PUBLIC HEARING ON
NOTICE OF PROPOSED RULEMAKING
ON SECTION 126 PETITIONS

Proposal to Amend Two Respects
of May 25, 1999 Final Rule
(64 FR 28250)

July 8, 1999
9:00 a.m.

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MR. HELMS: I'd like to welcome you here today and thank you for attending EPA's public hearing on the proposal to amend two aspects of the final rule on section 126 petitions. This final rule was signed by the administrator on April 30, 1999.

I'm Tom Helms with EPA's Office of Air Quality Planning and Standards. Alexander Tietz of our Office of General Counsel is here with me. Peter Tsirigotis, from our Acid Rain Division, will be here very shortly. We're glad to have you here. Let me give you a little bit of background and purpose of the session today.

In 1997-'98 time frame, eight northeast states submitted petitions under section 126 of the Clean Air Act seeking to mitigate the interstate transport of NOX emissions, a main precursor of the formation of ozone. All of the states petitioned. All of these eight states petitioned under the 1-hour ozone air quality standard and five of the states also petitioned under the 8-hour ozone standard.

On April 30th, when EPA issued a final rule,
in that rule, EPA determined that portions of the 1-hour and the 8-hour petitions that were submitted were technically approvable. However, EPA deferred making the section 126 petition findings that would trigger control requirements for certain upwind stationary sources as long as the states and EPA stayed on a schedule to meet the requirements of EPA's NOX SIP call. The NOX SIP call is a related action that addresses NOX transport in the eastern half of the United States.

We're now proposing today to amend certain aspects of the section 126 final rule in light of two recent court decisions by the U.S. Court of Appeals in the District of Columbia. In one ruling, the Court remanded the 8-hour air quality standard for ozone which formed the underlying technical basis for certain EPA determinations under section 126. In that ruling, the Court left the 8-hour standard in place based on its determination that it could not be enforced.

In a separate action, the D.C. Circuit granted a motion to stay the SIP submission deadlines established pursuant to the NOX SIP calls.
Because there is no longer a set schedule for complying with the NOX SIP call, this section 126 proposal, the one we're talking about today, removes the link between the NOX SIP deadline and the final action granting or denying the 126 petitions. Instead, EPA is proposing to take a final action later this year which will simply make the section 126 findings.

We're also proposing to indefinitely stay the 8-hour portion of the rule pending further developments in the ongoing NAAQS litigation. In the April 30th rule, EPA made separate technical determinations under the 1-hour and the 8-hour standards. The 1-hour standard determinations are not affected by this Court rulemaking.

In a separate action, EPA recently stayed the effectiveness of the April 30th rule on an interim basis until November 30th of this year, while EPA conducts the rulemaking that we're discussing today. EPA expects to promulgate a final rule on this proposal on or before November 30th of this year, when the interim stay expires. To address the possibility of any delay in this final rule, EPA is
also taking comment on an extension of the interim final stay of the April 30th rule in the event that EPA needs more time to complete the final rule.

While EPA does not think that an extension will be necessary, we anticipate that if one is, it will be over a two- or three-month time frame. Providing for this possible extension, if in fact we need it, would ensure that the automatic trigger deadlines for the section 126 findings, which are now in place, would not become effective through a lapse in the stay before EPA can take final action on this proposal.

What success for today. We are here today to listen to your comments on the proposal. EPA is only soliciting comments on the specific changes proposed in response to the court rulings. EPA is not reopening the remainder of the April 30th final ruling for public comment and reconsideration.

A transcript of this hearing will be prepared. It will be available for inspection and copying at EPA's Air and Radiation Docket Office and on our Internet web site in approximately 30 days.
Let's focus on the ground rules for conducting this hearing. This hearing is not intended to be adversarial in nature. You will simply come forward, make your statement. EPA may ask clarifying questions of any speaker as appropriate.

I'll call out each speaker one at a time and ask you to come forward down to this podium. We'll allow you 10 minutes to make your presentation. The notice said five. We'll in fact allow 10 minutes. We'll hold up a sign saying one minute remaining after nine minutes.

Hopefully you brought copies of your statement and you've left them out there for the record. As you come forward and start your presentation, please identify yourself and the company or the organization that you represent.

We have a contractor, E.H. Pechan and Associates, here today to help us and support us. In addition, JoAnn Allman of my staff and Linda Lassiter are out in the back foyer. They're here to assist you in any way possible. We have an overhead projector and slides if you should choose to use them.
Again, I want to introduce Peter Tsirigotis, Alexandra Tietz. They'll be here with me manning this public hearing.

Are there any questions before I begin?

(No questions.)

MR. HELMS: Okay. Let's get the show moving.

We have signed up right now four presenters and then we're having a -- someone is turning in testimony. It will not be read. So we have got four people, Norm Fichthorn. Norm, sorry about that. You're first on.

Come forward.

PRESENTATION BY NORMAN FICHTHORN

MR. FICHTHORN: Good morning. My name is Norman Fichthorn, and I'm with the law firm of Hunton and Williams. I'm here on behalf of the utility Air Regulatory Group to provide initial comments on EPA's proposed revisions to its rule under section 126 of the Clean Air Act.

EPA is limiting this new rulemaking to two changes. Both changes are attempts to react to decisions of the U.S. Court of Appeals for the D.C.
Circuit that have disrupted EPA's plan to impose massive additional NOX reductions on electric utilities.

First, EPA recognizes that, under the Court's May 14 decision in the American Trucking Associations case, the 8-hour ozone standard is unenforceable. So EPA is proposing to stay indefinitely its section 126 findings of significant contribution to projected 8-hour nonattainment, pending any further developments in that litigation.

Second, reacting to the Court's May 25 decision that states challenging the SIP call had met the criteria for a stay of the SIP submissions, EPA is severing the link in the existing section 126 rule between the dates for section 126 findings and the dates for submission of and EPA action on implementation plan revisions. The proposed rule would instead make 1-hour section 126 findings effective upon conclusion of the new rulemaking this fall, without regard to any date for SIP submissions.

On June 14th, Administrator Browner wrote the governors of the section 126-petitioning states about
EPA's plan to proceed with 1-hour findings, quote, unimpeded, close quote, by the Court's stay. And on that day, the Administrator said at a briefing that EPA was decoupling section 126 from the SIP call to avoid having EPA's NOX control scheme become ensnared, entangled and threatened, to use her words, by judicial proceedings.

At this time, we offer the following initial comments.

First, UARG welcomes EPA's recognition that it cannot move forward with 8-hour findings. Rather than merely stay these findings, however, EPA should proceed to deny the 8-hour parts of the section 126 petitions on the grounds not only that the 8-hour standard is unenforceable but also that, even without the ATA holding, it turns the Act on its head to impose emission controls on out-of-state sources to address projected future 8-hour nonattainment before any state is required to revise its own SIP to address that nonattainment within its own borders.

Second, EPA should not cut the link between dates for section 126 findings and dates for
implementation plan actions. Just six weeks ago, in publishing the section 126 rule, EPA described compelling reasons for that link; giving effect to the central role of the implementation plan process, avoiding unnecessary and burdensome competing control schemes, and avoiding impermissible pressure on states to conform their SIPs to the section 126 controls. These reasons for maintaining linkage have not disappeared merely because EPA has encountered a judicial impediment to its NOX control strategy.

Finally, UARG urges EPA to consider on the merits the comments that it receives on this proposal. We are not encouraged by the Administrator's characterization of the proposal on June 14th as a, quote, technical step, or by her letter to the governors assuring EPA's state allies that it will decouple section 126 from the SIP call.

Thank you for the opportunity to present these comments. UARG will submit written comments by the end of the comment period.

Do you have any questions?

MR. HELMS: Thank you.
MR. FICHTHORN: Thank you.

MR. HELMS: No questions. Thank you very much.

Our next presenter from the State of Michigan, Bryan Roosa.

PRESENTATION BY BRYAN ROOSA

MR. ROOSA: Good morning. My name is Bryan Roosa, and I am the Deputy Director of the State of Michigan, Washington Office. This testimony is provided on behalf of the Michigan Department of Environmental Quality. I will gladly convey any questions you may have for a written response from the Department. My comments today address the U.S. EPA's latest in a long and incredible series of proposed rulemakings aimed at reducing ozone transport.

EPA's attempt to apply a draconian level of control on sources in the eastern U.S. has been a tangled web of misapplied legal authority and inadequate technical analysis. This most recent proposal is yet another inappropriate action.

At the heart of our disagreement with this rulemaking, and related rulemakings, is that the NOX
reductions EPA is seeking are not necessary to address Michigan's contribution to ozone problems in downwind states. We have repeatedly submitted detailed comments and technical analysis which confirms this extreme level of control is unnecessary.

We have also consistently argued that the level of control in Michigan, or any other state for that matter, should be based on the state's contribution to nonattainment in another state. In fact, my governor and the governors of several other states in the Midwest and the Southeast submitted alternative proposals to EPA that included substantial NOX reductions. Our technical analysis confirmed that our alternative proposal is adequate to address Michigan's contribution to ozone nonattainment in downwind states.

The Clean Air Act allows EPA to address transport of air pollution from one state to another when it is significant. It also requires controls on contribution that a state has to ozone nonattainment in another state. The EPA's attempts to impose an extreme and uniform level of NOX control throughout the eastern
U.S. is obviously driven by policy considerations, not air quality impacts.

EPA has rejected a different level of control in the Midwest and Southeast in order to level the economic playing field with the Northeast. While these may be valid policy in the mind of those at EPA, it is not what the Clean Air Act provides.

Nowhere are the EPA's policy considerations more evident than with this rulemaking. EPA claims to be revising the basis for controls from the new 8-hour ozone standard to the old 1-hour standard. And yet the level of control that the EPA is seeking in Michigan has not changed. We argue that it is technically and scientifically impossible for Michigan to have the same impact with regard to two dramatically different standards.

Now we are here once again to urge the EPA to examine our technical analysis in making decisions on the appropriate levels of NOX controls in an unbiased and scientific manner. It is unfortunate that throughout this regulatory process to reduce ozone transport, the public affected by EPA's actions,
including states, have been hampered in their ability to analyze each rulemaking due to the lack of availability of necessary information.

EPA has released critical components of each rulemaking in a piecemeal manner. Emission inventory information has been in a constant state of flux, the modeling revised frequently. Changes have often been made after the agency closed the period for comment. When information was made available, it was usually in a form that was difficult to access and analyze.

Now EPA is announcing that the details of the proposed remedy for the 126 petitions will not be finalized on July 15, as previously announced. Instead, the EPA plans to identify the targeted sources, reveal the unit-by-unit allocations for the sources, and specify the basis for the total tonnage cap at the same time it makes the section 126 findings on November 30th.

This leaves affected parties in a difficult position to comment at this time on the level of emissions control which the EPA will determine to be necessary to reduce culpable emissions that cause
violations of the 1-hour standard in downwind states. We emphasize that the level of control must be modified from the level EPA proposed to mitigate transport contributing to the 8-hour ozone standard.

In conclusion, we also express additional concern about the timing of this rulemaking, in that EPA intends to finalize this action well before the U.S. Circuit Court of Appeals is likely to rule on the merits of the NOX SIP call litigation.

This appears to be an unabashed effort on the part of EPA to circumvent the legal proceedings and impose its predetermined mandate on the states regardless of what common sense and the most recent science on ozone transport dictates.

While we appreciate this opportunity to testify, please be assured we will be submitting written comments on this rulemaking.

Thank you.

MR. HELMS: Thank you. Thank you very much.

MR. ROOSA: Thank you.

Our third presenter, Michael Bradley.

PRESENTATION BY MICHAEL BRADLEY
MR. BRADLEY: Good morning. My name is Michael Bradley. I'm from the firm M.J. Bradley and Associates. I'm here to represent the Clean Energy Group. The members of the Clean Energy Group are major electric generating companies that are committed to the provision of clean energy and responsible environmental stewardship.

The 10 Clean Energy Group member companies operate power plants throughout the United States, including the Northeast, Southeast, Mid-Atlantic and West Coast, as well as in Canada. These companies include Northeast Utilities, PECO Energy, ConEd, Key Stem Energy, Mohawk, Ontario Power Generation, Inc., PG&E Generating, Semper Energy, PSE&G and Rochester Gas and Electric.

In light of the Clean Energy Group member companies' commitment to support policies that are sustainable from both an economic and an environmental perspective, these companies have long supported EPA's efforts to develop a regional NOX reduction program for the control of ground level ozone. More specifically, the Clean Energy companies believe strongly that a
regional, seasonal emissions cap and NOX trading program implemented by 2003 are necessary, cost effective and technically feasible.

For example, the members of the Clean Energy Group have determined that compliance with a NOX SIP call would have no impact on electric system reliability during the periods of peak electricity demand.

While electricity providers may be struggling now with reliability due to the widespread recordbreaking summer temperatures, the installation of NOX controls for the NOX SIP call, or in reaction to a 126 petition, will be widely achieved during non-peak periods; in other words, not during the summer period. This reliability report will be submitted to EPA for the record for both the 126 proceeding and any other proceeding that's related to it.

As a result of the recent court rulings which other presenters summarized effectively, affecting both the 8-hour ozone standard as well as the schedule for the NOX SIP call, the Clean Energy Group agrees that it is appropriate and necessary for EPA to revise the
April 30, 1999 section 126 notice of final rulemaking.

Since 1970, section 126 of the Clean Air Act has provided a mechanism for states to petition the EPA Administrator when sources located upwind interfere with the ability of a downwind state to achieve and maintain national health-based air quality standards.

The ability to petition the Agency when pollutants are transported across state borders is a critical feature of the Clean Air Act, particularly when dealing with the release and transport of nitrogen oxides and the subsequent formation of ground level ozone. These pollutants do not respect state boundaries. And in the absence of a regional reduction requirement, states in the Northeast will continue to face elevated, concentrated ozone levels. The ozone alerts announced throughout the region so far this season are simply a reminder that the problem still exists.

In 1998, following several years of extensive modeling analysis under the auspices of the ozone transport assessment process, eight states in the Northeast filed petitions under section 126. Earlier
this year, three additional states in the ozone transport region, those being Delaware, Maryland and New Jersey, also filed 126 petitions.

In April of '99, EPA found six of the original eight petitions to be basically approved technically; that is, with regard to the 1-hour standard, large electric generating units in Delaware, Indiana, Kentucky, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania and Virginia, also West Virginia and D.C., were found to contribute significantly to nonattainment or to interfere with maintenance in one or more of the states that submitted the 126 petitions.

The Clean Energy Group believes that the Agency, in responding to these petitions, established a reasonable trigger mechanism for acting on 126 petitions when it based its schedule and tied it to the NOX SIP call. In fact, this trigger was negotiated in an effort to ensure that sources in the affected Midwest and Southeast states would not be impacted by the 126 process should they proceed to comply with the NOX SIP call.
Also, keep in mind that under section 126, existing sources that are found to contribute, must comply with the necessary remedy within three years from the date of the finding. The Agency, again acting to the advantage of the upwind states, negotiated an initial year of compliance via settlement agreement to ensure that there would not be a section 126 impact on the affected states that, again, submitted SIPs in compliance with the NOX SIP call.

This was agreed to because the petitioning states in the Northeast recognized that the NOX SIP call established a reasonable, technically feasible schedule to reduce NOX emissions and to deliver the air quality benefits sought by the petitioning states.

However, in light of the recent partial stay of the SIP revisions required under the NOX SIP call, this reasonable and feasible schedule is now at risk. As a result, the Clean Energy Group supports the agency's decision to remove this 126 trigger mechanism. Maintaining this NOX SIP call-related trigger mechanism is no longer justified in light of the Court's action to stay the SIP revisions, and would risk delaying
action under the section 126 process, effectively
denying the petitioning states an expeditious and
practical resolution to their ongoing air quality
challenges.

Also, we support EPA's decision to postpone
implementation efforts under section 126 with respect
to the 8-hour ozone standard. Pending the outcome of a
rehearing, the Clean Energy Group also supports
reinstatement of the 1-hour standard or, in other
words, a recision of EPA's 1-hour revocation policy.

he Clean Energy Group believes that it is
sound policy to ensure that the 1-hour ozone standard
is in effect with enforceable provisions while the
status of the 8-hour standard is reconciled.

It is important to note that the absence of
the 8-hour component will mean that fewer NOX
reductions are achieved as compared to under the NOX
SIP call. As a result, additional states, such as
Wisconsin, may find it necessary to submit their own
126 petitions as a means to achieve compliance with the
nonattainment provisions in the Clean Air Act.

Further, many Midwest states, such as
Michigan, Ohio and others, in their criticism of EPA's technical justification for the NOX SIP call, repeatedly failed to recognize the impact of their NOX emissions on the air quality in southern Ontario.

In conclusion, although 126 is not as desirable a solution as the NOX SIP call to address the regional air quality concerns, the Clean Energy Group companies support EPA's proposal because it delivers meaningful benefits to downwind nonattainment areas in the Northeast and Mid-Atlantic states. The Clean Energy Group strongly supports EPA's actions to revise the April 30, 1999, Section 126 Notice of Final Rulemaking in light of the recent court decisions.

Again, the Clean Energy Group is planning to submit written detailed comments prior to August 9th.

Thank you.

MR. HELMS: Thank you. Thank you very much.

Our next speaker, Kathy Beckett.

PRESENTATION BY KATHY BECKETT

MS. BECKETT: Good morning. My name is Kathy Beckett. I'm from the law firm of Jackson and Kelly in Charleston, West Virginia. I'm here to provide this
hearing statement on behalf of the Midwest Ozone Group with regard to EPA's June 24, 1999 proposal.

The Midwest Ozone Group, otherwise known as MOG, is an affiliation of over 30 companies, trade organizations, and associations which have drawn upon their collective resources to advance the objective of seeking solutions to the development of legally and technically sound ambient air quality regulatory programs. It is the primary goal of MOG to work with policy makers in evaluating air quality policies by encouraging the appropriate application of science and law.

The summary portion of the June 24, 1999 Federal Register explains that the agency is proposing to stay, indefinitely, certain affirmative technical determinations made pending further developments in ongoing litigation.

The litigation referenced by EPA involves two suits of which MOG is a party. EPA does not mention that third litigation in which a number of petitions were filed that directly challenge the April 30, 1999 final section 126 determinations. Those petitions were
filed in late May and early June.

The two D.C. Circuit cases addressed by EPA call into question some of the principal assumptions that were made by the agency in issuing its April 30, 1999 final determinations. In the May 14, 1999 D.C. Circuit opinion in the American Trucking Association case, questions the constitutionality of the 8-hour ozone standard.

This decision is the first court ruling that begins the unraveling of EPA's April 30th 126 determinations. EPA correctly concludes that since certain portions of the 126 determinations were based on attainment of the 8-hour ozone standard, action upon those should be delayed indefinitely. MOG supports this conclusion.

Next, the May 25, 1999 D.C. Circuit grant of the petitioning parties' request for a stay of the filing date for the NOX SIP call in the Michigan case, created another set of problems for the 126 technical determinations. Since EPA had coupled the two rulemakings to provide for a single timeline for implementation and a single test for significance, it
has been forced to try to repair the inevitable unraveling of the combined rules.

The D.C. Circuit's stay created both a timing and a substantive problem for the section 126 determinations. The Court has issued the stay pending further ruling on the merits of the EPA NOX SIP call, indicating that it has previewed the substantive issues of the case and has determined that a stay is justified.

The EPA relied on many of the same substantive decisions in the section 126 determinations as it did in the NOX SIP call. The continued stability of the substantive bases of the section 126 determinations is unclear at this point in the litigation.

In the Federal Register announcement, EPA has not addressed the fact that its section 126 determinations are based upon many of the same legal and technical elements that are the subject of the NOX SIP call litigation, and which will be the subject of further court rulings.

EPA is only proposing to decouple the timing
and the implementation of the two rulemakings in an attempt to allow it to move forward on the section 126 petitions that assert nonattainment with the 1-hour ozone standard. MOG strongly urges EPA to stay all actions with regard to the section 126 petitions that were the subject of the April 30th rulemaking, pending resolution of the Court's review of the NOX SIP call.

The issue of the inability of the section 126 states to meet the 1-hour ozone standard deserves quick mention, however. The section 126 petitions that are the subject of this proposal and the April 30 rule assert nonattainment with the 1-hour ozone standard, as well as the 8-hour standard. In some areas of the country, the 1-hour standard remains in effect.

In other areas, EPA has acknowledged, as recently as June 9th, the fact that the nation is experiencing ozone improvement at a rate that justifies the revocation of the standard. EPA has finalized its revocation of the 1-hour ozone standard for 10 additional areas, 2 of which are within the 126 petitioning states; the Boston area, the Providence area, and then others to include Memphis, certain
Michigan counties, and Door County, Wisconsin.

EPA has proposed to identify seven additional ozone areas where the 1-hour ozone standard no longer applies. Through these and other revocations, EPA itself has acknowledged that the 1-hour ozone nonattainment dilemma is not as egregious as was initially believed.

From a review of the actual ambient air quality monitors for ozone in the section 126 petitioning states, as addressed in detail in the report filed with EPA which was written by TRC Consultants on behalf of the states of Michigan, West Virginia and Virginia, it is apparent that ozone air quality is improving. That report was filed with EPA on March 26, 1999, certainly by West Virginia DEP and I'm sure the other states have done the same.

Action on the section 126 petitions based upon the 1-hour standard must be reassessed based upon these obvious trends of improvement. MOG urges EPA to withdraw its April 30 rule and reinitiate rulemaking on the petitions asserting 1-hour ozone nonattainment after the resolution of the NOX SIP call litigation.
With regard to 126 petitions subsequently filed, asserting the same nonattainment problems as the initial ones, MOG supports EPA's decision to provide for an extension for responding to such petitions to six months. As EPA acknowledges, it is important to provide adequate time to develop proposals and to provide the public sufficient time to comment.

In conclusion, MOG urges EPA to stay its April 30, 1999 final rulemaking and withdraw its June 24, 1999 proposal until resolution of the NOX SIP call litigation. The Midwestern and Southeastern states and the sources impacted by the petitions filed by the Northeast states, deserve full review of the technical and legal issues currently the subject of litigation prior to being required to invest important and limited dollars in a rule that may be rendered invalid.

That's the close of my comments. MOG will be providing written comments within the comment period.

I'd also like to take this moment to explain that Steve Roberts was unable to attend on behalf of the West Virginia Chamber of Commerce, and I have provided his written statement, but I will not be reading it into
the record.

Thank you.

MR. HELMS:  Thank you.  Questions?

(No response.)

MR. HELMS:  Thank you very much.  Are there others present that would like to make a statement?

(No response.)

MR. HELMS:  Seeing none, then, we will conclude the hearing.

A couple of reminders.  We'd ask again that you make sure you've left a copy of your testimony with Linda Lassiter or JoAnn Allman in the back.  If you have not, please expeditiously get a copy to us as fast as you can.

The record will remain open until -- I believe the Federal Register indicates August 9th.  We ask you, though, if you're going to submit additional comments, please do it expeditiously so we can have time to process it, get all the information together so that we can honor our commitment to get the results of the hearing on our web site within 30 days.

I want to thank you very much for your time
and effort today. This hearing is adjourned.

(Whereupon, at 9:40 a.m., the hearing in the above-entitled matter was concluded.)

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