ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1231

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

STATE OF NEW YORK, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Action by the U.S. Environmental Protection Agency

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RESPONDENT EPA'S INITIAL BRIEF

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DATED: February 27, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by D.C. Circuit Rule 28(a)(1), undersigned counsel certifies that:

A. Parties and Amici

All parties and intervenors appearing in this case are accurately identified in Petitioners' opening brief. No party has sought to appear as amicus curiae.

B. Rulings Under Review

The agency action under review is EPA's denial of the State of New York's petition under § 7426 of the Clean Air Act, 42 U.S.C. § 7426(b). *See* 84 Fed. Reg. 56,058 (Oct. 18, 2019) (Denial).

C. Related Cases

The final agency action under review has not previously been before this Court or any other court. However, the pending case of *Maryland v. EPA* (D.C. Cir., No. 18-1285 and consolidated cases) may involve issues potentially pertinent to this case. That case involves a challenge to EPA's denial of petitions from Maryland and Delaware seeking findings under 42 U.S.C. § 7426(b) for certain upwind pollutant sources also at issue in New York's petition. That case involves several of the same parties involved here (New York State, New York City, and New Jersey as petitioner-intervenors; and Sierra Club, Environmental Defense Fund, and Adirondack Counsel as petitioners).

s/ *Samara M. Spence*
SAMARA M. SPENCE

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GLOSSARY

Cross-State Rule	Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (also formerly known as the Transport Rule)
Cross-State Update	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (also referred to as the Update)
Determination Rule	Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018) (also known as the Close-Out Rule)
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
Air quality standard	National Ambient Air Quality Standard
NO_X	Nitrogen Oxides
NO_X SIP Call	EPA rule published at 63 Fed. Reg. 57,356 (Oct. 27, 1998)
Catalytic controls	Selective Catalytic Reduction Controls
SO_2	Sulfur Dioxide
lb/mmBtu	Pounds per million British thermal units

INTRODUCTION

The Clean Air Act's (Act's) "Good Neighbor Provision," 42 U.S.C. § 7410(a)(2)(D)(i)(I), requires upwind states to eliminate emissions that will "contribute significantly" to nonattainment of, or interfere with maintenance of, an air quality standard in a downwind state. Upwind Good Neighbor contributions (i.e., those that are "significant"[1]) are primarily assessed and remedied through state or federal implementation plans. But downwind states may also petition EPA to find that a particular "major source or group of stationary sources" violates the Good Neighbor Provision. 42 U.S.C. § 7426(b). Although the substantive inquiry is the same under either mechanism, § 7426(b) does not confer on the Environmental Protection Agency (EPA) a duty "to conduct whatever data-gathering and research is necessary to either prove . . . or affirmatively disprove [a downwind state's] allegations." *New York v. EPA*, 852 F.2d 574, 578 (D.C. Cir. 1988) (*New York I*). Rather, the burden to provide the technical basis for a Good Neighbor finding falls on the petitioning state. For good reason: the Act gives EPA only 60 days to act on a petition.

Petitioners challenge EPA's Denial of a § 7426(b) petition from New York State. The petition sought a vast finding that 350 upwind sources of nitrous oxides

[1] This brief uses "significant" and "contribute significantly" as shorthand to refer to both the "contribute significantly" and "interfere with maintenance" prongs of the Good Neighbor Provision.

(NO_X) from nine states violate the Good Neighbor Provision under the 2008 and 2015 ozone standards. In essence, Petitioners seek to force EPA to affirmatively prove the State's broad claims and to indiscriminately impose the State's preferred uniform emission rate on all 350 sources.

Ignoring the State's own burden, Petitioners attempt to distract the Court from the actual basis of the Denial—the State's materially deficient petition. They also drastically overstate EPA's reliance on its prior implementation plans and improperly bring arguments concerning recent opinions issued by this Court that they did not raise in public comments. *See* 42 U.S.C. § 7607(d)(7)(B).

EPA did all that the law requires—and more. EPA considered the State's submissions. EPA found them deficient because they did not support a finding under "Step Three" of the Good Neighbor framework that the requested emission control level would be cost-effective. This was fatal to the petition because only emissions that can be cost-effectively controlled are considered "significant" under the Good Neighbor Provision. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 497 (2014) (*EME Homer City I*). And EPA went even further. It reasonably and appropriately considered its own data where available and still found the State's petition unsupported. This petition for review should be denied.

JURISDICTION

The Court has jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

EPA denied the § 7426(b) petition in its entirety at "Step Three" of the Good Neighbor framework.

1. When reviewing a § 7426(b) petition, EPA need not "conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations." *New York I*, 852 F.2d at 578. Did EPA err by asking whether the State met its burden and declining to affirmatively perform new analyses?
2. Under Step Three, only emissions that can be cost-effectively controlled are barred by the Good Neighbor Provision. Did EPA err in finding the petition deficient where the State merely sought a uniform emission rate on all upwind sources, with no information on the pollution controls installed or available at those sources, the cost of such controls, or what emission reductions or downwind air quality improvement would result?
3. Only objections "raised with reasonable specificity during the period for public comment" are judicially reviewable. 42 U.S.C. § 7607(d)(7)(B). Two recent opinions upheld EPA's pre-existing ozone remedies but remanded for EPA to complete its implementation plans under the 2008 ozone standard.

a. Petitioners did not raise their arguments concerning the new opinions in public comments. Are they barred from raising these arguments here?

b. Is the Denial reasonable where EPA found that the State's failure to meet its burden was dispositive irrespective of any portion of the analysis potentially affected by the recent opinions?

4. EPA found that the petition partially failed at Step One of the Good Neighbor framework because the record only supported a finding of a future air quality problem for certain areas and ozone standards.

a. Does this Court need to reach the claims regarding Step One where it had no impact on EPA's Step Three analysis?

b. Was EPA's conclusion that the petition partially failed at Step One nonetheless reasonable?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not in Petitioners' addendum are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. The Clean Air Act Process for Regulating Upwind Air Pollution

The Act, 42 U.S.C. §§ 7401-7671q, creates a comprehensive national program to address air pollution. Among other things, it directs EPA to set national ambient

air-quality standards—in the form of maximum concentration levels—for widely occurring pollutants, including ozone. 42 U.S.C. §§ 7408(a)(1), 7409(a)-(b).

EPA revises air quality standards from time-to-time. This triggers a cascade of other requirements. First, within two or three years, EPA designates areas within each state as in attainment, nonattainment, or unclassifiable for each air pollutant. *Id.* § 7407(d). Nonattainment areas for ozone are further classified based on severity as Marginal, Moderate, Serious, Severe, or Extreme. *Id.* §§ 7511, 7511a.

Next, within three years, states must adopt plans to implement the standard; those with nonattainment areas designated Moderate or higher must also submit plans to bring areas within their states into attainment. *Id.* §§ 7410(a), 7502, 7511a(b)(1)(A)(i). EPA has up to eighteen months to review state plans. *Id.* § 7410(k). If EPA finds a state has failed to adopt adequate plans, EPA has two additional years to adopt a federal implementation plan. *Id.* § 7410(c)(1).

The Act provides attainment deadlines for non-attainment areas based on classification; states that do not attain on time are bumped-up to the next most serious classification and given a longer period of time to comply.[2] 42 U.S.C. §§ 7502, 7511(a)(1), (b)(2)(A). States can eventually be relieved of certain requirements if EPA determines that the state has reached attainment. *E.g.*, *id.* § 7511(b)(2)(A); 40 C.F.R.

[2] Sanctions apply if a state fails to submit a state plan, but not if it fails to attain. *See* 42 U.S.C. §§ 7509, 7410(k).

§ 51.918. Once additional statutory criteria are met, nonattainment areas can be redesignated as attainment. *Id.* § 7407(d)(3).

Due to the "vagaries of the wind," concentrations of air pollutants in any one state may include pollutants that originated in other states. *EME Homer City I*, 572 U.S. at 497. Thus, under the "Good Neighbor Provision," state implementation plans must prohibit emissions transported beyond the state's borders that "will" "contribute significantly" to downwind nonattainment or "interfere with maintenance" in downwind areas. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Downwind states may also petition EPA "for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of [the Good Neighbor Provision]."[3] 42 U.S.C. § 7426(b). The process is much shorter than the implementation plan process: EPA has only 60 days, with the possibility of a six-month extension, to go through notice-and-comment and decide whether it has enough information to make the requested finding. *Id.* §§ 7426(b), 7607(d)(10). If EPA finds that an existing source violates the Good Neighbor Provision, the source must cease operating within three months or EPA may instead impose emission limits and allow the source to continue operating. 42 U.S.C. § 7426(c).

[3] This Court has held that § 7426(b) incorporates § 7410(a)(2)(D)(i), the Good Neighbor Provision; the cross-reference to § 7410(a)(2)(D)(ii) is a scrivener's error. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001).

"[T]he substantive inquiry for decision is the same in both" Good Neighbor Provision and § 7426(b) proceedings. *Appalachian Power*, 249 F.3d at 1047 (internal quotation marks omitted). However, unlike in the implementation plan context, § 7426(b) does not confer on EPA a duty "to conduct whatever data-gathering and research is necessary to either prove . . . or affirmatively disprove" a state's allegations. *New York I*, 852 F.2d at 578. Rather, the technical burden to support a Good Neighbor analysis falls on the petitioning state. *See id.*

II. Ozone Regulation

Ground-level ozone is an unusual pollutant because it is not typically emitted directly into the air. 84 Fed. Reg. at 56,061. It forms when ozone precursors—NO_X and volatile organic compounds—react in the atmosphere. *Id.*

Because ozone tends to behave regionally, EPA has found that the most effective way to assess and remedy Good Neighbor obligations for ozone in the eastern United States is through regional implementation plans. *See* 63 Fed. Reg. 57,356 (Oct. 27, 1998) (the NO_X SIP Call); 70 Fed. Reg. 25,162 (May 12, 2005) (the Clean Air Interstate Rule); 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the Cross-State Rule); 81 Fed. Reg. 74,504 (Oct. 26, 2016) (the Cross-State Update or Update). In these rulemakings, EPA has collected a tremendous amount of data, performed modeling and other analyses, and ultimately imposed NO_X emissions caps for upwind states and established allowance trading programs.

EPA uses a four-step framework to determine an upwind state's precise Good Neighbor obligations for ozone. *EME Homer City I*, 572 U.S. 489. First, EPA identifies downwind air quality monitors that "will" have a future air quality problem, meaning they will fail to attain or have difficulty maintaining the standard by a relevant future analytical year. *North Carolina v. EPA*, 531 F.3d 896, 913-14 (D.C. Cir. 2008), *modified on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008); *Wisconsin v. EPA*, 938 F.3d 303, 321-22 (D.C. Cir. 2019). Second, EPA determines which upwind states will "contribute" to each identified downwind problem. States that contribute over a threshold amount (for example, 1% of the standard) to the downwind area are considered "linked" to the downwind problem. *EME Homer City I*, 572 U.S. at 502-03.

Third, EPA determines which upwind emissions from which sources are "significant" such that they must be eliminated. This is no easy task. Downwind ozone concentrations are the result of precursor pollutants from thousands of sources combining under the right meteorological conditions. 84 Fed. Reg. at 56,074. Allocating "significant" responsibility among these sources presents a "thorny causation problem." *EME Homer City I*, 572 U.S. at 514. EPA's "efficient and equitable solution" is to determine the appropriate control level for categories of sources based on cost-effectiveness. *Id.* at 519. EPA does this by considering the pollutant sources in question, pollution controls available at those sources, cost and upwind emission reductions achievable from such controls, and modeled downwind

air quality improvement that would result from the various control levels. 84 Fed. Reg. at 56,082-83. Emission amounts that can be eliminated at the most cost-effective control level are deemed "significant." *EME Homer City I*, 572 U.S. at 519.

In Step Four, EPA chooses an emission limit (usually in the form of a state or regional cap) to implement the selected cost-effective control level. 84 Fed. Reg. at 56,062. Finally, EPA must ensure that it does not "over-control" the upwind states. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 124, 127-28 (D.C. Cir. 2015) (*EME Homer City II*). If a downwind state would attain the ozone standard without the identified upwind regulation, then EPA may not impose the requirement. *Id.*

A. Implementing the 2008 ozone standard

EPA revised the ozone standard to 75 parts per billion in 2008. 73 Fed. Reg. 16,436 (Mar. 27, 2008).

In 2016, EPA issued a rule—the Cross-State Update—partially addressing the Good Neighbor obligations of certain eastern states under the 2008 standard. 81 Fed. Reg. at 74,504, 74,533. Using its four-step framework, EPA determined that 22 upwind states, including New York and New Jersey, would contribute significantly to nonattainment of the 2008 standard at 19 downwind receptors. *Id.* at 74,506. Because EPA acted under tight timeframes, the Update determined Good Neighbor obligations only for certain sources that could reduce emissions quickly. *Id.* at 74,521. Specifically, at Step Three, EPA only assessed power plants without any combustion controls (such as low-NO_X burners or over-fire air) and power plants that had already

installed post-combustion control systems such as selective catalytic reduction ("catalytic controls") and selective non-catalytic reduction. *Id.* at 74,540-42. EPA set the cost-effectiveness threshold at $1,400 per ton of NO_X reduced, which was the level associated with installing combustion controls and optimizing existing catalytic controls. *Id.* at 74,550. EPA then implemented an allowance trading program and imposed state-wide emission caps based on reductions achievable with the selected controls. *Id.*

In *Wisconsin*, this Court upheld EPA's determination of Good Neighbor obligations, and the remedy imposed, for sources assessed in the Update. 938 F.3d at 320-37. However, because EPA did not purport to identify all of the Good Neighbor obligations under the 2008 standard—i.e., those from other sources not analyzed—the Court held that EPA impermissibly failed to require upwind states to fully eliminate their significant contributions by a relevant downwind attainment date. *Id.* at 313. The Court therefore remanded the rule to EPA to complete the job. *Id.* at 316.

In 2017, well before *Wisconsin*, EPA issued the "Determination Rule," which made Good Neighbor findings under the 2008 standard for the remaining sources not previously assessed. 83 Fed. Reg. 65,878 (Dec. 21, 2018). However, the Step One analysis there assessed downwind areas for potential air quality problems in 2023, a date that was not associated with attainment dates for the 2008 standard. *Id.* at 65,904-05, 65,917. After *Wisconsin*, therefore, EPA conceded that its Good Neighbor

assessment in the Determination Rule relied on a statutory interpretation invalidated in *Wisconsin*. *New York v. EPA*, 781 F. App'x 4, 6 (D.C. Cir. 2019) (*New York II*). The Court accordingly vacated the Determination Rule. *Id.* at 6-7. So EPA's determination of Good Neighbor obligations under the 2008 standard remains outstanding for sources other than those assessed in the Cross-State Update (i.e., power plants that have not already installed post-combustion controls and non-power plants).

B. Implementing the 2015 ozone standard

In 2015, EPA revised the ozone standard again to 70 parts per billion. 80 Fed. Reg. 65,292 (Oct. 26, 2015).

EPA is in the early stages of implementing the 2015 standard. Area designations were due in 2017, 42 U.S.C. § 7407(d), and EPA has issued over 3,000 designations. 82 Fed. Reg. 54,232 (Nov. 16, 2017); 83 Fed. Reg. 25,776 (June 4, 2018); 83 Fed. Reg. 35,136 (July 25, 2018). EPA published modeling data to assist the states in developing their Good Neighbor implementation plans, which were due in October 2018.[4] 42 U.S.C. § 7410(a)(1); Memo and Supplemental Information Regarding Interstate Transport SIPs for the 2015 Ozone NAAQS, *available at*

[4] Petitioner New Jersey submitted its state plan late. *See* National Status of a 110(a)(2) Ozone (2015) SIP Infrastructure Requirement, *available at* https://www3.epa.gov/airquality/urbanair/sipstatus/reports/x110_a__2__ozone__2015_section_110_a__2__d__i__-_i_prong_1__interstate_transport_-_significant_contribution_inbystate.html.

https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs. EPA is in the process of reviewing these. *E.g.*, 85 Fed. Reg. 5570 (Jan. 31, 2020) (recently approving D.C.'s state plan). EPA has not yet collected all of the data or completed the analyses that may ultimately be necessary for its own Good Neighbor analyses under the 2015 standard if any state plans are deemed insufficient.

III. EPA's Denial of New York's § 7426(b) Petition

In March 2018, New York State petitioned EPA to find that some 350 sources[5] in nine states violate the Good Neighbor Provision under both the 2008 and 2015 ozone standards. 84 Fed. Reg. 56,058 (Oct. 18, 2019) (Denial). The list generically included every source that emits over 400 tons of NO_X per year in states as close as Pennsylvania and as far away as Illinois. *Id.* at 56,058. The petition alleged that all of these sources "contribute significantly" to air quality problems under both standards in Chautauqua County, New York and the New York Metropolitan Area. *Id.*

Some of the named sources are the same power plants previously assessed and regulated in the Cross-State Update. *Id.* at 56,083, 56,092. But the petition did not differentiate sources with pollution controls from sources without. *Id.* It also did not

[5] The petition listed 360 sources but only alleged Good Neighbor violations at 350 of them, excluding those in New Jersey. *See* New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b), JA[EPA-HQ-OAR-2018-0170-0004] at JA[12] (State Petition).

differentiate based on achievable NO_X reduction levels or potential downwind ozone improvement. *Id.* at 56,060. The State instead requested, in effect, that EPA uniformly impose New York's in-state "reasonably available control technology" requirements to all nine upwind states. *See* 84 Fed. Reg. at 56,060. "Reasonably available control technology" is a statutory term representing the emission control level that states with nonattainment areas of Moderate or higher (among others not relevant here) must impose on sources in their own state. 42 U.S.C. § 7511a(a)-(e). Each state has discretion to determine its own applicable requirements, subject to EPA approval. New York has defined it's requirement as a uniform emission limit of 0.15 lb/mmBtu, based on a cost-threshold of $5,000 per ton NO_X removed. 84 Fed. Reg. at 56,060.

A. New York's failure to meet its burden

On September 20, 2019, EPA denied the petition because the State failed to meet its technical burden to support Good Neighbor findings for these 350 sources. *Id.* at 56,059. Specifically, EPA declined to make a finding as to all sources at Step Three of the Good Neighbor framework because the "material elements" in the petition "[were] insufficient" for EPA to determine whether and in what amounts these sources could be cost-effectively controlled beyond their current levels. *Id.* The State did not "support[] why the named facilities either can or should make certain reductions" either using "the cost and air quality factors that the EPA has generally relied on" or "any alternative analysis that would support" a Step Three cost-

effectiveness finding. *Id.* at 56,088. EPA also found the State's assertions to be insufficient because they did not provide any basis to weigh availability or costs of controls or account for the actual downwind air quality improvement achievable. *Id.* at 56,089.

Taking into account the future-looking Good Neighbor Provision and the edict against over-control, EPA also considered at Step One whether the downwind areas in question would attain and maintain the ozone standards absent the requested controls. *Id.* at 56,070. The State submitted no information indicating such air quality problems by any relevant future date, though EPA independently found that the New York Metropolitan Area would have a future problem under the 2015 standard. *Id.* at 56,059, 56,074. However, EPA did not have support showing a future air quality problem for that area under the 2008 standard or for Chautauqua County under either standard. *Id.* at 56,059.

Although the State neglected to submit supporting information, to the extent EPA had information on hand, EPA considered it. *Id.* at 56,070. Relevant here, EPA considered the analyses it had already performed, and the remedies it had already imposed, in prior 2008 ozone rulemakings. *Id.* at 56,074, 56,079-81, 56,092. In its Step One analysis, EPA also considered extensive modeling it had previously prepared projecting downwind air quality in 2023. *Id.* at 56,074. EPA used this modeling because it "ha[d] no comparable data available for earlier analytic years between 2017

and 2023" and it was "the best data currently available" to evaluate the petition. *Id.* EPA's pre-existing data also did not support the State's claims.

B. Timing and the recent ozone cases

When assessing the State's petition regarding 350 upwind sources, EPA struggled to meet the statutory timeframe, even after a six-month statutory extension. 42 U.S.C. § 7607(d)(10); 83 Fed. Reg. 21,909, 21,909-10 (May 11, 2018) (extension decision). A court gave EPA until September 20, 2019, to grant or deny the petition. Order of Sept. 5, 2019, *State of New York v. Wheeler*, No. 19-cv-3287 (S.D.N.Y.) (extension on consent); Order of July 25, 2019, *State of New York v. Wheeler* (original deadline of September 13, 2019).

Just seven days before EPA's court-ordered deadline, on September 13, 2019, this Court issued its decision in *Wisconsin*. 938 F.3d 303 (holding that the Cross-State Update did not fully address Good Neighbor obligations under the 2008 standard). At that point, it was too late for EPA to include its full understanding of *Wisconsin* or to explain in detail whether or not it would affect EPA's independent assessment. However, EPA made clear that it was denying the petition based on the State's failure to meet its burden. 84 Fed. Reg. at 56,059 n.1. That basis for denial "is independent and severable from any portion of the denial based on the EPA's discretionary evaluation" using the 2023 modeling. *Id.* Eleven days after EPA signed the Denial, this Court issued its decision in *New York II*. 781 F. App'x 4. No arguments concerning *Wisconson* or *New York II* were raised during the public comment period.

SUMMARY OF ARGUMENT

In the Denial, EPA applied the well-established rule that states bear the burden to support § 7426(b) petitions. EPA was not required to affirmatively prove Petitioners' sweeping allegations because the Act only gives EPA 60 days to respond. The State chose to seek findings as to 350 upwind sources and was therefore obligated to show that those sources have Good Neighbor obligations and in what amounts. EPA has its own affirmative duty to evaluate Good Neighbor obligations, just not in the § 7426(b) context.

EPA denied the petition in its entirety at Step Three of the Good Neighbor framework—asking what emission levels are "significant" by assessing whether they can be cost-effectively controlled—because the State did not support it's allegations. The State simply requested a uniform 0.15 lb/mmBtu emission rate to be indiscriminately applied to all sources. But it included neither the type of information EPA normally relies on to make a cost-effectiveness determination, nor any alternative basis for one. It took no account of the type or location of the source, its existing controls or requirements, the cost of implementing controls, or the anticipated effect on NO_X emissions or downwind ozone levels. EPA's conclusion was reasonable, and it was fatal to the petition.

Petitioners prefer to focus on the recent *Wisconsin* and *New York II* opinions, which upheld EPA's partial Good Neighbor implementation plans for the 2008 ozone standard but remanded for EPA to do additional analyses. But Petitioners' arguments

are barred because they were not raised in public comments. 42 U.S.C. §§ 7607(d)(1)(N), (d)(7)(B). If Petitioners believe these new opinions are "of central relevance to the outcome" of the Denial, then they must raise their claims in an administrative petition for reconsideration before obtaining judicial review. *Id.* § 7607(d)(7)(B). Nevertheless, to the extent any portion of these claims are justiciable, *Wisconsin* and *New York II* do not affect or undermine EPA's conclusion that the State failed to meet its burden.

Finally, although the petition partially failed at Step One—asking about downwind air quality problems in the areas of concern—the Court need not reach the Step One claims. This is because Step One was not dispositive before EPA or this Court. EPA reviewed all sources under Step Three, and the partial Step One failure had no effect on the Step Three basis for denial. The petition for review should be denied.

STANDARD OF REVIEW

The Court may reverse a § 7426(b) denial only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(N), (d)(9). This standard is narrow. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between facts found and choices made, its choice must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013) (court does not

referee battles between experts). The Court's task is to apply this standard to the administrative record that existed at the time of the decision. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Where, as here, EPA is administering the complicated provisions of the Clean Air Act, the Court gives an "extreme degree of deference" to EPA's evaluation of scientific data. *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (internal quotation marks omitted).

Judicial deference also extends to an agency's interpretation of a statute it administers. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Under *Chevron* step one, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. *Id.* at 842-43. However, under *Chevron's* second step, "if the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also EME Homer City I*, 572 U.S. at 513-14. The Court need not find that EPA's is the only permissible construction, or even the reading the Court would have reached, but only that EPA's interpretation is reasonable. *Chevron*, 467 U.S. at 843 n.11; *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985).

ARGUMENT

EPA properly denied the State's petition because it did not meet its burden at Step Three of the Good Neighbor framework. Step Three asks what emission levels are "significant" by assessing whether they can be cost-effectively controlled. 84 Fed.

Reg. at 56,069-70, 56,082-92. The petition had requested a uniform 0.15 lb/mmBtu emission rate to be applied indiscriminately to hundreds of upwind sources scattered across nine states. But it included no showing that this was cost-effective. It lacked information on pollution controls already installed at the sources, any additional available controls and their costs, and potential emission reductions and downwind air quality improvements. Nor did it include any alternate basis for EPA to make a cost-effectiveness finding except to assert the requested rate could be imposed for $5,000 per ton of NO_X. But that was erroneous on its face because costs for controls can vary drastically depending on the type of source and other factors.

The flaw was fatal to the petition because only "significant" contributions are barred under the Good Neighbor Provision. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Petitioners cannot prove that this was unreasonable. And Petitioners' other arguments are mere misdirection.

I. EPA Appropriately Assessed Whether New York Provided Sufficient Support for Its Allegations.

A fundamental problem throughout Petitioners' brief is that it spends pages disputing what is already well-established: the State's burden under § 7426(b). *E.g.*, Pet'r Br. 62-63; Pet'r-Int. Br. 34-35. Petitioners ask the Court to require *EPA* to collect the data to affirmatively prove the States' claims. *Id.* This is wrong as a matter of law.

A. A state's burden under § 7426(b) is well-established.

The relationship between the Good Neighbor Provision and § 7426(b) has long been resolved by this Court. The substantive inquiry is the same under both provisions. *Appalachian Power*, 249 F.3d at 1047, 1049-50. However, they operate differently in two procedurally meaningful ways. First, the Good Neighbor Provision is implemented by states controlling their *own* emissions (or EPA standing in the state's shoes to issue a federal plan), while § 7426(b) is invoked by a downwind state concerning emissions from *other* states. 42 U.S.C. §§ 7410(a)(2)(D)(i), 7426(b), 7410(c). Second, upwind states (and EPA) have several years to assess and create implementation plans for their Good Neighbor obligations, whereas EPA is given only 60 days plus an optional six-month extension to assess a § 7426(b) petition. 42 U.S.C. §§ 7410(a)(1), (c), 7426(b), 7607(d)(10) (extension accounts for notice-and-comment process).

Over thirty years ago, this Court recognized that this means Congress placed the burden under § 7426(b) on the petitioning state. In *New York I*, downwind states challenged EPA's denial of a § 7426(b) petition related to 38 upwind sources under air quality standards for sulfur dioxide (SO_2) and particulate matter. 852 F.2d at 577. Downwind states argued that EPA had an affirmative duty to investigate whether the upwind state plans covering these sources were in compliance with the Good

Neighbor Provision.[6] *Id.* at 577-78. In other words, they wanted EPA to investigate the precise Good Neighbor obligations of the sources in question and determine if the upwind state plans resolved them. The Court held that § 7426(b) imposes no such duty. *Id.* at 578.

Petitioners acknowledge this holding only by claiming that it is limited to meaning that EPA need not conduct a full-scale investigation into prior state plans. *See* Pet'r Br. 62-63; *see also* Pet'r-Int. Br. 34-35. Both the court's reasoning and basic logic undermine such a narrow reading.

First, the Court focused heavily on the Congressional intent underlying the short statutory deadline in § 7426(b). *New York I*, 852 F.2d at 578. Under the states' theory, the Court reasoned, EPA would have to "engage in an entire array of investigative duties," "undertake a full-scale investigation of the adequacy of" numerous state plans, "conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations" of Good Neighbor violations at the named 38 sources, "develop whatever new air pollution models are necessary" to confirm or disprove the states' theories, and go through rulemaking "*all within 60 days* of receipt of the petition." *Id.* (emphasis added). But "Congress did not intend that [EPA] be required to perform all of these duties in such

[6] At the time of *New York I*, the Good Neighbor Provision was codified in 42 U.S.C. § 7410(a)(2)(E). It was later moved to 42 U.S.C. § 7410(a)(2)(D)(i)(I). *See Appalachian Power*, 249 F.3d at 1040.

a short period of time." *Id.* The same reasoning applies here. The State asked EPA to make findings for a massive number of sources, engage in an array of investigations and data-gathering, and conduct new modeling to affirmatively prove the State's claims. Congress did not intend that to occur within such a short period of time.

Second, the limited statutory timeframe is an even stronger indication here than in *New York I* that Congress did not intend for EPA to carry the burden. 84 Fed. Reg. at 56,088. There, states sought findings as to only 38 sources, and some Good Neighbor analyses already existed though the pre-existing state plans. *New York I*, 852 F.2d at 577. Here, petitioners seek findings as to 350 sources, and EPA did not have existing information for many of the named sources because it was still reviewing state plans for the 2015 standard and had only just received the remand for the 2008 standard. *E.g.*, 84 Fed. Reg. at 56,084, 56,086 (insufficient information on the 220 non-power plant sources). It is illogical to presume that Congress gave EPA insufficient time to affirmatively investigate 38 sources where state plans existed but somehow expected EPA to be able to affirmatively investigate 350 sources here where much of the necessary analyses do not exist.

Congress gave EPA a 60-day deadline, with an optional six-month extension.[7] 42 U.S.C. §§ 7426(b), 7607(d)(10) (for notice-and-comment process). EPA concedes

[7] Indeed, the State held EPA to its limited time-period by filing a deadline suit. *See* Order of July 25, 2019, *State of New York v. Wheeler*, No. 19-cv-3287 (S.D.N.Y.).

that it did not meet its 60-day deadline here, unsurprisingly given the scope of the petition. However, it defies normal rules of statutory interpretation to suggest, as Petitioners do, that the Court should consider whether EPA in fact acted within 60 days to determine Congress' intent when establishing a 60-day deadline. *See* Pet'r Br. 61-62; Pet'r-Int. Br. 30-32. Regardless of EPA's ability to meet it, Congress meant something by it. And according to this Court, Congress did not mean for EPA to have to "conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations." *New York I*, 852 F.2d at 578. Indeed, the § 7426(b) petitions at issue in *New York I* were submitted four years before EPA acted on them. *See* Pet'r-Int. Br. 32 n.6 (citing 49 Fed. Reg. 34,851, 34,853-84 (Sept. 4, 1984)). That did not prevent this Court from concluding that the burden falls on petitioning states.

Even beyond this specific holding, the Court's reasoning made clear that the burden was on petitioning states. For example, the Court rejected various state claims because "Maine has failed to make even a threshold showing of entitlement" under § 7426(b), *New York I*, 852 F.2d at 579, and "Pennsylvania failed to submit any monitoring data showing an actual violation," *id.* at 580. In other words, those states did not meet their burdens to support the requested Good Neighbor findings.

B. The difficulty Petitioners claim in meeting the burden is due to the scope and timing of the State's petition.

Petitioners attempt to dodge precedent with buzz words. They argue that § 7426(b) is "source-specific," authorizes "targeted relief" or "tailored remedies," and does not require states to perform regional analyses. Pet'r Br. 55-58. Indeed.

But they overlook an obvious problem: it was the State that petitioned for a regional rulemaking. The State did not seek targeted relief or tailored remedies for a few specific sources. It sought a uniform emission rate for over 350 disparate sources in nine upwind states, including more than 220 non-power plants for which EPA had insufficient available analyses to support a full Step Three conclusion. 84 Fed. Reg. at 56,086, 56,090. The State cannot avoid its obligation to support the request by seeking what is effectively a regional remedy through an allegedly "targeted" petition.

Petitioners complain that it would be difficult for the State to obtain sufficient data to support a regional analysis. Pet'r Br. 58-61; Pet'r-Int. Br. 27-30. But this is "the natural result of the [State's] decision to name approximately 350 facilities" from nine states at the time it did. 84 Fed. Reg. at 56,086.

The State, unlike EPA, had the luxury of time to collect the necessary data to support its petition because it has no deadline under § 7426(b). It could have, for example, worked with other states and stakeholders to collect information and develop analytic work. That is what happened in the petitions at issue in *Appalachian Power*, which similarly sought findings as to numerous sources across multiple states.

249 F.3d at 1038. A state-led group of stakeholders (including EPA) collaboratively-developed an analysis that supported EPA's regional NO_X SIP Call, which was in turn used to support the § 7426(b) findings at issue in *Appalachian Power*. 249 F.3d at 1038-39 (petition findings relying on analysis from NO_X SIP Call); 84 Fed. Reg. 22,787, 22,791 (May 20, 2019) (relying on state-led collaborative analyses in NO_X SIP Call proposal).

Or the State could have performed a cost-effectiveness analysis using, in part, data available on EPA's public databases. For example, information on general performance and cost of NO_X control strategies for non-power plant sources is available on the Control Measures Database. EPA, Control Measures Database, available at https://www.epa.gov/sites/production/files/2020-02/cmdb_2019-10-09.zip. And it could have used EPA's Cost Strategy Tool to analyze available control strategies. EPA, Cost Strategy Tool, available at https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/cost-analysis-modelstools-air-pollution#control%20strategy%20tool.

Other states have found methods to successfully support their § 7426(b) petitions. For example, EPA granted a petition brought by New Jersey that narrowly targeted an upwind source of SO_2. 76 Fed. Reg. 19,662 (Apr. 7, 2011). New Jersey submitted modeling that showed the source's emissions were seven times the SO_2 standard, that the emission level was likely to persist absent controls, and that emission levels directly correlated to downwind nonattainment. *Id.* at 19,671-72.

It is not true, as Petitioners contend, that EPA is obligated to collect data in response to a § 7426(b) petition. *See* Pet'r Br. 59-60; Pet'r-Int. at 28-29. EPA does have authority under 42 U.S.C. § 7414(a)(1) to require specific sources to report data to EPA. But this takes time, particularly for this number of sources. Under the Paperwork Reduction Act, EPA has to obtain approval from the Office of Management and Budget before issuing information collection requests to 10 or more members of the public. 84 Fed. Reg. at 56084. Such a task would be at odds with EPA's 60-day deadline, not to mention this Court's precedent under *New York I*.

Nor can petitioners import into a § 7426(b) petition any information collection duty EPA may have in the *separate* implementation plan context. *See* Pet'r Br. 56, 60-61 (quoting *North Carolina v. EPA*, 531 F.3d at 920, which concerns EPA's duty to collect data in the *implementation plan* context); Pet'r-Int. Br. 32-33. EPA may indeed have to collect source data to complete its federal implementation plans under the 2008 standard, now that the Determination Rule has been vacated.[8] But any such duty is independent of § 7426(b). Indeed, as explained further in Section III.C, Petitioners have, and have exercised, other remedies for any alleged deficiency in EPA's implementation plans. *Infra* 44-45.

[8] But this is not necessarily true. EPA could conclude under Step One, for example, that the downwind areas no longer have attainment or maintenance problems or that data is needed for only some sources because further regulation beyond that would constitute over-control under *EME Homer City II*. 795 F.3d at 124, 127-28.

The bottom line is that any "paucity of data" in the § 7426(b) context is the petitioning state's responsibility to correct. *See* Pet'r Br. 60.

C. A state's burden to support its claim of Good Neighbor violations does not otherwise contravene the Act.

Other petitioner-side arguments regarding the burden all boil down to the same misunderstanding of the relationship between the Good Neighbor Provision and § 7426(b).

EPA's use of the four-step framework here does not deprive § 7426(b) of independent meaning. Pet'r-Int. Br. 22-24. Again, the "substantive inquiry for decision is the same in both" Good Neighbor and § 7426(b) proceedings. *Appalachian Power*, 249 F.3d at 1047, 1049. The only substantive distinction is that the Good Neighbor Provision broadly applies to "any source or other type of emissions activity," whereas § 7426(b) asks whether a particular "major source or group of stationary sources" violates the Good Neighbor Provision. *Id.* at 1049. This Court held in *Appalachian Power* that EPA reasonably reads this to mean only that the sources potentially subject to § 7426(b) are subsets of the larger category of emission activities covered by the Good Neighbor Provision. *Id.* at 1050.

Therefore, if EPA's use of the four-step framework in assessing New York's petition was a "policy choice," Pet'r-Int. Br. 25-26, it was a reasonable one. Nothing about § 7426(b) suggests that EPA must invent an entirely new method for determining Good Neighbor obligations when reviewing a state petition.

Nor does EPA's Step Three analysis conflate its obligations under § 7426(b) with its duties under § 7426(c). *See* Pet'r Br. 63-64; Pet'r-Int. Br. 24-27. Section 7426(c) only applies if a violation is found under subsection (b). If so, subsection (c) requires violating sources to cease operation within three months unless EPA chooses to instead impose emission limits. 42 U.S.C. § 7426(c)(2). Under Petitioners' theory, every source that passes Step Two—i.e., resides in a state that "contributes" over a threshold amount, like 1%, to a downwind air quality problem—would be subject to the draconian requirements of § 7426(c). But this is not how it works.

If a violation were found under § 7426(b) and EPA were to impose an emission limit under subsection (c), it would mean, for example, imposing an enforceable emission rate or an emission cap across multiple sources. This step is akin to Step Four of the Good Neighbor framework, where EPA imposes an emission limit (such as a state-wide emission cap) after the precise Good Neighbor obligation is determined. 84 Fed. Reg. at 56,087. It is not the same thing as allocating responsibility for downwind air quality problems under Step Three. *Contra* Pet'r-Int. Br. 25-26. Step Three is where EPA determines which of the many upwind sources' emissions are "significant" such that they can be said to be violating the Good Neighbor Provision at all. EPA does this by assessing what emission amounts at what sources can be eliminated cost-effectively. 84 Fed. Reg. at 56,087; *EME Homer City I*, 572 U.S. at 519.

II. EPA Reasonably Denied the Petition in its Entirety Because New York Failed to Provide a Valid Basis to Conclude Under Step Three of the Good Neighbor Framework That The Named Sources "Contribute Significantly" or In What Amounts.

Another fundamental problem throughout Petitioners' brief is that it alternately ignores and mischaracterizes the actual basis of the Denial. *E.g.*, Pet'r Br. 22, 26-30, 49-54, 56, 58. In reality, EPA reasonably denied the petition at Step Three because EPA concluded that the State failed to meet its burden. 84 Fed. Reg. at 56,082-92.

EPA used the same Step Three test it has used in other Good Neighbor analyses. 84 Fed. Reg. at 56,088. That is, EPA considered whether emissions from the named sources are "significant" by asking whether and in what amounts emissions from those sources could be cost-effectively eliminated. *Id.* at 56,082, 56,088. Neither this test nor its use in the § 7426(b) context are new. *See*, *e.g.*, *EME Homer City I*, 572 U.S. at 519 (affirming use of cost-effectiveness thresholds to determine which emissions are "significant"); *Appalachian Power*, 249 F.3d at 1049-50 (affirming use of state-wide cost-effectiveness thresholds to assess specific sources subject to § 7426(b) petition); *see also* 83 Fed. Reg. 16,064, 16,070 (Apr. 13, 2018) (using four-step framework to evaluate § 7426(b) petition); 83 Fed. Reg. 50,444, 50,453 (Oct. 5, 2018) (same).

As EPA explained, it has "historically" made Step Three determinations by considering factors like the types and cost of control strategies available at the upwind sources, the amount of potential NO_X reductions from such strategies, and the

potential resulting downwind improvement in ozone levels. 84 Fed. Reg. at 56,082-83. The point is to identify a level of upwind control that maximizes downwind benefit most cost-effectively. *Id.* at 56,083. Because ozone behaves regionally, this often involves considering the total amount of potential NO_X reductions from a source category.[9] *E.g.*, *id.* at 56,083 n.79. EPA then evaluates how this would impact the upwind state's contribution to downwind ozone. *Id.*

The State did not provide EPA with any sort of analysis supporting a Step Three cost-effectiveness finding—not using "the cost and air quality factors that the EPA has generally relied on" and not using "any alternative analysis that would support a conclusion at step 3." *Id.* at 56,088. EPA did not demand any particular method. *Contra* Pet'r-Int. Br. 23-24. EPA asked whether the State supported a cost-effectiveness finding using *any* method. And EPA found the State did not.

Instead, the State blanketly asserted that every source in nine upwind states that emits over 400 tons of NO_X per year should be subject to a generic emission rate of 0.15 lb/mmBtu. 84 Fed. Reg. at 56,058, 56,088-90. This was insufficient. A facility's emissions are not necessarily "significant" under the Good Neighbor Provision simply because it emits NO_X above a certain quantity or rate. "Significance" depends on

[9] Total potential NO_X reductions are measured in tons. This is a different measurement than the potential emission *rate* at a facility. A source might emit at a higher than average rate but nonetheless contribute an insignificant amount of total emissions, depending on operation frequency.

which types of facilities *can* emit at a lower rate, and whether doing so would provide a meaningful downwind improvement in ozone levels as compared to cost of controls without, of course, constituting over-control. *Id.* at 56,065; *see also EME Homer City II*, 795 F.3d at 127-28.

The State did not say which of the 350 facilities can achieve the requested rate cost-effectively. Nor did it identify the point where imposing that rate would constitute over-control. Worse, it did not even attempt an analysis. It did not, for example, say what kind of controls are available at which sources, how much NO_X reduction was available, or how much downwind air quality would improve. 84 Fed. Reg. at 56,089. And, except for sources already regulated in the Update, the State did not make a case for any particular type of control at any particular type of facility. *Id.*

The closest the State came to supporting a cost-effectiveness determination was to argue that New York imposes a 0.15 lb/mmBtu emission rate at an alleged cost of $5,000 per ton under the statutory "reasonably available control technology" requirement. *Id.* at 56,089-90. But this did not cut it. "Reasonably available control technology" is the level of control required for *in-state* sources in states with nonattainment areas classified as Moderate or higher. 42 U.S.C. § 7511a(b)(2). Such requirements are not limited to emissions from sources that "contribute significantly," like Good Neighbor obligations. *See* 42 U.S.C. § 7410(a)(2)(D)(i). EPA was not told "why that is an appropriate level of control to use to define significant contribution[s]" from these sources. 84 Fed. Reg. at 56,090. And the State did not

show that the named sources *can* reduce their emissions for a comparable cost of $5,000 per ton. *Id.* The cost of achieving any particular rate depends on the available controls and can vary drastically from one type of source to another. So EPA had no reasonable basis to accept that number.

In short, New York's petition fundamentally failed to give EPA the information needed to make a Step Three finding for any of the 350 named sources. As for the possibility of an independent EPA analysis, EPA did not have information on hand sufficient to evaluate a great number of the sources (such as the 220 non-power plants) and "has not done so here." 84 Fed. Reg. at 56,086. This conclusion was reasonable.

A. EPA was not compelled to find that the requested emission limits would be cost-effective at the 350 named sources based on the information submitted.

Petitioners' assertion that EPA was mandated to grant the petition based on information the State submitted is simply wrong. *See* Pet'r Br. 51-54.

First, Petitioners rely on modeling from the Cross-State Update showing contributions from the nine upwind states. Pet'r Br. 52. Their commentary on this is both factually inaccurate and beside the point. EPA did assume under Step Two that the nine upwind states "contribute" to downwind nonattainment in the New York Metropolitan Area under the 2015 standard because modeling indicates they

contribute over 1% of the standard to that area.[10] 84 Fed. Reg. at 56,081-82. But this does not mean that the *particular sources'* contributions are "significant" or in what amounts. That is a determination made at Step Three. *See, e.g.*, *EME Homer City I*, 572 U.S. at 519.

Second, Petitioners invoke an appendix to the petition, which shows that some—but by no means all—of the power plants named in the petition emitted at a rate above 0.15 lb/mmBtu from 2014 through 2016, and data showing 2018 NO_X emission rates for approximately thirty sources. *See* Pet'r Br. 52-54 (citing State Petition, JA[___] at App. B, JA[33-44]; NYSDEC Detailed Comments, JA[EPA-HQ-OAR-2018-0170-0084] at JA[5-6], tbls. 1&2). This information did not get the State very far. Even under Petitioners' theory, the sources that emit below 0.15 lb/mmBtu cannot be said to violate the Good Neighbor Provision. 84 Fed. Reg. at 56,092. Additionally, the information in the appendix was already out of date, as the Update's cap and trade program was implemented in 2017. *Id.*

But there was an even more fundamental problem with this data. It did not show "either that the [named] units are able to achieve the 0.15 lb/mmBtu rate" or that "the measures necessary for the sources to operate at that rate would be cost-effective." *Id.* at 56,092. Even for sources that have controls installed, "the fact that a

[10] One percent of the 2008 standard was the threshold level used in the Cross-State Update, but EPA has not yet determined the threshold level for the 2015 standard. 84 Fed. Reg. at 56,082.

source may have higher emissions on a particular day is not determinative" of whether a source can achieve a lower rate. *Id.* A source might operate at a higher rate, for example, due to "engineering limitations" under certain operating conditions. *Id.*

Third, while it is true that some of the sources have "existing, already installed controls that EPA already deemed in the Update to be cost-effective," Pet'r Br. 53, 54, EPA "has already taken regulatory action to control emissions from" these sources. 84 Fed. Reg. at 56,092. Petitioners are referring to power plants that have already installed catalytic controls or that can install cheaper combustion controls such as low-NO_X burners. *See* Pet'r Br. 53, Pet'r-Int. Br. 36-38. In the Update, EPA did determine that such control options fell at or below the cost-effectiveness threshold. 81 Fed. Reg. at 74,540-42. EPA remedied violating emissions by establishing state-wide emission caps based on reductions achievable with cost-effective controls, assuming fleet-wide average rates. *Id.* at 74,550. That some of these sources may be emitting at a higher rate, or that some sources choose to buy emission allowances instead of installing new controls, is an expected *feature* rather than a flaw of the emission trading program. *See* 84 Fed. Reg. at 56,092. The trading remedy has been upheld as a reasonable means to address Good Neighbor obligations for those sources. *Wisconsin*, 938 F.3d at 329-35. To the extent petitioners suggest that combustion controls are cost-effective at non-power plants simply because EPA previously found them to be cost-effective at power plants, this inference is entirely unsupported in the record.

Lastly, EPA reasonably found that the State *did not* show what impact the requested emission rate would have on downwind air quality. *Contra* Pet'r Br. 54. The State merely listed projected NO_X emissions for each source and rates for some. State Petition, JA[___] at App. B, JA[33-44]. It gave no explanation of how the source can be controlled or the potential effect on ozone levels. To the extent the State submitted an analysis of upwind impact, it evaluated only the impact prior to any controls (i.e., a Step Two analysis), not potential downwind improvement from the requested emission rate. *Id.* at JA[11-14]).

B. Petitioners' other arguments mischaracterize the record.

Petitioners misquote EPA as saying that controls are not "necessary" because the Determination Rule concluded that EPA had already fully addressed Good Neighbor obligations under the 2008 standard. Pet'r Br. 50 (citing 84 Fed. Reg. at 56,089). What EPA actually said is that *the State* "has failed to demonstrate that it is necessary to implement" additional controls "[f]or the reasons explained in this section," which includes all the ways the petition failed. 84 Fed. Reg. at 56,089. To the extent the conclusion in the Determination Rule was one of those reasons, it was an aside that was redundant with the other reasons, as explained further in Section III.

Petitioners also misquote EPA as requiring the State to perform a Step Three analysis for a "range of sources" including sources not named in the petition. *See* Pet'r Br. 56 (citing 84 Fed Reg. at 56,076). The quoted language comes from EPA's *Step One* analysis, where EPA explained why it is important to model air quality in

future years, taking into account emissions from a "range of sources." 84 Fed. Reg. at 56,076. It was not part of the Step Three discussion. In Step Three, EPA noted that *one possible way* the State could have supported its petition was by "providing information on the relative cost of the available emissions reductions and whether they are less expensive than other reductions from other sources." 84 Fed. Reg. at 56,089. Whether or not the State wished to use that method, it still did not provide any alternative method to show that the requested emission rate limit would be cost-effective across the suite of 350 sources. *See id.*

III. Petitioners Improperly Raise Claims Not Raised Before EPA and Attempt to Make This Case About EPA's *Separate* Duty to Issue Good Neighbor Implementation Plans.

Rather than acknowledge the primary basis of the Denial—i.e., the State's insufficient petition—Petitioners focus on this Court's recent opinions in *Wisconsin* and *New York II*. Pet'r Br. 22, 26-30. They also allege the Denial is "premised on" EPA's regional implementation plans under the 2008 ozone standard that were reviewed in those cases and seek to use the State's § 7426(b) petition as a vehicle to force EPA to correct perceived deficiencies in its plans. *See, e.g.*, Pet'r Br. 22, 26-30, 59. This is all misdirection.

A. New objections based on *Wisconsin* and *New York II* are not properly before this Court.

"Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial

review." 42 U.S.C. § 7607(d)(7)(B). Exhaustion under § 7607(d)(7)(B) is not optional; it is a "mandatory" procedural requirement. *EME Homer City I*, 572 U.S. at 512.

Petitioners did not raise their arguments concerning *Wisconsin* or *New York II* in public comments. Therefore, they may not raise those claims here. They do not get a pass simply because they rely on cases that did not previously exist. If they believe they have grounds for "objection [that] arose after" the comment period that are "of central relevance to the outcome," their route is to file a petition for reconsideration demonstrating this. 42 U.S.C. §§ 7607(d)(1)(N), (d)(7)(B). Only after final EPA action on a reconsideration petition may petitioners seek judicial review of their new claims. *Utility Air Regulatory Grp. v. EPA*, 744 F.3d 741, 746-47 (D.C. Cir. 2014) (*UARG*). In this way, the Act "ensure[s] that the agency is given the first opportunity" to resolve a challenge and that "the court enjoys the benefit of the agency's expertise." *North Dakota v. EPA*, 730 F.3d 750, 770 (8th Cir. 2013) (internal quotations marks omitted).

B. Nevertheless, EPA's conclusion that the State failed to meet its burden was severable from any discussion potentially implicated by those cases.

While ignoring their own obligation to raise objections about *Wisconsin* or *New York II* first before EPA, Petitioners imply that EPA should have addressed these new opinions. Pet'r Br. 28. EPA did not have time. EPA was under a court-ordered deadline to act on the State's petition by September 20, 2019. Order of Sept. 5, 2019, *State of New York v. Wheeler*, No. 19-cv-3287 (S.D.N.Y.); *see also* 84 Fed. Reg. at 56,093

(Denial signed September 20, 2019). The *Wisconsin* decision came out just seven days prior to that. 938 F.3d 303. By that time, the Denial was already in the final stages of EPA's internal review process. EPA would have risked contempt of court if it had initiated a full-scale review. And EPA had no opportunity to address *New York II* at all. That opinion was issued on October 1—eleven days *after* EPA signed the Denial and after it had been sent to the Federal Register and was awaiting publication. *New York II*, 781 F. App'x 4; Office of Federal Register, Document Drafting Handbook §§ 8.6, 8.8 (describing publication process and timing), *available at* https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.

If EPA had been given an opportunity to respond to Petitioners' objections, EPA would have explained that the opinions themselves, the Denial's short discussion of *Wisconsin*, and the remaining context of the Denial all show that the impact of those opinions was minimal and not dispositive.

The upshot after *Wisconsin* and *New York II* is that EPA's Good Neighbor implementation plans for the 2008 ozone standard remain only partial and are on remand for EPA to complete the job. *Wisconsin* reviewed the Cross-State Update, which promulgated partial Good Neighbor federal implementation plans for power plants that had already installed pollution control systems. 938 F.3d at 313. The vast majority of this rule was upheld. That includes EPA's use of the cost-effectiveness threshold under Step Three, EPA's modeling method, and the Update's remedy for the sources assessed. *Id.* at 320-35. The Update was remanded only because it had

excluded assessment of other sources; so the Court concluded EPA had not attempted to require upwind states to fully "eliminate" Good Neighbor contributions by any relevant downwind attainment date. *Id.* at 313, 316.

New York II was a challenge to the Determination Rule, in which EPA had assessed the remaining upwind sources under the 2008 standard. 781 F. App'x at 5-6. After *Wisconsin*, EPA conceded the rule used a future analytical year under Step One that did not correlate to any relevant attainment date under the 2008 standard. *Id.* at 6. Accordingly, the Court was compelled to vacate the Determination Rule without much analysis. *Id.* at 6-7.

These cases are, at most, tangential to the basis for denial: the State's failure to support its allegations. EPA primarily discussed the Update and Determination Rule to explain the four-step framework, to account for pollution controls already on the books, and as sources of data that EPA could use to independently assess the State's claims. *E.g.*, 84 Fed. Reg. at 56,062, 56,064, 56,072, 56,082-83, 56,092. Most of this was upheld in *Wisconsin*. 938 F.3d at 320-35.

Moreover, EPA confirmed in a footnote added to the Denial after *Wisconsin* that it was denying the petition "because [the State] did not meet its burden" and that basis "is independent and severable from any portion of the denial based on the EPA's discretionary evaluation." 84 Fed. Reg. at 56,059 n.1. The footnote mentioned EPA's use of the 2023 modeling, the only portion of EPA's independent evaluation potentially affected by *Wisconsin*. *See id.* EPA obviously did not mention vacatur of

the Determination Rule; *New York II* had not yet been issued. But the footnote nonetheless indicates that EPA considered the State's failure to prove its claim to be a sufficient basis for Denial, regardless of any EPA independent assessment of pre-existing rulemakings or data. This footnote was far from "conclusory." *Contra* Pet'r Br. 28. It made explicit what was pervasive throughout the Denial. *See* 84 Fed. Reg. at 56,058-59, 56,082-93; *supra* 29-36.

C. Any consideration of prior rulemakings potentially affected by *Wisconsin* and *New York II* were not dispositive.

Petitioners point to two aspects of the Denial they claim were undermined by *Wisconsin* and *New York II*: (1) EPA's discussion of the remedy in the Cross-State Update and the conclusion in the Determination Rule that Good Neighbor obligations under the 2008 standard had been fully addressed, and (2) EPA's use of its pre-existing modeling projecting air quality for 2023. Pet'r Br. 22, 26-30.

To the extent portions of these objections were raised in comments, the Court still need not reach them here. They all relate to EPA's belt-and-suspenders attempt to see if it could support the State's allegations using information on hand, even though the State did not. Petitioners cannot overcome the State's burden problem based on EPA's voluntary assessment it was not required to conduct. *See New York I*, 852 F.2d at 578.

But EPA's assessment was nonetheless sound.

1. Petitioners overstate EPA's reliance on the Cross-State Update and the Determination Rule.

Petitioners wildly mischaracterize the Denial as "premised on" the adequacy of EPA's pre-existing implementation plans for the 2008 standard. *E.g.*, Pet'r Br. 22, 26, 28, 29-30.

With respect to the Cross-State Update, nearly every example Petitioners cite as showing that EPA "rel[ied] solely on" that rule, *see* Pet'r Br. 30, was an instance of EPA using the Update to explain the four-step Good Neighbor framework, the kinds of things that New York might have used to support its claims but did not, or what pre-existing pollution controls were already in place. *E.g.*, 84 Fed. Reg. at 56,083 n.80 (as example of four-step framework), 56,083 (as example of data EPA typically uses in Step Three), 56,087 (to show Step Three involves quantifying amount of upwind emissions that violate Good Neighbor Provision), 56,088 (noting EPA looks for same type of data in § 7426(b) petitions as it uses in implementation plans); 56,092 (noting pre-existing regulations for some of the same sources subject to State's petition). The Update was upheld in all of these respects. *Wisconsin*, 938 F.3d at 329-35.

As for EPA's discussion of the Determination Rule, what Petitioners allege to be error is a statement that appears in EPA's Step Three discussion concerning cost-effectiveness. Pet'r Br. 26 (quoting 84 Fed. Reg. at 56,089). In this discussion, EPA first explained that the State failed to support its petition and that the State's request for upwind sources to match New York's in-state controls is inconsistent with the

Act. *Id.* at 56,082-89. EPA then addressed the contention that the requested rate was necessary because EPA had not completely addressed Good Neighbor obligations under the 2008 standard. *Id.* at 56,089. EPA responded by noting the Determination Rule's conclusion that the remedy in the Update fully addressed Good Neighbor obligations under the 2008 standard. *Id.*

EPA's factual statement was true at the time of the Denial, which is what matters for judicial review. *See Fla. Power & Light*, 470 U.S. at 743-44. EPA concedes that the Determination Rule has since been vacated, and so the statement is no longer true. *New York II*, 781 F. App'x at 7. But even if post-hoc factual changes matter at all, the statement was not dispositive. Even if it were deleted entirely, the State still had all the other problems with its unsupported request for a uniform emission rate, which were all valid bases for denial. *See supra* 29-36.

Finally, Petitioners can point to nothing in the Denial suggesting that EPA's conclusion as to the 2015 standard was premised on determinations for the 2008 standard. Rather, EPA "den[ied] the petition as to all areas for the 2008 and 2015 [standard] at step 3" because the "material elements in the petition . . . are insufficient." 84 Fed. Reg. at 56,059.

2. EPA's use of the 2023 modeling was not implicated by *Wisconsin* or *New York II*.

Petitioners also misrepresent how EPA used its pre-existing 2023 air quality modeling. After determining that the State entirely failed to support a Step One

finding (that the downwind areas have a present and future air quality problem), EPA voluntarily used the modeling to see if it could support one. *See* 84 Fed. Reg. at 56,069-81. The modeling did partially support an air quality problem in one downwind area. *Id.* at 56,072. This is why EPA went on to assess and deny the petition under Step Three. *Id.* at 56,082. As explained in more detail in Section IV, *infra* 45-46, the Court therefore need not reach the Step One claims. Nevertheless, EPA's use of the 2023 modeling remains valid.

As for EPA's assessment of downwind areas under the 2015 standard, it was the 2023 modeling that showed that the New York Metropolitan Area has a future air quality problem. *Id.* at 56,072. The modeling is the reason the petition partially passed Step One, so any alleged error, *see* Pet'r Br. 28, was not harmful to Petitioners.

With respect to the 2008 standard, the reason EPA used the 2023 modeling was because it was "the best data currently available for the EPA to evaluate" future air quality problems under Step One. 84 Fed. Reg. at 56,074. The State had not submitted information indicating an air quality problem by its "Serious area attainment year of 2021" or any other future date. *Id.* And "EPA ha[d] no comparable data available for earlier analytic years." *Id.* So EPA used the modeling to do a quick check with information it had handy.

Petitioners assert that EPA could not use 2023 projections. They base this argument on *Wisconsin's* holding that Step One analyses in implementation plans must be assessed based on downwind attainment dates, and the fact that 2023 is not an

attainment date under the 2008 standard. Pet'r Br. 26-28; *see also* Pet'r-Int. Br. 20; *Wisconsin*, 938 F.3d at 313, 316. However, Petitioners again forget the burden. Unlike in the federal implementation plans at issue in *Wisconsin*, EPA was not here required to independently assess *any* year under Step One. *New York I*, 852 F.2d at 578.

EPA's reference to the modeling was not intended to be a rigorous, affirmative Step One analysis. It was merely a quick check using the "best available data" on *any* future year. 84 Fed. Reg. at 56,074. EPA concedes that, in responding to comments, it noted its pre-*Wisconsin* position that the analytic year in a Step One analysis need not match downwind attainment dates. *See* 84 Fed. Reg. at 56,074-75. If the comments had been made post-*Wisconsin*, EPA would have responded differently. But EPA's statement was merely a secondary consideration to its other basis for using the modeling. And it was not the only independent data EPA considered. For example, EPA considered the measured ambient air quality (also called "design values") in New York for 2016 through 2018, which showed attainment of the 2008 standard. *Id.* at 56,080; *contra* Pet'r Br. 29. None of it supported the State's claims.

D. Section 7426(b) is not a mechanism to force revised or new federal implementation plans.

What Petitioners really seek are new federal implementation plans for the upwind states. They argue that EPA should do here what they allege EPA should have done in the Cross-State Update and Determination Rule. *See*, *e.g.*, Pet'r Br. 56,

59-61; Pet'r-Int. Br. 23, 30, 32-33. That is an improper use the § 7426(b) petition process.

EPA is now working to complete the Good Neighbor implementation plans for the 2008 ozone standard that are now on remand after *Wisconsin* and *New York II*. It is true that EPA has work to do. This may include collecting data and conducting new analyses. But Petitioners have already had their day in court with respect to the 2008 implementation plans. *See New York II*, 781 F. App'x 4. The remand proceeding is the proper place for addressing any deficiencies, not this case. And the scope of any responsibity EPA may have to issue 2015 implementation plans is still uncertain because EPA is still reviewing state plans. Absent a *meritorious* § 7426(b) petition, the Court should let the implementation plan process play out.

IV. The Court Need Not Reach the Step One Claims, But In Any Case, The State Also Failed to Support a Finding That Certain Downwind Areas Will Have Air Quality Problems.

The various quibbles over aspects of EPA's Step One Analysis, *see* Pet'r Br. 31-49; Pet'r-Int. at 13-21, are not dispositive, and the Court need not reach them. This is because EPA only partially rejected the petition at Step One. 84 Fed. Reg. at 56,058-59. The New York Metropolitan Area passed the Step One test with respect to the 2015 standard. *Id.* EPA went on to review the claims as to all 350 sources under Step Three and did not give any of the sources greater or lesser weight based on the Step One analysis. *See id.* at 56,082-93.

Nevertheless, EPA's partial Step One denial was reasonable and supported by precedent and the record. Chautauqua County attained the 2008 standard by its attainment date and was designated attainment for the 2015 standard. *Id.* at 56,079; 83 Fed. Reg. 49,492 (Oct. 2, 2018); 82 Fed. Reg. 54,232, 54,264 (Nov. 16, 2017). Additionally, EPA's data showed that average ambient air quality in the area for 2015-2017 and 2016-2018 was below both standards. 84 Fed. Reg. at 56,079. As to the New York Metropolitan Area under the 2008 standard, EPA's data showed that all New York monitors with design values for 2016-2018 were attaining. *Id.* at 56,080. And EPA's modeling showed that all monitoring sites in the area will attain and maintain the 2008 standard without further upwind controls. *Id.*

Petitioners' and Petitioner-Intervenors' Step One theories, which they have also advanced in other cases, lack merit. Citizen Pet'r Br. 9-14, *Maryland v. EPA*, No. 18-1285; Pet'r-Int. Br. 27-38, *Maryland v. EPA*, No. 18-1285.

A. The substantive analysis is the same under the Good Neighbor Provision and § 7426(b), including consideration of future air quality under Step One.

Petitioners argue that § 7426(b) requires EPA to consider only present air quality and not future air quality. Pet'r Br. 31, 35-39; Pet'r-Int. Br. 14-17, 19. This is wrong under established precedent.

"[T]he substantive inquiry for decision is the same in both [Good Neighbor Provision and § 7426(b)] proceedings." *Appalachian Power*, 249 F.3d at 1047 (internal quotation marks omitted). Therefore, if EPA can consider future air quality under the

Good Neighbor Provision, then it reasonably considers it in reviewing a § 7426(b) petition. And it can. This Court has held that EPA reasonably interprets the Good Neighbor Provision to implicate upwind sources that presently—*and* at the relevant future date will—contribute to nonattainment. 531 F.3d at 913–14; *Wisconsin*, 938 F.3d at 321-22 (same). This is because the Good Neighbor Provision instructs states to prohibit emissions "which will" significantly contribute to downwind air quality problems. 42 U.S.C. § 7410(a)(2)(D)(i).

The language in § 7426 does not undermine this logic. Under § 7426(b), EPA considers whether the source "emits or would emit" a pollutant "in violation of the prohibition of" the Good Neighbor Provision. 42 U.S.C. § 7426(b). That, in turn, instructs states to prohibit emissions "which will" significantly contribute to downwind air quality problems. *Id.* § 7410(a)(2)(D)(i). "[E]mits or would emit" simply means that EPA can assess either a source's current *or* its anticipated future emission levels. *Contra* Pet'r Br. 36; Pet'r-Int Br. 14, 16. Either way, the operative question is first whether there is a Good Neighbor violation. This is true only if there is an anticipated future air quality problem. 83 Fed. Reg. at 50,449. Moreover, the requirement that emission limits under § 7426(c) be implemented "as expeditiously as practicable" only applies if a violation has been found and EPA exercises its option to impose emission limits in lieu of shutdown. *See* 42 U.S.C. § 7426(c); *contra* Pet'r Br. 37.

Petitioners cite dicta from *North Carolina* stating that its holding did "not mean that EPA may ignore present-day violations for which there may be another remedy, such as relief pursuant to § [7426]." 531 F.3d at 914. However, that language is not controlling or persuasive here. The Court did not then have occasion to interpret § 7426(b) or its incorporation of the Good Neighbor Provision. *Appalachian Power* is more on point for the substantive relationship between the two provisions. *See* 249 F.3d at 1047. Nor did the *North Carolina* court have occasion to consider the rule against over-control, which restricts upwind regulation if downwind areas will attain without it. *See EME Homer City II*, 795 F.3d at 128. Considering how air quality will change in the time before downwind states have to impose controls is more consistent with this edict.

Petitioners are wrong to suggest that EPA did not also consider evidence of present air quality. *See* Pet'r Br. 32-34, 36. The average measured air quality showed current attainment in Chautauqua County. 84 Fed. Reg. at 56,079-80. And all monitors in New York are attaining the 2008 standard. *Id.* Petitioners' argument that EPA should have used later air quality measurements, Pet'r Br. 33-34, makes no sense. EPA used the latest data available at the time of the Denial. *See e.g.*, 84 Fed. Reg. at 56,079-80; Ozone Monitoring Site Design Values for 2008-2017 and for the year 2023, JA[EPA-HQ-OAR-2018-0170-0048].

EPA's consideration of future air quality was not a change in policy. *Contra* Pet'r Br. 38-39. Petitioners' historical reference point is a 2011 decision granting New

Jersey's § 7426(b) petition. 76 Fed. Reg. 19,662, 19,671. There, EPA found that a single upwind source violated the Good Neighbor Provision under the SO_2 standard. *Id.* The methodology EPA used was meant to address the "specific allegations" in that petition; it "d[id] not speak to how EPA might evaluate petitions that raise different interstate transport issues," like ozone. *Id.* at 19,666-67, 19,671. But the purpose was the same: to assess both present and likely future downwind air quality.

There, like here, EPA explained that it would consider modeling (which the petitioner there provided) of a source's current and anticipated emissions. *Id.* at 19,671. But SO_2, unlike ozone, is emitted directly into the air, and SO_2 nonattainment is typically caused by one or a few sources near the air quality problem. *See*, *e.g.*, 80 Fed. Reg. 51,052, 51,057 (Aug. 21, 2015). EPA did not there need complex modeling to predict future air quality levels because SO_2 emissions from the named source resulted in air concentrations *seven times* the standard. 76 Fed. Reg. at 19,672. So EPA was able to conclude that the source single-handedly contributed significantly to nonattainment in New Jersey and "would" continue to do so absent emission controls. *Id.*

B. While EPA was not required to consider downwind air quality in Connecticut, that state is also projected to attain the 2008 standard by 2023.

Petitioners' assertion that EPA should have considered downwind air quality at monitors in Connecticut is a non sequitur. *See* Pet'r Br. 40-43; Pet'r-Int. Br. 17-18. EPA's 2023 modeling showed that *all monitoring sites* in the New York Metropolitan

Area—including those in Connecticut—failed Step One because they will attain and maintain the 2008 standard without further controls. 84 Fed. Reg. at 56,080.

In any event, EPA reasonably interpreted its § 7426 authority under *Chevron* step two "as limited to states and political subdivisions seeking to address interstate transport of pollution impacting downwind receptors within their geographical borders." *Id.* This makes imminent sense here. One reason that parts of New York and Connecticut are in the same nonattainment area is because *New York* is contributing to air quality problems in *Connecticut*. Response to Comments, JA[EPA-HQ-OAR-2018-0170-0128] at JA[32]. Petitioners do not explain why an upwind contributor to Connecticut should be able to avoid its own obligations by seeking emission reductions from other upwind contributors.

EPA's interpretation is also reasonable in light of the text and context of § 7426(b). While the Act authorizes "any state" to file a petition, it does not say that the petition may seek a finding that sources are contributing to another downwind state. 42 U.S.C. § 7426(b). Indeed, § 7426 as a whole is directed toward moderating interstate transport concerns between affected states and upwind contributors. *E.g.* 42 U.S.C. § 7426(a) (requiring notification to *affected* downwind states).

C. EPA's modeling method is conservative and has been repeatedly upheld.

Petitioners' arguments concerning the validity of EPA's modeling, Pet'r Br. 43-49, are unfounded. Petitioners' complaint is that the model accounts for emission

reductions that EPA anticipates will occur, despite no enforceable requirement for the reduction. Pet'r Br. 43-47. EPA's modeling method is reasonably based on what EPA believes will *actually* occur and has been repeatedly upheld. *Wisconsin*, 938 F.3d at 327-28; *EME Homer City II*, 795 F.3d at 135.

The effect of Petitioners' objection is that they ask EPA to assume that all facilities will emit as much as legally allowed and to model the worst-case scenario. This is unreasonable on its face. If EPA knows of plans for facilities to retire or switch fuels, then EPA reasonably takes that into account. *See*, *e.g.*, 84 Fed. Reg. at 56,077, 56,079; Response to Comments, JA[___] at JA[37-39]. Even with these assumptions, EPA's method is conservative. For example, by 2017, power plant emissions were already 7 percent below the emission budgets set in the Update and dropped another 8 percent in 2018. Response to Comments, JA[___] at JA[38]. EPA's prediction for 2023 (10 percent below 2017 budget levels) have nearly already been met. *Id.*

Petitioners did not raise their arguments regarding other provisions of the Act in comments, *see* Pet'r Br. at 46-47, and have therefore waived them. 42 U.S.C. § 7607(d)(7)(B); *EME Homer City I*, 572 U.S. at 512.

Lastly, EPA's use of its modeling is consistent with its technical guidance, even in light of alternative modeling prepared by the Ozone Transport Commission. *Contra* Pet'r Br. 48-49. EPA's guidance requires only that it consider the weight of the evidence, not that it blindly accept alternative modeling. Modeling Guidance for

Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze, JA[EPA-HQ-OAR-2018-0170-0033] at JA[179-80]. EPA assessed the alternative modeling to determine why it deviated from EPA's own[11] and concluded that the alternate model was less reliable because it had a higher error rate and a lower correlation to measured air quality. Response to Comments, JA[___] at JA[13-17]. This was reasonable.

V. Petitioners' Remedy Arguments Are Improper.

The only issue presented for review is whether EPA arbitrarily denied the State's petition. It did not. But in the event the Court answers yes, then the proper remedy is remand. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Petitioners' request or a deadline on top of remand goes too far. Absent "substantial justification," courts may not dictate remand's "time dimension." *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45 (1978). There is no "substantial justification" here. EPA acted in good faith and issued the Denial by the Court-ordered deadline that *the State agreed to*. *See* Order of Sept. 5, 2019, *State of New York v. EPA*, No. 19-cv-3287. These facts are far removed from the persistent, years-long delays that have prompted this Court to set deadlines elsewhere. *See, e.g.*, *Pub.*

[11] EPA's modeling uses the Comprehensive Air Quality Model with Extensions (CAMx) platform, while the Ozone Transport Commission modeling used the Community Multiscale Air Quality (CMAQ) system. Response to Comments, JA[___] at JA[13-14].

Citizen Health Research Grp. v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987) (agency failed to act for years despite earlier court-ordered deadline).

Moreover, deadlines remedy *delayed* actions, not arbitrary ones. The Court is not presented with an unreasonable delay claim here. If unreasonable delay were to occur—an event that remains hypothetical and is therefore non-justiciable, U.S. Const. Art. III—Petitioners can petition this Court for mandamus or sue in district court. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). But this Court cannot prematurely consider Petitioners' timeliness concerns now.

CONCLUSION

For these reasons, the petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the word limitation in this Court's Order of December 20, 2019 because it contains 12,999 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Circuit Handbook of Practice and Internal Procedures Section IX.A.7, according to the count of Microsoft Word.

DATED: February 27, 2020

s/ *Samara M. Spence*
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I electronically filed the above brief using the Court's CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Samara M. Spence*
Counsel for Respondent

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM CONTENTS

Except for the following, all applicable Statutes and Code of Federal Regulations are contained in Petitioners' Addendum.

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart X. Provisions for Implementation of 8–Hour Ozone National Ambient Air Quality Standard (Refs & Annos)

40 C.F.R. § 51.918

§ 51.918 Can any SIP planning requirements be suspended in 8–hour ozone nonattainment areas that have air quality data that meets the NAAQS?

Effective: January 30, 2006
Currentness

Upon a determination by EPA that an area designated nonattainment for the 8–hour ozone NAAQS has attained the standard, the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 8–hour ozone NAAQS shall be suspended until such time as: the area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the 8–hour ozone NAAQS.

Credits
[70 FR 71702, Nov. 29, 2005]

AUTHORITY: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Current through February 20, 2020; 85 FR 9698.

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