



MATTHEW G. BEVIN
GOVERNOR

CHARLES G. SNAVELY
SECRETARY

**ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION**

ANTHONY R. HATTON
COMMISSIONER

300 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601

July 12, 2019

Ms. Beth Palma, U.S.EPA
Office of Air Quality Planning and Standards
Environmental Protection Agency Docket Center (EPA/DC)
Air and Radiation Docket and Information Center
Mail Code: 6102T, 1200 Pennsylvania Ave., NW
Washington, DC, 20460

Re: Comments relating to *Response to Clean Air Act Section 126(b) Petition from New York* (84 Fed. Reg. 22787) Docket ID No. EPA-HQ-OAR-2018-0170

Dear Ms. Palma,

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet) respectfully requests the Administrator of the United States Environmental Protection Agency (EPA) finalize the proposed denial of the Clean Air Act (CAA) section 126(b) petition filed by the state of New York on March 12, 2018. In its petition to EPA, the state of New York alleges that emissions sources located in nine states, including Kentucky, are interfering with attainment or maintenance of the 2008 and 2015 ozone National Ambient Air Quality Standards (NAAQS). On May 20, 2019, EPA proposed to deny the petition filed by the state of New York and explained its rationale to do so. After evaluating EPA's proposed denial, the Cabinet concurs with EPA's determination that New York has not met its statutory burden to demonstrate that sources located in Kentucky emit in violation of the "good neighbor" provision found in section 110 of the CAA.

Courts have historically afforded controlling weight to an administering agency's construction of an ambiguous statute.¹ EPA has consistently followed the same four-factor test when rulemaking under the Good Neighbor Provision and Courts have consistently upheld this process as permissible.² Regarding the first step of the analysis, EPA determined that New York's petition failed to identify, and EPA did not independently find, relevant air quality problems in Chataqua County with respect to the 2008 or 2015 ozone NAAQS or in the New

¹ *EME Homer City Generation*, 572 U.S. 489, 512-13 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

² *Id.* at 518-520.



York Metropolitan Area with respect to the 2008 ozone NAAQS.³ EPA did identify relevant downwind air quality problems in the New York Metropolitan Area with respect to the 2015 Ozone NAAQS.⁴ However, EPA determined “material elements in New York’s assessment of step 3 are insufficient, such that 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 Chataqua County of the [New York Metropolitan Area] relative to the 2008 and 2015 ozone NAAQS.”⁵ EPA appropriately exercised its discretion and did not waiver from this test when denying New York’s petition; its determination should be similarly afforded controlling weight.

It is important to note that the petition filed by New York lacks a technical analysis to support the requirement for additional air pollution controls beyond what is already regulatorily required. The U.S. Supreme Court and the United States Court of Appeals for the District of Columbia Circuit have both held that EPA may not require emissions reductions greater than necessary to achieve attainment and maintenance of the NAAQS in downwind areas.⁶ Currently, all of the ozone monitors in New York measure compliance with the 2008 ozone NAAQS. Requiring emissions sources in Kentucky to further reduce their alleged impact in New York relative to the 2008 ozone NAAQS would contradict the Supreme Court’s decision in *EME Homer City*.

The Supreme Court has also directed EPA to evaluate costs and benefits when determining obligations under the Good Neighbor provision.⁷ New York’s 126(b) petition did not evaluate impacts from individual emissions sources, the air pollution controls already installed and operated at those facilities, and the estimated costs of any additional air pollution controls sought by their petition. New York’s petition identified more than 350 sources across nine states and does not attempt to connect these sources by geography or any other means. This is outside of the meaning of “group of stationary sources” intended by Congress when it enacted section 126 of the CAA. Thus, the material elements of New York’s analysis are technically deficient and insufficient to support New York’s conclusions. Without adequate technical justification, EPA must deny New York’s petition under Section 126(b) of the CAA.

Recently, New York joined seven other states and petitioned the EPA to expand the Ozone Transport Region to include seven of the nine states included in this petition.⁸ EPA denied the petition and the United States Court of Appeals for the District of Columbia Circuit upheld the denial, noting that “[m]any of the States’ arguments against EPA’s denial [of the petition] derive from a fundamental misunderstanding of the scope of EPA’s discretion.”⁹ New York now asks EPA to require the named sources to operate with controls and at emission rates “commensurate with New York State’s Reasonably Available Control Technology (RACT) standards, which are

³ 84 Fed. Reg. 22789 (May 20, 2019).

⁴ *Id.*

⁵ *Id.* at 22802.

⁶ *EME Homer City Generation*, 572 U.S. at 521-22; *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 127 (D.C. Cir. 2015).

⁷ *Id.* at 519.

⁸ See *New York v. EPA*, 921 F.3d 257, 259 (D.C. Cir. 2019).

⁹ *Id.* at 261.

Ms. Beth Palma, U.S. EPA
Docket ID No. EPA-HQ-OAR-2018-0170
July 12, 2019
Page No. 3

based on a control efficiency of \$5,000 per ton of NO_x removed.”¹⁰ EPA appropriately exercised its discretion when declining to extend the Ozone Transport Region and when denying New York’s current petition.

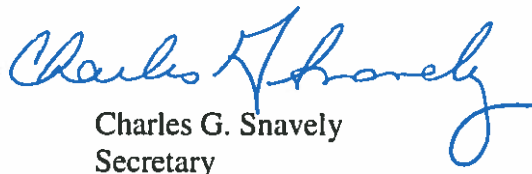
Specific to the actual data included with the petition, the emissions data for Kentucky electric generating units (EGU) included in the petition is inaccurate. New York’s petition also fails to account for the regulatory requirements and emission reductions associated with the 2017 Cross-State Air Pollution Rule (CSAPR) update. As a control strategy to reduce ozone concentrations, EPA significantly reduced the allowances of NO_x emissions in its allocations for the 2017 ozone control period and thereafter. In 2015 and 2016, EPA allotted Kentucky EGU’s a NO_x ozone season budget of 36,167 tons through CSAPR.¹¹ As a result of the CSAPR Update rule, EPA reduced its 2017 NO_x ozone season budget for Kentucky EGUs to 21,115 tons. These federally-enforceable emission limitations are not accounted for in the emissions data provided in New York’s petition.

More importantly, the petition filed by New York grossly inflates the annual NO_x emissions from Kentucky EGUs in 2017. New York estimated that annual NO_x emissions from the Kentucky EGUs listed in the petition to be more than 64,000 tons of NO_x, when actually the emissions from Kentucky EGUs were less than 46,000 tons of NO_x.

Under Section 126 of the CAA, the petitioner bears the burden of establishing a technical basis for the specific finding request. After evaluating the petition, EPA found 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...burden to demonstrate that the named sources currently emit or would emit in violation of the good neighbor provision with respect to the relevant ozone NAAQS.”¹² As such, EPA must deny New York’s 126 petition.

In closing, we appreciate the opportunity to provide technical comments and rationale to support EPA’s proposal to deny New York’s 126 petition. The enclosed comments provide additional technical information related to current air quality data.

Sincerely,


Charles G. Snavelly
Secretary

¹⁰ New York Department of Environmental Conservation, *New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b)*, at 2, https://www.dec.ny.gov/docs/air_pdf/sips126petition.pdf.

¹¹ 40 C.F.R. § 97.510(a)(8)(i).

¹² 84 Fed. Reg. 22789 (May 20, 2019).