from EPA from those consequences.

In sum, this Court should honor the plain, present-tense language of Section 126 and affirm that it provides downwind states relief from current and ongoing nonattainment and maintenance for any monitor in a multi-state nonattainment area.

B. EPA's Analytical Approach to Step 1 Cannot Be Squared with the Attainment Schedules Set Forth in Section 181(a)

EPA's analytical approach at Step 1 fails for a separate and independent reason: it is inconsistent with the attainment schedules in Section 181(a) and would read that section's "as expeditiously as practicable" language entirely out of the Act. Ozone nonattainment areas are required to attain applicable air quality standards "as expeditiously as practicable but not later than" dates set forth in the Act. 42 U.S.C. § 7511(a). For the New York Metropolitan Area for the 2008 ozone standard, this mandate means the area must attain no later than the July 20, 2021 serious nonattainment date, 84 Fed. Reg. at 56,071, JA ___, based on monitored air quality data from the 2018 to 2020 ozone seasons.

As this Court recently affirmed, "[t]he Act's central object is the 'attain[ment] [of] air quality of specified standards [within] a specified period of time.'" *Wisconsin*, 938 F.3d at 316. "By imposing a first-order obligation to attain the [air quality standards] 'as expeditiously as practicable,' Congress 'made clear that the States could not procrastinate until the deadline approached. Rather, the primary standards had to be met in less [time] if possible.'" *Id.* at 317 (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 259–60 (1976)). EPA's approach of looking exclusively to a future year fails to consider whether the requested emission reductions could accelerate New York's attainment, and therefore impermissibly fails to give effect to the "as expeditiously as practicable" language in Section

181(a). *See Rubin v. Islamic Repub. of Iran*, 138 S. Ct. 816, 818–19 (2018) (discussing the "basic interpretive canon to construe a statute so as to give effect to all of its provisions").

Moreover, even if it were permissible for EPA to look ahead to the New York Metropolitan Area's serious nonattainment date in 2021, EPA's reliance on 2023 modeling is plainly unlawful. As EPA itself acknowledged, the *Wisconsin* Court remanded the Cross-State Update as "inconsistent with the [Clean Air Act] because it does not fully address upwind states' obligations under the good neighbor provision *by the relevant attainment date for downwind areas*." 84 Fed. Reg. at 56,059 n.1, JA ___ (emphasis added).

EPA nevertheless doubles down on the Cross-State Update's error by claiming that 2023 is an appropriate analytical date for the 2008 ozone standard because it is consistent with the time frame in which EPA believes additional pollution controls could be installed. 84 Fed. Reg. at 56,070–71, JA ___. Such an approach was foreclosed by *North Carolina*, 531 F.3d at 911–12, and its impermissibility was reconfirmed in *Wisconsin*. 938 F.3d at 315.

Finally, the arbitrariness of denying New York's Section 126(b) petition at Step 1 in the face of ongoing nonattainment is further compounded by the Agency's actions to roll back and weaken the emission-reducing rules relied on in its 2023 modeling. As EPA implicitly acknowledges, despite two full ozone

seasons of implementation, the Cross-State Update has not brought all monitors in the New York Metropolitan Area into attainment of the 2008 ozone standard. 84 Fed. Reg. at 56,080, JA ___. And the additional emission reductions EPA presumes will occur by 2023 depend in part on the ongoing effectiveness and enforcement of rules—such as the Corporate Average Fuel Economy standards for light-duty vehicles and Control Techniques Guidelines for the Oil and Natural Gas Industry—that EPA is actively working to undermine. Sierra Club Comments at 7, JA ___. Indeed, EPA projects that monitors in the New York Metropolitan Area will attain the 2008 ozone standard in 2023 by *one tenth of a part per billion*, 2008 Ozone Standard Supp. Info., JA ___ (projecting maximum design value for Fairfield, Connecticut monitor 90019003 of 75.9 parts per billion), despite the monitor's 2016-2018 design value of 82 parts per billion. New York Dept. of Envtl. Conservation Comments at 1, JA ___. Any slowing of the pace of emission reductions could tip the New York Metropolitan Area back into modeled nonattainment.

II. In Rejecting New York's Petition, EPA Unlawfully and Arbitrarily Transmuted its Policy Preferences into Extra-Statutory Requirements on New York that are Incompatible with the Text and Structure of Section 126(b)

Petitioner-Intervenors adopt Point III in Petitioners' Opening Brief and supplement the Step 3 argument as follows:

EPA denied New York's Petition at Step 3 on the basis that New York failed to provide the Agency with information EPA deemed necessary to make a Section 126(b) finding under the Clean Air Act. 84 Fed. Reg. at 56,084, JA ___. EPA not only claims it can utilize the four-step framework the Agency has developed for creating multi-state emissions trading programs to analyze New York's Section 126(b) petition, but also that the burden was on New York to provide all information that EPA has previously used to conduct this intensive and extensive analysis. *Id.*

EPA's demand is contrary to the plain language and intent of the Clean Air Act and controlling case law in that it: (1) deprives Section 126 of any independent function; (2) unlawfully conflates Section 126(b) with Section 126(c), where the burden is on the Agency; (3) unreasonably requires Section 126(b) petitioners to obtain information from upwind emission sources that are located beyond the scope of the petitioners' police powers; and (4) impermissibly uses the expeditious time frames in Section 126(b) as a basis for imposing unreasonable and unlawful burdens upon states and political subdivisions seeking relief from transported pollution.

A. EPA's Denial of New York's Petition Impermissibly Deprives Section 126 of Any Independent Function

In its Denial of New York's Section 126(b) petition, EPA imposes a litany of extra-statutory obligations on New York that would have the effect of turning

any Section 126(b) petition into a complete multi-state transport rule. Specifically, the Agency asserts that the burden is on New York to, among other things: (1) develop or evaluate the cost and air quality factors that the EPA has generally relied on in Step 3 for its prior transport rules; (2) describe and conduct a multifactor analysis as EPA has done in prior transport rules to determine whether cost-effective controls are available at the named sources; and (3) demonstrate how to weigh these relevant cost and air quality factors to determine an appropriate level of control for the named sources. *See* 84 Fed. Reg. at 56,088–90, JA ___.

In other words, where EPA has yet to fulfill *its* statutory duty to establish a lawful transport rule that resolves outstanding good neighbor obligations under either the 2008 or 2015 ozone standard, EPA faults New York for not doing the Agency's job: completing an entire regional transport rulemaking that accounts for all upwind sources, including those not named in the petition. But this cannot be the requirement of a petitioning jurisdiction under Section 126(b).

Section 126(b) authorizes a state or political subdivision to petition EPA for a finding that "any major source or group of stationary sources" emits in violation of the Good Neighbor Provision. 42 U.S.C. § 7426(b). Section 126 allows states or political subdivisions to obtain source-specific relief and for the EPA to implement a tailored remedy, outside the framework of a Section 110(a)(2)(D)(i) regional trading program. By contrast, under EPA's interpretation, a petition could identify

a single source, but the petitioning jurisdiction would nonetheless be required to analyze not merely that source, but every other unnamed source in that state and every other upwind state. 84 Fed. Reg. at 56,090, JA ___.

Section 126 was designed to provide an alternative form of relief that was "intended to expedite, not delay, resolution of interstate pollution conflicts." H.R. Rep. 95-294, reprinted in 1977 U.S.C.C.A.N. 1077, 1410 (May 12, 1977), JA ____ (in creating Section 126, "the committee intends to create a second and entirely alternative method and basis for preventing and abating interstate pollution"). EPA's approach would undermine this intent.

By transmuting the Section 126 petition requirements into the complete four-step approach EPA has elected to adopt when developing regional trading programs under Section 110(a)(2)(D)(i), EPA has deprived Section 126 of any independent function.

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

While EPA recognizes that it has the burden to develop and impose a remedy under Section 126(c), *see* 84 Fed. Reg. at 56,087, JA ___, the extensive source-specific cost-related information that EPA demands of New York is relevant to the formulation of a remedy under Section 126(c), not to the initial finding under Section 126(b), and therefore any burden to procure it falls on the Agency.

Section 126(b) requires a petitioner to establish that a source or group of sources in an upwind state is making a significant contribution to nonattainment or interfering with maintenance in the state. 42 U.S.C. § 7426(b). New York has met this burden. New York's Petition provided and cited extensive information and sophisticated modeling analysis demonstrating that: (1) New York persists in nonattainment of the 2008 or the 2015 ozone standards; (2) the identified upwind sources are located in states that EPA itself has determined meet the threshold for contribution to nonattainment and/or maintenance of the ozone standards in New York; and (3) emissions from the petition sources are themselves contributing significantly to New York's nonattainment. New York Petition at 4–6, 10–12, JA ___, ___.

Once a petitioner presents information showing a significant contribution from the upwind source or sources to its nonattainment or maintenance areas, EPA must then determine the remedy: whether the source(s) must cease operation within three months or can be effectively controlled by emission limitations and compliance schedules. 42 U.S.C. § 7426(c). Section 126(c) plainly places the responsibility for analyzing and developing an appropriate remedy on EPA, not the petitioning jurisdiction.

To the extent EPA believes that additional information is necessary to allocate responsibility to the identified upwind sources and develop an appropriate

remedy under Section 126(c), that is a policy choice and the burden to assemble and analyze that information rests with EPA. For example, if EPA believes that detailed information regarding the relative costs of imposing controls on the identified upwind source(s) is of critical importance to developing emission limitations and compliance schedules during the remedy stage, EPA must obtain and evaluate that information.

EPA's election to use the four-step framework and consider cost-efficacy as a basis for allocating responsibility among upwind sources is not a requirement of Section 126; it is a voluntary choice – and one developed in the distinct context of regional transport regulations. While EPA's consideration of cost-efficacy as a basis for allocating emission reduction responsibility was deemed "permissible, workable, and equitable" in the context of a robust multi-state trading program developed by EPA to simultaneously address dozens of states' good neighbor obligations, *EME Homer City*, 572 U.S. at 491, the Court recognized it as a policy choice and not a requirement dictated by the Act. *See also GenOn REMA*, 722 F.3d at 521 ("[R]elief under Section 126, unlike [a multi-state transport rule], is independent of the discretionary policy preferences of the EPA since it must act on a petition within sixty days.").

Given the source-specific nature of Section 126(b) petitions, EPA's preferred allocation methodology may be considerably less workable in this

context than in the context of a multi-state transport rule. But regardless, the decision about how to allocate responsibility among sources to remedy a significant contribution is ultimately the responsibility of EPA under Section 126(c). And consequently, so is the burden to obtain information to support the Agency's preferred allocation.

By imposing this burden on New York at Step 3, EPA impermissibly folded the Section 126(b) remedy, which it is the Agency's burden to develop, into the Section 126(b) finding.

C. It is Irrational and Unlawful for EPA to Require Section 126(b) Petitioners to Provide Information that is Beyond the Authority of the Petitioning Jurisdiction to Obtain

EPA's attempt to require that a Section 126(b) petitioner obtain and analyze comprehensive emissions and cost information about every source identified in the petition and every other source not specifically identified, 84 Fed. Reg. at 56,086, JA ___, all of which are located in other states and are beyond the scope of the Petitioner's police powers—is manifestly unreasonable. EPA requested that New York provide EPA with information regarding "the current operating status of each named facility, the magnitude of emissions from each emitting unit within each named facility, the existing controls on each of these emissions units, additional control options on each emissions unit, the cost of each potential control option, the emissions reductions potential from installation of controls, and potential air

quality impacts of emissions reductions." *Id*. EPA also expressed its expectation that New York would provide information describing the cost and downwind air quality impacts of controlling the named sources relative to other sources not named in its petition. *Id.* at 56,089, JA ___.

The universe of sources about which EPA demands detailed information is vast (and ill-defined), and states and political subdivisions simply do not have access to this level of information for out-of-state sources. For example, as a petitioning state, New York does not have the power to regulate sources in other states, *see*, *e.g*., *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), nor to compel disclosure of information concerning their emissions or costs. *See Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). This authority rests exclusively with EPA.

Under Section 114 of the Clean Air Act, EPA has express authority to compel emission sources to provide information regarding control equipment on operating units, emission levels, compliance certifications, and other information that the EPA may reasonably require. 42 U.S.C. § 7414(a)(1). As EPA revealingly noted in its Denial, collecting the relevant data and conducting a Step 3 multi-factor analysis would require the Agency to "undertake such data collection efforts

under a formal information collection request." *See* 84 Fed. Reg. at 56,084, JA ___. Given New York's lack of authority to undertake this type of information collection request, it is irrational for EPA to have denied New York's Section 126(b) petition on the grounds that it failed to sufficiently develop or evaluate the information necessary for a Step 3 analysis.

In addition, the inclusion of the term "political subdivision" in Section 126(b) demonstrates that Congress clearly envisioned that not just states, but local governments as well, would have the opportunity to utilize Section 126(b) to obtain relief from upwind air pollution. *See* 42 U.S.C. § 7426(b). The information collection burdens that EPA has imposed are already insurmountable for a state. Their unreasonableness is even more apparent for a local government that is struggling to address failing air quality.

Furthermore, EPA's unreasonable request for New York to provide an impossible level of information to obtain relief from interstate air pollution runs counter to the Agency's duty to help states protect human health and the environment. It is improper for a federal agency, specifically created to do what states cannot do for themselves, to require states to perform herculean acts (or worse, acts beyond their constitutional powers) before receiving help from the federal government. This is particularly true in the context of interstate air pollution, where a downwind state simply does not have the legal power to stop

harmful air pollution from crossing its borders. *Cf. Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907) (recognizing federal remedy for a state threatened by air pollution caused "by the act of persons beyond its control"). As EPA previously recognized, the Agency "has an obligation independent of the standard of review for this particular decision to investigate and develop information on this area of public policy." 49 Fed. Reg. 48,152, 48,154 (Dec. 10, 1984).

The Section 126 petition process should not be adversarial in nature. In denying New York's Section 126(b) petition for failing to sufficiently develop or evaluate cost and air quality factors that the EPA has generally relied on in Step 3, EPA has abdicated its obligation to work with states, under the cooperative federalism framework set forth under the Clean Air Act, to address the interstate transport of air pollution.

D. The 60-Day Deadline in Section 126(b) Does Not Support EPA's Effort to Pose Unreasonable Burdens upon States and Political Subdivisions Seeking Relief from Transported Pollution

In its Denial, EPA claims support from the requirement that EPA act on a Section 126(b) petition "[w]ithin 60 days after receipt" of the petition, 42 U.S.C. § 7426(b), and this Court's decision in *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988) (*New York I*). 84 Fed. Reg. 56,084–85, JA ___. Neither the time frames in Section 126, nor *New York I*, can sustain EPA's position here.

EPA wields the 60-day statutory deadline as a weapon to disclaim virtually any responsibilities under Section 126. The statute does not support this, and EPA's claims ring hollow in light of past Agency practice and current inaction.

As an initial matter, EPA routinely grants itself a six-month extension under 42 U.S.C. § 7607(d)(10) to respond to Section 126 petitions. 83 Fed. Reg. 21,909 (May 11, 2018) (self-granted six-month extension to respond to New York's Section 126(b) petition); 82 Fed. Reg. 7,695 (Jan. 23, 2017) (same for Delaware Conemaugh Section 126(b) petition); 82 Fed. Reg. 22 (Jan. 3, 2017) (same for Maryland Section 126(b) petition); 81 Fed. Reg. 95,884 (Dec. 29, 2016) (same for Delaware Homer City Section 126(b) petition); 81 Fed. Reg. 66,189 (Sept. 27, 2016) (same for Delaware Harrison Section 126(b) petition); 81 Fed. Reg. 57,461 (Aug. 23, 2016) (same for Delaware Brunner Island Section 126(b) petition); 81 Fed. Reg. 48,348 (July 25, 2016) (same for Connecticut 126(b) petition). Consequently, EPA cannot draw conclusions from the statute's 60-day deadline while claiming it is entitled to eight months to respond to a Section 126(b) petition. 84 Fed. Reg.at 56,084 & n.84, JA ___, ___.[5]

In addition, while there is no dispute that Section 126 is intended to provide an expeditious remedy for interference with attainment or maintenance of air

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[5] The lawfulness of EPA's invocation of the six-month extension is not before the Court.

quality standards, EPA has consistently flouted both the 60-day deadline and the claimed eight-month timeframe,[6] and has frequently acted only when compelled by court order to do so following deadline litigation.

EPA urges that, because *it* faces an expeditious deadline, and downwind states or subdivisions confront no deadline to submit their petitions, the evidentiary and analytical burdens should be placed on state or local government petitioners. But EPA glosses over the fact that it is delinquent in its duty to promulgate a legally valid transport rule for the 2008 ozone standard and that it has approved no state implementation plans that impose emission limits to address ozone transport for the 2015 ozone standard more than four years into its implementation. Against

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[6] The petitions at issue in *New York*, 852 F.2d 574, had been filed as much as four years before EPA's final decision. *See* 49 Fed. Reg. 34,851, 34,853 (Sept. 4, 1984). For other petitions, EPA has taken at least 14 months, 69 Fed. Reg. 69,052 (Nov. 7, 2011) (granting New Jersey petition subsequently adjudicated in *GenOn REMA*), and generally longer. *See* 83 Fed. Reg. 16,064 (Apr. 13, 2018) (denying petition from Connecticut filed 22 months earlier); 83 Fed. Reg. 50,444 (Oct. 5, 2018) (denying five petitions submitted by Maryland and Delaware submitted 23 to 27 months earlier); 71 Fed. Reg. 25,328 (Apr. 28, 2006) (taking final action on petition filed by North Carolina 25 months earlier); 64 Fed. Reg. 28,250 (May 25, 1999) (finding in favor of eight states whose Section 126(b) petition was filed 20 months earlier); 47 Fed. Reg. 6624 (Feb. 16, 1982) (denying a petition filed by Jefferson County, Kentucky 33 months earlier). In the instant proceedings, EPA granted itself a 180-day extension to undertake, among other things, "the necessary technical review," 83 Fed. Reg. at 21,910, and then did not take final action until almost a year after the 180-day extension had expired.

this backdrop, it was plainly EPA's obligation to develop the type of information it is claiming New York was required to provide in its Section 126(b) petition. Indeed, it could have done so through guidance or otherwise, just as the Agency provides guidance to states in developing implementation plans to satisfy their good neighbor obligations. *See, e.g.*, 84 Fed. Reg. at 56,068 n.34, JA ___.

Moreover, EPA's position, like its similar arguments that this Court has rejected, ignores the Clean Air Act's emphasis on the temporal urgency of air pollution abatement. *See Wisconsin*, 938 F.3d at 315; *New York II*, 781 F. App'x at 5; *North Carolina*, 531 F.3d at 911–13. Downwind states in nonattainment from transported pollution *do* face urgent time pressures: health harms to their residents, environmental harms to their resources, and penalty-backed nonattainment deadlines under the Clean Air Act. Indeed, the 60-day deadline itself is intended to ensure *prompt* relief for downwind states whose residents are (or will be) enduring unhealthy air pollution. *See GenOn REMA*, 722 F.3d at 522–23 (Section 126 "is intended to expedite, not delay, resolution of interstate pollution conflicts.... [and] create a second … basis for preventing and abating interstate pollution") (quoting H.R. Rep. 95-294 at 331 (1977)); *id.* at 520 (explaining that the deadline "demonstrates that the EPA must act quickly" upon receipt of the petition, without "wait[ing] the potential several years that it would take for states to fully adopt" state implementation plans). In turning the statutory deadline into a basis for

placing unreasonable and (at least here) infeasible fact-finding and analytical burdens on downwind jurisdictions, EPA is frustrating the very purpose of Section 126.

Finally, EPA's reliance on this Court's decision in *New York I* is misplaced and significantly over-reads the case. In *New York I*, three upwind states "contend[ed] that the filing of their section 126(b) petitions immediately obliged EPA to take the investigatory steps necessary to determine whether the state implementation plans in all named upwind states were in compliance with § 110(a)(2)(E)." 852 F.2d at 578. This Court rejected that statutory argument, concluding that Section 126(b) does not create a right to compel immediate review of upwind states' implementation plans. *Id.* In so doing, the panel pointed to the 60-day disposition requirement as being inconsistent with an obligation to conduct a "full-scale investigation" of upwind states' state implementation plans within 60 days, to Section 126's focus "on 'major sources'" (rather than upwind states' state implementation plans), and to the telling absence of any language in it comparable to Section 124, which "specifically directed EPA to investigate the adequacy of existing state implementation plans," demonstrating that "where Congress wanted EPA to review the adequacy of existing state implementation plans, it said so." *Id.* at 578–79.

New York I thus cited the 60-day provision as one reason to reject a specific statutory argument that is not at issue here. The petition here does not demand that EPA review upwind states' state implementation plans. Rather, New York asks EPA to limit pollution from identified sources that demonstrably contribute to New York's nonattainment problems, but are beyond the scope of New York's own police powers. Unlike the mandatory, special state implementation plan review procedure requested by the states in *New York I*, the petition at issue here seeks no more and no less than what Section 126(b) requires. *New York I* does not justify EPA's invocation of the 60-day deadline to avoid its obligations to determine whether the upwind state is entitled to relief and to craft an appropriate remedy.[7]

III. EPA Unlawfully Disregarded Record Evidence of Highly Cost-Effective Emission Reductions from Dozens of Sources Identified in New York's Section 126(b) Petition

Even if EPA could lawfully require a petitioning jurisdiction to present the type of cost-efficacy data the Agency prefers as a precondition for relief under

[7] In *New York*, EPA did not claim it was the petitioning states' burden to make the entire demonstration necessary to support relief under Section 126(b). EPA "recognize[d] the importance of considering the best available information" and "g[a]ve the petitioners' data the most sympathetic reading." 49 Fed. Reg. at 34,864; *see also* 49 Fed. Reg. 48,152, 48,154 (Dec. 10, 1984) ("EPA has not held and will not hold petitioners to a formal trial-type burden of proof"; rather, it has "recogniz[ed] that it has an obligation independent of the standard of review for this particular decision to investigate and develop information on this area of public policy.").

Section 126(b) (which it cannot, *see* Part II *supra*), the record *does* present this information for numerous sources, which EPA irrationally discounts and disregards.

On the record, both New York and Maryland provided cost-efficacy data showing that additional emission reductions were available from dozens of petition sources at cost thresholds that EPA has previously deemed highly cost-effective. New York Dept. of Envtl. Conservation Comments at 4–5, JA ___; Maryland Dept. of the Env't. Comments at 3–4 (July 15, 2019) (EPA-HQ-OAR-2018-0170-0079), JA ___.

In developing its Cross-State Update, EPA concluded that emission reductions at a cost threshold of $1,400 per ton were highly cost-effective and would result in no "overcontrol" by any upwind state. 81 Fed. Reg. at 74,508. Indeed, in setting this cost threshold, EPA erred so far in avoiding "overcontrol" that the resulting rule represented only "a partial remedy" to address interstate emission transport for the 2008 ozone standard. *Id.* Due to the unlawfully "partial" nature of its remedy, this Court in *Wisconsin* recently invalidated the Cross-State Update on this ground and remanded it to the Agency. 938 F.3d at 318–19.

In light of its prior finding that emission reductions at a cost of $1,400 per ton are highly cost-effective, it was *at minimum* arbitrary and unlawful, in the context of New York's Section 126(b) petition, to deny the petition for sources

with additional emission reductions available at this cost. During the notice and comment period, both New York and Maryland provided information to support the availability of emission reductions from dozens of electric generating units identified in New York's petition at or below the $1,400 per ton threshold. New York Dept. of Envtl. Conservation Comments at 4–5, JA ___; Maryland Dept. of the Env't. Comments at 3–4, JA ___.

EPA had previously found that sources with installed catalytic controls for nitrogen oxides could optimize these controls and meet an emission rate of 0.10 pounds per million British thermal units (lb/MMBtu) at a cost threshold of $1,400 per ton. 81 Fed. Reg. at 74,541–43. And EPA found that electric generating units lacking basic combustion controls (low-nitrogen oxide burners and over-fire air) could install and operate these controls at a control cost of $500 to $1,200 per ton. *Id.* at 74,541. New York and Maryland identified dozens of electric generating units equipped with catalytic controls that were failing to optimize these already-installed controls during the 2018 ozone season. New York Dept. of Envtl. Conservation Comments at 5–6, JA ___; Maryland Dept. of the Env't. Comments at 4–5, JA ___. And New York's comments, at 6, JA ___, identify a half dozen additional electric generating units lacking basic combustion controls that, as a result, continued to emit thousands of tons of excess nitrogen oxides during the 2018 ozone season.

Accordingly, the record contains information demonstrating that, even under EPA's preferred cost-based policy framework, highly cost-effective emission reductions are available from numerous sources identified in New York's Section 126(b) petition.

The Agency's dismissal of this information was irrational and unlawful. First, EPA claims that it lacks evidence that the electric generating units in question that are equipped with catalytic controls could meet an emission rate of even 0.15 lb/MMBtu or that, if they could, it would be cost-effective for them to do so. 84 Fed. Reg. at 56,092, JA ___. This is absurd. In the Cross-State Update, EPA itself found that electric generating units equipped with catalytic controls could meet the much lower rate of 0.10 lb/MMBtu, and could do so at the highly cost-effective level of $1,400 per ton. *Id*. at 74,541–43.[8] EPA offers no basis for reversing its own prior conclusion.

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[8] EPA is wholly incorrect in claiming that commenters misconstrue the 0.10 lb/MMBtu as a rate ceiling rather than an average. 84 Fed. Reg. at 56,092, JA ___. EPA itself used the 0.10 lb/MMBtu as a rate ceiling in the 2023 modeling it relies on here, assuming all electric generating units equipped with catalytic controls meet the lower of their current rate or 0.10 lb/MMBtu. U.S. EPA, Technical Support Document (TSD): Additional Updates to Emissions Inventories for the Version 6.3, 2011 Emissions Modeling Platform for the Year 2023 at 100 (Oct. 2017) ("Emissions from units with existing SCRs in the [Cross-State] update region, but that operated at an emission rate greater than 0.10 lb/mmBtu in 2016, were adjusted downwards to reflect emissions when the SCR is operated to achieve a 0.10 lb/mmBtu emission rate.").

With regard to units lacking basic combustion controls, EPA contends that New York failed to "present complete engineering and cost analysis that speaks to whether these units can, and cost-effectively, operate at the proposed level" and failed to "explain how any potential reductions identified at these sources are more cost-effective than mitigation efforts at other upwind sources." 84 Fed. Reg. 56,092, JA ___. But these arguments are foreclosed by EPA's own analysis in the Cross-State Update regarding the availability and cost-efficacy of emission reductions from installation of these basic combustion controls.

In sum, it was arbitrary and unlawful, even under EPA's impermissibly burdensome construction of the Section 126(b) requirements, to deny New York's petition for numerous electric generating units identified in the petition.

CONCLUSION

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

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 9,055 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 January 14, 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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