

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

DONALD VAN DER VAART, in his official)
capacity as Secretary of the North Carolina)
Department of Environmental Quality; and)
the NORTH CAROLINA DEPARTMENT)
OF ENVIRONMENTAL QUALITY,)

File No.: _____

Plaintiffs,)

v.)

GINA McCARTHY, in her official capacity)
as Administrator of the United States)
Environmental Protection Agency; and the)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendants.)
_____)

COMPLAINT

Donald van der Vaart, in his official capacity as Secretary of the North Carolina Department of Environmental Quality, and the North Carolina Department of Environmental Quality, by the authority of the Secretary of the North Carolina Department of Environmental Quality, and through the undersigned attorneys, allege and state the following:

INTRODUCTION

1. This action is brought under the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, to compel the United States Environmental Protection Agency and the EPA Administrator (collectively “EPA”) to undertake their mandatory, non-discretionary duty to either approve or disapprove a petition submitted under 42 U.S.C § 7506a(a).

2. On or about December 9, 2013, several States within the Ozone Transport Region (OTR) submitted a §176A petition (2013 §176A Petition), requesting EPA to expand the OTR to include, among other states, North Carolina. *See* Exhibit 1 (2013 176A Petition).

3. 42 U.S.C. § 7506a(a) imposes a mandatory, non-discretionary duty upon the EPA Administrator by requiring the EPA Administrator to either approve or disapprove a §176A petition within eighteen months of its receipt.

4. To date, the EPA has failed to approve or disapprove the 2013 §176A Petition.

5. This lawsuit seeks to compel the EPA to either approve or disapprove the 2013 §176A Petition.

JURISDICTION

6. This Court has jurisdiction over this action to compel the EPA to perform a mandatory, non-discretionary duty pursuant to 42 U.S.C. § 7604(a) and 28 U.S.C. § 1331.

7. Plaintiffs provided Defendants with written notice of the claims set forth herein at least sixty days prior to commencing this action as required by 42 U.S.C. § 7604(b)(2). *See* Exhibit 2 (Plaintiff's Notice of Intent to Sue).

VENUE

8. Venue properly lies within the Eastern District of North Carolina pursuant to 28 U.S.C. § 1391(e).

PARTIES

9. Plaintiff DONALD VAN DER VAART is a party to this action in his official capacity as Secretary and principal head of the North Carolina Department of Environmental Quality.

10. Plaintiff NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY is an agency of a sovereign State and a “person” as defined in 42 U.S.C. § 7602(e).

11. Defendant GINA McCARTHY is the Administrator of the EPA. In that capacity, she is responsible for taking various actions to implement and enforce the CAA, including the action Plaintiffs seek to compel in this Complaint.

12. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is an agency of the United States within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. § 551(1).

LEGAL BACKGROUND

13. By statute, Congress created the OTR, which is comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia. 42 U.S.C. § 7511c(a).

14. The Governor of any State may Petition the EPA Administrator to add a State or portion of a State to an interstate transport region, such as the OTR. 42 U.S.C. § 7506a(a).

15. The EPA Administrator must approve or disapprove a §176A Petition or recommendation within eighteen months of its receipt. *Id.* The EPA must also “establish appropriate proceedings for public participation regarding such petitions and motions, including notice and comment.” *Id.*

16. The EPA Administrator may add a State to an interstate transport region, such as the OTR, only if the EPA Administrator determines that the interstate transport of air pollutants across State boundaries “contributes significantly” to a violation of a national ambient air quality standards in the interstate transport region. *Id.*

STATEMENT OF THE CASE AND CLAIM FOR RELIEF

17. On or about December 9, 2013, the Governors of the States of Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont submitted a §176A petition to the EPA. The 2013 §176A Petition requested EPA to expand the OTR to include Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. Subsequently, on or about December 10, 2013, the Governor of the State of Pennsylvania signed the 2013 §176A Petition.

18. Upon information and belief, EPA received the 2013 §176A Petition on December 9th, 2013 or shortly thereafter.

19. On February 14, 2014, environmental agencies from the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia sent EPA a letter, requesting that EPA deny the 2013 §176A Petition in a timely manner and requesting that EPA keep the states informed of the “expected review process and the timeline for its completion.” *See* Exhibit 3 (Joint Letter to EPA Opposing the 2013 176A Petition).

20. In a letter, dated March 27, 2014, EPA merely acknowledged receipt of Plaintiff’s February 14th letter and indicated that EPA would “carefully review and consider the information” provided. *See* Exhibit 4 (EPA Response to NCDEQ).

21. To date, Defendants have failed to perform a mandatory, non-discretionary duty by failing to approve or disapprove the 2013 §176A Petition by the date prescribed by the CAA.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations stated above, Plaintiffs request that this Court:

1. Declare that Defendants are in violation of the CAA by virtue of their failure to perform the mandatory, non-discretionary duty described above;
2. Issue an injunction directing Defendants to perform their mandatory, non-discretionary duty by a date certain;
3. Retain jurisdiction over this matter until such time as Defendants have performed their mandatory, non-discretionary duty under the CAA;
4. Award Plaintiffs their costs of litigation, including reasonable attorney and expert witness fees; and
5. Grant such additional relief as the Court may deem just and proper.

Respectfully submitted, this 30th day of March, 2016.

/s/ Sam M. Hayes
Sam M. Hayes, NC Bar No. 25552
General Counsel
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, North Carolina 27699-1601
Ph: (919) 707-8616 Fax: (919) 707-8626
sam.hayes@ncdenr.gov
Attorney for Plaintiffs

EXHIBIT 1

December 9, 2013

Gina McCarthy, EPA Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Dear Ms. McCarthy:

As allowed by §176A of the Clean Air Act (CAA), the undersigned states hereby submit the attached petition to the U.S. Environmental Protection Agency (EPA), requesting EPA to add the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region (OTR). We believe these states are the most significant contributors to continued ozone standard violations in the OTR and that expansion of the region will result in more emission reductions, a fairer distribution of the burdens of controlling air pollution (ozone), and a level economic playing field.

The OTR was established under CAA §184 to help the Northeastern and Mid-Atlantic states address transported air pollution. Decades of research have shown that transported pollution encompasses a broader area than was understood when the Clean Air Act was written. Based on our widened understanding of transport, the requested expansion will help address longer range transport. Section 176A permits EPA to add one or more states to the OTR if EPA has reason to believe that such states are significantly contributing to violations of the ozone standard in the transport region. The attached petition and technical support document establish that the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia are significantly contributing to violations of the ozone standard, not just in the undersigned states, but throughout the Ozone Transport Region. We urge you to grant the attached petition.

Transported air pollution is a major cause of continued nonattainment of the ozone standard in the OTR and in many states upwind of the OTR. States within the OTR have adopted stringent controls at significant cost. Continued nonattainment burdens our economies and deters economic growth. States outside of the OTR are not required to install the same basic controls on a statewide basis but only in nonattainment areas, and they sometimes seek and obtain waivers from even that limited obligation. We believe expansion of the transport region and implementation of the required controls in upwind states are necessary for all of the OTR to achieve attainment in a timely manner. We also believe that the consultation process that is such an important part of the Ozone Transport Commission's (OTC) activities can benefit all states in an expanded OTR in the assessment of the ozone transport problem and result in the development of effective solutions.

We acknowledge that EPA has been hampered by recent court rulings in its earlier attempts to address transport and is now moving forward on an expedited schedule to complete modeling and develop a new transport regulation. We support these efforts, but also believe that there is significant additional benefit to be gained through the OTC's collaborative process in an expanded transport region. For these reasons, we strongly urge you to grant this petition, which recognizes that upwind states are a major contributor to the current ozone problem in the Northeast and Mid-Atlantic, and are a necessary part of the transport solution.

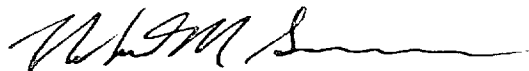
Sincerely,



Daniel C. Esty, Connecticut




Collin P. O'Mara, Delaware



Robert M. Summers, Ph.D., Maryland




Kenneth L. Kimmell, Massachusetts




Thomas S. Burack, New Hampshire



Joseph J. Martens, New York



Janet Coit, Rhode Island



David K. Mears, Vermont

Enclosure

PETITION
TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR THE
ADDITION OF
ILLINOIS, INDIANA, KENTUCKY, MICHIGAN, NORTH CAROLINA, OHIO,
TENNESSEE, VIRGINIA, AND WEST VIRGINIA
TO THE OZONE TRANSPORT REGION
ESTABLISHED PURSUANT TO SECTION 184 OF THE FEDERAL CLEAN AIR ACT
AS PERMITTED BY SECTION 176A OF THE FEDERAL CLEAN AIR ACT

WHEREAS, States in the Northeastern United States, including many of the undersigned petitioning States, face pervasive ozone nonattainment problems; and

WHEREAS, the Congress of the United States created an Ozone Transport Region (“OTR”)¹ pursuant to section 184 of the federal Clean Air Act (“Act”) to help states address the pervasive ozone nonattainment problems in the Northeastern United States; and

WHEREAS, the undersigned petitioning States are states within the OTR as currently constituted; and

WHEREAS, Congress promulgated section 176A of the Act to be read in conjunction and in harmony with section 184 of the Act, to permit a Governor of a State, including those States within the OTR, to petition the Administrator of the United States Environmental Protection Agency (“EPA”) (“Administrator”), inter alia, to add any State or portion of a State to any region established pursuant to section 176A and 184 of the Act whenever the Administrator has reason to believe that the interstate transport of air pollution from such State significantly contributes to a violation of a national ambient air quality standard (“NAAQS”) for ozone in the transport region; and

WHEREAS, EPA modeling shows that interstate transport of air pollution from IL, IN, KY, MI, NC, OH, TN, VA, and WV contributes significantly to violations of the 2008 ozone NAAQS within the OTR, including within the undersigned petitioning States; and

WHEREAS, analysis performed by the undersigned petitioning States (attached as Technical Support Document and incorporated herein) shows that interstate transport of air pollution from IL, IN, KY, MI, NC, OH, TN, VA, and WV contributes significantly to violations of the 2008 ozone NAAQS in the OTR, including within the undersigned petitioning States; and

WHEREAS, the undersigned petitioning States continue to struggle to meet and/or stay in attainment with the 2008 ozone NAAQS (and in several OTC States, the 1997 NAAQS); and

¹ The OTR consists of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and the Consolidated Metropolitan Statistical Area that includes the District of Columbia and northern Virginia. With respect to Virginia, only the Counties of Arlington, Fairfax, Loudoun, Prince William and Stafford and the Cities of Fairfax, Falls Church, Manassas, Manassas Park, and Alexandria are in the OTR.

WHEREAS, EPA has recognized that, despite enacting stringent controls, many of the States within the OTR, including the undersigned petitioning States, are significantly impacted by long range transport of ozone and ozone precursor pollutants from States outside the OTR; and

WHEREAS, States outside and upwind of the OTR which contribute significantly to nonattainment areas within the OTR are not required to install and generally do not impose controls as stringent as those required of OTR-state sources by section 184 of the Act; and

WHEREAS, based upon EPA's own modeling, referenced above, and the additional technical analysis submitted, the Administrator has reason to find that the interstate transport of air pollution from IL, IN, KY, MI, NC, OH, TN, VA, and WV significantly contributes to violations of the 2008 ozone NAAQS in the OTR within the undersigned petitioning States; and

WHEREAS, section 176A of the Act requires the Administrator to approve or disapprove a petition for the addition of a State or States to the OTR within 18 months of receipt; and

WHEREAS, section 176A of the Act requires the Administrator to establish appropriate proceedings for public participation regarding such petitions, during those 18 months, including notice and comment; and

WHEREAS, section 184 of the Act requires any state newly added to the OTR to submit within 9 months a State Implementation Plan ("SIP") which contains the minimum volatile organic compound (VOC) and nitrogen oxide (NO_x) emission control requirements applicable to OTR states (including but not limited to requirements for Inspection and Maintenance, New Source Review, and Reasonably Available Control Technology) as established by the Act, in its entirety; and

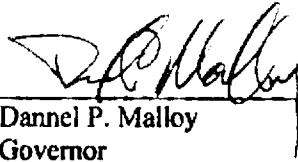
WHEREAS, the Administrator should approve this Petition such that marginal nonattainment areas within the OTR, which have a 2015 attainment date, and moderate nonattainment areas within the OTR, which must begin monitoring attainment by the 2016 ozone season, will begin experiencing transport reductions pursuant to this Petition as necessary to demonstrate compliance within the Act's deadlines; and

THEREFORE, the undersigned States hereby petition the Administrator, pursuant to section 176A(a) of the Act, to add IL, IN, KY, MI, NC, OH, TN, VA, and WV to the OTR established pursuant to section 184 of the Act; and

THEREFORE, the undersigned States request that the Administrator provide an opportunity for public participation, including public notice and comment, with regard to this Petition.

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 6th day of September, 2013.

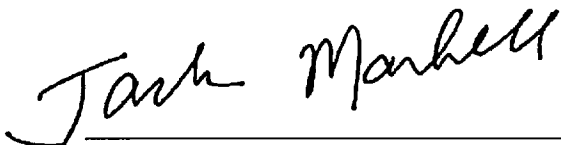
STATE OF CONNECTICUT



Dannel P. Malloy
Governor

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 4th day of December, 2013.

STATE OF DELAWARE



Jack A. Markell
Governor

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 3rd day of December, 2013.

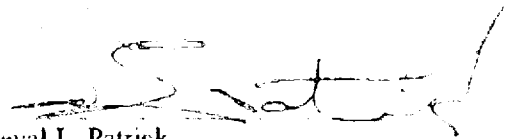
STATE OF MARYLAND

A handwritten signature in black ink, appearing to read "Martin J. O'Malley", written over a horizontal line.

Martin J. O'Malley
Governor

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 7th day of May, 2013.

STATE OF MASSACHUSETTS



Deval L. Patrick
Governor

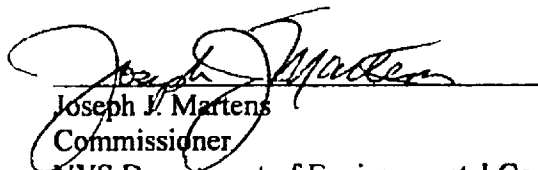
This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 25 day of November, 2013.

STATE OF NEW HAMPSHIRE


Margaret Wood Hassan
Governor

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 27 day of November, 2013.

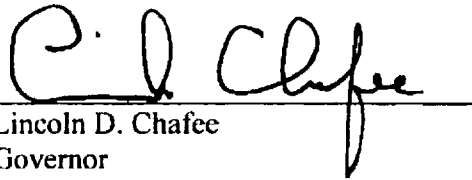
STATE OF NEW YORK

A handwritten signature in black ink, appearing to read "Joseph J. Martens", is written over a horizontal line. The signature is stylized and cursive.

Joseph J. Martens
Commissioner
NYS Department of Environmental Conservation

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 14 day of August, 2013.

STATE OF RHODE ISLAND



Lincoln D. Chafee
Governor

This Petition to the United States Environmental Protection Agency for the addition of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the Ozone Transport Region established pursuant to Section 184 of the Federal Clean Air Act as permitted by Section 176A of the Federal Clean Air Act signed as of the 27th day of August, 2013.

STATE OF VERMONT

A handwritten signature in black ink, appearing to read "Peter E. Shumlin", is written over a horizontal line. The signature is stylized with a large initial "P" and a long, sweeping tail.

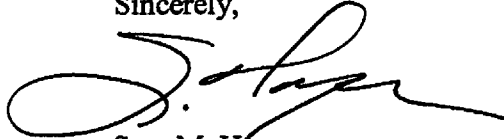
Peter E. Shumlin
Governor

EXHIBIT 2

Gina McCarthy, Administrator
November 13, 2015
Page 2

Please feel free to contact the undersigned counsel should you have any questions or concerns regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Hayes", with a large, stylized initial "S" and a long horizontal flourish extending to the right.

Sam M. Hayes
General Counsel

EXHIBIT 3

February 14, 2014

Gina McCarthy, Administrator
U. S. Environmental Protection Agency
Ariel Rios Building – Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Gina:

As you know, in December 2013, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont, all of which are members of the Ozone Transport Region (OTR), petitioned the Environmental Protection Agency (EPA) under §176A of the Clean Air Act (the Act) to expand the OTR to include the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. The petitioners argued that the additional requirements that would be imposed on the upwind states as new members of the OTR under §184 of the Act are essential to eliminate their alleged significant contribution to the petitioners' nonattainment with the National Ambient Air Quality Standard (NAAQS) for ozone.

We acknowledge our obligations under §110(a)(2)(d) of the Act to prohibit emissions that would contribute significantly to nonattainment or interfere with maintenance relative to the ozone NAAQS in downwind states. However, we strongly disagree with the stated basis for the petition and respectfully ask EPA to deny the petition in a timely manner. Some of the critical issues identified with the petition include:

- Expanding the OTR is neither an effective nor proper means to reduce ozone in the OTR. Upwind state implementation of emission reductions prescribed for OTR members, particularly CAA emphasis on volatile organic compound emission controls, would not lower ozone concentrations in petitioning states by any substantial amount.
- The petitioners state that their basis for filing the petition is air quality analyses described in a technical support document accompanying the petitions. In general, the information used in the analysis is outdated and does not reflect current and expected future emissions and air quality. This creates a critical deficiency in the basis for the petition.
- The petition inadequately describes the effectiveness of air pollution control programs of the undersigned states and their associated emission rates. For example, EPA's Clean Air Markets Division collects data that shows the tremendous progress made in recent decades in upwind states to reduce electric generating unit (EGU) emissions and improve air quality. EGU emission rates in the upwind states are generally comparable to those in the petitioning states. Additionally, emissions have been substantially reduced from non-EGU sectors in our states.
- The language of §176A of the Act clearly indicates that EPA's action in response to a petition is discretionary. §176A does not require EPA to grant a petition, especially if the Agency is already addressing interstate transport in other ways. EPA is progressing quickly towards completing an updated analysis that will determine what, if any, action is required of upwind states to address transport in the eastern United States. No such technical and economic analysis has been

conducted on the OTR expansion proposal. Creating an ineffective, parallel requirement for OTR membership is not necessary.

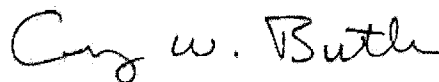
In conclusion, the undersigned states request that EPA deny in a timely manner the December 2013 petition to expand the OTC. If EPA chooses to move forward with anything other than a denial of the petition, we request to be so informed at the earliest date possible. In such case, our states request a dialogue with EPA on the issue and the opportunity to provide more in-depth information as appropriate. It would be helpful for EPA to inform us of details of the expected review process and the timeline for its completion.

We look forward to your response and thank you for your consideration.

Sincerely,



Lisa Bonnett, Director
Illinois Environmental Protection Agency



Craig W. Butler, Interim Director
Ohio Environmental Protection Agency



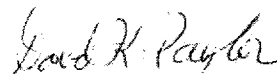
Thomas Easterly, Commissioner
Indiana Dept. of Environmental Management



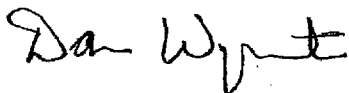
Robert J. Martineau, Jr., Commissioner
Tennessee Dept. of Environment & Conservation



R. Bruce Scott, Commissioner
Kentucky Dept. for Environmental Protection



David K. Paylor, Director
Virginia Dept. of Environmental Quality



Dan Wyant, Director
Michigan Dept. of Environmental Quality



Randy C. Huffman, Secretary
West Virginia Dept. of Environmental Protection



John E. Skvarla, III, Secretary
North Carolina Dept. of Environment and Natural Resources

Gina McCarthy
February 14, 2014
Page 3 of 3

Copies: Janet McCabe, EPA OAR
Steve Page, EPA OAQPS
Diana Esher, EPA Region 3
Beverly Banister, EPA Region 4
George Czerniak, EPA Region 5

EXHIBIT 4



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

MAR 27 2014

RECEIVED
Office of the Secretary

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Department of Environment
and Natural Resources

Mr. John E. Skvarla, III
Secretary
North Carolina Department of Environment and Natural Resources
1601 Mail Service Road
Raleigh, North Carolina 27699-1601

Dear Secretary Skvarla:

Thank you for your letter dated February 14, 2014, to U.S. Environmental Protection Agency Administrator Gina McCarthy transmitting your concerns on the petition submitted under section 176A of the Clean Air Act. In this petition, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont have requested to add the states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia and West Virginia to the Ozone Transport Region. Administrator McCarthy has asked me to respond on her behalf to acknowledge receipt of the letter.

We will carefully review and consider the information in your letter. In the meantime, if you have questions please contact me at (919) 541-5616 or Mike Koerber at (919) 541-5557.

Sincerely,

Stephen D. Page
Director
Office of Air Quality Planning
and Standards