

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 2020

Decided July 14, 2020

No. 19-1231

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW
WHEELER, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF
THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

ADIRONDACK COUNCIL, ET AL.,
INTERVENORS

On Petition for Review of a Final Action of the
United States Environmental Protection Agency

Steven C. Wu, Deputy Solicitor General, Office of the Attorney General for the State of New York, argued the cause for petitioners. With him on the briefs were *Letitia James*, Attorney General for the State of New York, *Barbara D. Underwood*, Solicitor General, *Morgan A. Costello* and *Claiborne E. Walthall*, Assistant Attorneys General, *Gurbir S. Grewal*, Attorney General for the State of New Jersey, *Lisa Morelli*, Deputy Attorney General, and *Christopher G. King*, Senior Counsel, New York City Law Department.

Joshua A. Berman argued the cause for petitioners-intervenors Sierra Club, et al. With him on the briefs were *Sean H. Donahue*, *Graham G. McCahan*, *Vickie L. Patton*, and *Liana James*.

Samara M. Spence, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were *Jonathan Brightbill*, Principal Deputy Assistant Attorney General, and *Abirami Vijayan* and *Stephanie L. Hogan*, Counsel, U.S. Environmental Protection Agency. *Sarah A. Buckley*, Attorney, U.S. Department of Justice, entered an appearance.

David M. Flannery, *Kathy G. Beckett*, *Edward L. Kropp*, *Samuel B. Boxerman*, *Samina M. Bharmal*, *David M. Friedland*, *Laura K. McAfee*, *E. Carter Chandler Clements*, *Norman W. Fichthorn*, *Steven P. Lehotsky*, and *Michael B. Schon* were on the brief for respondents-intervenors Midwest Ozone Group, et al. *Laura M. Goldfarb*, *Amy M. Smith* and *Peter Tolsdorf* entered appearances.

Joseph A. Newberg II and *Mary Ann Lee* were on the brief for *amicus curiae* Commonwealth of Kentucky, Energy and Environment Cabinet in support of respondents.

Before: SRINIVASAN, *Chief Judge*, and GRIFFITH and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

Concurring opinion filed by *Circuit Judge* GRIFFITH.

MILLETT, *Circuit Judge*: Air pollutants do not stay still. Nor do they respect state borders. That has created a “complex problem”—namely that “air pollution emitted in one State[]

[can] caus[e] harm in other States.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 495 (2014).

This case involves a challenge to the Environmental Protection Agency’s asserted failure to address cross-border pollution under the Clean Air Act’s Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i). The State of New York petitioned the EPA to find that power-generating and other facilities in nine different States were violating the Good Neighbor Provision by producing emissions that contributed significantly to New York’s difficulty attaining or maintaining compliance with the 2008 and 2015 National Ambient Air Quality Standards for ozone.

The EPA denied New York’s petition on the ground that it failed to meet the agency’s standard for establishing a violation of the Good Neighbor Provision and, in particular, for demonstrating that cost-effective controls could be imposed on the pollution sources. The State of New York, the State of New Jersey, and the City of New York petitioned this court for review.

We grant the petition for review. The EPA offered insufficient reasoning for the convoluted and seemingly unworkable showing it demanded of New York’s petition. In addition, the EPA’s finding that New York did not have an air quality problem under the 2008 National Ambient Air Quality Standards for ozone relied on two faulty interpretations of the Clean Air Act that have since been invalidated. *See Maryland v. EPA*, No. 18-1285, slip op. at 25–34 (D.C. Cir. May 19, 2020). For those reasons, we vacate the EPA’s decision and remand for further proceedings not inconsistent with this opinion.

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, directs the EPA to establish and periodically revise National Ambient Air Quality Standards, or NAAQS, that set the maximum allowable concentrations for various air pollutants, including ozone. 42 U.S.C. §§ 7408(a), 7409. To measure compliance with the NAAQS, the EPA, “in coordination with state governments, divides the country geographically into ‘air quality control regions.’” *Natural Res. Defense Council v. EPA*, 777 F.3d 456, 458 (D.C. Cir. 2014) (formatting modified) (quoting 42 U.S.C. § 7407). While some air quality control regions “lie within a single state[,] * * * others encompass portions of two or more states.” *Maryland*, slip op. at 6 (quoting *Delaware Dep’t of Natural Res. & Environmental Control v. EPA*, 895 F.3d 90, 94 (D.C. Cir. 2018)).

Once new air quality standards go into effect, each State must develop an implementation plan to ensure the standards are met within the State’s air quality control region. *See* 42 U.S.C. § 7410(a)(1); *see also id.* § 7407(b)–(e). In addition, those plans must prohibit “any source or * * * 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” the NAAQS. *Id.* § 7410(a)(2)(D)(i). That subpart is known as the “Good Neighbor Provision.” *See Wisconsin v. EPA*, 938 F.3d 303, 309–319 (D.C. Cir. 2019).

Under Section 110 of the Clean Air Act, the EPA must review each State’s implementation plan and ensure its compliance with statutory requirements, including the Good Neighbor provision. *See* 42 U.S.C. § 7410(k)(1)–(4). If a State fails to timely correct a deficiency in its plan, then the EPA will

promulgate a federal implementation plan for the relevant region(s). *Id.* § 7410(c)(1).

Section 126(b) of the Clean Air Act, 42 U.S.C. § 7426(b), creates an additional mechanism for enforcing the Good Neighbor Provision. It authorizes affected States or local subdivisions to petition the EPA to make a “finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of [the Good Neighbor Provision.]” *Id.*¹

Under Section 126(b), the EPA must generally respond to the petition “[w]ithin 60 days after receipt of [such] petition * * * and after public hearing[.]” 42 U.S.C. § 7426(b). The agency may, however, grant itself an extension of up to six months “upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of th[e] subsection.” *Id.* § 7607(d)(1)(N), (d)(10).

If an existing pollution source in another jurisdiction is found to be in violation of the Good Neighbor Provision, that source generally must cease operation within three months. 42 U.S.C. § 7426(c). But the EPA may allow continued operation if the “source complies with such emission limitations and compliance schedules * * * as may be provided by the Administrator to bring about compliance * * * as expeditiously

¹ Section 126(b) cross-references Section 110(a)(2)(D)(ii) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(ii). But that is understood to be a scrivener’s error. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040–1044 (D.C. Cir. 2001). For present purposes, the proper cross-reference is the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i). *See Appalachian Power*, 249 F.3d at 1040–1044.

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