ORAL ARGUMENT NOT YET SCHEDULED

Case No. 17-1273

United States Court of Appeals for the District of Columbia Circuit

STATE OF NEW YORK, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

PETITION FOR REVIEW OF FINAL ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OPENING PROOF BRIEF FOR PETITIONERS

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Dated: May 15, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), and updating the certificate filed January 26, 2018 (Doc. No. 1714964), the undersigned counsel of record certifies as follows:

A. Parties

Petitioners

The following parties appear as petitioners: State of New York, State of Connecticut, State of Delaware, State of Maryland, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, State of Rhode Island and State of Vermont (Petitioners).

Respondents

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

Intervenors

The following parties have been permitted to intervene in support of respondents: the Utility Air Regulatory Group (UARG) (Doc. No.

1722115), State of Ohio, State of Indiana, State of Michigan, State of West Virginia, and Kentucky Energy and Environment Cabinet and State of North Carolina (Doc. No. 1721411).

Amici

The following parties have sought to appear as amicus curiae in support of Petitioners: Sierra Club and the Chesapeake Bay Foundation (Doc. No. 1729608). The following party has sought to appear as amicus curiae in support of respondents: State of Tennessee (Doc. No. 1723170).

B. Ruling Under Review

Petitioners seek review of the final agency action by EPA entitled: "Response to December 9, 2013, Clean Air Act Section 176A Petition from Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont," 82 Fed. Reg. 51,238 (Nov. 3, 2017).

C. Related Cases

The final agency action at issue in this proceeding has not been previously reviewed in this or any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

Act	Clean Air Act
EPA	United States Environmental Protection Agency
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
JA	Joint Appendix
NAAQS	National ambient air quality standards
NOx	Oxides of nitrogen
RACT	Reasonably available control technology
VOCs	Volatile organic compounds

PRELIMINARY STATEMENT

This case challenges the Environmental Protection Agency's (EPA) refusal to use a unique statutory tool designed by Congress specifically to remedy the persistent problem of interstate ozone pollution. In 1990, Congress created the Ozone Transport Region (Transport Region), which imposes pollution control requirements on member states. While Congress designated certain states as members, it provided a mechanism for EPA to expand the initial Transport Region to other states that the agency found to be contributing significant amounts of ozone or its precursors (together, ozone pollution) to the same regional ozone problem.

Petitioners here asked EPA to expand the Transport Region to include certain upwind states based on compelling scientific data demonstrating that upwind sources in those states are transporting ozone pollution into the Transport Region in quantities so large that states in the Transport Region are unable to timely comply with mandatory federal air quality standards for ozone. Without disputing the fact or effects of this interstate transport of ozone pollution, EPA declined to expand the Transport Region on the ground that other provisions of

the Clean Air Act would solve the problem. However, EPA provided no reasonable basis to justify the belief that other provisions will be an effective solution standing alone within the timeframes mandated by the Act.

Rather, EPA has persistently failed to use these other provisions to help downwind states fully address transported ozone pollution, as is required of EPA under the Act. When EPA has acted—for example in its Good Neighbor Provision rulemakings—it has offered admittedly partial remedies after years of delay. Although EPA touts the purported utility of section 126 petitions—a process to address source-specific upwind emissions on an *ad hoc* basis—EPA does not identify any instance where it used that process to reduce ozone problems in the Transport Region. By asking this Court to defer to its judgment that other measures will more effectively mitigate ongoing violations of ozone standards, EPA asks this Court to turn a blind eye to the context and long history of its insufficient use of those very measures to resolve the problem of interstate ozone pollution.

In denying petitioners' application to expand the Transport Region, EPA offered no adequate explanation for whether or how it will now use

those Clean Air Act provisions in the future to enable Transport Region states to timely meet federal air quality standards. Indeed, recent history demonstrates that EPA under the current administration will likely be even *less* effective and timely at enforcing these other provisions. Since early 2017, EPA has started scaling back its Clean Air Act programs, retreating from the vigorous enforcement of existing standards and imposition of new measures necessary to redress longstanding violations of federal clean-air standards. Without articulating any reasonable basis to believe that the agency's implementation of other statutory provisions will effectively resolve the undisputed harms from transported ozone pollution, EPA's justification for declining to expand the Transport Region was arbitrary and capricious, and contrary to its duties under the Clean Air Act. This Court should accordingly vacate the denial and remand the petition to EPA for adequate consideration consistent with its responsibilities under the Act.

JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction under section 307(b) of the Act to review a challenge to the Administrator's final action denying a petition under section 176A of the Act, 42 U.S.C. § 7506a, where such

action is based on a "nationally applicable" determination or a determination of "nationwide scope and effect," as declared by the Administrator. 42 U.S.C. § 7607(b). Petitioners challenge EPA's final action, "Response to December 9, 2013, Clean Air Act Section 176A Petition from Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont," 82 Fed. Reg. 51,238 (Nov. 3, 2017) (Petition Denial), which denied a petition seeking expansion of the Transport Region under section 176A of the Act. The Petition Denial specified that the final action was "nationally applicable" and of "nationwide scope and effect." 82 Fed. Reg. at 51,250. Petitioners filed a petition for review of EPA's Petition Denial in this Court within the sixty-day period provided in 42 U.S.C. § 7607(b).

ISSUES PRESENTED

1. Whether, in refusing to grant the petition and implement a measure to reduce the upwind pollution that prevents states in the Transport Region from timely attaining the federal ozone air quality standards, EPA was entitled to rely on a policy preference for other statutory measures that have proven unable to fully remediate the problem.

2. Whether EPA's failure to meaningfully address the data presented and the technical merits of the petition, along with an erroneous and belated assertion that analytical gaps existed in the information presented, renders its denial arbitrary and capricious.

3. Whether EPA rationally refused to consider the inequitable allocation of costs between upwind and downwind states, when EPA has interpreted substantially similar operative language in a related provision to include such consideration.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions and legislative history excerpts are in the Addendum filed herewith.

STATEMENT OF THE CASE

STATUTORY BACKGROUND

A. National Ambient Air Quality Standards for Ozone

Under the Clean Air Act's cooperative federalism framework, EPA establishes and periodically revises national ambient air quality standards (NAAQS), which establish maximum allowable ambient air concentrations for certain pollutants that endanger human health and welfare. 42 U.S.C. §§ 7409(b)(1), 7407. States are primarily responsible

for ensuring that air quality meets the NAAQS by set deadlines, with EPA providing a federal "backstop". *Id.* §§ 7407(a), 7511(a).

Ozone, a pollutant regulated under the Act, forms when other pollutants known as precursors—specifically, oxides of nitrogen (NOx) and volatile organic compounds (VOCs)—react in the presence of sunlight. *See* 81 Fed. Reg. 74,504, 74,513 (Oct. 26, 2016). EPA has found significant negative health effects in individuals exposed to elevated levels of ozone, such as asthma, bronchitis, heart disease, and emphysema. 80 Fed. Reg. 65,292, 65,302-11 (Oct. 26, 2015). Exposure to ozone has also been linked to premature mortality. *Id.* Children, the elderly, and those with existing lung diseases, such as asthma, are more vulnerable to ozone's harmful effects. *Id.*

Pursuant to the Act, EPA promulgated a revised NAAQS for ozone in 2008 of 75 parts per billion (ppb). 73 Fed. Reg. 16,436 (Mar. 27, 2008) (2008 ozone NAAQS). In 2015, based on updated scientific information about the health risks of ozone at lower concentrations, EPA revised the ozone NAAQS, setting the standard at 70 ppb. 80 Fed. Reg. at 65,292

(effective Dec. 28, 2015) (2015 ozone NAAQS). Both standards remain in effect. [1]

The Act requires each state to meet the ozone NAAQS "as expeditiously as practicable," but no later than by specified attainment deadlines depending on the "classification" of an area. 42 U.S.C. § 7511(a)(1) & (b)(1). The initial attainment deadlines under the 2008 ozone NAAQS for "marginal," "moderate," and "serious" nonattainment areas are July 20, 2015; July 20, 2018; and July 20, 2021, respectively. 80 Fed. Reg. 12,264, 12,268 (Mar. 6, 2015).

B. Interstate Transport of Ozone Pollution

Many states have problems attaining and maintaining the ozone NAAQS due, in significant part, to emissions transported from sources in other states. The formation and transport of ozone pollution occurs on a regional scale over much of the eastern United States, with ozone and its precursors traveling across state lines, sometimes hundreds of miles from their sources. 81 Fed. Reg. at 74,514. Ozone precursors from multiple

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[1] Attainment of the levels set for the 2008 and 2015 ozone NAAQS is based on a three-consecutive-year average of the annual fourth-highest daily maximum eight-hour level measured at a given air quality monitoring site (a "monitor").

upwind sources in multiple upwind states are transported into the air of multiple downwind states, complicating the ability of downwind states to attain or maintain the ozone NAAQS. *Id.* When a state's pollution problems are caused in part by emissions from upwind states, the downwind state must regulate its own emission sources more stringently to compensate; even then, some downwind areas are unable to attain healthy air quality.

Congress has long recognized that ozone pollution is regional in nature and that control of out-of-state pollution is essential for downwind states to attain or maintain the ozone NAAQS. A central aim of the Clean Air Act is to address interstate pollution by ensuring that upwind states take sufficient steps to reduce the pollution they send to downwind states. Absent the Act's protections, upwind states would have little incentive to implement costly controls to reduce emissions whose harms are principally felt downwind. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014).

Congress has enacted several complementary mechanisms in the Act to address interstate transport of air pollution: (1) the Good Neighbor Provision in section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I);

(2) the enforcement mechanism in section 126, 42 U.S.C. § 7426; and (3) the ozone transport region provisions of sections 176A and 184, 42 U.S.C. §§ 7506a & 7511c.

1. The Good Neighbor Provision

Under section 110, all states must submit state implementation plans (SIPs) for EPA's approval within three years of any new or revised NAAQS that provide for the attainment and maintenance of the NAAQS through control programs directed to sources of the relevant pollutants. 42 U.S.C. § 7410. Section 110(a)(2)(D)(i)(I), the "Good Neighbor Provision," requires that each SIP contain adequate provisions prohibiting pollution that either contributes significantly to another state's nonattainment with the NAAQS, or interferes with another state's maintenance of the NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i)(I). EPA must approve or disapprove a SIP within twelve months. 42 U.S.C. § 7410(k)(2). If a state fails to submit a SIP that satisfies the Good Neighbor Provision, EPA must remedy that inadequacy by issuing a compliant federal implementation plan (FIP) within two years. *Id.* § 7410(c)(1).

2. Section 126 Enforcement

Under section 126 of the Act, any state "may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section [i.e., the Good Neighbor Provision]."[2] Section 126(b) requires that the Administrator, after a public hearing, act on the petition within sixty days. 42 U.S.C. § 7426(b). EPA's grant of a section 126 petition requires that the sources identified must either cease operation within three months, or comply with emissions limitations and schedules established by EPA to come into compliance with the Good Neighbor Provision as expeditiously as practicable, but not later than three years. 42 U.S.C. § 7426(c).

3. Ozone Transport Region Provisions

As originally enacted, the Good Neighbor Provision and section 126 proved inadequate to address systemic interstate ozone transport issues,

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[2] The statute's cross-reference to section 7410(a)(2)(D)(ii) is a scrivener's error; the correct cross-reference is to section 7410(a)(2)(D)(i), the Good Neighbor Provision. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001).

particularly in the Northeast and Mid-Atlantic States. Congress amended the Clean Air Act in 1990, adding section 184 to create the Transport Region comprised of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the District of Columbia/Northern Virginia Consolidated Metropolitan Statistical Area. 42 U.S.C. §§ 7511c(a)-(b).

The ozone transport region provisions in the Act include substantive and procedural mechanisms to control ozone pollution above and beyond the Act's other transport tools. Ozone-reducing measures under EPA's Good Neighbor Provision rules have predominantly entailed NOx reductions from power plants; and the section 126 process is an *ad hoc* remedy to address source-specific problems. In contrast, states within the Transport Region must implement a number of mandatory measures to control ozone precursor emissions from a wide array of in-state sources. Each Transport Region state must issue a SIP imposing requirements to adopt "reasonably available control technologies" (RACT) statewide, not just in nonattainment areas, on a host of sources of VOC and NOx emissions. Transport Region states must implement enhanced vehicle inspection and maintenance programs that are not

required in other states. *Id.* § 7511c(b). And all major stationary sources in each Transport Region state must meet the requirements for major stationary sources located in moderate ozone nonattainment areas, such as new source review permitting. *Id.* §§ 7511a, 7511c(b)(2). When a state is added to the Transport Region pursuant to section 176A, it must submit a SIP revision within nine months implementing the additional control requirements. *Id.* § 7511c(b)(1).

In addition to these substantive requirements, the ozone transport region provisions establish a unique framework for collaboration among the states on additional control measures. Each Transport Region state is part of a Transport Commission comprised of state and EPA designees. The Commission designs mitigation strategies for interstate pollution and develops recommendations for "additional control measures" that are "necessary to bring any area in such region into attainment" by relevant deadlines. *Id.* §§ 7506a, 7511c(c)(1). The Commission may recommend to the EPA Administrator control measures for all or parts of the region. *Id.* § 7511c(c)(1). The Administrator must approve such measures within nine months, or specify why disapproved measures are "not necessary" to achieve attainment by the statutory deadlines, or why other "equal or

more effective actions" are available "to conform the disapproved portion of the recommendations" to applicable requirements. *Id.* § 7511c(c)(4).

Congress also recognized that the measures undertaken within the Transport Region as initially established in section 184, in addition to controls implemented under the Good Neighbor Provision or section 126, might insufficiently protect the region's air quality in the future as circumstances change. In section 176A, Congress thus authorized EPA to expand the Transport Region, either on its own initiative or in response to a petition from the governor of any state, when the Administrator "has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the [ozone NAAQS] in the transport region." 42 U.S.C. § 7506a(a)(1). The Administrator must approve or disapprove a petition under section 176A within eighteen months and "establish appropriate proceedings for public participation regarding such petitions . . . including notice and comment." *Id.* § 7506a(a).

HISTORY OF REGULATION

A. EPA's Failure to Sufficiently Address Interstate Transport of Ozone Pollution

Despite the above provisions, EPA has failed to require upwind states to eliminate their significant contribution of ozone pollution to downwind states to allow downwind states to timely attain the ozone NAAQS. As a result, many of the Transport Region states did not meet their July 20, 2015, "marginal" attainment deadline for the 2008 ozone NAAQS, and areas within those states were reclassified to "moderate" nonattainment. *See, e.g.*, 81 Fed. Reg. 26,697, 26,710 (May 4, 2016) (effective June 3, 2016).

The downwind states' inability to attain the 2008 ozone NAAQS is due in large part to EPA's incomplete and untimely enforcement of the Good Neighbor Provision and section 126. In particular, EPA has failed to timely disapprove SIPs that do not comply with the Good Neighbor Provision, and failed to issue compliant FIPs within the Act's two-year deadline.

For example, EPA failed to disapprove the Good Neighbor Provision SIP submission for the 2008 ozone NAAQS from Kentucky, a state upwind to several Transport Region states, until compelled by a federal

district court.[3] EPA's belated disapproval in 2013[4] obligated it to promulgate a compliant FIP within two years, *see* 42 U.S.C. § 7410(c)(1)—by April 2015—but EPA missed that deadline and now faces a court-ordered deadline to promulgate a FIP for Kentucky by June 30, 2018.[5]

Similarly, on July 13, 2015, EPA published notice that twenty-four other states, including several upwind of the Transport Region, had failed to submit SIPs that satisfied their Good Neighbor Provision obligations for the 2008 ozone NAAQS. *See* 80 Fed. Reg. 39,961 (Jul. 13, 2015) (effective Aug. 12, 2015). EPA was required to promulgate compliant FIPs within two years—by August 12, 2017—but also missed this deadline. Petitioners New York and Connecticut are currently engaged in litigation against EPA for missing these FIP deadlines.[6]

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[3] *WildEarth Guardians v. Jackson*, Case No. 11-cv-5651 (N.D. Cal. Dec. 7, 2012).

[4] 78 Fed. Reg. 14,681 (Mar. 7, 2013) (effective Apr. 8, 2013).

[5] *Sierra Club v. Pruitt*, Case No. 15-cv-04328, Order Re Partial Consent Decree and Summary Judgment (N.D. Cal. May 23, 2017).

[6] *New York v. Pruitt*, Case No. 18-cv-00406-JGK (S.D.N.Y).

Even when EPA has promulgated FIPs, it has admittedly not provided a complete remedy to the problem of interstate ozone pollution. Since 1998, EPA has engaged in four regional rulemakings concerning interstate ozone pollution. Most recently, EPA finalized the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (effective Dec. 27, 2016) (2016 Transport Rule), which promulgated partial Good Neighbor Provision FIPs for twenty-two eastern states. *Id.* at 74,521. But EPA acknowledged that these FIPs do not fully address these states' failure to satisfy the Good Neighbor Provision. *Id.* at 74,506, 74,521-22. And EPA further determined that, even when all the emission reductions required by the rule are in place, both attainment and maintenance problems at downwind monitors, including in states within the Transport Region, may remain. *Id.* at 74,520, 74,521-22.

EPA also has a history of inaction and delay concerning section 126 petitions brought by states. For example, although the Act requires EPA to respond to section 126 petitions within sixty days, *see* 42 U.S.C. § 7426(b), EPA failed to respond to a petition filed by Connecticut on June

1, 2016, for *nearly two years*—and only when compelled by court order.[7] EPA has also missed the sixty-day deadline on four section 126 petitions from Delaware and a section 126 petition from Maryland, forcing Maryland to file suit in September 2017 to compel action by EPA.[8] And shortly before the filing of this brief, EPA delayed acting on a pending section 126 petition filed by New York. 83 Fed. Reg. 21,909 (May 11, 2018).

B. EPA's Denial of the 176A Petition

While the Transport Region's control requirements have reduced emissions from sources within the Transport Region, attainment of the 2008 ozone NAAQS remains elusive for some of those states due in large part to the continued transport of ozone pollution from upwind states outside the Transport Region. Recent data show that sources in such upwind states contribute significantly to ozone levels in the Transport Region—sometimes substantially more than sources *within* the Transport Region. Petition Technical Support Document (EPA-HQ-OAR-

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[7] *Connecticut v. Pruitt*, Case No. 17-cv-00796 (D. Conn. Feb. 2, 2018).

[8] *Maryland v. Pruitt*, Case No. 17-cv-02873 (D. Md.).

2016-0596-0002) (Petition TSD) at 16-17, JA____-____; New York Testimony (EPA-HQ-OAR-2016-0596-0100) at 2, JA____. Notwithstanding the significant contributions of sources in upwind states outside of the Transport Region, only the Transport Region states have adopted a full suite of stringent, costly controls to reduce their emissions; while sources in upwind states outside of the Transport Region have continued operating sometimes without even the cheapest, most basic emission controls. New York Testimony at 2, JA____; Delaware Comments (EPA EPA-HQ-OAR-2016-0596-0105) at 4, JA___.

To redress this disparity and resulting public health harms in the Transport Region, in December 2013 the states of Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont submitted a section 176A petition (Petition) and supporting technical documentation to EPA seeking to expand the Transport Region to include Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and portions of Virginia not already in the Transport Region (Upwind States). The Petition demonstrated that the interstate transport of ozone pollution from the Upwind States significantly contributes to a violation of the 2008 ozone

NAAQS in the Transport Region. Petition TSD at 7-8, 31-21, JA___-___, ___-____.

EPA failed to act on the Petition for nearly two years. On April 6, 2016, the petitioning states sent EPA a letter requesting immediate action, Petitioning State Letter (EPA-HQ-OAR-2016-0596-0005) at 2, JA___. The states also noted that EPA's own 2016 Transport Rule modeling demonstrated continued contribution from Upwind States to nonattainment within the Transport Region, and also noted that interstate transport would impair the ability of states in the Transport Region to attain the new, more stringent 2015 ozone NAAQS. *Id.* at 3-4, JA___-____.

After litigation forced EPA to act,[9] EPA proposed denial in January 2017, more than three years after the Petition had been filed and well beyond EPA's eighteen-month deadline. *See* 82 Fed. Reg. 6,509 (Jan. 19, 2017) (Proposed Denial). EPA held a public hearing on its Proposed Denial on April 13, 2017. Petitioners submitted comments and documentation that further demonstrated the necessity and factual

[9] *New York v. McCarthy*, Case No. 16-cv-827 (S.D.N.Y.).

support for expanding the Transport Region, including: (1) confirmation that the Upwind States were significantly contributing to nonattainment of the 2008 ozone NAAQS in the Transport Region;[10] (2) estimates of significant control cost disparities in the Transport Region versus outside the Transport Region;[11] (3) examples of how the other transport control provisions, such as the Good Neighbor Provision and section 126, were not effectively reducing ozone transport for the 2008 ozone NAAQS;[12] and (4) information on projected problems that Transport Region states will

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[10] Multistate Comments (EPA-HQ-OAR-2016-0596-0106) at 4, JA____; Delaware Report by Archer (EPA-HQ-OAR-2016-0596-0121) at 2,4&7, JA___,____&____; Maryland Testimony (EPA-HQ-OAR-2016-0596-0119) at 2, JA____; Maryland Comments (EPA-HQ-OAR-2016-0596-0101) at 4, JA_____; New York Testimony at 2, JA_____; Delaware (Amirikian) Testimony (EPA-HQ-OAR-2016-0596-0120) at 1, JA____.

[11] Maryland Testimony at 3, JA_____; Maryland Comments at attach. 3, JA_____; Connecticut Comments (EPA-HQ-OAR-2016-0596-0041) at 2, JA_____. For example, Connecticut demonstrated the cost per ton of additional NOx reductions in non- Transport Region states was estimated at $500 to $1,200, but $10,000 to $40,000 in Connecticut.

[12] Maryland Testimony at 2, JA_____; Maryland Comments attach. at 1-3, JA_____; New York Testimony at 3, JA____; Delaware (Prettyman) Testimony (EPA-HQ-OAR-2016-0596-0128) at 3, JA_____; Delaware (Fees) Testimony (EPA-HQ-OAR-2016-0596-0122) at 2, JA_____; Delaware (Mirzakhalili) Testimony (EPA-HQ-OAR-2016-0596-0126) at 2, JA_____.

have attaining the 2015 ozone NAAQS if the Transport Region is not expanded.[13]

Nearly four years after the filing of the Petition, EPA finalized its denial. *See* 82 Fed. Reg. 51,238 (Nov. 3, 2017). EPA primarily grounded its denial on a preference for addressing ozone transport using other provisions of the Act—such as the Good Neighbor Provision and section 126—that purportedly offer a "more flexible and effective" remedy than expanding the Transport Region and provide for more "tailored" control of upwind emissions. EPA asserted that these other provisions have proven historically effective in reducing ozone transport. *See* 82 Fed. Reg. at 51,239, 51,241. EPA also stated that "analytical gaps" in the submissions supporting the Petition justified denial, even though EPA had not identified any such defect in its Proposed Denial and had thus not given petitioners the opportunity to provide any purportedly missing information or analysis. *See* 82 Fed. Reg. at 51,239, 51,247-49.

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[13] Maryland Testimony at 2, JA____; New York Testimony at 3, JA_____.

New York, Connecticut, Delaware, Maryland, Massachusetts, Pennsylvania, Rhode Island, and Vermont (collectively petitioners) now seek review of EPA's denial.

STANDARD OF REVIEW

EPA's Petition Denial should be set aside if this Court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). In evaluating a denial of a petition for agency action, a court assesses whether the "agency's decision is not supported by substantial evidence or the agency has made a clear error in judgment." *Flyers Rights Educ. Fund v. FAA*, 864 F.3d 738, 743 (D.C. Cir. 2017); 5 U.S.C. § 706(2)(A). The agency must provide a reasonable explanation for its denial and adequately explain the facts and policy concerns it relied on and whether these facts have some basis in the record. *Flyers Rights*, 864 F.3d at 743. In addition, "[w]here, as here, Congress has delegated to an administrative agency the critical task of assessing public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and

expose every step of its reasoning." *American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

SUMMARY OF ARGUMENT

I. EPA's denial of the Petition based on the purported effectiveness of other provisions of the Clean Air Act was an unlawful abdication of the agency's statutory obligations. EPA's denial ignores Congress's specific judgment that the unique tools available under the ozone transport region provisions of the Act should be used in tandem with, and not as alternatives to, other measures provided by the Clean Air Act, including the Good Neighbor Provision and the section 126 petition process. By declining to expand the Transport Region based solely on the availability of those other provisions, EPA improperly reads the Transport Region protections out of the statute.

EPA's Petition Denial was also arbitrary and capricious. The measures EPA cited as preferred alternatives to address interstate transport of ozone pollution have proven insufficient to remedy the problem. And in practice, EPA is playing a shell game, consistently avoiding effective and timely use of its statutory authorities by pointing to other tools—when, in fact, it also is not using those other tools to

eliminate upwind states' contribution to downwind nonattainment and remedy the harm to downwind states from interstate ozone transport. Indeed, the actual history of EPA's regulation in this area consists of a series of partial remedies, missed mandatory statutory deadlines, requiring litigation to force EPA action, and delaying and then denying petitions seeking specific ozone-reducing actions, citing a purported preference for the type of regional approach that EPA is now rejecting. EPA has thus left petitioners without an effective remedy to interstate transport of ozone pollution ten years after promulgation of the 2008 ozone NAAQS.

II. EPA's failure to evaluate the technical merits of the Petition was arbitrary and capricious. EPA refused to engage in anything more than cursory review of the Petition, improperly placing the burden on petitioners to submit further data to support their claims even though the petitioners had established that the statutory criteria for expansion of the Transport Region had been met, and that additional measures were necessary to address the serious problem of interstate ozone transport. EPA also relied on a belated assertion of nonexistent "analytical gaps" in the states' submissions. EPA improperly raised that

objection for the first time in its Petition Denial, when it was too late for petitioners to comment on the error in that rationale or to put information into the record to address EPA's concern. And EPA irrationally refused to consider the more stringent 2015 ozone NAAQS in denying the Petition, even as EPA considered other new information arising after the Petition was filed, and even though the development of the more stringent 2015 NAAQS is a critical fact supporting the need to expand the Transport Region.

III. EPA's refusal to consider the inequities of the current interstate transport situation was arbitrary and capricious. At present, far greater cost-per-ton requirements are borne by sources within the Transport Region than by sources in the Upwind States, whose emissions prevent Transport Region states from attaining the ozone NAAQS. Nothing in section 176A constrains EPA's authority to consider costs in determining whether an upwind state "contributes significantly" to downwind nonattainment such that it should be added to the Transport Region. Further, EPA's cramped reading of its authority to expand the Transport Region presents an unexplained conflict with its interpretation of

"significant contribution" under the Good Neighbor Provision, pursuant to which EPA does consider costs and equity among states.

STANDING

Petitioners—all of which are state signatories to the Petition—are injured by EPA's unlawful and arbitrary denial. "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing, particularly where Congress has expressly given states the right to challenge a federal agency's action. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). Here, the Act specifically provides for states to use the 176A petition process and for this Court to review an administrative denial of such a petition. *See* 42 U.S.C. §§ 7606a(a), 7607(b). EPA's denial of the Petition directly injures petitioners by denying a remedy for interstate ozone pollution that Congress intended to provide, thus saddling petitioners with persistent, ongoing violations of federal air quality standards.

A. Injuries to Quasi-Sovereign Interests

EPA's denial will result in greater air pollution for petitioners, harming public health and welfare. Response to Comments (EPA-HQ-OAR-2016-0596-0150) (RTC) at 10, JA_____; 81 Fed. Reg. at 74,504; 80

Fed. Reg. at 65,302-11. Petitioners are injured in their *parens patriae* capacity because their residents suffer the effects of elevated ozone levels, in significant part because of EPA's failure to fully control interstate transport of ozone pollution, including through expansion of the Transport Region.[14] *See, e.g.*, Maryland Comments at 2-3, JA___-___; Connecticut Comments at attach. 1 (Pino Letter), JA____; Multistate Comments at 2, JA____.

Petitioners also have a quasi-sovereign interest in preventing harm to the health of their plants and ecosystems. *Massachusetts*, 549 U.S., at 519-22. These natural resources are injured by elevated ozone levels created by EPA's failure to control interstate ozone pollution. *See* 81 Fed. Reg. at 74,514 ("In ecosystems, ozone exposure causes visible foliar injury, decreases plant growth, and affects ecosystem community composition.").

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[14] The ordinary presumption against *parens patriae* standing in suits against the United States does not apply when, as here, the States are not suing to *prevent* the application of a federal statute, but instead to vindicate the Congressional will by preventing an agency from violating a federal statute and harming state residents. *See Massachusetts*, 549 U.S. at 520 n.17.

B. Injuries to Proprietary Interests

EPA's Petition Denial also injures petitioners' proprietary interests. EPA's denial makes it more onerous for states in the Transport Region to attain and maintain the ozone NAAQS. Without the relief from out-of-state transported emissions that an expansion of the Transport Region would provide, petitioners will see increased regulatory burdens and will be forced to further reduce in-state emissions at greater costs than would be incurred through expanding the Transport Region. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (EPA action that makes it more onerous for state to address pollution causes injury sufficient for Article III standing). Due in significant part to transported air pollution from sources in the Upwind States, petitioners have struggled for years to attain the 2008 ozone NAAQS and, as EPA acknowledged in the 2016 Transport Rule, have borne an "inequitable burden" to reduce emissions before sources in the Upwind States have reduced their emissions at far less cost. *See* 81 Fed. Reg. at 74,516.

Petitioners also suffer injury from the harms to their residents' health from elevated ozone levels. Ozone exposure increases rates of death, hospitalization, emergency room visits, and medication use,

leading to additional expenditures by state-administered healthcare programs. *See e.g.*, Maryland Comments at 2, JA___ (estimating cost savings in Maryland); Connecticut Comments at attach. 1 at 1, JA____. Ozone-related health problems will also affect petitioners' interests as employers and as administrators of schools, and will substantially harm petitioners' economies. These direct, proprietary injuries provide additional grounds for petitioners' standing. *See West Virginia*, 362 F.3d at 868.

ARGUMENT

POINT I

EPA IMPROPERLY DENIED THE PETITION BASED ON THE ASSERTED EFFECTIVENESS OF OTHER PROVISIONS THAT HAVE PROVEN INSUFFICIENT TO REMEDY THE PROBLEM OF INTERSTATE OZONE POLLUTION

EPA denied the petition on the ground that "other CAA provisions" will "effective[ly]. . . address[ ] any remaining air quality problems for the 2008 ozone NAAQS identified by the petitioners." 82 Fed. Reg. at 51,239. But EPA may not rely on the asserted effectiveness of these other Clean Air Act provisions unless it has a reasonable basis to believe that, without expansion of the Transport Region, these other provisions alone will resolve the problem of interstate ozone pollution that Congress intended

to address when it created the Transport Region. Without such a reasonable basis, EPA's refusal to expand the Transport Region unlawfully disregards Congress's intent to arm EPA and downwind states with a full array of tools to address the longstanding and complex problem of ozone pollution transport. The history and language of the Clean Air Act demonstrate that Congress intended other Clean Air Act provisions to be used in tandem with—not in place of—the distinct, tailored tools available under the Transport Region provisions. The record is unequivocal that the other provisions cited by EPA have proven insufficient, standing alone, to fully address the problem.

A. EPA May Not Rely on Other Statutory Provisions to Decline to Expand the Transport Region Without a Reasonable Basis to Believe That These Other Provisions Will Effectively Resolve Significant Contributions to Ozone NAAQS Violations.

EPA does not dispute that the scientific understanding of ozone transport and the regional nature of the ozone pollution problem have changed since initial membership of the Transport Region was set in 1990. Science now shows that ozone develops and travels over longer geographic distances than was understood in 1990, and that the current Transport Region does not encompass the extent of the ozone pollution

transport problem. Multistate Comments at 3, JA____; Delaware (Amirikian) Testimony at 1, JA____. Recent modeling demonstrates that sources in states upwind of the Transport Region contribute substantially, and sometimes more, to ozone levels within the Transport Region than sources in the Transport Region. New York Testimony at 2, JA_____. EPA also does not dispute that the Petition met the statutory prerequisite for expanding the Transport Region: emissions from the Upwind States "significantly contribute[] to a violation" of a NAAQS in the Transport Region. *See infra* Point II.A.

Congress created a mechanism for expanding the Transport Region for precisely this set of circumstances. EPA nonetheless denied the Petition based on a sweeping view of its own discretion to include or exclude states from the Transport Region. But EPA's discretion is nowhere near as unfettered as it contends here. As the purpose and history of the ozone transport region provisions show, EPA may not decline an expansion based solely on a preference to rely on other provisions absent a reasonable basis to believe that these other provisions will effectively, on their own, redress interstate ozone pollution.

Where Congress gives an agency discretion to act, the agency's exercise of that discretion must be consistent with the governing statute. *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6-7 (D.C. Cir. 1987) (remanding agency denial of rulemaking petition where record showed agency ignored "the source of its delegated power"); *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (upholding EPA denial of petition for rulemaking only upon finding that the "reasons given are consistent with the agency's delegated authority and supported by the record"). Language allowing the EPA Administrator to exercise his judgment "is not a roving license to ignore" the statute, but "a direction to exercise discretion within defined statutory limits." *See Massachusetts*, 549 U.S. at 533.

The fact that the Clean Air Act contains various statutory provisions regulating interstate air pollution is not a legitimate basis for denying the Petition. Congress intended to control interstate ozone pollution transport through a variety of complementary instruments. Congress's creation of a specific *ozone* transport region demonstrates particular concern with transported ozone pollution, and its intent for EPA to address that problem with a program specifically tailored to

reduce ozone pollution. EPA is wrong to characterize the Act's other provisions as more "tailored." *See, e.g.*, 82 Fed. Reg. at 51,242. The Transport Region is the remedy most narrowly tailored to the specific problem of transported ozone pollution.

In the 1990 amendments to the Clean Air Act, Congress not only strengthened the Good Neighbor Provision, which applies to a broad range of pollutants, but also created the Transport Region and its expansion mechanism to address the lack of sufficient progress in reducing ozone transport under the Good Neighbor Provision and associated enforcement under section 126. *See* Clean Air Act Amendments of 1990 § 110(a)(2)(D), Pub. L. No. 101-549, 104 Stat. 2399, 2404, 2419-2420, 2448-2450; *see* S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3407, 3434, 3437. As the Senate Report stated, the Transport Region is "one important" tool to address the ozone problem as part of a comprehensive "combination of control measures on national, regional and local levels[.]" 1990 U.S.C.C.A.N. at 3437.

EPA's position that it can reject expansion of the Transport Region solely because of the availability of the Good Neighbor Provision and section 126 conflicts with Congress's considered judgment that the

Transport Region provisions should supplement those other tools, which Congress did not find sufficient by themselves to eliminate regional ozone nonattainment problems. *See Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-27 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) (agency exceeded statutory discretion in refusing to regulate farmworker sanitation facilities based on "preference" for state regulation of facilities despite Congressional preference for federal regulation).

EPA's position also does not square with Congress's selected trigger for expansion. When the statutory criteria for expansion of the Transport Region is met—when upwind states are "significantly contribut[ing]" to violations—it means that states in the Transport Region experience ozone concentrations above the level EPA has deemed safe, and are unable to timely comply with the NAAQS due to insufficiently controlled ozone pollution from upwind states. A petitioner will thus only be able to establish the statutory standard when the combination of tools already employed by EPA—including the agency's mandatory obligations under the Good Neighbor Provision and other sections of the Act—requires supplementation. Within this framework, it makes little sense for EPA

to deny a petition simply because of a preference for other statutory sections that have not, on their own, allowed for compliance with the NAAQS by the statutory deadlines, and that were always intended to be used alongside the Transport Region's distinct tools.

B. EPA's Denial of the Petition Was Arbitrary and Capricious Because No Reasonable Basis Supports Its Claim that Other Programs Will Effectively Resolve the Problem of Interstate Ozone Transport into the Transport Region.

EPA asserts that its refusal to expand the Transport Region is justified because "states and EPA have historically and effectively reduced ozone transport using other authorities." 82 Fed. Reg. at 51,239. But EPA acknowledges that these other authorities have not enabled downwind states to attain the NAAQS within the deadlines set by Congress. *See* 42 U.S.C. § 7511; *see North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008) (EPA must act consistently with NAAQS attainment deadlines). EPA likewise fails to articulate any reasonable basis to believe that these authorities will enable future expeditious attainment of the NAAQS, particularly given the agency's own persistent failure to effectively apply these authorities to halt the problem of interstate ozone pollution. EPA has failed to employ "reasoned decisionmaking in rejecting the petition" and irrationally denied

petitioners—ten years after the promulgation of the 2008 NAAQS—an essential remedy to fully address the persistent problem of interstate ozone transport. *See Flyers Rights*, 864 F.3d at 743.

1. It is undisputed that Transport Region states continue to have problems attaining and maintaining the 2008 ozone NAAQS due to transported ozone pollution from the Upwind States.

EPA's claim that other authorities have been historically effective at resolving interstate transport of ozone pollution into the Transport Region is belied by the facts. Although ozone pollution has declined within the Transport Region, many of the states in the Transport Region continue to have nonattainment or maintenance problems due to ozone pollution from Upwind States.

Both the original data supporting the Petition and EPA's 2016 Transport Rule modeling demonstrate Upwind States' continuing significant contribution to nonattainment in downwind Transport Region states. The initial 2013 Petition detailed the scores of ozone monitors within the Transport Region expected to continue to show nonattainment, and showed how, in many cases, over half of the nonattainment problem was due to Upwind States' emissions. Petition TSD at 5-7, JA___-____.

Petitioners' subsequent 2017 submissions, using EPA's own more recent modeling data, demonstrated that the problem largely remains unresolved. For example, the 2016 Transport Rule modeling showed that approximately 14 percent of New York's ozone levels at the Staten Island air quality monitor were attributable to emissions sources in Upwind States. *See* Final CSAPR Update Design Values and Contributions, (EPA-HQ-OAR-2016-0596-0152), JA____; *see also* New York Testimony at 2, JA____. That modeling also demonstrated Upwind States' significant contribution to ozone pollution in Connecticut, Maryland, and Delaware. *Id.* (Upwind States contribute 8 percent of the ozone levels at Westport, Connecticut monitor); Sierra Club Comments (EPA-HQ-OAR-2016-0596-0108) at 4, JA____ (Maryland receives 18 ppb from Virginia, 11 ppb from Ohio, 9 ppb from North Carolina, and 6 ppb from West Virginia); Delaware Report at 3, JA____ (two Upwind States together contribute over 9 percent of Delaware's ozone—more than Delaware itself). Although EPA disagreed in its denial with the degree of transport in some instances, RTC at 4, JA___, EPA did not dispute that certain Upwind States continue to affect air quality in certain Transport Region

states that are in nonattainment with ozone NAAQS. 82 Fed. Reg. at 51,245.

As a result of transported ozone pollution, many Transport Region states were unable to attain the 2008 ozone NAAQS by the deadlines. For example, the New York City metropolitan area was reclassified to "moderate" nonattainment of the 2008 ozone NAAQS, effective on June 3, 2016. 81 Fed. Reg. at 26,710. This reclassification required New York and Connecticut to submit a SIP demonstrating how they would attain the 2008 ozone NAAQS of 75 ppb by the statutory deadline of July 20, 2018. *See* 80 Fed. Reg. 12,264 (Mar. 6, 2015) (effective Apr. 6, 2015). However, 2016 Transport Rule modeling data through 2017 indicated that New York and Connecticut will not attain the 2008 ozone NAAQS by the statutory deadline. 81 Fed. Reg. at 74,533.

Thus, nearly a decade after the 2008 ozone NAAQS were promulgated, interstate transport remains an unresolved problem for states within the Transport Region. Further, EPA has already determined in the 2015 ozone NAAQS that even more stringent ozone standards—70 ppb rather than 75 ppb—are actually necessary to protect human health. Yet when EPA and the states should be preparing to meet

the more stringent 2015 NAAQS, EPA has failed to use the tools available to ensure compliance with the 2008 NAAQS.

2. EPA's denial rested on the purported effectiveness of other statutory provisions that EPA itself recognized were partial remedies and that EPA has failed to meaningfully use.

The provisions that EPA asserts are sufficiently effective at addressing interstate ozone transport have not resolved the problem. The history of EPA's use of these provisions is one of partial remedies. EPA may not properly rely on partial solutions designed as first steps—such as the 2016 Transport Rule—to decline to expand the Transport Region, particularly given that EPA has consistently missed statutory deadlines to implement even these initial steps, and largely only after litigation. Nor can EPA rely on source-specific measures—like section 126 petitions—that have been ineffective because EPA itself has delayed and obstructed their usage.

a. EPA admits that the 2016 Transport Rule was only a partial remedy for ozone transport.

EPA's Petition Denial relied heavily on ozone pollution reduction measures imposed via the 2016 Transport Rule, which partially addressed emissions from multiple upwind states under the Good Neighbor Provision. However, EPA repeatedly acknowledged that the

rule was only a *partial* remedy to interstate transport of ozone pollution. 81 Fed. Reg. at 74,506, 74,521-22; Connecticut Comments at 3, JA____. Aside from a single state, the 2016 Transport Rule did not fully address *any* Upwind State's good-neighbor obligation with respect to the 2008 ozone NAAQS. 81 Fed. Reg. at 74,552 (final emission budgets "represent a partial solution for these states' good neighbor obligations[s] with respect to the 2008 ozone NAAQS.").

Indeed, the modeling for the 2016 Transport Rule projected that certain states in the Transport Region would remain in nonattainment well past their statutory attainment deadlines, large part because of interstate ozone transport from the Upwind States. *Id.* at 74,533; New York Testimony at 1, JA____. Nonetheless, the 2016 Transport Rule did not commit EPA or Upwind States to make the necessary further reductions to allow downwind states to achieve the 2008 ozone NAAQS by the applicable deadlines. EPA addressed only emission reductions achievable by the 2017 ozone season for the July 2018 moderate attainment deadline, and no measures achievable in subsequent timeframes that would, for example, affect compliance with the July 2021

serious attainment deadline to which several petitioners are or will be subject.

In its Petition Denial, EPA acknowledges that the 2016 Transport Rule was only a "first step" that does not "fully address" the obligation of upwind states to reduce their emissions. 82 Fed. Reg. at 51,243. Thus, it was irrational for EPA to rely predominantly on this incomplete "first step" in denying the more comprehensive measure Congress intended to address the problem of interstate ozone pollution.

b. EPA has failed to timely disapprove SIPs or issue compliant FIPs to address interstate transport.

In implementing the Good Neighbor Provision, EPA has failed to timely take the mandatory actions on SIPs and FIPs necessary to make the provision fully effective. EPA flatly mischaracterizes its own regulatory history in asserting that it "consistently and repeatedly used its authority . . . to approve state plans [SIPs] for reducing ozone transport or to promulgate FIPs to specifically focus on the sources of ozone transport within and outside the [Transport Region]." 82 Fed. Reg. at 51,245. The actual history comprises persistent inaction and unjustified delays by EPA.

For example, in 2015, EPA issued a finding that twenty-four states—including six of the nine Upwind States—had failed to submit compliant Good Neighbor Provision SIPs. *See* 80 Fed. Reg. at 39,961. EPA then missed the statutory deadline to promulgate FIPs fully addressing these states' Good Neighbor Provision obligations. To date, EPA has, by its own admission, failed to fully satisfy this obligation, and New York and Connecticut are currently engaged in litigation to bring about EPA's belated FIP promulgation with respect to five upwind states. *See supra* at 15n.6.

Similarly, EPA had to be sued twice to take action on Kentucky's inadequate Good Neighbor Provision SIP for the 2008 ozone NAAQS. EPA first failed to meet its deadline under 42 U.S.C. § 7410(k) to approve or disapprove Kentucky's SIP, and only disapproved the SIP in 2013 under court order. *See supra* at 15n.3; *see also* 78 Fed. Reg. at 14,681. EPA compounded its over two-and-a-half-year delay by missing its two-year deadline under 42 U.S.C. § 7410(c)(1) to promulgate a FIP for Kentucky. EPA is now under a court-ordered deadline of June 30, 2018—ten years after promulgation of the 2008 ozone NAAQS—to promulgate

a FIP fully addressing Kentucky's Good Neighbor Provision obligations for that ozone standard. *See supra* at 15n.5.

EPA's recent actions with respect to Kentucky further undermine its assertion that the SIP/FIP process will resolve interstate ozone pollution. Rather than comply with its court-ordered obligation to promulgate a FIP for Kentucky, EPA on April 18, 2018 proposed to approve a revised SIP submitted by Kentucky. The Kentucky SIP proposes no further emission reductions beyond implementation of the 2016 Transport Rule are necessary for Kentucky to comply with its Good Neighbor Provision obligations by *2023*, five years after the 2018 attainment deadline for "moderate" nonattainment areas and two years after the 2021 attainment deadline for "serious" nonattainment areas. *See* 83 Fed. Reg. 17,123 (Apr. 18, 2018). EPA's proposed approval of the Kentucky SIP suggests that EPA is unlikely to require any further emissions reductions in any Upwind States, and also indicates that EPA is unlikely to provide a complete remedy for the interstate transport of ozone pollution that will allow petitioners to meet their statutory attainment deadlines.

EPA's history of missed deadlines and incomplete remedies—context that its Petition Denial fails even to acknowledge—contradicts its contention that its actions on SIPs and FIPs under the Good Neighbor Provision will adequately address the problem of interstate ozone pollution. EPA's reliance on the purported effectiveness of the SIP/FIP process is misplaced and thus arbitrary and capricious. *See City of Kansas City v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (agency decision "cannot survive review" when based on factual premise contradicted by the record).

c. EPA cannot properly rely on the asserted effectiveness of the section 126 petition process given its pervasive history of delaying and denying such petitions.

EPA's history with section 126 petitions is similarly plagued by consistent tardiness and denials, which EPA also failed to acknowledge. For example, when EPA finally denied the Petition in November 2017, citing section 126 petitions as a more appropriate remedy, 82 Fed. Reg. at 51,242, several 126 petitions were pending before it. EPA's action on Connecticut's pending section 126 petition was long past due and the subject of active deadline enforcement litigation filed in May 2017. Yet EPA made no mention of its missed deadline or pending litigation in its

Petition Denial.[15] Similarly, EPA still has not acted to resolve Delaware and Maryland's section 126 petitions, all of which are long overdue.

EPA failed to reconcile its lengthy and unlawful delays with its assertion that the section 126 process will expeditiously redress interstate ozone transport. Nor has EPA identified a single instance where it successfully used a section 126 petition to reduce transport of ozone pollution into the Transport Region. EPA's reliance on 126 petitions as an "effective" mechanism for addressing interstate transport of ozone pollution simply lacks any record support.

d. EPA's suggestion that "additional rules" weigh against Transport Region expansion is unexplained and irrational, particularly given EPA's own recent rollbacks of ozone-reducing regulations.

In addition to the Good Neighbor Provision and section 126 petitions, EPA asserts—without any analysis—that other "additional rules" also exist that more effectively reduce ozone levels than do the Transport Region provisions. 82 Fed. Reg. at 51,244. But EPA has failed

[15] EPA subsequently denied the petition on April 13, 2018, in response to a court-ordered deadline. *Connecticut v. Pruitt*, No. 3:17-cv-00796, Ruling on Motions for Summary Judgment and Motion Concerning Remedy, at 6-7 (D. Conn. Feb. 2, 2018), ECF No. 52.

to adequately identify these rules or analyze their effect. This Court, however, has required agencies denying rulemaking petitions to concretely articulate their reasoning. *See Flyers Rights*, 864 F.3d at 743; *see also Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Gesturing at other regulations does not satisfy EPA's obligation to explain how they might reduce the interstate transport of ozone pollution into the Transport Region.

EPA's reliance on other additional environmental regulations is particularly arbitrary given that, at the time of its Petition Denial, EPA under the current administration had begun to roll back some of the preexisting rules that reduce ozone pollution—a fact the agency does not acknowledge.[16] The Petition Denial nowhere reconciles its rosy

[16] EPA has proposed to repeal a rule regulating NOx emissions from glider trucks (heavy duty diesel trucks constructed from a new body assembly mated to an older engine and transmission)—*see* 82 Fed. Reg. 53,442 (Nov. 16, 2017)—which unregulated are projected to increase NOx emissions by approximately 300,000 tons annually in 2025. *See* "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2," Response to Comments for Joint Rulemaking (EPA-420-R-16-901), at 1875-76 (Aug. 2016), *available at* www.regulations.gov. EPA is also considering

projections of reduced ozone precursors with EPA's recent, significant deregulatory activity.[17] And the broader context here—where EPA is engaging in parallel deregulatory tactics at odds with any assertedly good-faith efforts to reduce ozone pollution—suggests a need for enhanced scrutiny of EPA's claims that it is entitled to deference from this Court in addressing a problem that has not been resolved after decades of insufficient action.

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rescinding 2016 Control Techniques Guidelines for the Oil and Natural Gas Industry—*see* 83 Fed. Reg. 10,478 (Mar. 9, 2018)—which are estimated to reduce VOC emissions by 80,000 tons annually. 81 Fed. Reg. 74,798 (Oct. 27, 2016).

[17] Indeed, even more rollbacks of air quality regulations may be imminent: in EPA's proposed denial of the Petition, the agency had relied heavily on rules providing for stationary source emission reductions, such as New Source Performance Standards, a Regional Haze Rule, and other programs for particulate matter and sulfur dioxide emissions reductions. *See* 82 Fed. Reg. at 6,519-20. In the final Petition Denial, EPA conspicuously omitted these programs. *Compare* 82 Fed. Reg. at 51,244 *with* 82 Fed. Reg. 6,519-20. Regardless of EPA's intentions, EPA fails to explain how it expects the same degree of reductions of VOCs and NOx emissions as in its Proposed Denial when it is no longer comfortable referring to all of the same rules on which it had previously relied.

3. EPA mischaracterizes the nature and effectiveness of the distinct remedies for interstate ozone transport provided by the Act's transport region provisions.

In addition to exaggerating or misstating the effectiveness of other statutory mechanisms to reduce interstate ozone transport, EPA also failed to properly analyze the critical tools available only under the ozone transport region provisions.

EPA failed to acknowledge that expanding the Transport Region would not interfere with the other measures that EPA could adopt to reduce interstate transport. In other words, EPA did not face any choice between alternative protections. To the contrary, as Congress intended, EPA should embrace multiple statutory tools in tandem—including more vigorous enforcement of the Good Neighbor Provision and expansion of the Transport Region. S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. at 3437.

EPA also mischaracterizes and understates the nature of the remedies available under the transport region provisions. Among the chief benefits is the swift imposition of uniform regional emission controls in section 184 of the Act, including enhanced motor vehicle inspection

and maintenance programs and RACT on all major sources of VOCs[18] and NOx. *See* 42 U.S.C. § 7411c(b). Delaware (Pettingill) Testimony (EPA-HQ-OAR-2016-0596-0127) at 1, JA___; Maryland Testimony at 1-2, JA____; Maryland Comments at 4-5, JA____. These measures must be included in a new Transport Region member's SIP within nine months of inclusion in the region, thus ensuring expeditious emissions reductions. *Id.* EPA ignored this benefit in denying the Petition, wrongly finding that use of the Good Neighbor Provision "on its face provides a faster timeframe for implementation of interstate transport requirements for a new NAAQS." 82 Fed. Reg. at 51,248. In fact, the Good Neighbor Provision provides *less expeditious* remedies because states are allowed *three years* to submit SIPs after promulgation or revision of a NAAQS. 42 U.S.C. § 7410(a)(1). And EPA's actual experience implementing the Good Neighbor Provision shows that the purportedly "faster" remedies are, in

[18] EPA's Petition Denial ignores VOC transport almost entirely, despite Congress's judgment that interstate transport of all ozone precursors contributes to attainment and maintenance problems in downwind states and despite demonstrations in the record that reducing emissions of VOCs, in conjunction with NOx emissions, in Upwind States would reduce ozone pollution levels in the Transport Region. Petition TSD at 18-21, JA___-_____; Delaware Report at 7-9, JA___-___.

practice, extensively delayed: Good Neighbor Provision SIPs and FIPs for the 2008 ozone NAAQS are still overdue ten years after the NAAQS were promulgated.

EPA's dismissal of Transport Region expansion as limited to VOC emissions and ineffective in achieving reductions in NOx emissions is also irrational. 82 Fed. Reg. at 51,246-46. All major stationary sources within the Transport Region are required to comply with the same requirements as a major source in a moderate nonattainment area. 42 U.S.C. § 7511c(b)(2); Delaware Comments at 6-7, JA___. Those include the nonattainment new source review and "reasonable further progress" requirements, both of which consider NOx emissions and require NOx control through RACT. *See, e.g.*, 42 U.S.C. § 7511a(b)(1)(A) (requiring SIPs to show reasonable further progress by reducing baseline emissions, which may include NOx, and requiring application of new source review to major stationary sources); *id.* § 7511a(b) & 7511a(a)(2)(C) (requiring for moderate nonattainment areas that SIPs require permits for construction and operation of new or modified major stationary sources that comply with new source review); Delaware (Pettingill) Testimony at 1-3, JA____.

EPA further errs in failing to give any meaningful consideration to the Transport Region provisions that provide for collaboration among Transport Region states through the Transport Commission. 42 U.S.C. § 7506a(b). Indeed, the Transport Region members have already effectively used the state-driven approach enabled by the Commission to implement measures reducing ozone pollution transport in the Transport Region. Delaware (Fees) Testimony at 1, JA____; New York Testimony at 1&3, JA___&___; Petition TSD at 24, JA_____ (discussing Ozone Transport Commission NOx Memorandum). By focusing exclusively on the Good Neighbor Provision and section 126, EPA rejects a framework that would allow new avenues for interstate collaboration, in favor of a piecemeal approach that has regularly required federal intervention, oversight, and backstopping, not to mention extensive delays.

4. The decisions on which EPA relies are inapposite and did not involve agencies relying on solutions that had proven incomplete.

In asserting that it has broad discretion to deny the Petition based on the statutory measures it has referenced, EPA cites two decisions from this Court affirming denials of petitions for rulemaking. *See Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008), and *WildEarth*

Guardians v. EPA, 751 F.3d at 651. Neither case is apposite. In *Defenders of Wildlife*, the petitioners sought a speed restriction on boats by the National Marine Fisheries Service to protect right whales, but the court found the NMFS had discretion to instead focus its resources on a "more comprehensive strategy" to protect the whales. *Id.* And in *WildEarth Guardians*, the court endorsed EPA's decision not to list a particular category of stationary sources in light of the agency's decision to first dedicate its limited resources towards promulgation of standards for larger, more polluting source categories. 751 F.3d at 653-54.

In each case, the Court deferred to the agency's decision to devote scarce resources to other solutions that the agency reasonably believed were better approaches. But here, the record and historical context of EPA's approach show that the other statutory measures on which EPA now exclusively relies have proven insufficient to fully remedy the regional ozone problem. And whereas the cases cited by EPA did not involve ongoing violations of law, this case involves an agency's failure to fully address interstate ozone pollution using those mechanisms over a period of years, even when such failure has resulted in violations of a statutory standard (the NAAQS) within the timeframes set by Congress.

Moreover, EPA here has failed to reasonably explain how granting this Petition would impose resource constraints such that it would be handicapped in pursuing other approaches to mitigate the problem, especially given that Transport Region management is largely state-driven.

POINT II

EPA'S FAILURE TO EVALUATE THE DATA AND TECHNICAL MERITS OF THE PETITION WAS ARBITRARY AND CAPRICIOUS

In drawing conclusions based on the information and data before it, EPA committed several errors that render its decision arbitrary and capricious. First, EPA failed to conduct a meaningful technical analysis of the submitted data. Petitioners' submissions in support of the Petition unequivocally showed that states outside the Transport Region were significantly contributing to NAAQS violations within the region, and EPA identified no data or analysis suggesting otherwise. Second, EPA acted arbitrarily in relying in the final action on purported "analytical gaps" demonstrating a need for expansion when EPA had failed to identify any such gaps—which are nonexistent—in the Proposed Denial. Third, EPA's refusal to account for the impact of the stricter 2015 ozone

NAAQS was arbitrary and capricious, especially given EPA's consideration of other information that was available only after the date the Petition was submitted.

A. EPA Failed to Identify Any Data or Analysis Showing that Expanding the Transport Region Is Unnecessary to Fully Address Interstate Ozone Transport.

In denying the Petition, EPA refused to conduct a full technical analysis, stating that "[p]etitioners for administrative action generally should establish the merits of their petition in the first instance." 82 Fed. Reg. at 51,246. However, petitioners *did* establish the merits of the Petition through modeling data and other technical and policy submissions.

Indeed, EPA does not dispute that the Petition met the statutory standard for expanding the Transport Region—by demonstrating that states outside the Transport Region were significantly contributing to violations of the 2008 ozone NAAQS within the Transport Region. *See* 82 Fed. Reg. at 51,245-46; 42 U.S.C. § 7506a(a)(1). In its Proposed Denial, EPA noted that it "does not dispute that certain named upwind states in the petition might significantly contribute to violations of the 2008 ozone

NAAQS in one or more downwind states." 82 Fed. Reg. at 6,520.[19] Furthermore, as five of the petitioners pointed out to EPA in their April 6, 2016 letter, EPA's own 2016 Transport Rule modeling demonstrated the continued contribution by certain Upwind States to downwind nonattainment in the Transport Region. Petitioning State Letter at 3, JA____. Nonetheless, EPA refused to undertake a technical analysis to evaluate whether granting the Petition was justified, instead "disagree[ing] that it bears the burden" to perform any "empirical analysis." 82 Fed. Reg. at 51,246.

EPA's assertion cannot be squared with this Court's precedents requiring an agency to meaningfully and affirmatively grapple with the technical merits of a petition that raises legitimate health and safety concerns within the agency's core mandate. For example, in the recent *Flyers Rights* case, this Court found that the petitioners for an FAA rulemaking had identified a safety concern related to ever-dwindling airplane seat "pitch" and spacing and its dangerous impacts on

[19] Similarly, EPA's own Response to Comments conceded there were linkages between nonattainment monitors in the Transport Region and sources in the Upwind States. RTC at 5, JA_____.

emergency egress. 864 F.3d at 744. Since the petitioners had established a real safety concern at the heart of the agency's statutory mandate to protect passengers, the Court held that the agency erred in not addressing the risk presented in the petition. *Id.* The FAA's denial pointed to no evidence disputing this risk, producing instead flawed studies and illogical conclusions. *Id.* ("when the Administration responds to a petition for rulemaking that exposes a plausible life-and-death safety concern, the Administration must reasonably address that risk in its response.").

Similarly here, EPA pointed to other statutory provisions and lauded progress in reducing ozone emissions levels, but did not produce any data or studies showing that expansion of the Transport Region was not an important measure needed to fully address the significant and pervasive interstate ozone transport problem. Nor did EPA meaningfully address how it would fulfill a core statutory mandate: attainment of the NAAQS for ozone. EPA pointed to declining ozone levels, but nowhere cited to evidence showing that the levels achieved were at or below the levels it had previously determined were protective of human health. In contrast to *Flyers Rights*, where the agency at least produced some

relevant, if flawed, studies as the basis for its decision, EPA in denying the Petition did not produce any technical information supporting its denial at all.[20]

B. EPA's Belated Reliance on "Analytical Gaps" was Arbitrary and Capricious.

Instead of presenting information contrary to the Petition's demonstration of a technical basis for Transport Region expansion, EPA claimed in the final decision—for the first time—that "analytical gaps" in petitioners' submissions justified denial. EPA is wrong that any

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[20] To the extent that EPA's decision is grounded on the purported staleness of the data submitted by petitioners, such reliance is arbitrary and capricious even aside from EPA's failure to perform any empirical analysis or otherwise engage with the technical merits of the Petition. First, EPA has willfully ignored more recent available data that petitioners identified in their 2017 submissions to EPA—including EPA's own modeling—that continues to show persistent non-attainment in the Transport Region due to significant emissions of ozone pollution from Upwind States. And second, this Court should not countenance EPA's conduct in sitting on a petition for years beyond the statutory eighteen-month deadline, and then attempting to claim that petitioners had failed to meet their burden because their data was no longer as fresh as was required. EPA, in essence, asks this Court to condone a strategy where EPA can avoid reaching the merits of any petition by running out the clock and then pointing to purportedly stale data. Congress clearly did not intend EPA to be able to avoid its statutory obligations in this manner. To the contrary, Congress required that EPA act on 176A petitions within eighteen months. It would be perverse to allow EPA to use its failure to abide by that deadline as a sword to reject the Petition.

analytical gap justified denial, and in any event, its belated assertion of that issue violated notice requirements for rulemaking.

Specifically, EPA stated that the Petition did not demonstrate that the "suite" of section 184 controls was necessary. 82 Fed. Reg. at 51,247. But this reasoning—based on the perceived insufficiency of the Petition's discussion of the reasonableness of the Transport Region measures designed by Congress—inverts the proper operation of the Act.

Congress established the Transport Region and mandated the required pollution controls for states that are part of the regional ozone problem. 42 U.S.C. §§ 7511c, 7511a. All of the current Transport Region states abide by those controls. If another state is part of the same regional ozone problem in that it significantly contributes to nonattainment within the Transport Region—as the record demonstrates for the Upwind States—Congress has already determined the appropriate additional controls that are necessary. There is no requirement for petitioners to reassert why the controls selected by Congress, in section 184, to abate regional ozone transport problems are in fact reasonable to impose on other states contributing to the same regional problem. Had petitioners been provided an opportunity to comment on this rationale, they would

have explained as much, supplementing the record with information and argument on this point.

But EPA never provided the opportunity, instead raising the "analytical gaps" issue for the first time in its final rule and thereby violating the core principle that a final rule must be the "logical outgrowth" of a proposed rule. *See Small Refiner Lead-Phase Down Task Force v. EPA*, 705 F.2d 506, 540-41 (D.C. Cir. 1983). Petitioners submitted ample technical documentation to support granting the Petition, and EPA did not point to any purported analytical gaps in the Proposed Denial, resting instead on EPA's preferred use of other provisions. 82 Fed. Reg. at 6,510-11. Petitioners and others commented on the proposed grounds and offered legal, policy, and technical reasons for granting the Petition. Nothing in the proposal suggested that EPA would rely instead on "gaps" that petitioners could have disputed in their comments or filled with additional information and analysis. This Court's precedents rightly prevent an agency from proceeding in this manner—basic principles of administrative fairness require that an agency's entire basis for final decision be subject to comment. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394-95 (D.C. Cir. 1973), (remanding to

EPA for consideration of comment on backup studies that EPA had not provided to public prior to promulgation of final rule), *supersession by statute recognized in American Trucking Ass'ns., Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

C. EPA's Refusal to Consider the 2015 Ozone NAAQS Was Arbitrary and Capricious.

EPA's treatment of the information and data was also flawed because—despite relying on information developed only after submission of the Petition based on a need to "consider the most recent information," 82 Fed. Reg. at 51,247—EPA unreasonably refused to consider the critical impact of the 2015 ozone NAAQS. Section 176A, however, does not tie expansion of the Transport Region to nonattainment problems arising out of any particular NAAQS. And here, due to EPA's inaction on the Petition, the new, more stringent 2015 ozone NAAQS, as well as preliminary modeling on attainment area designations, was available well before both the proposed denial in January 2017 and the final denial in November 2017.

At the time EPA finally issued its Petition Denial, the 2015 NAAQS comprised a new, critical fact, particularly because the new standards are even more stringent (and hence the nonattainment problems more

widespread in the Transport Region) than under the 2008 ozone NAAQS. Nonetheless, EPA stated it was "limiting this final action to the 2008 ozone NAAQS." 82 Fed. Reg. at 51,250. This Court has consistently condemned an agency's refusal to consider new facts that bear directly on its rationales for decision. *See Flyers Rights*, 864 F.3d at 754. It was a glaring omission for EPA to refuse to consider the 2015 ozone NAAQS to assess whether it had additional "reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region." 42 U.S.C. § 7506a(a)(1).

Nor was EPA's refusal to consider the 2015 ozone NAAQS principled or complete. EPA dismissed the 2015 ozone NAAQS as beyond the scope of the Petition, 82 Fed. Reg. at 51,250, but still referenced updated modeling in denying the Petition, including modeling intended to assist states in meeting the 2015 ozone NAAQS. *See* 82 Fed. Reg. at 51,246 (denying petition by pointing to "more recent air quality information" than modeling provided by petitioners). EPA looked to this "more recent" information as purporting to show lower ozone levels in justifying its denial; though, notably, EPA did not claim that more recent information showed that these purported lower levels were sufficient to

demonstrate attainment or maintenance of either the 2008 or 2015 NAAQS by Transport Region states' attainment deadlines.[21] *Id.*

EPA cannot have it both ways—looking to the 2015 ozone NAAQS when associated modeling suits its purposes, but then ignoring those NAAQS when the stricter standard would support granting the Petition. EPA's refusal to consider the 2015 NAAQS is particularly arbitrary and capricious in light of petitioners' comments on the proposed denial drawing EPA's attention to the fact that states still struggling to attain or maintain the 2008 standards would need EPA to use all available tools, including expansion of the Transport Region, to meet the more stringent 2015 standards. Maryland Testimony at 2, JA_____; New York Testimony at 1&3, JA____&____; Petitioning State Letter at 2, JA____; Maryland Comments at 1 & attach. at 1, JA____&____.

[21] EPA's reliance on "more recent information" to support denial without providing such information in the administrative record also was arbitrary and capricious. *See Portland Cement Ass'n*, 486 F.2d at 394-95.

POINT III

EPA'S DECISION NOT TO CONSIDER THE INEQUITABLE COSTS IMPOSED ON DOWNWIND STATES BY TRANSPORTED POLLUTION WAS ARBITRARY AND CAPRICIOUS.

EPA "entirely failed to consider an important aspect of the problem," *see State Farm*, 463 U.S. at 43, when it refused to consider the inequitable burden that the problem of ozone pollution transport places on downwind states. Refusing to consider regulatory disparities in the context of determining whether to expand the Transport Region, including on the basis that EPA purportedly lacked authority to do so, was arbitrary and capricious.

EPA recognized in its Petition Denial that equity can and has played a role in apportioning responsibility for addressing transported pollution under the Good Neighbor Provision. 82 Fed. Reg. at 51,249. Under that provision, EPA considers cost as a component of determining the amount of states' emissions that are considered "significant" contributions to downwind nonattainment, and then EPA apportions emissions-reduction responsibilities among upwind states based on a uniform level of control, represented by cost. *Id.* The Supreme Court has recognized that approach as an "equitable solution to the allocation

problem" that the Good Neighbor Provision requires the agency to address. *Id.* (citing *EME Homer City Generation*, 134 S. Ct. at 1,607).

As petitioners demonstrated, however, use of the Good Neighbor Provision to address this regulatory disparity has been inadequate. EPA's Good Neighbor Provision approach to determining a uniform cost threshold does not take into account the greater cost-per-ton requirements imposed on Transport Region states through the more stringent control mechanisms mandated under section 184.[22] Similarly,

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[22] For instance, EPA in the 2016 Transport Rule imposed a uniform $1,400-per-ton reduction cost despite numerous comments from Transport Region states and the Ozone Transport Commission demonstrating far more expensive reduction costs imposed on sources in Transport Region states compared to non-Transport Region states. *Compare* 81 Fed. Reg. at 74,543 ($1,400/ton threshold), *with* Delaware Comments on 80 Fed. Reg. 75,706 (Dec. 3, 2015) (Proposed Transport Rule), EPA-HQ-OAR-2015-0500-0344, at 5 (Feb. 1, 2016) (stating that further reductions from power plants in Delaware will cost approximately $8,300 a ton for NOx); New York Comments on Proposed Transport Rule, EPA-HQ-OAR-2015-0500-0248, at 3 (Feb. 1, 2016) (stating that emission levels in New York are the result of state standards requiring reductions in some instances at a cost of $5,000 or more per ton of NOx eliminated); Ozone Transport Comm'n Comments on Proposed Transport Rule, EPA-HQ-OAR-2015-0500-0342, at 3, (Feb. 1, 2016) (noting that Transport Region states have "implement[ed] strategies to control emissions at costs that are orders of magnitudes greater than the cost to reduce emissions in non-[Transport Region] states."), *available at* www.regulations.gov.

the absence of more stringent control requirements, such as RACT and enhanced vehicle inspection and maintenance programs, in many areas in Upwind States has led to a growing disparity in environmental performance between sources within the Transport Region and those outside.[23]

Nonetheless, in the context of sections 176A and 184, EPA refused to consider or address regulatory disparities between Transport Region and non-Transport Region areas, stating instead that "the agency does not believe that Congress intended for it to exercise its discretion under CAA section 176A to resolve an alleged economic disparity or competitive disadvantage that is inherent in the creation of the [Transport Region] under CAA section 184." 82 Fed. Reg. at 51,249. But EPA itself injected comparative considerations of cost into the analysis when asserting that

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[23] For instance, emission rates for power plants in Indiana, Kentucky, and West Virginia are more than double the rate in New York, according to 2015 and 2016 emissions data reported to EPA. New York Testimony at 2, JA____. And as petitioners noted in their original technical support documents, the overall *per capita* emissions between Transport Region states and the Upwind States diverge dramatically. For example, in 2010 New York emitted 2.45 pounds of NOx per person, whereas West Virginia emitted 55.47 pounds per person. Petition TSD at 39, JA____.

it had determined to rely on other statutory measures, like the Good Neighbor Provision, because such measures are purportedly more "tailored" and would more "cost-effectively reduce emissions." 82 Fed. Reg. at 51,239, 51,245. Having decided to consider costs in that respect, EPA was not entitled to simply disregard petitioners' submissions that turned on related considerations of comparative costs and equity between different regulatory approaches.

Indeed, EPA's constrained reading of its authority here—that such cost considerations are irrelevant to whether an upwind state "contributes significantly" to downwind nonattainment—conflicts with its interpretation of "significant contribution" under the Good Neighbor Provision, pursuant to which EPA does consider equity among states in deciding on the appropriate level of required pollution reductions. EPA fails to provide any justification for its different interpretation of substantially similar statutory language in the same Act. EPA thus ignored "the source of its delegated power" and its denial of the petition should be vacated as arbitrary and capricious and remanded. *See American Horse Protection Ass'n*, 812 F.2d at 6-7.

CONCLUSION

For the reasons set forth above, the Petition should be granted and the Petition Denial vacated.

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Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that on May 15, 2018, the foregoing Opening Proof Brief of Petitioners was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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