

MJB&A Issue Brief ■ April 23, 2019

## D.C. Circuit Upholds EPA’s Decision to Deny Petition to Expand Ozone Transport Region (OTR)

On April 23, 2019, the U.S. Court of Appeals for the D.C. Circuit unanimously upheld the Environmental Protection Agency’s (EPA’s) decision to deny the petition of nine states to expand the northeast Ozone Transport Region (OTR) to include additional upwind states. The states filed the petition in 2013, arguing that ozone transport from certain upwind states significantly contributes to violations of the 2008 ozone National Ambient Air Quality Standards (NAAQS) in the OTR. In 2017, EPA denied the petition, stating that other Clean Air Act (CAA) provisions were more effective mechanisms to address remaining interstate ozone transport concerns. Eight states filed a petition for review of EPA’s denial of the petition, arguing that the action was unlawful and should be vacated. In its opinion, the D.C. Circuit finds that EPA’s denial of the states’ petition “complied with the Clean Air Act and was a reasonable exercise of the agency’s discretion.”

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### Background

The 1990 CAA Amendments established the OTR<sup>1</sup> to help Northeast states address ozone nonattainment concerns. Under the Act, OTR states must implement certain ozone control measures as well as require certain sources to install reasonably available control technology (RACT).

On December 9, 2013, nine states<sup>2</sup> in the OTR petitioned EPA under CAA section 176(a) to expand the OTR to include Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and the remaining portions of Virginia.<sup>3</sup> Section 176(a) authorizes EPA to add any state or portion of a state to the OTR “whenever the Administrator has reason to believe that the interstate transport of air pollutants from such state significantly contributes to a violation of [the ozone NAAQS] in the transport region.” In the petition, the states argued that “EPA modeling shows that interstate transport of air pollution from [the identified upwind states] contributes significantly to violations of the 2008 ozone NAAQS within the OTR” and stated that “expansion of the region will result in more emission reductions, a fairer distribution of the burdens of controlling air pollution (ozone), and a level economic playing field.”

On November 3, 2017, EPA denied the petition to expand the OTR “in light of existing control requirements both within and outside the OTR, the agency’s ongoing implementation of the ‘good neighbor provision’...through

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<sup>1</sup> The OTR is comprised of Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and part of Virginia.

<sup>2</sup> The nine petitioning states were Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont.

<sup>3</sup> Petition to EPA for the Addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the OTR (December 9, 2013), [https://www.ct.gov/deep/lib/deep/air/176a/EPA\\_Transmittal\\_letter\\_2013Dec9.pdf](https://www.ct.gov/deep/lib/deep/air/176a/EPA_Transmittal_letter_2013Dec9.pdf); Petition Transmittal Letter to EPA (December 9, 2013), [https://www.ct.gov/deep/lib/deep/air/176a/Petition\\_2013dec10.pdf](https://www.ct.gov/deep/lib/deep/air/176a/Petition_2013dec10.pdf).

updates to the Cross State Air Pollution Rule (CSAPR), and the emissions reductions achieved pursuant to federal and state programs[...], which have improved, and will continue to improve, air quality in the OTR and throughout the United States.”<sup>4</sup> In its denial, EPA also expressed its preference for using these other CAA provisions, including the good neighbor and Section 126 provisions, “because it believes these authorities allow the agency to develop a tailored remedy that is most effective for addressing any remaining air quality problems.”

On December 26, 2017, eight states filed a petition in the D.C. Circuit challenging EPA’s denial of the original petition.<sup>5</sup> The petitioning states argued that the EPA action was unlawful and should be vacated, arguing that Congress intended other provisions in the CAA to “be used in tandem with—not in place of—the distinct, tailored tools available under the Transport Region provisions.”

### Summary of D.C. Circuit Decision

In denying the states’ petition, the D.C. Circuit finds that the “statute provides only that EPA ‘may’ expand the region, not that it ‘shall’ or ‘must’ do so.” While the states argued that EPA’s reliance on other CAA tools will not solve their interstate ozone transport problems, the Court explains that even if such facts were true, EPA has no mandatory obligation to expand the OTR. The Court also notes that the states “have given us no reason to question EPA’s judgment that its current approach to regulating ‘the interstate transport of ozone is a proven, efficient, and cost-effective means of addressing downwind air quality concerns[...].” Rather, it finds that EPA has broad discretion and has “adequately explained the facts and policy concerns it relied on.”

By comparison, the Court explains that “[u]nlike the enlargement of a transport region...EPA’s duties under [the good neighbor provisions and section 126 petitions] are mandatory.” The Court states that “[s]tates have an independent remedy for whatever shortcomings they perceive in how EPA administers these provisions.”

Thus, the Court holds that EPA’s denial of the state’s petition was in compliance with the CAA and a reasonable exercise of its discretion.

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<sup>4</sup> EPA, Response to December 9, 2013, Clean Air Act Section 176A Petition, 82 Fed. Reg. 51238 (November 3, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-11-03/pdf/2017-23983.pdf>.

<sup>5</sup> The eight petitioning states for the D.C. Circuit case included: Connecticut, Delaware, Maryland, Massachusetts, New York, Pennsylvania, Rhode Island, and Vermont.

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