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U.S. Environmental Protection Agency (EPA)  
**Docket ID Number: EPA-HQ-OAR-2018-0170**

***RE: Response to Clean Air Act Section 126(b) Petition from New York***

Dear Docket Administrator,

The Connecticut Department of Energy and Environmental Protection (CT DEEP) submits the following comments opposing EPA's proposed denial of New York Department of Environmental Conservation's (NY DEC) Clean Air Act (CAA) section 126(b) petition submitted to EPA on March 12, 2018<sup>1</sup>. The petition requests EPA find that sources emitting more than 400 tons per year of nitrogen oxides located in Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia and West Virginia emit, or would emit, in violation of CAA section 110(a)(2)(D)(I)(i), also known as the good neighbor provision.

EPA explains its approach to granting or denying a 126 petition is based on procedures it has developed through previous actions to assess and apportion responsibility for interstate ozone transport. EPA developed these procedures in an attempt to clarify the meaning of a significant contribution under CAA section 110. EPA refers to this process as its "four-step framework."<sup>2</sup> The steps are as follows:

- (1) identify downwind air quality problems;
- (2) identify the upwind states that "contribute enough", or are "linked" to those problems;
- (3) identify emission reductions necessary (if any), considering cost and air quality factors, to prevent the state from contributing significantly to another state's air quality problems; and
- (4) adopt permanent and enforceable measures needed to achieve those reductions.

NYDEC's petition is consistent with the "four-step framework" and the flexibilities described in relevant EPA guidance. The subjective nature of the framework presents unnecessary challenges to the states when applying the framework to the good neighbor provision or CAA section 126 petitions. As acknowledged by EPA in its March 27, 2018 guidance memo on the topic, "... *this framework, and its analytical approaches have varied*

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<sup>1</sup> 84 FR 22787; May 20, 2019.

<sup>2</sup> The framework is briefly described at 84 FR 22791. A more detailed description of EPA's four-step process is found at: <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs> in a series of memos prepared to provide guidance for development of state implementation plans for the 2015 ozone standard.

*over time due to continued evolution of relevant tools and information, as well as their specific application.*”<sup>3</sup> As evidenced by memos that continued to be issued on the topic into late October 2018, after good neighbor state implementation plans (SIPs) for the 2015 standard were due, and by EPA statements made in the proposed rejection of NYDEC’s petition, the process remains ambiguous. Nevertheless, NYDEC’s petition is consistent with the framework and flexibilities described in relevant EPA guidance. It is therefore unclear why EPA is rejecting this petition.

**EPA incorrectly identifies the timing of downwind air quality problems as part of step 1 of the four step framework.** The good neighbor provision requires that state implementation plans prohibit “... *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 such...standard.*” A state assessing its contribution to nonattainment for the 2008 ozone standard would have been required to make that assessment prior to the initial 2008 attainment year.<sup>4</sup> New York was initially designated marginal nonattainment for the 2008 ozone standards and even with the delays in designations, attainment should have been met no later than the 2014 ozone season.<sup>5</sup> With delayed action, and reclassification, EPA now looks to 2023 to assess an air quality problem in step 1. Clearly, assessment of air quality in 2023 was not an available option to a state required to adhere to the good neighbor provision. New York’s petition under CAA section 126 is for EPA to take action against sources for emitting in violation of the good neighbor provision. The timeframe for implementing the good neighbor provision is fixed to the date of initial designation.

EPA attempts to justify use of 2023 for the 2008 standards by using the framework in a recursive manner. EPA guesses at the time necessary for installation of controls that might result in step 3 of the process and then selects the year for step 1 such that sufficient time would exist to install those controls. EPA used this process to justify selection of 2023 as the year for assessing an air quality problem. However, as step 1 is part of a screening process for determining what sources contribute significantly, it is not a necessity to look to a future year. As the future year projection creates uncertainty and is in conflict with the CAA section 110, EPA is wrong to base their assessment on 2023. Therefore, EPA is wrong to base its denial of NYDEC’s petition on whether or not air quality problems exist in 2023.<sup>6</sup>

**Step 2 does not provide a threshold for linking a source, or group of sources, to a significant contribution.** Critical to establishing a “significant contribution” in EPA’s four-step process is the threshold at which one establishes a linkage. For the 2008 standard EPA used one percent of the standard as the threshold for a state contribution. In its guidance memos for the good neighbor SIPs for the 2015 standards, dated after NYDEC’s petition, EPA offers states the flexibility to additionally consider thresholds of 1 and 2 ppb ozone.<sup>7</sup> Though the guidance indicates that EPA is inclined toward using a 1 ppb ozone threshold to establish linkage in step 2 for the 2015 standard, it does not define a threshold. In its proposed denial of NYDEC’s petition EPA again avoids defining the threshold at which linkage is established. “*The EPA is not in this action determining which of the potential thresholds described in this section (i.e. 1 percent of the NAAQS (0.70 ppb) or 1 ppb) is appropriate*

<sup>3</sup> Memorandum from Peter Tsirigotis / EPA Director, *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)*, page 3, at [https://www.epa.gov/sites/production/files/2018-03/documents/transport\\_memo\\_03\\_27\\_18\\_1.pdf](https://www.epa.gov/sites/production/files/2018-03/documents/transport_memo_03_27_18_1.pdf).

<sup>4</sup> “... in *North Carolina*, the D.C. Circuit held that the timeframe for implementation of emissions reductions required by the good neighbor provision should be selected by considering the relevant attainment dates of downwind nonattainment areas affected... [84 FR 22798].

<sup>5</sup> EPA notes at 84 FR 22798 that the timeframe for implementation of emission reductions required by the good neighbor provision should be selected by considering the relevant attainment dates of downwind nonattainment areas affected by interstate transport.

<sup>6</sup> Good neighbor SIPs are due within three years of designations, therefore the prohibition on interfering with, or contributing to, nonattainment is effective not later than 2011 for the 2008 standards and not later than 2018 for the 2015 standards.

<sup>7</sup> Memorandum from Peter Tsirigotis/ EPA Director, *Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards*, August 31, 2018 at [https://www.epa.gov/sites/production/files/2018-09/documents/contrib\\_thresholds\\_transport\\_sip\\_subm\\_2015\\_ozone\\_memo\\_08\\_31\\_18.pdf](https://www.epa.gov/sites/production/files/2018-09/documents/contrib_thresholds_transport_sip_subm_2015_ozone_memo_08_31_18.pdf).



for addressing collective contribution for the 2015 ozone NAAQS ... [h]owever EPA acknowledges that emissions from at least some of the named upwind states are linked..."<sup>8</sup> Failing to clearly define the threshold at which a linkage is established for a source or group of sources, it is difficult to understand how EPA believes the four-step framework brings clarity to the term it was intended to define. Nevertheless, NYDEC did demonstrate linkage at the 1 percent level and EPA is left to accept NYDEC's conclusion.

**Step 3 is ambiguous and subjective.** Without defining which sources are, or are not, linked to the air quality problem, EPA moves to step 3. Step 3 is described in EPA's March 2018 guidance, "*Step 3 – Identifying air quality, cost, and emission reduction factors to be evaluated in a multifactor test to identify emissions that significantly contribute to nonattainment or interference with maintenance of the NAAQS downwind...* [omitting language relevant to international contributions]... *For states that are found to significantly contribute to nonattainment or interfere with maintenance of the NAAQS downwind, apportioning responsibility among states.*" Unfortunately, the process description is vague and, while it is the expression for which the framework exists, nowhere in the guidance does EPA define "significantly contribute."

The proposed denial does no better at explaining step 3. Instead EPA gives an example. "*In the EPA's prior rulemakings for ozone and PM2.5, the Agency identified and apportioned emissions reduction responsibility among multiple upwind states linked to downwind air quality problems by identifying a uniform level of control stringency based on cost and air quality factors evaluated in a multi-factor test.*"<sup>9</sup>

NYDEC satisfied step 3 by providing an analysis of the maximum contribution to each of its monitors attributable to the sources from each upwind state. Those contributions and potential emissions reductions appear in Table 2 and Appendix B, respectively, of the petition. NYDEC proposed that these maximum contributions be reduced through application of control technology available at \$5000 per ton of NOx reduced – a cost consistent with NYDEC's RACT (reasonably available control technology) rule for control of nitrogen oxide emissions. Nevertheless, contradicting its own approach, EPA rejects NYDEC's proposal, "*Nothing in the text of the good neighbor provision indicates that upwind states are required to implement RACT...nor does the provision require uniformity of control strategies imposed in both upwind and downwind states.*"<sup>10</sup>

NYDEC's proposal for controls consistent with New York's RACT rule provides both a uniform level of control and cost. EPA, however, avoids specifying an acceptable cost and rejects the proposal though it is in keeping with the example EPA has given for its step 3 approach.

EPA further obfuscates the process by proposing to take 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).*"<sup>11</sup> However, nothing in NYDEC's proposal is inconsistent with the CAA sections 126 and 110. Section 126 clearly allows a petition against "any major source or group of stationary sources." Section 110 relates to "any source or other type of emissions activity."

NYDEC defined a group of sources in the specific upwind states that is more restrictive than necessary under the CAA. Each source is of a type emitting 400 tons per year or more of NOx – well above the

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<sup>8</sup> 84 FR 22802; May 20, 2019.

<sup>9</sup> 84 FR 22791; May 20, 2019.

<sup>10</sup> 84 FR 22803; May 20, 2019.

<sup>11</sup> 84 FR 22802; May 20, 2019.

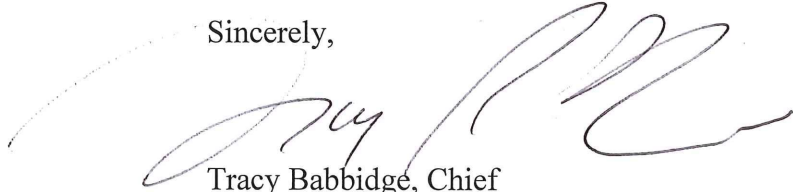
major source threshold required for a single source subject to a 126 petition. The act places no restrictions on the type of sources or grouping of sources. Section 126 only requires that grouped sources be stationary. NYDEC also apportioned and evaluated the contribution of the sources by state to satisfy Section 110. EPA cannot deny the petition based on the group of sources.

EPA takes issue with NYDEC's decision to include non-electric generating units (non-EGUs) in the group of sources. EPA claims that including non-EGUs in the four-step is too complex and, together with EPA's sixty day review time, is "*...evidence that Congress did not intend for the EPA to be required to conduct such detailed independent analyses...*"<sup>12</sup> It is more likely that Congress did not envision that EPA would create such ambiguity and complexity surrounding simple concepts such as "significant contribution" and "group of sources". Regardless, we note that on May 11, 2018, EPA extended the deadline for NYDEC's petition for an additional six months. In this extra time, EPA did not conduct any additional independent analyses to review the information NYDEC produced. If EPA did not conduct and produce new analyses, the response to New York's petition should have occurred within the sixty days Congress did intend.

**Step 4 cannot be an element of a state submitted CAA 126 petition.** Downwind states do not have the authority to regulate emission sources that are not within their borders. EPA dismisses NYDEC's petition by step 3, however, it is difficult to comprehend how EPA expects a state to satisfy the four-step framework under a CAA 126 petition when step 4 is completely outside the authority of a petitioning state to implement. At best a state could propose the method for eliminating the significant contribution. NYDEC did so in step 3.

EPA's denial of NYDEC's petition is inconsistent with the statement in their March 2018 guidance on the four-step process, "*...states have flexibility to follow the familiar four-step transport framework (using EPA's analytical approach or somewhat different analytical approaches within these steps) or alternative frameworks, so long as their chosen approach has adequate technical justification and is consistent with the requirements of the CAA.*" To the extent that EPA has given definition to determining a significant contribution from a source, or group of sources, NYDEC has met its burden of showing that the named group of sources are operating in violation of CAA section 126 for contributing significantly to nonattainment of the ozone standards in New York. EPA's own contribution analysis showed that 19-31% of ozone in New York originates from the nine states named in the petition.<sup>13</sup> EPA is therefore obliged to affirm the petition.

Sincerely,



Tracy Babbidge, Chief  
Bureau of Air Management

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<sup>12</sup> 84 FR 22804; May 20, 2019.

<sup>13</sup> Contribution Threshold Analysis for the 2015 NAAQS Ozone Transport at: [https://www.epa.gov/sites/production/files/2018-09/contribution\\_threshold\\_analysis\\_for\\_2015\\_naaqs\\_ozone\\_transport\\_08-31-18\\_0.xlsx](https://www.epa.gov/sites/production/files/2018-09/contribution_threshold_analysis_for_2015_naaqs_ozone_transport_08-31-18_0.xlsx)