

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 08-1200

(Consolidated with Nos. 08-1202, 08-1203, 08-1204, and 08-1206)

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

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STATE OF MISSISSIPPI, *et al.*,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY,

*Respondent.*

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**CORRECTED *AMICUS CURIAE* BRIEF FOR PROVINCE OF ONTARIO  
IN SUPPORT OF PETITIONERS STATE OF NEW YORK, *ET AL.*, AND  
PETITIONERS AMERICAN LUNG ASSOCIATION, *ET AL.***

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May 1, 2012

**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and Amici. All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioners State of New York *et al.*

B. Rulings Under Review. References to the ruling at issue appear in the Brief for Petitioners State of New York *et al.*

C. Related Cases. The rule at issue has not been previously reviewed in this or any other court. All other cases involving substantially the same parties and similar issues have been consolidated in this proceeding.

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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:

CASAC	Clean Air Scientific Advisory Committee
CMA	Canadian Medical Association
CWS	Canada-Wide Standard
EPA	United States Environmental Protection Agency
GEA	Green Energy Act
NAAQS	National Ambient Air Quality Standards
NICAP	National Illness Cost of Air Pollution
NSR	New Source Review
OMA	Ontario Medical Association
Ontario	Province of Ontario
Ozone Annex	Ozone Annex of the Canada-U.S. Air Quality Agreement
NO <sub>x</sub>	Nitrogen Oxides
PEMA	Pollution Emission Management Area
ppm	Parts per million
Province	Province of Ontario
SAD	Science Assessment Document
VOCs	Volatile Organic Compounds

## **STATUTES AND REGULATIONS**

The sole statute cited is contained in the Brief for Petitioners State of New York *et al.*

### **INTEREST OF AMICUS CURIAE THE PROVINCE OF ONTARIO**

The Province of Ontario (“Ontario” or the “Province”), on behalf of its more than 13 million residents, submits this brief as *amicus curiae* in support of Petitioners State of New York, *et al.*, and American Lung Association, *et al.*, and urges this Court to remand the Rule entitled “National Ambient Air Quality Standards for Ozone” (“ozone NAAQS”) to the U.S. Environmental Protection Agency (“EPA”) for further consideration. On July 25, 2008, the Province filed a Notice concerning the consent of all the parties in this proceeding to Ontario’s participation as *amicus curiae*.<sup>1</sup>

Ontario’s stake in this case is substantial. The Province has a sovereign duty to protect the public health and welfare of its residents. Scientific evidence has conclusively shown that ground-level ozone poses serious threats to human health and the environment in Ontario. The Ontario Medical Association (“OMA”) has estimated that 9,500 premature deaths are caused in Ontario each year by high levels of ozone and other harmful air pollutants. Health effects are particularly

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5), *amicus* also represents that no counsel for a party authored this brief in whole or in part; no party, party’s counsel or person or entity other than *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief.



acute among the elderly, young children, and individuals with sensitive respiratory systems. In addition, the economic cost is substantial: health care costs in Ontario from high levels of air pollution exceed C\$500 million each year.

Twelve years ago, Ontario determined that an ozone standard of .065 parts-per-million (“ppm”) was necessary to safeguard the health and welfare of its residents from the effects of ground-level ozone, and the Province adopted the .065 ppm Canada-Wide Standard (“CWS”) for ozone. The Province is currently considering a proposal to further tighten the standard in response to the growing evidence of ozone-related health impacts.

Despite Ontario’s efforts to control stationary and mobile sources of ozone in the Province, the high levels of ozone that the U.S. exports to Canada make it impossible for Ontario to meet its own .065 ppm standard in most locations near the border. In some parts of the Province, particularly southwestern Ontario, ozone attributable to sources outside the Province—including U.S. emissions—accounts for approximately 90% of ambient levels.

Ontario participated in this proceeding at the administrative level, filing comments in September 2007 that urged EPA to strengthen its proposed rule. It also submitted scientific and health data on the adverse health and environmental consequences of ozone that corroborated much of the data that EPA was considering at the time. Ontario has also participated in other U.S. judicial and

administrative clean air proceedings over the past two decades in order to reduce the flow of air pollution from the U.S. into Canada. These include: (1) the 2001 proceeding in which this Court upheld limitations on nitrogen oxide emissions; (2) EPA's proposals to weaken the protections afforded by New Source Review ("NSR"), and subsequent litigation involving NSR in 2006; (3) EPA's previous round of revisions to the NAAQS for particulate matter and ozone; and (4) proceedings before this Court that considered the scope of Section 115 of the Clean Air Act. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *U.S. v. Cinergy*, 458 F.3d 705 (7<sup>th</sup> Cir. 2006); Comments of the Province of Ontario to EPA (Dkt. Nos. A-95-54 & A-95-58) (March 6, 1997); and *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990).

## **ARGUMENT**

### **I. THE SCIENTIFIC DATA SUPPORT A STRONGER OZONE STANDARD IN ORDER TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT.**

A substantial body of scientific evidence has demonstrated the adverse impact of ozone on public health and the environment, and the need for ambient air quality standards to reduce that impact. The first comprehensive studies of the health impacts of ozone in Canada were undertaken in the late 1990's, and in 1999 Canadian scientists and doctors produced the Science Assessment Document ("SAD"). The SAD recorded the biological sequence whereby ozone impairs

respiratory and cardiovascular functions, possibly leading to death.<sup>2</sup> In order to assess the human health effects of ozone, the SAD examined data from human epidemiological studies, controlled human exposure studies, and animal toxicological studies. The following year, on the basis of the conclusions in the SAD, Ontario adopted the CWS for ozone of .065 ppm. That standard is .010 ppm below the ozone NAAQS that EPA adopted in 2008, a standard measured over the same 8-hour averaging time.

Since adopting the .065 ppm standard twelve years ago, scientists and doctors in Ontario have continued to assess the scope and severity of the ozone problem. In 2005, the OMA estimated that ozone and other smog pollutants resulted in 5,800 premature deaths in the Province, 17,000 hospital admissions, and nearly 60,000 emergency room visits.<sup>3</sup> The OMA estimated that in 2008 there were approximately 9,500 premature deaths caused by smog in Ontario, based on enhanced air pollution data, updated population and demographic information, and

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<sup>2</sup> Environment Canada, *National Ambient Air Quality Objectives for Ground Level Ozone, Summary Science Assessment Document (SAD)*, (July 1999), p. S-63; available at: [http://www.hc-sc.gc.ca/ewh-semt/pubs/air/naaqo-onqaa/ground\\_level\\_ozone\\_tropospherique/summary-sommaire/index\\_e.html](http://www.hc-sc.gc.ca/ewh-semt/pubs/air/naaqo-onqaa/ground_level_ozone_tropospherique/summary-sommaire/index_e.html) (cited in Comments Filed on Behalf of the Province of Ontario (Sept. 7, 2007).

<sup>3</sup> See Ontario Medical Association, *The Illness Costs of Air Pollution: 2005-2026 Health and Economic Damage Estimates* (June 2005), pp. 6-7, available at: <https://www.oma.org/Resources/Documents/e2005HealthAndEconomicDamageEstimates.pdf>.

new epidemiological studies.<sup>4</sup> The Canadian Medical Association (“CMA”) in its 2008 “National Illness Cost of Air Pollution” (“NICAP”) estimated that 92,000 emergency room visits would occur in Ontario and other Provinces in 2008 due to ozone and other smog pollutants, and projected that this total would rise to 152,000 by 2031.<sup>5</sup> In addition to ozone’s effects on human health, scientists in Ontario have determined that elevated ozone levels significantly impact the environment. Ground-level ozone damages building materials and contributes to the loss of agricultural production and forest productivity.<sup>6</sup> In 2011, Canadian scientists completed the second comprehensive Canadian Smog Science Assessment, which confirmed earlier findings on the adverse health effects of ozone.<sup>7</sup> In sum, Canada’s scientific community concluded many years ago that the evidence

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<sup>4</sup> See Ontario Medical Association, *Local Premature Smog Deaths in Ontario*, available at: <https://www.oma.org/Resources/Documents/2008LocalPrematureSmogDeaths.pdf>.

<sup>5</sup> Canadian Medical Association (CMA), *NICAP Summary Report*, p. 8 (August 2008), available at: [http://www.cma.ca/index.cfm/ci\\_id/86830/la\\_id/1.htm](http://www.cma.ca/index.cfm/ci_id/86830/la_id/1.htm).

<sup>6</sup> See Ontario Ministry of the Environment, *Transboundary Pollution in Ontario* (June 2005), available at: [http://www.ene.gov.on.ca/environment/en/resources/STD01\\_076512.html](http://www.ene.gov.on.ca/environment/en/resources/STD01_076512.html).

<sup>7</sup> Environment Canada and Health Canada, *Canadian Smog Science Assessment of Fine Particulate Matter and Ground-Level Ozone* (2011), summary available at: <http://www.ec.gc.ca/Publications/default.asp?lang=En&xml=AD024B6B-A18B-408D-ACA2-59B1B4E04863>).

supported adoption of the CWS of .065 ppm, and this has been reinforced by the more recent data on health and environmental impacts of ozone.

The data presented to EPA's Clean Air Scientific Advisory Committee ("CASAC") during its review in 2007 are fully consistent with Ontario's findings, and CASAC drew essentially the same conclusions as the Canadian scientific and medical experts. As one example, EPA's own risk assessment based on studies in twelve cities showed that at an ozone level of .074 ppm (a level just slightly more stringent than the current NAAQS), more than 300,000 school-age children suffer significant levels of lung impairment. This is the type of evidence that led CASAC to unanimously conclude that EPA should set the ozone NAAQS at .060-.070 ppm.<sup>8</sup> Unfortunately, EPA rejected that advice without a sound basis.

Ontario and the rest of Canada are not alone in the conclusions they have drawn from the scientific data. Other countries, states, and entities have adopted significantly stronger ozone standards than EPA's .075 ppm standard:<sup>9</sup>

- European Union: .060 ppm (8 hour averaging time);
- United Kingdom: .050 ppm (8 hour averaging time);
- Japan: .060 ppm (1 hour averaging time);

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<sup>8</sup> See Brief of Environmental Petitioners (Dkt. No. 1369354 at 22) & Brief of Petitioners State of New York *et al.* (Dkt. No. 1369352 at 29).

<sup>9</sup> See Figure 5 of Ontario's 2007 Comments, *supra* n. 1.

- Sweden: .060 ppm (8 hour averaging time);
- World Health Organization: .050 ppm (8 hour averaging time);
- State of California: .070 ppm (8 hour averaging time)

These authorities have determined, based on a compelling body of data, that ground-level ozone poses significant threats to human health and the environment, and that stronger air quality standards are needed in response.

**II. DUE TO TRANSBOUNDARY OZONE FLOW, ONTARIO CANNOT ADEQUATELY PROTECT ITS RESIDENTS FROM THE HARMFUL EFFECTS OF OZONE UNLESS THE U.S. ADOPTS A STRONGER STANDARD.**

If addressing the ozone threat were simply a matter of enforcing its own standards, Ontario would not need to be here. But unfortunately, ozone does not observe political boundaries. Millions of residents of Ontario experience unhealthy levels of ground-level ozone transported over long distances from stationary and mobile sources in the mid-western and southern U.S. The data compiled by scientists in both the U.S. and Canada clearly show: (1) that a significant portion of the ground-level ozone in Ontario is attributable to transboundary ozone flows originating in the U.S., and (2) that these flows are a direct cause of various pulmonary and cardiac medical conditions and respiratory diseases suffered by residents of Ontario.

Ontario has been able to track the flow of U.S.-origin ozone from utilities in the mid-western and southern U.S. These ozone origin and flow data have been

corroborated by EPA's own scientists, who have tracked ozone flows transported from mid-western and southern regions of the U.S. to the northern and eastern U.S. states in the common U.S.-Ontario airshed.<sup>10</sup>

The contribution of U.S.-origin ozone flows to serious health and environmental impacts in Ontario has been recorded by many years of health and environmental monitoring. As shown from Ontario's most recent ozone monitoring data from 2010, the southern parts of Ontario closest to the U.S. border experience the highest ozone concentration levels in the Province, including Toronto where the ozone metric level was measured at .074 ppm, which is approximately 14% higher than the CWS. Other areas of Ontario near the U.S. border had equivalent or even higher ozone levels, such as Windsor (.074 ppm and approximately 14% above the CWS) and Kingston (.077 ppm and approximately 18% above the CWS). These data reflect some recent improvement in the ozone levels near the U.S. border, but almost all locations near the border still exceed the .065 ppm CWS, many by a significant margin. The impact upon local residents is significant, especially during the warm summer months, when smog advisories warn residents that outdoor activity must be limited because of high ozone levels,

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<sup>10</sup> See USEPA, *Review of National Ambient Air Quality Standards for Ozone, Final Staff Paper* (July 2007), available at: [http://www.epa.gov/ttn/naaqs/standards/ozone/data/2007\\_07\\_ozone\\_staff\\_paper.pdf](http://www.epa.gov/ttn/naaqs/standards/ozone/data/2007_07_ozone_staff_paper.pdf).

and advise of the risk to vulnerable populations. From 2005 to 2010, the Ontario Ministry of the Environment issued 143 smog advisory days.<sup>11</sup>

Recognizing the significant challenge posed by ozone flow from the U.S., Ontario has enacted and implemented an aggressive ozone control program designed to lower anthropogenic sources of ozone in the Province. These are some of the steps that the Province has taken in recent years to deal with ozone and other sources of air pollution:

- The Province is closing *all* of its coal-fired power plants. Since 2003, Ontario has shut down 10 of its 19 coal units, and as a result, coal-fired electricity generation in the Province has dropped by nearly 90%. The Province is on track to phase out 100% of its coal-fired electricity generation by the end of 2014.<sup>12</sup>
- The Ontario Power Authority has executed more than 9,900 non-ozone-producing renewable energy contracts, totaling 10,277 megawatts.<sup>13</sup>
- Ontario is building over 900 kilometers of new or improved rapid transit that will result in eliminating 300 million car trips from Ontario's roads.<sup>14</sup>

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<sup>11</sup> See Ontario Ministry of the Environment, *Smog Advisory Statistics*, available at [http://www.airqualityontario.com/press/smog\\_advisories.php](http://www.airqualityontario.com/press/smog_advisories.php).

<sup>12</sup> See Ontario Regulation 496/07, available at: [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_070496\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070496_e.htm).

<sup>13</sup> Ontario Power Authority, *Progress Report on Electricity Supply* (2011, Third Quarter), available at: <http://powerauthority.on.ca/sites/default/files/OPA%20-%20A%20Progress%20Report%20on%20Electricity%20Supply%20-%202011%20Q3.pdf>.

<sup>14</sup> Ontario MoveOntario 2020 program, available at: <http://news.ontario.ca/opo/en/2007/06/moveontario-2020.html>.



- Ontario launched its Electric Vehicle Incentive Program in July 2010. The program provides purchase incentives of between \$5,000 and \$8,500 for eligible plug-in and battery-electric vehicles based on the vehicle's battery capacity.<sup>15</sup>
- Ontario implemented a Green Commercial Vehicle Program that provided 1,635 grants for companies to purchase alternative fuel medium duty vehicles and anti-idling devices for heavy duty vehicles. As a result of the program, 18.2 million lifecycle liters of fuel will be avoided, as well as lifecycle emission reductions of 260 metric tons of VOCs and 1,820 metric tons of NOx.<sup>16</sup>
- Ontario adopted the Green Energy Act ("GEA") in 2009. By 2030, GEA programs will achieve 7100 megawatts of conservation and 19,700 megawatts of new installed renewable energy.<sup>17</sup>

Despite these considerable efforts, Ontario's scientists have determined that almost all areas of the Province near the U.S. border cannot meet the CWS of .065 ppm, notwithstanding recent efforts by the U.S. to reduce coal-fired power plant emissions, and the Province's closure of its coal-fired plants. Simply put, Ontario cannot meet the ozone challenge without greater efforts to reduce ozone levels in the U.S.

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<sup>15</sup> Ontario Electric Vehicle Incentive Program, available at: <http://www.mto.gov.on.ca/english/dandv/vehicle/electric/electric-vehicles.shtml>.

<sup>16</sup> Ontario Green Commercial Vehicle Program, available at: <http://news.ontario.ca/mto/en/2009/05/ontario-helps-green-commercial-fleets.html>.

<sup>17</sup> See Green Energy and Green Economy Act, 2009, available at: [http://www.e-laws.gov.on.ca/html/source/statutes/english/2009/elaws\\_src\\_s09012\\_e.htm](http://www.e-laws.gov.on.ca/html/source/statutes/english/2009/elaws_src_s09012_e.htm); see also Ontario's Long-Term Energy Plan, available at: <http://www.energy.gov.on.ca/en/ltep/>.

In 2000, the U.S. and Canada adopted the Ozone Annex of the Canada-U.S. Air Quality Agreement (“Ozone Annex”).<sup>18</sup> The bilateral Ozone Annex established specific objectives for reducing ground-level ozone in the shared airshed known as the “Pollutant Emission Management Area” (“PEMA”), which includes central and southern Ontario, southern Quebec, 18 U.S. states, and the District of Columbia. For Canada, ozone reductions were to be accomplished through a national, multi-pollutant emission reduction program for particular sectors of Canadian industry. For the U.S., EPA was to implement a series of emissions reduction programs. The parties agreed to monitor ozone levels in the PEMA, and to produce progress reports regarding the objectives of the Ozone Annex. Ontario has made significant progress in the intervening years. For example, in 2009 NO<sub>x</sub> emissions from large fossil-fuel fired power plants in Ontario were 58% below the cap of 39,000 metric tons established for the Ontario portion of the PEMA in the Ozone Annex.<sup>19</sup>

While ambient levels of ozone in the PEMA have decreased somewhat since 2000, millions of residents on both sides of the Canada-U.S. border still experience

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<sup>18</sup> Protocol Between the Government of Canada and the Government of the United States of America Amending the “Agreement Between the Government of Canada and the Government of the United States of America on Air Quality” (2000), available at: <http://www.ec.gc.ca/air/default.asp?lang=En&n=FA26FE79-1>.

<sup>19</sup> Canada-U.S. Air Quality Agreement Progress Report 2010, p. 17, available at: <http://www.epa.gov/airmarkets/progsregs/usca/docs/2010report.pdf>.

elevated ozone levels, especially in the large urban areas of the PEMA. The statistical data on ambient ozone levels in 2008 (the most recent data available from the 2010 Ozone Annex Progress Report) show ozone concentrations along the border that significantly exceed the CWS of .065 ppm.<sup>20</sup> Based on the 2008-2010 data from Ontario's ozone monitoring locations, ambient ozone levels in many areas adjacent to U.S. urban centers, such as Windsor, Hamilton, Toronto, and Kingston, range from .069 ppm to .077 ppm. In short, progress under the Ozone Annex has been made, but EPA's refusal to strengthen the ozone NAAQS is frustrating further progress. As a result, millions of Ontarians and U.S. residents will continue to suffer the adverse impact of unhealthy levels of ozone.

To appreciate the burden of transboundary ozone flows that Ontario is dealing with, consider the following: If Ontario were to completely eliminate all of its anthropogenic sources of ozone pollution, flows of ozone from the U.S. would still lead to ozone levels in excess of the .065 ppm CWS at most of the monitoring stations in Ontario. Conversely, if Ontario's sources of anthropogenic ozone were unchanged, but transboundary ozone flows from the U.S. were eliminated entirely, 100% of Ontario's monitoring locations would meet the .065 ppm CWS.

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<sup>20</sup> *Id.*, Figure 22.

**III. EPA'S ACTIONS IN PROMULGATING THE FINAL RULE WERE ARBITRARY, CAPRICIOUS AND CONTRARY TO THE CLEAN AIR ACT AND TO INTERNATIONAL LAW.**

This Court has instructed that protecting public health must be the guidepost in determining NAAQS. EPA does not need to wait for conclusive findings before regulating a pollutant, and the agency is required to promulgate NAAQS even where the nature or degree of a pollutant's risks cannot be precisely identified. *See Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 533 (D.C. Cir. 2009). Moreover, this Court has instructed EPA to promulgate NAAQS that provide an adequate margin of safety for vulnerable subpopulations. *See id.* at 524-26.

Under the Clean Air Act, a reviewing court may reverse agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. §7607(d)(9)(A). As the U.S. Supreme Court has explained, in order to pass muster under this standard, "the agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983) (internal quotes and citations omitted); *see also Am. Farm Bureau*, 559 F.3d at 519. In addressing its decision to ignore recommendations that a standard lower than .075 ppm was required to provide an adequate margin of safety for at-risk groups, however, EPA failed to identify a

rational connection between its decision and the substantial weight of scientific evidence presented.

In 2007, CASAC unanimously concluded that the primary standard should not exceed .070 ppm in order to adequately protect public health, including at-risk groups, and supported this conclusion with extensive and detailed scientific evidence. Moreover, in its 2007 comments to EPA on its proposed ozone standard, Ontario submitted substantial data regarding vulnerable subpopulations such as the young and old, and those with heart or respiratory ailments.<sup>21</sup> These comments observed that Canada's decision more than a decade ago to adopt the CWS of .065 ppm was largely predicated on data showing the impact of ozone on vulnerable subpopulations.<sup>22</sup> EPA appeared to agree with this point when it stated that the decreased lung function experienced by healthy individuals exposed to ozone concentrations of .060 ppm "should be considered adverse for asthmatic individuals." *See* 73 Fed. Reg. 16,436, 16,455/1 (Mar. 27, 2008). And yet, EPA failed to explain how an ozone NAAQS of .075 ppm adequately protects vulnerable subpopulations in light of the evidence presented, instead providing only a conclusory statement that it disagreed with the weight CASAC put on certain information. *Id.* at 16,483. EPA's failure to adequately address compelling

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<sup>21</sup> *See* Ontario's 2007 Comments, *supra* n. 1, pp. 2-5, 15-21.

<sup>22</sup> *See supra* note 1.

scientific data in the record and to provide a rational connection between these data and its .075 standard constitutes an arbitrary and capricious action.

This Court has admonished EPA on other occasions to promulgate health-protective NAAQS even where a pollutant's risks cannot be precisely identified, particularly when EPA is establishing an adequate margin of safety for vulnerable subpopulations. For example, this Court found that EPA unreasonably focused on the purported limitations of a study finding irreversible lung damage in children from long-term exposure to particulate matter. *Am. Farm Bureau*, 559 F.3d at 524-25. Once again, EPA has "too hastily discounted [the scientific evidence] as lacking in significance." *Id.* at 525; *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008). Because the agency record clearly demonstrates that EPA's scientific justification for the ozone NAAQS was fatally flawed, this Court should apply the same scrutiny as in *American Farm Bureau*, and require full consideration of the scientific data produced by Ontario and other parties during the rulemaking process in 2007, so that the resulting ozone NAAQS adequately protects Ontarians' health and environment, and complies with the requirements of the Clean Air Act.

Finally, in setting the ozone NAAQS, EPA was required to act consistently with its obligations under international law, the Foreign Relations Law of the United States, and the Ozone Annex. In a long line of international law precedent,

stretching back to the landmark *Trail Smelter* case<sup>23</sup> and continuing through Principle 21 of the Stockholm Declaration, it has been widely accepted that “[S]tates have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>24</sup> This principle has been incorporated into the Foreign Relations Law of the United States through the Third Restatement.<sup>25</sup> A compelling body of scientific evidence demonstrates that an ozone NAAQS of .075 ppm would continue to cause significant adverse health and welfare effects both in the U.S. and Canada. A stronger standard is necessary in order to comply with international law and the goals of the U.S.-Canada Ozone Annex.

### **CONCLUSION**

For the foregoing reasons, the Province of Ontario respectfully urges this Court to remand the 2008 ozone NAAQS to EPA for further review on an expedited basis in accordance with the schedule in the Brief of Petitioners State of New York, *et al.*

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<sup>23</sup> *Trail Smelter Case*, 35 Am. J. Int’l. L. 684 (1941).

<sup>24</sup> Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1416, 1420.

<sup>25</sup> Restatement of the Foreign Relations Law of the United States, Third § 601. *See also* Principle 2 of the Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF. 151/5 rev. 1, 31 I.L.M. 874.

DATED: May 1, 2012

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7), as modified by the Court's Orders of December 23, 2008 and February 16, 2012 (which permit *amicus curiae* Province of Ontario to file an opening brief of up to 3,600 words). The word count function of the word processing system used to prepare this brief indicates that it contains 3,598 words (inclusive of footnotes and citations but exclusive of certificate as to parties, rulings and related cases, tables of contents and authorities, glossary, attorney's certificates, and addendum).

Pursuant to Circuit Rule 32, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in Times New Roman font, a proportionately spaced typeface, 14 point size, using Microsoft Word 2007.

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Dated: May 1, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Corrected *Amicus Curiae* Brief for Province of Ontario was filed on May 1, 2012 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system, except as noted below.

I further certify that the foregoing will be served within two business days on the following parties or their counsel of record, who do not receive electronic notice via the Court's CM/ECF system, by causing two copies thereof to be mailed, first class, postage prepaid, to the following counsel:

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