The National Rural Electric Cooperative Association

Comments on

Response to Clean Air Act Section 126(b) Petition From New York
Submitted Electronically to:

The Environmental Protection Agency
Air Docket

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Introduction

On behalf of America's Electric Cooperatives, the National Rural Electric Cooperative Association (NRECA) appreciates the opportunity to submit these comments on the Environmental Protection Agency's (EPA's) Response to Clean Air Act Section 126(b) Petition from New York; Notice of Proposed Action on Petition ("Proposed Action"). 84 Fed. Reg. 22,787 (May 20, 2019). For the reasons described in the Proposed Action, and as discussed herein, NRECA supports EPA's proposal to deny the petition filed by New York under section 126 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7426. EPA should make final its proposed denial of the petition.

NRECA is the national service organization for America's electric cooperatives. The nation's member-owned, not-for-profit electric cooperatives comprise a unique sector of the electric utility industry. Due to their size and structure, rural electric cooperatives face special challenges in adapting their operations to meet federal and state emissions restrictions. Those circumstances briefly detailed herein present a unique and valuable perspective on the nature, scope and compliance challenges cooperatives face with any new guidelines or regulations.

NRECA represents the interests of the nation's nearly 900 rural electric utilities, that have the responsibility for "keeping the lights on" for more than 42 million people across 48 states and over 65% of the United States land mass in the lower 48 states. The electric cooperatives collectively serve all or part of 88% of the nation's

counties and 13% of the nation's electric customers while distributing approximately 12% of all electricity sold in the United States.

Many consumers in rural communities are less affluent than those in other parts of the country. In 2015, the median household income for electric cooperative consumers was 11% below the national average. That figure is unsurprising, given that electric cooperatives serve 92% of persistent poverty counties (364 of 395) in the United States. Many of these economically disadvantaged cooperative electric consumers live in areas with harsh winters and without access to natural gas.

NRECA's member cooperatives include 62 generation and transmission cooperatives ("G&Ts") and 833 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. G&Ts generate and transmit power to nearly 80% of the distribution cooperatives, which in turn provide power directly to end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members account for about 5% of national generation. On net, they generate approximately 50% of the electric energy they sell, purchasing the remaining 50% from non-NRECA members. All but three of NRECA's member cooperatives are "small business entities" as defined by the Small Business Administration. G&Ts and distribution cooperatives share responsibility for serving their members by providing safe, reliable, and affordable electric service.

Specific to New York's 126(b) petition, NRECA member cooperatives own or have an ownership interest in twelve of the electric-generating unit[s] ("EGUs") located in five states that New York targets in its petition for additional, direct federal regulation of ozone-season nitrogen oxide ("NOx") emissions under section 126 of the Act. Therefore, NRECA and the member owners of these targeted EGUs have a substantial interest in this proceeding and its outcome.

I. Background

A. New York's Section 126 Petition

New York, through its Department of Environmental Conservation, filed a petition under CAA section 126 in March 2018, alleging significant contribution to nonattainment and interference with maintenance of the 2008 and 2015 ozone national ambient air quality standards ("NAAQS")[1] in Chautauqua County and the New York Metropolitan Area ("NYMA"), purportedly due to NOx emissions from over 350 stationary sources – including EGUs, non-EGU facilities, and oil and gas sector facilities – located in nine states: Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia. *See* 84 Fed. Reg. at 22,787, 22,789; New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b) (March 12, 2018), EPA-HQ-OAR-2018-0170-0004 ("Petition") at Appendix B.

[1] The levels of the 2008 and 2015 ozone NAAQS are 75 parts per billion ("ppb") and 70 ppb, respectively. *See* 84 Fed. Reg. at 22,789 (citing 73 Fed. Reg. 16,436 (Mar. 27, 2008) and 80 Fed. Reg. 65,292 (Oct. 26, 2015)).

The Petition explains that New York identified the hundreds of sources targeted in the Petition based on the states where they are located (*i.e.*, in states whose emissions purportedly contribute at least one percent of the relevant NAAQS) and the quantity of NOx they allegedly emit per year (*i.e.*, at least 400 tons per year), according to the 2017 Beta 2 projection inventory developed by the Mid-Atlantic Regional Air Management Association and/or the 2014 National Emissions Inventory. Petition at 9-10. The Petition further explains that New York identified the stationary sources listed in Appendix B to its Petition by modeling emissions from facilities meeting a NOx emission threshold of at least 400 tons per year "on a state-by-state basis" and considered a "model output . . . [that] represents the maximum influence from the combined 400 ton-per-year sources from an individual state" in determining which sources to target. *Id.* at 11.

In the Petition, New York asserts that the sources listed in Appendix B "should be operating with modern [NOx] emission controls (e.g., selective catalytic or non-catalytic reduction systems) and at emission rates commensurate with New York State's Reasonably Available Control Technology (RACT) standards, which are based on a control cost efficiency of $5,000 per ton of NOx removed." *Id.* at 2. New York requests that EPA "make a finding . . . that the groups of identified sources in each of the nine named states significantly contribute to nonattainment or interfere with maintenance of the 2008 and 2015 ozone NAAQS in violation of CAA section 110(a)(2)(D)(i)." *Id.* at 17. New York also requests that EPA: (a) "establish

enforceable emission limitations" for the sources listed in Appendix B "at levels designed to prevent them from significantly contributing to air pollution in New York State"; and (b) "establish a compliance schedule, including increments of progress, to ensure that the named major NOx sources comply with the emission limitations as expeditiously as practicable, but no later than three years [as] provided by [CAA] section 126(c)." *Id.* The Petition refers to the fact that some of the Appendix B sources "may already operate with a NOx emission rate equivalent to RACT as defined by New York State"; with respect to these sources, the Petition "requests that EPA establish enforceable *daily* emission limit[s] [applicable] during the ozone season to require th[os]e sources to operate as they are currently operating, to prevent emission controls from being turned off." *Id.* (emphasis added).

B. The Relevant Statutory Language and EPA's Interpretation of the Statute

The first sentence of section 126(b) provides that "[a]ny State . . . may petition the [EPA] 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 CAA section 110(a)(2)(D)(i).[2] CAA section 110(a)(2)(D)(i)(I) – which is sometimes called the "Good Neighbor Provision" – provides that a state implementation plan ("SIP")

[2] On its face, the text of section 126(b) refers to CAA section 110(a)(2)(D)(ii), but federal courts of appeals have held that that reference is a scrivener's error and that Congress intended section 126(b) to refer instead to section 110(a)(2)(D)(i). *GenOn Rema, LLC v. EPA*, 722 F.3d 513, 517 n.3 (3d Cir. 2013); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001) (per curiam); *see* 84 Fed. Reg. at 22,790 n.16.

for implementing NAAQS must "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." The second sentence of section 126(b) states that "[w]ithin 60 days after receipt of any petition under this subsection and after public hearing, the Administrator shall make such a finding [*i.e.*, a finding as described in the first sentence of section 126(b)] or deny the petition." Because section 126 actions of the Administrator are subject to section 307(d) of the CAA, *see* CAA § 307(d)(1)(N), EPA may extend section 126(b)'s 60-day deadline for action pursuant to its authority under CAA § 307(d)(10), and EPA did so with respect to the Petition. 83 Fed. Reg. 21,909 (May 11, 2018).

As described in the Proposed Action, the Agency has used the same basic four-step analytical framework in its previous assessments of interstate transport of ozone and ozone precursors, including the assessment underlying EPA's October 2016 Cross-State Air Pollution Rule ("CSAPR") Update for the 2008 ozone NAAQS[3] and the December 2018 final rule in which EPA determined that the CSAPR Update's emission limits, together with other existing emission control requirements, fully satisfy the Good Neighbor Provision obligations with respect to the 2008 ozone

[3] 81 Fed. Reg. 74,504 (Oct. 26, 2016) ("CSAPR Update").

NAAQS for 20 of the 22 states addressed by that rule.[4] That framework includes the following steps:

> (1) *Identify downwind receptors that are expected to have problems attaining or maintaining the NAAQS*. . . . [;]
>
> (2) *Determine which upwind states are linked to these identified downwind air quality problems and thus warrant further analysis to determine whether their emissions violate the good neighbor provision*. . . ..[;][5]
>
> (3) *For states linked to downwind air quality problems, identify upwind emissions (if any) on a statewide basis that will significantly contribute to nonattainment or interfere with maintenance of a standard at a receptor in another state*. . . .[;] [and]
>
> (4) *For upwind states that are found to have emissions that will significantly contribute to nonattainment or interfere with maintenance of the NAAQS downwind, implement the necessary emissions reductions within the state*.

84 Fed. Reg. at 22,791 (emphases in original). Consistent with this framework, EPA reasonably interprets the relevant statutory language as making it appropriate for the Agency to consider whether cost-effective emission reductions are available at a

[4] 83 Fed. Reg. 65,878 (Dec. 21, 2018) ("Determination Rule"). As discussed below, EPA made a definitive determination, in the CSAPR Update itself, that establishment and implementation of the CSAPR Update's emission limits would fully satisfy the Good Neighbor Provision obligations with respect to the 2008 ozone NAAQS for one of the 22 CSAPR Update states – Tennessee. *See* 81 Fed. Reg. at 74,540. EPA subsequently made such a determination for another of the 22 states – Kentucky – in a separate rulemaking. 83 Fed. Reg. 33,730 (July 17, 2018). The Determination Rule – often called the "CSAPR Close-Out Rule" – and these related EPA determinations are discussed in greater detail below.

[5] As EPA notes in the Proposed Action, "[i]n the EPA's most recent transport rulemakings for the 1997 and 2008 ozone NAAQS, as well as the 1997 and 2006 [fine particulate matter] NAAQS, the Agency identified [linked] upwind states to be those modeled to contribute at or above a threshold relative to the applicable NAAQS." 84 Fed. Reg. at 22,791.

particular emission source when it determines whether to make a finding requested under section 126(b) with respect to that source:

> EPA's decision whether to grant or deny a CAA section 126(b) petition regarding both the 2008 and 2015 ozone NAAQS depends on [an assessment of] whether there is a downwind air quality problem in the petitioning state (*i.e.*, step 1 of the four-step interstate transport framework); whether the upwind state where the source subject to the petition is located is linked to the downwind air quality problem (*i.e.*, step 2); and, if such a linkage exists, whether there are cost-effective emissions reductions available from sources in the upwind state to support a conclusion that the sources in the state significantly contribute to nonattainment or interfere with maintenance of the NAAQS (*i.e.*, step 3).

Id. at 22,796. Of course, step 4 in EPA's framework – *i.e.*, implementation of emission reduction requirements in an upwind state that is found, after application of steps 1, 2, and 3, to have a defined amount of emissions that contributes significantly to nonattainment or interferes with maintenance of the NAAQS in one or more downwind states – is not reached unless a defined amount of emissions from sources located in the upwind state is determined, through application of the first three steps, to have such downwind impacts. For reasons explained in the Proposed Action and discussed below, EPA properly did not reach step 4 in its analysis of New York's Petition.

In the Proposed Action, "EPA proposes to deny the petition because New York has not met its statutory burden to demonstrate, and the EPA has not independently found, that the group of identified sources emits or would emit in violation of the good neighbor provision for the 2008 or 2015 ozone NAAQS in

[either] Chautauqua County [or] the NYMA." *Id.* at 22,788; *see also id.* at 22,789. More particularly, "[w]ith respect to the 2008 and 2015 ozone NAAQS in Chautauqua County, the EPA is proposing to deny the petition at step 1 of the [Agency's four-step] framework (*i.e.*, whether there will be a downwind air quality problem relative to the relevant NAAQS)," and "[w]ith respect to the 2008 ozone NAAQS in the NYMA, the EPA is similarly proposing to deny the petition based on the conclusion that the petition has not identified, and the EPA has not independently found, relevant air quality problems." *Id.* at 22,789.[6]

The Proposed Action states further that "[t]he EPA is additionally proposing to deny the petition as to all areas and NAAQS at step 3 of the framework (*i.e.,* whether, considering cost and air-quality factors, emissions from sources in the named state(s) will significantly contribute to nonattainment or interfere with maintenance of a NAAQS at a receptor in another state)." *Id.* EPA bases this component of the Proposed Action on its proposed finding "that material elements in the petition's assessment of whether the sources may be further controlled through implementation of cost-effective controls are insufficient and, thus, New York has not met its step 3 burden to demonstrate that the named sources currently emit or would emit in

[6] EPA does not propose to deny the Petition with respect to the 2015 ozone NAAQS with reference to the NYMA at step 1, due to the Agency's identification of a relevant air quality problem in that area for the 2015 NAAQS. *Id*. at 22,789.

violation of the good neighbor provision with respect to the relevant ozone NAAQS." *Id.*

II. The CAA Provides EPA with Exceptionally Broad Discretion To Deny a Petition Under Section 126(b).

The Act provides EPA broad discretion to decline to make a finding requested in a section 126(b) petition and, thus, to deny the petition. The section 126 petitioner bears the burden of demonstrating that the finding that it requests is warranted, and the extreme remedy provided under section 126(c) underscores the importance of placing that burden on the petitioning state.

A. The Statutory Language Confirms the Unusually Broad Nature of EPA's Discretion To Deny a Section 126 Petition.

As EPA notes in the Proposed Action, under CAA section 126(b), the petitioning state must satisfy the obligation to provide a compelling technical analysis that clearly establishes the basis for the specific finding it requests. *See id.* at 22,797 ("EPA interprets CAA section 126(b) as placing an initial burden on the petitioner to establish a technical basis for the specific finding requested"). Failure by the petitioner to satisfy that obligation provides ample grounds for denying the petition. *See id.* This is consistent with EPA's longstanding approach to evaluating section 126 petitions. *Id.* And, although EPA may choose to conduct an independent technical analysis with respect to the issues raised in the petition, it is under no obligation to do so. *See id.* ("While the EPA interprets CAA section 126(b) as putting the burden on the petitioner, rather than the EPA, to provide a basis or justification for making the

requested finding, nothing precludes the EPA from choosing to conduct an independent analysis on a discretionary basis when the Agency determines it would be helpful in evaluating a petition").[7]

The express language of section 126(b) presents EPA with a binary choice: "the Administrator shall make such a finding [as requested by the petition] *or deny the petition.*" CAA § 126(b) (emphasis added). As EPA notes in the Proposed Action, the statutory language "does not . . . identify a specific methodology or specific criteria for the Administrator to apply when making a CAA section 126(b) finding or denying a petition." 84 Fed. Reg. at 22,795. Instead, the statute leaves to the Administrator's discretion the decision whether to make, or to decline to make, the finding requested in the petition. *Id.* If the Administrator determines in his judgment that the petition fails to present an adequate basis on which to make an affirmative finding that a source "emits or would emit . . . in violation of the prohibition of" section 110(a)(2)(D)(i)(I), the Administrator "*shall* . . . *deny* the petition." CAA § 126(b) (emphasis added). In other words, the Administrator in that circumstance is fully authorized – in fact, obligated – under the statute to deny the petition. Although the Administrator could, in his discretion, choose to undertake a separate analysis to

[7] EPA notes in the Proposed Action that the short, 60-day default timeframe provided by the statute for EPA to act on CAA section 126(b) petitions reinforces the conclusion that Congress did not intend to require EPA to engage in an independent analysis of whether to make the finding requested in the petition, but instead put the burden on the petitioner to establish a technical basis for the finding requested. 84 Fed. Reg. at 22,797. The courts have affirmed this interpretation. *See id.* (citing *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988)).

determine whether an adequate basis exists – independently from any information, analyses, or arguments presented in the section 126 petition itself – on which he might make an affirmative finding, section 126(b) does not obligate or direct the Administrator to conduct such an analysis. Of course, if the Administrator *does* decide in his discretion to undertake any additional analysis, he may rely on that analysis as a basis on which to determine that adequate grounds do *not* exist for making an affirmative finding in response to the petition.

B. The Extraordinary Severity of the Possible Consequences Under Section 126(c) of Granting a Petition – Including, in the Case of New York's Petition, the Potential Sudden Shutdown of Vast Sectors of This Nation's Electric Generating, Manufacturing, and Petroleum and Natural Gas Industries – Highlights the Importance and Propriety of Placing the Burden on the Petitioner To Fully Justify All Aspects of the Petition's Requests.

The default remedy established under CAA section 126(c) when the Administrator makes a finding under section 126(b) with respect to existing stationary sources – such as the vast categories of sources that New York listed in Appendix B to its Petition – is to cease operating no more than three months after the finding is made. *See* CAA § 126(c)(2) ("it shall be a violation of this section and the applicable implementation plan in [the state where the source is located] . . . for any major existing source to operate more than three months after [a] finding has been made with respect to it [under section 126(b)]").[8] As EPA notes in the Proposed Action,

[8] CAA section 126(c) provides that "[t]he Administrator *may* permit the continued operation of [such] a source . . . beyond the expiration of [the] three-month period if such source complies with such emission limitations and compliance schedules (containing increments of

"[i]t is difficult to imagine that Congress intended to require sources to shut down entirely absent a sufficient demonstration that such an extreme remedy was necessary." 84 Fed. Reg. at 22,797.

The ramifications of this default remedy in the case of New York's Petition are nothing short of catastrophic.[9] As noted above, New York's Petition targets hundreds of gas-fired and coal-fired EGUs and non-EGU facilities, including oil and gas sector facilities, in nine Midwestern and Mid-Atlantic states. Shutdown of all of these facilities within three months would strike a blow to the heart of the nation's manufacturing industry and would seriously threaten electric generation capacity and reliability in the region – potentially including all of the nine states where the targeted sources are located as well as neighboring and other nearby states – resulting in serious and long-lasting consequences. Such consequences could be expected to include economic losses for large and small businesses and the states where they operate, layoffs, and blackouts, which could threaten businesses that rely on electric

progress) as may be provided by the Administrator to bring about compliance with the requirements contained in [the Good Neighbor Provision] or this section as expeditiously as practicable, but in no case later than three years after the date of such finding." CAA § 126(c) (emphasis added). The fact that New York in the Petition requests that EPA impose emission limitations on the targeted sources (and does not request shutdown of the targeted sources within three months) does not limit the relevance of the default remedy under section 126(c) to EPA's analysis and its interpretation of the statute as placing the burden on the petitioner to justify all aspects of a section 126 petition.

[9] *See* 84 Fed. Reg. at 22,797 ("Congress certainly could not have envisioned that hundreds of stationary sources would be required to shut down within 3 months without a complete and compelling justification").

power – which is to say, all businesses – as well as schools, hospitals, governmental organizations, and individuals that rely on electricity to power life-sustaining medical equipment. Disruption of electrical service in even portions of the nine-state region directly affected by the Petition could result in cascading harmful effects both within and beyond that region. Likewise, the shuttering of non-EGU facilities and oil and gas sector facilities listed in the Petition – which include (among many other types of sources) petroleum refineries, pipeline companies, cement manufacturing facilities, brick and stone manufacturing facilities, glass manufacturing factories, and petrochemical plants – could have far-reaching adverse effects on supply chains, disrupt manufacturing, and threaten the ability of state and federal governments to build and maintain infrastructure.

It stands to reason that, in order to justify a finding that could bring about widespread devastating consequences such as these, a section 126 petitioner would need to provide particularly robust factual and technical support for each aspect of its requests. For the reasons discussed in the following sections of these comments, New York has not come close to meeting this burden here. As described below, EPA lawfully and reasonably proposes to conclude, based on the inadequacy of the data and analysis provided by New York in its Petition and based further on the results of EPA's own analyses, that an affirmative finding in response to the Petition cannot be justified, and that denial of the Petition is warranted.

III. EPA Properly Proposes To Exercise Its Broad Discretion by Declining To Make an Affirmative Finding in Response to the Petition; Denial of the Petition Is Therefore Necessary and Appropriate.

EPA reasonably and properly proposes to determine that New York failed to meet its burden of providing in its Petition an analysis adequate to demonstrate that the identified sources emit or would emit in violation of the prohibition of section 110(a)(2)(D)(i)(I). Furthermore, as EPA explains in the Proposed Action, EPA has recently conducted detailed analyses of interstate transport pertaining to the 2008 and 2015 ozone NAAQS that support the conclusion that imposing additional NOx emission reduction obligations on sources in the nine states addressed in the Petition is not justified at this time, and New York provided no information in its Petition to call into question the outcome of those EPA analyses.

A. EPA's Existing, Independent Analyses

EPA correctly notes that "if the EPA or a state has already adopted provisions that eliminate the significant contribution to nonattainment or interference with maintenance of the NAAQS in downwind states, then there simply is no violation of the CAA section 110(a)(2)(D)(i)(I) prohibition." *Id.* at 22,796. In other words, as EPA explains, in these circumstances, "requiring additional reductions from upwind sources would result in eliminating emissions that do not contribute significantly to nonattainment or interfere with maintenance of the NAAQS," and would constitute "an action . . . beyond the scope of the prohibition in CAA section 110(a)(2)(D)(i)(I) and, therefore, beyond the scope of the EPA's authority to make the requested

finding under CAA section 126(b)." *Id.* (citing the prohibition against any requirement of over-control under the Good Neighbor Provision, as articulated by the Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 515 n.18, 521-22 (2014)). The Proposed Action notes further that "EPA believes any prior findings made under the good neighbor provision are informative – if not determinative – for a CAA section 126(b) action." *Id.* Where the requirements of section 110(a)(2)(D)(i)(I) have been addressed adequately by a SIP or a federal implementation plan ("FIP"), a section 126 petitioner must, at a minimum, produce relevant new information in order to make out the case for an affirmative finding. *See id.* (noting that, where EPA has approved a SIP or issued a FIP that it has determined fully satisfied a state's Good Neighbor Provision obligation for a given NAAQS, "EPA has no basis to find that sources in the upwind state are emitting or would emit in violation of the CAA section 110(a)(2)(D)(i)(I) prohibition, absent new information to the contrary for that NAAQS").

As EPA explains in the Proposed Action, EPA applied its four-step framework to evaluate interstate transport with respect to the 2008 ozone NAAQS in the 2016 CSAPR Update and the 2018 Determination Rule. *Id.* The CSAPR Update addresses interstate transport with respect to the 2008 ozone NAAQS for 22 eastern states, including each of the nine states where the sources targeted by the Petition are located. As EPA notes in the Proposed Action, EPA stated in promulgating the CSAPR Update that at that time, EPA could not determine definitively that the

ozone-season NOx emission budgets imposed by that rule for 21 of the 22 states subject to the rule (*i.e.*, all of the 22 states except Tennessee) necessarily constitute a full remedy for interstate transport with respect to the 2008 ozone NAAQS. *See id.* at 22,793 & n.24. EPA subsequently issued the Determination Rule, in which it concluded, based on additional information and analyses, that the NOx emission budgets imposed under the CSAPR Update fully address the interstate transport obligations of 20 of the 21 remaining CSAPR Update states, including eight of the nine states where the Petition-targeted sources are located – *i.e.*, all of those nine states except Kentucky – based on EPA air quality modeling that projected that no air quality monitoring sites in the CSAPR Update region or elsewhere in the contiguous United States, outside of California, would have nonattainment or maintenance problems with respect to the 2008 ozone NAAQS in 2023.[10] *See id.* at 22,793. As

[10] EPA issued the results of its air quality monitoring that formed the basis for the Determination Rule in an October 27, 2017 memorandum. *See* 83 Fed. Reg. at 65,911 & n.115 (citing Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors, Regions 1–10, Supplemental Information on the Interstate Transport State Implementation Plan Submissions for the 2008 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I) (Oct. 27, 2017)). As EPA explains in the Proposed Action, "in determining the appropriate future analytic year for purposes of assessing remaining interstate transport obligations for the 2008 ozone NAAQS in the Determination Rule, the EPA considered two primary factors: (1) The applicable attainment dates for the 2008 ozone NAAQS; and (2) the timing to feasibly implement new NOx control strategies not previously addressed in the CSAPR Update." 84 Fed. Reg. at 22,798. Based on the length of time EPA determined would be required for installation of new NOx control equipment on EGUs within the CSAPR Update region, "EPA concluded that reductions from such control strategies were unlikely to be implemented for a full ozone season until 2023," which "is later than the attainment date for nonattainment areas classified as Serious (July 20, 2021)," but earlier than the attainment date for nonattainment areas classified as Severe (July 20, 2027). *Id*.

noted above, EPA determined in a separate rule that Kentucky's interstate transport SIP – which EPA approved in full – demonstrated that that state's CSAPR Update ozone-season NOx budget, together with other existing control requirements, fully resolves any significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in other states. 83 Fed. Reg. 33,730.

Although EPA has not conducted an interstate transport rulemaking addressing the 2015 ozone NAAQS, in March 2018, EPA released a technical information memorandum intended "to provide information to states and the [EPA] Regional offices as they develop or review [SIPs] that address section 110(a)(2)(D)(i)(I) of [the] Clean Air Act . . . as it pertains to the 2015 ozone [NAAQS]."[11] *See* 84 Fed. Reg. at 22,796. Attachment B to that March 2018 Memorandum provided "Projected Ozone Design Values at Potential Nonattainment and Maintenance Receptors Based on EPA's Updated 2023 Transport Modeling."[12] As EPA notes, the analysis in the March 2018 Memorandum generally followed EPA's four-step framework. *Id.*

[11] EPA Memorandum on "Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)" at 1 (Mar. 27, 2018) EPA Doc. EPA-HQ-OAR-2018-0170-0028 ("March 2018 Memorandum"). The March 2018 Memorandum states that information provided in that memorandum "builds upon information provided in [EPA's] October 2017 interstate transport memorandum" that formed the basis for the Determination Rule. *Id*.

[12] EPA explained in the memorandum that it projected 2023 ozone NAAQS design values based on its expectation that ozone season 2023 will be the last full ozone season in which ozone design values will be used for attainment demonstrations for areas that are classified as moderate nonattainment for the 2015 ozone NAAQS and that at this point are subject to an anticipated attainment deadline in August 2024. *See* March 2018 Memorandum at 3 & n.6; *see also* 84 Fed. Reg. at 22,799 ("EPA believes it is appropriate to consider the 2023 modeling when evaluating the petition's claims with respect to the 2015 ozone NAAQS because the 2023 ozone

In the Proposed Action, EPA notes that New York asserted in its Petition that EPA was precluded from using its analyses in the Determination Rule and the March 2018 Memorandum because they used an analytic year of 2023, and CAA section 126(c) requires compliance with any emission limits issued in conjunction with an affirmative EPA finding under section 126(b) within three years after the date of the finding. *Id.* at 22,799. But New York puts the cart before the horse: The selection of an analytic year (in this case, 2023) for air quality assessments is an essential *precondition* for undertaking the future-year air quality modeling that is the first step in the established four-step framework for implementing the Good Neighbor Provision. In contrast, the section 126(c) compliance timeframe cannot conceivably come into play until *after* EPA has made a finding of significant contribution to nonattainment or interference with maintenance of NAAQS at the conclusion of *step 3*. As EPA explains, "evaluation of air quality in 2023 is a necessary step to determine whether the sources named in New York's petition are in violation of the good neighbor provision in the first instance," and "the choice of 2023 as an analytic year does not preclude the implementation of a remedy in an earlier year if the necessary finding is made under CAA section 126(b)." *Id.*

EPA notes that New York also raised concerns in the Petition regarding other aspects of EPA's modeling, including EPA's expectation that EGUs not equipped

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season aligns with the attainment year for Moderate ozone nonattainment areas") (footnote omitted).

with certain types of NOx emission controls would reduce their emissions in future years in the absence of imposition by EPA of enforceable unit-level emission limits and issues concerning the methodology EPA used in modeling grid cells that contain land-water interface. *Id.* at 22,800. As EPA explains in the Proposed Action, New York did not provide any basis for these concerns that might call into question the reliability of EPA's modeling results. *Id.* Moreover, EPA addressed concerns relating to these issues in its response to public comments on its rulemaking on the Determination Rule, and the Petition did not provide any information that EPA had disregarded in that rulemaking concerning these issues. *Id.* New York's purported concerns, therefore, do not call into question the reliability of EPA's previous analyses or the suitability of those analyses to informing EPA's evaluation of the Petition.

In sum, in the Proposed Action, EPA appropriately relies on its existing analyses to evaluate the Petition using its four-step interstate transport framework. *See id.* at 22,797 ("where the EPA has existing relevant information at its disposal that could help inform its proposed decision on New York's section 126(b) petition, the EPA is using such information as part of its discretionary independent analysis of the petition").

B. EPA's Evaluation of the Petition Using Its Four-Step Interstate Transport Framework

Based on application of its well-established four-step framework, EPA proposes to deny the Petition at step 1 with respect to the 2008 and 2015 ozone

NAAQS in Chautauqua County and with respect to the 2008 ozone NAAQS in the NYMA, and EPA proposes to deny the Petition at step 3 with respect to the 2015 ozone NAAQS in the NYMA and to find that application of step 3 provides an additional basis for denying the aspects of the Petition that EPA proposes to deny based on its step 1 analysis. These proposed determinations are reasonable and well-supported in the Proposed Action, and EPA should make them final.

1. EPA's Step 1 Analysis

EPA proposes to deny the Petition with respect to Chautauqua County for both the 2008 and the 2015 ozone NAAQS based on its step 1 analysis because New York failed to provide information sufficient to demonstrate that the county will experience a nonattainment or maintenance problem with respect to either NAAQS. As EPA notes, New York correctly states in its Petition that EPA previously designated Chautauqua County as Marginal nonattainment for the 2008 ozone NAAQS, but the Petition does not provide analyses or other information indicating the County will experience a future nonattainment or maintenance problem. *Id.* at 22,800.[13] To the contrary, the Petition acknowledges that the area where the county is located attained the NAAQS by its applicable attainment date, and although the Petition asserts that the area is at risk of exceeding the 2008 ozone NAAQS in the

[13] EPA notes that it has taken the position that "designations themselves are not dispositive of whether a downwind area will have an air quality problem in the future." 84 Fed. Reg. at 22,800 (footnote omitted).

future, the Petition does not provide evidence to support that assertion. *Id.* Moreover, EPA's air quality data and existing independent analyses do not indicate a future nonattainment or maintenance problem in Chautauqua County for either NAAQS. The 2015-2017 measured design value for the area is 68 ppb – which is well below the level of both NAAQS – and EPA's air quality modeling for the area projected an average 2023 design value of 58.5 ppb and a maximum 2023 design value of 60.7 ppb, indicating continued attainment and maintenance of both NAAQS. *Id.*

Likewise, EPA explains that the Petition does not provide information sufficient to demonstrate that the NYMA will experience a nonattainment or maintenance problem with respect to the 2008 ozone NAAQS. Although the Petition points out that the NYMA was designated nonattainment for that NAAQS and did not attain the NAAQS by the relevant attainment date, the Petition does not provide evidence that the area will have nonattainment or maintenance problems in a future year. *Id.* EPA's independent analysis in the Determination Rule indicates that all monitoring sites in the NYMA – indeed, all monitoring sites throughout the CSAPR Update region – will attain and maintain the 2008 ozone NAAQS in 2023. *Id.* at 22,801. EPA notes that New York did not provide any new information in its Petition that calls into question EPA's conclusion in the Determination Rule. *Id.* For this reason, EPA reasonably proposes to deny the Petition as to the NYMA for the 2008 ozone NAAQS based on its step 1 analysis.

EPA's air quality modeling indicates nonattainment and maintenance problems in the NYMA in 2023 with respect to the 2015 ozone NAAQS. *Id.* Although New York did not include in its Petition evidence of future air quality problems in the NYMA with respect to the 2015 ozone NAAQS, EPA proceeded to step 2 in its four-step interstate transport framework based on its own air quality projections.

2. EPA's Step 2 Analysis

In step 2, EPA evaluated – based primarily on its existing air quality modeling – whether there are linkages between the nine upwind states where the Petition-targeted sources are located and air quality problems in the NYMA with respect to the 2015 ozone NAAQS.[14] EPA based its step 2 analysis on its existing air quality modeling because New York, in the Petition, did not provide technical information that was helpful in supplementing the existing modeling data.[15] As EPA explains in the

[14] As EPA notes, given the outcome of the step 1 analysis, there was no need to proceed to a detailed step 2 analysis with respect to Chautauqua County for the 2008 or 2015 ozone NAAQS or with respect to NYMA for the 2008 ozone NAAQS. *Id*. at 22,801 ("Because . . . neither the information in the petition nor existing information available to the EPA indicates there will be downwind nonattainment or maintenance concerns in Chautauqua County with respect to the 2008 and 2015 ozone NAAQS, or in the NYMA with respect to the 2008 ozone NAAQS, the EPA has no basis to find a linkage at step 2 of the four-step framework between the named upwind states and these downwind areas with regard to the respective NAAQS").

[15] In the Petition, New York cited EPA's contribution modeling for the 2008 ozone NAAQS that EPA issued in conjunction with the 2016 CSAPR Update. Petition at 10. This modeling has been superseded by EPA's modeling for the Determination Rule. With respect to the 2015 ozone NAAQS, New York mentioned the modeling that EPA released in October 2017 but stated that it had "significant concerns about the assumptions and results of this modeling." *Id*. *See* footnote [10] and accompanying text above for a discussion of the modeling that EPA released in October 2017. EPA's response to the concerns New York expressed in its Petition are discussed above in section [III.A].

Proposed Action, EPA's air quality modeling indicated that emissions from at least some of the nine states where the Petition-targeted sources are located are linked to air quality problems in the NYMA. *Id.* The number of the linkages varies based on the air quality "contribution" screening threshold applied. In past interstate transport rulemakings, including the CSAPR Update, EPA used one percent of the NAAQS as the applicable screening threshold at step 2 of the framework. *Id.* More recently, in an August 31, 2018 memorandum, EPA used the air quality modeling described in the March 2018 Memorandum to present information on contributions from upwind states to downwind areas with nonattainment and/or maintenance problems with respect to the 2015 ozone NAAQS using three possible screening thresholds: one percent of the 2015 ozone NAAQS (0.70 ppb), 1 ppb, and 2 ppb. *Id.* EPA's contribution modeling indicates that all nine states were linked to the NYMA using a contribution threshold of 0.70 ppb, while six of the nine were linked using a contribution threshold of 1 ppb.[16] Without determining which threshold is more appropriate for assessing contribution with respect to the 2015 NAAQS, EPA proceeded to step 3 of its analysis based on a conclusion that, in light of results from

[16] 84 Fed. Reg. at 22,802. The six states linked to the NYMA using a contribution threshold of 1 ppb are Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia. *Id*.

EPA modeling, at least some states where Petition-targeted sources are located are linked to projected future 2015 ozone NAAQS problems in the NYMA.[17]

3. EPA's Step 3 Analysis

In step 3, EPA evaluated whether New York had demonstrated in its Petition that the Petition-targeted sources will significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in the NYMA. As EPA explains in the Proposed Action, EPA in past rulemakings has used a multifactor approach to assess whether linked upwind states will significantly contribute to nonattainment or interfere with maintenance of the NAAQS at a downwind monitoring receptor. This approach has included an assessment of types of NOx emission control strategies available at the targeted sources, the costs of implementing those strategies relative to the emission reduction potential available from those strategies, and the projected ozone-reducing effect (or lack thereof) from

[17] Although there was no need for EPA to determine the appropriate contribution threshold to use at step 2 for purposes of its proposed denial of New York's Petition, we note that it would be much more appropriate to use a 1 ppb or 2 ppb contribution threshold than to use the one-percent-of-NAAQS threshold, particularly given the nature of the ozone air quality issues in the NYMA. As New York acknowledged in a recent proposed rule, monitors in the NYMA are heavily affected by emissions from within the State of New York. *See* New York State Dep't of Envtl. Conservation, Proposed Part 227-3 Regulatory Impact Statement, *available at* https://www.dec.ny.gov/regulations/116175.html (last accessed July 10, 2019) ("New York significantly contributes to nonattainment monitors in the Connecticut portion of [the NYMA]" and in particular, simple cycle and regenerative combustion turbines (the type of facility that would be regulated by the proposed New York regulation) "contributed 0.0048 ppm [*i.e.*, 4.8 ppb] to downwind monitors that currently show nonattainment"). In fact, in the same proposal, New York concluded that these New York sources' existing emissions "make it difficult, if not impossible, for New York to meet air quality goals and [Clean Air Act] requirements." *Id.*

implementation of those strategies in abating downwind air quality problems. *Id.* at 22,802.

EPA has not conducted an independent step 3 analysis with respect to the 2015 ozone NAAQS,[18] and as discussed above, EPA has no obligation under the Act to undertake such an analysis when it reviews a section 126 petition. EPA observes that New York "has not conducted any sort of multifactor analysis to determine whether cost-effective controls are available at the named sources and has not provided any alternative analysis that would support a conclusion at step 3 that the named sources will significantly contribute to nonattainment or interfere with maintenance of the NAAQS." *Id.* at 22,803. Instead, New York "simply names facilities that appear to have larger emissions than other facilities (at least 400 tons of NOx per year) without supporting *why* the named facilities should make certain reductions." *Id.* (emphasis added). And instead of assessing how cost and air quality factors should be evaluated and weighed to determine the appropriate level of NOx emission controls (if any) for targeted sources, New York "simply suggests that upwind sources should be subject to a comparable level of control as sources in downwind states (*i.e.*, the $5,000/ton level of control sources in New York are subjected to for purposes of RACT)." *Id.*

[18] EPA notes that, in the CSAPR Update, which EPA published in October 2016, it conducted a multifactor analysis at step 3 to evaluate cost-effective NOx emission reductions available from EGUs by the beginning of the 2017 ozone season but did not conduct a contribution analysis using a longer implementation timeframe and did not assess any cost-effective emission reductions that may be available from non-EGU facilities. 84 Fed. Reg. at 22,803 (citing 81 Fed. Reg. at 74,521-22).

As EPA notes, "[n]othing in the text of the good neighbor provision indicates that upwind states are required to implement RACT, which is a requirement that applies to designated nonattainment areas . . ., nor does the [good neighbor] provision require uniformity of control strategies imposed in both upwind and downwind states." *Id.* Although cost has always been a factor in EPA's analysis of what constitutes significant contribution to nonattainment and interference with maintenance, "EPA has never set upwind control obligations based solely on the level of controls imposed for purposes of RACT in downwind nonattainment areas, as the petition suggests the EPA do here." *Id.* As the following section of these comments explains, New York's request that EPA do so in response to the Petition is entirely without support and should be rejected.

In light of the Petition's lack of any step 3 analysis, EPA reasonably "propos[es] to find that material elements in New York's assessment of step 3 are insufficient, such that the EPA cannot conclude that any source or group of sources in any of the named states will significantly contribute to nonattainment or interfere with maintenance in Chautauqua County or the NYMA relative to the 2008 and 2015 ozone NAAQS." *Id.* at 22,802. Thus, in addition to the deficiency at step 1 that leads EPA to propose to deny the Petition as to Chautauqua County with respect to the 2008 and 2015 NAAQS and as to the NYMA with respect to the 2008 NAAQS, the lack of analysis in the Petition at step 3 represents an independent basis for denial of these aspects of the Petition *as well as* the aspect of the Petition pertaining to the

NYMA with respect to the 2015 NAAQS. *Id.* at 22,804. The grounds for EPA's proposal to deny the Petition as to both areas and both NAAQS based on step 3 are not only reasonable but compelling, given that New York in its Petition not only failed to demonstrate but failed even to *attempt* to demonstrate that cost-effective NOx emission controls are available at any – let alone all – of the targeted facilities.

IV. New York's Request that EPA Impose New York's RACT Requirements on Sources in Upwind States Is Inconsistent with the Act.

In its cover letter to the Petition, New York asserts that "New York requires its stationary sources to meet high standards of NOx control through the application of stringent [RACT] emission limits" and that "[r]equiring the same of upwind sources that significantly contribute to nonattainment and interfere with maintenance [of the 2008 and 2015 ozone NAAQS] in New York State will provide ample public health benefits and reduce the disproportionate economic burden to NOx sources in New York State."[19] New York's extraordinary request that EPA impose New York's RACT requirements on sources in other states conflicts with the terms, structure, and purposes of the Act. Under the Act's cooperative federalism structure, states lack authority to have EPA impose their own SIP solutions on sources in other states. *See, e.g.*, *Vermont v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988) (affirming EPA's decision that it was inappropriate to impose Vermont's own emission standards on sources in

[19] Petition, Cover Letter at 1. *See* footnote [17] above for a discussion of the negative effects of emissions from New York's own sources on that state's ability "to meet air quality goals and [Clean Air Act] requirements."

upwind states to address visibility impairment at the Lye Brook National Wilderness Area in Vermont, and explaining that "Vermont may not impose its standards on upwind states"); *see also* 84 Fed. Reg. at 22,795 (citing April 13, 2018 letter to EPA from the U.S. Chamber of Commerce (EPA Doc. EPA-HQ-OAR-2018-0170-0002) (pointing out that "[s]ignificant constitutional and statutory issues are raised by New York's attempt to apply its definition of RACT extra-territorially.")).

Even if New York were to provide a reasoned factual basis for its extraordinary request to impose its own RACT standards on a multiplicity of sources throughout nine other states – which New York does not (and cannot) provide – its request would still represent an inappropriate attempt at an end-run around EPA's denial of the petition filed by New York and some other northeastern states under CAA section 176A. In 2013, New York and those other states filed a petition under section 176A, requesting that EPA add nine states – including seven of the nine states where sources targeted in New York's section 126(b) petition at issue here are located – to the Ozone Transport Region ("OTR") established by Congress under section 184 of the Act. *See* Petition at 8-9.[20] Any state included within the OTR is thereby subjected to certain heightened emission control requirements, including imposition of RACT emission limits on sources *statewide* – not merely sources located in designated

[20] These seven states are Illinois, Indiana, Kentucky, Michigan, Ohio, West Virginia, and the portion of Virginia that is not already included in the OTR. Maryland, Pennsylvania, and the part of Virginia that is in the Consolidated Metropolitan Statistical Area that includes the District of Columbia were included by Congress in the OTR. *See* CAA § 184(a).

nonattainment areas, as is the case for states not included in the OTR – for emissions of volatile organic compounds and NOx. CAA §§ 182(f), 184(b)(1)(B); 57 Fed. Reg. 55,620, 55,622, 55,627 (Nov. 25, 1992). Section 176A of the Act authorizes EPA, where statutorily specified criteria are met, to add states to the OTR. CAA § 176A(a)(1). If EPA adds a state to the OTR, the state has nine months to submit a SIP revision to EPA that includes that state's determinations as to what RACT emission limits are appropriate for individual sources or groups of sources located within that state. CAA § 184(b)(1); 57 Fed. Reg. at 55,622.

Following careful consideration and notice-and-comment rulemaking, EPA issued a final rule denying New York's section 176A petition. 82 Fed. Reg. 51,238 (Nov. 3, 2017). In April 2019, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion upholding EPA's final rule denying the petition against a judicial challenge filed by New York and others. *New York v. EPA*, 921 F.3d 257, 263 (D.C. Cir. 2019) (holding that "EPA's denial of the States' petition complied with the Clean Air Act and was a reasonable exercise of the agency's discretion").

The Petition at issue in this rulemaking represents another attempt by New York to have EPA impose the types of emission reductions on upwind states' sources that it sought unsuccessfully through its section 176A petition. Indeed, New York here improperly requests even more than it would have received from an EPA approval of its section 176A petition; if that petition had been granted, upwind states would have been given the right under the CAA to make their own judgments,

embodied in their own SIPs, as to what RACT limits are appropriate for their sources. Here, in contrast, New York has asked EPA to impose on a host of sources throughout nine other states *New York's* own notion of what it deems appropriately "stringent" RACT controls for New York sources. Petition, Cover Letter at 1. Just as New York's petition to have EPA impose heightened emission reduction requirements for sources in these upwind states through section 176A failed, so should this even more egregious backdoor approach.

Finally, it bears emphasis that New York contends that EPA should grant the Petition in order to "reduce the disproportionate economic burden to NOx sources in New York State." *Id.* But equalizing economic impacts of emission controls among states – irrespective of any genuine, demonstrated air quality need for those controls – is not a legitimate or permissible objective of a petition under section 126 or of implementation of section 110(a)(2)(D)(i)(I). Moreover, EPA in proposing to deny the Petition properly relies on its interstate transport assessment framework, which the Supreme Court has upheld as offering "an efficient *and equitable* solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *EME Homer City,* 572 U.S. at 519 (emphasis added). EPA properly proposes to decline New York's invitation to reduce purported economic burdens on New York by imposing additional requirements on upwind sources that would risk creating the over-control that the Act prohibits. *See id.* at 521-22; *id.* at 515 n.18.

V. The Petition's Targeting of Expansive, Undifferentiated Categories of Sources Conflicts with Section 126(b) – Because It Makes Effectively Meaningless the Statutory Phrase "Group of Stationary Sources" – and Provides an Additional and Independent Reason for EPA's Denial of the Petition.

The Proposed Action states that "EPA is taking comment on whether to also deny the petition because the petitioner has not provided justification for the proposition that identification of such a large, undifferentiated number of sources located in numerous upwind states constitutes a 'group of stationary sources' within the context of CAA section 126(b)." 84 Fed. Reg. at 22,789. Section 126(b) of the CAA provides that "[a]ny 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 [CAA] section [110(a)(2)(D)(i)(I)]." CAA § 126(b) (emphasis added). As noted above, New York in the Petition seeks a section 126(b) finding with respect to over 350 stationary sources, including EGUs, non-EGU facilities, and oil and gas sector facilities, located in nine states. *See* [1-2] above. The extraordinary number of sources listed in Appendix B to New York's Petition, and the diverse and undifferentiated categories that those sources represent, would effectively render inoperative the "group of stationary sources" clause of section 126(b).

In the Petition, New York makes no attempt to categorize in any meaningful way the vast universe of sources it targets as a purported "group," instead simply alleging that they represent many of the higher-emitting sources spread over the

enormous geographic expanse of nine states. New York offers no justification for an interpretation that this huge and varied assortment of sources in multifarious categories throughout nine states should be construed as a "group of stationary sources" within the meaning of section 126(b). EPA suggests in the Proposed Action that "'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." 84 Fed. Reg. at 22,802. But New York has made no attempt to provide a reasonable or even plausible justification for applying the 400-tons-per-year emission threshold that it asserts it used to identify the sources targeted in its Petition, saying only that it "considered [these to be] the highest-emitting facilities" in the nine states. Petition at 9. The lack of any attempt by New York to justify its decision to apply *the same emission threshold* to sources in *different source categories* in nine different states reinforces the conclusion that New York has failed to provide the "justification" necessary to allow EPA even to consider treating this universe of sources as a "'group of stationary sources' within the context of CAA section 126(b)." *Id.* at 22,789.

As described in the discussion in section [II.B] above, the potential practical implications of section 126 petitions such as New York's – seeking application of section 126(c) to a broad array of industrial sources in very different source categories dispersed across a huge, nine-state region – are extreme and catastrophic, creating the

prospect of severe economic and social disruption if an affirmative finding were to be made in response to such a petition. This is not what Congress intended. Inclusion in the Petition of large, undifferentiated categories consisting of hundreds of sources – a range of different facilities that under no plausible reading could be considered a "group" of sources within section 126(b)'s meaning – therefore provides an additional and independent reason for EPA to deny the Petition.

VI. Conclusion

For the foregoing reasons and those stated in the Proposed Action, EPA should make final its proposed denial of the Petition.