Clean Air Task Force
Southern Environmental Law Center
Appalachian Voices

Canary Coalition
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Clean Air Watch
Climate Connection, NC Council of Churches
Environmental Defense
Georgia Public Interest Research Group
Maryland Public Interest Research Group
National Environmental Trust
North Carolina Conservation Network
North Carolina Public Interest Research Group
NC Sierra Club
Ohio Environmental Council
Ohio Public Interest Research Group
PennEnvironment

Southern Alliance for Clean Energy
Tennessee Environmental Council
United States Public Interest Research Group

October 24, 2005

VIA E-DOCKET, http://www.epa.gov/edocket and Email: A-and-R-Docket@epa.gov
with Hard Copy to Follow via U.S. Mail

Air Docket
Attention: Docket ID No. OAR-2004-0076
U.S. Environmental Protection Agency
Mail Code: 6102T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: *Rulemaking on Section 126 Petition From North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to the Clean Air Interstate Rule; Revisions to the Acid Rain Program; Proposed Rule*, 70 Fed. Reg. 49708 (August 24, 2005).

Dear Administrator Johnson:

The Southern Environmental Law Center and Clean Air Task Force submit the following comments on EPA's proposed response to North Carolina's Section 126 Petition (published in the Federal Register on August 24, 2005 at 70 Fed. Reg. 49708) on behalf of themselves and 18 local, regional, and national organizations active in the effort to protect public health and the

environment from the harmful effects of air pollution in North Carolina, the Southeast, and nationwide.

On March 19, 2004, North Carolina filed a petition under Section 126 of the Clean Air Act ("CAA"), requesting that EPA control power plant emissions in certain upwind states that substantially contribute to nonattainment in, and interfere with maintenance by, North Carolina with respect to the 8-hour ozone and $PM_{2.5}$ national ambient air quality standards ("NAAQS").[1] EPA's proposed response to North Carolina's Section 126 Petition fails to fulfill the agency's mission of protecting human health and the environment and violates its obligations under the CAA.[2]

In the CAA, Congress clearly laid out the process and standards governing petitions filed under Section 126: EPA must require upwind sources contributing to downwind nonattainment, or interfering with downwind maintenance, to reduce their emissions within three years or cease operations. Rather than complying with this straightforward statutory mandate, EPA instead proposes, in the alternative: (a) an unlawful and complete denial of North Carolina's 126 Petition based on proposed rulemakings related to EPA's Clean Air Interstate Rule [3] under Section 110 of the CAA; or (b) an illegal, substitute remedy that would allow upwind power plants to continue sending their pollution to North Carolina for years after Section 126's three-year deadline, and would exempt from ozone-specific controls certain highly polluting plants located upwind of North Carolina. EPA's proposal, which would eviscerate the only independent remedy for interstate pollution transport provided by Congress to the states in Section 126 of the CAA, is unlawful, arbitrary and capricious.[4]

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[1] State of North Carolina, *Petition Pursuant to Section 126 of the Clean Air Act, 42 U.S.C. §7426* (March 18, 2004).
[2] EPA, *Rulemaking on Section 126 Petition From North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone* (Proposed Rule), 70 Fed. Reg. 49708 (August 24, 2005).
[3] EPA, *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NOx SIP Call; Final Rule*, 70 Fed. Reg. 25162 (May 12, 2005) (hereinafter "CAIR").
[4] EPA's Section 126 proposal appears to be part of an effort to reinterpret the existing provisions of the CAA in a manner that is calculated to produce regulations that mimic the Bush administration's "Clear Skies" legislative proposals (e.g., the proposed "Clear Skies Act of 2003," S.1844). Implementing the current Clean Air Act constrained by a yet-to-be-enacted legislative proposal—rather than the requirements of the CAA itself and sound analysis—is clearly arbitrary action.

I. Background

A. Ozone and Fine Particle Pollution Threaten the Health of North Carolina Citizens

Power plants are a major source of nitrogen oxide ("NO_x") and sulfur dioxide ("SO_2") emissions, which react in the atmosphere to form other unhealthful secondary pollutants such as ground-level ozone and fine particulate matter ("$PM_{2.5}$"). As EPA has recognized, fine particle and ozone pollution pose a severe threat to human health.

EPA itself has recognized that exposure to $PM_{2.5}$ is associated with a myriad of serious health effects. These include premature mortality, aggravation of respiratory and cardiovascular disease, lung disease, decreased lung function, asthma attacks, and cardiovascular problems such as heart attacks and cardiac arrhythmia.[5] Three major cohort studies, including new studies sponsored by the EPA-industry funded Health Effects Institute, have consistently associated fine particulate matter with premature death throughout the United States.[6] Nationwide, EPA estimates that attainment of the $PM_{2.5}$ National Ambient Air Quality Standards ("NAAQS") "would prolong tens of thousands of lives and prevent tens of thousands of hospital admissions each year, as well as hundreds of thousands of doctor visits, absences from work and school, and respiratory illnesses in children."[7]

In addition to the health effects associated with $PM_{2.5}$, EPA has documented a number of serious health effects associated with ozone. EPA findings indicate that long-term exposure to ozone can damage the lining of the lungs, leading to permanent changes in lung tissue and

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[5] *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule)* (Proposed Rule), 69 Fed. Reg. 4566, 4571 (January 30, 2004) (now known as "CAIR").

[6] *See, e.g.,*

Pope, C.A., Thun, M.J., Namboordiri, M.M. and Dockery, D.W., et al.; *Particulate Air Pollution as a Predictor of Mortality in a Prospective Study of U.S. Adults.* 151 American Journal of Respiratory and Critical Care Medicine (1995). Available online at http://ajrccm.atsjournals.org/search.shtml.

Krewski, D., Burnett, R.T., Goldberg, M.S., Hoover, K., Siemiatycki, J., Jerrett, M., Abrahamowicz, A. and White, W.H., *Reanalysis of the Harvard Six Cities Study and the American Cancer Society Study of Particulate Matter and Mortality;* Special Report to the Health Effects Institute, Cambridge, MA (July 2000).

Samet, J.M., Dominici, F., Zeger, S.L., Schwartz, J. and Dockery, D.W.; *National Morbidity, Mortality and Air Pollution Study, Part II: Morbidity, Mortality and Air Pollution in the United States;* Health Effects Institute Research Report No. 94, Cambridge MA (June 2000).

Dockery, D.W., Pope, C.A., Xu, S. and Spengler, J.D., et al; *An Association Between Air Pollution and Mortality in Six U.S. Cities;* 329 New England J. Medicine 1753-59 (1993). Available online at http://nejm.org/content/1993/0329/0024/1753.asp.

[7] 69 Fed. Reg. at 4571.

irreversible reductions in lung function. Even short-term exposure can irritate the respiratory system, reduce lung function, and aggravate asthma.[8] EPA has also linked ozone exposure to increased hospital admissions due to respiratory ailments such as asthma, bronchitis, chronic obstructive pulmonary disease, and other serious adverse health effects.[9] Comprehensive new epidemiological studies have shown significant associations between increased ozone and premature death;[10] even short-term spikes in urban ambient ozone concentrations have been associated with increased death rates during the following week.[11] Further, recent studies suggest that ozone exposure is associated with stunted lung development in children,[12] and not only aggravates childhood asthma but can actually *cause* active children in highly polluted areas to develop the disease.[13]

Thirty-two North Carolina counties are classified as nonattainment, in whole or in part, for the 8-hour ozone and/or fine particle pollution NAAQS. This means that almost four million North Carolinians – about half the State's population – live in areas with unhealthy air. As a result, for many North Carolina citizens, the simple act of breathing can be a high-risk activity that carries with it a host of serious health effects. More than 550,000 North Carolinians suffer from asthma, and in 2000, more than seven percent of the adult population in North Carolina reported having current asthma symptoms. [14]

Children in North Carolina suffer disproportionately from asthma, with an estimated 10 to 17 percent of children ages birth to 18 suffering from diagnosed asthma, and another 17 percent of children suffering from undiagnosed asthma-like symptoms.[15] A study conducted by the North Carolina Department of Health and Human Services also found that 50 percent of

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[8] *Id.*
[9] *Id.*
[10] A. Gryparis et al., "Acute Effects on Mortality from the 'Air Pollution and Human Health: A European Approach' Project," *Am. J. Respir. Crit. Care Med.*, 170:1080-87, 2004.
[11] M.L. Bell et al., "Ozone and Short-term Mortality in 95 U.S. Urban Communities," 1987-2000, *Journal of the American Medical Association*, 292:2372-2378, 2004.
[12] Plopper, C.G., Fanucci, M.V., Evans, M.J., Larson, S.P., Schelegle, E.S., Joad, J.P., Pinkerton, K.E., VanWinkle, L.S., Gershwin, L.J., Miller, L.A., Wu, R., Buckpitt, A.R., and Hyde, D.M. 2001. *Air pollution effects in a primate model of asthma*. Abstract and presentation, HEI Annual Conference, Washington DC; Program and Abstracts; Health Effects Institute, Cambridge MA, 02139
[13] McConnell, R., Berhane, K., Gilliland, F., London, S.J., Islam, T., Gauderman, W.J., Avol, E., Margolis, H.G., Peters, J.M., "Asthma in exercising children exposed to ozone: a cohort study," *The Lancet* 359 (2002): 386-391.
[14] North Carolina Department of Health and Human Services website: http://wch.dhhs.state.nc.us/Asthma/AANC.htm
[15] *Id.*

children with asthma reported missing school due to breathing difficulties at least once each month during the previous year.[16]

Power plant emissions also contribute to numerous adverse environmental effects, including acid deposition, watershed eutrophication and nitrification, and visibility impairment and regional haze.[17] In addition, ozone has adverse effects on vegetation, reducing yields of timber and agricultural crops. [18]

B. The North Carolina Clean Smokestacks Act Is Not a Complete Solution to the State's Ozone and Fine Particle Pollution

Recognizing the severe health effects of power plant pollution, in June 2002, North Carolina enacted the landmark Clean Smokestacks Act ("CSA"), which requires significant emissions reductions from the 14 largest coal-fired power plants in the state.[19] Under the CSA, these power plants must reduce their NO_x emissions 77 percent by 2009, and must reduce their SO_2 emissions 49 percent by 2009 and 73 percent by 2013. This represents a reduction of about one-third of the state's total NO_x emissions and of one-half of the state's total SO_2 emissions. North Carolina's two largest power companies, Duke Power and Progress Energy, must achieve these emissions cuts by the specified deadlines through actual reductions. They cannot delay making pollution reductions by buying emissions credits from utilities in other states. The power companies also cannot sell credits for their emissions cuts to utilities in neighboring states, which could negate the gains achieved in North Carolina.[20]

Unfortunately, the CSA is not a complete solution to the problem of ozone and fine particle pollution in North Carolina because a significant part of North Carolina's air pollution originates at sources in upwind states and is transported into North Carolina. To address the

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[16] *Asthma in North Carolina: The North Carolina School Asthma Survey, 1999-2000.* Available at http://wch.dhhs.state.nc.us/Asthma/surveillance.htm.
[17] 69 Fed. Reg. at 4571-72, 4642-43, and 4645-47.
See also CATF/Clear the Air, *Unfinished Business: Why the Acid Rain Problem is not Solved,* Oct. 2001, available online at http://www.catf.us/publications/reports/acid_rain_report.php; and
CATF/Clear the Air, *Out of Sight: Power Plant Emissions and Haze in Our National Parks*, Sept. 2000, available online at http://www.catf.us/publications/reports/out_of_sight.php.
[18] 69 Fed. Reg. at 4571.
[19] 2002 N.C. Sess. L. 4, codified at N.C. Gen. Stat. § 143-215.107D.
[20] North Carolina Division of Air Quality website: http://daq.state.nc.us/news/leg/stackfacts.shtml.

problem of interstate transport, North Carolina officials have tried to convince upwind states to voluntarily reduce their emissions. In the CSA, the North Carolina legislature expressed its intent that the state work to achieve similar reductions on a similar schedule in upwind states.[21] In response to this mandate, state officials contacted their counterparts in other states and at the Tennessee Valley Authority in an attempt to secure emissions reductions similar to those required by the CSA at upwind out-of-state sources. These efforts proved unavailing.

The failure of upwind states to reduce their power plant emissions left North Carolina no choice: the only tool left for North Carolina to combat pollution from upwind states was Section 126 of the federal Clean Air Act.[22] As EPA has recognized, this is precisely the situation Congress envisioned when it enacted Section 126: "Congress provided section 126 to downwind states as a critical remedy to address pollution problems . . . otherwise beyond their control, and EPA has no authority to refuse to act under this section."[23] EPA must not let North Carolinians down.

C. North Carolina's Section 126 Petition

North Carolina's Section 126 Petition requested that the EPA Administrator make a finding that power plants in 12 upwind states (Alabama, Georgia, Illinois, Indiana, Kentucky, Michigan, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia) do, and will continue to, contribute significantly to non-attainment and interfere with maintenance of the NAAQS for $PM_{2.5}$ in North Carolina. The petition also requested that the Administrator make a finding that sources in five upwind states (Georgia, Maryland, South Carolina, Tennessee, and Virginia) do, and will continue to, contribute significantly to non-attainment and interfere with maintenance of the 8-hour ozone NAAQS in North Carolina.[24] If EPA makes the requested findings, Section 126 requires those sources to cut emissions to levels that will not significantly

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[21] 2002 N.C. Sess. L. 4, § 10.

[22] State of North Carolina, *Petition Pursuant to Section 126 of the Clean Air Act, 42 U.S.C. §7426* (March 18, 2004) at 23-24.

[23] *Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport*, 65 Fed. Reg. 2674, 2681 (January 18, 2000).

[24] *Petition Pursuant to Section 126 of the Clean Air Act.*

contribute to downwind nonattainment or interfere with downwind maintenance within a maximum period of three years, or cease operations.[25]

The technical determinations that would support the requested findings have already been made. EPA has already found through modeling conducted for purposes of Clean Air Interstate Rule ("CAIR"),[26] that power plants outside of North Carolina do, and will continue to, significantly contribute to nonattainment and interfere with maintenance of the ozone and fine particulate matter NAAQS in North Carolina.[27] Under Section 126, this pre-existing finding alone compels the conclusion that North Carolina's petition must be granted. Moreover, evidence provided by North Carolina in support of its Section 126 Petition shows that emissions of SO_2 and/or NO_x from large EGUs in 13 other states contribute significantly to nonattainment in, and interfere with maintenance by, North Carolina with respect to the NAAQS for fine particulate matter and/or 8-hour ozone.

II. EPA Must Grant North Carolina's Section 126 Petition

A. Statutory Framework

Section 126 of the CAA "provides a mechanism whereby downwind states may petition the EPA to directly regulate upwind sources of pollution."[28] Under Section 126(b), "[a]ny State . . . may petition the [EPA] Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)([i])[29] or this section."[30] The referenced "prohibition" is contained in Section 110, which provides that state plans ("SIPs") implementing the NAAQS must include adequate provisions "prohibiting . . . any source or other type of emissions activity within the State from

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[25] 42 U.S.C. § 7426(c).
[26] *Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule)*, 70 Fed. Reg. 25162 (May 12, 2005).
[27] 69 Fed. Reg. at 4637-38; *see also Technical Support Document for the Interstate Air Quality Rule: Air Quality Modeling Analysis* at 27-36, H-1-H-7, and Appendix G
[28] *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001).
[29] Section 126 actually refers to section 110(a)(2)(D)(**ii**), but the D.C. Circuit in the *Appalachian Power* case agreed with EPA that this was a scrivenor's error and the intended reference was to section 110 (a)(2)(D)(**i**). *Appalachian Power*, 249 F.3d at 1040-44.
[30] 42 U.S.C. § 7426(b).

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 such [NAAQS]."[31]

Once EPA makes a finding under Section 126(b) that a source or group of sources is emitting a pollutant in an amount which will contribute significantly to nonattainment or interfere with maintenance of a NAAQS in a downwind state, "it shall be a violation of this section...for any major existing source to operate more than three months after such finding has been made with respect to it."[32] EPA may thereafter allow the source to continue operating only if the source complies with emission limitations and compliance schedules provided by EPA "to bring about compliance with the requirements contained in section 110(a)(2)(D)([i]) as expeditiously as practicable, but in no case later than three years after the date of such finding."[33]

The D.C. Circuit has explained that "[t]he 'prohibition' to which § 126 refers is . . . the 'functional prohibition' upon emissions of pollutants that subsequently cross state lines" contained in Section 110 of the CAA.[34] Thus, "the substantive inquiry for decision is the same in both [§ 110 and § 126] proceedings":[35] whether emissions from sources in an upwind state contribute significantly to nonattainment in, or interfere with maintenance by, a downwind state. The *difference* between Sections 110 and 126 is the procedure and timeframe for remedying the problem of upwind contribution: Section 110 provides for state action to reduce interstate transport through state implementation plans developed and applied over time, while Section 126 provides for direct EPA action to regulate sources immediately – and in no case later than a maximum of three years.

B. Sections 110 and 126 of the Clean Air Act Provide Separate and Independent Mechanisms for Reducing Interstate Transport of Air Pollution

Court decisions have clearly acknowledged that Sections 110 and 126 are separate and independent mechanisms for addressing interstate air pollution. The D.C. Circuit held in *Appalachian Power Co. v. EPA* that issuance of an interstate transport rule pursuant to Section

[31] *Id.* at § 7410(a)(2)(D)(i)(I).
[32] *Id.* at § 7426(c).
[33] *Id.*
[34] *Appalachian Power*, 249 F.3d at 1045.
[35] *Connecticut v. United States EPA*, 656 F.2d 902, 907 (2d Cir. 1981)

110 is distinct from, and not a substitute for, the obligation to make a finding on a Section 126 petition.[36] Quoting EPA itself, the court emphasized that Sections 126 and 110 are "'independent statutory tools to address the problems of interstate pollution transport' that EPA may deploy either singly or in tandem . . . ."[37]

In *Appalachian Power*, the industry petitioners challenged EPA's decision to make findings on several pending Section 126 petitions while the NO_x SIP Call was ongoing. In rejecting industry's arguments, the court reasoned, in part, that if the lengthened timetable of the NO_x SIP Call were to suspend the Section 126 process, "three critical provisions of §126 would lose their force":

> "First, §126 emphatically requires that any source found to contribute to downwind nonattainment may in no event be permitted to operate for more than 3 years after such finding. Second, under §126, "[r]elief does not depend upon any action by the upwind states, as is necessary for a SIP revision." Third, relief under a §126 finding is independent also of the discretionary policy preferences of the EPA; the agency must act upon a request for a §126 finding within 60 days. Under the EPA's approach [that is, "delinking" the two rules], of course, §126 retains each of these features."[38]

The industry petitioners also argued that under the principle of "cooperative federalism," a SIP call was the preferred remedy, while direct federal regulation of sources, as authorized by Section 126, must be a last resort reserved for cases in which states cannot or do not meet their SIP obligation. The court explicitly rejected industry's argument that if the two sections were independent, then EPA could impose a remedy under only one of them, upholding EPA's decision "[b]ecause it is reasonable, and because the 'Congress provided both [Sections 110 and 126] without indicating any preference for one over the other[.]'. . . ."[39]

The courts have repeatedly recognized that Sections 110 and 126 provide separate and independent processes for reducing interstate transport of air pollution. For example, in *New York v. U.S. Environmental Protection Agency*, the D.C. Circuit agreed with EPA that a Section 126 petition does not trigger reevaluation and revision of existing SIPs under Section 110.[40] In *Connecticut v. United States EPA*, noting that "it seems clear that [sections 110 and 126] are

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[36] *Appalachian Power*, 249 F.3d 1032.
[37] *Id.* at 1046 (quoting 65 Fed. Reg. at 2680-81).
[38] *Id.* at 1047 (quoting 64 Fed. Reg. at 28264; other citations omitted).
[39] *Id.* at 1048 (quoting 65 Fed. Reg. at 2680-81).
[40] 852 F.2d 574, 578 (D.C. Cir. 1988)

intended to be utilized in differing procedural settings[,]" the Second Circuit held that completion of the Section 126(b) procedure is not a prerequisite to EPA approval of a SIP revision.[41] Finally, in examining EPA's authority to regulate interstate air pollution under the CAA, the court in *Alabama Power Co. v. Costle* also recognized that Sections 110 and 126 are separate "vehicle[s] for abating substantial interstate air pollution[.]"[42] Thus, the case law is clear that the remedies provided by Sections 110 and 126 are distinct, and therefore cannot lawfully be substituted for one another.

C. EPA May Not Substitute FIPs (or SIPs) Implementing CAIR for Its Duty to Directly Regulate Upwind Sources Within Three Years Under Section 126

Ignoring the clear language of the Clean Air Act and the courts' repeated statements distinguishing Sections 110 and 126, EPA's proposed response to North Carolina's Section 126 Petition is a Section 110 remedy: issuance of an implementation plan. EPA proposes, with respect to states shown to be linked to $PM_{2.5}$ nonattainment and maintenance problems in North Carolina under the CAIR, to deny North Carolina's Petition and promulgate a Federal Implementation Plan (FIP)[43] by March 15, 2006, requiring states to implement the emissions reductions set forth in the CAIR. This is EPA's "preferred option."[44] EPA will "withdraw" the FIP with respect to one or more states if they later submit their own SIP implementing the CAIR reductions.[45] In the alternative, EPA proposes to grant the petition and make the Section 126 findings if EPA does not promulgate a FIP by March 15, 2006 (the court-ordered deadline for EPA's final action on the petition). Nevertheless, EPA will "withdraw" its 126 findings once a CAIR FIP is in place, or a state submits an approvable CAIR SIP.[46] This convoluted series of proposals seems to have one primary purpose—to deny North Carolina any remedy to its Section 126 Petition that goes beyond or differs from EPA's CAIR requirements.

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[41] 656 F.2d 902, 907 (2d Cir. 1981).
[42] 636 F.2d 323, 367 (D.C. Cir. 1979).
[43] Section 110 provides that in the absence of an EPA-approved SIP, EPA shall promulgate a Federal Implementation Plan ("FIP") to meet the NAAQS. 42 U.S.C. § 7410(c).
[44] 70 Fed. Reg. 49708, 49717-19.
[45] *Id.* at 49718.
[46] *See, eg.*, 70 Fed. Reg. at 49718, 49720.

Furthermore, both of EPA's proposals are contrary to law in at least three key respects. First, as discussed more fully below, EPA's proposal illegally delays the remedy beyond the maximum of three years permitted by Section 126. The CAIR reductions which EPA attempts to substitute for a remedy under Section 126 would not even begin until 2009 (in the case of NO_x) or 2010 (in the case of SO_2), and would stretch for years beyond Section 126's three-year deadline.

The second flaw in EPA's proposed scheme is that the CAIR reductions would apply on a statewide basis, with the option of banking and trading on a region-wide basis – despite the fact that Section 126, on its face, requires that EPA directly regulate specific sources that are found to impair downwind air quality. In its proposal, EPA repeatedly emphasizes the "integral relationship" between Sections 110 and 126 in support of its argument that the two sections are functionally interchangeable.[47] As discussed above, EPA is correct that the *substantive* standard in 126 and 110(a)(2)(D)(i) is the same[48] – that is, both are triggered by upwind pollution that significantly contributes to downwind nonattainment or interferes with downwind maintenance – but the *remedy* is different. The remedy contemplated in Section 110 is inclusion in the SIP (or, if a state fails to comply, in the FIP) of "adequate provisions" prohibiting emissions from upwind sources that significantly contribute to downwind nonattainment or interfere with downwind maintenance.[49] In contrast, the remedy explicitly provided in Section 126 is direct EPA regulation of upwind sources.[50] Once EPA has made the required findings under Section 126, as it must here since the technical basis for those findings already exists, EPA must respond with timely, source-specific controls, not a Section 110 implementation plan.

Finally, and fundamentally, EPA's proposal illegally conditions its duty to make Section 126 findings on states' noncompliance with their obligation to revise their SIPs in accordance with Section 110. As discussed above, EPA bases its approach on its erroneous interpretation of Sections 110 and 126 of the CAA. However, EPA's duty under Section 126 is unconditional and is not impacted by what states do or don't do under Section 110. EPA asserts that "a section 126(b) violation no longer exists once EPA approves a timely SIP, or adopts a timely FIP,

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[47] *See, e.g., id.* at 49717.
[48] *See Connecticut v. EPA*, 656 F.2d at 907 (substantive inquiry is the same under both § 110 and § 126).
[49] 42 U.S.C. § 7410(a)(2)(D)(i)(I).
[50] *See Appalachian Power*, 249 F.3d at 1037 (section 126 "provides a mechanism whereby downwind states may petition the EPA to directly regulate upwind sources of pollution.").

requiring each state contributing significantly (in this case, to North Carolina) to reduce emissions to the levels reflecting elimination of the State's significant contribution . . . ."[51] This is clearly erroneous. In attempting to justify its proposed approach, EPA claims that "EPA's determination whether or not to grant a section 126 petition . . . turns on whether *SIPs* are in violation of section 110(a)(2)(D)" (emphasis added) and cites *Appalachian Power* for this proposition.[52] Here, EPA misreads both the Clean Air Act and *Appalachian Power*. As the D.C. Circuit has explained, "[t]he 'prohibition' to which § 126 refers is . . . the 'functional prohibition' upon emissions of pollutants that subsequently cross state lines" in § 110 of the Act.[53] In addition, EPA itself has previously acknowledged that "prohibition" means "the actual functional prohibition of section 110(a)(2)(D)(i), which bars impermissible state transport, rather than the specific provisions through which states implement that prohibition . . . in an approved SIP."[54]

The D.C. Circuit has made it clear that "under § 126 'relief does not depend upon any action by the upwind states, as is necessary for a SIP revision.'"[55] Thus, EPA may not rely on state actions under Section 110 as a substitute for compliance with Section 126. This is equally true with respect to an EPA-issued FIP. As the D.C. Circuit has emphasized, Sections 126 and 110 are "independent statutory tools to address the problems of interstate pollution transport."[56] Because the provisions are independent of one another, compliance or noncompliance with one section cannot be conditioned on compliance with the other. Instead, EPA must take action on North Carolina's Section 126 Petition consistent with the clear terms of Section 126, which requires direct EPA regulation of upwind sources.[57]

III. EPA Must Control Offending Upwind Sources Within Three Years

As discussed above, once EPA makes a finding under Section 126 that upwind sources are contributing significantly to nonattainment in, or interfering with maintenance by, another

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[51] 70 Fed. Reg. at 49717.
[52] *Id.* at 49716.
[53] *Appalachian Power*, 249 F.3d at 1045.
[54] 64 Fed. Reg. at 28272.
[55] *Appalachian Power*, 249 F.3d at 1047 (quoting 64 Fed. Reg. at 28264).
[56] *Id.* at 1046.
[57] We do not argue that state action in compliance with a SIP or a FIP to eliminate prohibited power plant emissions in its state may not serve to comply with a Section 126 finding. But it is the control of the emissions that are the subject of the Section 126 finding, not the mere promulgation of a SIP or a FIP, that constitutes compliance with the Section 126 finding.

state, no major existing source may operate more than three months after such a finding has been made with respect to it, unless the source complies with emission limitations and compliance schedules provided by EPA "to bring about compliance with the requirements contained in Section 110(a)(2)(D)(ii) as expeditiously as practicable, but in no case later than three years after the date of such finding."[58]

Section 126 thus requires EPA to directly regulate emissions from upwind plants within a maximum of three years from the date on which the agency makes a finding that the downwind state's air quality problems result in part from the upwind state's pollution. In the case of North Carolina's Petition, EPA's CAIR modeling provides the basis for this finding. As a result, EPA is required to grant the petition and impose emissions controls on violating upwind sources. Instead, EPA is proposing the CAIR NO_x and SO_2 cap-and-trade programs as the control remedy for both the Section 126 action and the FIP.[59] Yet the CAIR reductions would not even begin until 2009 (in the case of NO_x) or 2010 (in the case of SO_2). This proposed remedy violates the plain language of the CAA, which requires the contributing sources to cut their emissions or cease operation within three years.

Unfortunately, EPA's proposed response to North Carolina's Section 126 Petition is entirely consistent with the agency's pattern of illegal delay, in which EPA has repeatedly failed to take action on the petition within the required time period. North Carolina filed its petition on March 19, 2004. After taking no action at all on the petition within the initial 60-day period required by §126 of the Clean Air Act, EPA granted itself an extension of time under Section 307(d) of the CAA.[60] EPA then failed to develop a response to the petition during the extension period. It was only after Environmental Defense, represented by the Southern Environmental Law Center, and the State of North Carolina separately filed suit in January 2004 to compel EPA to act on the petition that EPA entered into settlement negotiations and agreed, finally, to a timetable for action on the petition.[61] Yet EPA's current proposal is for further delay.

In an attempt to justify substituting the extended timeframe of CAIR for the expeditious timeframe of Section 126, EPA relies on selective quotation of the CAA and a completely

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[58] 42 U.S.C. § 7426(c).
[59] 70 Fed. Reg. at 49717.
[60] 42 U.S.C. §7607(d).
[61] *State of North Carolina v. Johnson,* No. 5:05-CV-112 (E.D.N.C.) and *Environmental Defense v. Johnson*, No. 5:05-CV-113 (E.D.N.C.)

implausible interpretation of its provisions. EPA takes the untenable position that its proposed control remedy "would satisfy the 3-year compliance period in section 126(c)" because "the remedy would *commence* within the 3-year maximum timeframe set out in section 126(c) . . . ."[62] (Emphasis added.) In attempting to explain its position, EPA states that 126(c) "on its face contemplates that control measures satisfying both section 126 and section 110(a)(2)(D) may stretch out beyond a 3-year period."[63] EPA then quotes part of the provision in Section 126(c) stating that sources subject to a Section 126(b) finding may continue to operate beyond the initial three-month period if they comply with "emissions limitations and compliance schedules (*containing increments of progress*) provided by [EPA][.]"[64] (Emphasis EPA's.) Here, however, EPA simply omits the last phrase of the subsection, which continues, "to bring about compliance with the requirements contained in section 110(a)(2)(D)([i]) *as expeditiously as practicable, but in no case later than three years* after the date of such finding."[65] (Emphasis added.) By quoting selectively from the Clean Air Act, EPA attempts to read out of the Act the three-year deadline for compliance. The agency then asserts that "the reference to increments of progress can describe a situation where compliance is stretched out over periods exceeding 3 years provided initial action (*i.e.* an initial increment of progress) occurs within 3 years."[66] EPA's reference to "increment of progress" is nothing but a red herring. The plain language of Section 126(c) simply allows EPA to require—as a condition for a delay in emissions control beyond 3 months—"increments of progress" as part of compliance schedules and emissions limits. Section 126(c) then unequivocally provides that any such delay is not to exceed three years under any circumstances.

Thus, EPA's position directly conflicts with the language of the CAA, which clearly states that EPA must "bring about compliance" (*i.e.*, cut pollution to levels that will not significantly contribute to nonattainment in or interfere with maintenance by a downwind state) from the offending upwind plants *within a maximum of three years*. EPA must not just begin the process of controlling sources (which could take many years, and in the case of CAIR, will do just that), but must actually achieve emissions cuts at sources with respect to which it makes a

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[62] 70 Fed.Reg. at 49718.
[63] *Id.* at 49718.
[64] *Id.*
[65] *Id.*
[66] *Id.*

finding under Section 126 within three years of the date on which the agency makes the finding. Under the explicit timetable for action provided by Section 126, EPA should have acted on North Carolina's petition by November 2004 at the latest, and should have controlled emissions at upwind plants by November 2007 at the latest. EPA's proposed remedy, which stretches the timetable for compliance to 2015 and beyond, is arbitrary and capricious, and is plainly illegal under the CAA. Rather, EPA must require implementation of controls that will eliminate the prohibited emissions subject to the 126 findings within 3 years of the finding, or no later than March 2009.[67]

IV. EPA's Proposed Denial of North Carolina's Section 126 Petition With Respect to the 8-Hour Ozone NAAQS is Unlawful.

A. Upwind Emissions will Interfere with Maintenance by North Carolina and Must be Reduced under Sections 126 and 110(a)(2)(D)

North Carolina's Petition explicitly seeks findings from EPA pursuant to Sections 126 and 110(a)(2)(D) that upwind power plant emissions not only "contribute significantly to nonattainment" in North Carolina, but also "interfere with maintenance" by North Carolina, with respect to both the 8-hour ozone and $PM_{2.5}$ NAAQS. This, of course, tracks the requirements of Section 110(a)(2)(D) of the Clean Air Act, prohibiting emissions which will "contribute significantly to nonattainment in, *or interfere with maintenance by,* any other State with respect to any such national or secondary ambient air quality standard" (emphasis added).

EPA proposes to deny North Carolina's Petition with respect to the ozone NAAQS, however, because "EPA's updated [CAIR] analyses project all of North Carolina to be in attainment for 8-hour ozone in the CAIR 2010 base case."[68] In this regard, EPA's proposal effectively ignores the "interfere with maintenance" provision of North Carolina's Petition and of Section 110(a)(2)(D)(i)(I) of the Act. This glaring omission in EPA's proposal violates the plain language of the Act, is arbitrary, capricious and unlawful. EPA must grant North

[67] This assumes that EPA delays finalizing its 126 findings until March 2006, the latest date permitted by the court's order in *State of NC v. Johnson, supra*, at footnote 61, *supra*.
[68] *See* 70 Fed. Reg at 49717.

Carolina's ozone petition, even if North Carolina is projected to attain the ozone NAAQS by 2010, because upwind power plant emissions from certain states will interfere with maintenance by North Carolina.

First of all, North Carolina's Petition may be distinguished from CAIR by North Carolina's specific request for emission reductions that would interfere with maintenance. EPA's CAIR rulemaking was almost exclusively focused on the "contributes significantly to nonattainment" prong of the alternate prohibition found in Section 110(A)(2)(D)(i)(I) of the Act. In fact, EPA's original CAIR proposal was based entirely on contribution to nonattainment, and did not mention interference with maintenance at all.[69] EPA did address maintenance issues in a limited manner in the final CAIR, but only in the context of providing one of several rationales for requiring the second phase of emissions reductions in 2015 for those areas that were projected to be in attainment in 2015 but not in 2010.[70] EPA did *not* evaluate in CAIR whether certain areas projected to be in attainment by 2010 needed upwind reductions to prevent interference with maintenance of the 8-hour ozone standard thereafter.

North Carolina's Petition explicitly seeks relief from upwind emissions on the ground that those emissions will interfere with maintenance. Under Sections 126 and 110 of the Act, EPA must respond to that request, even though it did not address the issue in CAIR. EPA's discussion in CAIR of the maintenance prong of Section 110(a)(2)(D) in the context of the second phase CAIR cap, however, does provide substantial guidance on how EPA should address the issue raised here in North Carolina's Petition.

EPA stated in CAIR that:

> "[W]e believe the 'interfere with maintenance' prong may come into play only in circumstances where EPA or the State can reasonably determine or project, based on available data, that an area in a downwind state will achieve attainment, but due to emissions growth or other relevant factors is likely to fall back into nonattainment."[71]

EPA then went on to apply the "interfere with maintenance" prong as one of several

[69] *See, e.g.*, 69 Fed. Reg. 4566, at 4570.
[70] *See, e.g*, 70 Fed. Reg. at 25192-95; 70 Fed. Reg at 49716.
[71] 70 Fed. Reg. at 25193, footnote 45.

justifications for imposing second phase 2015 emission caps to benefit downwind receptor areas projected to be in attainment in 2015 but not 2010. With respect to ozone, EPA stated:

> "Even if all ozone nonattainment areas in the CAIR region could achieve reductions sufficient to meet the level of the 8-hour ozone standard in 2009 [footnote omitted] based on local controls, 2009 CAIR NO_x reductions and existing programs, we believe that numerous downwind receptor areas would remain close enough to the standard to be at risk of falling back into nonattainment...."[72]

EPA then acknowledged that one of the main reasons for this risk is the historic variability of ozone formation and transport based on changing weather conditions:

> "We recognize that the ozone levels in ozone receptor areas will improve somewhat between 2010 and 2015 due chiefly to downward trends in NO_x emissions projected under existing requirements. Nevertheless, ...the projected improvements in ozone levels in the receptor areas are less (often considerably less) than historic variability in monitored 8-hour ozone design values from one three year period to the next. We believe this variability is mostly attributable to changing weather conditions (which significantly affect the rate at which ozone is formed in the atmosphere and movement of ozone after it is formed), rather than variability in the emissions inventory. Thus, absent the second phase CAIR cap, these receptors remain vulnerable to falling back into nonattainment."[73]

EPA concluded by noting that ozone variability would not be automatically assumed, but must be demonstrated in order to apply the "interfere with maintenance" prong:

> "We recognize that in the absence of substantial evidence, variability alone would not be a sufficient basis for applying the "interfere with maintenance" prong of section 110(a)(2)(D). Here, however, where there is a substantial body of historical data documenting the variability in ozone concentrations, we believe it is appropriate to consider variability in determining whether emission reductions from upwind states are necessary to prevent interference with maintenance of ozone in downwind states."[74]

In the case of North Carolina's 126 Petition, application of the above-stated principles requires that EPA find that at least one nonattainment area in North Carolina, while projected by EPA to attain the ozone NAAQS by 2010, is thereafter "at risk of falling back into

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[72] 70 Fed. Reg. at 25195.
[73] *Id.*
[74] 70 Fed. Reg. 25195, footnote 50.

nonattainment," and thus that emission reductions from certain upwind states are necessary to prevent interference with maintenance of ozone in North Carolina.

First, EPA's projections of ozone concentrations for North Carolina show attainment of the ozone NAAQS by 2010 by only a slim margin. In fact, EPA's original modeling analysis for its initial CAIR proposal projected that Mecklenburg County, North Carolina would be in nonattainment of the ozone NAAQS in 2010, and that emissions in Georgia, Maryland, South Carolina, Tennessee and Virginia were significantly contributing to that nonattainment.[75] Only after EPA revised its modeling and analysis for the final CAIR did it project all of North Carolina to be in attainment. Even then, Mecklenburg was projected to barely attain the NAAQS, with a design value of 82.5 (rounded to 83 per EPA rounding convention), very close to the 85 ppb limit.[76]

Furthermore, in order to reach attainment by 2010, North Carolina will need a dramatic improvement in air quality. According to EPA data, Mecklenburg County's ozone design value for the years 2001-03 was 98, or *13 ppb* over the standard. Clearly, like many of the ozone nonattainment areas mentioned by the EPA in CAIR, Mecklenburg will need steep reductions merely to reach attainment.[77] This not only increases the risk that Mecklenburg will fall back into nonattainment, but also makes EPA's attainment projections less certain (as discussed below in section IV.B. of these comments).

Third, North Carolina clearly can show, based on historical data, substantial variability in ozone concentrations over the last two decades. EPA includes this data in the CAIR docket in its "Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling" (March 2005), at Table E-1 of Appendix E. The average design value for the latest two periods (the 3 years ending 2002 and 2003) was 100, which was the *same* as the earliest period (1982). During that 20 year period with *no net change* in the ozone design value, the yearly design value varied from a low of 91 (in 1992 and 1993) to a high of 112 (in 1988); there were year-to-year variations of at least 8 ppb on four occasions, 6 ppb on another, and at least 3 ppb on four

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[75] *See, e.g.*, 69 Fed. Reg. at 4603, Table V-3; EPA, *Technical Support Document for the Interstate Air Quality Rule Air Quality Modeling Analysis*, at Appendix G (January 2004).

[76] *See* EPA, *Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling*, March 2005, at Appendix E, Table E-1.

[77] EPA noted that areas needing over 6 ppb "would need substantial emission reductions merely to attain," would be unlikely to attain by a wide margin, and thus would be at greater risk of falling back into nonattainment. 70 Fed. Reg. at 25195.

additional occasions. It is difficult to imagine any clearer evidence of historical ozone variability than that reflected in the Mecklenburg County data.

In the CAIR modeling, EPA's evaluation of the risk that a downwind receptor area would fall back into ozone nonattainment focused on the comparison between the projected margin of attainment and the historical variability in ozone concentrations.[78] Specifically, EPA found that most receptor areas would attain by margins of 3 ppb or less. EPA also found, by reviewing historical monitoring data, that year-to-year variations in ozone concentrations in those areas were greater than the 3 ppb attainment margin. Thus, EPA concluded that "historical data indicates that attaining counties with air quality levels within 3 ppb of the standard are at risk of returning to nonattainment," and that "there is a reasonable likelihood that interstate transport of NO_x ...will interfere with maintenance of the 8-hour ozone NAAQS."[79]

Applying EPA's approach here leads to the inescapable conclusion that Mecklenburg County, North Carolina is likely to fall back into nonattainment, and that therefore it is likely that interstate transport of NO_x from certain states upwind of North Carolina will interfere with maintenance of the 8-hour ozone NAAQS by North Carolina absent upwind summer ozone season NO_x reductions. Not only is Mecklenburg is projected to attain the ozone NAAQS by 2010 by less than 3 ppb, but also year-to-year variability in Mecklenburg's ozone design values has frequently and widely exceed this margin over the last 20 years.

In view of the above, EPA must grant North Carolina's 126 Petition with respect to ozone, and require that power plants in Georgia, Maryland, South Carolina, Tennessee and Virginia reduce their ozone season NO_x emissions to eliminate their contribution to North Carolina's maintenance problem.[80]

B. Upwind Reductions are Required by Section 126 to Eliminate Significant Contributions to Existing Nonattainment

[78] *See, e.g.*, 70 Fed. Reg. at 25195; and EPA, *Corrected Response to Significant Public Comments on the Proposed Clean Air Interstate Rule*, (April 2005) (hereafter "RTC"), Response to III.C.17 Comment, pages 134-151.
[79] RTC, Response to III.C.17 Comment, pages 147-151.
[80] As indicated above, at footnote 75 and accompanying text, EPA originally found in its CAIR proposal that these 5 states contributed to ozone nonattainment in North Carolina. EPA will need to confirm these linkages, and perhaps add others, using revised modeling and analysis utilized in the final CAIR.

EPA's denial of North Carolina's Petition with respect to ozone is unlawful for a second reason. As mentioned previously, EPA based that denial on its revised projection in the final CAIR that no North Carolina area would be in nonattainment in 2010.[81] However, EPA's denial ignores the fact that six North Carolina areas are presently in nonattainment; over 50 percent of North Carolina's population lives in these areas.[82] Section 126 provides for a downwind state to petition for a finding that any group of stationary sources "emits or would emit" pollution in violation of the Section 110(a)(2)(D) prohibition. Thus, EPA's response to such a petition cannot be limited to projections of future attainment status. Rather, it must also address contributions to current nonattainment.

EPA does not discuss its rationale for denying North Carolina's Petition other than by referring to its projection in the final CAIR that all North Carolina counties should be in nonattainment in 2010. We believe, however, that EPA's analysis in CAIR cannot control its response to North Carolina's 126 Petition on this issue. Not only are North Carolina's specific circumstances different from those considered by EPA in the CAIR rulemaking for the eastern half of the country as a whole, but more, importantly, Section 126 requires that EPA eliminate *presently existing* significant contribution to nonattainment, even assuming *arguendo* that Section 110(a)(2)(D) does not. Section 126 applies to sources that "emit or would emit," speaking clearly to both present and future emissions. Further, Section 126 provides a tight timeline for EPA response, and for elimination of the prohibited emissions—three months, but no later than three years. In contrast, Section 110 (a)(2)(D) prohibits emissions which "will" contribute significantly to nonattainment, and provides no explicit timeline for elimination of those emissions.

Thus, Section 126 requires EPA to identify upwind sources *now* that contribute to *existing* nonattainment, and not to base its finding on projections of future nonattainment and contribution in 2009—some five years after North Carolina filed its petition. Using the present case as an example makes this clear. North Carolina's Petition was filed in March 2004. Had EPA responded to that petition in a timely manner—no later than November, 2004—controls would have been required on identified sources a maximum of three years later, by November

[81] *See, e.g.*, 70 Fed. Reg. at 49711.

[82] Those areas are Greensboro-Winston-Salem-Highpoint, Great Smoky Mountain NP, Hickory-Morganton-Lenoir, Raleigh-Durham-Chapel Hill, Rocky Mount, and Charlotte-Gastonia-Rock Hill. See, e.g., EPA's Green Book, available on the internet at http://www.epa.gov/oar/oaqps/greenbk/qncl13.html.

2007. Clearly, under such circumstances, Congress could not have intended that EPA choose some date in the future—even a date after offending sources would be required to control their emissions—to project which areas would then be in nonattainment and which sources would then be required to reduce their emissions. Under any rational interpretation of Section 126, the sources to be controlled must be selected on the basis of circumstances existing prior to the date the controls are required to be installed.

Furthermore, several of the considerations discussed above that led EPA in CAIR to find second phase controls necessary to prevent interference with maintenance by certain receptor areas projected to be in attainment by 2015 are relevant here. In fact, they should lead EPA here to conclude that it should not deny North Carolina's Petition with respect to ozone solely based on CAIR projections of North Carolina's 2010 attainment status. That is, the facts that:

- EPA first projected Mecklenburg County to be in nonattainment in 2010;
- EPA then projected Mecklenburg County to be in attainment, but only by a slim 2 ppb margin;
- Historical data from Mecklenburg County clearly demonstrates significantly greater ozone variability;

all call into question the likelihood that EPA's projection will in fact be realized. In view of the substantial uncertainty as to North Carolina's ozone attainment status as of 2010, the certainty of a substantial portion of the state currently being in nonattainment, and EPA's findings of significant contribution from certain upwind states to North Carolina's ozone air quality, EPA must grant North Carolina's Petition with respect to 8-hour ozone, and require ozone season NO_x emission reductions from power plants in Georgia, Maryland, South Carolina, Tennessee and Virginia.

V. Any Emissions Trading Program that EPA Adopts as Part of a North Carolina Section 126 Remedy Must Ensure that Emissions Actually Impacting North Carolina are Eliminated

Once EPA determines that emissions from certain states upwind of North Carolina are significantly contributing to nonattainment in, or interfere with maintenance by, North Carolina areas, those particular emissions must be eliminated.[83] It is not enough that emissions from some other area of the country, even those within the CAIR region, are controlled; rather, at a minimum the required reductions must come from the states identified by EPA as contributing significantly to $PM_{2.5}$ or 8-hour ozone nonattainment or maintenance problems.[84]

We do not argue that emissions trading will necessarily render North Carolina's Section 126 remedy inadequate and unlawful. However, we do believe that for such a remedy to be lawful it must eliminate those emissions prohibited by Sections 126 and 110—that is, annual NO_x and SO_2 emissions within those states that are contributing to North Carolina's PM nonattainment problems, and ozone season NO_x emissions contributing to North Carolina's ozone nonattainment and maintenance problems.[85]

EPA's proposed response with respect to North Carolina's $PM_{2.5}$ nonattainment problem, however, does not ensure that the prohibited emissions will be eliminated. Rather, EPA simply proposes as a full and complete Section 126 remedy, without adjustment, limitation or correction, imposition of the CAIR cap-and-trade program for power plants within the NC PM Control Region. By virtue of the CAIR trading regime, however, plants within the NC PM Control Region may participate in trading with power plants outside of that region. Thus, power plants located in Georgia or Tennessee close to North Carolina nonattainment areas may chose to meet their emission requirements by purchasing SO_2 allowances from Minnesota (or even California) and NO_x allowances from Massachusetts, rather than by controlling emissions at their own plants. In such an event, the prohibited Georgia or Tennessee emissions will *not* be

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[83] *See, e.g.*, 70 Fed. Reg. at 49716-17.

[84] Those states that EPA has found to be contributing significantly to North Carolina $PM_{2.5}$ nonattainment are Alabama, Georgia, Indiana, Kentucky, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia and Virginia (this area is hereafter referred to as the "NC PM Control Region"). Those states which EPA data shows are contributing to North Carolina's ozone problem (and as we explain above, at section IV of these comments, interfering with maintenance by, and significantly contributing to nonattainment in, North Carolina) are Georgia, Maryland, South Carolina, Tennessee and Virginia. *See, e.g.*, 70 Fed. Reg. at 49711.

[85] We refer here to both reductions necessary with respect to both the PM and ozone NAAQS, even though EPA proposes to deny the NC 126 Petition with respect to zone. In section IV of these comments, we demonstrate that EPA must grant the ozone portion of the NC Petition as well. For ease of reference, we will hereafter refer only to this trading issue in the context of the NC PM Control Region or the NC Control Region, even though once the ozone portion of the NC Petition is granted, these comments apply to the ozone control region listed in footnote 84, *supra* as well.

eliminated, and North Carolina will *not* receive the benefit to which it is entitled under Section 126 and 110 of the Act.

Limiting the response to North Carolina's 126 Petition to the application of the unrestricted emissions trading regime of CAIR raises other issues. Table 1 below, prepared by Environmental Defense, displays EPA's own projections of coal-fired power plants in the CAIR control region in the eastern United States that in 2015 will not have installed scrubbers to control SO_2 emissions. According to these EPA projections, there will be over 450 coal-fired units in the CAIR region in 2015 without SO_2 scrubber controls. These units are anticipated to emit 2.8 million tons of SO_2 in 2015. In our region in the same year, EPA predicts 75 units, emitting over 460,000 tons of SO_2, will remain unscrubbed in Tennessee, Georgia, South Carolina and Virginia – the states bordering North Carolina. Furthermore, North Carolina's closest neighbors will emit far greater uncontrolled SO_2 than will North Carolina itself; in fact, unscrubbed SO_2 emissions from Georgia's coal plants are projected to be 157,000 tons annually in 2015, over *six times* that from North Carolina plants.

Table 1
Clean Air Interstate Rule in 2015
EPA's Own Modeling Shows Numerous Coal-Fired Power Plants without Scrubbers for Sulfur Dioxide in CAIR Region

States included in CAIR	Number of Electric Generating Units w/out SO_2 Controls	SO_2 Emissions from Units w/out SO_2 Controls [tons]	Capacity of Units w/out SO_2 Controls [Megawatts]
Alabama	24	183,000	6230
Arkansas	5	82,000	3817
Connecticut	-	-	-
Delaware	6	47,000	994
District of Columbia	-	-	-
Florida	11	74,000	2210
Georgia	13	**157,000**	4864
Illinois	34	208,000	10,666
Indiana	35	234,000	8137
Iowa	24	118,000	4980
Kentucky	22	97,000	3067
Louisiana	3	52,000	1730
Maryland	-	-	-
Massachusetts	3	13,000	300
Michigan	53	384,000	11,249
Mississippi	13	30,000	1571
Minnesota	4	62,000	1805
Missouri	32	241,000	9763
New Jersey	2	12,000	209
New York	8	28,000	648
North Carolina	23	**24,000**	1356
Ohio	27	84,000	2969
Pennsylvania	7	32,000	714
South Carolina	16	**85,000**	2187
Tennessee	26	**125,000**	4088
Texas	19	235,000	8859
Virginia	20	**100,000**	2596
West Virginia	-	-	-
Wisconsin	26	118,000	4254
TOTALS	**456**	**2.82 million tons**	**99,263**

IPM File for EPA Final CAIR parsed for year 2015 (Final CAIR modeling):
http://www.epa.gov/airmarkets/epa-ipm/iaqr/ipm_finalcair2015parsed.xls
CAIR-only states
Coal only (removed all gas- and oil-fired plants)
Removed plants ≤ 25 MW
Removed plants with existing SO_2 control (under 'EMF Controls' column)
Removed plants predicted by model to have SO_2 controls in 2015 (under 'Retrofit SO2/NO_x Controls' column)

The Clean Air Act requires communities to comply as expeditiously as practicable with ambient air quality standards, and we know that it is highly cost-effective to cut SO_2 emissions to a much lower level than the CAIR cap. Thus, it is of particular concern that EPA is considering a response to North Carolina's 126 Petition that fails to address so many power plant units so close to North Carolina's borders. In addition, as EPA has emphasized, one of the primary goals of rulemakings to reduce the regional transport of pollution under Sections 126 and 110 is to "promot[e] a reasonable balance between upwind state controls and local (including all in-state) controls to attain and maintain the NAAQS."[86] As demonstrated by EPA's projections in Table 1, CAIR alone will not achieve anything approaching a reasonable balance between North Carolina and its closest neighbors. While emissions trading has been often shown to be an effective means of reducing pollution, EPA must also require plants near North Carolina's borders to install modern emission controls or otherwise significantly reduce their pollution.

We believe that there are several approaches that EPA might consider to ensure that the emission reductions within the NC Control Region are actually realized. They include:

- requiring some type of allowance flow control, as used successfully by the Ozone Transport Commission;
- requiring higher out-of-region trading ratios, which would allow plants within the NC Control Region to trade emission allowances with other plants within that region per the normal CAIR requirements, but would allow those plants to purchase allowances from plants outside of the NC Control Region only by surrendering additional allowances for retirement (for example, double or triple the normal CAIR requirement); or
- limiting allowance trading among plants located within the NC Control Region to that region, and prohibiting trading with plants outside that region.

These approaches would permit plants within the NC Control Region to benefit from the flexibility that emissions trading offers, while at the same time protecting the health and environment of North Carolina. The acid test to measure the validity of any emissions trading program adopted by EPA as part of an adequate remedy responsive to North Carolina's Petition

[86] *See, e.g.*, 70 Fed. Reg. at 25193.

is that it must ensure that the prohibited emissions from the NC Control Region will be eliminated, so that in the aggregate, the emissions budgets for the states in the NC Control Region are not exceeded.

VI. Conclusion

Every day, millions of North Carolinians breathe air that violates EPA's health-based standards for ozone and/or fine particle pollution. North Carolina's leaders have done their part by enacting the Clean Smokestacks Act. EPA must now act to grant North Carolina its requested relief under Section 126 of the CAA, which provides the sole mechanism available to the state to address upwind emissions that impair the state's air. Since the technical determinations to support North Carolina's petition already exist, EPA must make the requested findings. With respect to the appropriate remedy, EPA's proposal to substitute FIPs or SIPs implementing CAIR under Section 110 for its duty to directly regulate upwind sources within three years under Section 126 violates the CAA and established case law. Instead, EPA must comply with Section 126 and provide North Carolina with a remedy that controls upwind sources whose emissions impair the state's air quality now or in future within a maximum of three years.

Thank you for the opportunity to submit these comments, on behalf of ourselves and the above-listed groups. Please contact the undersigned with any questions or requests for additional information.

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