

July 15, 2019

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Via electronic submission to <http://www.regulations.gov>

Attn: Docket ID No. EPA-HQ-OAR-2018-0170

Re: Response to Clean Air Act Section 126(b) Petition from New York, 84 Fed. Reg. 22,787 (May 20, 2019).

Dear Administrator Wheeler:

Environmental Defense Fund (EDF) and the Adirondack Council appreciate the opportunity to submit comments on the proposed denial of the Clean Air Act section 126(b) petition filed by the State of New York. While the Environmental Protection Agency (EPA) is finally taking steps to perform its nondiscretionary duty to grant or deny New York's petition, the proposed denial conflicts with EPA's obligations under the Good Neighbor provisions of the Clean Air Act to ensure that New York maintains compliance with the 2008 and 2015 8-hour ozone national ambient air quality standards (NAAQS) and that communities and families in the affected downwind communities have safe air to breathe.

For this reason, we strongly urge EPA to carry out its duties under our nation's clean air laws and grant New York's section 126(b) petition. As detailed in these comments, EPA's proposed denial cannot be reconciled with the Clean Air Act's requirement for EPA to prohibit interstate pollution that significantly contributes to nonattainment or interferes with the maintenance of air quality standards,¹ and is otherwise unlawful and arbitrary.

I. Health Impacts of Ozone Pollution

The health impacts of ozone pollution are well-documented, with impacts including harm to the respiratory system, aggravation of asthma and lung diseases, and premature death. EPA's decision to update the ozone NAAQS in 2015 was based upon a body of scientific evidence spanning thousands of studies; and there were significant new studies available since the review conducted for the 2008 standards that underpinned the Administrator's decision to update the standard from 75 parts per billion (ppb) to 70 ppb.

The benefits of decreased pollution exposure listed in the CSAPR Update include avoidance of tens of thousands of episodes of asthma exacerbation and missed work or school days; avoidance of hundreds of emergency room visits for asthma; and, prevention of dozens of premature deaths.² In

¹ 42 U.S.C. § 7410(a)(2)(D)(i)(I).

² 80 Fed. Reg. 75,706, 75,756–57 (Dec. 3, 2015).

addition, a major study published in December of 2015, found that “long-term ambient [ozone] contributes to risk of respiratory and circulatory mortality.”³ In particular, the study, which started in 1982, found that every 10 ppb increase in long-term ozone exposure increased risk of lung disease death by 12 percent; cardiovascular disease by 3 percent; and all causes of death by 2 percent. Another study published in December of 2015 found that long-term ozone exposure increases the risk of developing Acute Respiratory Distress Syndrome (ARDS) for at-risk critically ill persons.⁴ These are just a handful of studies that underscore the importance of EPA moving forward to reduce ozone pollution.

EPA also recognizes that certain communities are at particular risk from ozone pollution, including low-income and minority populations. In the 2015 Ozone Regulatory Impact Analysis (RIA), EPA’s assessment found that “in areas with poor air quality relative to the revised [ozone] standard, the representation of minority populations was slightly greater than in the U.S. as a whole. Because the air quality in these areas does not currently meet the revised standard, populations in these areas would be expected to benefit from implementation of the strengthened standard, and, thus, would be more affected by strategies to attain the revised standard.”⁵

Recent studies have also indicated that the costs of ozone pollution are larger than previously understood. In particular, economists Olivier Deschenes, Michael Greenstone, and Joe Shapiro, issued a discussion paper in 2013 that found that a 1 ppb decrease in ozone concentrations in the East yields \$1.743 billion in societal benefits, underscoring the significant and cost-effective economic benefits resulting from reductions in ozone pollution.⁶

II. The Good Neighbor Legal Framework

The EPA’s overarching obligation under the Clean Air Act is to work with the states to attain the health-based NAAQS “as expeditiously as practicable” but, at least, no later than the Act’s attainment deadlines.⁷ While EPA determines the level at which to set the NAAQS, the Act makes each state initially responsible for ensuring that it meets the NAAQS as expeditiously as practicable and by the statutory deadlines. But when Congress mandated that all states achieve the health-based air quality standards, it recognized that emissions affecting a state’s air quality can come from sources outside that state. Accordingly, in 1970, Congress added a provision to the Act requiring state implementation plans (SIPs) to include “measures necessary” to “insure” against interference

³ Jerrett, *et al.*, “Long-Term Ozone Exposure and Mortality in a Large Prospective Study,” *Am J Respir Crit Care Med.*, Dec. 2015.

⁴ Ware, *et al.*, “Long-Term Ozone Exposure Increases the Risk of Developing the Acute Respiratory Distress Syndrome,” *Am J Respir Crit Care Med.*, Dec. 2015.

⁵ EPA, *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone* (Sept. 2015).

⁶ O. Deschenes, M. Greenstone, and J. Shapiro, *Defensive Investments and the Demand for Air Quality: Evidence from the Nox Budget Program and Ozone Reductions*. IZA Discussion Paper No. 7557. Available at SSRN: <http://ssrn.com/abstract=2318738>.

⁷ See 42 U.S.C. § 7511(a)(1); *Ass’n of Irrigated Residents v. EPA*, 423 F.3d 989, 997 (9th Cir. 2005) (stating “the [Clean Air] Act’s overarching goal [is] that nonattainment areas achieve the standards as expeditiously as practicable”); *NRDC v. EPA*, 777 F.3d 456, 467–69 (vacating EPA’s attempt to extend the attainment deadlines for the 2008 ozone NAAQS and stating that the attainment deadlines “are central to the regulatory scheme”) (*quoting Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002)).

with attainment in downwind areas.⁸ EPA, with court approval, interpreted the provision narrowly as requiring only “information exchange” among states.⁹

Concluding that “[t]he problem of interstate air pollution remains a serious one that requires a better solution,”¹⁰ Congress amended the Act in 1977 to require that each state plan contains adequate provisions to prohibit emissions from “any stationary source within the State . . . which will . . . prevent attainment or maintenance by any other State of any . . . air quality standard.”¹¹ Congress also authorized EPA to impose emissions limitations directly upon stationary sources whose emissions prevented attainment or maintenance of air quality standards in another state.¹² The 1977 amendments reflected Congress’s recognition that weak regulation had “result[ed] in serious inequities among several States”— *i.e.*, that “[i]n the absence of interstate abatement procedures,” plants in downwind states were “at a distinct economic and competitive disadvantage.”¹³ Therefore, Congress intended the amendments “to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State.”¹⁴

Even after these amendments, however, requirements for reducing interstate pollution under the Act remained inadequate. Due in part to the absence of remedies for “states affected by numerous sources,”¹⁵ and the challenging “prevent attainment” standard, downwind states’ efforts to obtain relief from upwind pollution was uniformly unsuccessful.¹⁶ Determining that “additional efforts” were needed to address the “transport problem,”¹⁷ Congress again amended the Act and added the current “Good Neighbor” provision, which required that each state implementation plan:

(D) contain adequate provisions—

(i) prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .¹⁸

As with other SIP requirements, state plans addressing interstate pollution transport under the Good Neighbor provision must be submitted to EPA within three years of the promulgation of a new or

⁸ Pub. L. No. 91-604, § 4(a), 84 Stat. at 1680–81.

⁹ *See, e.g., NRDC v. EPA*, 483 F.2d 690, 692–93 (8th Cir. 1973).

¹⁰ H.R. Rep. No. 95-294, at 330 (1977).

¹¹ Pub. L. No. 95-95, § 108(a)(4), 91 Stat. at 693.

¹² Pub. L. 95-95, § 123, 91 Stat. at 724.

¹³ S. Rep. No. 95-127, at 41–42 (1977).

¹⁴ *Id.*

¹⁵ Kay M. Crider, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 Chi.-Kent L. Rev. 619, 638 (1988).

¹⁶ *See, e.g., Connecticut v. EPA*, 696 F.2d 147, 152 (2d Cir. 1982); *Air Pollution Control Dist. of Jefferson Cnty. v. EPA*, 739 F.2d 1071, 1094–95 (6th Cir. 1984); *New York v. EPA*, 852 F.2d 574, 581 (D.C. Cir. 1988).

¹⁷ *See* S. Rep. No. 101-228, at 48 (1989).

¹⁸ Pub. L. No. 101-549, § 101, 104 Stat. at 2404, codified at 42 U.S.C. § 7410(a)(2).

revised NAAQS.¹⁹ And if EPA determines that a state’s Good Neighbor plan is inadequate, then the Agency has a statutory duty to issue a federal implementation plan (FIP) within two years to address the state’s Good Neighbor obligations (unless the state corrects the deficiency).²⁰ In addition, when the EPA issues a Good Neighbor FIP, the EPA “has a statutory obligation to avoid ‘under-control,’ i.e., to maximize achievement of attainment downwind.”²¹ These mandates help ensure that areas having trouble achieving or maintaining the NAAQS expeditiously receive the benefits of upwind states’ required Good Neighbor reductions, and that the downwind states are able to meet their statutory attainment deadlines through a combination of their own efforts and those of upwind states. Moreover, there is nothing in the Clean Air Act indicating that a state must wait for the EPA to implement a FIP before filing a petition under section 126(b) requesting a finding that a 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).

Under the Act, each state remains responsible for complying with air quality standards by the statutory deadlines even if much of its local air pollution originates from other states.²² Accordingly, in overturning EPA’s Clean Air Interstate Rule, the D.C. Circuit held that upwind states’ Good Neighbor obligations must be harmonized with downwind states’ mandatory attainment deadlines so that downwind states are not “forc[ed] . . . to make greater reductions than section 110(a)(2)(D)(i)(I) requires.”²³

In response, the EPA promulgated the Cross-State Air Pollution Rule (CSAPR) to replace CAIR. As part of the CSAPR Update, EPA acknowledged that it is required to achieve Good Neighbor reductions for the 2008 ozone NAAQS that align with the relevant attainment deadlines for affected downwind areas.²⁴ As a result, EPA designed the CSAPR Update to provide partial relief for moderate ozone nonattainment areas in the last full ozone season prior to their July 2018 attainment deadline.²⁵

While the CSAPR Update has provided significant air quality improvements and associated health benefits,²⁶ to fulfill the Good Neighbor provision’s mandate, the EPA must continue to work to: (1)

¹⁹ 42 U.S.C. §§ 7410(a)(1), 7410(a)(2)(D).

²⁰ 42 U.S.C. § 7410(c)(1); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).

²¹ *EME Homer City*, 134 S. Ct. at 1609 (emphasis added).

²² See *Sierra Club v. EPA*, 294 F.3d at 160–62 (holding that EPA was without authority to grant extension from nonattainment deadline in 42 U.S.C. § 7511(a)(1) on basis of “setbacks owing to [interstate] ozone transport”); *Sierra Club v. EPA*, 311 F.3d 853, 860 (7th Cir. 2002); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002); see also *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 115–17 (3d Cir. 1997) (Alito, J.) (upholding EPA’s refusal to redesignate a nonattainment area in Western Pennsylvania despite the argument that much of the area’s ozone pollution was attributable to pollution transported from other states, and sustaining the agency’s conclusion that the origin of pollution was “legally irrelevant” to attainment status); *id.* at 124 (Becker, J., concurring) (lamenting circumstances of a locality “whose herculean and largely successful efforts to combat air pollution may be derailed due to circumstances (upwind ozone) beyond its control”).

²³ *North Carolina v. EPA*, 531 F.3d 896, 911–12 (D.C. Cir. 2008) (emphasis in original).

²⁴ 80 Fed. Reg. at 75,708.

²⁵ *Id.*

²⁶ *Id.* at 75,736 (CSAPR Update will provide approximately 19 ppb of combined downwind ozone improvement across nonattainment and maintenance receptors); *id.* at 75,756–57 (estimating that the CSAPR Update will avoid dozens of premature deaths and hundreds of emergency room visits for asthma; estimating total monetized health benefits from the CSAPR Update of between \$670 million and \$1.2 billion.)

“avoid under-control” and “maximize”²⁷ near-term reductions of upwind contributions to downwind nonattainment and maintenance problems; and, (2) lay the groundwork for additional emissions reductions that will be achieved “as expeditiously as practicable”²⁸ and completely address each upwind state’s contributions to downwind nonattainment and maintenance problems. These facts remain true despite EPA’s recent finding that the CSAPR Update fully addresses certain states’ obligations under the Good Neighbor provisions of the Clean Air Act regarding interstate pollution transport for the 2008 ozone NAAQS.²⁹

III. Technical Demonstration by New York with Respect to its Section 126(b) Petition

A. New York has Demonstrated that Upwind Sources Emit Air Pollution in Violation of the Clean Air Act’s Good Neighbor Provision.

EPA proposes to deny New York’s section 126(b) petition on the basis that New York has not met its statutory burden to demonstrate that the group of identified sources emits or would emit in violation of the Good Neighbor Provision of the Clean Air Act for the 2008 or the 2015 ozone NAAQS.³⁰ In particular, EPA states that New York has not met its burden to establish that Chautauqua County will have relevant air quality problems with respect to either the 2008 or the 2015 NAAQS.³¹ In addition, EPA proposes to find that New York’s petition has not identified any relevant air quality problems with respect to the 2008 ozone NAAQS in the New York Metropolitan Area (NYMA).³² Finally, EPA proposes to deny New York’s section 126(b) petition with respect to both Chautauqua County and the NYMA on the basis that New York has not met its burden to demonstrate that the named sources will contribute significantly to nonattainment or interfere with maintenance of the 2008 or 2015 ozone NAAQS as required by section 110(a)(2)(D)(i).³³

EPA’s analysis is unreasonable. A review of the extensive supporting data submitted as part of New York’s 126(b) petition clearly demonstrates that (1) New York is not in attainment with the 2008 or the 2015 ozone NAAQS; and (2) the named out-of-state sources are significantly contributing to nonattainment and/or interfering with maintenance of the 2008 and 2015 ozone NAAQS in New York. Section 110(a)(2)(D)(i) requires that upwind states or EPA—either pursuant to a FIP or in response to a section 126 petition—must “prohibit” the specified sources from “emitting any air pollution in amounts” which meet these two criteria.

²⁷ See *EME Homer City*, 134 S. Ct. at 1609.

²⁸ See 42 U.S.C. § 7511(a)(1); *Ass’n of Irrigated Residents v. EPA*, 423 F.3d 989, 997 (9th Cir. 2005) (stating “the [Clean Air] Act’s overarching goal [is] that nonattainment areas achieve the standards as expeditiously as practicable”); *NRDC v. EPA*, 777 F.3d 456, 467–69 (vacating EPA’s attempt to extend the attainment deadlines for the 2008 ozone NAAQS and stating that the attainment deadlines “are central to the regulatory scheme”) (*quoting Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002)).

²⁹ 83 Fed. Reg. 65,878 (December 21, 2018).

³⁰ 84 Fed. Reg. 22,787, 22,788 (May 20, 2019).

³¹ *Id.*

³² *Id.*

³³ *Id.*

1. New York is not in attainment with the 2008 or 2015 ozone NAAQS.

New York's section 126(b) petition provides clear evidence that both the NYMA and Chautauqua County are experiencing challenges attaining or maintaining the 2008 and the 2015 ozone NAAQS. The NYMA and Chautauqua County, which are home to over twenty million people, are both currently designated as nonattainment areas for the 2008 ozone NAAQS.³⁴ Certified monitoring data through 2016 and data from 2017 indicate that the NYMA did not attain the moderate attainment deadline of July 20, 2018. In fact, data from the 2017 Design Value Report demonstrates that the NYMA registered a 2015-2017 design value of 83 ppb.³⁵ This design value significantly exceeds both the 2008 ozone standard of 75 ppb and the 2015 ozone standard of 70 ppb. Furthermore, New York has provided evidence demonstrating that the air quality monitor in Dunkirk NY, which is located in Chautauqua County, often exceeds the 2008 and the 2015 ozone standard with design values sometimes reaching 82 ppb.³⁶

In addition, EPA has designated the NYMA as a moderate nonattainment area for the 2015 ozone standard.³⁷ The 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions Report projects that a monitor in New York County will exceed the 2015 ozone standard of 70 ppb with an average design value of 74.4 ppb and a maximum design value of 75.5 ppb in 2023.³⁸ The 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions Report also projects that a monitor in Queens County will have a maximum design value of 72.0 ppb in 2023, which exceeds the 2015 ozone standard of 70 ppb.³⁹

Accordingly, New York has demonstrated that the state is not in attainment with the 2008 or the 2015 ozone standards.

2. Out-of-state sources are significantly contributing to nonattainment and/or interfering with maintenance of the 2008 and 2015 ozone NAAQS in New York.

As part of its section 126(b) petition, New York has provided a significant amount of technical information demonstrating that emissions from Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia are significantly contributing to nonattainment and/or interfering with maintenance of the 2008 and 2015 ozone NAAQS in New York. In fact, data from EPA's 2015 Ozone NAAQS Interstate Transport Assessment Design Values and Contributions Report projects that emissions from these same upwind states continue to contribute to ozone levels in New York that exceed the health-based standards.⁴⁰

³⁴ EPA Green Book, 8-Hour Ozone (2008) Nonattainment Areas, available at <https://www3.epa.gov/airquality/greenbook/hbtc.html>.

³⁵ EPA, 2017 Design Value Reports: Design Values in Areas Designated Nonattainment for the 2015 8-Hour Ozone NAAQS, available at: <https://www.epa.gov/air-trends/air-quality-design-values#report>.

³⁶ State of New York Section 126(b) Petition at 7 (2018), available at https://www.dec.ny.gov/docs/air_pdf/sips126petition.pdf.

³⁷ EPA Green Book, 8-Hour Ozone (2015) Nonattainment Areas, available at: <https://www3.epa.gov/airquality/greenbook/jbtc.html>.

³⁸ EPA, 2015 Ozone NAAQS Preliminary Transport Assessment Design Values Contributions, available at: <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs>.

³⁹ *Id.*

⁴⁰ *Id.*

In addition, New York’s petition went a step further to demonstrate that the highest-emitting EGU and non-EGU facilities from nine states significantly contribute to nonattainment or interfere with maintenance of the 2008 and 2015 ozone standard in the NYMA and Chautauqua County. In particular, New York demonstrates that emissions from over 125 EGU facilities, over 150 non-EGU units, and approximately 20 oil and gas sector facilities, are contributing to New York’s ozone exceedances under the 2008 and 2015 ozone standards.⁴¹ The results demonstrate that these sources contribute up to 6.34 ppb in Chautauqua County and 4.97 ppb in the NYMA nonattainment area.⁴² Finally, New York has submitted information demonstrating a feasible emission rate of less than or equal to 0.15 lb/mmBtu for EGU facilities for the 2014 to 2016 period.⁴³

Given the significant amount of technical information submitted by New York demonstrating that out-of-state sources are significantly contributing to nonattainment and/or interfering with maintenance of the 2008 and 2015 ozone NAAQS in New York, the state has also met its burden with respect to this element of the section 126 analysis.

B. The sources listed in New York’s section 126(b) petition constitute a “group of stationary sources.”

As part of EPA’s proposed denial of New York’s section 126(b) petition, EPA is taking comment on whether to also deny the petition because New York has not provided justification for the proposition that such a large number of undifferentiated sources located in numerous upwind states constitute a “group of stationary sources” within the context of Clean Air Act section 126(b).⁴⁴ In particular, EPA states that a “group of stationary sources” could mean “stationary sources within a geographic region, sources identified by a specific North American Industry Classification System (NAICS) Code, sources emitting over a defined threshold and/or any combination of these or other defining characteristics.”⁴⁵

It would be arbitrary and capricious for EPA to deny New York’s section 126(b) petition on the basis that such a large number of undifferentiated sources located in nine states do not constitute a “group of sources” pursuant to section 126(b) of the Clean Air Act. While New York’s petition has identified a significant number of sources in a variety of different sectors, it has also provided a clear and reasonable 400 ton per-year emission threshold as a defining characteristic.⁴⁶ Furthermore, New York has gone a step further to demonstrate that establishing enforceable emissions limitations on these large stationary sources would result in a 6.34 ppb emission reduction in Chautauqua County and a 4.97 ppb emission reduction in the NYMA.⁴⁷ This is all that is required under the Clean Air Act.

⁴¹ State of New York Section 126(b) Petition, Appendix B: List of 400 Ton-per-Year Stationary Sources Significantly Contributing to Nonattainment and Interfering with Maintenance in New York State (2018), available at https://www.dec.ny.gov/docs/air_pdf/sips126petition.pdf.

⁴² State of New York Section 126(b) Petition at 1 (2018), available at https://www.dec.ny.gov/docs/air_pdf/sips126petition.pdf.

⁴³ *Id.* at 17.

⁴⁴ 84 Fed. Reg. at 22802.

⁴⁵ *Id.*

⁴⁶ State of New York Section 126(b) Petition at 1 (2018), available at https://www.dec.ny.gov/docs/air_pdf/sips126petition.pdf.

⁴⁷ *Id.*

IV. Sections 126 and 110(a)(2)(D)(i) require EPA to “prohibit” the specified sources from “emitting any air pollution in amounts” which meet the criteria above as expeditiously as practicable, but in no case later than three years after the date of the Administrator’s finding.

Pursuant to section 126 of the Clean Air Act, if the Administrator finds that a major source or group of sources is emitting a pollutant in violation of section 110 of the Clean Air Act, the source or sources must cease operation within three months, unless the Administrator permits the continued operation of the source with emission limitations and compliance schedules.⁴⁸ These compliance requirements must be implemented as expeditiously as practicable, but in no case later than three years after the date of the Administrator’s finding.⁴⁹

Given the clear evidence that cross state air pollution is significantly contributing to New York’s nonattainment of the 2008 and 2015 ozone NAAQS, Administrator Wheeler must (1) make a finding that the major NO_x sources in the nine named states significantly contribute to nonattainment or interfere with maintenance of the 2008 and 2015 ozone NAAQS in violation of Clean Air Act section 110(a)(2)(D)(i); and (2) establish enforceable emissions limitations and compliance schedules for the major NO_x sources listed in New York’s section 126(b) petition. As noted above, EPA must ensure compliance with this finding as expeditiously as practicable, but no later than three years from the date of the finding.⁵⁰

For this reason, EPA’s determination that 2023 is a reasonable year to assess downwind air quality to evaluate any remaining requirements under the Good Neighbor Provision with respect to either the 2008 or the 2015 NAAQS is an unlawful violation of the statutory deadline set forth under section 126 of the Clean Air Act. EPA’s claims about air quality in 2023 do not excuse the Agency from prohibiting interstate air pollution that is significantly contributing to nonattainment and interfering with maintenance of the 2008 and the 2015 ozone standards. Because air pollution emitted by the named sources do and will contribute significantly to nonattainment and interfere with maintenance of the 2008 and 2015 ozone NAAQS in New York between now and 2023, EPA’s claims about better air quality in 2023 are irreconcilable with this proposed denial with the Clean Air Act. Accordingly, EPA’s 2023 modeling cannot be used to support a decision to deny New York’s 126(b) petition.

While the CSAPR Update was a critical first step in fulfilling EPA’s obligation under section 110(a)(2)(D)(i) of the Clean Air Act with respect to the 2008 ozone NAAQS, the existence of the CSAPR Update does not foreclose a state from seeking—or EPA from providing—redress under section 126(b) when the state finds itself struggling to meet NAAQS due to significant upwind contributions or interference. In fact, when the EPA promulgated the CSAPR Update it explicitly noted that it only served as a “partial remedy” and would only “represent a partial solution for these states’ good neighbor obligation with respect to the 2008 ozone NAAQS.”⁵¹ The fact that New York is continuing to experience challenges attaining the 2008 ozone NAAQS demonstrates that significant interstate pollution and associated attainment difficulties remain after the implementation

⁴⁸ 42 U.S.C. § 7426 (c).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 80 Fed. Reg. 74,704, 74,552 (Oct. 26, 2016).

of the CSAPR Update. This is true despite EPA’s recent decision not to require any further reductions in interstate air pollution in the CSAPR region with respect to the 2008 ozone standard.⁵²

Finally, the fact that EPA is currently moving forward with finalizing attainment plans and demonstrations for the 2015 ozone NAAQS does not relieve the Agency of its duty to ensure that areas having trouble achieving or maintaining the 2015 NAAQS receive the benefits of upwind states required Good Neighbor reductions.

V. EPA’s proposed denial of New York’s section 126(b) petition fails to prohibit interstate pollution by the attainment deadlines specified in the Clean Air Act.

EPA’s claim of authority to not prohibit pollution that significantly contributes to nonattainment and interferes with maintenance between now and 2023 is also inconsistent with the Clean Air Act’s attainment deadlines—deadlines which are not only “central to the . . . regulatory scheme,”⁵³ but constitute the very “heart” of the Clean Air Act.⁵⁴ EPA’s implementation of the Good Neighbor Provision must be consistent with the other provisions of Title I of the Clean Air Act, including the deadlines for attainment specified in section 7511(a).⁵⁵ EPA’s proposal to deny New York’s section 126(b) petition and to allow continued interstate pollution between now and 2023 is plainly not consistent with attainment deadlines of 2015, 2016, 2018, or 2021, and therefore violates the Clean Air Act.

In addition, EPA’s claim that Congress’s use of the term “will” excuses it’s failure to prohibit this pollution is inconsistent with the plain language of the Clean Air Act. Congress specified that implementation plans must prohibit “any” pollution from “any” source that will contribute significantly to nonattainment and interfere with maintenance.⁵⁶ This includes pollution that will do so between now and 2023.

VI. EPA’s conclusion that no attainment or maintenance issues will remain in 2023 with respect to the 2008 and 2015 ozone standard in Chautauqua County and the 2008 ozone standard in the NYMA is based on flawed modeling.

There are at least three serious issues with the modeling EPA relies on to predict downwind attainment in 2023 with respect to the 2008 and 2015 ozone standard in Chautauqua County and the 2008 ozone standard in the NYMA. First, EPA relies on projections of future emissions based on a current regulatory framework that EPA is actively attempting to dismantle. Second, the model includes biases such as assumed over-compliance with prior air pollution rules. Third, EPA ignores significant modeling uncertainty, all while expecting high enough accuracy from such a long-range projection to discern compliance by tenths of a part per billion.

⁵² 83 Fed. Reg. at 65,878.

⁵³ *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 258 (1976)).

⁵⁴ *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 66-67 (1975).

⁵⁵ *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir. 2008); 42 U.S.C. §§ 7410(a)(2)(D)), 7511(a)

⁵⁶ 42 U.S.C. § 7410(a)(2)(D).

Therefore, EPA's conclusion that Chautauqua County will be in attainment with the 2008 and 2015 ozone standard and that the NYMA will be in attainment with the 2008 ozone standard by 2023 is arbitrary and capricious.

VII. Conclusion

For the reasons provided above, failing to grant New York's section 126(b) petition would result in the continued violation of section 110(a)(2)(D)(i) of the Clean Air Act. For these reasons, we strongly urge EPA to carry out its duties under our nation's clean air laws and grant New York's section 126(b) petition.

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Please do not hesitate to contact us if you have any questions.

Respectfully submitted,

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