

March 26, 2018

William Wehrum, Assistant Administrator
U.S. Environmental Protection Agency, Office of Air and Radiation
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OAR-2016-0347

*Re: Response to June 1, 2016 Clean Air Act Section 126(b) Petition From Connecticut –
Proposed Action on Petition*

Dear Assistant Administrator Wehrum:

The Northeast States for Coordinated Air Use Management (NESCAUM) offer the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed action, published on February 22, 2018 in the Federal Register, entitled *Response to June 1, 2016 Clean Air Act Section 126(b) Petition From Connecticut* [83 FR 7710-7719]. NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.¹

The EPA is proposing to deny Connecticut's section 126 petition, which requested that EPA find that emissions from the Brunner Island Steam Electric Station in York County, Pennsylvania significantly contribute to nonattainment and interfere with maintenance of the 2008 ozone national ambient air quality standard (NAAQS) in Connecticut in violation of the Clean Air Act's (CAA's) "good neighbor provision" (CAA section 110(a)(2)(D)(i)).² All of Connecticut was originally designated as marginal nonattainment for the 2008 ozone NAAQS, and the State was unable to meet the standard by the July 20, 2015 attainment date. Connecticut seeks assistance from EPA in achieving the ozone standard through its section 126 petition to eliminate the significant contribution of emissions from Brunner Island to Connecticut's air quality problems. EPA has proposed to deny that assistance.

¹ These comments reflect the majority view of NESCAUM members. Individual member states may hold some views different from the NESCAUM states' majority consensus.

² CAA section 126(b) references section 110(a)(2)(D)(ii), which the U.S. Court of Appeals D.C. Circuit has held is a scrivener's error occurring during a renumbering of section 110(a)(2)(E)(i) while drafting the 1990 Clean Air Act Amendments, and instead the correct reference is to section 110(a)(2)(D)(i). *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). Section 110(a)(2)(D)(i) requires that a state implementation plan "must contain adequate provisions...prohibiting...any source or other type of emissions activity within the State from 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 [national ambient air quality standard.]

The EPA gives two general grounds for its proposed action: 1) the petition fails to demonstrate that Brunner Island significantly contributes to nonattainment or interferes with maintenance of the 2008 ozone NAAQS in Connecticut, and 2) Brunner Island currently does not emit nor is expected to emit pollution in violation of the CAA's good neighbor provision.

NESCAUM disagrees with EPA's proposed denial of Connecticut's petition for the following reasons.

1. *Connecticut has made a sufficient technical demonstration of significant contribution and interference with maintenance of the 2008 ozone NAAQS*

Consistent with past EPA approaches under CAA section 110(a)(2)(D)(i), the modeling the Connecticut Department of Energy and Environmental Protection (CT DEEP) has provided to EPA establishes the linkage between emissions of nitrogen oxides (NO_x) at Brunner Island to downwind nonattainment and maintenance ozone problems at monitoring sites in Connecticut at the one percent or greater level of the 2008 ozone NAAQS.

The ozone NAAQS design value is the 3-year average of the annual 4th maximum 8-hour ozone concentration at a monitor. CT DEEP's modeling for 2011 shows that there are linkages to ozone in Connecticut arising from NO_x emissions at Brunner Island on two separate days when the 2008 ozone standard was exceeded at an individual Connecticut ozone monitoring site. Because the form of the ozone design value is dependent upon the annual 4th maximum ozone value, this multi-day modeled contribution affects Connecticut's ability to attain the ozone NAAQS on at least 2 of the 4 days for this particular year when used in determining the site's design value.

In addition, CT DEEP identified several highly cost effective and readily available NO_x control options for coal-fired utility boilers in its petition. One option is fuel switching from coal to natural gas. That this option is viable has already been borne out by the power plant's recent modification to install a natural gas pipeline to serve its boilers. As EPA notes in its proposed action, Brunner Island has proceeded to burn primarily natural gas during the 2017 ozone season. Having the existing capability to burn natural gas clearly falls well below the \$1,400 per ton of NO_x "highly cost effective" threshold used by EPA for the 2008 ozone NAAQS in the CSAPR Update.

CT DEEP's modeled linkages and identification of highly cost effective NO_x reduction options demonstrate a significant contribution to, and interference with maintenance of, the ozone NAAQS in Connecticut caused by Brunner Islands' NO_x emissions.

2. *The EPA fails to account for allowable emissions from Brunner Island, in contradiction to its previous approach in approving a section 126 petition*

The EPA incorrectly bases its consideration of NO_x reductions and control costs at Brunner Island relative to a natural gas-fired power plant. This fails to consider allowable emissions at the

facility from its continued ability to burn coal, and contradicts EPA's previous approach in analyzing a section 126 petition submitted by New Jersey for SO₂ emissions from the Portland Generating Station in Northampton County, Pennsylvania. In approving that petition, EPA determined that "it is reasonable and appropriate to model allowable emissions when evaluating whether the source 'emits or would emit' any air pollutant in violation of the prohibition of section 110(a)(2)(D)(i) under a section 126 petition."³ While Brunner Island burned mainly natural gas during the summer of 2017, it has maintained the ability to switch back to coal, and there is no enforceable requirement prohibiting it from doing so. That EPA believes it is unlikely Brunner Island will burn coal in the foreseeable future based on current and projected fuel economics is speculative, and does not provide the State with an enforceable remedy under section 126.

Brunner Island retains the ability to burn coal, and Connecticut has demonstrated its NO_x emissions when burning coal significantly contribute to ozone problems in the State. The power plant's owner Talen Energy is seeking to maintain the option of burning coal during the summer up until the 2023 ozone season (and the rest of the year through 2028), as indicated in its recent proposed consent decree with the Sierra Club announced on February 14, 2018.⁴ Had the plant's owner envisioned not burning coal once natural gas became available at the plant location, there would be no need to retain coal as an option in the proposed consent decree.

Due to Brunner Island's ability to burn natural gas now, the power plant is in a position to comply with an enforceable NO_x emission limit immediately, consistent with the section 126 requirement that a facility eliminate its downwind contribution "as expeditiously as possible."

3. The EPA fails to give independent meaning to a remedy under CAA section 126(c)

The EPA's assertion that the CSAPR Update provides an alternative remedy to Connecticut's petition reads section 126(c) out of the Clean Air Act. Section 126 is specific to "any major stationary source, or group of stationary sources," and Congress provided in section 126(c) a clear and targeted remedy to address these stationary sources found to significantly contribute or interfere with maintenance of a national ambient air quality standard in a downwind state. Under the plain language of this provision, it is inappropriate for EPA to assert a section 110(a)(2)(d)(i) "good neighbor" remedy is an adequate substitute.

Aside from Congress clearly providing a separate and independent remedy in section 126(c), the "good neighbor" provision in and of itself does not provide the remedy Connecticut seeks. Connecticut's petition specifically targets a major stationary source of emissions affecting air quality in the State. Section 126(c) provides a remedy narrowly tailored to address the specific

³ 76 Fed. Reg. 19662-19681 (April 7, 2011), at 19671.

⁴ Joint Statement: Talen Energy and the Sierra Club Reach Agreement on the Future Operation of the Brunner Island Power Plant (February 14, 2018). Available at <http://talenenergy.investorroom.com/2018-02-14-Joint-Statement-Talen-Energy-and-the-Sierra-Club-Reach-Agreement-on-the-Future-Operation-of-the-Brunner-Island-Power-Plant> (accessed March 9, 2018).

source Connecticut seeks relief from, and in a timely manner. A substitute remedy, such as the CSAPR Update, does not provide the relief Connecticut seeks, as compliance can take many forms, and over a longer period of time, than the specific, source-focused remedy of section 126(c). In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), the D.C. Circuit held that EPA's remedy options are circumscribed by the plain language of the Clean Air Act. In that case, the remedy must address "emissions activity within the State." In the situation of section 126, the plain language requires that the remedy address "any major stationary source, or group of stationary sources." Under the plain language of the CAA, one does not substitute for the other.

The source-specific remedy requested by Connecticut also provides a more scientifically sound result. Connecticut has shown that emissions from Brunner Island affect its air quality. Under EPA's view that the CSAPR Update removes the significant contribution, the NOx tons could be reduced at one or more power plants (or any other "emissions activity") in western Pennsylvania with no reduction at Brunner Island in eastern Pennsylvania, which is much closer to Connecticut. An equivalent NOx reduction at greater distance from Connecticut, even if within the same state, has less of an impact on Connecticut's air quality. Such an approach does not address Connecticut's air quality problem from Brunner Island's emissions.

4. *Because Brunner Island can now burn natural gas, it can achieve "highly cost effective" NOx reductions to comply with enforceable limits in response to Connecticut's section 126 petition*

Connecticut seeks an enforceable limit to reduce NOx emissions from Brunner Island. One control option suggested by Connecticut in its petition is fuel switching at the facility to burn natural gas in lieu of coal. Since filing the petition, Brunner Island has in fact now installed the ability to burn natural gas. Because the cost of fuel conversion to natural gas has already been incurred by the owner of Brunner Island separate and independent of Connecticut's petition, it represents a previously sunk cost and is not a cost attributable to Connecticut's requested remedy.

In EPA's analysis for the CSAPR Update, previously installed controls were not considered a cost attributable to the rule. The same situation applies here. The EPA has used a threshold cost of \$1,400/ton of NOx reduced as its "highly cost effective" criterion in finding significant contributions from upwind emissions to downwind air quality problems. Here, where Brunner Island has now installed the capacity to burn natural gas, the cost of NOx reductions achievable through an enforceable NOx emission limit consistent with natural gas combustion approaches zero, well below EPA's "highly cost effective" threshold.

5. *The EPA has consistently failed to adequately address interstate ozone transport in a timely manner, and has functionally removed all options under the CAA for states to address themselves*

In addition to our comments above, we also wish to express our concern more generally on EPA's consistent failure to fully address interstate transport of ozone and its precursors, and its seeming unwillingness to use the full complement of tools available under the Clean Air Act to address this persistent public health problem. In this instance, Connecticut had to seek court assistance in compelling EPA to perform its mandatory duty to respond to the State's section 126 petition well after the statutory deadline had passed. Other current and previous section 126 petitions have similarly languished at EPA long past the required date for agency action. Furthermore, EPA has yet to fully address interstate transport problems under the "good neighbor" provision and has denied states' efforts to expand the Ozone Transport Region to include more contributing upwind states. Downwind states are now frustrated by a "Catch 22" situation in which EPA responds that whatever effort is being requested would be better served under a different provision of the Act, and then frustrating those efforts as well when states seek to use them. It is our sincere hope that EPA will cease this merry-go-round, and assist the states once and for all in addressing the burdens placed upon them and the public from the interstate transport of ozone pollution.

Sincerely,

A handwritten signature in cursive script, appearing to read "Arthur N. Marin".

Arthur N. Marin
Executive Director

cc: NESCAUM directors
EPA Region 1
EPA Region 2