

U.S. CHAMBER OF COMMERCE

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April 13, 2018

By Electronic Mail and First-Class Mail

Mr. William Wehrum
Assistant Administrator, Office of Air and Radiation
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Matthew Leopold
General Counsel
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
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Washington, DC 20460

Dear Messrs. Wehrum and Leopold:

I write on behalf of the U.S. Chamber of Commerce (the "Chamber") to request that the U.S. Environmental Protection Agency ("EPA" or "Agency") extend the review period for the State of New York's Clean Air Act Section 126 petition in order to afford the public the right to participate fairly and fully in the process leading up to the agency's decision. See New York State Petition for a Finding Pursuant to Clean Air Act Section 126 (Mar. 12, 2018) (the "Petition").

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. To this end, the Chamber regularly comments and engages the Agency on regulatory matters of interest to the business community.

New York's Petition seeks to invoke Section 126 of the Clean Air Act ("CAA" or "Act") to compel EPA to either order the shutdown of over 350 specific facilities or impose additional, unnecessary, burdensome and costly limits on nitrogen oxide ("NOx") emissions from these

facilities in a nine-state area. Several of these targeted sources are Chamber members who are just learning of the Petition.

While the Petition is both legally and technically deficient, New York's proposed schedule for EPA's resolution of the Petition would violate our members' right to participate meaningfully in the process. Citing Section 126(b) of the CAA, New York requests that EPA grant its Petition within sixty days. However, that timeline ignores the magnitude of New York's request and the technical and legal issues on which the public should be afforded a meaningful opportunity to review and comment. Section 307(d) of the Act allows EPA to extend the deadline for responding to the Petition by six months upon a finding that an extension is "necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection." *See* 42 U.S.C. §§ 7607(d)(1)(N), (d)(10). Section 307(d) provides procedural protections beyond those offered by the Administrative Procedure Act to allow meaningful public engagement in light of the societal significance of issues under the Act. *See Union Oil Co. of California v. EPA*, 821 F.2d 678, 682 (D.C. Cir. 1987).

An extension of at least six months is necessary for several reasons.

New York's Section 126 Petition is Unprecedented in Scope. The Petition targets every stationary source in a nine-state area that it alleges emits 400 tons per year or more of NO_x, resulting in New York naming over 350 sources in its Petition. The appendices to the Petition also lists dozens of other sources below the 400 ton per threshold, but without any explanation of why New York chose to include them. The breadth of the Petition suggests that it might impact other currently unnamed sources. The relevant named facilities span a range of industry sectors, including cement, chemicals, electric generation, midstream oil and gas, paper, refining and steel. Prior petitions have focused on electric generating units, with most petitions targeting only a single power plant in a single state. The analysis for a multi-sector rulemaking spanning several states is far more complex than a single-site assessment. Indeed, the last Section 126 rulemaking that the agency conducted in parallel with the NO_x SIP Call took several years to prepare and finalize.

The Petition Breaks from Prior EPA Models, Emissions Inventories and Methodologies. EPA recently performed complex air quality modeling in support of the Cross State Air Pollution Rule Update (CSAPR Update), using the CAMx 2017 Source Apportionment Model. That modeling included the nine-state area and the sources named in New York's Petition. Rather than using that EPA modeling, however, New York conducted its own assessment using a different model, "CMAQ." The CMAQ modeling runs did not use the same emissions inputs as EPA's CAMx modeling. Instead, New York relied on a regional organization's emissions inventory, the MARAMA 2017 Beta Emissions Inventory. In analyzing its modeling, the Petition used a different approach than used by EPA for calculating ozone contributions, and it used a novel metric to assess whether NO_x emissions contribute to ozone in New York monitors. Our initial technical review of New York's Petition suggests that it suffers from several technical defects, such as overinflating emissions from numerous facilities and inclusion of monitors that show attainment with the ozone standard due to CSAPR and other regulations. However, New York's new modeling runs, data and methodologies are not publicly available in a form that

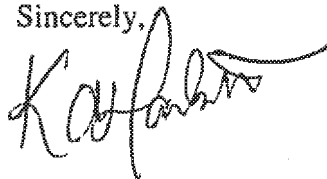
would allow the Chamber and its members to review and assess its validity in a robust and methodological fashion, so our initial technical review is limited. The analysis of New York's modeling and data – once secured – can take months. Additionally, the Data Quality Act and EPA's Information Quality Guidelines require information EPA relies upon to support its decisions to be accurate and reliable. EPA Office of Env'tl. Info., "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency" (EPA/260-R-02-008), § 5.3 (Oct. 2002). EPA cannot meet this requirement until it has obtained and can review New York's modeling and data. Reviewing the analysis underlying the Petition requires additional time in the petition process.

New York's Novel Theory of RACT. In its Petition, New York requests that EPA impose Reasonably Available Control Technology ("RACT") on the named sources based on New York's opinion of what constitutes RACT. Specifically, New York defines RACT as NOx limits that cost as much as \$5,000 per ton, based on how New York implements and enforces RACT within its borders. Significant constitutional and statutory issues are raised by New York's attempt to apply its definition of RACT extra-territorially. New York's opinion of RACT is more than three times higher than the \$1,400 per ton cost threshold used in the CSAPR Update to identify cost-effective NOx controls for electric generating units, which tend to be much larger emitters than other industrial sources. Likewise, the Petition departs from past EPA precedent because it rejects using ozone budgets and NOx trading, policy options that EPA has used in prior transport rulemakings to drive down costs. New York, instead, insists on continuous emission limits using a 24-hour averaging time. The legal and technical analysis of New York's novel RACT theory will necessarily require more time, particularly when analyzing multiple industry sectors spread across nine states.

EPA's Existing Section 126 Docket Commands a Significant Share of Agency Resources. At least six other Section 126 petitions are pending. Each depends on complex photochemical modeling, which is a time-intensive analytical tool. In light of the existing docket, an extension is necessary.

Based on the above, we are requesting that EPA exercise its authority to extend the review period by six months. We appreciate your consideration of this request. Please contact my colleague Michael Schon, Deputy Chief Counsel, U.S. Chamber Litigation Center, at Ex. 6 Ex. 6 if you have any questions.

Sincerely,



Karen A. Harbert
President and CEO
Global Energy Institute
U.S. Chamber of Commerce

CC: Mr. Justin Schwab, Deputy General Counsel, USEPA