

US EPA ARCHIVE DOCUMENT



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

MAY - 7 2007

THE ADMINISTRATOR

Ms. Marily Nixon
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516-2520

Dear Ms. Nixon:

The U.S. Environmental Protection Agency has considered the June 26, 2006, petition you submitted on behalf of the Southern Environmental Law Center that asks the Agency to reconsider specific issues relating to EPA's denial of a petition submitted by the State of North Carolina under section 126 of the Clean Air Act. North Carolina's 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. For the reasons explained below, EPA denies the SELC 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 petition, including written and oral comments from SELC. In its comments, SELC 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, SELC 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. The Agency's 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).

SELC 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 and denies the petition for reconsideration because it fails to show that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act (CAA).

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.

SELC argues that recent data and modeling confirms that North Carolina has attainment and maintenance issues that entitle it to relief; petition pp. 4-6. The petition refers to projected 8-hour ozone modeling results for the Charlotte-Gastonia-Rock Hill area conducted by North Carolina, asserting that this modeling shows that these areas are projected to either be in nonattainment or close to it in 2009. The petition presents these conclusions, but it contains virtually no information as to how the results were obtained. The affidavit from Sheila Holman appended as the second attachment 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 the Clean Air Interstate Rule, 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.

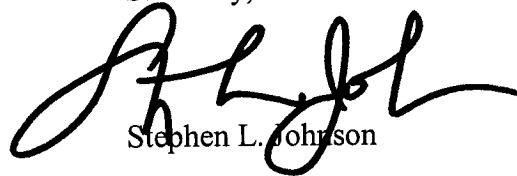
SELC next argues that recently concluded monitoring conducted by the North Carolina Division of Air Quality shows that Mecklenburg County is in nonattainment for the annual fine particle (PM_{2.5}) national ambient air quality standard and that EPA should reevaluate its section 126 determination in light of this information and also determine if upwind sources contribute significantly to nonattainment in Mecklenburg County. EPA does not believe this information to be of central relevance to the section 126 proceeding. First, the determination of whether an upwind source contributes significantly to a downwind receptor's PM_{2.5} nonattainment is based on air quality status in 2010, not present nonattainment, 71 FR 25336-37. Thus, information on current nonattainment status is not relevant to the issue of significance of contribution. Moreover, EPA determined in the CAIR proceeding that Mecklenburg County would be in nonattainment for the PM_{2.5} NAAQS in 2010, 70 FR 25252 at Table VI-10, and accordingly required upwind states to eliminate their significant contribution to North Carolina's PM_{2.5} nonattainment. Furthermore, since EPA projected North Carolina counties other than Mecklenburg to be in nonattainment for the PM_{2.5} NAAQS in 2010, *id.* at 22251, upwind states are required to eliminate their significant contribution to North Carolina's PM_{2.5} nonattainment

whether or not Mecklenburg County (or any additional North Carolina county) is in nonattainment. Thus, EPA does not see that this information has legal or practical consequence, and so it cannot be of central relevance to this proceeding.

Finally, SELC argues that the new modeling and monitoring information illustrates that upwind states are contributing significantly to North Carolina's ability to maintain compliance with the PM2.5 and ozone NAAQS; petition pp. 8-9. As explained above, the ozone modeling referred to cannot be rationally assessed because of the lack of documentation for its results. The PM2.5 monitoring information is for a period not relevant in assessing significance of contribution of upwind sources. Therefore, the information is not of central relevance to this proceeding, and there is no basis for granting reconsideration of this issue.

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. The signature is positioned above the printed name 'Stephen L. Johnson'.

Stephen L. Johnson