[ARGUED SEPTEMBER 28, 2022; DECIDED MARCH 3, 2023]

Case No. 21-1146

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST OZONE GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Judicial Review of Final Agency Action of the United States Environmental Protection Agency 86 Fed. Reg. 23,054 (Apr. 30, 2021)

PETITION FOR PANEL OR EN BANC REHEARING

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Dated: April 17, 2023.

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GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

CAA	Clean Air Act
Update Rule	Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)
Revised Update Rule (or Revised Rule)	Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054, 23,081 (Apr. 30, 2021)
EPA	United States Environmental Protection Agency
MOG	Midwest Ozone Group
NAAQS	national ambient air quality standard(s)
NOx (or NO_x)	nitrogen oxide
ppb	part(s) per billion

I. STATEMENT REQUIRED BY RULE 35(b)

Rehearing of this case is warranted because the Panel Opinion issued on March 3, 2023, overlooked critical issues raised, briefed, and argued by the Petitioner, Midwest Ozone Group ("MOG").[1]

Specifically, in its challenge before the Court to the Revised Update Rule that was promulgated by EPA pursuant to Section 110(a)(2)(D)(i)(I) (the Good Neighbor Provision) of the Clean Air Act ("CAA")[2], MOG raises several issues, only one of which was addressed in the Panel Opinion, i.e., whether EPA had conducted appropriate air quality modeling.

The most significant of the issues overlooked by the Panel was the absence of legal authority supporting EPA's failure to align the upwind state obligations imposed by the Revised Update Rule to the downwind regulatory requirements related to the applicable nonattainment deadline. Petitioner's Opening Brief ("POB") at 1. While the Panel Opinion acknowledged that "MOG challenges EPA on three of the four steps of the Good Neighbor Provision evaluation method," (Op. at 6), the Opinion only addressed the modeling issue and not the critical statutory question of harmonizing the emission reduction obligations of upwind and downwind states as directed by the

[1] *Midwest Ozone Group. v. EPA*, 61 F.4th 187 (D.C. Cir. 2023). The Panel referred to Midwest Ozone Group as "MOG" throughout its decision.

[2] This Petition uses this abbreviation and others that were used by the Panel throughout its opinion. *See* note 1.

Court's decision in *Wisconsin v. EPA*, 938 F.3d 303, 313 (D.C. Cir. 2019) in which the Court stated:

> We explained [in *North Carolina*] that EPA needed to *"harmonize"* the . . . deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas," . . . Otherwise, downwind areas would need to attain the NAAQS "without the elimination of upwind states' significant contribution."

Wisconsin, 938 F.3d 314 (emphasis added). Not only does the Panel Opinion overlook the *Wisconsin* mandate, but it also overlooks the mandate of *North Carolina v. EPA*., 531 F.3d 896 (D.C. Cir.), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) which was at the heart of the decision in *Wisconsin*.

This Court in *North Carolina* found that EPA did not explain why it did not coordinate the Good Neighbor Provision with the rule under consideration and stated:

> Despite Section 110(a)(2(D)(i)'s requirement that upwind contributions to downwind nonattainment be 'consistent with the provisions of [Title I]," EPA did not make any effort to *harmonize* CAIR's Phase Two deadline for upwind contributors to eliminate their significant contribution with the attainment deadlines for downwind areas. ... As a result, downwind nonattainment areas must attain NAAQS for ozone and PM2.5 without the elimination of upwind states' significant contribution to downwind nonattainment, forcing downwind areas to make greater reductions than section 110(a)(2)(D)(i)(I) requires.

In the *Wisconsin* and *North Carolina* decisions, this Court applied the Good Neighbor Provision of the CAA to EPA's actions involving the delay of upwind state emission reduction obligations until *after* the date set for downwind states to come into compliance with the ozone NAAQS. In the case now before the Court involving the Revised Update Rule, it is EPA's actions to accelerate upwind emission reductions so

that they occur before the implementation of controls for downwind states that raises the harmonization issue that has been overlooked in the Panel Opinion.

Specific legal issues "that the panel may have failed to address" are the proper subject of rehearing. *See Apelt v. Ryan*, 906 F.3d 834, 841 (9th Cir. 2018) ("At the very least, rehearing en banc was necessary to correct the panel's failure to address Apelt's claim … The panel had an obligation to address Apelt's argument—one which he did not waive—on its merits rather than expecting the parties to read some sort of conclusion from the opinion's silence on the issue."); *Booker v. Johnson*, 473 F. App'x 249 at 1 (4th Cir. 2012) ("Booker petitioned for panel rehearing, asserting that our opinion failed to address his appeal of the district court's order denying his motions to alter or amend the judgment filed pursuant to Fed. R. Civ. P. 59(e). Upon consideration of his petition, we grant panel rehearing."); *Ecolab, Inc. v. FMC Corp.*, 366 F. App'x 154, 155 (Fed. Cir. 2009) ("The panel has considered the petition for panel rehearing and the response to that petition, which was limited to Ecolab's assertion that this court erred by failing to address its argument that the district court erroneously denied Ecolab's motion for prejudgment interest on its trade secret damages award … the panel grants Ecolab's petition for panel rehearing …."); *Rivera v. People of Virgin Islands*, No. CRIM. 2008-052, 2009 WL 1044577, at 1 (2009) ("As suggested by the rule, petitions for panel rehearing should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address ….") (citation and internal quotation marks omitted); *Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008));

see also R. App. P. 40(a)(2) ("The petition must state with particularity each point of law … that the petitioner believes the court has overlooked …."). In this case, likewise, a rehearing is warranted.

II. STATEMENT OF THE CASE

A. Clean Air Act Requirements.

Sections 109 and 110 of the CAA provide for the implementation, maintenance, and enforcement of national ambient air quality standards ("NAAQS") for areas designated as nonattainment for the relevant NAAQS and in Sections 110(a)(1) and 110(a)(2), 42 U.S.C. §7410(a)(1) and (a)(2), for infrastructure State Implementation Plans that apply to all states, regardless of whether the state includes areas designated nonattainment for the relevant NAAQS.

Section 110 of the CAA provides that after a NAAQS revision, states must submit recommendations regarding each area's attainment status (either attainment, nonattainment, or unclassifiable) for EPA approval. Upon a final determination of attainment status by EPA, each state is responsible for developing plans to demonstrate as "expeditiously as practicable"[3] how standards will be achieved, maintained, and enforced that take into consideration unique air pollution problems in the state and that significantly contribute to other "downwind" states.

[3] 42 U.S.C. §7502(c)(1).

Section 110(a)(2)(D)(i)(I) of the CAA establishes a "good neighbor provision" ("Good Neighbor Provision") that requires each state to include provisions in its State Implementation Plan that prohibit emissions in amounts that will contribute significantly to nonattainment in or interfere with maintenance by another state concerning any NAAQS and to do so "consistent with the provisions of this subchapter," (i.e., Title I of the CAA. 42 U.S.C. §7410(a)(2)). 42 U.S.C. §7410(a)(2)(D)(i)(I). Section 110(c)(1) of the CAA requires EPA's promulgation within two years of a Federal Implementation Plan to address requirements needed if the Administrator: (1) finds that a state has failed to submit a required State Implementation Plan; (2) finds a State Implementation Plan submission to be incomplete; or (3) disapproves a State Implementation Plan submission. 42 U.S.C. §7410(c)(1). In this matter, the Revised Update Rule is an action by EPA to establish a Federal Implementation Plan to address Good Neighbor obligations concerning the 2008 ozone NAAQS.

B. EPA Good Neighbor Rules.

The Revised Update Rule before the Court at this time is the Federal Implementation Plan that establishes statewide emission "budgets" limiting ozone-season (May-through-September) nitrogen oxide ("NOx") emissions from electricity-generating units in twelve states that EPA found require further ozone season NOx emission reductions to address significant contribution to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in other states. 86 Fed. Reg. at 23,056,

JA 251. EPA invoked Section 110(a)(2)(D)(i)(I), which requires each state to prohibit emissions "in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]."

There is a history of rulemakings and case law addressing CAA ozone transport rules. In 2011, EPA promulgated the Cross-State Air Pollution Rule under CAA section 110(a)(2)(D)(i)(I) to address, among other things, the 1997 ozone NAAQS. 76 Fed. Reg. 48,208, 48,213 (August 8, 2011). Following litigation in this Court and the Supreme Court, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) ("*EME Homer I*"), *rev'd & remanded*, 572 U.S. 489 (2014), *on remand*, 795 F.3d 118 (D.C. Cir. 2015) ("*EME Homer II*"), Cross-State Air Pollution Rule finalized a Federal Implementation Plan for twenty states and established emission limitations which took effect in 2015.

In 2016, EPA promulgated the Cross-State Air Pollution Rule Update ("Update Rule") to partially address interstate transport for the 75-ppb ozone NAAQS promulgated in 2008. The Update Rule finalized Federal Implementation Plans for twenty-two states, and emission budgets became effective in 2017 under the 2008 ozone NAAQS. 81 Fed. Reg. 74,504 (October 26, 2016).

The 2016 Update Rule was challenged in this Court in *Wisconsin*, which resulted in a remand of the Update Rule to provide, in part, a complete rather than partial remedy. In response to the decision EPA promulgated the Revised Cross-State Air Pollution

Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054, JA 249-279 ("Revised Update Rule" or "Revised Rule").

C. Petitioner's Challenge to EPA's Rule.

Upon appeal of the Revised Update Rule, MOG raised the modeling issue addressed by the Panel and, independently, EPA's failure to align the emissions reduction obligation of both upwind and downwind states to avoid imbalance among the states concerning ozone attainment implementation and strategy. POB at 17-29, 31-39; Petitioner's Reply Brief ("PRB") at 2-13, 13-20. That the Panel did not address EPA's failure to align the obligations of upwind and downwind states will be the principal focus of this petition.[4]

In making its challenge to EPA's failure to align the obligations of upwind and downwind states, MOG relied on the decisions of this Court in *North Carolina* and *Wisconsin*. MOG directs the Court to the concern that EPA only assessed implementation of upwind control strategies without undertaking the parallel analysis of control strategies in downwind areas. EPA failed to consider implementation of downwind area emission reduction control programs even though the record clearly

[4] In addition, MOG also raised the following issues that were not addressed by the Panel: (1) EPA's failure to follow its guidance on identifying maintenance monitors and "contribution threshold," (2) EPA's failure to have considered the air quality impacts of existing regulatory requirements, (3) EPA's failure to account for exceptional events, (4) EPA's decision to erroneous base its rule on days in which downwind monitors were actually in attainment with the ozone air quality standard, and (5) EPA's misinterpretation of the *Wisconsin* remand related to "further controls."

establishes that EPA has approved the delay of emission controls on sources in the New York Metropolitan Area for years beyond the nonattainment date that it applied to upwind states - controls that would have resulted in attainment of all nonattainment addressed by the Revised Update Rule that were relied upon by EPA to justify the imposition of new control requirements on the vast majority of the upwind states that are subject to the rule. Petitioner's Reply Brief ("PRB") at 11. EPA's approval of the delays in implementation of these emission controls has resulted in those sources being allowed to continue to adversely impact the Connecticut monitors which will remain in nonattainment until those emission controls are implemented improperly assigning the air quality remedy to upwind states. POB at 38-39. As is established by *North Carolina* and *Wisconsin*, the obligations of upwind and downwind areas must be aligned, so the burden is not shifted from one group of states to the other. EPA's failure to address the *Wisconsin* and *North Carolina* mandate for balance is an arbitrary and capricious action that mandates vacatur of the Rule. PRB at 10-11. *North Carolina* makes it clear that EPA must harmonize the deadline for upwind states contributors to eliminate their significant contribution with the attainment deadlines for downwind states. POB at 35-36. This is confirmed by the *Wisconsin* opinion which provides,

> the Good Neighbor Provision calls for the elimination of upwind States' significant contribution *on par* with the relevant downwind attainment deadline" and ". . . it is the statutorily designed relationship between the Good Neighbor Provision's obligations for upwind States and the statutory attainment deadlines for downwind areas that generally calls for parallel timeframes.

Id. POB at 38-39.

Although the Panel Opinion has a passing reference in a footnote to prior judicial decisions related to EPA's conduct in proceedings relevant to this case (Op. at n. 1), there is no substantive discussion of EPA's statutorily impermissible imbalance among regulatory burdens of downwind and upwind states in violation of the Good Neighbor provisions of the CAA. Accordingly, a rehearing is warranted.

III. ARGUMENT

A. REHEARING IS WARRANTED BECAUSE THE PANEL OPINION OVERLOOKED A CRITICAL ISSUE RAISED, BRIEFED, AND ARGUED BY MOG.

The Panel Opinion focuses upon MOG's concern about EPA's use of linear interpolation methodology, as opposed to photochemical modeling and concludes that "so long as EPA 'acted within its delegated statutory authority, . . .we will not interfere with its conclusion." (quoting *Ethyl Corp.*, 51 F.3d at 1064))." Op at 12. The Panel Opinion overlooks other issues raised by MOG to include the CAA mission of balance among the states' NAAQS obligations.

The Good Neighbor Provisions of the CAA, as provided in Section 110(a)(2)(D)(i)(I), fail to state a specific date by which an upwind state must eliminate its significant contribution to downwind nonattainment and maintenance. Instead, Section 110(a)(2)(D)(i)(I) states that such contribution must be eliminated "consistent with the provisions of this subchapter," i.e., Title I of the CAA. 42 U.S.C. §7410(a)(2). EPA failed in the promulgation of the Revised Update Rule to simultaneously assess:

(1) upwind states' obligations under CAA Section 110(a)(2)(D)(i)(I) to eliminate significant contribution to downwind nonattainment and (2) the duty of downwind states to impose controls on sources impacting nonattainment under CAA Section 172. PRB at 1.

In short, EPA's Revised Update Rule unlawfully requires upwind states to impose emission reduction on their sources that would not have been needed had EPA honored the *Wisconsin* admonition that EPA must "harmonize" and manage the relationship among states as parallel and "on par" meaning to be judged on a common level with the other. PRB at 4-5. EPA's failure to "harmonize" the Good Neighbor Provision was deemed by the *North Carolina* court as unlawful. PRB 5-6. As MOG has noted "EPA myopically views its duties and assumes its role is a singular task rather than a dual alignment of implementation plans, i.e., harmonization of upwind and downwind state obligations, ignoring the law and science of NOx emissions . . .simultaneously impacting on nonattainment . . . this limited perspective fails the statutory requirement to implement the Good Neighbor Provision on par with the entire title I implementation program for all states." PRB at 8.

In promulgating the Revised Update Rule EPA erroneously assessed the obligation of the upwind states under CAA Section 110(a)(2)(D)(i)(I) without accounting for the fact that it has already approved the delay in implementing controls on critical sources in downwind states for several years beyond the applicable attainment date. As noted previously, the Revised Update Rule fails to recognize that

the EPA had approved downwind state emission control requirements under CAA Section 172 that delayed the imposition of nonattainment control for years beyond the applicable attainment date. The record supporting the rulemaking establishes that it is the "delayed controls in the nonattainment area that are causing the nonattainment involved" *id.* at 7. EPA's regulatory actions for the New York Metropolitan nonattainment area allowing delay of controls on "peaking units" causing demonstrated extended nonattainment illustrates EPA's failure to implement balance pursuant to the CAA which supports vacatur of the Revised Update Rule. PRB 8 – 11.

The decision in *Wisconsin, supra* at 316, concluded that such shifting of burden among the states was inconsistent with Congress' regulatory plan:

> The Act's central object is the 'attain[ment] [of] air quality of specified standards [within] a specified period of time." *Train*, 421 U.S. at 64-65 … EPA's interpretation of the Good Neighbor Provision subverts that scheme. Under the Update Rule, downwind States face a crucial statutory obligation to secure attainment. . .even though upwind States face no symmetrical obligation . . . The Rule thus puts downwind States to the choice of flouting the attainment deadlines or making greater reductions than the Good Neighbor Provision requires. That choice is "incompatible with the substance of Congress' regulatory scheme." *Util. Air Regulatory Grp.*, 573 U.S. at 322."

Notably, the court in *Wisconsin*, *supra* at 309, ruled that the asymmetrical treatment among the states by the transport rule was its demise: "We conclude … the Rule is inconsistent with the Act: it allows upwind States to continue their significant contributions to downwind air quality problems beyond statutory deadlines by which downwind States must demonstrate their attainment of air quality standards."

EPA's action in promulgating the Revised Update Rule without considering the extended delay of needed nonattainment controls creates a fatal flaw, which could have been addressed as a corresponding extension to the obligations of the upwind states involved. See *Wisconsin, supra* at 317.

Accordingly, Petitioner requests a rehearing to address an overlooked issue and to send the message to EPA that the CAA does not create an imbalance among the states regarding their air quality obligations but is symmetrical in its mission. Congress did not create a program where states are permitted to shift to one another emissions control programs by gaming implementation deadlines; it instead created a program where states emissions programs are designed to complement one another on par.

B. THE EPA IS ALREADY APPLYING IT'S INTERPREATION OF THIS COURT'S DECISION RELATIVE TO AN ISSUE NOT ADDRESSED BY THE COURT AND CONTRARY TO THE APPLICABLE LAW.

Twelve days after the Panel Opinion, EPA issued its final "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards" and stated in the preamble to the Rule that a commenter (Midwest Ozone Group) had misread the *North Carolina*, *Wisconsin*, and *Maryland*[5] decisions "calling for good neighbor

[5] EPA's reference to this Court's *Maryland* decision invites discussion of the text concerning states' nonattainment relationships, "states in a multistate nonattainment area share not only a nonattainment designation but also the concomitant responsibility to limit their own emissions." *Maryland v EPA*, 958 F.3d 1185, 1201 (D.C. Cir. 2020). These words speak to the timely work of all states involved and do not support delayed attainment programs on local sources in nonattainment areas.

analysis and emission controls to be aligned with the timing of the implementation of nonattainment controls by downwind states." Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. __ (forthcoming 2023) (pmbl. IV.A) (pre-publication version on file in Docket No. EPA-HQ-OAR-2021-0668). EPA stated that instead, "the D.C. Circuit has held that the statutory attainment dates are the relevant downwind deadlines the EPA must align with in implementing the good neighbor provisions." *Id.* Significantly, even though this issue was not addressed in the Panel Opinion in this case, EPA cites the Panel Opinion in support of its position, stating that the "Court *declined to entertain similar arguments* to those presented by comments here and instead in a footnote explained that it had 'exhaustively summarized the regulatory framework governing EPA's conduct' and that it '[drew] on those decisions and incorporated them herein by reference . . .'" *Id.* (emphasis supplied) Or in other words, EPA is taking the position that the Panel Opinion, which it acknowledges never reached MOG's CAA parallel upwind/downwind arguments, nevertheless has established national law on the issue.

The impact of the Panel Opinion not to address the balance of upwind and downwind sources of regulated air pollution creates a path forward for the EPA to ignore the balance issue for regulated entities and all states. Accordingly, a rehearing is needed.

IV. CONCLUSION

Petitioner's Petition for Panel or En Banc Rehearing should be granted, and the Rule vacated.

Respectfully submitted,

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Dated: April 17, 2023.

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 35(b) and Circuit Rule 35, because it contains 3308 words, excluding exempted parts, according to the count of Microsoft Word 2010. I further certify that the foregoing brief also complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Word 2010 in a 14-point proportionally spaced Garamond typeface.

/s/ David M Flannery
David M. Flannery

Dated: April 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2023, the foregoing Petitioner's Petition for Panel or En Banc Rehearing was served electronically on all registered counsel through the Court's CM/ECF system.

/s/ David M Flannery
David M. Flannery

ADDENDUM

1. Panel Opinion dated March 3, 2023
2. Certificate of Parties and Amici
3. Disclosure Statement

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 28, 2022 Decided March 3, 2023

No. 21-1146

MIDWEST OZONE GROUP,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

APPALACHIAN MOUNTAIN CLUB, ET AL.,
INTERVENORS

On Petition for Review of a Final Action
of the Environmental Protection Agency

David M. Flannery argued the cause for petitioner. With him on the briefs were *Kathy G. Beckett* and *Edward L. Kropp*.

Chloe H. Kolman, Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief were *Todd Kim*, Assistant Attorney General, and *Daniel P. Schramm,* Attorney, U.S. Environmental Protection Agency.

Sean M. Helle, *Kathleen Riley, Ann Brewster Weeks, Hayden Hashimoto, Zachary Fabish,* and *Graham McCahan* were on the brief for respondent-intervenors.

Letitia James, Attorney General, Office of the Attorney General for the State of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Judith Vale*, Assistant Deputy Solicitor General, *Morgan A. Costello* and *Claiborne E. Walthall*, Assistant Attorneys General of Counsel, *Kathleen Jennings,* Attorney General, Office of the Attorney General for the State of Delaware, *Christian Douglas Wright*, Director of Impact Litigation, *Valerie Satterfield Edge*, Deputy Attorney General, *Matthew J. Platkin*, Attorney General, Office of the Attorney General for the State of New Jersey, *Maura Healy*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *David S. Frankel*, Special Assistant Attorney General, and *Christopher G. King*, Senior Counsel, New York City Law Department, were on the brief for *amici curiae* in support of respondents.

Before: WILKINS, RAO and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

CHILDS, *Circuit Judge*: Petitioner Midwest Ozone Group (MOG), an association of companies, trade organizations, and individual entities maintaining a collective interest in air quality, petitions for review of the Environmental Protection Agency's (EPA) final action, 86 Fed. Reg. 23,054 (Apr. 30, 2021), entitled the Revised Cross-State Air Pollution Update Rule (Revised Rule) for the 2008 Ozone National Ambient Air Quality Standards (NAAQS), which EPA promulgated in response to this Court's remand in *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019). In the Revised Rule, EPA addresses its

failure to balance emissions obligations in accordance with 2008 ozone NAAQS and its prescribed date of attainment. *Id.* at 315. In this appeal, MOG contends that the Revised Rule is arbitrary and capricious, and that EPA failed to conduct a legally and technically appropriate assessment as required by the Good Neighbor Provision of the Clean Air Act (CAA). 42 U.S.C. § 7410(a)(2)(D)(i). We disagree. Instead, we hold that the Revised Rule is an appropriate exercise of EPA's statutory authority under the "Good Neighbor Provision," and deny the petition on the merits.

I.

The CAA, codified at 42 U.S.C. §§ 7401–7671q, authorizes EPA to adopt NAAQS to regulate air pollutants, such as ozone.[1] *Id.* § 7409(a), (b). Wind carries air pollution from state to state, thereby disregarding state boundaries. Upwind is the direction the wind is coming from and downwind is the direction toward which the wind is blowing. Emissions from upwind States can impact downwind states' attainment of the NAAQS. To address this problem, the CAA contains the Good Neighbor Provision which requires each

[1] This Court is familiar with ozone's status as a pollutant and recognizes its harmful effects. *See Clean Wis. v. EPA*, 964 F.3d 1145, 1154 (D.C. Cir. 2020). The Court has also exhaustively summarized the regulatory framework governing EPA's conduct in addition to providing the background for statutory provisions and the agency proceedings relevant to this case. *See id. See also Sierra Club v. EPA*, 21 F.4th 815 (D.C. Cir. 2021); *Maryland v. EPA*, 958 F.3d 1185 (D.C. Cir. 2020); *New York v. EPA*, 781 F. App'x 4 (D.C. Cir. 2019); *EME Homer City Generation, LP v. EPA*, 795 F.3d 118 (D.C. Cir. 2015). We draw on those decisions and incorporate them herein by reference.

upwind state to prevent its air pollutant emissions from contributing significantly to nonattainment in any other downwind state. *See* 42 U.S.C. § 7410(a)(2)(D)(i).

In *Wisconsin v. EPA*, we held that EPA, in implementing the predecessor of the Revised Rule, the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update), 81 Fed. Reg. 74,504 (Oct. 26, 2016), acted unlawfully and violated its statutory authority under the Good Neighbor Provision. We remanded the CSAPR Update because it improperly allowed upwind states to continue polluting beyond statutory deadlines which were still applicable to downwind states. *Wisconsin*, 938 F.3d at 309, 336.

EPA devised the Revised Rule using the four-step method for evaluating Good Neighbor Provision obligations. *See Maryland v. EPA*, 958 F.3d 1185, 1188 (D.C. Cir. 2020).

At the first step, EPA "performed air quality modeling coupled with ambient measurements in an interpolation technique to project ozone concentrations at air quality monitoring sites in 2021." 86 Fed. Reg. at 23,057. Linear interpolation is a mathematical method of using the equation of a line to find a new data point, based on an existing set of data points. EPA observed that "in this case the known data are the 2016 measured-based and 2023 modeling-based ozone concentrations." *Id.* at 23,058. EPA acknowledged evaluating "2021 projected ozone concentrations at individual monitoring sites[, referred to as nonattainment and/or maintenance receptors,] and consider[ing] current ozone monitoring data at these sites to identify receptors that [we]re anticipated to have problems attaining or maintaining the 2008 ozone NAAQS." *Id.*

At step two, EPA "used an air quality modeling-based

technique to quantify the contributions in 2021 from upwind states to ozone concentrations at individual monitoring sites." *Id.* Once the contributions were quantified, EPA "then evaluated these contributions relative to a screening threshold of 1 percent of the NAAQS (*i.e.*, 0.75 [parts per billion]) for those monitoring sites identified as nonattainment and/or maintenance receptors in step [one]." *Id.* "States with contributions that equal[ed] or exceed[ed] 1 [%] of the NAAQS were identified as warranting further analysis for significant contribution to nonattainment or interference with maintenance." *Id.* "States with contributions below 1 [%] of the NAAQS were considered to not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in downwind states." *Id.* As a result of its air quality and contribution analysis for the analytic year 2021, EPA concluded that Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia had ozone contributions that equaled or surpassed the 2008 NAAQS thereby warranting further analysis for significant contribution to nonattainment or interference with maintenance. *Id.* For the nine remaining states of Alabama, Arkansas, Iowa, Kansas, Mississippi, Missouri, Oklahoma, Texas, and Wisconsin, EPA found that they were not linked to 2021 downwind air quality problems. *Id.* at 23,057.

At step three, EPA applied a multifactor test which evaluated "cost, available emission reductions, and downwind air quality impacts to determine the amount of linked upwind states' emissions that 'significantly' contribute to downwind nonattainment or maintenance receptors." *Id.* at 23,058. EPA applied the multifactor test to both electricity generating units and non-electricity generating source categories and "assessed potential emission reductions in all years for which there [wa]s a potential remaining interstate ozone transport problem (*i.e.*,

through 2025), in order to ensure a full remedy in accordance with the *Wisconsin* decision." *Id.*

Finally, at step four of the four-step framework, EPA specified enforceable measures in Federal Implementation Plans (FIP) for Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia to accomplish required emission reductions in these states. *Id.* at 23,059.

EPA proposed the Revised Rule on October 30, 2020. 85 Fed. Reg. 68,964. EPA published the Revised Rule on April 30, 2021, with an effective date of June 29, 2021. 86 Fed. Reg. 23,054.

II.

MOG challenges EPA on three of the four steps of the Good Neighbor Provision evaluation method. MOG asserts that "EPA deviated from its past practice of performing state-of-the-science photochemical air quality modeling[2] for the analytical year of 2021 . . . in favor of using a linear interpolation technique to predict air quality concentrations at monitors in 2021," at the first step of the four-step framework. Pet'r's Br. 7. MOG asserts that "EPA's linear interpolation methodology resulted in a significantly higher estimate of 2021 ozone design values than was appropriate," *id.* at 25, and "was executed even though the Courts have gone to great lengths to uphold EPA non-linear modeling in connection with prior

[2] "Photochemical modeling is the central element of the air quality modeling process and is used to simulate and predict pollutant concentrations." *Tex. Comm'n on Env'tal Quality*, https://www.tceq.texas.gov/airquality/airmod/overview/am_pm.html (last visited Oct. 14, 2022).

Good Neighbor Provision rules." *Id.* at 18–19 (citing, *e.g.*, *Wisconsin*, 938 F.3d at 310–11). MOG labels EPA's action "a mathematical and analytical shortcut" that should not have been used "to determine mandatory state obligations." *Id.* at 10, 11. As a result, EPA's actions are "arbitrary and capricious" because "'the assumptions and the methodology used' [we]re inconsistent with prior modeling upheld by this Court." *Id.* at 11. MOG argues that EPA should have used photochemical modeling to assess the analytic year of 2021, but instead chose to use "modeling [that] did not include legal emission reduction requirements in effect for downwind sources and failed to consider the impact of exceptional events on the impacted monitors." *Id.* at 12.

As additional criticism of EPA's approach, MOG cites to *New Jersey v. Wheeler*, 475 F. Supp. 3d 308 (S.D.N.Y. 2020). There, the court ordered EPA, in the context of FIPs for upwind states Illinois, Indiana, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia, "to promulgate a complete-remedy rulemaking addressing . . . EPA's outstanding statutory obligations by March 15, 2021." *Id.* at 313. MOG asserts that to meet the *Wheeler* court's deadline, EPA used existing modeling data rather than conduct new modeling, shortened notice and/or comment periods, refused to extend said periods, and would not allow a redefinition of nonattainment and maintenance receptors.

MOG further argues that EPA's adoption of the Revised Rule is arbitrary because (1) eleven of the twelve states identified were considered significant pollution contributors based on flawed data, (2) EPA's modeling failed to consider official regulatory programs and/or other emission reduction requirements applicable to sources in downwind states that could contribute to improving ambient air quality, and (3) EPA failed to account for the impact of exceptional events such as

wildfires on the ozone design values of the air quality monitors. Finally, MOG contends that at step three of the four-step framework, EPA arbitrarily "determined control requirements for the units subject to th[e] Rule" when the Court in *Wisconsin v. EPA* did not require EPA to perform this task and did so using data from "states not affected by the Rule," which "resulted in EPA assessing units that exhibit different characteristics . . . ." *Id.* at 47–48, 54.

In response to MOG's arguments, EPA admits that it adjusted its traditional step one methodology to finish the Revised Rule before the July 20, 2021 serious attainment date for downwind states, as required by the Court in *Wisconsin v. EPA*. EPA contends that it used linear interpolation methodology "to determine how much of the ozone improvement between the 2016 base year and the 2023 projected year could be expected to occur by 2021," but the 2021 air quality values were derived from a full set of air quality modeling emission inventories for 2023. Resp.'s Br. 8–9 (citing 86 Fed. Reg. at 23,078–80). Moreover, EPA contends that it conducted additional testing and those outcomes showed that MOG's preferred approach would not have led to a different regulatory result. In this regard, EPA asserts that despite its revised methodology, MOG has not demonstrated that its preferred photochemical air quality modeling methodology would have changed which states were affected by the Revised Rule.

III.

This Court has jurisdiction to review EPA's Revised Rule pursuant to 42 U.S.C. § 7607(b)(1). Because "we apply the same standard of review under the [CAA] as we do under the Administrative Procedure Act," *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000), this Court

will uphold EPA's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Id.* § 7607(d)(9)(A). Our review is narrow; if an action is not contrary to law, "agency action simply [must] be 'reasonable and reasonably explained.'" *Cmtys. for a Better Env't v. EPA*, 748 F.3d 333, 335 (D.C. Cir. 2014) (citation omitted). Generally, a reviewing court "must affirm . . . EPA's rules if the agency has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made.'" *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

Under this standard, "[a]gency determinations based upon highly complex and technical matters are 'entitled to great deference,'" *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1051–52 (D.C. Cir. 2001) (citation omitted), because "many agency actions having the force of law require expertise the courts lack and involve policy choices more appropriately overseen by a politically accountable branch of the government." Edwards, Harry T., *Post Publication Update for Federal Standards of Review*, 119 (2022); *see also Huls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) ("[W]e will give an extreme degree of deference to the agency when 'it is evaluating scientific data within its technical expertise.'") (citation omitted); *Maryland*, 958 F.3d at 1196 ("[A reviewing court] must give an extreme degree of deference to . . . EPA's evaluation of scientific data within its technical expertise, especially where . . . EPA's administration of the complicated provisions of the [CAA is under review.]") (citations and quotation marks omitted).

Statistical analysis has been described as "perhaps the prime example of an area of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of

the land." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir. 1998). "Although computer models are 'a useful and often essential tool for performing the Herculean labors Congress imposed on EPA in the [CAA],' their scientific nature does not easily lend itself to judicial review." *Id.* (internal citation omitted). Thus, "[a reviewing court] do[es] not look at the decision as would a scientist, but only to ensure that EPA adheres to certain minimal standards of rationality." *Cmtys. for a Better Env't*, 748 F.3d at 336 (citation and quotation marks omitted). The reviewing court also "will not take it upon [itself], as nonstatisticians, to perform [its] own statistical analysis—a job more properly left to the agency to which it was delegated." *Appalachian Power Co.*, 135 F.3d at 802. "[I]t is only when the model bears no rational relationship to the characteristics of the data to which it is applied that [the reviewing court] will hold that the use of the model was arbitrary and capricious." *Id.* (citations omitted).

IV.

We have considered MOG's arguments as to the arbitrariness and capriciousness of the Revised Rule and observe that the Court has never required EPA to use a particular modeling method to generate its data or adhere to past practice, but rather that EPA "consider[s] all of the relevant factors, and demonstrate[s] a reasonable connection between the facts on the record and its decision." *Id.* (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995)). Thus, when an agency has not otherwise acted contrary to law, we will conclude that its choice of model is arbitrary and capricious if "the model is so oversimplified that the agency's conclusions from it are unreasonable." *Appalachian Power*, 249 F.3d at 1052 (quoting *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)).

Based on the record before us, EPA appears to have chosen analytical techniques rationally connected to the Revised Rule and appropriately explained its use of the linear interpolation and subsequent methods for establishing the Revised Rule. In addition, EPA's methodology did also incorporate photochemical modeling, MOG's preferred technique, as the "foundation for its projections" and "merely layered an additional mathematical function, linear interpolation" over the original projected data to generate 2021 ozone concentrations. Resp.'s Br. at 19. EPA then performed further data analysis by checking its 2021 interpolated projection against both a sensitivity analysis[3] and engineering analytics approach.[4] These tools produced consistent results and MOG has not proven that different states would have been regulated differently under any other method, including a purely photochemical modeling approach.

Against the backdrop of MOG's complaints and our directive in *Wisconsin*, EPA also was cognizant of the CAA's statutory directive that emissions reductions should be done "as expeditiously as practicable." 42 U.S.C. § 7511(a)(1). We therefore conclude that EPA reasonably believed it should address upwind states' significant contributions before the next downwind attainment deadline, which was the serious attainment deadline of July 20, 2021. *See, e.g.*, 86 Fed. Reg. at 23,072. Given the limited amount of time EPA had to complete the rulemaking for the Revised Rule, we discern that EPA

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[3] Using the North American Emissions Modeling Platform, EPA sensitivity analysis projected 2021 emissions numbers based on a comprehensive assessment of emissions expected. *See, e.g.*, 86 Fed. Reg. at 23,075.

[4] This analytical approach estimated 2021 power plant emissions based on historical emissions and known fleet changes.

reasonably chose to use existing air quality modeling and contribution information to derive an appropriately reliable projection of air quality conditions and contributions in 2021. In reaching this determination, the Court does not disregard MOG's technical data presentation depicting higher ozone NO_x emissions resulting from use of the linear interpolation methodology, as opposed to photochemical modeling. However, in the context of the deferential standard afforded EPA, MOG has not established that EPA's linear interpolation method is oversimplified or that the agency has produced unreasonable results. *See id.* at 23,080–81. *See also Appalachian Power Co.*, 135 F.3d at 802 ("[S]o long as EPA 'acted within its delegated statutory authority, . . . we will not interfere with its conclusion." (quoting *Ethyl Corp.*, 51 F.3d at 1064)).

V.

For the reasons stated above, MOG fails to demonstrate that EPA's promulgation of the Revised Rule was arbitrary, capricious, or promulgated in violation of its statutory authority under the Good Neighbor Provision. Accordingly, we deny MOG's petition.

So ordered.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Petitioner submits this Certificate pursuant to Circuit Rule 35(c).

A. Parties, Intervenors, and *Amici Curiae*.

This case involves the following parties:

Petitioner:

The Petitioner is the Midwest Ozone Group.

Respondents:

The Respondents are the United States Environmental Protection Agency ("EPA") and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Intervenors:

Intervenors in support of Respondents are Downwinders at Risk, Texas Environmental Justice Advocacy Services, Appalachian Mountain Club, Sierra Club, Environmental Defense Fund, and Clean Wisconsin.

***Amici Curiae*:**

Amici Curiae in support of the Respondents are the States of New York, Delaware, and New Jersey, the Commonwealth of Massachusetts, and the City of New York.

B. Ruling Under Review

This case involves a petition to review the final EPA action entitled Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS [National Ambient Air Quality Standard] published at 86 Fed. Reg. 23,054 (Apr. 30, 2021), ("Rule" or "Revised Rule") Joint Appendix ("JA") 249-279.

C. Related Cases

Undersigned counsel is not aware of any other related cases presently pending in this Court or any other court.

RULE 26.1 DISCLOSURE STATEMENT

The Petitioner makes the following statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 35(c):

The Midwest Ozone Group is a 'trade association,' within the meaning of Circuit Rule 26.1(b), as it is a continuing association of organizations and individual entities operated to promote the general interests of its membership on matters related to air emissions and air quality. Midwest Ozone Group has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although specific individuals in the membership of Midwest Ozone Group have done so. Midwest Ozone Group has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in Midwest Ozone Group.