

## STATE ENVIRONMENTAL LAW

## Expert Analysis

# New York Fights Interstate Smog, And the EPA

Emissions of nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) to the ambient air can react in the presence of sunlight and heat to produce unhealthy ground-level ozone pollution, commonly known as smog. “Peak ozone concentrations in New York State typically occur during the May to September period when temperatures are highest,” according to the New York State Department of Environmental Conservation (NYSDEC).

New York state strictly governs the release of NO<sub>x</sub> and VOCs. State authorities have asserted that New York state’s laws and regulations, which apply to emissions from power plants, factories, motor vehicles, and other sources, reduced annual NO<sub>x</sub> emissions by 43 percent between 2008 and 2014 and led to a 73 percent reduction of ozone-season NO<sub>x</sub> emissions from the state’s power plants between 2008 and 2017.

High levels of ozone nevertheless continue to be found in various locations throughout the state at numerous occasions throughout the year. In the

---

CHARLOTTE A. BIBLOW, a partner in the environmental, land use and municipal law and litigation departments of Farrell Fritz, can be reached at [cbiblow@farrellfritz.com](mailto:cbiblow@farrellfritz.com).

By  
**Charlotte A. Biblow**



NYSDEC’s opinion, a significant cause for that is the movement of ozone from “upwind states” to New York.

In March 2018, New York state, through the NYSDEC, filed a petition with the U.S. Environmental Protection Agency (EPA) to require power plants and large industrial sources in nine upwind states to reduce their contribution of pollution impacting New York. On Oct. 18, 2019, the EPA denied the petition. About 10 days later, New York state, along with New York City and the state of New Jersey, filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit to review the EPA’s decision and to vacate it as unlawful, arbitrary, and capricious.

Over the years, many state laws and regulations have successfully eliminated or remediated environmental problems that New York state officials have sought to address. Poor air quality, however, is a persistent concern that reflects the interconnectivity of our

society, the absence of effective physical barriers between jurisdictions, and, at bottom, the need for communal solutions. In fact, in its March 2018 petition, New York state relied on the “good neighbor” provision of the federal Clean Air Act (CAA), at §110(a)(2)(D)(i), in its request to the EPA.

---

The petition filed by New York state in March 2018 sought a finding from the EPA under §126(b) of the CAA that certain stationary sources located in upwind states impacted the ability of New York state to attain the National Ambient Air Quality Standards (NAAQS) for ozone.

This column reviews the main provisions of New York state’s petition, and then examines the EPA’s denial of that petition, available at 84 Fed. Reg. 56058 (Oct. 18, 2019).

### The New York State Petition

The petition filed by New York state in March 2018 sought a finding from the EPA under §126(b) of the CAA that certain stationary sources located in upwind states impacted the ability of New York state to attain the National

Ambient Air Quality Standards (NAAQS) for ozone. Section 126(b) provides that any state or political subdivision may petition the EPA for a finding that “any major source or group of stationary sources emits or would emit any air pollutant” in violation of the CAA’s good neighbor provision. As explained in the petition, the good neighbor provision requires that a state’s plan for complying with the CAA, known as a State Implementation Plan (SIP), “contain provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to a NAAQS.”

In particular, New York state’s petition asserted that upwind sources interfered with nine downstate counties (the five counties in New York City, Nassau, Suffolk, Westchester, and Rockland), 12 counties in northern New Jersey, and three counties in Connecticut, known as the New York Metropolitan Area (NYMA), attaining the 2008 and 2015 ozone NAAQS. The petition also asserted that these upwind sources interfered with the ability of Chautauqua County in western New York to maintain its attainment of the 2008 and 2015 ozone NAAQS.

The petition identified “[s]ignificant levels of transported ozone” from approximately 350 sources in the following nine upwind states as interfering with the ability to attain or maintain the 2008 and 2015 ozone NAAQS in New York state: Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia and West Virginia. The petition asserted that these sources often are “characterized by the operation of large boilers

and other units that require very tall stacks to emit the exhaust from their combustion processes. Because of the use of these tall stacks and the high temperatures of the exiting gases, enormous volumes of NOx emissions are sent high into the atmosphere.” Moreover, the petition contended, “[t]hese high concentrations of NOx and the subsequently-formed ozone are transported aloft during the night to downwind areas like western New York and the NYMA where they combine with locally-formed ozone and precursors during the day to result in exceedances of the NAAQS.”

The petition further asserted that modeling analyses “repeatedly confirmed that there are significant ozone impacts in New York State from” these upwind states. According to the petition, “[t]he upwind sources’ significant contributions compromised the health and welfare of the 20 million citizens living within the NYMA and the 135,000 citizens in Chautauqua County and create a disproportionate economic burden for sources of ozone precursors in New York State.”

The petition requested that the EPA require these states “to impose suitable emission limits on these large stationary sources that are affecting air quality in New York within the three years allowed for under Section 126(c).” New York state contended that these sources “should be operating with modern NOx emission controls” and “at emission rates commensurate with New York state’s Reasonably Available Control Technology (RACT) standards.”

Put simply, New York state wanted the EPA, as expeditiously as practicable but no later than the three years provided in §126(c), to require

upwind states to control emissions from major coal- and oil-fired electric utility steam generating units (EGUs) and non-EGU stationary sources in the upwind states so that NOx emissions from them would be more in line with emissions from similar sources located in New York.

### Delayed Response

Under §126, the EPA was required to make a determination on the petition within 60 days of receipt. The EPA did not meet that deadline. Rather, the EPA granted itself a six-month extension to Nov. 9, 2018, a deadline that it also failed to meet.

In early February 2019, New York state called on the EPA to act on its petition, indicating that it intended to bring suit if the EPA did not do so.

On May 6, 2019, more than one year after the petition was submitted to it, the EPA issued a Notice of Proposed Action, available at 84 F.R. 22787 (May 20, 2019). In that notice, the EPA indicated that it was proposing to deny New York state’s petition. On Oct. 18, 2019, after accepting comments, the EPA published its denial in 36 pages of the Federal Register.

### The EPA’s Denial

In denying New York state’s petition, the EPA said that it found that New York had not demonstrated, and the EPA had not independently found, that the group of sources identified in the petition were violating the CAA’s good neighbor provision for the 2008 or 2015 ozone NAAQS with respect to either Chautauqua County or the NYMA.

The EPA evaluated the petition using a four-step interstate transport framework that it previously had used in regulatory actions addressing regional

ozone transport problems. The four steps are:

- (1) Identify downwind receptors expected to have problems attaining or maintaining the NAAQS.
- (2) Determine which upwind states were linked to these identified downwind air quality problems and, therefore, warranted further analysis to determine whether their emissions violated the good neighbor provision.
- (3) For states linked to downwind air quality problems, identify upwind emissions (if any) on a statewide basis that would significantly contribute to nonattainment or interfere with maintenance of a standard at a receptor in another state.
- (4) For upwind states found to have emissions that would significantly contribute to nonattainment or interfere with maintenance of the NAAQS downwind, implement the necessary emissions reductions within the state.

Following a lengthy discussion of its four-prong framework, the EPA denied the petition, relying on its assessment of the first and third steps of its framework.

In particular, with respect to the 2008 and 2015 ozone NAAQS in Chautauqua County, the EPA denied the petition at Step 1 of the framework, concluding that the petition did not provide sufficient information to indicate that Chautauqua County should be considered a nonattainment or maintenance receptor pursuant to the good neighbor provision. With respect to the 2008 ozone NAAQS in the NYMA, the EPA denied the petition at Step 1 of the framework, concluding that the petition did not provide sufficient information to indicate that the NYMA

should be considered a nonattainment or maintenance receptor pursuant to the good neighbor provision.

In addition, the EPA said that its own independent analysis of available information indicated that there was not currently, nor was there projected to be in 2023, an air quality problem with respect to either NAAQS in Chautauqua County, and that in 2023 there was not projected to be any further air quality problem with respect to the 2008 ozone NAAQS in the NYMA.

Essentially, the EPA decided that New York state had not met its burden at Step 1 of the four-step interstate transport framework to demonstrate

---

On Oct. 29, 2019, following the EPA's denial of the NYSDEC's petition, New York state, New York City and New Jersey sued the EPA, seeking to invalidate the EPA's decision.

that the group of identified sources either emit or would emit pollution in violation of the good neighbor provision. The EPA acknowledged, however, that, with respect to the 2015 ozone NAAQS in the NYMA, the EPA's 2023 modeling showed a relevant downwind air quality problem and, therefore, the EPA did not deny this portion of the NYSDEC's petition with respect to Step 1.

The EPA, however, additionally denied the petition as to all areas for the 2008 and 2015 NAAQS at Step 3 of the framework. The EPA said that it found that material elements in the petition's assessment of whether the sources might be further controlled through implementation of cost-effective controls were "insufficient" and,

therefore, that New York state had not met its Step 3 burden to demonstrate that the named sources emit or would emit in violation of the good neighbor provision with respect to the relevant ozone NAAQS.

### Conclusion

States including New York have filed numerous lawsuits against the EPA in recent years seeking to challenge its decisions on a host of matters or to compel it to act. On Oct. 29, 2019, following the EPA's denial of the NYSDEC's petition, New York state, New York City and New Jersey sued the EPA, seeking to invalidate the EPA's decision.

\* \* \*

Unrelated to the NYSDEC's "good neighbor" petition, but of significance to parties to administrative enforcement proceedings before the NYSDEC, is a recent proposal by the agency to amend its uniform enforcement hearing procedures. The NYSDEC is holding a hearing on its proposal on Jan. 7, 2020; the comment period ends on Jan. 31, 2020. The proposed revisions are discussed in detail at <http://www.dec.ny.gov/regulations/118492.html>.