pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

April 7, 2021

Honorable Michael S. Regan
Administrator
United States Environmental Protection Agency
Air and Radiation Docket
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OAR-2020-0351

RE: Ozone Transport Commission Recommendation that EPA Require Daily Limits for Emissions of Nitrogen Oxides from Certain Sources in Pennsylvania, 86 Fed. Reg. 4,049 (January 15, 2021).

Dear Administrator Regan:

The Pennsylvania Department of Environmental Protection (DEP) appreciates the opportunity to submit these comments and supporting information to the United States Environmental Protection Agency (EPA) in response to the "Ozone Transport Commission Recommendation that EPA Require Daily Limits for Emissions of Nitrogen Oxides From Certain Sources in Pennsylvania" (the Petition) published in the *Federal Register* on January 15, 2021 (86 Fed. Reg. 4,049). The comment period deadline regarding the Petition was subsequently extended by EPA to April 7, 2021. 86 Fed. Reg. 10,267 (February 19, 2021).

The Ozone Transport Commission (OTC) submitted the Petition to EPA pursuant to section 184(c) of the Clean Air Act (CAA) (42 U.S.C. § 7511c(c)). The Petition, if approved by EPA, would require additional control measures in the form of daily emission limits for oxides of nitrogen (NOx) on select Pennsylvania coal-fired electric generating units (EGU) and a revision to the Commonwealth of Pennsylvania's (Commonwealth) State Implementation Plan (SIP). The OTC asserts in the Petition that such daily limits are necessary for states downwind of the named sources to attain the 2008 and 2015 National Ambient Air Quality Standard (NAAQS) for ozone. DEP, as indicated in its February 2, 2021 testimony and reiterated in these comments in detail, strongly disagrees with the OTC's assertions and recommendations, and therefore, urges EPA to deny the Petition.

I. Introduction

The Commonwealth of Pennsylvania is the only state targeted by the Petition, and certain coal-fired units located in the Commonwealth are the subject of the Petition just as they were previously the subject of a petition brought under section 126(b) of the CAA, 42 U.S.C. § 7426(b), by the states of Maryland and Delaware, on this same subject.[1] With respect to the Petition now brought by the OTC:

- The OTC received a petition from a member state (State Petitioner) asking the OTC to file the 184(c) Petition currently before EPA. The OTC did not initiate this action on its own, but rather was responding to a petition it received.

[1] 83 Fed. Reg. 50,444 (October 5, 2018).

- The State Petitioner provided modeling conclusions to the OTC, but did not give access to the OTC of its inputs, modeling parameters, etc. The State Petitioner withheld and still withholds the modeling files from the public. The OTC did not do its own modeling analysis, nor did it verify the data, methodology, etc. that was submitted by State Petitioner. In other words, the OTC did not perform modeling of emissions, nor did it do or provide for any opportunity for public or peer review of State Petitioner's modeling during the OTC's comment period.

- The CAA 126(b) petition is the appropriate process for any OTC state to petition EPA to address significant downwind contributions of specific sources located in another state. The State Petitioner previously availed itself of the CAA 126(b) petition process and was unsuccessful. See "Response to Clean Air Act Section 126(b) Petitions from Delaware and Maryland," 83 Fed. Reg. 50,444 (October 5, 2018). The State Petitioner has stated on numerous occasions—including in at least one OTC meeting during the second half of 2020—that the purpose of the CAA 184(c) petition is to avoid the insurmountable legal issues presented by pursuing a CAA 126(b) petition; a petition which the D.C. Circuit Court of Appeals analyzed in depth.[2,3]

OTC's petition is premature. Since the 184(c) Petition was filed, there have been two intervening events that invalidate the assumptions, analysis and conclusions which the 184(c) Petition is based upon. In addition, the petition is premature because the Reasonably Available Control Technology (RACT) for the 2015 ozone NAAQS has not been completed by Pennsylvania.

Within the last month, EPA has addressed multi-state transport issues through issuance of the final "Revised Cross-State Air Pollution Rule (CSAPR) Update for the 2008 Ozone NAAQS" rule (Revised CSAPR Update).[4] Additionally, DEP is requiring the NOx sources identified in the Petition to submit case-by-case Reasonably Available Control Technology (RACT) evaluations for both the 2008 (Requirement rose post-184(c) Petition filing) and 2015 ozone NAAQS[5]. The 2008 NAAQS case-by-case RACT proposals were received within the last 10 days and are actively being evaluated by DEP. The unit-specific RACT determinations, using unit-specific factors, will undergo a thorough public participation process that provides an opportunity for the public, OTC states and EPA to comment. DEP will submit these source-specific RACT determinations to EPA as a SIP revision to meet the Commonwealth's CAA RACT obligations.

To act in favor of the Petition, EPA must find that five separate elements have been met.

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[2] See, EPA Virtual Public Hearing on the Ozone Transport Commission's Recommendation Under Section 184(c) of the Clean Air Act, Transcript Testimony of Ben Grumbles, Maryland Dep't of the Environment, at pp. 15-16.
[3] See, *Maryland v. EPA*, 958 F.3d 1185 (D.C. Cir. 2020) rejected its appeal of Maryland's CAA 126(b) petition denial regarding the 2008 ozone NAAQS.
[4] EPA, Revised Cross-State Air Pollution Update Final Rulemaking, available at: https://www.epa.gov/csapr/revised-cross-state-air-pollution-rule-update
[5] In *Sierra Club v. EPA*, 972 F.3d 290 (3d. Cir. 2020), the Third Circuit Court of Appeals gave EPA two years from August 28, 2021 to approve a revised, compliant SIP or formulate a new Federal Implementation Plan. The Third Circuit acknowledged that coal-fired power plants could use "source-specific RACT" under 25 Pa. Code § 129.99 to meet CAA RACT requirements. *Sierra Club*, 972 F.3d at 296, 301.

1. The Petition must have been properly submitted in conformance with the statutory requirements of section 184(c) of the CAA. *It was not.*

2. The Petition must demonstrate impairment of a downwind state's ability to meet attainment. *It does not and embellishes the benefits of the Petition recommendations.*

3. The Petition must demonstrate causation of the impairment by the upwind state. *To the extent that assumptions used in the modeling that were included in the Petition efforts can be ascertained, they are unreasonable and fail to account for significant contributions from other states.*

4. The Petition must demonstrate that all feasible local actions have been taken. *The OTC states and many states within the corridor continue to disregard high variability in their daily NOx emissions caused by operating High Electric Demand Day units. The 184(c) Petition includes no information whatsoever regarding the status of local actions.*

5. The Petition must demonstrate that the requested remedy is sufficient, appropriate and within EPA's legal authority. *The remedy sought in the Petition is not sufficient, appropriate or within EPA's legal authority. No analysis of the effect of the remedy is included in the 184(c) Petition and the OTC seeks a remedy that goes beyond EPA's authority, because it would force Pennsylvania to accept additional control measures designed for units in other states and force these measures on specific Pennsylvania facilities to reduce emissions to address other states' significant contributions which are not addressed (or mentioned) in the Petition.*

In addition to meeting the elements above, EPA must only evaluate the four corners of the 184(c) Petition and cannot use post-petition submissions to cure procedural and other defects.[6] The CAA gives EPA only three options when reviewing a recommendation under Section 184(c) – approval, disapproval, or partial disapproval. 42 U.S.C. § 7511c(c)(4). DEP agrees with EPA's interpretation of Section 184(c) that EPA cannot modify or supplement an OTC recommendation.

II. CAA Statutory Overview

A. State RACT Obligations Under the CAA

States have the primary responsibility under the CAA for achieving the NAAQS as established and revised by EPA under section 109 of the CAA. 42 U.S.C. § 7410. Pennsylvania is required to determine and implement RACT for applicable sources each time that the ozone standard is revised.[7] The Clean Air Act gives each State "wide discretion in formulating its State Implementation Plan" for achieving the air quality standards set by EPA. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016). "So long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id*. (citing *Train v. Nat. Res. Def. Council, Inc.* 421 U.S. 60, 79 (1975)); see also *BCCA Appeal Group v. EPA*, 355 F. 3d 817, 822 (5th Cir. 2003). "Part D [of Title I of the CAA] leaves to the

[6] The Petition must be evaluated by EPA "as is" and not supplemented with additional arguments, modeling or analysis not included in the original Petition submittal.
[7] 42 U.S.C. §§ 7502(c)(1), 7511a and 7511c.

states the primary responsibility for meeting the NAAQS and allows considerable discretion in devising an appropriate mix of emission limitations." *Navistar Intern. Corp. v. EPA*, 941 F.2d 1339, 1342 (6th Cir. 1991) (citing *Connecticut Fund for Env't. Inc. v. EPA*, 696 F. 2d 169, 173 (2d Cir. 1982)).

State determinations of RACT involve evaluating major sources and determining what constitutes RACT for those sources [or group of sources], taking into consideration both economic and technological feasibility. See 44 Fed. Reg. 53,762 (September 17, 1979). "[D]epending on site-specific considerations, such as geographic constraints, RACT can differ for similar sources." *Nat'l Steel Corp., Great Lakes Steel Div. v. Gorsuch*, 700 F.2d 314, 322-323 (6th Cir. 1983). For some categories, EPA has promulgated control techniques guidelines (CTGs) and alternative control techniques (ACTs) to assist States in determining what control techniques meet the RACT requirement. *Natural Res. Def. Council v. EPA*, 571 F.3d 1,245, 1,254 (D.C. Cir. 2009). Where CTGs exist, they establish presumptive levels of control meeting RACT. States may opt to require alternative controls rather than following the CTGs. *Id.* These ACTs "describe available control techniques and their cost effectiveness" but do not establish presumptive RACT. *Id.*

Under the CAA, Pennsylvania and no other entity has the obligation and authority to evaluate the information relevant to the economic and technological feasibility of control techniques and provide a justification in its SIP submittal demonstrating what control level constitutes RACT for a category of sources within Pennsylvania. Sources subject to RACT may use "source-specific RACT" to meet CAA RACT requirements. *Sierra Club v. EPA*, 972 F. 3d at 296, 301-302. A State may choose to establish and implement "beyond RACT" controls for certain sources based on policy choices unique to that State.[8] Once approved by EPA, a State's RACT SIP revision becomes federally enforceable.

B. CAA Interstate Transport Obligations

EPA must designate areas as "nonattainment," "attainment," or "unclassifiable" for NAAQS under section 109 of the CAA. 42 U.S.C. § 7407(d). Under section 110(a)(1), 42 U.S.C. § 7410(a)(1), each State is required to submit an [infrastructure] SIP revision to EPA within 3 years after EPA promulgates a standard, which provides for the implementation, maintenance, and enforcement of the NAAQS. From the date EPA determines that the State's SIP submittal is inaccurate or incomplete, the agency has two years to promulgate a Federal Implementation Plan (FIP). 42 U.S.C. § 7410(c)(1). Among the components, the CAA requires SIPs to "contain adequate provisions… prohibiting any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such primary or secondary [NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Where States do not address their good neighbor provisions, the CAA provides that EPA may issue a FIP to address interstate transport obligations under section 110(a)(2)(D). In *EPA v.*

[8] Memorandum from William T. Harnett, Director, Air Quality Policy Division, USEPA, to Regional Air Division Directors, "RACT Qs & As – Reasonably Available Control Technology (RACT): Questions and Answers" (May 18, 2006), at 1 and 3, available at: http://www.epa.gov/sites/production/files/2016-08/documents/ract_and_nsps1dec1988.pdf (Noting that just because another similar source has such controls in place does not mean that such a control is reasonably available for all other similar sources across the country; differentiating RACT from Best Available Control Technology (BACT) and "beyond RACT" emission controls).

EME Homer City Generation L.P., 572 U.S. 489, 521 (2014), the United States Supreme Court agreed with the D.C. Circuit Court of Appeals that "EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State *or* at odds with the one-percent threshold the Agency has set." See also, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 20 (D.C. Cir. 2012) (citing *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008) (EPA may not force a State to eliminate more than its own "significant contribution" to a downwind State's nonattainment area). Under the CAA, "the portion of an upwind State's contribution to a downwind State that "contribute[s] significantly" to that downwind State's "nonattainment" necessarily depends on the relative contributions[9] of that upwind State, of other upwind State contributors, and of the downwind State itself." *EME Homer City Generation, L.P.*, 696 F.3d at 20. EPA may not require any upwind State to "share the burden of reducing other upwind states' emissions." *Id.* Similarly, nowhere does the CAA require an upwind state to take on an additional emissions reduction burden as a substitute for a downwind state's obligation to reduce its own emissions contributions.

EPA promulgated the final rulemaking entitled, "Cross-State Air Pollution Update for the 2008 Ozone NAAQS" on October 26, 2016 (81 Fed. Reg. 74,505) to finalize Federal Implementation Plans for 22 states to address the interstate transport of emissions with respect to the 2008 ozone NAAQS (CSAPR Update). In *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019), the D.C. Circuit remanded the CSAPR Update to EPA, and in doing so, found that the CSAPR Update was unlawful to the extent it allowed upwind states to continue their significant contributions to downwind ozone problems beyond the [CAA] statutory dates by which downwind states must demonstrate their attainment of the NAAQS. The EPA announced the release of the pre-publication version of the final Revised CSAPR Update on March 15, 2021, to address the D.C. Circuit's decision in *Wisconsin* for 22 states, including Pennsylvania. 85 Fed. Reg. 68,964 (October 30, 2020). The emission budgets established in the Revised CSAPR Update reflect EPA's identified EGU control stringency of optimization of all existing post-combustion controls (SCRs and SNCRs) during the 2021 ozone season, and the installation and operation of state-of-the-art NOx combustion controls by the start of the 2022 ozone season.[10] EPA's FIP satisfies the interstate transport obligations for 22 states, including Pennsylvania, under section 110(a)(2)(D) of the CAA for the 2008 ozone standard.

When evaluating EPA's revised CSAPR modeled design values versus the 2015 ozone standard, the modeled design values projected to 2021 show that only the OTR states of Connecticut, New York, New Jersey, and Pennsylvania continue to have compliance and maintenance issues associated with the 2015 ozone standard. EPA's modeled design values projected to 2023 show that only two OTR states, Pennsylvania and Connecticut, have compliance and maintenance issues for the 2015 ozone standard. The two highest ozone contributing states to Connecticut's 2021 continuing nonattainment are New York at 18.62 part per billion (ppb) and New Jersey at 9.21 ppb. The two highest contributing states to Pennsylvania's 2021 continuing nonattainment

[9] See, *Homer City EME Generation, L.P.*, 572 U.S. at 518-521 (The statute permits EPA to use cost to lower an upwind State's obligation under the good neighbor provision); But see, *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 131-132 (D.C. Cir. 2015) (Holding that EPA's uniform cost thresholds violated the Supreme Court's mandate in *EME Homer City* where such thresholds have required States to reduce pollutants beyond the point necessary to achieve downwind attainment).

[10] EPA, Revised Cross-State Air Pollution Rule Update Final Rulemaking, "Revised CSAPR Update Final (PDF)"; Page 124.

are New Jersey at 6.44 ppb and Maryland at 3.21 ppb.[11] This highlights the multi-state contribution issues raised by Pennsylvania and why the specific remedy sought by OTC is not appropriate. Please note that this modeling and the modeling results were performed by EPA; all relevant data was made publicly available for peer review and consideration by the public in preparing comments.

C. CAA 184(c) Petition Process

The Ozone Transport Region (OTR) was established by Congress under sections 176A and 184 of the CAA (42 U.S.C. §§ 7506a and 7511c) and consists of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, Vermont, and the District of Columbia. The CAA establishes a process whereby the OTC may submit recommendations to the EPA Administrator for the purpose of reducing interstate ozone pollution. Under section 176A(b)(2) of the CAA, 42 U.S.C. § 7506a(b)(2), "the transport commission shall assess the degree of interstate transport of the pollutant or precursors to the pollutant throughout the transport region, assess strategies for mitigating the interstate pollution, and recommend to the [EPA] Administrator such measures as the Commission determines to be necessary to ensure that the plans for the relevant States meet the requirements of section 7410(a)(2)(D) of this title."

Under section 184(c) of the CAA, "[u]pon the petition of any State within a transport region established by ozone, and based on a majority vote of the Governors on the Commission (or their designees), the Commission may after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by this subpart [D]." In evaluating the 184(c) petition, the [EPA] Administrator shall… "(B) commence a review of the recommendations to determine whether the [additional] control measures in the recommendations are necessary to bring any area in such region into attainment by the dates provided by this subpart and are otherwise consistent with this chapter." 42 U.S.C. § 7511c(c)(2)(B). In undertaking the review required… "the Administrator shall consult with the members of the commission of the affected States and shall take into account the data, views, and comments received." 42 U.S.C. § 7511c(c)(3).[12]

DEP is aware of only one other instance whereby the OTC attempted to use the CAA 184(c) petition process to mandate that other States and the District of Columbia adopt certain emissions controls. That effort failed. In *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), the D.C. Circuit held that EPA did not have authority under section 110 of the CAA to condition approval of a State's plan on the State's adoption of control measures that EPA itself had chosen, and notably, that other portions of the CAA barred EPA from ordering States to enact a certain vehicle emissions program. In this case with respect to RACT obligations under CAA sections 172, 182 and 184, "[t]he **States** are responsible in the first instance for meeting the" NAAQS "through state-designated plans that provide for attainment, maintenance, and enforcement of

[11] EPA, Revised Cross-State Air Pollution Rule Update Final Rulemaking, Technical Support Documents: "Data File with Ozone Design Values and Ozone Contributions," available at: https://www.epa.gov/csapr/revised-cross-state-air-pollution-rule-update

[12] Although DEP was not able to peer review the modeling because most of the necessary information is not available, it is clear from the portions that have been made available that the modeling is not consistent with section 184(d) of the CAA, 42 U.S.C. § 7511c(d).

the" NAAQS in each air quality control region. Thus, **each State** determines an emission reduction program for its nonattainment areas, subject to EPA approval, within deadlines imposed by Congress." *Virginia* at 108 F.3d 1397, 1410 (citing *Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995); see also, *Train* at 421 U.S. 60, 79. Finding in favor of this 184(c) petition would usurp Pennsylvania's RACT evaluations and determinations for certain coal-fired power plants[13] and impose "additional control measures" for certain Pennsylvania sources beyond the authority granted by the statutory provisions of the CAA. The OTC Petition itself recognizes that this process is intended to substitute for Pennsylvania's pending RACT statutory rights as set forth above.[14]

III. OTC Failed to Satisfy Statutory Obligations Mandated by Congress Under Section 184(c) of the CAA

The OTC failed to provide the public a meaningful opportunity to comment before approving submission of the 184(c) Petition to EPA. The OTC did not make key information available, including modeling files, prior to or during the public comment period. The OTC provide no analysis of the emission reductions or their impact at any monitoring station that could occur due to implementation of the remedy. The OTC failed to consider significant comments submitted during the public comment period. The issuance of the Comment and Response document included in the 184(c) Petition is fatally flawed, both substantively and as a matter of administrative law. While the facts and harm from each of these issues are inter-mixed to an extent, each of these failures independently drives the conclusion that the 184(c) Petition does not meet the minimum requirements under section 184(c) of the CAA.

As a federal agency, EPA is quite familiar with obligations under the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq*. See also 42 U.S.C.A. § 7607(d). While the OTC itself has no rulemaking authority, it is a multi-state organization created by Congress under the section 176A of CAA.[15] In section 184(c) of the CAA, Congress expressly mandates that the OTC provide the opportunity for notice and public comment before developing a 184(c) recommendation. This means that the OTC is required to solicit public input; and make the proposed petition, the relevant underlying modeling data and other supporting information available to the public; and consider the comments it receives on the proposed petition.

The opportunity for public comment must be meaningful. *Prometheus Radio Project v. Fed. Commc'n Comm'n*, 652 F.3D 431, 450 (3d Cir. 2011), cert. denied 545 U.S. 1123 (2005) (meaningful opportunity for public comment "means enough time with enough information to comment and for the agency to consider and respond to comments"); see also, *Ohio Valley Environmental Coalition v. U.S. Army Corps of Eng'Rs*, 674 F. Supp. 783, 807, 808 (S.D. W.Va.

[13] EPA previously issued a partial approval and partial conditional approval of Pennsylvania's RACT II Rule (84 Fed. Reg. 20,274; May 9, 2019). Pennsylvania is currently working on case-by-case RACT analyses consistent with the Third Circuit Court of Appeals decision in *Sierra Club v. EPA*, 972 F.3d 290 (3d. Cir. 2020). The DEP's case-by-case RACT submittals to EPA for the coal-fired power plants at issue will address CAA RACT requirements for both the 2008 and 2015 ozone NAAQS.

[14] The June 5, 2020 Petition submittal to EPA notes that "[s]hould Pennsylvania succeed in *adopting a final RACT III rule that addresses this recommendation*, OTC will withdraw it from further consideration by EPA." DEP notes that OTC states will have the opportunity to provide public comment on the Commonwealth's case-by-case RACT determinations for the 2008 and 2015 ozone standard.

[15] 42 U.S.C. § 7506a; see also Ozone Transport Commission website, "OTC Process", available at: https://otcair.org/OTC_process.asp

2009). "To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether." *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981) (*citing United States v. Nova Scotia Food Products Corp*., 568 F.2d 240, 252 (2d Cir. 1977); see also, *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). That is precisely what occurred in this instance.

The OTC failed to make the Petitioner State modeling data, on which the proposed 184(c) petition is based, publicly available before and during the OTC's public comment period, which has subsequently expired.[16] In Attachment 6 of the proposed petition, the Petitioner State only provided outputs from the modeling they conducted relating to coal-fired facilities in Pennsylvania. The modeling information in Attachment 6 does not provide the raw data, inputs, and modeling assumptions from various sectors. Furthermore, the OTC did not include appropriate modeling information for other upwind states or local sources in the proposed petition.[17] Because the OTC did not make this information available to the public during the comment period, it failed to provide Pennsylvania and others the opportunity for meaningful comment. These omissions deprived Pennsylvania and others from meaningful peer review of the underlying modeling data and assumptions that were used as the basis for the proposed petition.[18] *Washington Trollers Ass'n*, 645 F.2d at 686. Because the OTC failed to comply with the express statutory requirement of CAA section 184(c) in this regard, the Petition must be disapproved by EPA on procedural grounds.

Similarly, the 184(c) Petition recommends that EPA require Pennsylvania to select isolated portions of either the Maryland, Delaware or New Jersey RACT rules as a remedy ("RACT Rule Remedies"). 86 Fed. Reg. 4,051. Yet, the proposed petition put out for public comment as well as the "Policy and Technical Rationale Supporting OTC's Recommendation for Additional Control Measures Under Section 184(c)" submitted to EPA is void of any technical analysis or discussion as to why each of options in the RACT Rule Remedies would be an appropriate remedy as source-specific RACT for each Pennsylvania EGU subject to the Petition. While the RACT Rule Remedies were included for public comment, the information provided was merely select portions of each state's rules. No information nor discussion of projected reductions from application of the Delaware or New Jersey rules was included. In fact, the Petition includes no calculation, estimation, educated guesses or even cursory statement of the reductions that could or would be achieved by adoption of either state's regulations.

The analysis that was provided and is implied to be an expression of the reductions under Maryland's regulation is wholly deficient. The only estimation of the emission reductions and their impacts in the Petition is not based on application of the Maryland rule that is a requested remedy. The emission reductions and impacts are estimated by selection of an "across the board" emission rate that is not representative of any of the proffered remedies. Without any analysis of the reductions that could be achieved by requiring implementation of any of the

[16] Accessible through the OTC website, Maryland merely included attachments to rules for Maryland, Delaware and New Jersey. Data was not provided on the OTC's website for public access and review.

[17] It is not possible to ascertain whether "additional control measures" on certain coal-fired facilities in Pennsylvania are "necessary" without providing this data for peer review. The petition simply targets a particular subset of sources in a conclusory manner instead of providing all relevant OTR emissions data.

[18] This precluded DEP and other stakeholders from peer reviewing the modeling data in the context of section 184(d) of the CAA, 42 U.S.C. § 7511c(d) (best available air quality monitoring and modeling). To the best of our knowledge, the OTC still has not made this information publicly available nor has it provided it to Pennsylvania, the subject of this petition.

options in the Proposed RACT Remedies, the public and affected stakeholders were deprived of the opportunity to meaningfully evaluate and comment on the remedy sought in the Petition.

Comments received from affected stakeholders during the public comment period must be meaningfully considered. *Rural Cellular Ass'n v. Fed. Commc'ns Comm'n*, 588 F. 3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for comment must be a meaningful opportunity, … in order to satisfy this requirement, an agency must also remain sufficiently open-minded"). In this case, it is obvious that the OTC failed to meaningfully consider and address the significant comments received. OTC prepared and attached "Responses to Comments Received on OTC 184(c) Recommendation" (Comment-Response Document) as part of its 184(c) filing. This Comment-Response Document fails to respond to relevant and significant public comments, and thus, is woefully inadequate.

Instead, the OTC's Comment-Response Document provides responses in a vacuum—the comments themselves were not included in the Comment-Response at all. Many of the significant comments received during the comment period are not included, summarized, or even referenced in the response document. Courts have set aside agency actions under the APA that are "arbitrary-and-capricious, an abuse of discretion, or otherwise not in accordance with the law" or that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). "An agency violates this standard if it "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 42 (1983). "An agency also violates this standard if it fails to respond to "significant points" and consider "all relevant factors" raised by the public comments." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). It is a common practice of EPA and other federal agencies to address significant comments received as part of a proposed action. It is also common practice for state agencies like Pennsylvania DEP, New Jersey DEP, Maryland DOE and the vast majority of other OTC members to develop a comment and response document for a proposed action that, at a minimum, provides at least an accurate and complete summary of the comments received either verbatim or summarized. Similarly, each state provides written response to all significant comments received. It ensures that the responses are in context, can be understood, and meets the legal requirement that significant comments are in fact considered.

When evaluating the Comment-Response Document developed by OTC after the public comment period and submitted to EPA, it is obvious that OTC neither meaningfully considered nor addressed many of the significant comments received. For example, Homer City Generation, L.P., a stakeholder that could be affected by the Petition, submitted nine comments organized around three themes. OTC only addressed one comment. Seven comments are clearly not even addressed at all, and one comment is undetermined. For example, Homer City commented that:

> "Further reductions will be realized as the result of the recently-announced closures of the Bruce Mansfield, Colver Power Project and Cambria Cogen stations, all in western Pennsylvania. In 2017 and 2018, the combined NOx emissions from these three facilities were 3,046 tons and 4,550 tons, respectively."[19]

[19] OTC website, Homer City Generation, L.P. Comment 2019 Letter, p. 2 available at: https://otcair.org/document.asp?fview=meeting

Since this comment was submitted, Colver Power Project has withdrawn its deactivation notice to PJM. This demonstrates the volatile generation market in Pennsylvania. However, even with Colver removed, the failure of the analysis adopted by OTC to address an average of 3,000+ tons per year (tpy) in its Petition is highly troubling; but, the failure to even consider or address a comment on this subject is legally inexcusable and indefensible.

There can be no argument from the OTC regarding whether a comment regarding over 3,000 tpy of NOx is significant. The OTC approved and submitted a formal comment letter to EPA addressing three issues during the comment period for the Revised CSAPR Update (Proposed Rule).[20]

In the section addressing its second issue, OTC criticizes the EPA as "…downplaying the SNCR NOx reduction potential as "approximately only 3,000 tons'". OTC further indicates that delaying those 3,000 tons for just one year would result in a failure to "…be consistent with the statutory attainment deadline and drive greater public health protection…". Furthermore, the OTC claims that a one-year delay in 3,000 tons of NOx reductions is "…in direct contravention to four court cases clearly stating that it cannot do so (citations omitted).

The OTC cannot claim that a permanent reduction of over 3,000 tpy of NOx does not rise to the level of significance as to their obligation to consider all significant comments at the same time it avers, at length, that a one-year delay of 3,000 tons of NOx emissions is important and must be revised by EPA in the proposed Revised CSAPR Update. It is impossible to reconcile an implied decision that a permanent NOx reduction of over 3,000 tpy is not meaningful in the context of this petition, but that a one-year delay of 3,000 tons is meaningful.

The CAA 184(c) petition process creates a statutory right to public notice and comment and an obligation for OTC to meaningfully consider the comments received. It is not enough for OTC to say that the public comments were considered, it needs to provide a record that demonstrates that relevant and significant public comments were considered and addressed. DEP has included a list of significant comments in Attachment 7 as well as to whether they were addressed or not addressed in the Comment-Response Document. Below are several examples of significant comments that OTC failed to consider or respond to:

- A comment from DEP suggesting that OTC had not provided any independent multistate modeling that includes all CSAPR states. Therefore, nothing shows that "additional" NOx emission reductions from sources in Pennsylvania are necessary to address Pennsylvania's portion of the multistate downwind contribution to the NAAQS exceedances. Maryland's petition does not provide multistate CSAPR-wide modeling.

- A comment from DEP suggesting that fleetwide average NOx emissions calculated on Maryland's ozone exceedance days, are lower than what would be required by the OTC proposed daily requirements. DEP points out that transported pollutants do not distinguish between fleet averages for daily emission rates or the average of daily individual unit rates operating at a standard when the resulting overall daily average emissions are the same.

[20] Proposed Rule—Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, Docket ID NO. EPA-HQ-OAR-2020-0272, dated December 14, 2020. Available at: https://otcair.org/upload/Documents/Correspondence/otc-comments-proposed-revised-csapr-update-20201214-signed.pdf as well as the official EPA docket.

OTC's required daily unit emission rates, as they are proposed, will not achieve, nor do they require actual daily NOx reductions.

- Another comment from DEP suggests that OTC's proposal fails to appropriately apportion contribution responsibly. Ozone transport issues in the OTR are not limited to a single state.

- A comment from the PA Chamber of Business and Industry suggesting that emissions from point sources disperse over distance (based upon a number of complex variables affecting dispersion) and that it's a questionable proposition that Pennsylvania facilities are the culprit for the majority of exceedances outlined in the petition. Rather, there are numerous other factors that contribute to localized air impacts meteorological conditions and mobile source contributions from within Maryland.

In addition to the obvious examples of no response to significant comments, in some cases, OTC provided a response that inadequately addressed the comment like the example below:

- The PA Chamber of Business and Industry advised OTC to develop a robust comment/response document as the Chamber noted that no comment/response document had been prepared.

OTC's response to comments was woefully inadequate. OTC received 46 significant comments contrary to OTC's 184(c) Petition. Of the 46 comments received, OTC responded to 5 comments adequately, responded to 5 comments inadequately, and provided no response at all to the remaining 36 comments (OTC's response rate was only 22% to comments received in opposition to its proposed 184(c) petition).

The failure of the OTC to respond to 78% of all significant comments received is undefendable and legally inexcusable.

Surely, when Congress included the public notice and comment mandate under section 184(c) of the CAA, it did not intend for OTC to simply ignore relevant and significant comments received from potentially affected stakeholders, including the state and facilities directly targeted in the Petition. The OTC failed to comply with the notice and comment requirement under the statute, failed to provide a complete record to EPA in the Petition for evaluation, did not consider all significant comments, and appears to have engaged in a process with a pre-determined outcome. The Petition should be disapproved by EPA on every one of these four independent bases.

Despite these significant flaws, the Comment-Response Document was made part of the 184(c) Petition. The OTC response document was incorporated into the Petition, but it was not separately and properly authorized by OTC under its own by-laws.

- No vote or formal approval by the OTC under Article V – Quorum and Voting was held on the development, approval and release of the Comment-Response Document for the proposed 184(c) petition.[21]

[21] The OTC Bylaws, as amended through June 7, 2018, provide in Article X that "[a]ny action required or permitted to be taken by the membership may be taken without a meeting, if all members are notified and there is consent of a majority of the full Commission membership eligible to vote to take said action." Pennsylvania was not notified in this regard pertaining to the development, review, and release of the Comment-Response Document.

- The OTC bylaws state that all meetings must be conducted according to Robert's Rules of Order; yet there is nothing in the minutes discussing a vote to release the Comment-Response Document.

- The OTC bylaws themselves are silent with respect to the notice and comment mandate under section 184(c) of the CAA.

- A Technical Support Document was not prepared or included in OTC's petition.

- The OTC simply "rubber stamped" State Petition's modeling and conclusions without any peer technical review.

- The OTC incorporated State Petitioner's modeling whole cloth into their CAA 184(c) Petition with no review or independent analysis; yet failed to make the modeling data and assumptions necessary for meaningful review available during the comment period.

- Despite Pennsylvania's request as a member of the OTC, the OTC declined to include EPA's previous 126(b) petition denials as part of the record that sought a similar remedy from EPA.

OTC failed to follow its own procedures to the extent they even exist. The combination of OTC's lack of internal procedures and failure to provide the opportunity for meaningful comment as referenced above raises heightened procedural due process concerns. This combination resulted in a "blank check" for the OTC to press forward with a pre-determined outcome. Because of these flaws in the process, EPA should disapprove the Petition.

IV. The Clean Air Act 126(b) Petition is the Appropriate Process, Not the 184(c) Petition Process

The CAA 126(b) petition process is the appropriate vehicle for the remedy sought. Under section 126(b) of the CAA (42 U.S.C. § 7426(b)), "[a]ny State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section." The coal-fired power plants in Pennsylvania that participate in an allowance trading program have been the subject of multiple 126(b) petitions and are the target of the OTC's 184(c) petition.

In *Maryland v. EPA*, 958 F. 3d 1185 (D.C. Cir. 2020), the D.C. Circuit rejected the unit optimization arguments from Maryland and Delaware pertaining to EPA's denial of their CAA 126(b) petitions. In its CAA 126(b) petition denial, EPA determined that "all identified cost-effective emission reductions have already been implemented for the 2008 ozone NAAQS with respect to the identified sources" based on both "a conceptual case as to why those reductions will be achieved through the [Update Rule's] existing allowance trading program, and an evidence-based case that reductions based on control optimization [were] already achieved in 2017." *Maryland*, 958 F. 3d at 1194. Notably, the D.C. Circuit upheld EPA's position on cost effectiveness in denying the Maryland and Delaware 126(b) petitions, and it was a central pillar of the case's holding. The D.C. Circuit stated in its Opinion:

> "Now suppose a source is found emitting above the EPA's estimated average—at 0.11 lb./MMBtu, for instance—after the Update Rule. Is the source failing to optimize? Petitioners seem to think so. But the EPA explains why that may not be so: The optimized rate for any particular unit depends on the unit-specific characteristics, such as boiler configuration, burner type and configuration, fuel type, capacity factor, and control characteristics such as the age, type, and number of layers of catalyst and reagent concentration and type."

Maryland, 958 F.3d at 1206. The OTC assumes without any evidence that cost-effective reductions are available at the units in Pennsylvania subject to the Petition.

In their Comment-Response Document, the OTC states "[a]lthough EPA summarily rejected Section 126 petitions filed by Connecticut, Delaware, Maryland and New York, OTC States disagree with comments arguing EPA has already finalized the Section 126 issues. The grounds for EPA's Section 126 decisions have been undermined by court decisions remanding the CSAPR Update Rule and vacating the CSAPR Close-Out Rule. The United States Court of Appeals for the District of Columbia Circuit (DC Circuit) held that in attempting to address interstate transport, EPA failed to align needed ozone reductions with statutory attainment deadlines and did not provide a complete remedy, and these are the same grounds for the 184(c) recommendation." See Comment-Response Document at p. 2, See also the Petition at p. 169.This argument is misleading. The D.C. Circuit in *Maryland* decisively, not "summarily," addressed the optimization arguments of both Delaware and Maryland. The D.C. Circuit's holding in *Maryland* has not been "undermined" by subsequent court decisions, particularly decisions made on wholly different grounds, and *Maryland* remains good caselaw. The D.C. Circuit found that Maryland, just like Delaware, failed to identify further cost-effective emission reductions at sources operating with catalytic controls. Notably, the Court stated:

> "The EPA also noted that there may be valid operational reasons not to operate catalytic controls on particular days, "e.g., to avoid damaging or plugging of the [control] or taking a forced outage where a breakdown leaves the unit unavailable to produce power." *Id.* at 50,466-67. As a result, that a source ends up emitting above 0.20 lb./MMBtu on a particular day is not necessarily evidence of a failure to optimize. The EPA's explanation was reasonable."

Maryland, 958 F.3d at 1207.

Furthermore, section 126 of the CAA provides modeling and other procedures for states to use in determining whether a source or group of sources are significantly contributing (i.e. 1% or more of the NAAQS) to or interfering with the maintenance of the NAAQS standard through the interstate transport of ozone. The CAA 126(b) Petition process looks at specific unit impacts (or groups of units) and is not affected by the impact of trading program regulations. In contrast, the CAA 184(c) petition process does not provide appropriate guidance or procedures on either modeling or what constitutes significant contribution. Again, in contrast to the CAA 126(b) Petition process, the modeling results submitted as part of the CAA 184(c) Petition do <u>not</u> address the subset of EGUs that are already regulated by an emission trading program, nor do they address the impact of the Revised CSAPR Update, a trading program that will be in full effect before the 184(c) Petition can be decided. CAA section 126(b) is the correct authority to bring a petition of this type—both legally and substantively.

V. The 184(c) is Not Supported by Accurate Data, Modeling or Analysis

The 184(c) Petition does not demonstrate impairment of any downwind state's ability to attain the 2008 and 2015 ozone standards due to the Pennsylvania EGU units at issue. The 184(c) Petition embellishes the benefits of its RACT Rule Remedies by providing analysis at 0.08 lb/MMBtu, significantly lower than application of all of the three options in the RACT Rule Remedy (Delaware option—0.125 lb/MMBtu; it is our understanding that the New Jersey option results in a similar level of control). The Maryland option in the State RACT Remedy would require "optimization" but does not establish an emission limit. The OTC made no attempt to quantify the reductions that would be achieved if the 184(c) Petition were approved, nor does the 184(c) Petition include any credible analysis that supports imposition of the State RACT Remedy or the necessity of additional control measures on Pennsylvania units. The legal effect of the failure to analyze the impact of any of the options in the RACT Rule Remedies is a fatal flaw which compels rejection of the requests in the 184(c) Petition.

The use of a 0.08 lb/MMBtu daily emission rate in place of any of the options in the RACT Rule Remedies has a profound effect on the calculation of "excess" emissions. Application of the Delaware option at 0.125 lb/MMBtu, which is 50% higher than the 0.08 lb/MMBtu figure used in the 184(c) Petition, appears to be the most restrictive of the three options in the State RACT Remedies.[22] Using an example before EPA in this proceeding, the emissions from the coal-fired EGU's in question during a specific high ozone episode were alleged to be 120 tons over 5 days (average of 24 tons per day), based on all emissions over the 0.08 lb/MMBtu emission rate as "excess emissions".[23]

Using the Delaware option of the State RACT Rule, the Pennsylvania EGU excess emissions for the same time period are 16 tons (versus 120 tons) for the entire 5-day period (an average of 3 tons per day versus 24 tons per day). Three tons of NOx reduction per day in western Pennsylvania is highly unlikely to have a measurable impact on the downwind monitors, let alone meet the definition of significant contribution. The previous CAA 126(b) Petition brought by Maryland and Delaware was rejected because it did not support a finding of significant contribution (see Attachment 4, EPA's Clean Air Markets Division (CAMD) document from the CAA 126(b) Petition preceding titled "Evaluation of Maryland's Testimony / OTC's Remedy Delaware's Standard"). Pennsylvania EGU emissions have dropped significantly since that decision finding of no significant contribution, yet this 184(c) Petition claims significantly higher impacts.

Impact of issuance of the Revised CSAPR Update

[22] DE option is 0.125 lbs/MMBtu. PA currently has a 0.12 lbs/MMBtu limitation so 0.12 lbs/MMBtu has been used in all of our analyses. The NJ option is output based but depending on EGU unit characteristics, may be slightly less restrictive than the DE option. The MD option does not include or establish a numerical emission limit rate.

[23] The 184(c) petition does not provide any basis for the use of 0.08 lbs/MMBtu of NOx. The 184(c) Petition was filed well before either the proposed Revised CSPAR Update or the promulgated Revised CSPAR Update were published. While EPA determined that the NOx rate of 0.08 lbs/MMBtu used in its final Revised CSAPR Update as a generally achievable rate that reflects a reasonable emission rate for representing SCR optimization in quantifying state emission budgets, it did not find or impose that rate as any type of emission limitation. Rather, that rate was used to set an overall emissions budget as part of a trading program that is fundamentally based on the premise that not all units are created equally and that rate is not an appropriate emission limitation; i.e. it explicitly recognizes and embraces the concept that not all units can meet that limit. If all units could meet that limit, there would be no basis or environmental benefit from a trading program at all. In addition, an emission rate limitation of 0.08 lbs/MMBtu is not requested as a remedy in this petition.

The OTC's 184(c) Petition is premature because EPA's Revised CSAPR Update already addresses this interstate transport issue through implementation of a trading program with state budgets established by EPA. Based on EPA's modeling for the Revised CSAPR Update, all Maryland monitors have projected design values that model attainment for the 2015 ozone standard by 2021. In its December 14, 2020 comment letter to EPA regarding the Revised CSAPR Update (Proposed Rule), the OTC indicates as an aside during its discussion of issue 3 (removing Louisiana from the Group 3 program) that while it does not prefer trading programs, "…the OTC welcomes and supports the proposed Revised CSAPR Update rule because it achieves real reductions in transported interstate ozone pollution …" (Emphasis added).

The results of EPA's final Modeling for the Revised CSAPR Update Rule show attainment with the 70 ppb 2015 ozone standard in 2021, 2023, and 2028 for all monitors located in Maryland.[24]

After implementation of the final Revised CSAPR Update, EPA has determined that there will be no significant contribution by Pennsylvania to any of the monitors located in Maryland. In other words, submission of the 184(c) Petition to EPA was premature and should be rejected as it is beyond EPA's authority to review at this time.

The OTC modeling completely ignores the emission reductions that will occur as a result of promulgation of the Revised CSAPR Update, the specific emission reductions that will occur at the EGUs at issue in this petition as a result of the Revised CSAPR Update, and the over 3,000 tpy of NOx emissions from the closure of two coal-fired EGU's in Pennsylvania. Each of these omissions would have a major impact on the assumptions (and outcomes) used in the 184(c) Petition. DEP questions OTC's right to continue this 184(c) petition process as it is based upon outdated analysis, information and modeling that are cited as proof of several elements necessary to succeed on this petition. OTC knows that the analysis is outdated and inaccurate, but has not withdrawn the analysis or the 184(c) Petition.

In the final preamble to the Revised CSAPR Update (Proposed Rule), EPA includes a graph that indicates roughly 25,000 tons of EGU NOx reductions (an average of 163 tons per day) from all affected upwind states will achieve an average ozone reduction of 0.2 ppb at downwind monitors. 85 Fed. Reg. 69,002 (October 30, 2020). This EPA graph suggests that 163 daily tons of NOx reductions will achieve a 0.2 ppb reduction. The OTC petition to EPA indicates that a "maximum" of 47 tons per day of additional NOx emission reductions "could" occur under OTC's proposed remedy and the result would be "up to" 7.0 ppb of downwind monitor reductions.[25] In other words, the OTC claims that 47 tons per day NOx emission reductions will result in ambient ozone concentration reductions up to 7.0 ppb, whereas in contrast, EPA's modeling shows that 163 tons per day (triple OTC's reduction) would result in only a 0.2 ppb reduction (only 1/35th) of the reduction the OTC cites. Even with the differences between model coverage, the results of Maryland's modeling are not reconcilable with EPA's modeling. In terms of the comparative reliability, EPA's modeling has undergone peer review; the modeling inputs, data and files were publicly available; the results were internally validated; and the results

[24] EPA website, Revised Cross-State Air Pollution Rule Update Final Rulemaking, Technical Support Documents (TSDs): Data File with Ozone Design Values and Ozone Contributions, available at: https://www.epa.gov/csapr/revised-cross-state-air-pollution-rule-update

[25] EPA website, Ozone Transport Commission 184(c) Recommendation, Attachment 4 at p. 28 and Attachment 6 at p. 1, available at: 20200605_otc_184c_recommendation_to_epa_w_attachments_and_cvr_lttr-final.pdf;

are consistent with other modeling efforts. The OTC modeling possesses none of those characteristics.

VI. The Petition Fails Fundamental Requirements for Approval

A. Failure to Demonstrate Causation

The 184(c) Petition fails to demonstrate several fundamental requirements necessary for EPA to find in favor of the petitioner. These issues include:

1. Failure to demonstrate causation of a downwind state's ability to meet attainment;
2. Failure to consider the impact of multi-state excess NOx emissions; and
3. Failure to evaluate and demonstrate all local actions have been taken evaluate local emissions.

The OTC ignored back trajectories it was provided that contradicted their conclusion that NOx emissions from Pennsylvania EGUs were the origin of NOx emissions at noncomplying monitors within the OTR during many of the high ozone days cited in the 184(c) Petition (See attachments 5.1 through 5.13). OTC also ignored many of its own back trajectories that showed there were days that OTR monitors were not being impacted by air masses flowing over the Pennsylvania EGUs identified in the Petition as well as days during which emission pathways went through multiple states.

Furthermore, the OTC made no evaluation of the impact of local emissions or contributions from other states. The 184(c) Petition did not identify or evaluate excess emissions from noncoal units throughout the OTR, and an analysis of the June 25 to June 28, 2019 ozone episode demonstrates that excess emissions from other states were significantly greater than those from Pennsylvania EGUs. Without consideration of the impact of local emissions or emission impact from any other state than Pennsylvania, the OTC effort to demonstrate impairment by Pennsylvania EGUs is faulty and unreliable (See Attachment 6).

In addition, to rule for the petitioner, the EPA must find that all local actions have been taken. No analysis of the status of local actions is included in the 184(c) Petition. Similarly, elimination of significant contribution from all other states must occur before additional control measures can be determined to be necessary under Section 184(c). See, *EPA v. EME Homer City Generation L.P.*, 572 U.S. at 521. Because OTC failed to: (1) evaluate the significant contributions from other states; (2) evaluate the effect of local emissions; and (3) demonstrate that all local actions have been taken, the Petition is not approvable.

B. The Petition Relies on Flawed Assumptions and is Outdated

The 184(c) Petition contains no source-specific plant analysis based upon the technology employed by each EGU, how the EGU operates, existing permit limitations, or the control that the grid operator exercises over the facility. The only information proffered in the Petition regarding the EGUs ability's to lower emission rates is distant past performance, when these units operated as baseload units operating at high and stable generation rates.

The 184(c) Petition relies solely on historical emission rate comparisons as the basis for its determination that the Pennsylvania EGUs could meet the State RACT Remedy set forth in the 184(c) Petition and without any analysis of any of the specific EGUs technical capabilities or limitations. In contrast, each of the options in the State RACT Remedy was developed

separately by a single state, including an evaluation of the technical limitations of each EGU in their state.[26] The remedy proposed is inappropriate because it was developed without any consideration of the technical limitations of any of the Pennsylvania EGUs. *Nat'l Steel Corp.,* 700 F.2d at 322-323 (6th Cir. 1983). The units previously operated as baseload units operating at high generation rates. The units, as well as their selective catalytic reduction (SCR) controls, were designed for this type of steady-state operation. Temperature across the catalysts was relatively constant and high. As a result of decoupling of retail electric from generators in Pennsylvania, the grid operator exercises a high level of control over each EGU as to when it operates and at what load level it operates.

Another fundamental flaw in the 184(c) Petition is that it is outdated. It does not include the impact of over 3,000 tpy of NOx reductions from the permanent closure of two Pennsylvania EGU's that occurred pre-petition. It does not include any of the 22,829 tons per year of NOx reductions that will occur based on the Revised CASPR Rule (about 23 tons per day from Pennsylvania EGUs). It does not factor in the effect of emissions reductions from the on-going case-by-case evaluations for EGUs to meet CAA RACT requirements for the 2008 ozone NAAQS[27], nor the reductions that will be obtained from promulgation and implementation of the CAA RACT requirements for the 2015 NAAQS applicable to all major sources. The OTC 184(c) Petition relies on obsolete data and obsolete information that completely undermines the validity of its analysis and conclusions.

The 184(c) Petition fails because it does not include any technical data of the Pennsylvania EGUs that supports any determination of feasible emission rates. The 184(c) Petition also fails as it relies on outdated information regarding NOx emissions to the extent it renders the analysis unreliable.

VII. The Remedy in the Petition is Not Sufficient and Inconsistent with the CAA.

The Petition must demonstrate that the requested remedy is sufficient, appropriate and within EPA's legal authority. In this case, the OTC's proposed remedy fails completely. The OTC does not demonstrate through any modeling or other means the impact of the State RACT Remedy, let alone that the impact is sufficient or appropriate. Selection of any option in the State RACT Remedy would require EPA to go beyond its authority by imposing the regulatory requirements from other OTR States onto Pennsylvania without a legal basis.

The federal CAA requires states including Pennsylvania to evaluate and implement RACT each time the ozone NAAQS is revised by EPA, including the right and the obligation to determine its own RACT-based emission limits and regulatory structure considering the technical and cost characteristics unique to its states and subject units. This petition seeks to undermine and eliminate Pennsylvania's ability to do this, in contravention of the CAA RACT statutory requirements.

OTC's Petition implicitly acknowledges that the required demonstrations to succeed on the merits of its petition cannot be made. The Petition states that if the RACT III rulemaking being developed by Pennsylvania was to their [OTC's] liking, they would withdraw their petition. In

[26] It is also possible those states established "beyond RACT" controls for sources in their rulemakings based on policy choices unique to those states.
[27] See, *Sierra Club*, 972 F.3d at 296, 301.

other words, OTC indicates that the forthcoming RACT III rule, when completed, could result in additional control measures being completely unnecessary. Therefore, the OTC recognizes the Petition is premature because Pennsylvania has not completed its RACT III rule, and confirms that the 184(c) Petition is an improper attempt to hijack another state's RACT process, using the same arguments already rejected by the D.C. Circuit in *Maryland*. Indeed, the 184(c) Petition states that "[t]he OTC 184(c) recommendation is needed as a specific, daily NOx control measure because such a measure could not be achieved through a collaborative process." Because the 184(c) Petition provides an inadequate remedy and otherwise fails to meet the CAA requirements, DEP urges EPA to deny the Petition.

VIII. Conclusion

The 184(c) Petition cannot be approved because it fails to meet all the necessary requirements to find in favor of the petitioners.

1. The Petition was not properly submitted in conformance with the statutory requirements in section 184(c) of the CAA.

The OTC's process in approving submission of this 184(c) Petition was flawed. The OTC withheld underlying modeling data and assumptions from public review and comment; failed to consider all significant comments; failed to approve the Comment-Response document in accordance with its by-laws and/or the CAA, and submitted a petition that was premature as Pennsylvania has not completed its RACT processes for the 2008 or 2015 NAAQS Moreover, the 184(c) Petition is incomplete because it is missing mandatory elements, such as information regarding emissions from local sources and the status of local actions in downwind states.

2. The 184(c) Petition process is not appropriate for specific sources that participate in a trading program.

The 184(c) Petition is merely an attempt to undo the D.C. Circuit's ruling in *Maryland*, which upheld EPA's denial of Maryland's and Delaware's CAA 126(b) petitions. The CAA 126(b) petition process, not the 184(c) petition process, is the appropriate section under the CAA and includes guidance, procedures and criteria for determining significant contribution.

3. The Petition does not demonstrate impairment of a downwind state's ability to meet attainment.

The 184(c) Petition's modeling is flawed and unreliable. In addition, the modeling did not include over 3,000 tpy of NOx emission reductions from closed Pennsylvania EGUs nor the over 22,000 tons of annual NOx reductions from the EPA's final Revised CSAPR Update. The Revised CSAPR Update states that Maryland's monitor will demonstrate attainment of the 2015 ozone NAAQS due to the implementation of the final rule.

4. The Petition does not demonstrate causation of the impairment by the upwind state.

Because EPA has already found that Maryland's monitors will be in attainment, there can be no interference with Maryland's ability to demonstrate attainment. There is no causation showing possible because there is no impairment.

The modeling does not include any analysis of a variety of other factors necessary to demonstrate causation, including an analysis of the impact of non-Pennsylvania units with significantly higher emissions on High Electric Demand Days and any contradictory back trajectory information.

5. The Petition does not demonstrate that all feasible local actions have been taken.

The 184(c) includes no information, discussion or analysis of whether all local actions have been taken. Therefore, EPA has no information on which to make the required determination that all local actions have been taken. Without such a determination, EPA cannot find in favor of petitioners.

6. The Petition does not demonstrate that the requested remedy is sufficient, appropriate and within EPA's legal authority.

The remedy sought in the 184(c) Petition is not sufficient, appropriate or within EPA's legal authority. Even setting aside the dubious legality of submission of a remedy that includes "options" for EPA to select from, the 184(c) Petition does not include the minimal amount of information that allows EPA to make this determination. The 184(c) Petition includes no calculation or analysis of the NOx emission reductions that could be obtained from any of the remedy options nor any discussion as to why remedy options are appropriate for each EGU targeted in the 184(c) Petition. Because the 184(c) Petition includes no information that can be used to determine the effect of the remedy, it is impossible for EPA to find that the remedy in the 184(c) Petition is sufficient.

In addition, the 184(c) Petition's remedy is neither appropriate nor within EPA's legal authority. The remedy would be unlawful and premature because it would force Pennsylvania to accept additional control measures designed for units in other states and force these measures on specific Pennsylvania facilities to reduce emissions to address other states' significant contributions which are not addressed (or mentioned) in the 184(c) Petition. Adoption of the 184(c) Petition remedy would also be inconsistent with the CAA by not allowing Pennsylvania to complete its own RACT analyses for the 2008 and 2015 ozone NAAQS.

Pennsylvania requests that EPA recognize the significant legal, data assumptions and modeling errors that are inseparable from the 184(c) Petition. OTC's failure to submit an approvable petition cannot be cured by post-petition submissions by the petitioners or others.

As stated earlier, use of the CAA section 126(b) petition process is the appropriate avenue for a state to request that EPA address significant contributions from specific sources located in one state to exceedances at a downwind state monitor. Furthermore, even with the presumption of Pennsylvania sources' contributions, the current Pennsylvania's RACT initiatives requiring case-specific RACT determinations for the sources included in the OTC petition would be a more effective, timely and lawful action rather than the nebulous remedy sought by OTC in the Petition. We urge EPA to deny this OTC petition. We thank you for this opportunity to offer our comments on the Petition.

This letter, along with the attached supporting documentation, is being submitted to EPA electronically through Regulations.gov. Should you have any questions regarding this submission, please contact Mark Hammond, Director for Bureau of Air Quality, by e-mail at mahammond@pa.gov or by telephone at 717.787.9702.

Sincerely,

Patrick McDonnell
Secretary

cc: Cristina Fernandez, EPA Region III
Mark Hammond

Attachments