ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Respondents.	Case No. 19-1019 (and consolidated cases)

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

PETITIONERS' MOTION FOR EXPEDITED CONSIDERATION OF THE CASES, ABBREVIATED BRIEFING, AND ORAL ARGUMENT IN SEPTEMBER 2019

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INTRODUCTION

Petitioners in these consolidated cases, New York, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, and the City of New York (State Petitioners), Downwinders at Risk, Appalachian Mountain Club, Sierra Club, Chesapeake Bay Foundation, Inc., Texas Environmental Justice Advocacy Services, Air Alliance Houston and Clean Wisconsin (Citizen Petitioners), move this Court to expedite consideration of their petitions for review, order an abbreviated briefing schedule to be completed by the end of July 2019, and schedule oral argument in early September 2019, so that the Court may issue a decision by the end of 2019, or as expeditiously as the Court's schedule will allow. Expedited consideration, so that the Court may issue its decision with enough time to achieve pollution reductions before the 2020 ozone season, is essential to provide Petitioners meaningful relief and avoid irreparable harm.

Petitioners have consulted with Respondents, United States Environmental Protection Agency and Administrator Andrew Wheeler (together, EPA) as well as proposed intervenors, State of Texas and the Texas Commission on Environmental Quality, the Utility Air Regulatory

Group, and Homer City Generation, L.P., on this motion. EPA, Texas, Texas Commission on Environmental Quality, and Utility Air Regulatory Group do not consent to the motion for expedited consideration of these cases and reserve the right to file an opposition or other response. Homer City Generation has not stated a position. The parties are conferring on a briefing schedule and format proposal, and if the parties can reach agreement, anticipate providing this to the Court in a separate filing.

These cases challenge EPA's determination that pollution sources in twenty upwind states may continue emitting pollution that significantly contributes to exceedances of air quality standards for ground-level ozone—"smog"—in downwind states. That determination is contrary to the Clean Air Act (Act), and arbitrary and capricious.

The Act requires downwind states to demonstrate attainment of the ozone standard by a deadline in July 2021 using air quality data from 2018-2020. If these cases proceed in the normal course, a ruling would not be expected until mid-2020, which will be too late to put into place new pollution reductions before the end of the 2020 summer ozone season. Normal course consideration would deprive Petitioners of legally mandated emission reductions from sources in upwind states and may

prevent downwind areas from attaining the ozone standard by the 2021 statutory deadline. This would subject downwind states, including State Petitioners, to legal consequences, require State Petitioners to take further abatement measures to address ozone pollution for which upwind states are responsible, and expose millions of people, including Citizen Petitioners' members, to unhealthy air during the 2020 ozone season, resulting in elevated risks of asthma, scarring of the lungs and premature death. EPA's action is illegal, *inter alia*, precisely because EPA refused to align its action with the upcoming 2021 deadline and based its decision not to regulate on its predictions about air quality in 2023. A swift decision is needed to rectify that error and provide relief in time for it to be meaningful.

BACKGROUND

Petitioners challenge a final rulemaking entitled "Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard," 83 Fed. Reg. 65,878 (Dec. 21, 2018) (Close-Out Rule or Rule). EPA determined in the Rule that 20 states have no further obligation to reduce interstate ozone transport under the Good Neighbor Provision of the Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I), for the 2008

ozone national ambient air quality standards (2008 ozone standard), based on EPA's modeling claiming to show attainment of that standard by 2023. EPA determined that measures it had characterized in 2016 as only providing a *partial* remedy for interstate ozone transport in fact constituted a full remedy for the ozone problem in the eastern United States. EPA determined it would not require any of the 20 states covered by the Close-Out Rule to submit state implementation plans establishing additional control requirements to reduce upwind state emissions that significantly contribute to ongoing downwind state ozone problems.

A. Ground-Level Ozone

Ground-level ozone forms in the atmosphere through complex chemical reactions involving ozone precursors—namely, nitrogen oxides and volatile organic compounds—in the presence of sunlight and warm temperatures. Sheehan Decl. ¶12. Breathing ozone in elevated concentrations can trigger respiratory illness and even early death. Those most at risk include people with asthma, children, older adults and people active outdoors, especially outdoor workers. Ozone also interferes with plants' ability to produce and store nutrients, making them more susceptible to disease, insects, harsh weather and other pollutants.

Ozone-related problems are worst during the May to September[1] "ozone season" when temperatures are highest. Sheehan Decl. ¶13; Davis Decl. ¶¶7, 11-12.

The formation and transport of ozone occurs on a regional scale over much of the eastern United States. In many downwind states—including the Petitioner states—ozone and ozone precursors transported from upwind states combine with emissions from local sources to produce elevated ozone levels. Sheehan Decl. ¶14; Davis Decl. ¶8. Despite imposing stringent controls within their jurisdictions, State Petitioners have long suffered from ozone pollution, in large part due to emissions from upwind states. Sheehan Decl. ¶¶34-37; Davis Decl.¶¶17-18. Citizen Petitioners have members who live, work, and recreate in these areas, whose health is affected by ozone pollution. Bennett Decl. ¶¶4, 6-11; Blake Decl. ¶¶8-9, 14; Evans Decl. ¶¶4, 7-9, 13; Browning Decl. ¶¶3-5, 8, 11; Feldt Decl. ¶¶14, 20.

B. The Clean Air Act's Regulation of Ozone and Its Precursors

Under the Act's cooperative federalism framework, EPA and the states are required to work together to achieve healthy air quality

[1] New Jersey's ozone season extends to October. *See* Davis Decl. ¶7 n.1.

throughout the country. EPA must establish and periodically revise "national ambient air quality standards," which establish maximum allowable ambient air concentrations for certain pollutants, including ozone. 42 U.S.C. §§ 7408-7409. States are primarily responsible for ensuring that air quality within their own borders meets the standards by specified attainment deadlines, *id.* § 7407(a), and each state is also responsible for ensuring that its emissions—when transported downwind—do not prevent other states from attaining the standards, *id.* § 7410(a)(2)(D)(i)(I). EPA classifies areas not attaining the standard as "nonattainment" and as marginal, moderate, serious, severe or extreme, depending on the severity of the nonattainment. *Id.* § 7511(a)(1).[2]

Within three years of EPA promulgating an ozone standard, each state must submit a state implementation plan that provides for the "implementation, maintenance, and enforcement" of the standard. 42 U.S.C. § 7410(a)(1). To address interstate pollution transport, *see id.* § 7410(a)(2), each plan must comply with the Good Neighbor Provision, which requires adequate plan provisions to "prohibit" emissions that will

[2] EPA may also classify areas as "maintenance," meaning they have previously been in nonattainment but have reached attainment and are required to maintain compliance.

"contribute significantly to" nonattainment of or "interfere with maintenance" of, air quality standards in a downwind state. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Good Neighbor Provision must be implemented consistently with all applicable requirements of Title I of the Clean Air Act, "includ[ing] the deadlines for attainment." 42 U.S.C. § 7410(a)(2)(D)(i)(I); *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir.), *amended in part on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008).

EPA has a duty to determine if a state's plan meets the requirements of the Act, including the Good Neighbor Provision. 42 U.S.C. § 7410(k)(1). If a state fails to submit a fully compliant plan, EPA must make a "finding of failure to submit" and establish a backstop by issuing a federal implementation plan within two years that meets the requirements of the Act, including the Good Neighbor Provision. *Id.* § 7410(c)(1).

C. Actions by State Petitioners and EPA Pursuant to the 2008 Ozone Standard

For decades, the State Petitioners have struggled to attain and maintain ozone standards in areas including the New York Metro Area, the Philadelphia Metro Area, the Greater Connecticut Nonattainment Area, and the Baltimore Nonattainment Area. Sheehan Decl. ¶18-33, 23;

Davis Decl. ¶¶13-17; 83 Fed. Reg. 50,444, 50,463 (Oct. 5, 2018). In 2008, EPA promulgated a revised ozone standard of 75 parts per billion (ppb), 73 Fed. Reg. 16,436 (Mar. 27, 2008). Now, over ten years later—despite EPA's recognition that ozone has serious adverse health effects at even lower concentrations[3]—many downwind areas are still not meeting that 75 ppb standard. Sheehan Decl. ¶¶32-33.

In 2012, EPA designated the New York Metro Area as being in "marginal" nonattainment of the 2008 ozone standard. Sheehan Decl. ¶18. This required New York, New Jersey, and Connecticut to meet a July 2015 statutory attainment deadline. Despite significant emission reductions achieved through in-state controls, the New York Metro Area did not attain the 2008 standard by the 2015 deadline, due in large part to pollution transported from upwind states. Sheehan Decl. ¶¶20-21, 23; Davis Decl. ¶16. EPA reclassified the New York Metro Area to "moderate" nonattainment in June 2016, with a July 20, 2018 statutory attainment deadline. Sheehan Decl. ¶¶20-24.

[3] In 2015, based on updated scientific information about the health risks of ozone at lower concentrations, EPA set a new, more stringent standard of 70 ppb. 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). Both the 2008 and 2015 standards remain in effect, and states face compliance obligations for each standard, on different timetables.

As the states with nonattainment areas were making significant, costly efforts during this time to reduce in-state ozone pollution, *see, e.g.*, Sheehan Decl. ¶¶20-23; Davis Decl. ¶18—including reducing precursor emissions by at least three percent annually—numerous upwind states failed to timely submit state plans compliant with the Good Neighbor Provision. After EPA initially failed to meet its two-year deadline for promulgating federal plans for those noncompliant upwind states, *see* 42 U.S.C. § 7410(c)(1), in 2016, EPA promulgated the Cross-State Air Pollution Rule Update to address the 2008 standard. 81 Fed. Reg. 74,504 (Oct. 26, 2016) (Cross-State Update, or Update).

The Cross-State Update, however, admittedly did not provide a full remedy for the ozone transported from upwind states, which was continuing to prevent downwind states from attaining and maintaining the 2008 standard. EPA only addressed emissions from power plants, and only required reductions it determined would be implemented quickly, by the 2017 ozone season. *Id.* at 74,507. EPA acknowledged the Update was only a "partial remedy" under the Good Neighbor Provision, *id.* at 74,508, and that further upwind controls may be necessary to address

nonattainment and maintenance problems that were projected to persist. *Id.* at 74,506, 74,520, 74,521-22.

As EPA projected, reductions in upwind ozone transport from the Update were insufficient. The New York Metro Area and other areas did not attain the 2008 standard by the 2018 deadline. Sheehan Decl. ¶27. EPA proposed reclassification of the New York Metro Area and Greater Connecticut Area, among others, to "serious" nonattainment, with a July 20, 2021 statutory attainment deadline. *See* 83 Fed. Reg. 56,781 (Nov. 14, 2018); Sheehan Decl. ¶¶28-29; *see also* 83 Fed. Reg. at 56,784 (proposing "serious" nonattainment reclassification of Baltimore, Dallas, Houston, and Sheboygan County, Wisconsin). Attainment by the 2021 deadline will be determined based on 2018-2020 ozone season monitoring data. *Id.* at 56,784; 42 U.S.C. § 7511(b)(2)(A). Upon EPA's finalization of the reclassification, the affected State Petitioners will be required to submit to EPA revised attainment plans, which must include three percent annual reductions in ozone precursors through additional in-state control programs and any additional local reductions necessary for attainment.

Preliminary 2018 air quality monitoring data indicate that downwind states still have ozone concentrations well above the standard

and are not expected to attain the 2008 standard by the 2021 deadline. Sheehan Decl. ¶¶32-33; Davis Decl. ¶¶20-21. EPA's modeling shows that these exceedances are due, in significant part, to ozone transported from upwind states. Sheehan Decl. ¶¶42-44; *See* Comments of the Attorneys General of the States of New York, Connecticut, Maryland, and New Jersey and the Corporation Counsel of the City of New York, EPA-HQ-OAR-2018-0225-0318, at 24-26 (Aug. 31, 2018) (Multistate Comments).

D. The Challenged Close-Out Rule

To compel EPA to secure additional pollution reductions that it recognized were still needed, New York and Connecticut brought deadline enforcement litigation in federal district court,[4] which directed EPA to take final action to fully address its federal implementation plan obligations by December 6, 2018.

EPA promulgated the Close-Out Rule in response to the court order. In the Rule, EPA concluded that no further upwind ozone reductions are necessary. That determination rests on EPA's claim that modeling shows downwind states will attain the 2008 ozone standard *in 2023*, two years

[4] *New York v. Pruitt*, Case No. 1:18-cv-00406-JGK, Order on Plaintiffs' Motion for Summary Judgment, ECF Document No. 33 (S.D.N.Y. June 12, 2018).

past the next relevant attainment deadline. EPA's own projections, however, show that interstate ozone pollution will significantly contribute to downwind states' inability to meet that upcoming 2021 deadline, in violation of the Good Neighbor Provision. Sheehan Decl. ¶70. EPA nonetheless declined to require upwind sources to control pollution that will cause or contribute to exceedances of the standard between now and 2021, despite the statutory obligation to implement the Good Neighbor Provision consistently with downwind states' attainment deadlines. Petitioners now seek expedited review of the Rule.

ARGUMENT

A motion for expedited consideration "must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge." *D.C. Circuit Handbook of Practice and Internal Procedures* 33 (2018). The standard is less stringent than for a motion to stay.[5] *See* Order, *Air Alliance Houston v. EPA*, Case No. 17-1155, Doc. 1690788 (D.C. Cir. Aug. 30, 2017) (denying motion to stay but granting expedited consideration). The Court may also expedite cases "in

[5] Since the Close-Out Rule does not impose any further regulatory requirements, Petitioners do not seek a stay. Only expedited consideration will address the irreparable harm caused by the Rule.

which the public generally . . . ha[s] an unusual interest in prompt disposition." *D.C. Circuit Handbook* at 33. Because Petitioners' challenges meet these standards, the Court should grant the motion.

I. The Close-Out Rule's Unlawful and Arbitrary Determinations Will Cause Irreparable Harm If Not Corrected Swiftly

EPA fundamentally erred in the Close-Out Rule by failing to require upwind states to make available emissions reductions necessary to eliminate their significant contribution to downwind states' nonattainment in time for downwind states to attain the ozone standard by the 2021 deadline. To remedy EPA's failure to mandate near-term emissions reductions—and to prevent the irreparable health and environmental harms from elevated ozone levels and missed attainment deadlines by downwind states—swift action by this Court is necessary. A decision issued after the end of 2019 might be too late for EPA to require upwind controls at a meaningful time, as the 2020 ozone season is the last of three years used to assess attainment by 2021. As shown in the record, there are installed but unoperated or underutilized controls that can be rapidly implemented by sources in upwind states, if EPA would require it. Sheehan Decl. Ex. A.

A. EPA Unlawfully and Arbitrarily Disregarded State Petitioners' 2021 Attainment Deadlines

EPA violated the Act when it unlawfully and arbitrarily chose 2023 as the future year for evaluating the need for additional pollution controls in upwind states. *See* 83 Fed. Reg. at 65,885. That choice of year disregarded the mandatory 2021 attainment deadlines faced by several states, including certain State Petitioners. It is also inconsistent with EPA's own recent prior practice to select such a remote benchmark year. The Act requires that a state or federal implementation plan eliminate significant contributions to downwind nonattainment, or interference with maintenance, *at the latest* by the next attainment deadline. *North Carolina*, 531 F.3d at 912 (invalidating deadline for pollution control in EPA interstate transport rule because that deadline was not consistent with the applicable attainment deadlines).

Contrary to that "statutory mandate," *see id.*, the Rule pays only lip service to the 2021 attainment deadline. Petitioners' comments demonstrated how a range of controls—such as requiring operation and optimization of already-installed, but idled emissions control equipment on power plants in upwind states—would meaningfully reduce ozone transport by 2020. *See*, *e.g.* Sheehan Decl. Ex. A Attachment at 1;

Comments of Earthjustice, Sierra Club, Appalachian Mountain Club, Environmental Defense Fund, Chesapeake Bay Foundation, Environmental Law and Policy Center, Clean Air Task Force, Downwinders at Risk, NAACP, and Texas Environmental Justice Advocacy Services on EPA's Proposed Bad Neighbor Rule, EPA-HQ-OAR-2018-0225-0319, at 20-28 (Aug. 31, 2018) (Citizen Petitioner Comments). But EPA's response pointed only to overall declining emissions by 2023, without disputing that exceedances in downwind areas would continue in 2020. 83 Fed. Reg. 65,892-98. EPA may not decline to issue Good Neighbor federal plans when there are significant contributions to nonattainment that upwind sources can eliminate before downwind states' attainment deadlines. *North Carolina*, 531 F.3d at 911-12. Indeed, EPA previously recognized this requirement in the 2016 Cross-State Update, which was expressly designed to assist downwind states in meeting the then-upcoming 2018 attainment deadline. *See* 81 Fed. Reg. at 74,521.

Instead of aligning its action here to the 2021 deadline, EPA unlawfully and arbitrarily relied on the 2027 attainment deadline—a deadline to which no areas outside California are now subject, and which

will be triggered in the east only if the 2021 deadlines are missed. 83 Fed. Reg. at 65,892. EPA also refused to give any weight to the fact that all the areas at issue are in violation of earlier deadlines from 2015, 2016, and 2018. *Id.*

EPA's selection of 2023 as the dispositive modeling year was also unlawfully and irrationally based on EPA's determination that no additional cost-effective emission reductions were feasible before then. *See, e.g.*, 83 Fed. Reg. at 65,890. EPA arbitrarily limited its feasibility analysis to emissions controls that meet an unreasonable cost-effectiveness threshold invented by EPA—a requirement that cost-effectiveness be "maximized." *See, e.g.*, 83 Fed. Reg. at 65,884, 65,893. Even if EPA has authority to *allocate* or *prioritize* reductions based on a goal of maximized cost-effectiveness, EPA has no authority to eliminate feasible controls needed for downwind attainment and maintenance from consideration in this manner. The Good Neighbor Provision provides EPA no authority to establish such a cost threshold. 42 U.S.C. § 7410(a)(2)(D)(i)(I). *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 523 (2014) ("while EPA has a statutory duty to avoid over-

control, the Agency also has a statutory obligation to avoid 'under-control.'").

To the contrary, the State Petitioners have already implemented numerous stringent controls, and there is no reason why the upwind states cannot implement the more limited remedial measures Petitioners' comments discussed. EPA refused to consider controls costing in excess of $1,400 per ton of nitrogen oxides removed—a figure corresponding to the estimated cost of operating one type of idled existing emissions control equipment. 81 Fed. Reg. at 74,541. But information in the record for the Close-Out Rule—uncontested by EPA—demonstrates that sources in the State Petitioners faced marginal costs for additional nitrogen oxide controls of $5,000 to $44,000 per ton, orders of magnitude greater than the Rule's arbitrary threshold. Multistate Comments at 19-21. The Act provides no basis for exempting upwind states from implementing feasible controls, when downwind states have long implemented more costly and stringent controls to meet their own obligations.

Even accepting EPA's flawed premise that using an arbitrary, extra-statutory cost-threshold to exclude available controls is

permissible, Petitioners identified inexpensive, feasible pollution reduction options in their comments. Petitioners advised EPA of emissions reductions from more intensive operation of *already installed* controls. 83 Fed. Reg. at 65,893-94. In rejecting this approach, by broadly concluding that such controls were being implemented appropriately or were widely operating, *id.* at 65,893 & 65,898, EPA disregarded data from generating units that demonstrated such controls were underused, and that greater usage could achieve meaningful emissions reductions. Sheehan Decl. ¶60 & Ex. A at 1 and Attachment. Petitioners also demonstrated that additional inexpensive reductions are immediately available through shifting generation from higher-polluting plants to lower-polluting sources like wind, solar, and gas plants. Citizen Petitioner Comments at 26. EPA agreed these reductions are available, but rejected this option for reasons that bear no rational relationship to statutory requirements. *Id.* at 65,894.

B. Delay In Resolving These Cases Will Cause Petitioners Irreparable Injury Because There Will Be No Opportunity to Correct EPA's Unlawful Disregard of the 2021 Deadlines, Further Exposing Residents to the Dangers of Ozone.

Absent expedited consideration, EPA's disregard of emissions controls available by the 2021 attainment deadline will cause Petitioners

irreparable injury—harm that is not adequately compensated through money damages or other relief. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see generally Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008).

Preliminary monitoring data for 2018 demonstrate that ozone concentrations continue to exceed the 2008 standard in downwind areas such as the New York Metro Area. Sheehan Decl. ¶33; Davis Decl. ¶21; EPA, 8-Hour Ozone (2008) Nonattainment Area Summary with History, *available at* https://www3.epa.gov/airquality/greenbook/hnsum2.html (last updated Jan. 19, 2019). Modeling data in the record project continuing exceedances through 2020, the last year used to assess attainment by the 2021 deadline. Sheehan Decl. Ex. A Attachment, at 10, 12; Citizen Petitioners Comments, at 5-7.

Due to EPA's failure to require any additional emissions reductions in upwind areas, these downwind nonattainment areas face continuing nonattainment past their 2021 deadline. Had EPA properly aligned its action with 2021 attainment deadlines as this Court has instructed in *North Carolina*, EPA would have determined that additional upwind

emission reductions are necessary and feasible in 2019 and 2020 to assist State Petitioners in meeting their next attainment deadline.[6]

Instead, by declining to impose any additional controls on upwind states, EPA has effectively imposed on State Petitioners the unfair burden of further reducing in-state emissions at much higher costs to compensate for unchecked upwind pollution. Sheehan Decl. ¶72. Yet State Petitioners already have state plans with some of the strictest air quality control regulations in the country. Sheehan Decl. ¶¶20-23; Davis Decl. ¶18. And, largely because of the emissions of ozone precursors in upwind states, State Petitioners' residents and Citizen Petitioners' members continue to suffer from unsafe levels of ozone pollution. Sheehan Decl. ¶¶35-37, 42-44, 69-70, 73; Davis Decl. ¶¶21-22; Blake Decl. ¶¶8, 13-14; Bennett Decl. ¶¶8-11; Evans Decl. ¶¶8-14.

[6] Even in certain areas that have recently attained the ozone standard, such as the Baltimore area, EPA determined that the area continues to have a maintenance problem linked to pollution from upwind states. *See* 83 Fed. Reg. at 50,463. EPA's failure to impose additional upwind pollution controls in the Close-Out Rule means that Maryland will have to bear more of the burden over additional ozone seasons to ensure that the Baltimore area does not fall back into nonattainment.

Without expedited consideration by the Court, it is almost certain that no new upwind controls will be implemented by the 2020 ozone season. That outcome would deprive Petitioners of reductions in interstate ozone transport at a time when such reductions would bear on their ability to attain the ozone standard by the 2021 deadline. In turn, State Petitioners and other downwind states that have already implemented costly controls will have to bear the regulatory burdens of implementing even more stringent controls, even as the upwind states—who have failed to implement some of the most basic controls—are not required to fulfill their obligations under the Good Neighbor Provision. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

In the normal course, disposition of these petitions would be unlikely before July 2020, nearly halfway into the May-September 2020 ozone season.[7] Additional time will then be needed for EPA to establish and implement the pollution controls required by law. EPA's past regional transport rulemakings have involved significant time to collect air pollution data and conduct air quality modeling, plus significant time

[7] The median time for an administrative agency appeal terminated on the merits in this Court is 17.9 months from docket to final order. *See* Judicial Business of U.S. Courts, *2017 Annual Report* Table B-4C.

for public comment. Thus, expedited consideration that resolves Petitioners' challenges by the end of 2019, or as expeditiously as possible, is vital to Petitioners obtaining relief by summer 2020.

Petitioners suffer additional irreparable injury beyond the regulatory consequences and unrecoverable costs under the Act of continued nonattainment by the 2021 deadline. Each additional ozone season that EPA allows upwind states to continue emitting in violation of the Good Neighbor Provision withholds protections of the Act from State and Citizen Petitioners, burdening their residents' health and welfare and harming their economies and environments. *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1308 (1976) (Rehnquist, J., in chambers) (irreparable harm where lower court's stay of safety standards would delay effective implementation of Congress' program to reduce traffic accidents).

Expedited consideration would save lives and spare millions of people from additional summers of illness caused or exacerbated by unhealthy ozone levels. *See* Blake Decl. ¶¶6, 12-14; Bennett Decl. ¶5-6, 9-11; Davis Decl. ¶28. Swift consideration would also protect State Petitioners' ecosystems from additional periods of harm caused by

elevated ozone. *See* Feldt Decl. ¶20-23 *See generally Massachusetts v. EPA*, 549 U.S. 497, 519-23 (2007).

Ozone's adverse health effects will also foist upon the State Petitioners unrecoverable costs, which also demonstrate irreparable harm.[8] Elevated ozone levels will result in increased medical costs, some of which the State Petitioners bear directly through Medicaid reimbursement. Ozone pollution also contributes to missed school and work, which results in lost productivity and associated costs, including costs borne by the State Petitioners when their employees are absent or less productive. Sheehan Decl. ¶73.

C. Numerous Additional Errors by EPA Provide a Substantial Basis for Petitioners' Challenge

Beyond failing to account for the 2021 attainment deadline, EPA committed numerous additional errors that are fatal to the Close-Out Rule, further confirming the substantial nature of this challenge, and the significant public health and welfare benefits of expediting review.

[8] *See, e.g.*, *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004) ("courts have recognized that economic loss may constitute 'irreparable harm' where a plaintiff's alleged damages are unrecoverable").

For example, EPA assumed optimized operation of selective catalytic reduction controls on power plants within the Cross-State Update region in projecting 2023 ozone concentrations. However, data in the record indicated that in 2017, 37 power plant units out of 72 in the Cross-State Update region had nitrogen oxide emissions—an ozone precursor—above the level EPA determined would indicate optimized operation of such controls. Sheehan Decl. Ex. A Attachment at 1. Many of these 37 units are located in upwind states, such as Ohio, Indiana, and West Virginia. EPA's modeling assumptions thus do not accurately capture reality. Since the Rule imposes no new requirements on these plants that have not been optimizing their controls, there is no basis for EPA's assumption that they will fully utilize these controls to reduce their emissions in the future. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (rejecting models that rely on "speculative factual assertion[s]").

Furthermore, contrary to the Act's requirements, EPA assumes that private actors will operate certain ozone-reducing controls without any *enforceable* mechanisms, schedules, or timetables to guarantee such compliance. *Cf.* 42 U.S.C. § 7410(a)(2)(A) (state plans must "include

enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance"); *id.* § 7410(a)(2)(C) (state plans must contain an enforcement program). EPA relies on assumptions about emissions control optimization, fuel switches, and retirements, without any valid reason to presume that industry actors will voluntarily use such approaches between now and 2023.

EPA also failed to analyze the potential for cost-effective emissions reductions from sources other than power plants. 83 Fed. Reg. at 65,902-04. EPA did not regulate non-power plant sources in the 2016 Cross-State Update because it concluded that it had insufficient information to determine what controls could be implemented by the 2017 ozone season. 81 Fed. Reg. at 74,508. In 2016, EPA prepared preliminary estimates of installation times for controls on non-power plant sources, while simultaneously concluding that fuller examination was necessary. *Id.* Yet EPA never undertook any further examination. Instead, EPA now—two years later—presents mere speculation, based on information available at the time of the 2016 Update, that "an expeditious timeframe for

installing sector- or region-wide controls on non-[power plant] sources may be four years or more." 83 Fed. Reg. at 65,903.

EPA's conclusion that no non-power plant sources can be controlled prior to 2023 thus lacks an adequate record basis. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency may not "fail[] to consider an important aspect of the problem"). The conclusion is even more arbitrary in light of EPA's prior statement in the Cross-State Update that to determine a full remedy, it would have to evaluate "the contribution to interstate transport from non-[power plants] and further [power plant] reductions that are achievable after 2017." 81 Fed. Reg. at 74,522. EPA did not explain its arbitrary reversal in policy and failure to follow through on its prior commitments. *See State Farm*, 463 U.S. at 43; *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012).

II. The Public Interest Requires Prompt Disposition of These Cases

There is also a significant public interest in the expedited disposition of these cases. Generally, "[t]here is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S.*

v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal citations and quotations omitted). And practically, the difference between normal and expedited consideration is one or more additional ozone seasons during which millions of people, along with downwind ecosystems and environments, will face elevated, unhealthy and unlawful levels of ozone pollution.

A swift determination is also necessary to adjudicate the proper balance of burdens between states, and between states and the federal government, at a time when all actors can still be held accountable. The Act places the burdens of addressing transported ozone on upwind states in the first instance, and on EPA as a backstop, and the Act requires EPA to properly police the allocation of those burdens. Extended litigation may limit the Court's ability to reallocate the costly regulatory burdens of nonattainment that EPA—in violation of the Act—has improperly placed on downwind states.

Furthermore, EPA strengthened the ozone standard in 2015 to further protect public health and welfare, and implementation of the more stringent 2015 standards is just beginning. Without progress from upwind states now, downwind states will face even greater challenges in

meeting the 2015 standard. Multistate Comments at 30. Yet EPA's Close-Out Rule achieves no progress, and without the Court's expedited consideration, the next regional rulemaking may still be years away.

REQUESTED RELIEF

To enable the Court's disposition of these cases by the end of 2019, or as expeditiously as the Court's schedule will allow, Petitioners respectfully request that the Court grant their motion for expedited consideration, order an abbreviated briefing schedule to be completed by the end of July 2019, and schedule oral argument in early September 2019.

Dated: March 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Claiborne E. Walthall, hereby certifies:

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Dated: March 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Expedite Consideration and accompanying declarations and exhibits were filed on March 4, 2019 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: March 4, 2019

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