

***COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S.
ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED INTERSTATE AIR
QUALITY RULE***

69 Fed.Reg. 4566 (Jan. 30, 2004)

SUBMITTED MARCH 25, 2004

**COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE**

MARCH 25, 2004

The New England Council (the "Council") appreciates the opportunity to submit these comments to the U.S. Environmental Protection Agency ("EPA" or "the Agency") regarding the Agency's proposed Interstate Air Quality Rule ("IAQR")(69 Fed.Reg. 4566 (Jan. 30, 2004)). The Council is a nonprofit trade association representing over 300 manufacturers, financial and academic institutions, utilities, service industries and technology companies in the New England region (Connecticut, Maine, Massachusetts, Rhode Island, Vermont and New Hampshire). The nation's oldest regional business organization, the Council's mission is to advance the interests of the New England region by promoting legislative and regulatory initiatives that both protect the quality of life in New England and safeguard its economy.

The Council has been involved in issues relating to air quality in the New England region for over fifteen years. Among the most critical issues for the region is the interstate transport of pollution, with which the region has been struggling for decades. The Council has been active in efforts spearheaded by both regional and national organization, including the New England Coalition for Clean Air, the Ozone Transport Commission and the Ozone Transport Assessment Group. The Council has participated in EPA rulemakings (such as those involving the NO_x SIP Call and the various petitions submitted to the Agency pursuant to Section 126 of the Clean Air Act, 42 U.S.C. §7426), has testified before the Agency and Congress regarding these issues, and intervened in support of the Agency's NO_x SIP Call in the litigation challenging that rule (*State of Michigan et al. v. U.S. Environmental Protection Agency*, 213 F.3d 663 (D.C. Cir. 2000)).

States in the New England region have been at the forefront of aggressive efforts to reduce air pollution and improve air quality. The region has made significant progress in improving air quality through local and regional control efforts; in many instances these efforts have gone well beyond the requirements set forth in the Clean Air Act ("CAA"). Despite these efforts, fourteen years after the passage of the 1990 Clean Air Act Amendments the New England region is still waiting to realize the benefits of the myriad programs designed to alleviate the burdens imposed as a result of the transport of pollutants into the region from upwind states and sources. These burdens include both the adverse impact on air quality and the corresponding impact on the region's economy.

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

States in the region are now also facing the challenge of identifying strategies to deal with the more stringent eight hour ozone standard and the new fine particulate matter standard. There are also additional programs such as those designed to address regional haze concerns that states in New England will have to address. It is clear from experience that any effort to meet these challenges will not succeed unless and until the impact of transport of pollutants into the region is significantly mitigated. Any strategy to reduce ambient levels of ozone and fine particulate matter must focus on oxides of nitrogen (“NOx”) and sulfur dioxide (“SO2”). Not surprisingly, it is the transport of these two pollutants into the New England region that has the most significant adverse impact in the context of interstate transport of pollutants.

The Council applauds the Agency for proposing a comprehensive strategy to address the transport of these pollutants in the proposed IAQR. The Council has some reservations regarding whether the IAQR, as proposed, will bring about relief from transported NOx and SO2 at levels and in time to assist the region, not only in meeting the next round of attainment deadlines and regulatory requirements but also generally in achieving cleaner air in the region. The Council’s main concern, however, and the concern that is the focus of these comments, is the manner in which the Agency is proposing to effectively read out of the Clean Air Act the states’ section 126(b) petition tool under some circumstances.

Section 126(b) of the Clean Air Act

Section 126(b) of the CAA, 42 U.S.C. §7426(b), provides that any state may petition the Agency for a finding that a major source or a group of major sources is emitting and will emit pollutants in violation of Section 110(a)(2)(D)(i) of the CAA.¹ Section 110(a)(2)(D)(i) requires that State Implementation Plans (“SIPs”) prohibit sources from emitting pollutants in amounts that would significantly contribute to nonattainment with national ambient air quality standards

¹ Although the statutory provision actually refers to section 110(a)(2)(D)(ii), the Agency has taken the position that this is a scrivener’s error (*See*, 64 Fed.Reg. 28250, 28267 (May 25, 1999)) and that the reference is correctly to 110(a)(2)(D)(i). The United States Court of Appeals for the District of Columbia Circuit agreed with EPA’s position in *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-1041 (D.C.Cir. 2001). For the purposes of these comments the Council will follow the Agency’s position as upheld by the D.C. Circuit Court of Appeals.

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

in any other state. 42 U.S.C. §7410(a)(2)(D)(i). EPA is required to make such a finding or deny the petition within 60 days of receipt of the petition. 42 U.S.C. §7426(b).

As the Agency has itself recognized, Congress added section 126 to the CAA (as part of the Clean Air Act Amendments of 1977) to give downwind states "...a critical remedy to address pollution problems...otherwise beyond their control." 65 Fed.Reg. 2674, 2681 (Jan. 18, 2000). Unfortunately, states in the New England region serve as the best example of this scenario -- despite having implemented stringent regional and local control regimes, there are still air quality problems. Absent the ability to force EPA to act pursuant to a Section 126 petition, there is no remedy in the CAA or otherwise that gives them the ability to remedy the problem of pollution transport. The importance of retaining the ability to use the section 126 petition process is underscored in another section of the proposed IAQR where EPA acknowledges that "there are likely more localized transport problems that will remain [after implementation of the rule], particularly between contiguous areas located in two or more states." 69 Fed.Reg. 4566, 4580 (Jan. 30, 2004).

In the absence of a viable section 126 petition process, the CAA statutory scheme and protections offered to states to address interstate transport of pollutants will be materially altered, and states' ability to seek expeditious relief from interstate pollution will be eliminated.² The states in the New England region have experienced first-hand the usefulness of the section 126 tool. Delays in the implementation of the NOx SIP call caused by litigation challenging that rule rendered it necessary for New England states to push forward with the section 126 petitions they filed; when a court-ordered stay of the NOx SIP Call regulatory deadline was issued, it was EPA's rulemaking on the 126 petitions that set the deadlines for upwind states to implement NOx mitigation programs.

² Although not the focus of these comments, the Council notes that the proposed Clear Skies Act of 2003 (H.R. 999) would both place a moratorium on the use of section 126 of the CAA and fundamentally change the analysis and criteria to be used by EPA in evaluating section 126 petitions. Both of these changes would do drastic and permanent harm to the ability of states to address interstate transport of pollutants under the CAA. While recent statements by EPA officials appear to indicate that the Agency does not support that language (*see*, "EPA Agrees to Reconsider Clear Skies' Limit on State Air Petitions," Environmental Policy Alert, Dec. 24, 2003), to the Council's knowledge this troublesome language remains in the proposed legislation.

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

The Council believes that the Agency need look no further than this experience for proof that the section 126 petition process must remain a viable and available tool for any state that suffers significant adverse impacts from transported air pollution. In that regard the Council suggests that the Agency reconsider the position it takes in the IAQR with respect to the section 126 petition process, and continue to process petitions filed pursuant to section 126 in accordance with the plain statutory language and within the timeframe set forth in that section.

EPA's Proposed IAQR and Section 126

While the Agency's proposed IAQR does not attempt to eviscerate section 126 to the same degree as the proposed Clear Skies legislation (*see footnote 2, infra*), it does seek to limit the circumstances under which it will act on petitions filed under section 126, despite clear statutory language that requires that it act within sixty (60) days of receipt of such a petition. In the preamble to the proposed IAQR the Agency makes the following pronouncement:

“[A]s long as EPA has promulgated a transport rule under Section 110(a)(2)(D), the transport rule and Section 126 timeframes are roughly comparable, and a state is on track to comply with the transport rule, then EPA is not required to approve section 126 petitions targeting sources in that state if those petitions rely on essentially the same record.” 69 Fed.Reg. 4580-4581

Thus, the Agency appears to be taking the position that it will not make a section 126 finding, even where a state adequately demonstrates “significant contribution” by an upwind source or sources, so long as it believes that a state may address the source or sources pursuant to a separate regulation. This is not only bad policy, it runs afoul of the clear statutory language of Section 126(b) of the CAA.

Non-Discretionary Duty to Act. Section 126(b) imposes a non-discretionary duty on EPA to act within 60 days of receipt of a petition filed pursuant to that section; EPA must either make the finding requested or deny the petition. 42 U.S.C. §7426(b). The section does not allow

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

EPA to defer action on a petition that otherwise satisfies the standard, based on reliance that controls may be required pursuant to an independent set of regulations.

It cannot be disputed that the language in section 126(b) of the CAA sets forth a non-discretionary duty to act within the time period specified. In a case involving an effort to compel EPA to promulgate a rule pursuant to the PSD provisions of the CAA, the U.S. Court of Appeals for the District of Columbia Circuit held that where the relevant provisions of the CAA contain stated deadlines, those provisions should, “as a rule, be construed as creating non-discretionary duties.” Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C.Cir. 1987).³ Similarly, where the Second Circuit Court of Appeals was asked to decide whether the Agency was required to review and revise national ambient air quality standards pursuant to section 109 of the CAA (42 U.S.C. §7409), it held: “...we cannot agree with appellees that the Administrator may simply make no formal decision to revise, leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court.” Environmental Defense Fund v. Thomas, 870 F.2d 892, 900 (2d Cir. 1989).

The language set forth in the proposed IAQR would do exactly that – states would be forced to wait to see whether the series of events identified by the Agency occur and whether they result in mitigation of the “significant contribution” before the Agency decides to act on the petition.

The interpretation being offered by EPA simply ignores the clear language in the last sentence of section 126(b). Where an agency seeks to interpret statutory provisions that it is charged with implementing, it must do so in a manner to give full effect to all of the statutory language. Alabama Power Co., v. EPA, 40 F.3d 450, 455 (D.C.Cir. 1994). In the course of acting on the section 126 petitions filed in 1997 by eight northeastern states, the Agency in fact acknowledged the tension between the section 126 petition process and the section 110 SIP call provisions of the CAA. Only four years ago, in response to comments that the Agency should be

³ See also, NRDC, Inc. v. Train, 510 F.2d 692 (D.C.Cir. 1975)(finding that under the Clean Water Act a statutorily imposed mandatory deadlines for promulgating CWA regulations imposed a nondiscretionary duty to so promulgate).

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

precluded from acting on a section 126 petition pending implementation of the NO_x SIP Call, the Agency made the following five findings:

- 1) "There are no statutory provisions to support the argument that EPA may disregard the plain language of section 126 in favor of following an alternative scheme for addressing interstate transport." 65 Fed.Reg. 2674, 2681 (Jan. 18, 2000)
- 2) "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." *Id.* (emphasis added).
- 3) "The mere existence of a SIP call for States to address the [interstate transport] problem cannot bar EPA from action under section 126." *Id.*
- 4) "The language of section 126 is unambiguous in directing EPA to act on petitions from downwind states within a specific timeframe, without any prerequisite of a State's failure to comply with a SIP call." *Id.*
- 5) The language of section 126 does not explicitly provide for any deferral of EPA action. To the contrary, the very tight deadlines for EPA to act on the petitions and for sources to comply strongly indicate Congress' intent to provide downwind States a remedy for transported pollution and to force action under this provision. *Id.*, at 2682.

It is clear from this series of findings that the Agency itself recognizes that it must act to make the requisite finding or deny a section 126 petition within sixty days of receipt, even if the section 126 finding "rely on essentially the same record." There is simply no statutory authority for the Agency to decide, as a general regulatory matter, that it will not act on a petition that otherwise satisfies the standard set forth in section 126.

Of course, the Agency always has the authority to deny the section 126 petition on the merits of the petition if, for example, the Agency determines that the petition does not set forth record evidence that the source(s) that are the subject of the petition emit or would emit air

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

pollution in violation of section 110(a)(2)(D)(i). In the section of the proposed IAQR that is the subject of these comments, however, EPA states that under the delineated circumstances it does not believe that it “is required to approve the section 126 petition.” 69 Fed.Reg. 4566, 4581. It appears that the Agency’s proposed plan rests on the assumption that the underlying petition sets forth sufficient evidence to conclude that there would be a violation of section 110(a)(2)(D), and that absent one or more of the three criteria set forth by EPA (the existence of the transport rule, the rough comparability of timeframes under the rule and the 126 petition, and the states being on track to meet the deadline), EPA would in fact make the requisite finding and approve the petition.⁴

Thus, the Council assumes that the Agency’s position is that it would not take any action on the petition under those circumstance, and the Council’s comments seek to address that scenario. If, however, EPA is proposing a regulation that would in effect deny all petitions submitted under these circumstances, there is nothing in the proposal or in the record to support such a “general denial” standard. The Council further believes such a general determination on section 126 petitions would not be supportable under the statute. Further, an Agency determination to deny a section 126 petition must, of course, be subject to judicial review.

IAQR’s Position on Section 126 is Bad Policy. The Council believes that not only is EPA’s position on this issue contrary to the plain language of the CAA, it is also inconsistent with prior Agency statements and bad policy as well. As an initial matter, the underlying “transport rule” referenced by the Agency is being proposed in the context of a “SIP Call” as provided for in section 110 of the CAA. The specific relevant section is 110(a)(2)(D), which generally requires that SIPs contain provisions prohibiting air pollution from sources that “contribute significantly” to downwind nonattainment. Again, the Council support and applauds the Agency’s efforts to use this provision of the Act to attempt to mitigate transported air pollution. The Council also believes, however, that sections 110 and 126 should be construed as two, independent tools that can be used to address interstate transport, and that the Agency

⁴ For purposes of these comments the Council assumes that the Agency has in fact made this assumption, and that in the abstract it is a correct assumption.

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

should not take the position that it will not use one tool (section 126) simply because it is also using the other (section 110). In addition to representing bad policy, the Council also believes that this construction departs from prior EPA efforts and positions.

In enacting section 126 as part of the Clean Air Act Amendments of 1977, Congress made it clear that it was not to be considered simply a part of the section 110 statutory scheme to address transported pollution: "The section 126(b) process is designed to provide an entirely alternative method and basis for preventing and abating interstate pollution." H.R. Rep. No. 95-249, at 331, *reprinted in* 4 A Legislative History of the Clean Air Act Amendments of 1977 at 2798 (1978). EPA has previously explicitly recognized Congress' intent with respect to the two sections: "EPA considers the two provisions to be independent statutory tools" that it "may deploy either singly or in tandem" to address the problem of interstate transport. Appalachian Power, 249 F.3d 1032, 1046.

As part of the record in the 1999 rulemaking on the northeastern states' 126 petitions, EPA stated "It is perfectly reasonable for Congress to have established section 126 as an alternative mechanism under the Clean Air Act to address the interstate pollution problem." 64 Fed.Reg. 28250, 28274 (May 25, 1999). Based on this history, it is clear that EPA understood the independence of these two statutory tools. In the proposed IAQR, however, the Agency is proposing to ignore a section 126 petition simply because it has already acted under section 110, even where the petition may document significant contribution as required by the statute. Thus, rather than an alternative mechanism EPA is now saying that section 126 is a secondary or backup mechanism.

One key issue that is missing from the Agency's discussion of the relationship between the section 110 transport SIP Call and the section 126 petition process is the recognition that states historically have not invoked section 126 authority unless reductions pursuant to the section 126 petition are necessary to abate a condition of significant contribution to downwind nonattainment. In other words, there is simply no reason to attempt to restrict the broad scope of the section 126 protections because section 126 has historically only been used when other

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

efforts to reduce interstate transport have failed, and the downwind states have only the section 126 tool left as an option. Agency officials have recognized that states have not abused the section 126 process in statements, and that section 126 does need to remain a viable and available tool for states to use. See, "*EPA Agrees to Reconsider Clear Skies' Limit on State Air Petitions*," Environmental Policy Alert, Dec. 24, 2003.

If the programs implemented as a result of the IAQR work as the Agency believes they will, such that they eliminate significant contribution to downwind nonattainment, the Agency will not have to worry about acting on section 126 petitions – none will be filed. If, however, the transport SIP Call does not achieve the results expected by EPA, or evidence shows that the emission reductions envisioned in the SIP Call are not sufficient to mitigate significant contribution to downwind nonattainment, then EPA cannot and should not preclude the states' ability to use section 126 in the manner envisioned by Congress (and, until recently, by the Agency itself).

Finally, the Council suggests that taking this position with respect to these two independent sections of the CAA is simply bad policy. Congress intended section 126 to be an independent tool that states could use if necessary to address circumstances not otherwise addressable by the states. The appropriate policy to fully comport with Congress' intent is to continue to process section 126 petitions on the merits, determining whether the petitions set forth sufficient evidence to make the requisite finding that there is significant contribution to downwind nonattainment. If the Agency decides that a petition should be denied after such evaluation, the Agency can deny the petition, set forth the rationale for denial, and defend the decision to deny if it is challenged. It is not good policy to use this transport SIP Call rulemaking to fundamentally change the manner in which section 126 petitions will be addressed by the Agency. Rather, EPA should focus its resources on ensuring that this section 110 SIP Call results in SIP provisions that are sufficiently stringent and implemented in a timely fashion such that states have no reason to file section 126 petitions.

*COMMENTS OF THE NEW ENGLAND COUNCIL ON THE U.S. ENVIRONMENTAL PROTECTION
AGENCY'S PROPOSED INTERSTATE AIR QUALITY RULE*

MARCH 25, 2004

Conclusion

The Council appreciates the opportunity to provide these comments to EPA regarding the proposed IAQR. The New England region continues to support Agency efforts to address interstate transport of pollution using all of the tools available under the CAA. The Council believes, however, that the Agency's attempt to restrict the states' ability to use the section 126 petition process effectively, in the circumstances outlined by EPA in the preamble of the proposed IAQR, is misguided and contrary to statutory design, good policy and the Agency's past practices. The Council recommends that EPA reconsider its position with respect to section 126 and the IAQR, and that it commit in the final rule to process section 126 petitions in accordance with the clear mandates of that statutory provision and consistent with the manner in which it has historically processed such petitions.