ORAL ARGUMENT SCHEDULED FOR MAY 7, 2020
Case No. 19-1231

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, ET AL.,

Respondents.

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

PROOF REPLY BRIEF FOR PETITIONERS

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MORGAN A. COSTELLO
CLAIBORNE E. WALTHALL
Assistant Attorneys General
Of Counsel

LETITIA JAMES
Attorney General of New York
State Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

Dated: March 19, 2020

Counsel for Petitioner State of New York
Counsel for Additional Petitioners Listed Below on Signature Page

Reproduced on Recycled Paper

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to the Court's Order of October 30, 2019 (Doc No. 1813332), containing the information specified in D.C. Circuit Rule 28(a)(1), and updating the information in the certificate filed January 14, 2020 with Petitioners' Opening Proof Brief (Doc. No. 1824155) and the certificate filed with Respondent EPA's Initial Brief (Doc. No 1830717), the undersigned counsel of record certifies as follows:

A. Parties and Amici

All parties and intervenors are accurately identified in the certificate filed with Petitioners' Opening Brief. On March 2, 2020, the Commonwealth of Kentucky Energy and Environment Cabinet filed a notice of intent to file a brief as amicus curiae in support of respondents (Doc. No. 1831230), an amicus brief on March 5, 2020 (Doc. No. 1832071), and an amended brief on March 6, 2020 (Doc. No. 1832378).

B. Ruling Under Review

Petitioners seek review of the final agency action by respondents entitled: "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.

There is one related case currently pending in this Court, *State of Maryland v. EPA*, Case No. 18-1285 (and consolidated cases).

There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

DATED: March 19, 2020

Respectfully submitted,

/s/Claiborne E. Walthall
CLAIBORNE E. WALTHALL
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

Counsel for Petitioner
State of New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

MISCELLANEOUS AUTHORITIES

GLOSSARY

Act	Clean Air Act
AG Comments	Comments of the Attorneys General of the States of New York and New Jersey and the Corporation Counsel of the City of New York on the Proposed Denial, EPA-HQ-OAR-2018-0170-0083
Cross-State Close-Out or Close-Out	Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018)
Cross-State Update or Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
Denial	"Response to Clean Air Act Section 126(b) Petition from New York," 84 Fed. Reg. 56,058 (Oct. 18, 2019)
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
JA	Joint Appendix
lb/mmBtu	pounds per million British thermal units

NYSDEC Comments and Detailed Comments	Comments of the New York State Department of Environmental Conservation on the Proposed Denial, EPA-HQ-OAR-2018-0170-0081 and -0084
New York Metropolitan Area	New York-Northern New Jersey-Long Island, NY-NJ-CT Nonattainment Area for 2008 and 2015 ozone standards
2008 ozone standard	The national ambient air quality standards for ozone promulgated by EPA in 2008
2015 ozone standard	The national ambient air quality standards for ozone promulgated by EPA in 2015

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

For years, Petitioners have been unable to meet federal ozone standards because of pollution blown into the New York Metropolitan Area from sources in upwind States. Despite undisputed evidence of continuing air quality violations through the next downwind attainment deadline in 2021, EPA has refused to require further emission reductions from the largest sources of these emissions. Instead, EPA denied New York's section 126 petition (Petition) based on its wrongful assumption that EPA had already fulfilled its own responsibilities under the Good Neighbor Provision to fully address the transport of upwind ozone emissions under the 2008 ozone standard in two prior ozone rules—the Cross-State Update and Close-Out—that this Court has held are inadequate. EPA also erected an impossibly high barrier for any State petitioning for relief from upwind ozone pollution by requiring New York to collect and analyze detailed, source-specific information on out-of-state sources that is only available to EPA. EPA's Denial should be vacated on three grounds.

First, EPA's decision to apply a heightened burden on New York based on its mistaken assumption that the Update and Close-Out were

legally sufficient to fully resolve the requirements under the Good Neighbor Provision for the 2008 ozone standard was unlawful and arbitrary and capricious. EPA cannot shift onto New York its own obligation to have collected and analyzed the very information that EPA faults New York for failing to provide with respect to the same Good Neighbor Provision violations.

Second, in determining that New York failed to demonstrate an air quality problem under Step One of EPA's four-step framework, EPA continues to rely on flawed statutory interpretations to ignore present emissions that violate the Good Neighbor Provision and elevated ozone levels in the Connecticut portion of the multistate New York Metropolitan Area.

Third, EPA established an unreasonable burden for a section 126 petition, requiring information that no State alone can obtain from other States' upwind sources. The Court should not allow EPA to erect an unsurmountable burden for section 126 petitions. Further, EPA arbitrarily ignored the availability of additional, cost-effective emissions reductions from numerous upwind power plants named in the Petition and the demonstrated necessity for short-term emission limits.

Finally, following vacatur and remand of the Denial, EPA's history of delays coupled with downwind States' impending attainment deadlines necessitate setting a new sixty-day deadline consistent with section 126(b) for EPA's action.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are in the Addendum to Petitioners' opening brief.

ARGUMENT

POINT I

EPA'S PERVASIVE RELIANCE ON THE CROSS-STATE UPDATE AND CLOSE-OUT RENDERED ITS DENIAL OF THE PETITION UNLAWFUL AND ARBITRARY AND CAPRICIOUS

A. EPA's Reliance on Its Non-Compliant Prior Rules Requires Vacatur in This Proceeding, and Need Not Be Addressed in a Future Reconsideration Proceeding.

EPA's Denial of New York's section 126 Petition was based on a fundamental misconception of the law and facts in the record. Throughout the Denial, EPA assumed that it had fully addressed the transport of upwind ozone emissions under the Good Neighbor Provision for the 2008 ozone standard in the Update and the Close-Out. *See* 84 Fed. Reg. 56,058, 56,080 (Oct. 18, 2019); *see also id.* at 56,089. Thus, EPA

continued to rely on its unlawful interpretation of the Good Neighbor Provision as not requiring upwind States to eliminate their significant contribution to downwind nonattainment by the next relevant downwind attainment deadline. *See, e.g., id.* at 56,075.

This Court conclusively rejected that interpretation in *Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019), which held that EPA's 2023 end date in the Update was foreclosed by *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). The Court then vacated the Close-Out in *New York v. EPA*, because "the Close-Out Rule relied upon the same statutory interpretation of the Good Neighbor Provision that we rejected in *Wisconsin*." 781 Fed. App'x 4, 6 (D.C. Cir. 2019) (quotation marks omitted) (*New York II*).

EPA's reliance on the adequacy of those rules to deny the Petition was mistaken both before and after the Court expressly recognized their inadequacy in *Wisconsin* and *New York II;* that reliance necessitates vacatur here. EPA is wrong to contend that Petitioners were required to raise this argument in a reconsideration petition simply because *Wisconsin* and *New York II* were decided after the comment period. *See*

EPA Br. at 36-37. Petitioners preserved this ground for vacatur by objecting to EPA's reliance on 2023, a year beyond their attainment deadline in 2021, as inconsistent with the Act as interpreted by this Court's holding in *North Carolina*. AG Comments at 11, JA-___; *see also* 84 Fed. Reg. at 56,074 (dismissing such comments).[1] Petitioners' comments specifically referenced the *New York II* litigation and attached their briefs, which discussed these issues in even greater detail. *See* AG Comments at 11 n.56 & Ex. C, Opening Br. at 24-29, Reply Br. at 3-6, JA-___, ___-___, ___-___; *see also* 84 Fed. Reg. at 56,074 (citing the pending *New York II* litigation). And Petitioners also specifically objected to EPA's reliance on the Update and Close-Out as providing a complete remedy for upwind ozone transport under the 2008 ozone standard, arguing that "EPA's reliance on the [] Close-Out Rule as a purported complete remedy with respect to the 2008 ozone [standard] is arbitrary and capricious"

[1] EPA "concedes" that its comments response relied on its unlawful pre-*Wisconsin* position that "the analytic year in a Step One analysis need not match downwind attainment dates," EPA Br. at 44, but attempts a sleight-of-hand, stating that "[i]f the comments had been made post-*Wisconsin*, EPA would have responded differently." *Id.* But the lawfulness of EPA's action is determined on the facts and record at the time of the Denial, not the date comments were submitted. EPA cannot avoid the fact that, at the time of the Denial, its position was unlawful.

because these rules "fail to eliminate current and ongoing significant contributions by upwind states and sources through 2021, which is the basis for New York's Petition." AG Comments at 20, JA-___; *see also* 84 Fed. Reg. at 56,069 (EPA's acknowledgment of such comments).

Wisconsin and *New York II* thus did not provide new grounds undermining EPA's reasoning in the Denial, but confirmed the correctness of Petitioners' fully preserved objections to the Denial. And because Petitioners raised in comments their specific concerns about EPA's reliance on the Update and the Close-Out, EPA wrongly asserts (EPA Br. at 38) that it lacked adequate opportunity to respond. 42 U.S.C. § 7607(d)(7)(B) (requiring an objection be raised only with "reasonable specificity" in comments). EPA had opportunity to respond to Petitioners' objections, and could also have responded to the same objections to EPA's unlawful reasoning in the Update and Close-Out rulemakings. EPA's attempt to avoid the necessary implication of *Wisconsin* and *New York II* is meritless.

EPA is also mistaken to argue that Petitioners cannot rely on decisions of this Court rendered after the comment period. Petitioners are entitled to rely on those decisions as precedents supporting vacatur

here. *See Solite Corp. v. EPA*, 952 F.2d 473, 493-94 (D.C. Cir. 1991) (vacatur appropriate when a challenged rule rests on a prior rule that has been vacated).

B. EPA's Reliance on the Update and Close-Out Rules to Place a Heightened Burden on New York Was Unlawful and Arbitrary and Capricious.

EPA also wrongly asserts that its Denial was not squarely premised on the adequacy of the Update and Close-Out and that its improper reliance on those unlawful rules was not dispositive. EPA Br. 37-44. Both the burden that EPA established under section 126 and EPA's assessment of whether New York had met that burden were directly based on EPA's assumption that the Update and Close-Out were lawful.

The Denial references the Update and Close-Out throughout its "Standard of Review" discussion in Section III.B. 84 Fed. Reg. at 56,067-69. As EPA explained, "if EPA has promulgated a [federal implementation plan] that *fully eliminates* emissions that significantly contribute to nonattainment or interfere with maintenance in a downwind state for a specific [air quality standard], the EPA has no basis to find that sources in the upwind states are emitting or would emit in violation of the [Good Neighbor Provision], *absent new information* to the

contrary for that [standard]." *Id.* at 56,068 (emphasis added). EPA further stated that, because it had already promulgated full plans in the Update and Close-Out, it would deny the Petition unless it presented "additional information that was not previously considered by the EPA in either the [] Update or the [Close-Out]." *Id.* at 56,069.

EPA's flawed standard for reviewing the sufficiency of the Petition affected its evaluation under Steps One and Three of the four-step Good Neighbor framework. In denying the Petition under Step One for the 2008 ozone standard, EPA stated that it had "evaluated the petition *consistent with the standard of review described in Section III.B*," and concluded that "New York has not provided any new information that contradicts the EPA's conclusion in the [Close-Out] that the [New York Metropolitan Area] will no longer have an air quality problem in the future." *Id.* at 56,072, 56,080.[2] And in denying the Petition at Step Three,

[2] EPA admits that it relied on the 2023 modeling foreclosed by *Wisconsin* at Step One, claiming that it was the "best available data" on any future year and EPA had "no comparable data available for earlier analytic years." EPA Br. at 43. This argument ignores that 2018-2020 are the only ozone seasons that are relevant to whether Petitioners will attain the 2008 standard by their 2021 attainment deadline, and actual air quality monitoring data in the record for 2017, 2018 and 2019 showed

EPA expressly relied on its determination in the Close-Out that the "emissions reductions required under the [] Update fully address good neighbor requirements with respect to the 2008 ozone" standard to conclude that the Petition "failed to demonstrate that it is necessary to implement additional" control requirements. *Id.* at 56,089.

EPA attempts to justify its erroneous reliance on the adequacy of the Update by claiming that the Update was—and *remains* even after *Wisconsin*—a complete remedy for the sources covered by that rule, *i.e.,* upwind power plants that had already installed pollution controls. EPA Br. at 38-39; *see also id.* at 10-11. EPA mischaracterizes the Court's holding in *Wisconsin*. Although recognizing that the Update was deficient "in large part" because it failed to assess emission reductions from sources that are not power plants, the Court also found it inadequate because EPA failed to require sufficient reductions from power plants. The Court cited EPA's own statement in the Update that "a full resolution of upwind transport obligations would require. . .*further*

---

exceedances of the 2008 standard throughout the New York Metropolitan Area. Pet'r Br. at 32-33.

[power plant] reductions that are achievable after 2017." *Wisconsin*, 938 F.3d at 313 (quoting Update, 81 Fed. Reg. 74,504, 74,522 (Oct. 26, 2016)) (emphasis added) (internal quotes omitted). Thus, contrary to EPA's mischaracterization, the Court did not determine that the Update was a complete remedy with respect to *any* category of sources.

EPA's faulty assumption that it had provided a full remedy for the 2008 ozone standard pervaded its Denial, including EPA's allegedly "independent and severable" basis for denying the Petition at Steps One and Three. EPA's pervasive error here warrants vacatur of the Denial.

C. EPA Unreasonably Determined that It Had No Affirmative Duty to Evaluate the Good Neighbor Provision Violations Identified in the Petition.

EPA claims that its improper reliance on the adequacy of its Good Neighbor rulemakings is "at most, tangential," EPA Br. at 39, because the Petition did not provide the information and analysis that EPA requires under the four-step Good Neighbor framework and EPA did not have any obligation to itself gather or analyze such information. Even putting aside that EPA's conclusion relied on a flawed standard of review, EPA is wrong to argue that it had no affirmative duty to analyze for itself the violations identified in the Petition.

In disclaiming any affirmative burden with respect to the Petition, EPA relies on *New York v. EPA*, 852 F.2d 574, 577 (D.C. Cir. 1988) (*New York I*). EPA Br. at 20-23, 40 & 44. *New York I* is plainly distinguishable. There, EPA had already reviewed and approved state implementation plans for the upwind States where sources identified in the section 126 petitions were located. The petitioners there asked EPA to undertake *another* review of those plans—an obligation that EPA did not otherwise have.

Here, by contrast, EPA *did* have a pre-existing obligation to collect the very information and undertake the very analysis sought by Petitioners. EPA previously determined, for the 2008 ozone standard, that the upwind States where the named sources are located had failed to submit adequate state implementation plans. 80 Fed. Reg. 39,961 (July 13, 2015). That determination obligated EPA to promulgate federal plans for those upwind States within two years. 42 U.S.C. § 7410(c)(1); *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508-09 (2014). EPA was required to collect and analyze information concerning upwind sources, including power plants and non-power plants, and potentially available controls necessary to ensure that all available cost-

effective emission reductions would be achieved in time for downwind States' upcoming 2021 attainment deadline. But EPA has not conducted the proper analysis or promulgated plans consistent with the Good Neighbor Provision—as EPA now concedes and the *Wisconsin* and *New York II* decisions confirm. *Wisconsin*, 938 F.3d at 315; *New York II*, 781 F. App'x at 6-7; EPA Br. at 11-12, 26, 45.[3]

Thus, unlike in *New York I*, the Petition here did not seek to impose new obligations on EPA, but rather to require EPA to fulfill its pre-existing obligation to investigate, analyze and determine what reductions would remedy upwind States' significant contribution to downwind States' nonattainment by the statutory deadlines, and then impose necessary reductions on individual sources.

Similarly, the timing considerations that *New York I* cited—i.e., EPA's inability in that case to conduct the requested investigation and analysis within the 60-day deadline for EPA action on a section 126

[3] Six months after this Court's remand in *Wisconsin*, EPA still cannot tell the Court what it is planning to do to finally fulfill its obligations beyond that it "may include collecting data and conducting new analysis." EPA Br. at 45. With *New York II's* vacatur of the Close-Out, it is hard to imagine how EPA would fully satisfy its obligations with respect to the 2008 standard without new analysis.

petition—are inapplicable here. EPA argues that the same reasoning applies because the Petition "has asked EPA to make findings for a massive number of sources," including "more than 220 non-power plants for which EPA had insufficient available analysis." EPA Br. at 22 & 24. But again, because EPA was under a pre-existing obligation to promulgate an adequate federal implementation plan based upon its determination that various state plans were inadequate, the relevant timeframe here is not the 60-day deadline for the section 126 petition, but the years that EPA has had to collect information and undertake analysis to provide a full remedy to downwind states for the 2008 standard.[4] In setting a 60-day deadline for EPA action on a section 126 petition, Congress assumed that EPA would comply with its own data gathering and analysis obligations under the Good Neighbor Provision. EPA cannot rely on its own failure to comply with the Good Neighbor Provision to excuse itself from its section 126 obligations.

[4] EPA has cited a purported absence of information to avoid controlling non-power plant sources for more than a decade. *See* 70 Fed. Reg. 25,162, 25,214-15 (May 12, 2005) (Clean Air Interstate Rule); 81 Fed. Reg. at 74,522 (Update).

EPA argues that its duty to collect and analyze data under the Good Neighbor Provision is "independent of" section 126, EPA Br. at 26, but fails to cite any statutory language or case law for this blanket assertion. Rather, as EPA noted in explaining the use of its four-step framework to evaluate section 126 petitions, "the substantive inquiry for decision is the same" under the Good Neighbor Provision and section 126. EPA Br. at 27; *see also id.* at 7 & 27. EPA cannot have it both ways, arguing that the obligations under the two related provisions are independent in certain contexts, but the same in others. Having chosen not to do an adequate substantive inquiry under the Good Neighbor Provision, "EPA cannot now rely on the resulting paucity of data" for purposes of the same inquiry to address the same violations under section 126. *North Carolina*, 531 F.3d at 920.

POINT II

EPA'S STEP ONE DENIAL ARBITRARILY IGNORED CURRENT AND ONGOING AIR QUALITY PROBLEMS WITHIN THE NEW YORK METROPOLITAN AREA

EPA attempts to minimize Petitioners' Step One arguments as mere "quibbles" and urges the Court not to reach them. EPA Br. at 45. But EPA's Step One analysis contained fundamental misinterpretations

of its legal authority that support vacatur of the Denial. Pet'r Br. at 31-49.[5]

A. EPA Unlawfully Interprets Section 126(b) to Ignore Evidence of Current and Ongoing Nonattainment.

EPA mischaracterizes Petitioners' position as arguing that EPA may "consider *only* present air quality and not future air quality." EPA Br. at 46 (emphasis added). In fact, Petitioners have argued that EPA must consider *both* present and future air quality. But the Denial unlawfully and unreasonably considers only future air quality and ignores present problems. That approach reads the present-tense "emits" out of the statute. EPA argues that the "emits or would emit" language in section 126(b) gives it discretion to consider "either a source's current *or* its anticipated future emission levels," EPA Br. at 47 (emphasis in

[5] Contrary to EPA's argument, EPA Br. at 51, Petitioners raised in comments their arguments regarding the flaws in EPA's 2023 modeling conducted for the now-invalidated Close-Out. *See* Petition at 10, JA-__; NYSDEC Detailed Comments, at 7-8, JA-___-___; AG Comments 12-13 & Ex. C Opening Brief at 43-45 & Reply Br. at 20-27; JA-___-___, ___-___, ___-___. The Court vacated the Close-Out on other grounds without reaching those arguments. EPA's continued labeling of the *additional* modeling conducted by the Ozone Transport Commission as "alternative" only further demonstrates that EPA failed to give it any weight, violating its own Modeling Guidance.

original). But this interpretation is unsupported by statutory text or history and is inconsistent with the independent deadlines and remedies Congress provided in section 126. *See* Pet'r Br. at 36-39; *GenOn REMA, LLC v. EPA,* 722 F.3d 513, 520-21 (3d Cir. 2013).

The language of section 126 directs EPA to consider *both* present and future violations.[6] This Court has recognized that section 126's fundamental purpose is to provide a separate statutory remedy for immediate relief for current air quality problems: in *North Carolina*, this Court explained that while EPA's evaluation of air quality at a future date was reasonable under the Good Neighbor Provision, EPA could not "ignore present-day violations for which there may be another remedy, such as relief pursuant to section 126." 531 F.3d at 914. Contrary to EPA's arguments here, EPA Br. at 48, that language is not merely dicta, but was a critical limitation that the *North Carolina* court placed on EPA's interpretation. Nor is the language inconsistent with the Supreme

[6] EPA is wrong that a Good Neighbor violation exists only if there is an anticipated future air quality problem. EPA Br. at 47. A present Good Neighbor violation exists where, as here, EPA has already found Good Neighbor violations with respect to sources in upwind states for a particular ozone standard and has not yet fully remedied those violations.

Court's subsequent ruling in *EPA v. EME Homer City Generation, L.P.*, that EPA must avoid "over-control." 572 U.S. 489, 523 (2014). EPA's theoretical concern about *future* over-control does not excuse EPA's concomitant statutory obligation to prevent *present* under-control by allowing upwind sources that currently emit excess pollutants to continue to do so.

B. EPA's Refusal to Consider Nonattainment at Connecticut Monitors in Its Step One Denial Was Unlawful and Unreasonable.

EPA concedes that it failed to consider downwind air quality at monitoring sites in Connecticut within the New York Metropolitan Area. EPA Br. at 50. EPA initially attempts to justify ignoring Connecticut monitors in denying the Petition at Step One because its modeling purports to show attainment by all Connecticut monitors in 2023. EPA Br. at 49-50. But EPA's reliance on modeling of air quality only in 2023 is contrary to this Court's decisions in *North Carolina*, *Wisconsin*, and *New York II*, and provides no basis for its Step One denial. Rather, the record shows that these monitors currently exceed and likely will

continue to exceed the 2008 standard by the downwind 2021 attainment deadline. 84 Fed. Reg. at 56,081; *see also* Pet'r Br. at 32-34.

EPA relied on an unreasonable interpretation of section 126 to conclude that a State within a multistate nonattainment area cannot seek relief based on nonattaining monitors outside the petitioning State's borders.[7] Section 126 expressly permits "[a]ny state" to petition EPA. Pet'r Br. at 41-42 (citing *Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 895 F.3d 90, 97-100 (D.C. Cir. 2018)). And, as Petitioners explained (*Id.* at 40-41), EPA's interpretation ignores the regulatory consequences of EPA's decision to create a multistate nonattainment area. By statute, nonattainment at any monitor in a multistate nonattainment area places the entire area into nonattainment. 42 U.S.C. §§ 7407(d)(1)(A)(i), 7511a. Thus, every state in a shared multistate nonattainment area is practically and legally "affected" by the nonattaining monitor, regardless of whether that monitor is located within its own geographical borders. EPA's decision to disregard monitors in the New York Metropolitan Area

[7] EPA relied on this same mistaken justification to deny section 126 petitions from Delaware. *See* 83 Fed. Reg. 50,444, 50,460 (Oct. 5, 2018); Final Opening Br. for Pet'rs-Ints., *Maryland v. EPA*, Case No. 18-1285, Doc. 1808443, at 28-33 (D.C. Cir. filed Sept. 27, 2019), JA-____-____.

as designated by EPA that are located within Connecticut contravenes the statutory scheme.

EPA incorrectly asserts that New York is trying to utilize section 126 to "avoid its own obligations." EPA Br. at 50. However, whether the petitioning State has independent emission control obligations is immaterial to the Step One analysis.[8] And, contrary to EPA's assertions, New York is not attempting to avoid its own obligations,[9] but rather to utilize section 126 as Congress intended to ensure that EPA distributes the burden of emissions reductions equitably across *all* upwind sources that affect the New York Metropolitan Area's attainment. *See GenOn*, 722 F.3d at 523 ("[Section 126(b)] is intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." (Quoting S. Rep. No. 95-127, at 42 (1977)).

---

[8] Further, most of Connecticut's ozone does *not* come from New York, as Respondent-Intervenors concede. Resp.-Ints' Br. at 34.

[9] EPA, Respondent-Intervenors, and Amici conveniently ignore New York's decades-long effort and success in reducing in-state emissions, at great cost to in-state sources. *See* NYSDEC Detailed Comments, at 1, JA-___; Sheehan Decl., Doc. 1817645, at ¶ 24; *see* 6 NYCRR Part 227-3.

POINT III

EPA'S STEP THREE DENIAL APPLIED AN UNREASONABLE BURDEN TO NEW YORK'S PETITION AND IGNORED AVAILABLE EMISSION REDUCTIONS

EPA faults New York for not providing the same Step Three cost-effectiveness analysis that EPA has used in its regional transport rulemakings, EPA Br. at 13-14 & 29, even though EPA concedes that it has provided only a partial remedy for ozone transport under the Good Neighbor Provision for the 2008 ozone standard, EPA Br. at 9, and no remedy for the 2015 ozone standard, *id.* at 11-12. EPA is wrong.

A. EPA Has Erected an Insurmountable Burden for States' Section 126 Petitions.

Based on the information available to it, New York demonstrated that the identified upwind sources were significantly contributing to nonattainment in the New York Metropolitan Area under both the 2008 and the 2015 ozone standards. Pet'r Br. at 51-55; Point III.C, *infra*. Despite this substantial threshold showing, EPA faulted New York for not providing the "cost and air quality factors that the EPA has generally relied on" in assessing significant contribution at Step Three. EPA Br. at

30.[10] However, it was unreasonable for EPA to require New York to collect the comprehensive and detailed source-specific information regarding sources in upwind States that EPA's Denial requires a downwind State to submit.

EPA continues to ignore that New York has no ability to obtain the demanded information about each named upwind source, all of which are located out of state. 84 Fed. Reg. at 56,086 (requiring, *inter alia*, source-specific information on current operating status, installed controls, availability and costs of additional controls, emissions reduction potential of additional controls, and potential air quality impacts of emissions reductions). Nor does New York have the ability to analyze whether the named sources have available cost-effective emissions reductions "as compared to one another or as compared to other, unnamed sources in the same upwind states or in other states." *Id*. at

[10] EPA also argues that New York failed to provide "any alternative analysis that would support a conclusion at step 3." EPA Br. at 30; *see also* 84 Fed. Reg. at 56,088-89 (providing examples of "potential analyses" Petition could have provided). But New York did provide several of those analyses. *See* Section III.C, *infra*. The other purportedly "alternative analyses" required information unavailable to New York or not reasonably required for a Step Three analysis. *See* AG Comments at 18-19, JA-___-___.

56,090. New York's difficulty in obtaining this information and conducting these analyses is not, as EPA asserts, EPA Br. at 24, merely a function of New York's decision to name 350 sources. Rather, the problem is that New York has no direct regulatory authority over such sources or the means to compel them to provide the necessary information. By contrast, EPA has express authority under the Act to compel emission sources to maintain records and produce them to EPA on demand. *See* 42 U.S.C. § 7414(a)(1); 84 Fed. Reg. at 56,084. It is unreasonable for EPA to demand that States have the same level of information at Step Three of the Good Neighbor framework as EPA, when EPA alone has the legal authority to obtain such information.[11]

EPA concedes it has the authority to collect the data it claims is needed, EPA Br. at 26, but argues that such data requests "take[] time"—more time than permitted by EPA's 60-day deadline to act on a section 126 petition. *Id.* But EPA's excuses for not obtaining these data ring

[11] EPA's suggestion that New York could have used public data sources such as the Control Measures Database, EPA Br. at 25, ignores that for non-power plants, EPA has long asserted—including in the Denial—that this information is insufficient or unreliable, and cannot explain how the agency would have granted the Petition had New York relied on it. *See* 84 Fed. Reg. at 56,086.

hollow here when EPA took a year and a half to finalize the Denial, and then only under court order. EPA has not demonstrated that collecting such data would have been impossible or even impracticable in the year-plus it took to decide the Petition. Rather, EPA states it made *no attempt* to collect such data, merely using whatever information it had "on hand," EPA Br. at 40.

Further ignoring the impossibility of New York obtaining the type of information demanded, EPA offers an example of a collaborative effort to collect data that resulted in the section 126 petitions that were later the subject of the *Appalachian Power* litigation. EPA Br. at 24-25 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1038-39 (D.C. Cir. 2001)). But EPA's example acknowledges that *EPA itself* was involved in this effort—a striking contrast to EPA's refusal here to collect *any* data. EPA Br. at 26.[12] And EPA's suggestion ignores New York's many efforts over

[12] Similarly, EPA's suggestion that its grant of New Jersey's section 126 petition concerning sulfur dioxide emissions—a pollutant EPA has argued elsewhere is different from ozone and does not inform response to ozone 126 petitions—demonstrates that "other states have found methods to successful support their § 7426(b) petitions," EPA Br. at 25, ignores the fact that EPA in that case undertook an independent analysis to support granting that petition. 84 Fed. Reg. at 56,088. And, in reality, EPA has denied all recent ozone-related section 126 petitions.

decades to obtain adequate relief from transported ozone pollution through multi-state efforts, including through the Ozone Transport Commission (a group that includes EPA representatives) and by petitioning EPA to expand the Ozone Transport Region, another measure that EPA rejected. *See* 82 Fed. Reg. 51,238 (Nov. 3, 2017) (denying multi-state petition to expand Ozone Transport Region).

B. EPA Effectively Imposed on New York an Obligation to Conduct a Complete Regional Rulemaking, Including Development of a Remedy.

EPA concedes that, in evaluating a Petition under section 126, it imposes a duty on the petitioning state to satisfy EPA's four-step framework developed in the context of its regional transport rulemakings. EPA Br. at 27. It is arbitrary and unreasonable for EPA to apply this framework to the section 126 context in such a way that makes it impossible for States to petition for relief under section 126's independent remedy. Pet'r Br. at 56-58. Requiring a petitioning State to undertake an analysis as comprehensive as EPA's regional transport rulemakings conflicts with settled law permitting States to petition under section 126 *before* the state or federal implementation plan process is complete. *See Appalachian Power*, 249 F.3d at 1047-48; *GenOn*, 722

F.3d at 520; *see* H.R. Rep. No. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1410 (May 12, 1977) (section 126 provides "a second and entirely alternative method and basis for preventing and abating interstate pollution" to "expedite, not delay, resolution of interstate pollution conflicts"). And it was unreasonable for EPA to fault New York for failing to provide EPA with "all of the information necessary to conduct" a Step Three analysis for all regional sources that EPA has itself never conducted despite the agency's obligation to provide downwind states with a full remedy to meet their attainment deadlines. 84 Fed. Reg. at 56,086.

In addition to essentially reading section 126 out of the Clean Air Act as an independent statutory tool, EPA's unreasonable interpretation conflates the obligations of petitioning States under section 126(b) with EPA's duties to determine a remedy under section 126(c). Pet'r Br. at 63-64. EPA admits that it required New York to demonstrate at Step Three "what amounts at what sources can be eliminated cost-effectively." EPA Br. at 28; *see also* 84 Fed. Reg. at 56,089 (faulting the Petition for failing at Step Three to "determine [the] appropriate level of control for the named sources"). EPA has no persuasive explanation for how imposing a

duty on petitioning States to identify source-specific remedies differs from EPA's acknowledged burden under section 126(c) to identify specific remedies for the same sources.

C. EPA's Step Three Denial Arbitrarily Ignored Available Reductions from Named Sources, Including Through Short-Term Emission Limits.

New York made a threshold demonstration under section 126 of upwind Good Neighbor violations linked to downwind nonattainment or maintenance problems, which was further supported by evidence in the record. Pet'r Br. at 52-54. Specifically, New York presented data showing that specific sources were operating at greater than 0.15/lbmmBtu, the rate that New York has determined is reasonably achievable with control equipment required in New York. *See* NYSDEC Detailed Comments at 5-6, tbls. 1&2, JA-___-_____; *see* AG Comments at 18n.82, JA-__. New York also quantified potentially available emissions reductions that could be attained in many cases by operating already-installed controls that EPA deemed in the Update to be cost-effective. Petition at 11, 17 & App. B, JA-___, ___, ___-____; NYSDEC Detailed Comments at 4-6, JA-___-___. New York further pointed EPA to its own data from the Close-Out rulemaking indicating that certain power plant sources were not

fully operating existing air pollution controls. AG Comments at 18n.85, JA-___; Petition at App. B, JA-____-_____; *see* 83 Fed. Reg. at 65,898 (noting that 83 power plant units covered by the Update and equipped with selective catalytic reduction equipment were still not meeting the average emission rate in 2017 that would indicate full operation). New York also demonstrated the impact these reductions would have on New York. NYSDEC Detailed Comments at 4-6, JA-___-____; Petition at 17, App. B, JA-____, ____-_____.

EPA unreasonably ignored this demonstration of highly cost-effective emission reductions available from the dozens of power plant sources named in the Petition, much of which rested on EPA's own data and analysis in the Update. 84 Fed. Reg. at 56,090-93. EPA provides no reasonable explanation of why New York's demonstration, bolstered by additional data and analysis in comments and EPA's own data, is not precisely the type of "alternative analysis that would support a conclusion at step 3 that the named sources will significantly contribute to nonattainment or interfere with maintenance." *Id.* at 56,088. Rather, EPA rejected the Petition in its entirety as insufficient to show that "all" of the named sources could achieve a 0.15 lb/mmBtu rate or that the

proposed rate is cost-effective for "the suite of sources" named in the Petition. 84 Fed. Reg. at 56,090; *see also* EPA Br. at 33. EPA's all-or-nothing rejection of emissions relief from any of the named sources was arbitrary and capricious.

EPA admits that New York presented sufficient information with respect to emissions reductions from power plants with installed air pollution controls that EPA has already determined to be cost-effective. EPA Br. at 34. EPA's rationale for nonetheless rejecting any additional relief with respect to such sources, *see id.*, rests on a mischaracterization of the Court's holding in *Wisconsin*. *See supra* at Point I.B. In attempting to justify ignoring New York's demonstration of available emission reductions, EPA also repeatedly mischaracterizes the Petition and completely ignores Petitioners' request for short-term emission limits. *See* Pet'r Br. at 54-55. EPA argues that New York asked for a uniform rate across all sources, regardless of sector or feasibility. EPA Br. at 2, 13, 26. That is incorrect. New York asked EPA to set source-specific emission rate limits, including enforceable daily emission limits, by holding those sources already achieving 0.15 lb/mmBtus or less of

nitrogen oxides to their achievable rates, and then to determine limits for other facilities that are cost-effective. Petition at 17, JA-___.

And regardless of whatever specific recommendation New York made in its Petition regarding relief, it is EPA's job under subsection 126(c) to determine the appropriate relief upon finding a Good Neighbor violation. New York has never argued that EPA lacks discretion to prioritize emissions reductions, such as by selecting those that are most cost-effective. EPA could have examined the sources named in the Petition and found that some were fully controlled and that no further reductions are available. It could have then imposed further controls on only those sources where further reductions are possible, while locking in emission rates of the sources it found were fully controlled.[13]

POINT IV

A DEADLINE FOR EPA ACTION FOLLOWING VACATUR AND REMAND IS NECESSARY AND APPROPRIATE

The Court has the power to set a 60-day deadline to effectuate its mandate, particularly where the public interest is at stake. *See Porter v.*

[13] And where sources have shutdown, *see*, *e.g.*, Kentucky Br. at 9-12, an enforceable commitment to remain so could also be an acceptable response.

Warner Holding Co., 328 U.S. 395, 398 (1946); *accord Nat. Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974). As this Court recognized in expediting the briefing and oral argument in this case, prompt action by EPA by the 2020 and 2021 ozone seasons is necessary to assist the New York Metropolitan Area in attaining the 2008 and 2015 ozone standards as expeditiously as practicable, and no later than upcoming attainment deadlines. This Court recognized its power to set a deadline for EPA in *Wisconsin*, but declined there to exercise that power. 938 F.3d at 336-37. However, unlike here, the rule remanded in *Wisconsin* provided at least *some* additional emission reductions. And unfortunately, the Court's faith in *Wisconsin* that EPA would promptly respond to the Court's remand was misplaced because EPA has announced no action on a revised rule in the more than six months since the remand in *Wisconsin*.

Petitioners' remedy arguments here are neither improper nor unnecessary, and there is substantial justification for the Court to set a 60-day deadline for EPA action. EPA Br. at 52. That deadline is consistent with the statutory period for EPA to act on section 126 petitions. And, upon vacatur and remand, EPA will be more than two

years past its mandated statutory deadline for action on the March 2018 Petition. This case thus involves precisely the type of "persistent, years long delay[]" that EPA agrees has "prompted this Court to set deadlines elsewhere." EPA Br. at 52.

Absent a court order, EPA has proven itself totally incapable of taking action on section 126 petitions within statutory timeframes, including on this Petition. *See* Mem. Op. & Order, *New York v. Wheeler*, No. 1:19-cv-03287-JMF (Doc. No. 32) (S.D.N.Y. July 25, 2019), JA-___-____; *see also Connecticut v. Pruitt*, No. 17-cv-00796, 2018 WL 745953 (D. Conn. Feb. 7, 2018); *Maryland v. Wheeler*, No. 17-cv-02873 (D. Md.). EPA has not demonstrated good faith in acting in a timely manner on this or any other recent section 126 petition. Despite a 60-day deadline for final action on a petition, EPA sought an additional five months for final action after issuing a proposal in May 2019—*after* already delaying even proposed action on the Petition for over a year. *See* Defs' Mem. in Opp. to

Pltf's Mot. Summ. Judg., *New York v. Wheeler,* No. 19-cv-3287 (Doc. 24), at 12 (S.D.N.Y. filed Jun. 28, 2019), JA-___.[14]

If the Court does not set a prompt deadline for EPA's action, the 2020 ozone season will pass with no additional upwind emissions reductions. Petitioners will face almost certain reclassification to "Severe" nonattainment under the 2008 ozone standard. And without a prompt deadline for EPA's action, the 2021 ozone season, which will determine in part the New York Metropolitan Area's attainment of the 2015 ozone standard by a 2024 deadline, will arrive without further critical upwind emissions reductions required under the Act.

[14] Indeed, EPA was unable to meet even its court-ordered deadline for this Petition and had to seek an extension. EPA now disingenuously attempts to use Petitioners' courtesy in agreeing to a one-week extension against them. *See* EPA Br. at 52; Order, *New York v. Wheeler*, No. 19-cv-3287 (S.D.N.Y. Sept. 5, 2019), JA-___.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the petition for review, vacate the Denial, and remand to EPA for a new decision within sixty days.

Dated: March 19, 2020

Respectfully submitted,

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General
BARBARA D. UNDERWOOD
Solicitor General

/s/Claiborne E. Walthall[15]
STEVEN C. WU
Deputy Solicitor General
MORGAN A. COSTELLO
CLAIBORNE E. WALTHALL
Assistant Attorneys General
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

[15] Counsel for the State of New York certifies that the other parties listed in the signature blocks consent to this filing.

FOR THE STATE OF
NEW JERSEY

GURBIR S. GREWAL
Attorney General

/s/Lisa Morelli (w/permission)
LISA MORELLI
Deputy Attorney General
Division of Law
R.J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625-0093
(609) 376-2745
lisa.morelli@law.njoag.gov

FOR THE CITY OF
NEW YORK

JAMES E. JOHNSON
Corporation Counsel

/s/Christopher G. King
(w/permission)
CHRISTOPHER G. KING
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2319
cking@law.nyc.gov

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's order dated December 20, 2019 setting a briefing schedule (Doc. No. 1821221). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 6,495 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

Dated: March 19, 2020

/s/ *Claiborne E. Walthall*
CLAIBORNE E. WALTHALL
Assistant Attorney General
New York State
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Proof Reply Brief for Petitioners was filed on March 19, 2020 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: March 19, 2020

/s/ *Claiborne E. Walthall*
CLAIBORNE E. WALTHALL
Assistant Attorney General
New York State
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 776-2380
claiborne.walthall@ag.ny.gov