ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 18-1203, 18-1205, 18-1206, 18-1208, 18-1212, 18-1214 (cons.)

CLEAN WISCONSIN, *et al*.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and
ANDREW R. WHEELER, Administrator,
United States Environmental Protection Agency,
Respondents.

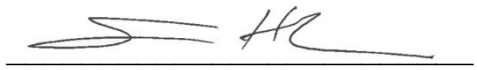
BCCA APPEAL GROUP, *et al.*,
Intervenors.

PETITION FOR REVIEW OF FINAL ADMINISTRATIVE ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' JOINT FINAL REPLY BRIEF

DATED: August 7, 2019

Counsel for Petitioners listed inside cover



Susan Hedman
Of Counsel
Clean Wisconsin
634 W. Main Street, Suite 300
Madison, WI 53703
(608) 251-7020 ext. 29
shedman@cleanwisconsin.org

/s/ Ann Brewster Weeks
Ann Brewster Weeks
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
(617) 359-4077
aweeks@catf.us
Counsel for Petitioner Clean Wisconsin

/s/ Maxine I. Lipeles
Maxine I. Lipeles
Interdisciplinary Environmental Clinic
Professor of Law Emerita
Washington University School of Law
One Brookings Drive – CB 1120
St. Louis, MO 63130
(314) 346-0804
milipele@wustl.edu

Counsel for Petitioner Sierra Club

Kwame Raoul, Attorney General
Jane Elinor Notz, Solicitor General
Matthew J. Dunn, Chief,
Environmental Enforcement/
Asbestos Litigation Division
Daniel I. Rottenberg
Stephen J. Sylvester
Assistant Attorneys General

By: */s/ Daniel I. Rottenberg*
Daniel I. Rottenberg
Assistant Attorney General
Office of the Attorney General
69 W. Washington St, 18th Floor
Chicago, IL 60602
(312) 814-3816
drottenberg@atg.state.il.us

Counsel for Petitioner State of Illinois

Mark A. Flessner, Corporation Counsel
Benna Ruth Solomon, Deputy
Corporation Counsel
Jared Policicchio, Supervising
Assistant Corporation Counsel
Stephen J. Kane, Deputy Corporation
Counsel

By: */s/ Stephen J. Kane*
Stephen J. Kane
Deputy Corporation Counsel
Affirmative Litigation Division
City of Chicago Department of Law
121 N. LaSalle St., Room 600
Chicago, IL 60602
(312) 744-6934
stephen.kane@cityofchicago.org

Counsel for Petitioner City of Chicago

/s/ Elena K. Saxonhouse
Elena K. Saxonhouse
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
(415) 977-5765
elena.saxonhouse@sierraclub.org

Counsel for Petitioner Sierra Club

/s/ Joshua A. Berman
Joshua A. Berman
Sierra Club Environmental Law Program
50 F. St. NW, 8th Floor
Washington, DC 20001
(202) 650-6062
josh.berman@sierraclub.org

Counsel for Petitioner Sierra Club

/s/ David R. Baake
David R. Baake
Baake Law LLC
275 Downtown Mall
Las Cruces, NM 8801
(545) 343-2782
david@baakelaw.com

Counsel for Petitioners Sierra Club; City of Sunland Park, New Mexico; and Familias Unidas del Chamizal

/s/ Robert Ukeiley
Robert Ukeiley
Center for Biological Diversity
1536 Wynkoop St., Suite 421
Denver, CO 80202
(720) 496-8568
rukeiley@biologicaldiversity.org

Jonathan Evans
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7100 ext. 318
jevans@biologicaldiversity.org

Counsel for Petitioners Board of County Commissions of Boulder County; Center for Biological Diversity; National Parks Conservation Association; and Sierra Club

/s/ Howard A. Learner
Howard A. Learner
Scott Strand
Ann Jaworski
Environmental Law and Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
(312) 673-6500
hlearner@elpc.org

Counsel for Petitioners Environmental Law and Policy Center; and Respiratory Health Association

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

AR-	Document numbers in EPA docket number EPA-HQ-OAR-2017-0548, as listed in the Amended Certified Index to the Administrative Record, Doc. No. 1772913, filed in this case by EPA on February 12, 2019
EPA	United States Environmental Protection Agency
Illinois EPA	Illinois Environmental Protection Agency
NAAQS	National Ambient Air Quality Standard(s)
ppb	parts per billion
Br.	Petitioners' Final Opening Brief
El Paso Chamber Br.	Proof Brief for Intervenors Greater El Paso Chamber of Commerce, El Paso Electric Company, BCCA Appeal Group, Texas Association of Manufacturers, and Texas Oil & Gas Association, Doc. No. 1791980
EPA Br.	EPA's Proof Answering Brief, Doc. No. 1787456
MI Br.	Initial Brief for Intervenor-Respondent State of Michigan, Doc. No. 1791952
TX Br.	Proof Brief for the Texas Respondent-Intervenors, Doc. No. 1791815
WI Br.	Proof Brief of the State of Wisconsin In Support of Respondents, Doc. No. 1791970

API Amici Br.	Proof Brief for *Amici Curiae* American Petroleum Institute, Colorado Oil & Gas Association, Colorado Chamber of Commerce, and Colorado Farm Bureau in Support of Respondents, Doc. No. 1791904

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' opening brief shows EPA's pattern of arbitrary and capricious decision-making that resulted in significantly reduced numbers and/or sizes of nonattainment areas designated in the final rule. In some cases, EPA reversed its intended designations, seemingly in response to political considerations.[1] In other cases, EPA reversed intended designations without logical explanation or factual support, sometimes even relying on the very same technical support documents that supported the intended designations. In other cases, EPA ignored the best available science, failed to consider relevant factors, relied on irrelevant factors, or adopted implausible conclusions that contradicted, or are not rationally related to,

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[1] *See* Br. at 11-12 & n.2 (discussing the Messina Letter, AR-0406, JA1371, obtained under the Freedom of Information Act by Petitioners). As indicated in recent press reports (included in Attachment A, JA1470-1484), EPA just released additional documents suggesting that staff analysis was disregarded and that extra-statutory considerations tainted EPA's final designations:

https://www.reuters.com/article/us-usa-epa-smog/emails-show-trump-epa-overruled-career-staff-on-wisconsin-air-pollution-idUSKCN1SY2BP;

https://www.nytimes.com/2019/05/24/climate/epa-pruitt-wisconsin-foxconn.html;

https://www.chicagotribune.com/news/breaking/ct-met-foxconn-indiana-smog-trump-epa-20190516-story.html;

https://www.bloomberg.com/news/articles/2019-05-25/trump-appointees-shunted-scientists-on-pollution-at-foxconn-site.

the evidence before the agency. EPA also repeatedly applied an interpretation that this Court said would "[do] … violence to section 107(d)'s very purpose," *Catawba Cnty. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009), by employing a but-for causation test to determine if an area "contributes" to nearby nonattainment. EPA fails to explain how its application of "contributes" honors Congress' choice to not require that contributions be significant.

EPA remarkably *declines to defend its designations for nine of sixteen counties challenged.* Instead, EPA asks the Court to remand those designations, while also challenging Petitioners' standing for three of them—plus four others, for which it offers unavailing merits defenses.

Petitioners have standing to challenge each designation at issue. The harm EPA's unlawful designations cause to Petitioners is evident in EPA's record and Petitioners' declarations. EPA's designations harm Petitioners' members living in areas erroneously designated attainment and those living in nearby nonattainment areas. Because no additional pollution controls will be required in the wrongly designated attainment areas, all persons in those areas will suffer higher pollution levels than they otherwise would. States and municipalities are harmed in their capacity as property owners due to vegetation damage caused by elevated ozone pollution, and in their regulatory interest as parties primarily responsible for implementing the standards.

Where EPA seeks to defend its designations, its arguments fail due to the arbitrary and capricious and otherwise unlawful nature of EPA's decision-making described in detail below. Petitioners therefore ask the Court to vacate and remand all challenged attainment designations to ensure that EPA properly discharges its responsibilities under the Clean Air Act, including the statutory timeline for completing designations. 42 U.S.C. § 7407(d)(1)(B)(i).

STANDING

EPA attempts to evade judicial review by asserting that Petitioners lack standing to challenge seven designations. EPA Br. at 14-18. Petitioners demonstrably suffer injury-in-fact due to these unlawful agency actions, which can be redressed by requiring EPA to follow the law. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Only one" Petitioner need have standing for each designation. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

A. Environmental Petitioners have standing.

Environmental Petitioners demonstrate standing to challenge EPA's unlawful designations on behalf of members suffering ongoing injury, because they live, work, and recreate in places where pollution sources would be subject to stricter pollution controls, if the area were properly designated nonattainment. Br. at 44-46, & Addendum. For example, Clean Wisconsin submitted declarations showing injury to members living in parts of Door and Kenosha Counties that EPA

properly intended to designate nonattainment, but arbitrarily and unlawfully designated attainment. A Clean Wisconsin member suffering from asthma and chronic obstructive pulmonary disorder stated that EPA's:

> … decision to designate the portion of Door County where I live as "Attainment/Unclassifiable" means that the State of Wisconsin will not be required to take additional steps to reduce emissions of pollutants that form ozone in the portion of Door County where I live … [whereas] EPA's intended "Nonattainment" designation … would have benefitted my interest in breathing cleaner air and preventing exacerbation of the effects … I experience while I am gardening, doing yardwork, doing Habitat [for Humanity] construction, golfing and fishing near my residence on summer days.

Br. Add. at 151, Powers Decl. ¶¶ 15-16. *See also id.* at 010, Antaramian Decl., ¶¶ 15-16; *id.* at 027, Bewitz Decl., ¶ 12; *id.* at 095-96, Leline Decl., ¶¶ 13-14; *id.* at 138, B. Perloff Decl., ¶¶ 15-16; *id.* at 141, W. Perloff Decl., ¶¶ 15-16.

Environmental Petitioners also submitted declarations from members residing in Porter,[2] McHenry, and El Paso Counties, making similar points. Br. at 44-46 & Addendum (Schindler, Aztlan, Quevado, and Villegas Declarations).

Environmental Petitioners' members in Cook County, Illinois, where ozone concentrations exceed the standard, are irrefutably harmed by pollution

[2] Standing declarant Charlotte Read passed away in May 2019. Environmental Petitioners substitute the declaration of another Porter County resident. Stanton Decl., Att. B.

contributions from McHenry, Porter, Lake (Indiana), and Kenosha, as shown in the attached declarations.[3] Horine Decl.; Lipton Decl., Att. B.

EPA also incorrectly asserts that individuals living in areas that contribute to downwind ozone violations, but do not themselves have violating ozone monitors, suffer no injury. EPA Br. at 14-15. This novel argument—for which EPA provides no support—is meritless.

EPA has not shown any reason why standing should be analyzed differently in this case than in others where petitioners suffer harm by breathing additional air pollution due to EPA's action. Courts regularly hear such cases brought by petitioners challenging designations, *Miss. Comm'n on Envtl. Qual. v. EPA,* 790 F.3d 138 (D.C. Cir. 2015). Similarly, courts hear challenges to EPA actions granting "prevention of significant deterioration" permits to sources in areas with pollution levels meeting a standard, *NRDC v. EPA*, 937 F.2d 641 (D.C. Cir. 1991), or changing rules governing that process. *EDF v. EPA*, 489 F.3d 1320 (D.C. Cir. 2007). Petitioners in all those cases had standing because they experienced higher pollution levels than if EPA had acted differently. Likewise, individuals living in

[3] Petitioners seek leave to submit additional declarations in Att. B, in light of EPA's standing challenges, *Am. Library Ass'n v. FCC*, 401 F.3d 489, 494 (D.C. Cir. 2005), and because they lead to the "irrefutable" conclusion that petitioners have standing. *Communities Against Runway Expansion (CARE), Inc. v. EPA*, 355 F.3d 678, 685 (D.C. Cir. 2004).

the challenged contributing areas would breathe less pollution if EPA had properly designated those areas nonattainment, because sources in those areas would be required to reduce their emissions.

EPA's suggestion that no harm to human health occurs at ozone levels below 70 ppb is scientifically incorrect, never mind inconsistent with EPA's own assessments and statements. Because "there is a smooth dose-response curve without evidence of a threshold for [ozone] exposures between 40 and 120 ppb," 80 Fed. Reg. 65,292, 65,303 (Oct. 26, 2015), human-health effects are seen at exposure levels above and below 70 ppb. Ozone is a non-threshold pollutant, *id*. at 65,316-17, 65,318, 65,320 n.72, 65,326 n.82, 65,354, so even individuals in areas meeting the standard can experience ozone-related health effects. *Mississippi v. EPA*, 744 F.3d 1334, 1350-51 (D.C. Cir. 2013); *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 360 (D.C. Cir. 2002).

B. Government Petitioners have standing.

EPA argues that certain Government Petitioners lack standing to sue as *parens patriae*. EPA Br. at 15.[4] This ignores that these Government Petitioners are *directly* injured as a result of EPA's unlawful designations. Therefore, this Court need not reach *parens patriae* standing. *See City of Olmsted Falls v. FAA*,

[4] EPA does not contest Board of County Commissioners of Boulder County's standing to challenge the northern Weld County designation.

292 F.3d 261, 268 (D.C. Cir. 2002). In any event, EPA's argument that no Government Petitioner has *parens patriae* standing because of the so-called *Mellon* bar is incorrect.

1. EPA's unlawful designations directly harm Government Petitioners.

EPA's unlawful designations directly injure Government Petitioners in at least three ways. First, ozone pollution damages Government Petitioners' property. This injury is of particular significance for Illinois because "States are not normal litigants," but are entitled to "special solicitude" for standing purposes. *Massachusetts*, 549 U.S. at 517, 520. Even greater solicitude is warranted here because Congress has expressly given States the right to challenge this agency action. *Id.* at 519, *see infra* at 10-13. Illinois therefore has direct-injury standing based on its "well-founded desire to preserve its sovereign territory." *Massachusetts*, 549 U.S. at 519.

As Petitioners' opening brief explained, Illinois and Chicago have standing based on their "interest in protecting their residents *and environment* from the harmful effects of ozone." Br. at 46-47 (emphasis added) (citing *Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 238-40 (1907) (recognizing State's standing to regulate pollution threatening forests and other state lands)). Petitioners likewise explained that Sunland Park had standing based on "threaten[ed] *environmental harm* within [the] city." Br. at 47 (emphasis added).

The record demonstrates that ozone pollution harms Government Petitioners' environments by, among other things, damaging government owned-and-operated property such as parks. This Court recognizes that ozone pollution "has a broad array of effects on trees, vegetation, and crops and can indirectly affect other ecosystem components such as soil, water, and wildlife." *Miss. Comm'n*, 790 F.3d at 147. EPA similarly recognized in promulgating the standards that ozone restrictions are critical to protecting forests, crops, and other environmental property. AR-0061 at 1, JA0507. And the record in this case specifically states that "park ecosystems across the country show damage from ground-level ozone pollution." AR-0246 at 1-2, JA0721-0722. Thus, the record establishes that Government Petitioners are directly injured by, and therefore have standing to challenge, the unlawful designations.

Based on this administrative record, Government Petitioners "reasonably believed" that injury to their proprietary interests caused by ozone pollution is "self-evident," *Am. Library*, 401 F.3d at 492, and that "no evidence outside the administrative record [was] necessary for the court to be sure of it." *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). "Were there any doubt," *Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014), however, Illinois and Chicago have submitted a rebuttal declaration from their original declarant in which he avers that ozone from the challenged areas damages Illinois and Chicago

owned-and-operated lands. Att. B, Zemba Rebuttal Decl. ¶¶ 7-8; *supra* n.3. It is therefore "irrefutable" that Government Petitioners suffer direct injury to their property, which suffices for standing. *CARE*, 355 F.3d at 685.

Second, Government Petitioners will suffer direct financial harm, and be forced to undertake additional work, due to EPA's unlawful designations. For example, EPA's decision to designate El Paso as attainment while designating neighboring (and much smaller) Sunland Park as nonattainment, puts Sunland Park at an unfair disadvantage in attracting new businesses and causes Sunland Park to "see reduced gross receipts tax revenue." Br. Add. at 036, Brown Decl. ¶ 6. EPA's failure to designate areas in states neighboring Illinois as nonattainment also directly harms Illinois because it must devote additional resources to addressing health and environmental problems caused by neighboring States' emissions. For instance, EPA's failure to require Wisconsin and Indiana to reduce pollution that enters Illinois will make Illinois' "task of devising an adequate [State Implementation Plan]" for itself more "difficult and onerous." *W. Va. v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *see also Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1227-28 (D.C. Cir. 2007).

Finally, EPA's unlawful designations cause Illinois to suffer the same kind of direct procedural injury that supported standing in *Massachusetts*. *See* 549 U.S. at 498. Congress directed EPA to protect Illinois by prescribing applicable

standards and promulgating final designations, 42 U.S.C. §§ 7409(b), 7407(d), and allowed Illinois to protect itself by giving it a concomitant right to challenge EPA's designations as arbitrary and capricious, *id.* § 7607(b)(1). If EPA had designated the challenged areas in Wisconsin and Indiana as nonattainment, those States would be required to prepare plans to bring their areas into attainment, *id.* § 7502(b). Illinois would also have the right to comment on those plans, challenge them as inadequate, and enforce their terms in federal court. *Id.* §§ 7502(c)(7), 7607(b)(1), 7406(a)(1). By depriving Illinois of these statutorily-granted rights, EPA's designations directly injure Illinois.

2. The Clean Air Act gives Illinois an express right to challenge standards designations as *parens patriae*.

As explained, this Court need not reach the issue of *parens patriae* standing. However, if it does, Illinois has such standing. Although States generally lack "standing as *parens patriae* to bring an action against the Federal Government," *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez* , 458 U.S. 592, 610 n.16 (1982) (citing *Mass. v. Mellon*, 262 U.S. 447, 485-86 (1923)), the "*Mellon* bar speaks to prudential, not Article III, standing." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 180 (D.C. Cir. 2019) (citing *Md. People's Counsel v. F.E.R.C.*, 760 F.2d 318, 322 (D.C. Cir. 1985)). Congress therefore may authorize a State to sue the federal government in its *parens patriae* capacity. *Id.* The Clean Air Act provides such authorization.

In *Maryland People's Counsel*, this Court concluded that the judicial-review provision in the Natural Gas Act allows States to sue as *parens patriae*. 760 F.2d at 320-21. In *Manitoba*, by contrast, this Court held that States may not bring APA actions in that capacity. 923 F.3d at 180.[5] This case is more like *Maryland People's Counsel* than *Manitoba*.

First, the Clean Air Act—like the Natural Gas Act, but unlike the APA—expressly gives States a statutory right to sue the federal government. *Compare Md. People's Counsel*, 760 F.2d at 321 (Natural Gas Act expressly gives States party status) *with Manitoba*, 923 F.3d at 181 (APA judicial-review provision includes States by implication only). Specifically, Section 302(e) of the Clean Air Act defines "person" to include any "State," 42 U.S.C. § 7602(e), and Sections 307(b)(1) and 304(a)(1) give "any person" the right to challenge nationally applicable EPA regulations and bring citizen suits against EPA. *Id.* §§ 7607(b)(1), 7604(a)(1). Indeed, thirteen States, including Illinois, brought a citizen suit to require that EPA promulgate the designations at issue in this case. *In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082 (N.D. Cal. 2018). It is "inconceivable that the specific provision of party … status for states" was not designed to vindicate States' *parens patriae* interests in protecting their citizens in this

[5] *Manitoba* was decided after Petitioners filed their opening brief but before EPA filed its brief. Although EPA does not cite *Manitoba*, Petitioners address this new authority in the interests of completeness.

"traditional governmental field" of air-pollution regulation. *Md. People's Counsel*, 760 F.2d at 321.

Second, this case does not implicate the dual-sovereignty concerns underlying the *Mellon* bar. Clean Air Act implementation is a "field where the federal government and the States have long shared regulatory responsibility." *Id.* at 322. "Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 537 (2014). The statutory scheme at issue here imposes obligations on States while also granting States' rights and recognizing States' interests in protecting their residents as *parens patriae*. States are responsible for compiling air-quality data, recommending initial designations, developing plans to attain the final designations, and implementing those plans. *See* 42 U.S.C. §§ 7407(d)(1)(A), 7407(a), 7410(a)(1). That Illinois "participates directly in the operation of the" program "makes even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents." *Snapp*, 458 U.S. at 610; *see also id.* at 608 (States "have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to [their] general population."). Precluding Illinois from challenging designations to protect its residents would "frustrate the process of state and federal cooperation and the integrated planning" that the program was

created to foster. *EDF v. EPA*, 82 F.3d 451, 468 (D.C. Cir.), *amended*, 92 F.3d 1209 (D.C. Cir. 1996).

ARGUMENT

A. EPA's final designation for Lake County, Indiana contradicts prior designations without evidence of any material change.

The last-minute decision to exclude the southern half of Lake County, Indiana, illustrates EPA's pattern of making the nonattainment areas as small as possible. EPA's Lake County designation, like the others challenged, was not based on facts and did not reflect any consideration of public-health impacts. It was a purely results-oriented decision based on EPA exercising only its will rather than its judgment.

EPA's final technical support document failed to show why southern Lake County did not contribute to the Chicago area's ozone violations, when multiple prior rounds of designations concluded that it did. AR-0418 at 5, JA1273. EPA of course can set different nonattainment area boundaries in each designation round, but must justify each new designation. It has failed to justify this designation by showing that either the distribution of sources in Lake County has shifted or some other material change has occurred since the previous designations.

EPA attempts to justify the designation merely by saying that the nonattainment area comprises the majority of Lake County's population and ozone precursor emissions. AR-0418 at 25, JA1293; EPA Br. at 19. EPA did not

examine other emissions-related factors, such as vehicle miles traveled, on a township level. As this Court has established, just because one area's contribution to a violating monitor may be larger than another area's does not change the fact that the second area contributes. *Miss. Comm'n*, 790 F.3d at 163. EPA has therefore failed to show, on this record, why the fact that one part of Lake County contributes a larger share of the county's emissions should render emissions from the rest of the county irrelevant.

B. St. Louis, Missouri-Illinois.

1. EPA invents an explanation, unsupported by the record, for excluding Jefferson County from the St. Louis, Missouri-Illinois nonattainment area.

In attempting to justify the exclusion of Jefferson County, Missouri from the St. Louis, Missouri-Illinois nonattainment area, EPA claims that "much had changed" between the intended and final designations. EPA Br. at 21. The fatal flaw with this argument is that only one thing truly changed, and EPA's record fails to show how that change justifies Jefferson's exclusion.

There are two parts to EPA's "much had changed" argument. First, EPA notes that there were five violating monitors in the bi-state region as of the intended designation but only one (West Alton) remained in violation for the final designation. *Id*. However, the decrease in the number of violating monitors is irrelevant because Jefferson contributes to the one that remained in violation and

therefore must be designated nonattainment. 42 U.S.C. § 7407(d)(1)(A)(i). The record is replete with evidence that Jefferson contributes to the still-violating West Alton monitor, which was true for both the intended and final designations. AR-0211 at 8-15, 18, JA0699-0706, JA0709; AR-0416 at 10-11, 13, 15-16, 18, JA1169-1170, JA1172, JA1174-1175, JA1177. *See also* Br. at 95-109.

Missouri's initial recommendation included Jefferson based solely on its contribution to violations at the West Alton monitor—the only violating monitor in the Missouri portion of the area at the time. AR-0026 at 1, 33-34, JA0370, JA0390-0391. Missouri concluded that "trajectories demonstrate frequent contribution [from Jefferson] to the exceeding [West Alton] monitor." *Id*. at 34, JA0391. The basis for this conclusion—the pattern of trajectories to the West Alton monitor coming primarily from the south (where Jefferson is located)—did not change between Missouri's initial recommendation and EPA's final designation. AR-0026 at 26, JA0388; AR-0416 at 18, JA1177. In addition, there was no change in the emissions and emissions-related data (*i.e.*, population and traffic) used by Missouri and EPA throughout the designation process, only rhetorical revisions characterizing the same data differently in attempting to reverse course. AR-0026 at 12-23, JA0374-0385; AR-0303 at 12-20, JA0957-0965; AR-0211 at 8-15, JA0699-0706; AR-0416 at 9-17, JA1168-1176.

EPA's brief focuses primarily on the second part of its "much had changed" argument, claiming that EPA excluded Jefferson because one of the monitors that was no longer in violation as of the final designation (the Maryland Heights monitor) was the one closest to Jefferson, which was "now farther away from any violating monitors than it had been before." EPA Br. at 22. EPA's distance theory is at the heart of its summary argument as well as the first two of its three points purporting to refute Petitioners' brief. *Id*. at 20-24. Not only does EPA's distance theory lack support in the record, but the record contradicts it.

Although EPA's brief claims that it was "crucial[]" that the monitor closest to Jefferson was one of those no longer in violation, *id*. at 21, EPA's decision document makes no mention of this. AR-0416, JA1160-1186. That silence is unsurprising, as EPA's earlier analysis showed that far fewer trajectories passed through Jefferson to Maryland Heights than to West Alton on exceedance days. AR-0211 at 17-18, JA0708-0709. This indicates that Jefferson was not a significant contributor to the Maryland Heights monitor when it was in violation even though that monitor is closer to Jefferson than the West Alton monitor—defeating EPA's distance theory.

EPA reprises its distance theory in attempting to justify its disparate treatment of Jefferson and Franklin Counties. EPA Br. at 23-24. Although EPA's brief argues that it considered the distance between the large Franklin point source

and the West Alton monitor to be significantly different from the distance between the large Jefferson point sources and that monitor, the record provides no support for that contention. EPA's final designation highlights the large Franklin (Boles Township) source but fails to mention the similarly-large Jefferson sources, let alone their relative distances from the violating West Alton monitor. AR-0416 at 23, JA1182. Accordingly, EPA also failed to explain the significance of the sources' relative distances from the violating monitor. Any attempt to do so would have been compromised by EPA's erroneous assertion that the Franklin source is "approximately 20 [kilometers – 12.4 miles] from the violating monitor," *id.*, when the record shows that it is actually 39 miles away—more than three times the distance. AR-0435 [National Emissions Inventory data], JA1367-1368.

EPA's trajectory analysis actually shows far greater contributions from Jefferson, including the southern portion where its large point sources are located, to the West Alton monitor on ozone exceedance days, than from the portion of Franklin that EPA included in the nonattainment area, where its comparable point source is located.

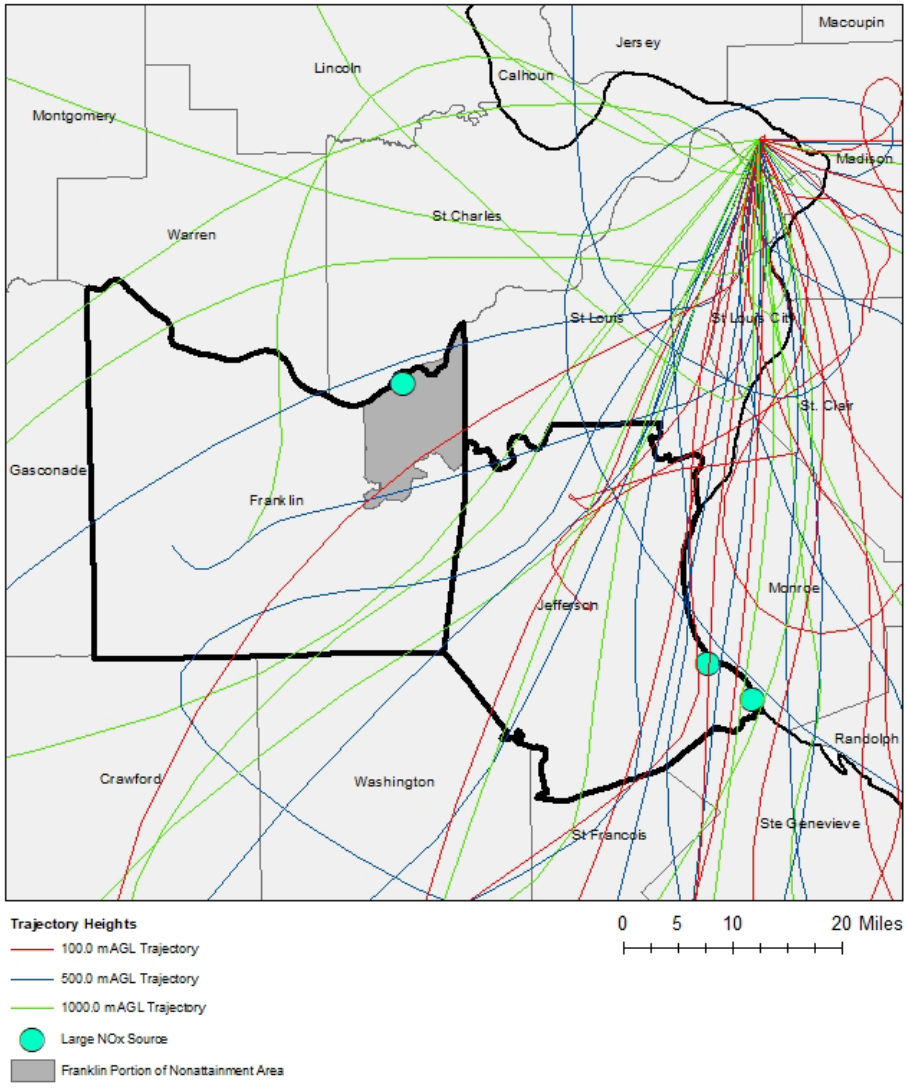

Figure 1. Back trajectories for the violating West Alton monitor on all seventeen ozone exceedance days, 2015-2017. Franklin and Jefferson are bolded; the nonattainment portion of Franklin is shaded gray. Adapted from AR-0416 at 18, Fig. 6a, JA1177.

EPA's reliance on distance to dismiss the significance of the large Jefferson point sources is also contrary to its Designations Guidance, which states: "Because ozone and its precursor emissions are pervasive and readily transported, the EPA believes it is important to examine ozone-contributing emissions across a relatively broad geographic area associated with a monitored violation." AR-0061 at 5,

JA0511. Further, EPA's Designations Guidance refers to "nearby areas" as those within a metropolitan area. *Id*. While each designation involves a site-specific evaluation, ozone pollution readily travels, and distance alone is by no means determinative. Here, EPA unreasonably excluded Jefferson from the nonattainment area when its own analysis established that Jefferson contributes to violations at the West Alton monitor.

In addition to its flawed distance theory, EPA argues that its exclusion of Jefferson is justified by its "holistic analysis." EPA Br. at 24-26. But the record contains no such analysis. The only place in the final designation where EPA purports to explain its exclusion of Jefferson relies solely on three of the seventeen exceedance days at the West Alton monitor. AR-0416 at 27, JA1186. And although EPA touts its consideration of the other fourteen violation days, EPA Br. at 25, the record shows that EPA did so only for Franklin—but not Jefferson. *Compare* AR-0416 at 23, JA1182, *with id*. at 27, JA1186. While EPA points to the map showing trajectories for all seventeen exceedance days, EPA Br. at 25, the final designation contains no indication that EPA evaluated those trajectories for Jefferson—in stark contrast to its discussion of their significance regarding Franklin.

EPA's brief tries to mask that failure by belittling the significance of trajectories, explaining that they show wind direction but not pollution and that

other factors must also be considered. EPA Br. at 25-26. This argument is disingenuous. EPA emphasized the trajectories in explaining its designation decisions for the areas it included in the final nonattainment designation. AR-0416 at 22-23, 25-27, JA1181-1182, JA1184-1186. Furthermore, EPA said the following when including Jefferson in the intended nonattainment designation:

> Franklin County, Jefferson County, and the City of St. Louis in Missouri and St. Clair County in Illinois, do not have violating monitors. These counties have, however, among the highest [ozone precursor] emissions in the area of analysis and among the highest [vehicle miles traveled] in those counties. … Jefferson County ranked fourth and sixth, respectively, for [ozone precursor] emissions; sixth for population; and fifth for total [vehicle miles traveled].

AR-0211 at 23, JA-0714. None of those emissions and emissions-related data regarding Jefferson changed between the intended and final designation.

In sum, EPA provided no rational basis for its exclusion of Jefferson County from the St. Louis, Missouri-Illinois nonattainment area, the record supports its inclusion, and EPA's designation was arbitrary and capricious.

2. EPA improperly designated Monroe County attainment.

Petitioners' opening brief noted three independent reasons why EPA improperly designated Monroe County attainment. Br. at 94-95. EPA fails to adequately address any of these reasons.

First, EPA used an illogical process, reversing years of work culminating in Illinois EPA's recommended and EPA's intended nonattainment designations for

Monroe, based primarily on the last-minute, one-paragraph Messina Letter. EPA responds that it changed course based on "updated data" showing that the Maryland Heights monitor came into compliance following EPA's intended designations. EPA Br. at 26. EPA's actions demonstrate otherwise: its final designations cited the Messina Letter three times to explain Monroe's reversal. AR-0416 at 1 n.1, 2 n.3, 25, JA1160, JA1161, JA1184.

If EPA believed that new data required a modified designation, the Act mandated the appropriate process: notify Illinois "no later than 120 days before" the final designation. 42 U.S.C. § 7407(d)(1)(B)(ii). But because EPA had already delayed the designations improperly and was therefore up against a court-ordered deadline just four days away, Br. at 8-9, EPA sought to circumvent section 7407(d)(1)(B)(ii) by using a "5 min[ute] … call" with Illinois EPA to engineer the Messina Letter. Br., Exh. 2, JA1456. This is antithetical to the "logical" process this Court has demanded. *United States Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016).

Second, EPA failed to offer a rational explanation for its reversal. EPA observes that Monroe "has no violating monitor," EPA Br. at 26, but omits a critical fact: Monroe has no monitor at all. AR-0015 at 14, JA0208. EPA's intended designations declared Monroe nonattainment because it contributed to nearby violations in the St. Louis metropolitan area. AR-0211 at 6, JA0697; *see*

Miss. Comm'n, 790 F.3d at 152 ("nearby" counties "presumptively includ[e] counties within the same metropolitan area as the violating county").

EPA also again cites the Maryland Heights monitor's compliance. EPA Br. at 26. That explanation contradicts the Messina Letter, which suggested that EPA could consider designating Monroe attainment based on "2014 emissions data." AR-0406, JA-1371. Tellingly, EPA does not defend that rationale. For good reason: 2014 emissions data did not change between EPA's 2017 intended and 2018 final designations. And Illinois EPA's rationale–devised after a call with EPA–has nothing to do with the rationale advanced by EPA four days later, making both explanations "suspect." *Catawba*, 571 F.3d at 52.

Even taking EPA's explanation at face value, EPA errs in asserting that updated data regarding Maryland Heights explain the reversal because winds traveled through "higher-emitting areas" that were "less distant" than Monroe from the remaining violating monitor in West Alton. EPA Br. at 26. EPA's final designations did not cite updated data regarding Maryland Heights in explaining Monroe's reversal. EPA may not defend designations based on "*post hoc* rationalizations." *NRDC v. EPA*, 755 F.3d 1010, 1020-21 (D.C. Cir. 2014). Also, EPA's intended designations concluded that ozone-causing emissions traveled "predominately from the south." AR-0211 at 17-22, JA0708-0713. Monroe is due south of West Alton's violating monitor, but southeast of Maryland

Heights. AR-0416 at 6, JA1165. Indeed, Illinois recommended designating Monroe nonattainment based on violations in Alton, Illinois—right next to West Alton. AR-0015 at 13, JA0207. Updated data regarding Maryland Heights therefore could not explain Monroe's reversal.

Moreover, EPA's final designations continued to show winds traveling through Monroe to West Alton:

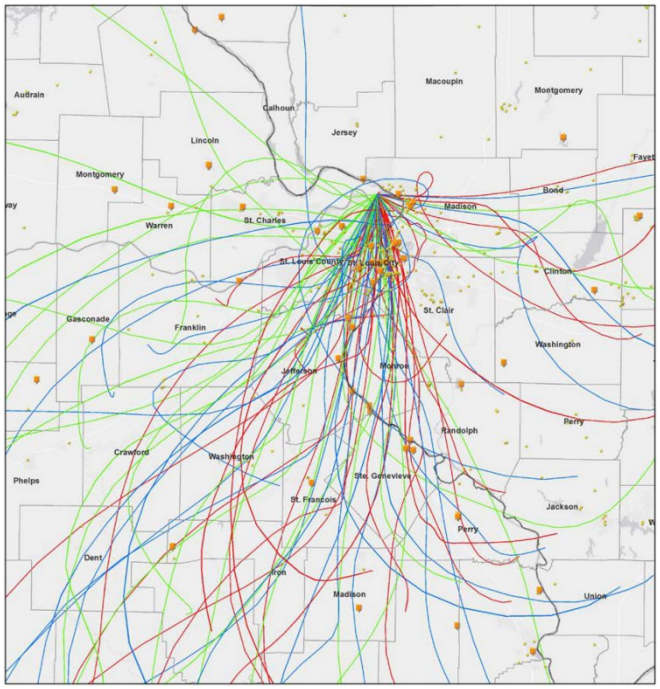

Figure 2. Back trajectories for the West Alton violating monitor. AR-0416 at 18, Fig. 6a, JA1177.

Even if EPA were correct in declaring Monroe's emissions "less likely" than other counties' emissions to contribute to West Alton violations, *id.* at 26, JA1185, that does not answer the relevant question: did Monroe contribute to violations in West Alton? EPA mistakenly argues that Petitioners "demand certainty." EPA Br. at 28-29. To be sure, EPA could declare a county attainment if the county *likely* did

not contribute to violations. But EPA did not make that determination with respect to Monroe; rather, EPA concluded only that Monroe was less likely *than other counties* to contribute to violations.

Third, EPA gave Illinois EPA just four days' notice of EPA's intent to change Monroe's designation, violating the Act's requirement that EPA provide 120 days' notice before modifying a designation. 42 U.S.C. § 7407(d)(1)(B)(ii). EPA asserts it simply accepted Illinois EPA's own request to "revise[]" Monroe's designation. EPA Br. at 28. In fact, emails uncovered through FOIA demonstrate that EPA actively solicited the Messina Letter. Br., Exh. 2, JA1452-1468. Regardless, Illinois EPA did not ask EPA to change Monroe's designation; the Messina Letter stated only that it would "seem" appropriate for EPA to "consider" designating Monroe attainment. AR-0406, JA1371.

Even if the Messina Letter had revised Illinois EPA's recommended designation, the Act requires State recommendations "not later than 1 year after" a revised standard. 42 U.S.C. § 7407(d)(1)(A). EPA promulgated the standard in 2015, so the Act's deadline for State-recommended designations had long since expired when Illinois EPA sent the Messina Letter in 2018. The Messina Letter

therefore could not legally have changed Illinois EPA's recommendation under section 7407(d)(1)(B)(ii).[6]

Apparently recognizing the weakness of its lead argument, EPA offers a fallback: any statutory violation was harmless because the Messina Letter suggested it would "seem" appropriate for EPA to "consider" designating Monroe attainment. EPA Br. at 28, AR-0406, JA1371. The Act "is an experiment in federalism," however, so EPA "may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Va. v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997). Because EPA violated Illinois' statutory right to 120 days' notice, any ambiguity in the one-paragraph Messina Letter should be read to favor the construction offered by Illinois here. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 n.27 (D.C. Cir. 1978) ("If we cannot be sure that under the correct procedures the Agency would have reached the same conclusion … we cannot characterize the defect as harmless.").

[6] As Petitioners noted, Br. at 52, the Act authorizes States to recommend changed designations on their "own motion" under section 7407(d)(1)(B)(iii). EPA does not argue that the Messina Letter invoked that power, for good reason. Section 7407(d)(1)(B)(iii) requires EPA to "act on such designations in accordance with" section 7407(d)(3), which EPA did not do. *See, e.g.*, 42 U.S.C. § 7407(d)(3)(E).

C. EPA's final designations for Wisconsin are arbitrary because they are based on an unverified and incorrect "distance-from-the-shoreline" model.

EPA asks this Court to remand seven of the nine challenged Wisconsin designations. EPA Br. at 59-60. Petitioners request vacatur and remand because the designations are so flawed they cannot be salvaged by more explanation. EPA at the very least must address on remand relevant material that was not available when the Certified Index to the Record was lodged in this case—material bearing on the process that EPA used to finalize the Wisconsin designations, similar to communications that occurred between EPA and Illinois on the eve of the final rule. *See supra* n.1.

Petitioners' Brief explains numerous significant deficiencies with the designations for the seven counties where EPA seeks voluntary remand—and also for Sheboygan and Door Counties. Br. at 14-17; 60-83. Nonetheless, EPA inaccurately suggests that Petitioners merely "disagree with EPA's conclusion," or challenge the "novelty" of Wisconsin's distance-from-the-shoreline analysis. EPA Br. at 36-37. In fact, Petitioners argue EPA arbitrarily and capriciously deleted or expressly disregarded critical information in EPA's own technical support documents which, *inter alia*, clearly shows that the record does *not* support bounding ozone nonattainment areas at a 2.3-mile contour along portions of the Lake Michigan shoreline. Br. at 14-17; 66-80.

EPA's final 2.3-mile nonattainment boundary for several Wisconsin counties relies on two theories: that ozone transported at a height of 100 meters over Lake Michigan from upwind sources is the sole cause of ozone violations in Wisconsin, and that there is a sharp linear reduction in ozone levels as distance from the shoreline increases. AR-0051 at 15, JA0430; AR-0300 at 10-11, A8-A9, JA0899-0900, JA0931-0932. EPA's own record belies both theories. Documents EPA issued with the final designations clearly show ozone precursor emissions reaching violating monitors at 100-meter, 500-meter, and 1000-meter trajectories *over land*—including many trajectories originating from point and mobile sources in Wisconsin, often in the same counties where the violating monitors are located. AR-0417 at 28, JA1214; AR-0418 at 11-20, JA1279-1288; AR-0419 at 16-23, 26-33, 46-52, 61-67, JA1309-1316, JA1319-1326, JA1339-1345, JA1354-1360. And EPA's Response to Comments expressly notes "the *nonlinear* nature of ozone chemistry," AR-0417 at 26-27, JA1212-1213 (emphasis added).

Figure 3. WI Br. at 11

Wisconsin's brief includes two maps that clearly demonstrate the fallacy of the distance-from-the-shoreline model. One shows a narrow 2.3-mile contour along the Lake Michigan shoreline, produced by the Wisconsin model. WI Br. at 11, reproduced as Figure 3, *supra*. In contrast, the other shows that there are monitors up to 75 miles inland from the shoreline recording 69-70 ppb design values (*e.g.,* Beloit, Jefferson and Lake Geneva). *Id.* at 4, reproduced *infra* as Figure 4.

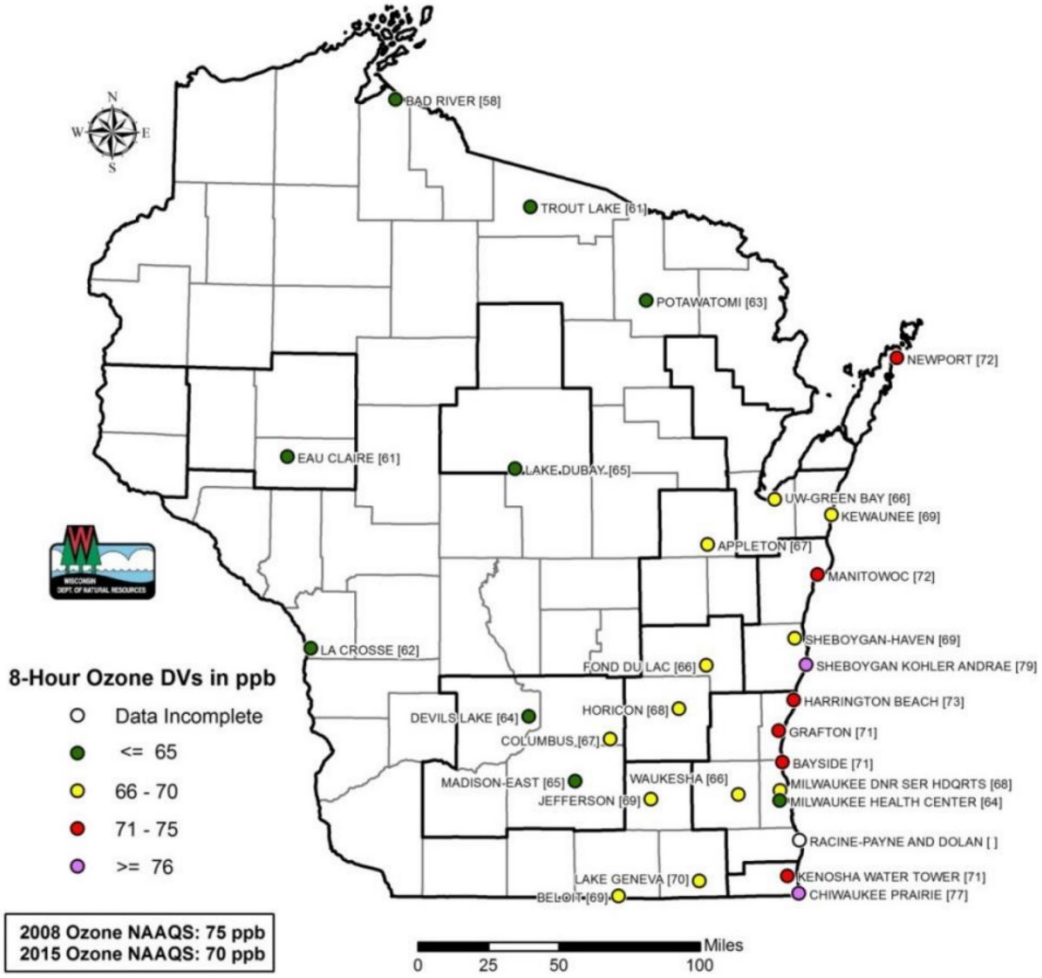

Figure 4. WI Br. at 4.

This evidence shows that it was an abuse of discretion for EPA to *assume* that Wisconsin's linear model was correct—and that all air west of the arbitrarily narrow shoreline contour is in attainment with the standard—rather than fully considering all record evidence. *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) ("EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, noncapricious rule" (cites omitted)). EPA also admits in the record that it "did not have the details necessary to fully review … the modelling analyses," AR-0419 at

40, JA1333, used to support claims that "Wisconsin emissions do not meaningfully affect lakeshore monitors," WI Br. at 8-10, the very claims EPA relied on to conclude that "most ozone-rich air reaching Wisconsin's lakeshore comes from … other states to the south." EPA Br. at 35.

EPA is required by statute to designate nonattainment *all* areas that cause or contribute to violations. 42 U.S.C. §§ 7407(d)(1)(A)(i), 7410(a). There are no exceptions if out-of-state sources contribute more than in-state sources, as Wisconsin repeatedly asserts. WI Br. at 1, 3, 5, 8-10, 16-17, 20-21, 27, 29-30. Moreover, Wisconsin's attempts to deflect attention from in-state sources by pointing at other states might seem somewhat more credible if Wisconsin had filed a petition to address interstate transport of ozone—instead of leading the charge to challenge EPA's Cross State Air Pollution Rule in 2016. *Wisconsin v. EPA*, D.C. Cir. No. 16-1406.

1. EPA's final designations for Sheboygan and Door Counties are arbitrary and capricious and an abuse of discretion.

The area boundaries in the two EPA-contested counties are infected with arbitrary and capricious decision-making, with the resulting nonattainment areas too narrowly drawn to be health- or environmentally-protective.

a) Sheboygan County

EPA's final nonattainment boundary relies on the unverified "distance-from-the-shoreline-approach" supplied by Wisconsin, with the result that significant industrial and mobile ozone precursor sources in Sheboygan County are outside the final nonattainment area. Compare Figure 5 with Figure 6. This transparently outcome-driven decision departs from EPA's record and intended designation. Br. at 75-77. EPA's intended nonattainment area included the violating monitor and these nearby sources—unlike the final designation.

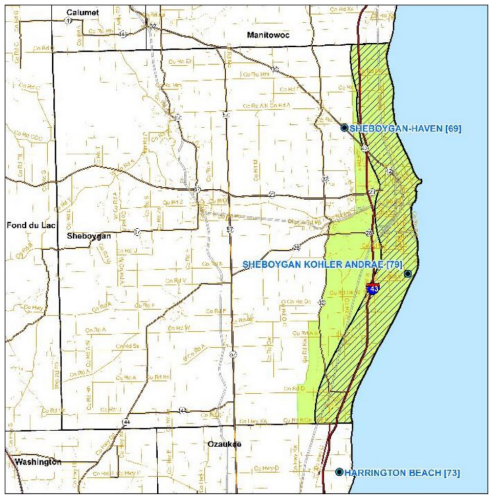

Figure 5. Proposed (green) and final (hatched) Sheboygan nonattainment boundaries. Br. at 76 (citing AR-0300 at 30, Fig. 12, JA0919).

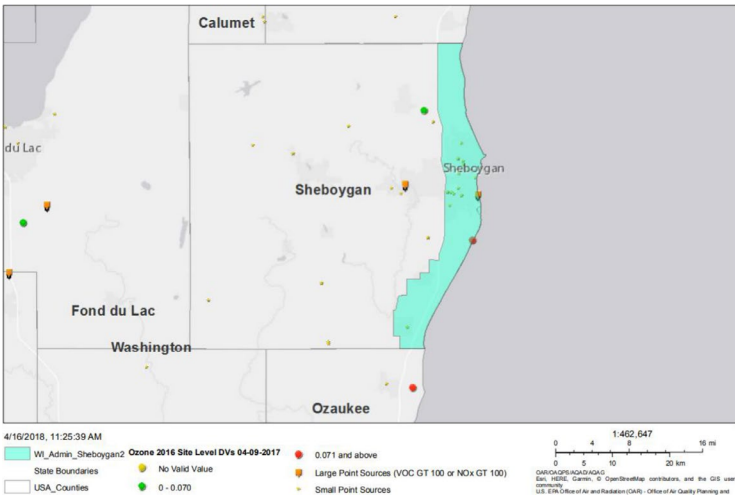

Figure 6. Relationship between monitors and point sources. Br. at 77 (citing AR-0419 at 4, JA1297).

EPA's brief fails to mention that the final technical support document *deleted*—without explanation—the agency's own analysis of precursor emissions

from Sheboygan County sources that contribute to violations of the standard. *Compare* AR-0116 at 41-44, JA0650-0653 *with* AR-0419 at 39-42, JA1332-1335. That analysis supports EPA's intended nonattainment area boundary, which includes most ozone precursor emissions in the county, including emissions from large and small point sources in Sheboygan Falls and Kohler—municipalities which are not part of the final nonattainment area:

Precursor / Geographic Area	% of county point source emissions	% of total county emissions
NO_x emissions east of intended boundary*	95	38
VOC emissions east of intended boundary*	41	7
NO_x emissions west of intended boundary*	5	2
VOC emissions west of intended boundary*	59	10

Figure 7. Sheboygan County precursor emissions east and west of intended nonattainment boundary. AR-0116 at 44, Table 7, JA0653.

The technical support document accompanying the intended designation also notes that non-point (area), on-road, and off-road mobile emissions of ozone precursors are concentrated around these municipalities—which are near the violating monitor. AR-0116 at 43-44, JA0652-0653.

EPA is dismissive of Petitioners' emphasis on the need to consider these emission sources within Sheboygan County, but fails to explain the arbitrary

deletion of EPA's own "granular" county-level analysis of emission sources near the violating monitor. EPA Br. at 35. EPA failed to examine "relevant data and articulate a satisfactory explanation" when it disregarded its own analysis supporting the intended nonattainment area. *Catawba*, 571 F.3d at 52. Rather than explaining itself, EPA simply replaced Figure 7, *supra,* with a table "comparing Sheboygan County and Chicago Area ozone precursor emissions" —as if that comparison were legally relevant, which it is not—thereby turning a blind eye to emission sources near the violating monitor. EPA Br. at 33, citing AR-0419 at 40, Table 2, JA1333.

EPA's argument that it relied on "county-level data," EPA Br. at 35, is belied by its failure to follow its own guidance. *See Miss. Comm'n*, 790 F.3d at 172. EPA's Designations Guidance requires analysis of emissions produced by all sources in a Core Based Statistical Area (in this case Sheboygan County) where a violating monitor is located to determine whether those sources contribute to violations of the standard. AR-0061 at 5, JA0511. EPA deleted that analysis and relied instead on Wisconsin's claims that local emissions have a negligible effect, EPA Br. at 32-33, 35, even though the technical support document issued with the final Sheboygan designation expressly states that Wisconsin's claims "are difficult to fully evaluate because EPA does not have the details necessary to fully review … the modelling analyses that these claims are based on." Br. at 17, citing AR-

0419 at 40, JA1333; *see also* AR-0417 at 26-27, JA1212-1213. The Designations Guidance also promotes the concept of broader nonattainment area boundaries, by including entire metropolitan areas such as the contiguous municipalities of Sheboygan, Kohler and Sheboygan Falls, AR-0061 at 6 & n.11, JA0512 (citing *Miss. Comm'n,* 790 F.3d at 160, for the point that "[t]his approach to designations has been upheld by numerous courts under a variety of challenges").

It is abundantly clear that EPA failed to "reasonably weigh[] *all* the evidence" required to complete EPA's own five-factor "holistic analysis" when finalizing the nonattainment designation for Sheboygan County. EPA Br. at 13. This Court must reject the agency's final Sheboygan County nonattainment boundary insofar as it establishes an attainment area that includes major sources of ozone precursors near the violating monitor, because EPA failed to examine relevant data and articulate a satisfactory explanation for its actions. Because EPA's underinclusive boundary is arbitrary, capricious and an abuse of discretion, this designation should be vacated and remanded.

b) Door County

EPA correctly summarizes Petitioners' objection to the final Door County designation: "EPA adopted Wisconsin's suggested nonattainment area without confirming that nonattainment is limited to that area." EPA Br. at 39. Indeed, the record shows that EPA arbitrarily and capriciously finalized a boundary limited to

"the immediate area," EPA Br. at 37, around the violating monitor (pink area in Figure 8), which "runs counter to the evidence before the agency" and, moreover, is "implausible." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

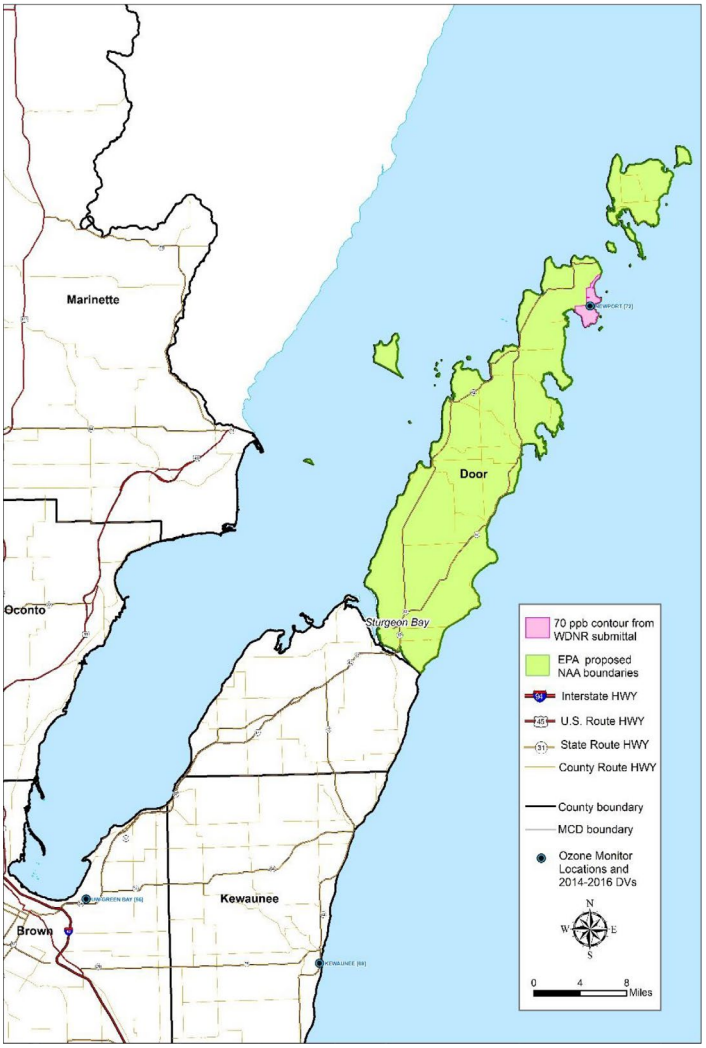

Figure 8. Br. at 81 (citing AR-0300 at 7, JA0896). EPA's intended nonattainment area (green) and Wisconsin recommendation/EPA final designation (pink).

EPA contends that violations occur solely due to the Door County monitor's "unusual location … [o]n a spit of land jutting out into the lake," which makes "the

monitor … susceptible to lake breezes that can bring emissions over Lake Michigan from distant upwind sources." EPA Br. at 38. But EPA's own record demonstrates that multiple sources of ozone precursors on the Door County peninsula southwest of the final nonattainment boundary—and long-range ozone transport over land—also contribute to the monitored violation.

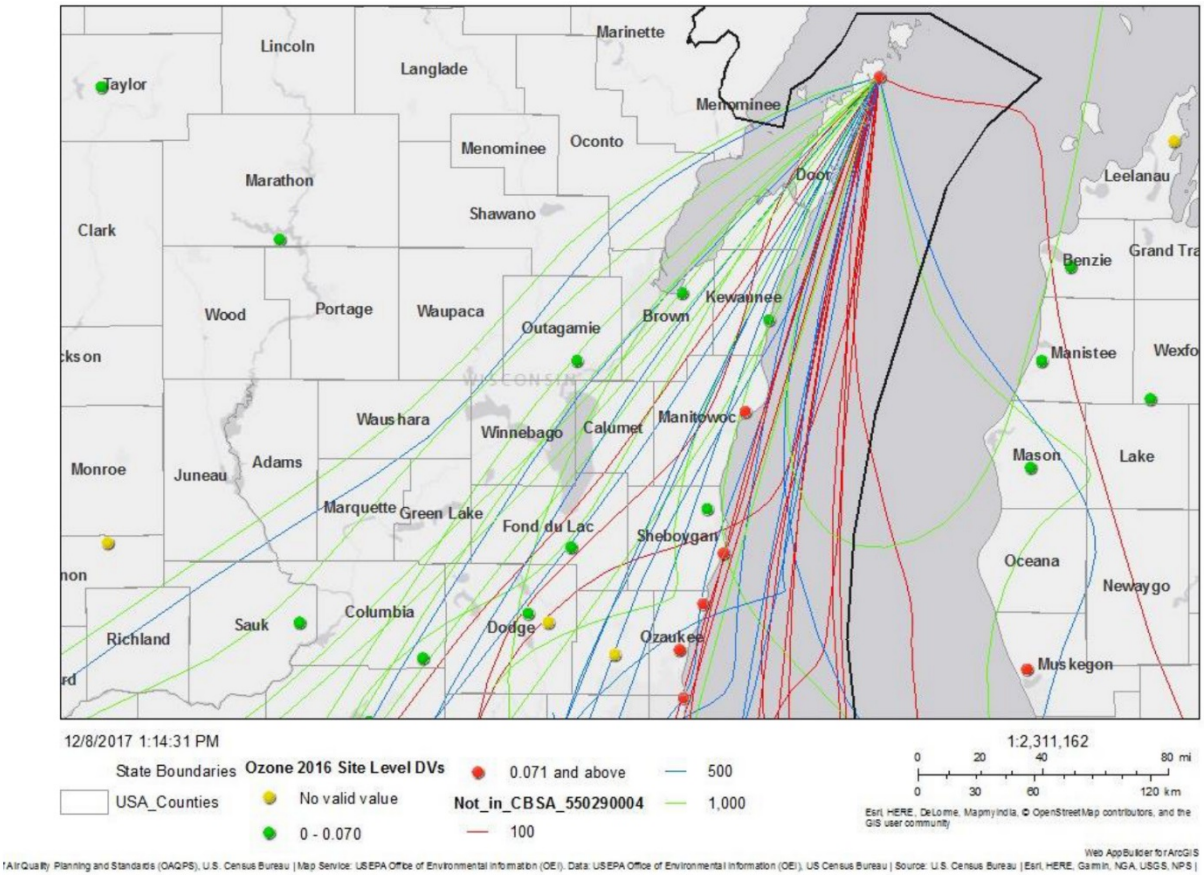

Figure 9. Modeled back trajectories for violating monitor.
AR-0419 at 67 Fig. 6, JA1360.

EPA's final designation relies on Wisconsin's unsubstantiated assertion "that only the 100 m[eter] trajectories (represented by the red lines in Figure [9]) are relevant … for assessing potential impact of regional air movements on

monitored ozone concentrations" and that "[t]he 100 m[eter] trajectories show that, on exceedance days air parcels traveled almost exclusively from the south with most passing over Lake Michigan …." AR-0419 at 67, JA1360; EPA Br. at 41. Wisconsin's unsubstantiated assertion is also directly contradicted by EPA's final technical support document, which uses 100-meter, 500-meter, and 1000-meter trajectories to define the Door County Rural Transport Area. *See* Br. at 15; *compare* AR-0419 at 66-67, JA1359-1360 *with id*. at 72, JA1365. A vague, after-the-fact statement that "depending on context, some trajectory levels may be more informative than others, but all three levels have value" doesn't support EPA's reasoning for ignoring two levels in one context but not in another. EPA Br. at 41. That "explanation" completely fails to support EPA's unequivocal statement that "only the 100 m[eter] trajectories … are relevant" to EPA's determination that Door County's final nonattainment area is limited to the 3.7 square mile boundary of Newport State Park—an area with no stationary emission sources, where the monitor is located. AR-0419 at 67, JA1360.

EPA failed to examine "relevant data and articulate a satisfactory explanation," *Catawba*, 571 F.3d at 52, including expressly refusing to consider evidence showing ozone transport over the full length of the Door County peninsula to the violating monitor. AR-0419 at 67, JA1360. The final designation thus "runs counter to the evidence before the agency"—which indicates the entire

peninsula was impacted by ozone-laden air to some degree—and, consequently, the final nonattainment boundary is "implausible." *State Farm*, 463 U.S. at 43.

D. The Ottawa County, Michigan designation should be vacated and remanded because EPA never performed a five-factor analysis or explained why such analysis was not necessary.

Petitioners explain that EPA's designation of Ottawa County, Michigan was arbitrary and capricious because EPA "at no point … examined *any* of the Designation Guidance factors" to determine whether Ottawa contributed to nonattainment in Muskegon and Allegan Counties, two counties that border Ottawa and are included in the same Combined Statistical Area. Br. at 87. Petitioners note, *id.* at 83, that EPA's only discussion of Ottawa—a single paragraph in the Response to Comments Document, AR-0417 at 19-20, JA1205-1206—neither applied the five factors nor explained why such analysis was not required, but instead made the legally irrelevant point that the ozone exceedances in Western Michigan were "mainly" or "primarily" impacted by out-of-state sources. Petitioners further explained that, if EPA had performed a five-factor analysis, it would have concluded that Ottawa *does* contribute to nonattainment in Muskegon and Allegan, because Ottawa's population, population density, vehicle miles traveled, and total emissions are among the highest in the region. Br. at 86.

EPA does not contend that it properly evaluated Ottawa under the Designations Guidance factors. Nor does EPA identify anywhere in the record

where it explained why such analysis was not required. That should be the end of the matter. While the Designations Guidance is not binding, the agency was not free to depart, without explanation, from a framework it used throughout this rulemaking, and which it purported to apply *in the precise action at issue here*—its analysis of contributions to nonattainment in Muskegon and Allegan Counties. *See Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1269 & n.3 (D.C. Cir. 2004) (EPA must "adequately account[] for any departures" from guidance, even if such guidance is "not strictly binding"); *cf. Miss. Comm'n*, 790 F.3d at 171 (EPA must show "it treated similar counties similarly").

In its response, EPA argues for the first time, EPA Br. at 42, that it was not required to analyze Ottawa under the Designations Guidance factors because Ottawa is not "nearby" Muskegon or Allegan. This *post hoc* argument should be disregarded. *Missouri Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000).[7] Even if it *were* properly before the Court, this argument could not support EPA's refusal to evaluate Ottawa's impact on nonattainment in Muskegon and Allegan. As EPA itself explains: "Ottawa is directly north of Allegan and directly south of Muskegon." EPA Br. at 43. This Court has previously upheld EPA's interpretation of the term "nearby" as "presumptively including counties within the

[7] The Court should similarly disregard EPA's absurd contention, EPA Br. at 45, that Petitioners "waived" the right to respond to its brand-new argument.

same metropolitan area as the violating county" because this understanding "falls readily within the dictionary definition of 'nearby'," is consistent with EPA's historical practice, and comports with the fact that "Congress itself chose the metropolitan area as the default boundary for ozone nonattainment areas." *Miss. Comm'n*, 790 F.3d at 152. These factors confirm that it is *un*reasonable for EPA to refuse to perform a contribution analysis of a county that has significant emissions and that is directly adjacent to, and in the same metropolitan area as, a county with a violating monitor.[8]

Michigan claims that *it* performed a five-factor contribution analysis to determine whether Ottawa contributed to nonattainment in Muskegon, but that is irrelevant. MI Br. at 7. EPA did not refer to this analysis or purport to incorporate it by reference in its Response to Comments—the only place it discussed Ottawa. EPA never performed a contribution analysis for Ottawa, or explained why such analysis was not required. The Court should remand on that basis alone. *Cf.* EPA Br. at 59 (inviting remand where "the Court could benefit from additional explanations of" designations).

[8] EPA contends that it has discretion to limit the area of analysis to "single-county areas." EPA Br. at 44. This is equivalent to saying that EPA has discretion to refuse to perform a contribution analysis. That interpretation cannot be squared with Congress' command that the agency designate "*any* area … that contributes to" nearby nonattainment. 42 U.S.C. § 7407(d)(1)(A).

1. Petitioners provide ample evidence linking Ottawa's emissions to ozone exceedances.

Both EPA and Michigan fault Petitioners for failing to "link" Ottawa's emissions to particular exceedances at nearby monitors. EPA Br. at 47, MI Br. at 13. For example, EPA dismisses the enormous emissions from Ottawa County—which dwarf many of the individual counties in Michigan designated nonattainment—by stating that "[e]missions alone cannot prove contribution." EPA Br. at 47.

These criticisms are misplaced. First, while emission totals are not dispositive of contribution, they are certainly a relevant factor that must be considered. Throughout this rulemaking, EPA has relied heavily on aggregate emissions to inform its contribution analysis, explaining that "emission levels from sources in a nearby area indicate the potential for the area to contribute to monitored violations." AR-0414 at 9, JA1116. EPA's decision to completely disregard Ottawa's aggregate emissions is an arbitrary departure from EPA's normal practice.

Second, there is ample evidence that Ottawa's emissions actually do reach violating monitors on exceedance days. Modeling performed by Michigan showed back trajectories passing through Ottawa, and especially along the shore where Ottawa's largest source (the JH Campbell coal-fired power plant) is located, on the

way to the violating monitors in Muskegon on exceedance days. *See* Br. at 88-89 (citing record).

In addition, Sierra Club submitted sophisticated air-dispersion modeling confirming that the JH Campbell plant sends significant amounts of air pollution to the Muskegon and Allegan monitors. Petitioners acknowledged that "the plant's emissions profile ha[d] changed since the date of the emissions data used in the modeling," Br. at 90, and EPA and Michigan make much of this fact. But *regional meteorology* has not changed since the study was done. If emissions from this Ottawa source were being carried to violating monitors on exceedance days in 2011, there is no rational basis to conclude that the emissions are not following similar trajectories now. Moreover, *even following upgrades*, the JH Campbell plant was, at times, emitting at the same daily levels that had caused significant impacts in 2011. *Id.* (citing record).

At minimum, Sierra Club's analysis showing that emissions from a single Ottawa source significantly contributed to monitored violations in the recent past would have caused a rational decision-maker to look closely at whether collective emissions from the entire County are currently contributing to violations. Ultimately, it is *EPA*'s obligation to make a fully informed decision about whether a county is contributing. To the extent that Sierra Club's modeling was not fully conclusive, the proper response was for EPA to investigate the issue further—not

to push ahead with a decision contrary to the best analysis available. The fact that EPA ignored highly probative modelling provides an additional basis for remand.

2. EPA improperly failed to consider whether locations along the Ottawa shoreline might themselves violate the standard.

EPA should also have looked more closely at whether parts of Ottawa are themselves violating the standard. As Petitioners explained, there is a violating monitor located directly at the Ottawa border, and many parts of Ottawa are closer to this or another violating monitor than they are to the attaining monitor in eastern Ottawa. Br. at 84. Moreover, the "lake breeze" effect, which EPA cites as the primary cause of nonattainment at the violating monitors in Muskegon and Allegan, would presumably cause exceedances along the Ottawa shore as well. The Court should vacate and remand so EPA can take a close look at whether parts of Ottawa are themselves exceeding the standard.

E. EPA's exclusion of northern Weld County from the Metro-Denver nonattainment area was arbitrary and does not reflect the plain language of the statute.

1. EPA still has not established that it is honoring Congress' choice to not require contributions to be significant for an area to be designated nonattainment.

Congress chose to require that to be designated nonattainment, an area need only "contribute," rather than "significantly contribute," to violating ambient air quality in a nearby area. 42 U.S.C. § 7407(d)(1)(A)(i). However, in other parts of the Clean Air Act, Congress set the bar higher by using the term "significantly contribute." *See e.g.* 42 U.S.C. §§ 7410(a)(2)(D)(i)(I), 7426(a)(1)(B), 7511a(h)(2). Congress' choice to leave "significant" out of 42 U.S.C. § 7407(d)(1)(A)(i) must be given meaning by EPA. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

EPA offers no explanation for how its five factor, weight-of-the-evidence approach to designations, or its application to northern Weld County, implements Congress' choice to leave "significant" out of 42 U.S.C. § 7407(d)(1)(A)(i). And the Court "should not attempt itself to make up for such deficiencies." *State Farm*, 463 U.S. at 43. *See also Dep't of Commerce v. New York*, 588 U.S. __, (2019), slip op. at 23 ("an agency must 'disclose the basis' of its action").

EPA claims that it has "already shown that EPA did not ignore plain statutory language." EPA Br. at 54, n.27. EPA provides no citation to where it showed this. None exists.

The fact that the Court has previously upheld EPA's use of a multi-factor, holistic approach does not save EPA. *See id.* at 52-53. This Court has not previously been asked to answer the statutory interpretation argument about the lack of the term "significant" in 42 U.S.C. § 7407(d)(1)(A)(i) versus other parts of the Clean Air Act.

EPA argues the obvious; that the other parts of the Clean Air Act that use the term "significant contribution" are different parts of the Clean Air Act. EPA Br. at 53-54. The point is Congress used "significant contribution" in some parts of the Clean Air Act but not in 42 U.S.C. § 7407(d)(1)(A)(i). EPA has failed to explain how it honors this difference.

Amici argue because EPA used the word "contribute" rather than "significantly contribute," EPA is complying with the plain language of the statute. API Amici Br. at 4. EPA's invocation of the term "contribute" still does not answer the question of how EPA's analysis reflects the lower standard of "contribute" versus "significantly contribute."

EPA also argues that its previous finding that Wyoming, which is farther away from the nonattainment area than northern Weld County, significantly

contributes to the Denver-Metro nonattainment, is not relevant because the Good Neighbor provision of 42 U.S.C. § 7410(a)(2)(D)(i)(I) "looks at things like the costs and benefits of various emission controls." EPA Br. at 53. This simplistic argument ignores how EPA actually implements the Good Neighbor provision.

EPA uses a two-step approach. *EME Homer*, 572 U.S. at 500. Under the first step, which is relevant to this case, EPA determines if any upwind State contributes less than one percent of the standard to any downwind State. *Id.* If an upwind state contributes less than one percent, EPA does not consider it to have contributed significantly. *Id* at 501. It is only in the second step, after EPA has determined that there is more than a one percent contribution from an upwind State, that EPA considers costs to determine how much emission reductions are required. *Id*. Petitioners' argument is that EPA has not reconciled how it determined, under step one of the Good Neighbor provision, that Wyoming significantly contributes to the Metro-Denver nonattainment area but that, in terms of nonattainment designations, northern Weld does not even contribute.

Amici claim that EPA previously determined that Wyoming did not sufficiently evaluate its emissions interference with a maintenance receptor in Metro-Denver but that EPA determined that Wyoming does not contribute significantly to nonattainment in the Metro-Denver area. API Amici Br. at 10-11. This is half true, but the half true part is misleading.

The part that is not true is that EPA previously determined that Wyoming did not sufficiently evaluate its emissions interference with a maintenance receptor. What EPA really found was its own modeling analysis "showed that emissions from Wyoming contribute above the one percent threshold to one identified maintenance receptor in the Denver, Colorado Area." 82 Fed. Reg. 9,142, 9,143 (Feb. 3, 2017).

The misleading part is that EPA determined that Wyoming does not contribute significantly to a nonattainment monitor in Metro-Denver not because Wyoming does not contribute, but because EPA's modeling predicted that Metro-Denver would not have any nonattainment monitors by the end of 2017. *See Id*. at 9,152. Thus, to EPA, there would be no nonattainment monitors for Wyoming to contribute to. *Id.* Sierra Club explained to EPA in comments that EPA was wrong and Metro-Denver would not likely be in attainment. *Id.* EPA agreed that it was unlikely Metro-Denver would be in attainment, but EPA decided to stick with the unlikely assumption. *Id.* It turned out that Sierra Club was right, and that Metro-Denver *was* in nonattainment for the 2008 ozone standard in 2017. *See* 83 Fed. Reg. 56,781, 56,784, Table 1 (Nov. 14, 2018) (Denver "Failed to Attain" based on 2015-2017 design value).

2. EPA's designation of northern Weld County was arbitrary.

EPA's analysis of the topography/geography factor was arbitrary. EPA's claim, that the Cheyenne Ridge forms the northern physical border of the Denver Basin which keeps emissions from northern Weld County from reaching the violating monitors, runs counter to the evidence in the form of the topographic maps of the area.

EPA claims that "much of northern Weld County" has elevated terrain. EPA Br. at 56. EPA's problem is it did not designate "*much* of northern Weld County" attainment; it designated *all* of it. There is no rational relationship between the east-west dividing line EPA used for the designation and the actual topographic map, which is on page 56 of EPA's Brief. This is particularly problematic for northern Weld County where the emissions come from thousands of dispersed oil and gas wells rather than a large point source or a highway.

EPA goes on to make a strawman argument. It claims that Petitioners want EPA to set the Weld County's nonattainment boundary based on elevation, as EPA did for the Uinta Basin in Utah. EPA Br. at 57. Then EPA claims that "issue" has been waived because Petitioners cannot raise it for the first time in litigation. *Id.*

In reality, Petitioners never claimed they want the boundary to be based on elevation. Petitioners think the boundary should be the Wyoming border. But that is an issue Petitioners would take up in comments on remand, not in this briefing.

In this briefing, all Petitioners were pointing out is that it was indeed possible for EPA to have set a nonattainment boundary rationally related to the actual topography, with the use of an elevation-based designation being one option. This minor point is not a new "issue." In any event, the map alone is enough for Petitioners to prevail on the actual issue of the disconnect between the actual topography and EPA's designation.

Next, EPA argues that it could avoid looking at northern Weld's impacts to the violating Boulder monitor because EPA wanted to avoid a mismatched dataset, in terms of using one three-year period for some monitors and another three-year period for other monitors. EPA Br. at 57-58. EPA claims that the Court approved the avoidance of mismatched datasets in *Miss. Comm'n*. *Id.* at 58.

EPA's argument falters on the fact that EPA did not use any data from the Boulder monitor. Unlike *Miss Comm'n* where EPA used data from *all* monitors for the same time frame, here EPA simply ignored the Boulder monitor. But it is arbitrary for an agency to ignore an important aspect of a problem, and there is no exception to this requirement for "holistic," weight of the evidence analysis. *State Farm*, 463 U.S. at 43. *See also Dep't of Commerce v. New York*, 588 U.S. __, (2019), slip op. at 16 (an agency must examine "the relevant data.").

EPA's decision to ignore the Boulder monitor also runs contrary, without any explanation, to EPA's Designations Guidance which said it would determine

attainment status based on "the most recent complete three consecutive calendar years of quality-assured, certified air quality data in the EPA Air Quality System." AR-0061 at 3, JA0509. The 2013-2015 data was the most recent, complete, three consecutive calendar years of quality-assured, certified air quality data in the EPA Air Quality System for the Boulder monitor. But EPA ignored it.

EPA goes on to claim that its Response to Comments notes that any impacts to the Boulder monitor would have come from southern Weld County. EPA Br. at 58. What the Response to Comments actually said was:

> While the referenced study indicates that "[oil and gas] sources amount to the second largest [nitrogen oxides] sources with most of them attributed to Weld County," the reference does not specifically assess what proportions of emissions come from northern Weld County, as opposed to the portion of Weld County the EPA is including in the nonattainment area. The EPA has addressed in the [technical support document] and five factor analysis why the northern portion is being excluded from the nonattainment area. The commenter cites Reference Ex. 2 abstract, which states that "Analyses of surface ozone and wind observations from two sites, namely, South Boulder and the Boulder Atmospheric Observatory, both near Boulder, [Colorado], show a preponderance of elevated ozone events associated with east-to-west airflow from regions with [oil and natural gas] operations in [the north east-southeast], and a relatively minor contribution of transport from the Denver Metropolitan area to the [southeast-south]." It is precisely the southern portion of Weld county, which EPA and the state included in the recommended nonattainment area, that is contributing to ozone formed and observed after the east to west motion described in this abstract cited by the commenter.

AR-0417 at 44, JA1230.[9] This paragraph is so internally inconsistent that it is arbitrary, regardless of what level of deference it is entitled to. In the paragraph, EPA says twice that the referenced studies do not explain whether the pollution is coming from northern or southern Weld. It then seems to claim that the "east to west motion" means the southern portion of Weld county is what is contributing to ozone. But it offers no explanation of why the east to west motion means the southern part of Weld is what is contributing. Without any explanation, the unsupported conclusion is not an acceptable basis for EPA's decision.

Finally, EPA implicitly concedes that it failed to consider northern Weld's emissions in relationship to the emissions in other counties which were designated nonattainment. EPA Br. at 58. Rather, all EPA did was compare northern Weld's emissions to Weld County as a whole, even though the whole Weld County's emissions are massive and swamp all the other counties. *See e.g.* Br. at 118, Fig. 13.

EPA says no matter that it did not consider northern Weld's emissions to the nonattainment counties because EPA uses a "holistic analysis" and this single factor cannot be dispositive. EPA Br. at 58. EPA cites to *Miss. Comm'n*, 790 F.3d at 162, to try to support its argument. *Id*.

[9] Petitioners are not relying on the referenced studies in this case. Rather, Petitioners' position is the back-trajectory modeling should have considered impacts to the Boulder monitor along with the other violating monitors.

But in *Miss. Comm'n*, 790 F.3d at 162, the Court discussed EPA's comparison of one county's emissions in relationship to the other counties potentially in the nonattainment area. This is what EPA failed to do with regard to northern Weld County.

EPA's citation is also misplaced because that is where the Court held that it only asks if EPA "considered all relevant factors." *Miss. Comm'n*, 790 F.3d at 162. Here, EPA failed to consider the relevant factor of northern Weld's emissions compared to the other counties which EPA did, or could have, included in the nonattainment area. Had EPA included this comparison, it would have seen that northern Weld's emissions are relatively massive with its volatile organic compound emissions, for example, being nearly nine times higher than Broomfield County, which was included in the nonattainment area. AR-0007 at 47, 57, JA0103, JA0113. This failure renders EPA's decision to exclude northern Weld County arbitrary.

EPA seems to be asking the Court to adopt a new standard where a challenger would have to identify an error or omission and then establish that the error or omissions would have resulted in a different conclusion in the "holistic" analysis. EPA Br. at 58. EPA would respond to such an argument by saying that is just the challenger's opinion, and only EPA's application of the "holistic" analysis matters. In other words, EPA asks the Court to adopt a standard which is

impossible for a petitioner to meet. The Court should decline EPA's invitation to effectively end judicial review of designations, which can be life or death decisions. *See* 83 Fed. Reg. 25,776, 25,778 (June 4, 2018), SA008 (ozone can cause premature mortality).

F. The El Paso Designation Must Be Vacated and Remanded.

Petitioners show that El Paso County should have been designated nonattainment because it contributes most of the domestic ozone-precursor emissions affecting Sunland Park, New Mexico—a nonattainment area directly adjacent to El Paso. Br. at 119-125. EPA does not dispute that El Paso contributes to Sunland Park's nonattainment and does not defend its decision to designate El Paso as attainment. Instead, EPA asks the Court to remand the El Paso designation if any petitioner can establish standing to challenge it. EPA Br. at 59.

Petitioners have standing to challenge the El Paso Designation. As explained *supra* at 5-6, there is no merit to EPA's argument that an individual can only suffer an injury-in-fact from air pollution if the individual is based in an area that itself violates the ozone standard. But more to the point, Petitioners' El Paso-based declarants *are* based in an area that violates the ozone standard. As Petitioners' opening brief explains:

> It is not true that all of the El Paso monitors were meeting the 2015 ozone standard. Texas originally recommended that El Paso County be listed as nonattainment, because the University of Texas at El Paso monitor … had a design value that exceeded the 2015 ozone [standard].

> Only by massaging the raw data (i.e., treating one of the exceedances at the monitor as an "exceptional event") was Texas able to argue that El Paso should be designated attainment.

Br. at 121; *see also id.* at 36 (citing record evidence). Petitioners' El Paso-based declarants are breathing air that exceeds the ozone standard, and they suffer a variety of health problems as a result. *See*, *e.g.*, Br. Add. at 183, Villegas Decl., ¶¶ 4-5. Petitioners clearly have standing.[10] Because Petitioners have standing to challenge the El Paso Designation, Petitioners and EPA agree that *at a minimum,* this designation must be remanded.

Undeterred by EPA's request for a remand, two Intervenors—the State of Texas and the Greater El Paso Chamber of Commerce, *et al*. ("El Paso Chamber") —attempt to defend a decision the agency has determined it cannot defend. They are not successful.

To begin, El Paso Chamber is not properly before the Court because none of the groups that joined this brief filed a standing declaration. The El Paso Chamber brief does not discuss standing at all; their Motion to Intervene alleges generally that the groups' members may face "additional regulatory requirements that would impact their operations and increase their compliance costs," Mot. to Int. of El Paso Chamber, *et al.*, Doc. No. 1748492 at 10, but provides no supporting

[10] As explained above, *infra* at 9, the City of Sunland Park also stands to suffer a direct injury in the form of reduced tax revenue. *See* Br. Add. at 034-36, Brown Decl.

evidence. This failure is particularly significant given that El Paso Chamber is now seeking relief that is different from that sought by either party. Because El Paso Chamber has not established standing, its brief should be stricken. *Cf. Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (providing "no more than speculation" of harm insufficient to support trade association standing).

Nor do Texas or El Paso Chamber succeed with a merits showing that the El Paso Designation is consistent with the Clean Air Act. Neither Intervenor disputes that El Paso was responsible for *most* domestic emissions in the region analyzed by EPA. Nor do the Intervenors dispute that the violating monitor in Sunland Park is located just over a mile from the El Paso border—a fact that would lead any rational decision-maker to presume that each city "contributes to air quality" in the other. Unable to dispute these critical facts, Intervenors are left to comb through the record in search of other support for EPA's decision.

Intervenors seek support from EPA's discussion of geography/topography. EPA explained that the Franklin Mountains, "which run north/south near the western edge of El Paso County[,] appear to influence the flow of air by limiting air pollution transport." EPA Br. at 41. As Petitioners explained, this analysis is woefully inadequate because it ignores "the pass" between the mountains that El Paso is named for: "Although the violating Desert View monitor is directly adjacent to the Rio Grande, and the river extends from Sunland Park into

downtown El Paso, EPA did not consider whether the river valley affects the flow of air pollution." Br. at 38. EPA's air-flow modeling shows a high number of back trajectories moving from the south and east from El Paso up the Rio Grande valley to Sunland Park. *See* AR-0405 at 14, JA-1042 (noting that "many of the back trajectories from the east flow across monitors in El Paso," and providing a map showing trajectories moving up the Rio Grande valley). EPA's flawed geography/topography analysis cannot save its flawed decision.

Intervenors assert that "emissions from Mexico, not El Paso, are the problem." TX Br. at 10. But as Petitioners explain, EPA's analysis of Mexico's contribution contained factual and logical errors. Br. at 122-123. Moreover, relying on Mexican emissions to excuse El Paso's contribution to Sunland Park's nonattainment is inconsistent with this Court's case law and the Clean Air Act's scheme for dealing with foreign emissions. Br. at 119-121. EPA apparently agrees that its analysis was seriously flawed, which is why it is seeking remand.

Intervenors' remaining arguments are meritless. El Paso Chamber accuses Petitioners of "mischaracteriz[ing] EPA's findings," El Paso Chamber Br. at 8, because Petitioners assume that counties in the area of analysis contributed to Sunland Park's nonattainment in proportion to their total emissions. Although this is certainly a simplification, it is a simplification that *EPA* made. *See* AR-0405 at 9-10, 16, JA1037-1038, JA1044 (using county-wide emissions as a proxy to

determine which areas contributes to ozone exceedances). Petitioners cannot be faulted for making the same simplifying assumptions that the expert agency made.[11]

Ultimately, Intervenors are unable to overcome a basic contradiction in their position: they cannot explain why, if EPA's designations must be given an "extreme degree of deference," El Paso Chamber Br. at 19, EPA's subsequent determination that these designations are flawed should receive no deference whatsoever. Petitioners have identified serious issues with EPA's decision and EPA agrees that these issues warrant further review. Accordingly, the Court should vacate and remand the El Paso Designation.[12]

REMEDY

Vacating and remanding all of the improper attainment designations is required to fully vindicate Petitioners' claims and avoid environmental damage.

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[11] It is El Paso Chamber that mischaracterizes the record. It repeatedly states that "all ozone monitors in El Paso are compliant with the 2015 NAAQS," El Paso Chamber Br. at 6, which is not true. *Compare id. with* TX Br. at 11 (acknowledging that "fewer than all of the air-quality monitors in El Paso were meeting the [standard].").

[12] Texas argues, TX Br. at 5, 12, that EPA should proceed under the Act's redesignation provision, 42 U.S.C. § 7407(d)(3). Texas does not explain how such a proceeding would differ from the approach EPA proposes, or why it believes this provision limits the Court's discretion in crafting a remedy where an air-quality designation is found to violate the Clean Air Act.

That remedy, well within the Court's discretion,[13] is the only outcome that offers Petitioners effective relief, comports with the purposes of the Clean Air Act, and prevents further extended environmental harm due to uncabined agency delay. *Cf. Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150-51 (D.C. Cir 1993) (setting forth factors supporting vacatur).

Petitioners describe fatal deficiencies in EPA's rule, including its collision with the language and purposes of the Clean Air Act. In an effort to minimize the extent of nonattainment areas, EPA made outcome-driven boundary determinations that contradict statutory directives, fail to follow the agency's own guidelines, and disregard the factual record in favor of unverified theories that do not rationally reflect the situation at hand. EPA has not provided a "full analytic defense" of the theories and decisions Petitioners challenge, and those undefended theories so infect the rule that only vacatur of the improper attainment designations can resolve the problem. *Columbia Falls*, 139 F.3d at 923.

[13] The Court has broad discretion to fashion a remedy, including vacatur of those decisions that are clearly in excess of statutory authority, *New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008). Courts may vacate and remand unlawful portions of a rulemaking to "foreclos[e] readoption of the same policy" where "the agency's … choice is unreasonable in light of the congressional purpose and factual record" and "there is no reason to believe that … [any] change in circumstances" support the original decision. Merrick B. Garland, "Deregulation and Judicial Review," 98 Harv. L. Rev. 507, 570 (1985).

Despite EPA "confessing no error," EPA Br. at 61, the record further shows that at least some of its designations line-drawing exercises were driven by improper extra-statutory considerations.[14] EPA's brief offered no new contrary evidence to support its taking voluntary remand to "supplement the record or modify designations to moot Petitioners' challenges." EPA Br. at 60.[15]

In fact, this case offers precisely the situation in which vacatur is *most* indicated. EPA's designations do not afford proper protections from air pollution, never mind proper adherence to the statute's commands and purposes. Remand without vacatur would leave those unlawful and arbitrary designations in effect while EPA modifies them, without additional pollution control measures in areas wrongly designated attainment. EPA itself notes that those measures include emissions offsets, the requirement to install emissions controls at new or modified major sources or use existing controls more often at existing sources, and other pollution-reducing actions specific to nonattainment areas. EPA Br. at 62, citing 42 U.S.C. §§ 7511a(a)(2)(C), 7511a(a)(1), 7511a(a)(3), 7506(c). Without these measures in place in areas improperly designated attainment, the air continues to

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[14] *See supra* n.1.

[15] Even if the Court grants EPA's remand-only request, it should direct EPA, in "supplement[ing] the record," to include updated ozone design value data, as well as the materials only recently released in a second tranche of information responding to Petitioners' May 2018 Freedom of Information Act request, concerning the original decision-making.

be dirtier than it otherwise would be, harming Petitioners in those areas and downwind. Any *further* delay in establishing correct designation boundaries for the 2015 ozone standards therefore harms everyone breathing that dirtier air as a result, and perpetuates damage to government property.

Remand without vacatur "would give EPA an end run around the Clean Air Act's timing requirements." WI Br. at 36, *see NPCA v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009). The Act requires that designations be in place "as expeditiously as practicable, but in no case later than 2 years from the date of promulgation" of the 2015 standard. 42 U.S.C. § 7407(d)(1)(B)(i). Vacatur would restore the *status quo ante* EPA's illegal final actions. *See New Jersey*, 517 F.3d at 583-84. That is, the wrongly designated areas again would be undesignated, and EPA again would be subject to a firm deadline for corrective actions it claims it wants to undertake.[16] Petitioners' requested remedy offers a "safety valve" so that EPA will properly designate those areas in a timely manner. *See Honeywell v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph & Sentelle, concurring), *reh'g granted in part* (adopting this concurrence as the holding), 393 F.3d 1315 (2005).

[16] And EPA has already demonstrated a propensity to delay—certain Petitioners and others were forced to sue to secure a deadline for the 2015 ozone standard designations. *See In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082 (N.D. Cal. 2018); *ALA v. Pruitt,* D.C. Cir. No. 17-1172 (filed July 12, 2017).

EPA is simply wrong that vacating the challenged designations would not grant the relief Petitioners seek. While it is true that EPA "would still need to decide what designations to issue," EPA Br. at 62, vacatur and remand offers Petitioners the only opportunity to ensure that EPA does so on a firm deadline. EPA also grasps at straws in arguing that its discretion on technical matters justifies a voluntary remand without vacatur—Congress set firm deadlines for EPA action on designations, a point that EPA ignores. Those deadlines would spring back to life if remand is preceded by vacatur of the improper designations.

EPA also mistakenly asserts that vacatur would unnecessarily "lift environmental protections now in place," EPA Br. at 61. First, *there are no environmental protections now in place* in areas that have been unlawfully designated attainment. Second, Petitioners seek vacatur *only* of the unlawful and improper attainment designations. This remedy is within the Court's equitable authority to frame, and consistent both with the definition of a "rule" at 5 U.S.C. § 551(4) as including "portions" of Agency actions, and with EPA's authority to designate "portions of areas." 42 U.S.C. § 7407(d)(1)(B)(i).

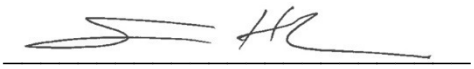
Finally, no one will be unduly prejudiced or harmed by vacatur and remand. Requiring EPA to finalize new designations as expeditiously as possible benefits all parties by providing greater certainty and minimizing regulated party reliance on designations that will ultimately be overturned.

CONCLUSION

In short, only vacatur and remand offer the relief Petitioners seek—the reversal of the unlawfully drawn attainment area boundaries for the 2015 ozone standard, and the ability to obtain a firm deadline for EPA's corrective action.

DATED: August 7, 2019

RESPECTFULLY SUBMITTED,



Susan Hedman
Of Counsel
Clean Wisconsin
634 W. Main Street, Suite 300
Madison, WI 53703
(608) 251-7020 ext. 29
shedman@cleanwisconsin.org

/s/ Ann Brewster Weeks
Ann Brewster Weeks
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
(617) 359-4077
aweeks@catf.us

Counsel for Petitioner Clean Wisconsin

Kwame Raoul, Attorney General
Jane Elinor Notz, Solicitor General
Matthew J. Dunn, Chief,
Environmental Enforcement/
Asbestos Litigation Division
Daniel I. Rottenberg
Stephen J. Sylvester
Assistant Attorneys General

By: */s/ Daniel I. Rottenberg*
Daniel I. Rottenberg
Assistant Attorney General
Office of the Attorney General
69 W. Washington St, 18th Floor
Chicago, IL 60602
(312) 814-3816
drottenberg@atg.state.il.us

Counsel for Petitioner State of Illinois

/s/ Maxine I. Lipeles
Maxine I. Lipeles
Interdisciplinary Environmental Clinic
Professor of Law Emerita
Washington University School of Law
One Brookings Drive – CB 1120
St. Louis, MO 63130
(314) 346-0804
milipele@wustl.edu

Counsel for Petitioner Sierra Club

Mark A. Flessner, Corporation Counsel
Benna Ruth Solomon, Deputy Corporation Counsel
Jared Policicchio, Supervising Assistant Corporation Counsel
Stephen J. Kane, Deputy Corporation Counsel

By: */s/ Stephen J. Kane*
Stephen J. Kane
Deputy Corporation Counsel
Affirmative Litigation Division
City of Chicago Department of Law
121 N. LaSalle St., Room 600
Chicago, IL 60602
(312) 744-6934
stephen.kane@cityofchicago.org

Counsel for Petitioner City of Chicago

/s/ Elena K. Saxonhouse
Elena K. Saxonhouse
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
(415) 977-5765
elena.saxonhouse@sierraclub.org

Counsel for Petitioner Sierra Club

/s/ Joshua A. Berman
Joshua A. Berman
Sierra Club Environmental Law Program
50 F. St. NW, 8th Floor
Washington, DC 20001
(202) 650-6062
josh.berman@sierraclub.org

Counsel for Petitioner Sierra Club

/s/ David R. Baake
David R. Baake
Baake Law LLC
275 Downtown Mall
Las Cruces, NM 8801
(545) 343-2782
david@baakelaw.com

Counsel for Petitioners Sierra Club; City of Sunland Park, New Mexico; and Familias Unidas del Chamizal

/s/ Robert Ukeiley
Robert Ukeiley
Center for Biological Diversity
1536 Wynkoop St., Suite 421
Denver, CO 80202
(720) 496-8568
rukeiley@biologicaldiversity.org

Jonathan Evans
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7100 ext. 318
jevans@biologicaldiversity.org

Counsel for Petitioners Board of County Commissions of Boulder County; Center for Biological Diversity; National Parks Conservation Association; and Sierra Club

/s/ Howard A. Learner
Howard A. Learner
Scott Strand, Ann Jaworski
Environmental Law and Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
(312) 673-6500
hlearner@elpc.org

Counsel for Petitioners Environmental Law and Policy Center; and Respiratory Health Association

CERTIFICATES OF COMPLIANCE AND SERVICE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

I certify that this brief complies with the type-volume limit of Fed. R. App. P. 32 (a)(5) and (6) because it uses 14-point Times New Roman type, a proportionally spaced font. This brief contains 12,884 words, according to Microsoft Word's count, excluding those portions of the brief exempted under Rule 32(f).

DATED: August 7, 2019

SIGNED: */s/ Ann Brewster Weeks*
Ann Brewster Weeks

Certificate of Service

I hereby certify that the foregoing Petitioners' Joint Final Reply Brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record who have registered with the Court's CM/ECF system, and that I have caused eight paper copies to be provided to the Clerk of the Court, by first class mail, pursuant to Circuit Rules 31 and 32.

DATED: August 7, 2019

SIGNED: */s/ Ann Brewster Weeks*
Ann Brewster Weeks