NESCAUM
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The Clean Air Association of the Northeast States
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Arthur N. Marin, Executive Director

October 24, 2005

Stephen L. Johnson
U.S. Environmental Protection Agency
Air Docket, Clean Air Interstate Rule
Mail Code 6102T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket #OAR 2004-0076

Re: *Proposed Rulemaking on North Carolina's Section 126 Petition and Federal Implementation Plan for the Clean Air Interstate Rule*

Dear Administrator Johnson:

The Northeast States for Coordinated Air Use Management (NESCAUM) offer the following comments on the U.S. Environmental Protection Agency's (EPA's) proposal, published on August 24, 2005 in the Federal Register (70 FR 49708-49833), entitled *Rulemaking on Section 126 Petition From North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to the Clean Air Interstate Rule; Revisions to the Acid Rain Program*. NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

Beginning in August 1997, the NESCAUM states submitted petitions under Section 126 of the Clean Air Act to EPA, seeking expeditious relief from upwind sources whose emissions were interfering with their ability to attain or maintain the health-based federal ozone standard. Some of these Section 126 petitions have been granted, some have been denied, and others are still pending before your Agency. Section 126 is a critical tool to address interstate transport and must remain available to provide expeditious relief as appropriate and necessary.

The NESCAUM states have several concerns with EPA's proposal; some of which have also been expressed in comments submitted into this docket by the Ozone Transport Commission. We would like to highlight the following five issues:

First, we do not agree with EPA's position that a State Implementation Plan (SIP) or Federal Implementation Plan (FIP) submittal satisfies the requirements of a Section 126 petition. We do not believe that EPA can use a SIP or FIP submittal as the basis to deny the petition in question. Section 126 petitions and "SIP Calls" (issued under Section 110 of the Clean Air Act) are separate processes with distinct requirements and responses. If a State files a Section 126 petition, it deserves a remedy and the rapid response that Congress provided for in the statute. EPA must grant North Carolina's Section 126 petition on its merits, notwithstanding any other action the Agency might be considering. If actual emission reductions resulting from a SIP or FIP are identical, both in terms of the reductions and timing requirements of Section 126, then EPA should complete action on that petition by making a determination in accordance with Clean Air Act requirements.

Second, EPA must make a determination on a Section 126 petition on the basis of whether the named sources interfere with attainment and/or maintenance of the criteria pollutant standards in the petitioning state, and EPA, at the time of the finding must issue a remedy that aligns with the timelines specified in Section 126. EPA cannot postpone a remedy based on the promise of future controls or on the basis of the area attaining, but not maintaining the standard.

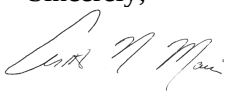
Third, EPA cannot use the Clean Air Interstate Rule (CAIR) to preempt future Section 126 petitions. Through Section 126, Congress provides states with clear authority to petition and EPA cannot preempt this authority through rulemaking. Moreover, even if EPA could preempt states from filing Section 126 petitions, NESCAUM believes that CAIR fails to adequately address "significant contribution" or address the range of highly cost-effective controls from electric generating units (EGUs) covered by CAIR as well as other sources. EPA should anticipate that there may be future Section 126 petitions filed, and should respond to those petitions based on their merit according to the procedure and timelines defined in the Clean Air Act.

Fourth, EPA does not have the authority to promulgate a FIP before a State fails to make a required SIP submission. We do believe that a conditional FIP may be an appropriate mechanism for the purposes of putting states on notice as to the type of remedy EPA will exact from states in the absence of a SIP responding to the CAIR. That model is consistent with the approach EPA used in implementing the NOx SIP Call in 1998.

Fifth, while we wholeheartedly support the notion of addressing transport “up front,” we are concerned that EPA views its action with respect to CAIR and the CAIR FIP as representing ultimate determinations that significant contributions from EGUs has been addressed, and that no further action is needed. EPA must now evaluate transport in concert with states’ attainment planning efforts and the high resolution modeling and data analyses that are being developed as part of those efforts. Such data will better equip EPA and the states to assess and respond to transport and its impacts on the states’ ability to attain and maintain the National Ambient Air Quality Standards.

If you or your staff have any questions regarding the issues raised in this letter, please contact Leah Weiss at the NESCAUM office at 617-259-2000.

Sincerely,



Arthur N. Marin
Executive Director

cc: NESCAUM Directors
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