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Legal Deficiencies in the Town of Eliot's Section 126 Petition

I. Summary

The section 126 petition filed by the Town of Eliot (the "Town" or "Eliot")[1] requests that the Environmental Protection Agency ("EPA") find that emissions from Schiller Station, a coal-fired facility located in New Hampshire and owned and operated by Public Service Company of New Hampshire ("PSNH"), are significantly contributing to nonattainment of the 1-hour sulfur dioxide (SO2) National Ambient Air Quality Standards ("NAAQS"). The Town's Petition was openly conceived, developed, and prepared in all respects by Sierra Club as part of its "Beyond Coal" campaign[2] to shut down all coal-fired electric generating facilities in America, regardless of the impact on or cost to the public.[3] At least three major flaws, however, require denial of the Petition and also differentiate this Petition from the one at issue in *GenOn Rema, LLC v. EPA*, 722 F.3d 513 (3d Cir. 2013).[4]

First, *as a threshold matter*, the Town is located in an area that is in compliance with the NAAQS. Section 126 provides a remedy only for areas in "nonattainment." But Eliot has never been in noncompliance with the SO2 NAAQS. Indeed, in 2011, the Governor of Maine informed EPA that monitoring by the Maine Department of Environmental Protection ("MEDEP") demonstrates that *all* areas of Maine (which would include the Town of Eliot) and areas within 50 kilometers of Maine's border (which would include the location of Schiller Station) are "in compliance." Thus, the State of Maine did not recommend that any area be designated as nonattainment. In 2013, EPA concurred with this conclusion. And after learning of the Town's Petition, the MEDEP even sent the Town its analysis showing that "the [MEDEP] is confident that the existing air quality in Eliot would be meeting the national ambient air quality standard for SO2 for all averaging periods at this time." Attachment A. Because it is logically and factually impossible for Schiller Station to contribute to nonexistent nonattainment, the Petition asks for a remedy where there is no problem. An order of an agency is arbitrary and

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[1] *See* Michael T. Moynahan, Chairman, Board of Selectmen, Eliot, Maine, *Petition Pursuant to Section 126 of the [CAA] to the [U.S. EPA] for Abatement of Emissions from Schiller Station in Portsmouth, New Hampshire that Directly Cause or Contribute to Nonattainment of the One-Hour SO2 [NAAQS] in the Town of Eliot, Maine* (Aug. 22, 2013) (hereinafter, the "Petition").

[2] *See* http://content.sierraclub.org/coal/.

[3] The Town even neglected to fill in a placeholder Sierra Club included for specific experiences of the Town, of which Sierra Club would have no knowledge. *See* Petition at 3 ("[IF DESIRED, THE TOWN CAN INSERT ANY RELEVANT DISCUSSION OF ELIOT'S PAST EXPERIENCES WITH SCHILLER AND ACCOMPANYING HEALTH ISSUES.]").

[4] PSNH believes the petition suffers from many legal and factual infirmities, but emphasizes only three threshold issues here, any one of which requires denial of the petition on its face and relieves EPA of expending resources to consider the Petition further.

capricious where it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). Here, a finding that Schiller Station is contributing to nonattainment in Eliot is not only "implausible," but impossible.

Second, *as a threshold matter*, the Town is not even authorized to file a petition under section 126. Section 126 authorizes petitions only by a "State or political subdivision." The Town, of course, is not the State, and EPA's regulations define a "political subdivision" as "the representative body *that is responsible for adopting and/or implementing air pollution controls*." 40 C.F.R. § 50.30(a)(1) (emphasis added). That is not the Town. Instead, it is the MEDEP—the very entity that has already concluded the area is "in compliance" and should not be designated as nonattainment. A decision to accept the Town's position over the very state body statutorily authorized to make the determination would be completely at odds with the statutory role of section 126. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Finally, Sierra Club supported the Town's Petition exclusively with modeling of hypothetical potential emissions that is completely divorced from *actual*, *existing* emissions data and, in any event, technically flawed. Because Sierra Club's modeling conflicts with actual emissions data, the MEDEP concluded that the "Town may not be aware of the work that [it] has done" and shared its own analysis with the Town after learning of this Petition. *See* Attachment A. The MEDEP informed the Town that the modeling Sierra Club provided it "does not reflect actual facility operations or the actual air quality levels in the area." *Id.* at 2. The MEDEP's own analysis is based on "[a]ll readily available sulfur dioxide (SO2) monitoring and emissions data since 1980 from SO2 monitoring sites and emission data from major sources in and near Kittery, Maine and Portsmouth, New Hampshire." *Id.* As the MEDEP pointed out to the Town, EPA has stated that actual air quality should be used for SO2 NAAQS purposes. Indeed, the plain language of section 126 and its legislative history show that Congress intended EPA to rely on real-world emissions data, and EPA's current modeling guidance unambiguously adopts that position as well. Such data is available here, and Sierra Club's own supplemental modeling of actual emissions confirms that Schiller Station's emissions are *decreasing* and that no violation of the NAAQS would occur. Moreover, even Sierra Club's modeling of potential emissions is technically flawed. A consultant hired by PSNH to review this modeling confirms these serious methodological flaws and identifies numerous problems. *See* Attachment B.

EPA has steadfastly denied section 126 petitions where: (1) information demonstrated that the sources were not "significantly contributing to nonattainment"; (2) EPA did not have adequate information to show significant contribution to nonattainment; or (3) monitoring data showed compliance with the 1-hour standard. *See, e.g.*, 64 Fed. Reg. 28,250, 28,252 (May 25, 1999) (partially denying section 126 petitions for "one of three reasons"); *see also* 71 Fed. Reg. 25,328, 25,337 (Apr. 28, 2006) (denying section 126 petition where EPA's "analyses project all of North Carolina to be in attainment" for relevant standard). All three of these deficiencies exist here. In fact, granting the Town's Petition would be a quintessential arbitrary and capricious action. It would provide relief to an entity not authorized to seek it, in an area not classified for