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Paul J. Miller, Executive Director

July 12, 2019

Anne Idsal, Acting Assistant Administrator
U.S. Environmental Protection Agency, Office of Air and Radiation
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket ID No. EPA–HQ–OAR–2018–0170

Re: Response to Clean Air Act Section 126(b) Petition From New York – Proposed Action on Petition

Dear Acting Assistant Administrator Idsal:

The Northeast States for Coordinated Air Use Management (NESCAUM) offer the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed action *Response to Clean Air Act Section 126(b) Petition From New York* [84 Fed. Reg. 22787-22805 (May 20, 2019)]. NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

The EPA is proposing to deny New York's section 126(b) petition, which requested that EPA find emissions from a group of stationary sources located in the states of Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia significantly contribute to nonattainment and interfere with maintenance of the 2008 and 2015 ozone national ambient air quality standards (NAAQS) in Chautauqua County and the New York Metropolitan Area (NYMA) in violation of the Clean Air Act's (CAA's) "good neighbor provision" (CAA section 110(a)(2)(D)(i)).[1] In proposing to deny New York's petition, EPA asserts New York did not meet its statutory burden, and EPA did not independently find, that the identified group of sources emit or would emit in violation of the CAA's good neighbor provision for the 2008 and 2015 NAAQS in the areas covered by New York's petition.

NESCAUM disagrees with EPA's proposed denial of New York's petition for the following reasons.

1. *New York's petition is justified in identifying a large group of stationary sources under CAA section 126(b).*

[1] CAA section 126(b) references section 110(a)(2)(D)(ii), which the U.S. Court of Appeals D.C. Circuit has held is a scrivener's error occurring during a renumbering of section 110(a)(2)(E)(i) while drafting the 1990 Clean Air Act Amendments, and instead the correct reference is to section 110(a)(2)(D)(i). *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). Section 110(a)(2)(D)(i) requires that a state implementation plan "must 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 [national ambient air quality standard.]

EPA is requesting comment on whether New York's petition is justified in its identification of hundreds of sources across multiple states as within the context of a "group of stationary sources" under section 126(b). EPA speculates that "Congress certainly could not have envisioned that hundreds of stationary sources would be required to shut down within 3 months without a complete and compelling justification."[2] First, there is a "complete and compelling justification" as clearly laid out in the New York petition; "The upwind sources' significant contributions compromise the health and welfare of the 20 million citizens living within the [NYMA] and the 135,000 citizens in Chautauqua County and create a disproportionate economic burden for sources of ozone precursors in New York State."[3] EPA's own analysis finds that 19-31% of the ozone affecting poor air quality in the New York City metropolitan area comes from the nine states containing the sources covered by the petition.[4]

Second, as EPA recognizes in its proposed denial, section 126(c) contains an alternative to a three-month deadline for source shutdowns. Congress provided that EPA may allow the continued operation of a source for up to three years subject to the source meeting emission limitations and compliance schedules "as expeditiously as practicable."[5] EPA's basis for dismissing this alternative is that this "is a detailed analytic task that requires time and resources to develop."[6] In other words, EPA cannot be bothered to even consider another remedy short of a full shutdown in three months.

EPA is charged by Congress under the CAA to promote public health and welfare. In ignoring this basic statutory purpose, EPA seeks to hamstring itself by not making even the most remedial attempt at fulfilling its duty under the CAA with the tools provided by Congress. If EPA considers a three-month shutdown deadline too draconian, then EPA can and should propose other remedies under section 126(c) in keeping with the Agency's statutory obligation to protect public health and welfare from the harms of air pollution.

2. *Section 126 provides an independent and separate remedy when the CAA "good neighbor" provision cannot fully address interstate pollution transport.*

Where the "good neighbor" provision of the CAA fails to fully account for the extent of transported air pollution, section 126 provides a separate and distinguishable approach that can address this shortcoming. It also better reflects the science of air pollution transport. Under EPA's "four-step interstate transport framework" for determining significant contributions, the

[2] 84 Fed. Reg. 22787-22805 (May 20, 2019), at 22797.
[3] New York State Petition for a Finding Pursuant to Clean Air Act Section 126(b) (March 2018), at 1.
[4] EPA's May 2018 contribution threshold analysis for the 2015 ozone NAAQS, available at: https://www.epa.gov/sites/production/files/2018-09/contribution_threshold_analysis_for_2015_naaqs_ozone_transport_08-31-18_0.xlsx (accessed July 12, 2019).
[5] EPA has previously provided for a three-year compliance period in approving a past CAA sec. 126(b) petition. *See* "Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station," 76 Fed. Reg. 69052-69077 (November 7, 2011).
[6] 84 Fed. Reg., at 22797.

second step is evaluating state-specific linkages to downwind air quality problems at some threshold level of contribution (*e.g.*, one-percent of the relevant NAAQS). This framework, which is intended to align with state-specific planning requirements in SIPs, artificially partitions contributing source groups and regions according to state political boundaries. This is a legal construct of the CAA; it is not an approach one would adopt if thinking solely in terms of science. Because it is not completely based on science, the "good neighbor" provision can take a physically large "significant contribution" from a group of sources and partition it according to political state lines into a subset of "non-significant contributions" from a collection of smaller source groupings. A downwind state continues to receive the same large amount of pollution, but that large contribution gets parsed into something less according to state borders.

Section 126 provides a separate, independent provision that can capture the significant contribution of a group of sources irrespective of their state addresses. From the perspective of the atmosphere and the physics of pollution transport, the section 126 approach better reflects physical reality in those situations where the artificial divisions created by state borders mask a source groupings' collective contribution. In this light, EPA's repeated efforts to treat a remedy under the "good neighbor" provision as fully addressing a remedy under section 126 fails as a matter of science.

We note that this distinguishing feature is embodied within the text of the CAA. In the situation of the "good neighbor" provision, the remedy must address "emissions activity within the State." In the situation of section 126, the plain language requires that the remedy address "any major stationary source, or group of stationary sources" without reference to a group of stationary sources being located within only one state.

3. *In establishing linkages from upwind sources to air quality problems in New York State, EPA should retain a one-percent threshold level based on the relevant ozone NAAQS.*

Whether the 2008 or 2015 ozone NAAQS, EPA should continue to use a one-percent contribution threshold in its analysis of significant contribution. To raise the linkage threshold to 1 part per billion (or greater) in the face of increasingly stringent air quality health standards creates the perverse result that upwind contributions have to be greater in absolute terms in order to "contribute significantly" to a more stringent NAAQS than to prior weaker standards. This retrograde approach makes no logical sense and amplifies the inequitable practice of placing the burden on downwind states to compensate for an increased absolute amount of air pollution coming from out-of-state sources.

We also note that 16 eastern states, including most of the states that New York identified as having stationary sources significantly contributing to its air quality problems, signed a joint letter to EPA in 2009 expressing their support for a one-percent linkage threshold.[7]

[7] Letter to EPA Administrator Lisa Jackson, September 2, 2009 (signed by CT, DC, IL, IN, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VT, VA, WI). Available at https://otcair.org/upload/Documents/Correspondence/Final%20Recommendation%20Letter_090902.pdf (accessed July 10, 2019).

4. *EPA is incorrect in basing its proposed denial on a 2023 "attainment" projection when the New York City metropolitan area is required by the CAA to achieve attainment by an earlier year.*

The New York City metropolitan area (New York-N. New Jersey-Long Island, NY-NJ-CT) did not attain the 2008 ozone NAAQS by the 2018 deadline for moderate nonattainment areas. New York has requested reclassification to serious nonattainment with an attainment date of 2021. EPA has based its proposed denial of New York's 126(b) petition using an "attainment" projection in 2023. EPA cannot adopt a different attainment year than allowed under the statutory mandate of the Clean Air Act (*North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008)).

5. *The EPA has consistently failed to adequately address interstate ozone transport in a timely manner, and has functionally removed all options under the CAA for states to address themselves.*

EPA asserts as a basis for its proposed petition denial that Congress did not intend section 126 to apply to as large a number of sources as in the group identified by New York. EPA, however, has thwarted all other alternatives by not requiring upwind states to submit SIPs fully satisfying their good neighbor requirements, by denying all other section 126 petitions with smaller source groupings, and by denying a petition to add states that significantly contribute or interfere with maintenance in the Northeast to the existing Ozone Transport Region.

New York is pursuing its section 126 petition because of EPA's consistent failure to use the full complement of tools available under the CAA to address this persistent public health problem affecting New York and surrounding states. It is a specious response for EPA to assert New York's effort under section 126 is too broad after it has denied all other avenues under the CAA that would address New York's long standing ozone transport problem.

Sincerely,

Paul J. Miller
Executive Director

cc: NESCAUM directors
EPA Region 1
EPA Region 2