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

MAR 15 2006

THE ADMINISTRATOR

Mr. Roy Cooper
Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

Dear Mr. Cooper:

The Environmental Protection Agency has received the July 2005 petition for reconsideration of the Clean Air Interstate Rule (CAIR) you filed on behalf of the State of North Carolina (Petitioner). This petition asks EPA to reconsider specific aspects of the CAIR. We appreciate your continued interest in this rule and your overall support for the CAIR. As you are aware, EPA received numerous petitions for reconsideration of the CAIR and has initiated processes to reconsider several aspects of the rule. After careful consideration and for the reasons explained below, EPA denies the requests in your petition for reconsideration.

The CAIR, published in the Federal Register on May 12, 2005 (70 FR 25162), is a powerful component of the Bush Administration's plan to help over 450 counties in the eastern United States meet air quality standards for ozone and fine particles. EPA determined that reductions in upwind precursor emissions will assist downwind areas in meeting the national ambient air quality standards (NAAQS). EPA also determined that attainment will be achieved in a more equitable, cost-effective manner than if each nonattainment area attempted to achieve attainment with the ozone and fine particles NAAQS by implementing local emissions reductions alone. The CAIR was developed through a process that involved extensive public participation. We received and responded to thousands of comments and held public hearings in February and June 2005. The robust public dialogue was an important part of the rulemaking process.

EPA recognizes the continuing significant public interest in the CAIR. Following publication of the rule, EPA received twelve separate petitions for reconsideration, including the one you submitted. In response, EPA granted reconsideration on and reopened for public comment the following six issues:

(1) the definition of "electric generating units" as it relates to solid waste incinerators (70 FR 49708, 49738);

(2) claims that inequities result from the sulfur dioxide (SO2) allocation methodology to be used by States participating in the EPA-administered trading program (70 FR 72268, 72272);

(3) EPA's use of fuel adjustment factors (1.0 for coal, 0.6 for oil, and 0.4 for gas) in establishing State nitrogen oxides (NOx) budgets (70 FR 72268, 72276);

(4) certain inputs to the fine particle (PM2.5) modeling used to determine whether Minnesota should be included in the CAIR region for PM2.5 (70 FR 72268, 72279);

(5) EPA's determination that Florida should be included in the CAIR ozone region (70 FR 72268, 72280); and,

(6) impact of New York v. EPA on certain analyses prepared for the final CAIR (70 FR 77101).

EPA published Federal Register notices announcing the reconsideration processes and requested public comment on the issues under reconsideration. EPA is taking final action on reconsideration of these issues in a separate rulemaking signed today.

Your petition raises four additional issues. First, you ask EPA to reconsider its interpretation of the "interfere with maintenance" prong of section 110(a)(2)(D)(i)(I). Second, you ask EPA to reconsider its decision for purposes of assessing significance of upwind State contribution, to identify downwind nonattainment areas on the basis of their projected air quality status in 2010. Third, you ask EPA to reconsider the threshold for determining if a State significantly contributes to downwind PM2.5 nonattainment. Fourth, you ask EPA to reconsider its decision to include a compliance supplement pool (CSP) in the final CAIR. We address each of these issues in turn below. As noted, EPA has concluded that reconsideration of these four issues is not warranted under section 307(d)(7)(B) of the Clean Air Act. Consequently, EPA is not required to respond to Petitioner's substantive arguments. Nonetheless, below EPA also discusses briefly each issue of concern to Petitioner.

The "Interfere with Maintenance" Prong of Section 110

The Petition states that EPA announced a new interpretation of the "interfere with maintenance" prong of section 110 (a)(2)(D) in the final CAIR, and that the interpretation is legally impermissible. The specific interpretative issue raised is whether downwind States can be identified as receptors for maintenance reasons even if upwind emissions do not significantly contribute to nonattainment in the downwind State. The Petition says further that because EPA first announced this interpretation in the final rule, there was no opportunity to comment on it.

EPA disagrees that opportunities to comment on this issue were lacking during the CAIR rulemaking. In the proposed CAIR, EPA neither identified any areas as being in the CAIR region based solely on maintenance concerns, nor conducted any independent analysis of whether upwind States contributed to maintenance problems in downwind areas. This is similar to EPA's approach in the NOx SIP Call, where EPA likewise did not conduct any independent

analysis of whether upwind States contributed to downwind maintenance problems.

The rulemaking process thus provided a full opportunity to comment on the issue of whether interference with maintenance should be invoked as an independent reason for identifying upwind States. Indeed, EPA received comment to this effect, showing that the issue was presented for public comment. See, e.g., Comments II.A. 9 and II.A. 12 in Corrected Response to Significant Comments on the Proposed Clean Air Interstate Rule (EPA, 2005). Therefore, since Petitioner has failed to demonstrate that it was impractical to raise the issue in public comment (since commenters did so) and, for the same reason, fails to show that the issue was not presented for public comment, EPA is denying this aspect of the petition.

We also note, however, that the Petitioner has raised a similar issue in its section 126 Petition and its comments on EPA's proposal regarding that Petition. EPA is responding substantively to those comments in the section 126 Petition proceeding. These responses can be found in section II of the preamble to the final rule responding to the section 126 Petition, and in individual responses to comment. As a practical matter, therefore, all of Petitioner's comments on this issue are being addressed by EPA.

Identification of Downwind Nonattainment Areas

The Petition argues that EPA erred substantively in assessing significance of contribution based on projected conditions in downwind States in the 2010 base case, which models downwind air quality impacts of emissions from multiple source categories, assuming implementation of existing Federal and State regulations. The Petition states that as a matter of law, the determination must be based on current nonattainment conditions in downwind States. As grounds for reconsideration, the Petition states that the issue was not of practical concern at proposal, because one area in North Carolina was projected to be in nonattainment for ozone in the 2010 base case (and, presumably, because several areas were projected to be in nonattainment for PM2.5) so that "it was impractical to submit comments on this aspect of the rule."

The Petition does not present adequate grounds for reconsidering this issue. The issue was obviously presented at proposal, since EPA used the 2010 base case for all of its significant contribution determinations. See, e.g., 69 FR at 4600, 4602-03 (ozone), 4607-09 (PM2.5). EPA was following its own prominent precedent in doing so. See 63 FR at 57375 (adopting same approach in the NOx SIP Call). The issue that the Petitioner wishes to raise is legal (how to construe section 110 (a) (2) (D) of the CAA), and so does not depend on factual information which might have been unavailable at proposal. In short, the issue could and should have been raised in comments to the proposed rule. Since the Petition fails to demonstrate that it was impractical to raise the issue in public comment, and, as noted, the grounds for the Petition did not arise after the public comment period, EPA is denying this aspect of the Petition.

As it happens, North Carolina has raised a similar comment in its section 126 Petition to EPA, and EPA is responding substantively to the argument in that proceeding. See section II of the preamble to the final rule and other comment responses. As a practical matter, therefore, this issue is raised before the Agency.

PM2.5 Threshold for Determining Significant Contribution

Petitioner also asks EPA to reconsider the 0.2 $\mu g/m^3$ significance threshold for PM2.5 that was used in EPA's air quality modeling analyses to determine whether a State's emissions contribute significantly to PM2.5 nonattainment or maintenance problems in a downwind State. As grounds for reconsideration, Petitioner claims it could not provide meaningful comment because it claims EPA did not provide an adequate analysis in the proposed rule of the 0.2 $\mu g/m^3$ threshold. Further, Petitioner contends the selection of the threshold is arbitrary. The EPA disagrees for the reasons discussed below.

In the CAIR proposal, EPA proposed to use a threshold of 0.15$\mu g/m^3$ and provided analyses based on both 0.15 $\mu g/m^3$ and 0.10 $\mu g/m^3$ thresholds. It also explicitly solicited comments on "the merits of the proposed 0.15 $\mu g/m^3$ threshold level . . . [and] request[ed] comments on the use of higher and lower thresholds . . . ." (69 FR 4584). EPA disagrees that it was impractical for Petitioner to comment on the threshold level during the comment period. In fact, EPA received numerous timely comments recommending the use of alternative thresholds, both higher and lower. Ultimately, in response to comments that the threshold level should not exceed the precision of the PM2.5 NAAQS, EPA revised and rounded the threshold to 0.2. $\mu g/m^3$ (70 FR 25191). EPA did not modify its basic conclusion; the Agency explained in detail in the proposed CAIR that the threshold for evaluating the air quality component of determining whether an individual State's emissions "contribute significantly" to downwind nonattainment of the PM2.5 standard should be very small compared to the NAAQS. Further, in rounding the threshold from 0.15 to 0.2, EPA acted in accordance with well-established rounding conventions, whereby numbers ending in 5 are rounded up. For these reasons, EPA believes that adequate opportunity was provided to comment on the PM2.5 threshold. Petitioner has not shown that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act, and has not presented evidence sufficient to convince EPA that the PM2.5 threshold should be changed.

Compliance Supplement Pool

The State of North Carolina also asks EPA to reconsider its decision to establish a Compliance Supplement Pool (CSP) for the annual NOx trading program. As grounds for reconsideration, it argues that EPA did not provide adequate opportunity for public comment on this issue and therefore must reconsider its decision. North Carolina also argues that two specific aspects of the CSP should be revised. First, the State claims EPA should not allow distribution of CSP allowances to facilities demonstrating a need for such allowances to avoid "undue risk to the reliability of electricity supply...." Second, the State claims EPA should provide additional guidance regarding what constitutes "early reductions" that may qualify a source to receive CSP allowances. After careful consideration and for the reasons below, EPA denies Petitioner's request for reconsideration of the CSP.

EPA provided adequate opportunities for public input on the potential use of a CSP. In the Supplemental Notice of Proposed Rulemaking (SNPR), EPA explicitly solicited comment on "whether NOx ERCs [emission reduction credits] should be included in the CAIR and, if so, how a NOx ERC program should be structured" (60 FR 32702). EPA discussed several approaches it could use to create such a program including creating a cap on the amount of ERCs that could be

created (60 FR 32702). After considering all significant comments submitted on the SNPR, EPA opted to create a compliance supplement pool that would cap, at 200,000 tons, the amount of ERCs that could be created. EPA thus believes that it provided adequate opportunity for public comment on this issue. Petitioner has not presented evidence showing that it was impractical for them to comment during the public comment period or that the grounds for this petition arose after that comment period. Thus, Petitioner has failed to show that reconsideration is warranted under section 307(d)(7)(B).

Further, EPA disagrees with North Carolina's assertions that two specific aspects of the CSP should be changed. North Carolina asserts that the CSP includes a "compliance exemption" for specific facilities that have difficulty reducing their emissions by 2009, but that the EPA's methodology for determining reduction levels incorporates available labor and materials, hence there should be no room for such a compliance exemption. North Carolina also argues that the final rule fails to provide adequate guidance regarding the early reduction aspect of the CSP, and claims the regulation allows for distribution of credits to any source that achieves unnecessary emissions reductions in 2007 and 2008. Petitioner argues that sources should not be able to acquire allowances for pre-existing control technologies activated prior to finalization of CAIR. Petitioner claims that to achieve long term reductions, early reductions must stem from recently installed control equipment.

EPA believes the CSP, as an element of the model NOx trading rules, will encourage early emission reductions and create a smooth transition to the 2009 emission requirements. EPA added a CSP of approximately 200,000 tons at the same time it accelerated the NOx compliance date from 2010 to 2009 (70 FR 25286). EPA budgets CSP allowances for each State (70 FR 25232) and identifies mechanisms through which States may opt to allocate allowances to individual units. The program gives States flexibility in how to distribute their share of the 200,000 CSP allowances. States may distribute CSP allowances through two mechanisms:

1. on a pro–rata basis to sources that implement NOx control measures resulting in reductions in 2007 or 2008 that are beyond what is required by any applicable State or Federal emissions limitation, and

2. States may distribute CSP allowances based on the demonstration of a need for an extension of the 2009 deadline for implementing emission controls. The demonstration must show unacceptable risk either to a source's own operation or its associated industry (70 FR 25263).

EPA believes it is important to give States flexibility to take steps to encourage early reductions in emissions and, if necessary, to provide short term assistance to facilities that demonstrate a need for such allowances to avoid "undue risk to the reliability of electricity supply" (70 FR 25351).

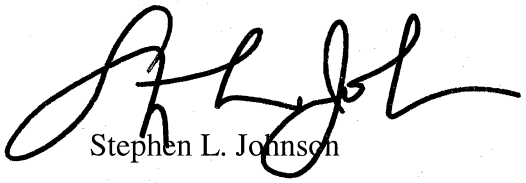
EPA believes the CSP will help ensure reliable, affordable electricity for the public welfare, while encouraging early emission reductions. As noted in the final CAIR, the CSP allowance is small relative to the budget (13 percent). EPA does not agree with Petitioner's concern that the CSP excuses upwind States from emission reductions; it only permits flexibility

in achieving those goals for critical facilities. Controls are in place to limit the allowance tons distributed, and ensure that they are only awarded on a 1:1 ratio with facility emission reductions.

The CAIR provides adequate guidance to States regarding the allocation of CSP allowances. Sources would not receive CSP allowances for pre-existing technology unless they took extra steps to utilize them to reduce emissions beyond existing requirements. One example would be the wintertime operation of a selective catalytic reduction (SCR) by a source that may have originally installed the SCR only for an ozone-season emission control program. The reductions from wintertime operation would not be required by current ozone season programs, thus would be considered surplus reductions. The market-based incentive inherent in the CSP will facilitate early emission reductions, not impede them, and provide the petitioner with better air quality at an earlier date.

Thank you for your interest in the final CAIR. EPA looks forward to working with you as implementation of the rule proceeds. If you have any questions about this letter, please contact Sonja Rodman in the Office of General Counsel at 202-564-4079.

Sincerely,



Stephen L. Johnson