Air Stewardship Coalition Comments
EPA–HQ–OAR–2018–0170
July 15, 2019

Air Stewardship Coalition Comments in Support of U.S. Environmental Protection Agency Proposal to Deny Clean Air Act Section 126 Petition from New York Department of Environmental Conservation EPA–HQ–OAR–2018–0170

The Air Stewardship Coalition appreciates the opportunity to submit these comments and the attached Ramboll Technical Memorandum[1] in support of the U.S. Environmental Protection Agency's proposal[2] to deny the petition submitted by the New York Department of Environmental Conservation under Section 126 of the Clean Air Act. The Petition claims areas in the New York metropolitan area and western New York face issues with compliance with the 2008 and 2015 ozone national ambient air quality standards (NAAQS) due to interstate transport of emissions from a diverse array of 350+ upwind sources across nine states.

The Air Stewardship Coalition[3] is an ad hoc group of trade associations and companies that seeks to assist EPA and states in addressing alleged interstate transport issues arising under the CAA. Our members include and represent energy and industrial facilities targeted by the NY Petition. These facilities have already made substantial emissions reductions under EPA regulations and State Implementation Plans under the Act, as well as through other mechanisms.

ASC submitted initial comments and extensive technical analysis to EPA in response to New York's Petition, and ASC's comments demonstrate why the Petition fails and should be denied.[4] These same comments still apply, and thus for all the same reasons as outlined in ASC's comments, ASC urges EPA to finalize its proposal and deny the NY Petition.

Specifically, New York's petition fails under EPA's four-step transport framework that governs Section 126 petitions, under which a petitioning state must show:

(1) the downwind state faces an actual non-attainment or maintenance issue (Step One),

(2) the named upwind source(s) contributes beyond a threshold amount to the alleged downwind attainment issue (Step Two), and(3) a highly cost-effective control measure is

[1] R. Morris, Ramboll Technical Memorandum Supporting EPA's Response to Clean Air Act Section 126(b) Petition From New York at 84 FR 22787 (July 15, 2019) (Ramboll Technical Memorandum).

[2] 84 Fed. Reg. 22787 (May 20, 2019) (the Proposal).

[3] ASC includes the following entities: American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, Portland Cement Association, ExxonMobil Corporation, Kinder Morgan, Inc., Holcim US, Inc., Lima Refining Company, Marathon Petroleum Company LP, Saudi Basic Industries Corporation (SABIC), and TransCanada U.S. Pipelines.

[4] Air Stewardship Coalition Initial Comments in Response to New York Department Of Environmental Conservation Section 126 Petition, EPA-HQ-OAR-2018-0170-0008 (Sept. 24, 2018) (ASC Initial Comments). The ASC Initial Comments included two attachments: (A) Ramboll, Analysis of the Technical Basis for the New York Section 126 Petition (Sept. 2018)(2018 Ramboll Technical Report) and (B) Ramboll, Overview of Reasonably Available Control Technology (Sept. 2018) (2018 Ramboll RACT Analysis). The ASC Initial Comments and attachments are incorporated here by reference.

available that could be installed at the named source and would address the excess emissions (Step Three).

(4) only if all three of these are established may EPA fashion a remedy to control a source that is the subject of a Section 126 petition (Step Four). 84 Fed. Reg. at 22791.

ASC supports EPA's use of the four-step framework to address the Petition because the framework is consistent with the Act, has been upheld by the courts, and is consistent with EPA's long-standing practice. Applying that framework EPA has properly denied the Petition.

- Step One: As EPA correctly explains, available data and technical analysis demonstrate that New York has failed to show air quality problems sufficient to justify a finding under Step One as to the 2008 ozone NAAQS. In addition, EPA should also find under Step One that the Petition fails as to the 2015 ozone NAAQS, when emissions from exceptional events and international contributions properly are excluded.

- Step Two: EPA should also find that New York's Petition fails at Step Two because New York has not even placed in the administrative record the data and modeling on which it claims to have based its Petition, even though New York itself acknowledged it bears the burden to support its Petition. Petition at 2. On that basis alone, EPA should deny the Petition. In the absence of this information, ASC was forced to take extra steps to obtain this data through New York's Freedom of Information Law process. In addition, ASC's review of the data it was given confirms that New York's modeling and associated analysis is flawed and does not support its requested relief. Indeed, the data show there is not even a potential, actionable linkage under EPA's standard criteria for eight of the states covered by the New York Petition. Any potential remaining link does not justify the expansive relief New York demands.

- Step Three: EPA has likewise correctly found that New York has failed to meet its burden of proof as to Step Three. The Petition fails to provide any information to support its demand that New York's chosen control technologies should be imposed on 357 sources in nine other states or to show that its demanded remedies are cost effective, as required by the EPA transport framework. Beyond that, as ASC detailed in its initial comments and as supplemented here, there is ample additional information in the record to find that New York is not entitled to relief. The sources at issue are already subject to expansive regulations imposing reasonably available control technology (RACT) requirements, consent decrees, and other mandated and voluntary mechanisms that adequately address emissions, consistent with EPA's findings in its most recent rulemaking on interstate transport. Moreover, as to Pennsylvania in particular, recent "RACT II" regulations impose further and tighter restrictions that will address any potential linkage to that state's sources.

In sum, EPA has properly rejected New York's Petition.

I. EPA correctly used its established four-step Transport Framework to evaluate the Petition.

ASC supports EPA's continued use of its four-step transport framework to evaluate Section 126 petitions. EPA has long used a four-step framework to evaluate "good neighbor" obligations under Section 110 of the Clean Air Act, and EPA's four-step framework is a reasonable mechanism to review the Petition. *See North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008). Section 126 operates as an adjunct to Section 110, authorizing EPA to impose good neighbor requirements when a downwind state can prove that an upwind state has failed to implement its good neighbor obligations under Section 110. It is logical and consistent with the CAA for EPA to apply the same four-step framework in Section 126 as it applies under Section 110. 84 Fed. Reg. at 22795; *Appalachian Power Co. v. EPA*, 249 F.3d 1031, 1049-50 (D.C. Cir. 2001); ASC Initial Comments at 35.

Moreover, using the four-step framework squares fully with past practice by the Agency. *See Am. Mining Congress v. EPA*, 824 F.2d 1177, 1182 (D.C. Cir. 1987) (consistent agency interpretation merits judicial deference) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 at n. 30 (1987)). As EPA explained in its 2006 decision denying a Section 126 petition submitted by North Carolina, "section 126 and section 110(a)(2)(D)(i) are integrally connected (due to the reference to the section 110(a)(2)(D)(i) prohibition found in section 126(b)). Thus, the interstate transport problem at issue could be addressed under either provision, and once the underlying section 110(a)(2)(D)(i) SIP deficiency is eliminated, there no longer is a basis for EPA to make a positive finding under section 126." 71 Fed. Reg. 25328, 25332 (Apr. 28, 2006). In that decision, EPA assessed whether there was a downwind air quality problem (Step One); whether there was a link between the named sources and the downwind receptor (Step Two); and whether there were highly cost-effective controls available to address the link (Step Three) to determine whether there was significant contribution meriting EPA-imposed relief under Section 126 (Step Four). 71 Fed. Reg. at 25337. EPA again used this framework in addressing the Section 126 petitions submitted by Connecticut, Delaware, and Maryland—and it should retain the framework in its final decision on the Petition. ASC Initial Comments at 7-8.

II. In its proposed denial, EPA has properly reasoned that New York bears the burden to show that the extraordinary relief it seeks under Section 126 is warranted.

ASC further supports EPA's proposal to find New York bears the burden to establish the bases for its Petition and the relief the state requests. This is clear from the statutory language and framework and confirmed by the policy implications of a Section 126 petition.

There are serious implications for a named source, if EPA were to grant a Section 126 petition. Section 126 grants EPA discretion to impose emissions limitations or compliance schedules directly on the source. And, if the named upwind source cannot meet those requirements, then the source must shut down within three months. See 42 U.S.C. § 7426(c). These are extraordinary powers for the agency to wield. If a source were suddenly required to close to meet New York's extraordinary demands, the shutdown could cause substantial economic harm not only to the source, but to its employees, customers, the surrounding community and a national/global supply chain that may depend on the source's operations.

Furthermore, Section 126 has an extremely short timeline for EPA to make a determination. Within 60 days of a petition and after public hearing, EPA must make a finding to grant or deny the petition. 42 U.S.C. §7426(b). The Act allows EPA an additional six months to carry out Section 126 if the Agency determines that more time is needed. 42 U.S.C. § 7607(d)(10). As EPA correctly highlights in its Proposal, the difficulty for EPA and the public to carry out the purpose of Section 126 within this very narrow timeframe is exacerbated when, as here, the petition names, not a "major source or group of stationary sources," but instead hundreds of sources spanning various industries across nine states. 84 Fed. Reg. at 22797.

In this context, EPA has properly found that the Section 126 petitioning state bears the burden to bring forth sufficient proof to demonstrate that the extraordinary relief it is seeking must be imposed under Section 126. Requiring the Section 126 petitioner to meet this burden is well established. *See New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988) (upholding EPA interpretation that petitioning states had burden to show relief under Section 126 petitions was warranted). Moreover, placing the burden on the petitioning government – which possesses ample, in fact, boundless, time in advance to prepare its filing – is the equitable approach. For Step Two alone, the complex air quality and photochemical modeling and technical analyses involved takes many months to prepare. *See* ASC Request for Extension, EPA-HQ-OAR-2018-0170-0003, Declaration of Ralph E. Morris at ¶¶ 7-12 (April 25, 2018). EPA clearly could not develop the data and other information necessary to resolve a Section 126 petition in a mere 60 days.

Indeed, by providing EPA only a limited timeframe, Congress' intent is clear—that EPA would not itself "be required to undertake a full-scale investigation of the adequacy of the SIPs of all states named in the petition for all pollutants involved, to conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations, and to develop whatever new air pollution models are necessary to confirm or affirmatively disprove Petitioners' modeling theories, as well as conducting a public hearing, analyzing the evidence presented by all interested parties, proposing a determination, considering all comments submitted and promulgating a final rule—all within 60 days of receipt of the petition." *See New York*, *supra* 852 F.2d at 578. Had Congress intended that EPA would "be required to perform all these duties in such a short period of time" it would have said so expressly. *Id.* Instead, Congress intended that the Section 126 petitioner do its homework before filing its petition and present EPA with the information necessary to resolve that petition within the 60-day window provided by Section 126. Thus, New York bears the burden of demonstrating that relief is warranted under Section 126.[5]

Because New York failed to meet this burden, EPA should finalize its proposal and deny New York's Petition.

[5] New York itself acknowledged in its Petition that it bears this burden. . . . . NY Petition at 2 ("[T]he burden on a state filing a petition pursuant to section 126(b) is to demonstrate that any major source or group of stationary sources emits or would emit an air pollutant that leads to difficulty attaining or maintaining a NAAQS.").

III. EPA correctly found New York is not entitled to relief under CAA Section 126.

Under EPA's four-step framework, if a Section 126 petition fails at any Step, the petition should be rejected by EPA. Here, EPA proposes to deny the Petition because it fails in part (as to the 2008 NAAQS) at Step One and in full (as to both the 2008 and 2015 NAAQS) at Step Three because New York has failed to meet its burden of proof. We agree with EPA's conclusion to deny the Petition and its supporting rationale. However, ASC also submits that the Petition has failed more broadly and provides additional information for the administrative record to support EPA's denial.

A. EPA correctly proposed to find that the Petition fails at Step One for the 2008 NAAQS and for the 2015 NAAQS in Chautauqua County, but should likewise find generally that the Petition fails at Step One across New York.

To satisfy Step One of the EPA's Transport Framework, EPA would have to find that there is a downwind attainment problem in New York. EPA correctly proposed to find that New York has no attainment problems with the 2008 NAAQS and no attainment issues with the 2015 ozone NAAQS in Chautauqua County—but should likewise find that no area of New York has an ozone attainment issue under either the 2008 or the 2015 NAAQS.

First, the data unequivocally prove that Chautauqua County has no current or future attainment issues for either the 2008 or the 2015 ozone NAAQS. New York did not even use the most current data available to it when submitting its petition and thus failed to consider the significant, ongoing emission reductions across the relevant states. Ramboll's technical analysis based on updated data provides additional support for EPA's own findings and confirms that Chautauqua County has no ozone NAAQS issues warranting relief. ASC Initial Comments at 8-13, 2018 Ramboll Technical Report at Appendix 1. Accordingly, we urge EPA to retain this finding in its final decision.

Second, for all other areas in New York, EPA's modeling and supporting analysis in the Determination Rule show that New York will attain compliance with the 2008 NAAQS in accord with the timeline under Section 126. 84 Fed. Reg. 22793; 83 Fed. Reg. 65878 (Dec. 21, 2018). Having done this analysis for the Cross State Air Pollution Rule (CSAPR), EPA appropriately relies on this previously conducted modeling to support its decision on the NY Petition.

Third, in addition to the analysis in the Determination Rule, there is substantial additional evidence to support EPA's proposed denial of New York's Petition. Using 2017 as the "future year" (the same analytic year used in the CSAPR Update rule and the year on which New York bases its Petition) demonstrates that almost no monitors show attainment issues in New York for the 2008 and 2015 ozone NAAQS. ASC Initial Comments at 11; 2018 Ramboll Technical Report at 7, 12-13, Table 2-1.

Finally, even beyond EPA's proposed denial, we urge EPA to further support its decision to deny the Petition by considering contributions from international transport and exceptional events at Step One (and Steps Two and Three, as appropriate) in its analysis. ASC Initial Comments at 11-13. The President has directed EPA to account for non-upwind state

contributions from exceptional events and international transport when evaluating a state ozone NAAQS SIP submission. *E.g.*, Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, 83 Fed. Reg. 16761, 16762-763 (April 12, 2018).

Moreover, EPA guidance now provides that state compliance demonstrations for ozone NAAQS may consider international transport of emissions under section 179B of the Act. 83 Fed. Reg. 63998, 63010 (Dec. 6, 2018) (EPA did not adopt "any geographic limitation on the use of CAA section 179B" and "instead clarify[ied] that a demonstration prepared under CAA section 179B could consider emissions emanating from North American or intercontinental sources and is not restricted to areas adjoining international borders"). Likewise, EPA guidance authorizes the use of exceptional events in determining ozone attainment status and "whether a SIP satisfies CAA § 110(a)(2)(D)(i)(I) regarding interstate transport." EPA OAQPS, Additional Methods, Determinations, and Analyses to Modify Air Quality Data Beyond Exceptional Events at 2-3 (EPA-457/B-19-002) (April 2019).

In view of this direction from the President and EPA's own guidance, EPA should consider these emissions in determining whether to impose extraordinary measures on an upwind source, as provided under Section 126. If the upwind source is not truly contributing significantly or there are, in fact, no cognizable ozone attainment issues downwind when international emissions and exceptional events are properly considered, then Section 126 should not be triggered. Yet, here, when those other contributions are appropriately excluded from the analysis, New York does not have any potential ozone attainment issue at any receptors for either the 2008 or the 2015 ozone NAAQS. ASC Initial Comments at 11-13, 2018 Ramboll Technical Report at 18; 2019 Ramboll Technical Memo at 6-7.

B. EPA should also find New York has failed to satisfy Step Two based on New York's deeply flawed modeling and failure to provide adequate data to support the alleged "link" between named sources and New York receptors.

New York's flawed approach to Step Two provides an additional reason for denying the Petition.

First, New York's Petition fails to provide both the data on which it relied to conduct its modeling, and its modeling analysis. Without these basic elements, EPA (and the public at large) cannot assess the reliability or the accuracy of New York's claims. *See* ASC Initial Comments at 15-16 & n.75 (information upon which EPA relies in making decisions must be accurate and reliable under the Information Quality Act and EPA Information Quality Guidelines). New York thus asked EPA to make a finding about complex, highly technical photochemical air quality modeling and analysis, without actually providing the underlying modeling data or analysis to EPA. This is reason enough to find that New York has failed to meet Step Two, regardless of the particular NAAQS or significance threshold at issue.

Second, New York's attempt to establish a link between the named sources and New York receptors is deeply flawed for the reasons ASC details at length in its initial comments and

the supporting Ramboll analysis. *See* ASC Initial Comments at 15-26; 2018 Ramboll Technical Report at 22-31. Briefly:

- New York inexplicably used an incomplete modeling period even though a full modeling period was available. ASC Initial Comments at 16. A decision of this scope should not be based on an incomplete data set.
- New York relied on outdated, non-representative emissions information, notwithstanding that more current—significantly lower—emissions data was available before New York filed its Petition. ASC Initial Comments at 16-17. As such, New York did not consider the significant reductions in emissions that had already accrued across the region before it submitted its Petition. This likewise improperly skewed the results.
- As detailed in the 2018 Ramboll Technical Report at 27, New York fashioned a new, non-standard ozone contribution metric—and buried the metric deep in its modeling data such that it could not be discerned from the paper submissions New York provided with its Petition. A close review of the data revealed that New York used a single day with the highest upwind state ozone contribution to a specific receptor to set the ozone contribution metric. By contrast, EPA's standard approach is to project the future air quality design value for the eight-hour ozone NAAQS based on a 10-day average (not highest) of the 10 highest daily maximum eight-hour average concentrations in a simulated period. ASC Initial Comments at 18. New York's non-standard approach creates invalid comparisons that result in overstated contribution estimates. ASC Initial Comments at 17-19, 2018 Ramboll Technical Report at 27. EPA has not used this metric to evaluate source contributions in past regional transport evaluations, and in fact, EPA expressly rejected the approach when it developed the CSAPR Rule. ASC Initial Comments at 18.
- New York also used an inferior modeling technique to assess source contributions. ASC Initial Comments at 19. Instead of using the CAMx source apportionment method – the widely available and superior approach that is now generally recognized in the industry as state-of-the-art for modeling long-range transport of pollutants – New York used CMAQ 2017 NOx emissions zero-out modeling. New York's method is less robust because it unrealistically assumes that NOx emissions are simultaneously eliminated from the over 350 facilities across nine states, and then claims to proceed to evaluate the contributions of these sources to 2017 baseline ozone levels. This approach is unrealistic because removing the source alters the environment in which ozone is formed, thus preventing an accurate depiction of ozone contributions. ASC Initial Comments at 19; 2018 Ramboll Technical Report at 25.
- New York's modeling also fails to account for the impacts of existing regulations that require NOx reductions. ASC Initial Comments at 19-21. EPA has evaluated NOx emissions for states in which targeted sources are located through other 126 petitions, upwind state SIP submissions, Federal Implementation Plans (FIPs) developed as part of the CSAPR process, the Determination rule, and the upwind states 2015 ozone SIP submissions. ASC Initial Comments at 20. New York does not identify what these other regulatory efforts fail to address that require additional relief imposed under Section 126.

See 84 Fed. Reg. 22796 (EPA has no basis to find that sources emit or would emit in violation of a promulgated FIP absent new information); *id.* at 22801 (New York has not provided new information the agency has not already considered).

- Finally, New York did not conduct a model performance evaluation to check for accuracy or bias in its modeling, deviating from statistical best practices in the industry and regulatory guidance. ASC Initial Comments at 21-22.

These pervasive flaws provide ample additional reasons for EPA to deny the NY Petition. Indeed, these flaws confirm that New York failed to meet its burden under Step Two of the Transport Framework, even before applying a significant contribution threshold. Thus, New York's failure to meet Step Two provides an independent basis for EPA to deny the Petition.

Furthermore, with these flaws corrected—e.g., using a complete modeling period, representative data, standard ozone contribution metric, and a proper modeling approach—New York still cannot satisfy its burden to establish a "link" sufficient to warrant the relief it requests. ASC engaged Ramboll to conduct air quality modeling to assess the assertions in the Petition. Ramboll's modeling demonstrates that eight of the nine states are not linked to New York receptors, even assuming the significant contribution threshold of 1% of the applicable NAAQS were to apply. ASC Initial Comments at 23; 2018 Ramboll Technical Report at 40.

Instead, at most, a single Pennsylvania link to one New York monitor is all that theoretically remains of the Petition,[6] but this alleged link provides an insufficient basis for EPA to impose relief here. ASC Initial Comments at 23; 2018 Ramboll Technical Report at 40. First, New York improperly includes in its petition receptors not only in New York, but also in Connecticut and New Jersey. Section 126 authorizes only a "state or political subdivision" to petition for relief for its own alleged attainment issues. 42 U.S.C. § 7426(b). Hence, the Petition seeks to bring in receptors in Connecticut and New Jersey, but these receptors are irrelevant to New York's claims. Thus, EPA correctly concludes in its Proposal that Section 126 cannot support EPA action with respect to any link between Pennsylvania and receptors in these non-petitioning states. 84 Fed. Reg. 22801, n. 52. Second, a single alleged link in Pennsylvania is insufficient to support New York's attempt to use EPA to impose New York's desired controls on over 350 sources across nine states. This is especially true in light of Pennsylvania's extensive regulation of stationary sources, as further discussed below.

C. EPA correctly proposes to deny the Petition under Step Three because New York has not even attempted to meet its burden to show its requested relief is appropriate—but should also find that there are adequate control programs already in place in Pennsylvania and other states.

EPA likewise has correctly proposed to find New York's Petition fails Step Three. New York has failed to meet its burden of proof at this step. Moreover, regardless, there are again ample facts and data that we have submitted as part of the ASC Initial Comments that support EPA's determination.

[6] This assumes that emissions from international transport and exceptional events are not excluded.

Under Step Three of the transport framework, New York must show that highly cost-effective control technologies exist that would address the alleged emissions from an upwind state. EPA's Proposal properly finds that New York failed to meet this burden. 84 Fed. Reg. at 22802-03. EPA's reasoning is clear and sound. New York claims EPA should impose RACT across industry based on NOx removal at $5,000/ton, and require sources to install controls and implement other measures—selective catalytic reduction (SCR), selective non-catalytic reduction (SNCR), and short-term averaging—but provided no analysis whatsoever to support its claimed relief. For example:

- New York provided no technical analysis regarding whether its requested controls were highly cost-effective at any named source or group of sources. ASC Initial Comments at 26-27. Instead, it arbitrarily imposed its own $5,000/ton NOx RACT removal threshold on nine other states, a uniformity that has never been mandated under the Act. *E.g.*, 84 Fed. Reg. 20274, 20286 (May 9, 2019) (in approving Pennsylvania RACT program for NOx and VOC emissions, EPA reaffirmed that it "has not set a single cost, emission reduction, or cost-effectiveness figure to fully define cost-effectiveness in meeting the NOX RACT requirement" and thus "each state must make and defend its own determination on how to weigh these values in establishing RACT.").
- Further, the RACT threshold New York seeks to impose is more than double the cost/ton of NOx removed that the Agency has ever before imposed in all of its transport rulemakings. Yet, New York provides no support for this extraordinary cost-effectiveness threshold and fails to present any information as to how EPA's imposing on all named sources a $5,000/ton NOx removal threshold would address the alleged linked emissions. ASC Initial Comments at 27.
- Moreover, many sources already have SCR, SNCR and other NOx and VOC control technologies in place that would meet New York's $5,000/ton NOx removal threshold. For those, New York claims short-term averaging is required, but the Petition does not provide data showing how imposing short-term emissions averaging would be highly cost-effective. ASC Initial Comments at 27.
- The Petition also asserts the appropriate NOx emissions rate for certain combustion sources should be 0.15 lb/MMBtu, but offers no proof for that assertion, as it is silent on how a NOx emission rate of 0.15 lb/MMBtu is equivalent to its asserted $5,000/ton NOx removed threshold. NY Petition at 17; 2018 Ramboll RACT Analysis at 6-7.

EPA has appropriately denied New York's requested relief, because the Petition failed to address these basic issues or provide any cost-effectiveness analysis. Indeed, it would be arbitrary and capricious for EPA to do otherwise.

There are ample additional reasons to deny the Petition under Step Three. First, the relief New York seeks has already been resolved in the Determination Rule. As New York explained, the transport emissions that it claimed had not been addressed under the CSAPR Update were the impetus of the state's Petition. NY Petition at 6. Yet, EPA has now addressed those claims in the Determination Rule, and EPA can rely on that analysis here to deny the Petition. ASC Initial Comments at 28.

Second, New York's requested form of relief is not well founded. Without analyzing why its chosen RACT is a reasonable or appropriate approach, New York is essentially demanding that the upwind states apply the same type of RACT requirements that New York claims it has chosen. Yet, nowhere does the CAA authorize a state to use the federal government to impose that state's chosen form of controls on another state. ASC Initial Comments at 29. EPA has repeatedly recognized this, including in its review of the Pennsylvania RACT II program. 84 Fed. Reg. at 20277 (highlighting the discretion states have to adopt RACT and that states are not required to adopt the "same level of control as the most stringent state").

Third, EPA has already evaluated whether there are highly cost-effective control technologies available for the named sources through the CSAPR Update Rule. There is no reason for EPA to repeat that here. ASC Initial Comments at 29-30.

Fourth, as detailed in ASC's preliminary comments, existing mechanisms—federal and state regulations, operating permits, consent decrees, and voluntary capital investments—demonstrate that the named sources already implement highly cost-effective controls to reduce emissions of NOx and other potential ozone precursors. ASC Initial Comments at 32-33. Moreover, the named sources are in states that already impose extensive regulatory requirements, including RACT for NOx and VOCs for many sources. 2018 Ramboll RACT Analysis at 3-5 & Table 1. Indeed, the over 350 named sources are from the most highly regulated industry sectors in the United States, including cement, chemicals, electric generation, midstream oil and gas, paper, refining, and steel. Through voluntary investments, consent decrees, federal and state regulation, and multi-state regional programs, these sources have implemented emission control technologies or have switched to lower emitting fuel sources, all with the result of materially reducing their emissions of NOx and other ozone precursors. By contrast, New York's suggested mechanisms—SCR, SNCR, and short-term averaging—have not been shown to be highly cost-effective, and each faces significant technical limitations in particular applications. ASC Initial Comments at 32-33.

Fifth, Pennsylvania already has a rigorous program to address ozone and its precursors. New York has not demonstrated that any of these existing mechanisms will fail to address the alleged non-attainment linked to Pennsylvania—or that any of the Pennsylvania sources named in the NY Petition do not already have or will not be subject to sufficient measures:

- *OTR requirements.* As an initial matter, the entire Commonwealth of Pennsylvania is part of the regional Ozone Transport Region (OTR) established under section 184 of the CAA and thus is subject statewide to the RACT requirements of CAA sections 182(b)(2) and 182(f). Thus, any consideration under Step Three must factor in that Pennsylvania is in the OTR and thus already is implementing and may implement further measures to address its contributions to downwind ozone as determined appropriate by the OTR process. New York's Petition entirely fails to consider this fact.

- *Pennsylvania RACT II.* Further, at the time New York filed its Petition, Pennsylvania had proposed, and now EPA has recently approved in large part, Pennsylvania's

> "RACT II" program. *See* 84 Fed. Reg. 20274 (May 9, 2019).[7] Pennsylvania's RACT II program requires stationary sources in Pennsylvania to comply with RACT through presumptive NOx limitations, facility- or system-wide averaging to meet presumptive NOx limitations as appropriate, or additional measures on a case-by-case basis as further approved by EPA. This will apply to the same types of existing sources on which New York claims in its Petition that EPA must impose additional regulation, including combustion units, process heaters, combustion turbines, stationary internal combustion engines, cement kilns, and others. 84 Fed. Reg. 20275. Moreover, Pennsylvania's Department of Environmental Protection (PADEP) expressly considered comments by New York and other states and made its RACT II program even more stringent in response. As EPA explained:
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> > After considering comments received, PADEP determined that the NO_X limits for coal-fired boilers with a rated heat input equal to or greater than 250 million British Thermal Units (MMBTU) per hour (MMBTU/hr) could be revised to reflect more stringent RACT. PADEP revised the presumptive NO_X limit from coal-fired boilers that are circulating fluidized bed combustion units (CFBs) from 0.20 pounds per MMBTU (lbs/MMBTU) to 0.16 lbs/MMBTU. PADEP also adopted additional presumptive RACT requirements for coal-fired boilers with selective non-catalytic reduction (SNCR) and selective catalytic reduction (SCR), established in subparagraph 129.97(g)(1)(vii) and 129.97(g)(1)(viii).
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> 84 Fed. Reg. 20,276. This extended to imposing a 30-day rolling average NOx emission limit on coal-fired units of 0.12 lbs/MMBTU. 84 Fed. Reg. 20278 (EPA reviewed the record, data and Pennsylvania DEP's analysis and concluded the NOx limit "is reasonable and consistently achievable by Pennsylvania's coal-fired boilers with SCR, representative of SCR operation, and adequate for representing RACT for these units based on Pennsylvania's analysis.").

This system designed by Pennsylvania to address its sources in consideration of various factors cannot be replaced by the arbitrary, one-size-fits-all approach advocated by New York. EPA's Proposal properly rejects New York's attempt. ASC Initial Comments at 33-34; 2018 Ramboll RACT Analysis at 5 and Table 1.

D. New York is not entitled to relief under Step Four.

Because New York failed to satisfy its burden as EPA explains, and for the additional reasons outlined in these comments, ASC urges EPA to move forward with its proposal and deny New York's requested relief under Step Four of EPA's transport framework.

[7] *See* 25 Pa. Code sections 129.96-129.100 titled "Additional RACT Requirements for Major Sources of NOx and VOCs" (the RACT II Rule) and amendments to 25 Pa. Code section 121.1, including related definitions, to be incorporated into the Pennsylvania SIP.

IV. EPA should likewise deny the Petition because New York failed to identify a "group of stationary sources" as required for relief under Section 126.

As noted, the Petition names a diverse array of over 350 sources from across multiple industry sectors. New York makes no attempt to identify how these named sources fit Congress's direction to limit Section 126 petitions to either an individual major source or a "group of stationary sources," and EPA has specifically asked for comment on whether the Petition meets this requirement of CAA Section 126. 84 Fed. Reg. 22802.

New York has failed to meet this required element under Section 126, and thus this is an additional, independent basis for EPA to deny the Petition. *See* ASC Initial Comments at 37-39. Based on the plain meaning of Section 126 and its core framework, a Section 126 petitioner must identify a "group" of sources that have a rational, unifying relationship. New York has failed to provide one.

The starting point for EPA must be the plain language of the Act. Under well-established principles of statutory construction, statutes must be interpreted as written, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476 (1992), giving each word its "ordinary, contemporary, common meaning." *Walters v. Metropolitan Ed. Enterprises, Inc.,* 519 U.S. 202, 207, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997). In Section 126, Congress used the term "group" of stationary sources, not just "stationary sources" or "sources." Hence, the term "group" must be given meaning to define the intended scope of Section 126 petitions. Otherwise, "group" would be read out of the statute, contrary to basic principles of statutory construction.[8] Moreover, as New York's petition itself makes clear, without some limiting scope based on what is a "group" in this context, EPA could run afoul of the Supreme Court's admonition against discovering in a long-extant statute power to regulate ever-widening swaths of the economy.[9]

Common definitions suggest a "group" would mean an assembly of related sources that have a "unifying relationship" or are "classed together."[10] The D.C. Circuit has likewise recognized that Congress added the phrase group of stationary sources "in order to regulate facilities in upwind states as a class or category."[11] However, the NY Petition cobbles together different types of unrelated sources across different industries with no single unifying class or category of sources presented. Hence, it has not met the basic understanding of a "group" of sources.

Nor is there any legal rationale to create a "group" of stationary sources based on an arbitrary emission level. ASC Initial Comments at 37-39; *see also* 2018 Ramboll RACT Analysis

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[8] *E.g., Advocate Health Care Network v. Stapleton,* 137 S. Ct. 1652, 1659 (2017) (Supreme Court gives "effect, if possible, to every clause and word of a statute"); *see generally* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174-179 (2012) (the presumption is that each word Congress uses is there for a reason).

[9] *See UARG v. EPA*, 134 S. Ct. 2427, 2444 (2014).

[10] *Group*, Merriam-Webster (Online Ed.) (a "group" is commonly understood to be "a number of . . . things that are located close together or are considered or classed together.").

[11] *Appalachian*, 249 F.3d at 1057.

at 6-7 (no technical basis in RACT for 400 tpy threshold or 0.15 lb/MMBtu threshold, and no consistent bases in the Named Sources for applying RACT). Instead, New York simply assumes its conclusion in targeting these sources: "These high-emitting facilities are expected to have the greatest impact."[12] That approach has no limiting principle. Following this logic, a state could choose to target sources that emit at even lower levels, and explain that controlling more sources at lower levels will likewise have a high impact. Section 126 petitioners cannot rely on this type of circular logic to support a Section 126 petition.

New York's approach also would be an expansion of how Section 126 has previously been applied to a group of sources. In the Petition, the 350+ named sources do not share an industry segment or source category, as has been the case in previous Section 126 petitions that target more than one source. New York categorizes the named sources as EGUs and non-EGUs in its petition, but this is for narrative purposes only and is not reflected in its modeling or supported by any material analysis of the remedy it asserts that it is seeking in its overly expansive petition.[13]

Moreover, New York's arbitrary use of 400 tons per year in NOx emissions does not actually describe the named sources. The NY Petition itself shows that not all the named sources reflect emissions of at least 400 tpy.[14] Further, New York has cobbled together its list from different (outdated) emissions data. At a minimum, in fashioning a "group," a petitioner should rely on a common data set to create the baseline for evaluation. Yet, New York switches from using one set of emissions projections—the 2017 Beta 2 projection inventory, based off of eight-year old data (the 2011 National Emissions Inventory, or NEI)—to a different set of now-five-years-old emissions data—the 2014 NEI—without providing any reasoned, documented justification for using these different data sets. Thus, even New York's identifying characteristic is not the same for all of the sources.

Hence, EPA should find that New York has failed to meet the statutory requirement to allege a "group" of stationary sources is at issue as a further basis for denying the Petition.

Conclusion

For these reasons, ASC supports EPA's Proposal to deny the Petition.

[12] NY Petition at 10.

[13] *See* NY Petition, Appendix B.

[14] NY Petition, Appendix B.