

contribution to nonattainment of air quality standards in other States, and the Court's decision not to revisit that holding on rehearing, have eliminated the legal basis for EPA's denial of the petition. Thus, a remand is required for the Agency to review North Carolina's petition in light of this Court's decision in No. 05-1244. EPA's denial of North Carolina's petition regarding ozone is not affected by the Court's decision in No. 05-1244. However, the factual predicate for EPA's decision on ozone has fundamentally changed. Specifically, while at the time EPA made its decision the Agency's modeling predicted that all areas in North Carolina would attain the ozone standard, more recent monitoring indicates that they will not. EPA believes that it would be appropriate to reconsider the petition in light of this changed factual circumstance and requests that the ozone decision also be remanded to the Agency. A remand for EPA to reconsider the State's section 126 petition would render Petitioners' challenge to EPA's denial of North Carolina's administrative petition for reconsideration moot.

BACKGROUND

These consolidated petitions seek review of EPA's denial of a petition submitted by the State of North Carolina pursuant to Clean Air Act section 126, 42 U.S.C. § 7426, and of EPA's denial of North Carolina's administrative petition for reconsideration of that denial. Section 126 allows a State to petition EPA for a finding that a source or sources of emissions in another State significantly

contribute to nonattainment of air quality standards or interfere with the petitioning State's ability to maintain those standards. If EPA makes the finding, the source(s) must cease operations within three months or comply with emission limitations and compliance schedules established by EPA that will eliminate the significant contribution to nonattainment or interference with maintenance in no more than three years.

North Carolina's section 126 petition was primarily based on findings made by EPA in proposing CAIR, promulgated at 70 Fed. Reg. 25,162 (May 12, 2005). In promulgating CAIR, EPA found that a number of States in the eastern United States contributed to nonattainment of the National Ambient Air Quality Standards for ozone and/or fine particulate matter in other States. CAIR required those States to modify their State Implementation Plans to eliminate that significant contribution and established a regional emissions trading program so that the required emission reductions would be made in the most cost-effective manner. In addition to requiring States to modify their State Implementation Plans, EPA imposed the CAIR requirements directly on sources through promulgation of a Federal Implementation Plan for each State – *i.e.*, “CAIR FIPs.” 71 Fed. Reg. 25328 (April 28, 2006).

In its petition, North Carolina sought relief under section 126 against sources in those States that EPA had proposed to include in CAIR on the ground

that they significantly contributed to nonattainment of both the PM_{2.5} and ozone standards in North Carolina. With regard to PM_{2.5}, EPA denied the petition on the ground that the promulgation of CAIR and implementation of the rule by the CAIR FIPs would eliminate the significant contribution of the upwind States to North Carolina. 71 Fed. Reg. 25,328, 25,337-38 (Apr. 28, 2006). With regard to ozone, EPA denied the petition on the ground that predictive modeling indicated that all areas in North Carolina would attain the ozone standard and remain in attainment without the need for additional reductions from other States. *Id.* at 25,337. EPA subsequently denied North Carolina's administrative petition for reconsideration of both decisions. 72 Fed. Reg. 35,354 (June 28, 2007).

CAIR was subject to multiple petitions for review in this Court, which were consolidated as State of North Carolina v. EPA, No. 05-1244. Because of the close relationship between CAIR and EPA's decisions on North Carolina's section 126 petition, EPA moved to assign the petitions for review of all these actions to the same panel. By Order dated February 8, 2008, the Court denied that motion, but ordered that the instant cases be held in abeyance.

The Court issued its opinion in No. 05-1244 on July 11, 2008. 531 F.3d 896 (D.C. Cir. 2008). In that opinion the Court held, *inter alia*, that EPA had improperly determined that a State's compliance with CAIR fulfilled its obligation under Clean Air Act section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), to

eliminate significant contribution to nonattainment of air quality standards in other States, and that CAIR must be vacated. Several parties, including EPA, petitioned for rehearing or rehearing en banc. In an Order issued December 23, 2008, the panel denied the petitions for rehearing except that it granted the request that CAIR be remanded to the Agency without vacatur. The petitions for rehearing en banc were denied in their entirety.

ARGUMENT

I. EPA'S DENIAL OF NORTH CAROLINA'S SECTION 126 PETITION REGARDING PM_{2.5} SHOULD BE REMANDED

In promulgating CAIR, EPA determined that States that comply with the requirements of that rule, which could include participation in a regional trading program, would meet the requirement under section 110(a)(2)(D) that States include in their State Implementation Plans “adequate provisions (i) prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard” North Carolina’s section 126 petition requested that EPA find that emissions from sources in those States EPA found were “linked” to North Carolina for purposes of CAIR “contribute significantly to nonattainment in, and interfere with

maintenance by, the State with respect to the national primary and secondary ambient air quality standards ('NAAQS') for fine particulate matter ('PM_{2.5}').” JA 000239. Because EPA had already found that compliance with CAIR would eliminate these States’ significant contribution to nonattainment in other States, including North Carolina, EPA denied the petition.

In North Carolina, this Court held that EPA’s determination that compliance with CAIR constituted compliance with section 110(a)(2)(D)(i), i.e., that it eliminated the covered States’ significant contribution to downwind nonattainment, was unlawful. 531 F.3d at 907. Because that determination by EPA was the basis for its denial of North Carolina’s section 126 petition for PM_{2.5}, the Court’s decision effectively invalidated the basis for that denial, as indicated in our brief filed in this case on January 5, 2009, at 26-27. Accordingly, EPA no longer intends to defend the decision, and the decision should be remanded to the Agency for review in light of the Court’s holding in North Carolina. See Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (“We commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than waste the courts’ and parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.”) While the Court’s December 23 Order on rehearing left the requirements of CAIR in place pending the Agency’s action on remand, the accompanying opinion makes clear that the Court was not altering its

holding concerning the legality of EPA's determination that the covered States would comply with section 110(a)(2)(D)(i) by virtue of complying with CAIR. Opinion on Rehearing at 3 (per curiam), 4 (Rogers, J., concurring). Thus, the Court's Order on rehearing does not change the Agency's determination that the decision must be reconsidered.

In light of EPA's determination that there is no longer any legal basis for this portion of its decision, there is no reason for the Court to consider any of the particular issues argued by Petitioners, as this aspect of the case no longer presents a "case or controversy." Specifically, there is no basis for the Court to determine in the abstract whether sources in a State that has met the requirements of section 110(a)(2)(D)(i) – i.e., no longer contributes significantly to a downwind State's ability to attain or maintain a standard – can be subject to a petition under section 126, a question that EPA believes Petitioners may ask the Court to address. The interplay between these two statutory provisions can arise in numerous factual circumstances, and there is no basis for the Court to address the issue except in the context of reviewing a specific decision by EPA to grant or deny a section 126 petition. Furthermore, under the principles of Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), how these statutory provisions should be interpreted in specific circumstances should be addressed by the agency charged with administering the statute before being addressed by the Court. This Court has invalidated EPA's

determination that CAIR met the requirements of section 110(a)(2)(D)(i), and EPA must now consider anew how to address the problem of regional transport of pollutants. Until the Agency has had the opportunity to do so, and to consider a specific request under section 126, the Court lacks jurisdiction to offer an advisory opinion on the relationship between these statutory provisions.

Nor is there any basis for the Court to impose a deadline on EPA to complete its reconsideration on remand, as the Court found in addressing the same sort of request with regard to the remand in North Carolina. Opinion on Rehearing at 3 (per curiam). The Court's role on judicial review is to determine the lawfulness of EPA actions. See 42 U.S.C. § 7607(d)(10) (Court may "reverse" an EPA action it finds unlawful). Once that role has been fulfilled it is up to the Agency to act in accordance with the Court's opinion. In this case, the Court's role is fulfilled when the decisions are remanded to EPA for reconsideration.

II. EPA'S DENIAL OF NORTH CAROLINA'S SECTION 126 PETITION REGARDING OZONE SHOULD BE REMANDED

EPA's decision to deny North Carolina's petition with regard to ozone was not based on CAIR. North Carolina's section 126 petition was based on the modeling EPA had done for the CAIR proposal, in which some areas in North Carolina were projected not to achieve the ozone standard by the attainment date of 2010. Subsequent modeling by EPA used to justify the final rule, however, projected that all areas in North Carolina would achieve the ozone standard by the

attainment date. Thus, EPA determined that no other State significantly contributed to nonattainment of the ozone standard in North Carolina. 71 Fed. Reg. at 25,337. In response to comments, EPA also considered whether the petition should be granted on the basis that sources in one or more States would interfere with maintenance of the ozone standard in North Carolina. EPA determined as a factual matter that they would not. Id. at 25,337 n.11.

Recent monitoring data indicates that the Charlotte-Gastonia-Rockhill nonattainment area is not likely to attain the ozone standard by the attainment date, and North Carolina has withdrawn its attainment demonstration for the area. Atts. 1, 2. Accordingly, EPA believes that it is appropriate to reconsider its denial of North Carolina's section 126 petition on the basis of these fundamentally changed factual circumstances, and therefore requests that the ozone decision also be remanded to the Agency. EPA continues to believe that its decision denying the petition for ozone was correct based on the facts that were known at the time the decision was made. However, the Agency believes there is little point in litigating the issue where it has determined that the changed facts warrant reconsideration of the decision regardless of what the Court might decide. See B.J. Alan Co., Inc. v. ICC, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (“[a]dministrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts,” quoting Commonwealth of Pennsylvania v.

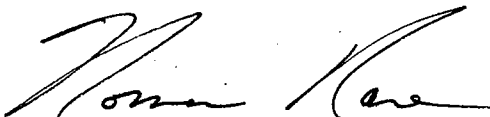
ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). EPA does not believe that it would be appropriate for the Court to impose a deadline on EPA's reconsideration for the reasons discussed above with regard to PM_{2.5}.

CONCLUSION

EPA's decisions denying North Carolina's section 126 petition with regard to both PM_{2.5} and ozone should be remanded to the Agency for reconsideration in light of the changed legal and factual circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2009, I caused a true and correct copy of the foregoing Respondent's Supplemental Filing Requesting Remand to be served by electronic mail and by first class mail, postage-prepaid, on the following:

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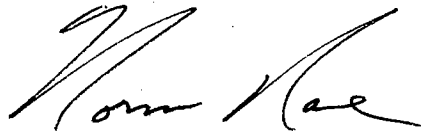
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A handwritten signature in cursive script, appearing to read "Norm Rave". The signature is written in black ink on a white background.

Norman L. Rave, Jr.