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Midwest Ozone Group Update

CIBO Virtual Meeting

June 10, 2020



DC District Rules on Maryland/Delaware 126 Denial Appeal



- May 19, 2020 DC District issued it's ruling, generally upholding EPA's denial.
- A few take-aways:
 - **Burden of Proof**: The petitioners in a 126 case have the burden of proof. This is central issue in the New York cases and this ruling is very favorable.
 - “We recognize that the petitioning states in *New York* sought to compel the EPA to evaluate entire SIPs, whereas Delaware seeks only a finding that individual upwind sources emit excessively. This distinction makes little difference, for any evaluation under the Good Neighbor Provision requires time-intensive research and analysis assessing air quality problems in the petitioning downwind state, the cause of those problems in upwind states, and the cost-effectiveness of possible solutions. As we explained in *New York*, these tasks are at odds with a sixty-day deadline. We therefore hold that the EPA reasonably interpreted section 126(b) to require Delaware to bear the burden of proof.”

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Consideration of Out-of-State Monitors: A petitioning state can rely on monitors located in a multistate nonattainment area that includes the petitioning state. This issue is raised in the New York 126 case and should allow New York to rely on monitors in Connecticut, unless the Court agrees with MOG that New York causes the Connecticut problem.

- “In sum, states in a multistate nonattainment area share not only a nonattainment designation but also the concomitant responsibility to limit their own emissions. To equalize the burdens between upwind and downwind states, the Clean Air Act authorizes a state to petition the EPA for a finding that upwind emissions significantly contribute to that state’s nonattainment of the ozone NAAQS. But, under the EPA’s interpretation, a state cannot file a section 126(b) petition if its nonattainment status is caused by a receptor outside its political boundaries, even as the state remains burdened by the corresponding regulatory obligations. It is arbitrary for the EPA to subject states like Delaware to this burden while denying access to the intended remedy. *Cf. Catawba Cty.*, 571 F.3d at 39 (“[S]tatutory interpretation that is arbitrary and capricious is unreasonable under *Chevron* step two.” (citing *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005))). We therefore conclude that the EPA’s interpretation of section 126(b) is unreasonable, at least if the petition involves “monitors . . . located in a multistate nonattainment area that includes the petitioning state.” Response to Delaware and Maryland, 83 Fed. Reg. 50,460. Accordingly, the EPA could not ignore Delaware’s evidence of non-attaining receptors in the Philadelphia-Wilmington-Atlantic City nonattainment area.”

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Current v Future Nonattainment: Petitioners must show that nonattainment will last into the future. This is very positive and supports MOG's position that one must model a future year and not just rely on current monitoring data.

- *“North Carolina* resolves the question presented here. Section 126(b) requires a finding on whether an emission causes a violation of the Good Neighbor Provision. And an upwind source that currently contributes to downwind air quality problems, but that will not contribute to these problems in the future, does not cause such a violation. Thus, in its Step One analysis, the EPA permissibly excluded downwind areas that are not currently attaining the NAAQS but that will reach attainment by a relevant future date.”

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Future Nonattainment Year: EPA is required to measure air quality in the year that corresponds with the next applicable downwind attainment deadline. While not helpful, this ruling when applied to the New York case invites the question about whether New York has offered data on 2021 air quality that sufficient to sustain its burden of proof. In any case, EPA did not deny the New York petition on the basis of air quality

- “The EPA’s responses are unpersuasive. It argues that marginal nonattainment areas often achieve the NAAQS without further downwind reductions, so it would be unreasonable to impose reductions on upwind sources based on the next marginal attainment deadline. Nonetheless, Delaware must achieve attainment “as expeditiously as practicable but not later than” 2021, 42 U.S.C. § 7511(a)(1), so upwind sources violate the Good Neighbor Provision if they will significantly contribute to Delaware’s failure to meet that deadline. See *Wisconsin*, 938 F.3d at 314. The EPA adds that if Delaware’s marginal area fails to reach attainment by 2021, it will be automatically bumped up to a moderate nonattainment status and then subjected to a 2024 deadline. See 42 U.S.C. § 7511(b)(2). But that does not make Delaware’s obligation to attain the NAAQS by 2021 any less binding. And an upgrade from a marginal to a moderate nonattainment area carries significant consequences, such as a requirement to provide for annual emissions reductions in SIPs. See *id.* § 7511a(b). So long as upwind sources significantly contribute to Delaware’s nonattainment at its 2021 attainment deadline, they violate the Good Neighbor Provision.”
- “After rejecting Delaware’s petitions on this ground, the EPA went on to conduct its own independent analysis of future attainment, which erroneously considered pollution levels in 2023 rather than 2021. But because the EPA independently rested its decision on Delaware’s failure to carry its burden of proof, the agency’s error on this point was harmless.”

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Catalytic Controls: Operational data shows that catalytic controls are being optimized. Very favorable to the New York case.

- “If optimization is the measure of Good Neighbor compliance, and if the named sources are failing to optimize, then it necessarily follows that those sources are not currently in compliance with the Good Neighbor Provision.
- The EPA offered two answers in its denial. First, it said, the latest data showed that “the control optimization and the emission reductions anticipated from the [Update Rule] are being realized from the 34 units with [catalytic controls].” Response to Delaware and Maryland, 83 Fed. Reg. at 50,465 (emphasis added). Second, it explained, “even in the event of any single-unit variation in performance, the overall reductions [attributable to optimization] are occurring within the same airshed due to the fact that state budgets and assurance levels were set to ensure those reduction levels statewide and regionwide” through the Update Rule’s trading program. *Id.* at 50,466. In other words, the logic of a cap-and-trade program is that not all sources will reduce their individual emissions to the same extent. We uphold the EPA’s first answer as reasonable and do not address the second.

2017-2019 Design Values for Eastern Half of US



AQS Site ID	State Name	County Name	Local Site Name	MDA8 Design Value (ppb)		
				2015-2016	2016-2017	2017-2018
090013007	Connecticut	Fairfield		83	82	82
090019003	Connecticut	Fairfield	Sherwood Island Connector (See Coordinates)	83	82	82
090099002	Connecticut	New Haven	Hammonasset State Park	82	81	82
090010017	Connecticut	Fairfield	Greenwich Point Park	79	79	81
482010024	Texas	Harris	Houston Aldine	81	78	81
090079007	Connecticut	Middlesex	Cvh	79	78	77
481130075	Texas	Dallas	Dallas North #2	74	75	77
482010055	Texas	Harris	Houston Bayland Park	77	76	77
180910005	Indiana	LaPorte	Michigan City- W. Michigan Blvd./ Nipsco Gas Station			76
420170012	Pennsylvania	Bucks	A420170012lat/Long Point Is Of Sampling Inlet	80	81	76
480850005	Texas	Collin	Frisco	74	75	76
481671034	Texas	Galveston	Galveston 99th Street	77	74	76
482510003	Texas	Johnson	Cleburne Airport	73	76	76
483390078	Texas	Montgomery	Conroe Relocated	74	75	76

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