

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY - 7 2007

THE ADMINISTRATOR

Mr. Marc Bernstein
Special Deputy Attorney General
State of North Carolina
Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

Dear Mr. Bernstein:

The U.S. Environmental Protection Agency has considered the June 26, 2006, petition you submitted on behalf of the State of North Carolina. This petition asks the Agency to reconsider specific issues relating to EPA's denial of a petition submitted by North Carolina under section 126 of the Clean Air Act. The section 126 petition requested EPA to establish control requirements for electric generating units in 13 states based on findings that these sources are significantly contributing to fine particle and/or 8-hour ozone nonattainment and maintenance problems in North Carolina. After careful consideration and for the reasons explained below, EPA denies the North Carolina petition for reconsideration.

EPA's action denying North Carolina's section 126 petition was published in the *Federal Register* on April 28, 2006. See 71 Fed. Reg. 25328 (Apr. 28, 2006) (Air Pollution Control – Transport of Emissions of Nitrogen Oxides (NO_x) and Sulfur Dioxide (SO₂): Final Rule). The denial was developed through processes that involved extensive public participation, including a proposal and two public hearings. See 70 FR 49708 (August 24, 2005).

EPA received numerous comments on the proposed denial of the section 126 petition, including written and oral comments from North Carolina. In its comments, North Carolina argued, in essence, that section 126 requires a specific environmental result: reductions of emissions from designated upwind sources linked to North Carolina nonattainment or maintenance problems, which reductions are to occur in 3 years. Thus, North Carolina concluded that if an approved State Implementation Plan or a Federal Implementation Plan does not provide this result within the 3-year time frame, then EPA must grant the section 126 petition.

EPA responded to these comments in the preamble to the section 126 denial rule and the response to comments document. Our response stated that section 126 provides a mechanism forcing EPA to take action to eliminate the significant contribution to downwind nonattainment and that once EPA has taken action to eliminate the significant contribution, there is no longer a cause of action under section 126, 71 FR 25335 (April 28, 2006).

North Carolina has now submitted this petition for reconsideration that asks EPA to reconsider issues in the section 126 denial rule. EPA disagrees with the assertions in the petition for reconsideration and denies the petition because it fails to show that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act.

Section 307(d)(7)(B) of the CAA provides for reconsideration of a rule if two criteria are met. First, a person raising an objection must demonstrate either that it was impracticable to raise the objection during the public comment period or that the grounds for the objection arose after the period for public comment (but within the time specified for judicial review). Second, the petitioner must show that the objection is of central relevance to the outcome of the rule. We do not believe that these criteria are satisfied for any of the issues raised in your petition.

North Carolina asserts that EPA, in the section 126 denial rule, announced a “new and unlawful” method for determining what emissions are considered to contribute significantly to downwind states’ nonattainment. Specifically, the petition states that “EPA has used the timing of controls – which formerly it had said was a function of technical feasibility constraints and was considered only after ‘significant contribution’ had already been determined, as an input into its evaluation of ‘significant contribution.’” Petition p. 1. The premise of this argument is incorrect. EPA applied the same test for significance of contribution in the section 126 proceeding as it did in the Clean Air Interstate Rule: upwind state’s emissions are considered to contribute significantly to downwind states’ nonattainment, or their ability to maintain a standard, if such emissions have a demonstrable impact on the downwind state’s air quality, and *whether those emissions may be eliminated through controls that may be considered highly cost effective*, 70 FR 25174-175 (May 12, 2005) (CAIR final rule, emphasis added). We further made clear that issues of feasibility can be relevant in assessing the highly cost effective prong of the test: “in determining the appropriate level of controls, we considered feasibility issues – as we did in the NO_x SIP Call – specifically ‘the applicability, performance, and reliability of different types of pollution control technologies for different types of sources; ... and other implementation costs of a regulatory program for any particular group of sources’”. 70 FR 25175 quoting CAIR proposal 69 FR 4585; see also *id.* at 25219 (“[i]f there was insufficient labor for the amount of air pollution controls that will need to be installed, the program would in jeopardy. For instance, shortages in manpower could lead to high wage rates that could substantially increase construction costs for pollution controls and reduce the cost effectiveness of this program”). Issues of feasibility, which can include issues of timing, can influence control costs and are therefore of obvious relevance in determining which controls are highly cost effective.

Moreover, prior experience under the NO_x SIP Call confirms that pollution control costs increase as feasibility of control becomes more difficult. During the 2002-2004 period, selective catalytic reduction systems were installed to control NO_x on approximately 140 units. Significant price increases for SCR systems were reported for this period, reflecting such factors as shortages of skilled labor, especially boilermakers, 70 FR 25219. CAIR will require installation of SCR and the more complicated flue gas desulfurization systems on 340 units. Installation of more than twice as many and increasingly complex controls in a shorter time than available for the NO_x SIP Call, as North Carolina is requesting, would necessarily result in major increases in compliance costs.

The North Carolina petition seizes on one statement in the CAIR record, made in a different context, to support its contention that issues of feasibility are divorced from consideration of what controls are highly cost effective. In responding to comments that EPA should consider emission reductions achieved in the initial phase of CAIR control in determining whether further controls in 2015 are necessary, EPA responded that CAIR is a single program and that the requirement of controls occurring in two phases was due to feasibility issues, so that the significant contribution determination applied to both phases of the program, although, based upon feasibility, only certain controls were required in the first phase. In this context, the Agency made the statement quoted in North Carolina's petition: "EPA views the CAIR emission reduction requirement as a single action. It is implemented in two phases solely for reasons of feasibility. Thus, once a state's emissions are determined to contribute significantly to downwind nonattainment, the upwind state should reduce its emissions by the amount that results from implementation of highly cost-effective controls. The timetable for these reductions, but not their necessity, is determined by feasibility constraints," response to Comment Document, p. 58. This response on a different issue – whether CAIR is one program or two – does not address the different issue of whether issues of feasibility are considered in assessing which controls are highly cost-effective. We reiterate that since issues of feasibility influence how much controls will cost, it is obviously necessary to consider feasibility issues as part of determining which controls are highly cost effective.

Since EPA applied the identical test in its action on the section 126 petition as it applied in CAIR, the petition for reconsideration incorrectly states that it addresses a new issue about which there was no opportunity to comment during the section 126 proceeding. All issues of feasibility and cost effectiveness of controls could have been raised by North Carolina during the comment period to CAIR. Accordingly, we deny the request to reconsider this issue.

North Carolina next argues that recent modeling demonstrates that substantially more SO₂ reductions are both technically feasible and cost effective, and hence that further reductions would be highly cost effective and therefore are part of the significant contribution to North Carolina nonattainment; petition pp. 10-24. The petition refers to modeling prepared by EPA for legislative use, which modeling was made available on October 27, 2005, shortly after the close of the comment period on the proposed denial of North Carolina's section 126 petition (although well before the end of that proceeding). Even assuming that this information could not have been presented to EPA in the course of this section 126 proceeding, this aspect of the petition is misplaced. EPA determined its approach for assessing which emissions contribute significantly in CAIR, not in the section 126 proceeding. North Carolina's section 126 petition is based on the modeling EPA conducted for CAIR. Consequently, to the extent the information is relevant at all, it would be in the context of CAIR (or conceivably in another section 126 petition, see 71 FR 25335 n. 6), not in this proceeding. Moreover, EPA's principal basis for denying North Carolina's argument that section 126 commands relief within 3 years is that this is true only where a section 126 cause of action exists. No such cause of action exists here because CAIR and the CAIR FIP have rectified the underlying section 110 (a) (2) (D) SIP deficiency, 71 FR 25335-336. North Carolina's argument and information presented here do not address that fundamental issue, and hence the information is not of central relevance to this proceeding.

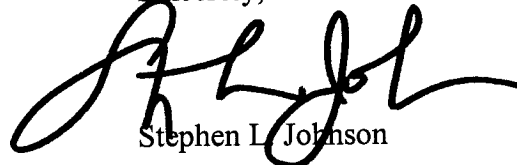
North Carolina next seeks reconsideration of a footnote in the final rule, 71 FR 25336 n. 8, and argues that EPA inaccurately characterized the NO_x SIP Call as having a six-year time frame for reductions. North Carolina instead maintains that the NO_x SIP Call in fact required all controls to be implemented in 3 years, with states having to demonstrate compliance with the budgets in six years. Petition p. 25. The issue of the duration of the remedy period in the NO_x SIP Call was raised by North Carolina itself in its comments, to which EPA was responding. Thus, this issue was not newly raised after the period for public comment, and North Carolina could and has commented upon it. Reconsideration of the issue is thus inappropriate. Indeed, North Carolina itself recognizes that this issue is likely not appropriate for reconsideration, petition p. 25 n. 7.

North Carolina next challenges EPA's statement that EPA "might" consider a higher level of cost effectiveness for emission reductions contributing significantly to maintenance problems, as opposed to those contributing significantly to nonattainment, Petition p. 27. There is no action here to reconsider. The petition recognizes, correctly, that the statement in question was a "suggestion", and therefore, not a definitive agency position. Accordingly, EPA is not granting reconsideration of this issue.

North Carolina's final argument is that "recent data and modeling confirms that North Carolina has attainment and maintenance issues that entitle it to relief," petition p. 29. The petition refers to projected eight-hour ozone modeling results for the Charlotte-Gastonia-Rock Hill area, asserting that this modeling shows that these areas are projected to either be in nonattainment or close to it in 2009. However, the petition presents these conclusions, but contains virtually no information as to how the results were obtained. The affidavit from Sheila Holman appended to the petition essentially concedes that the modeling results are based on an undocumented modeling process: "These model runs are being completed as part of the federally mandated SIP attainment planning process, which is not complete yet. Therefore, [North Carolina Division of Air Quality] has not produced any reports of this modeling. The model results will be reported when the State completes its SIP demonstration," (Affidavit of Sheila Holman, para. 6.) The petition also does not indicate potential deficiencies with EPA's modeling for CAIR, which reached different conclusions under transparent modeling assumptions and inputs. Without any analysis showing how North Carolina obtained its results, or even a description of how its modeling differs from that which EPA conducted and explanations for these differences, EPA cannot rationally evaluate the conclusory results presented, and the information consequently is not of central relevance to this proceeding.

If you have any questions concerning our decision, please contact Steven Silverman in the Office of General Counsel at (202) 564-5523.

Sincerely,

A handwritten signature in black ink, appearing to read "S. L. Johnson", written in a cursive style.

Stephen L. Johnson