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Senator Dawn Hill
Maine State Senate
3 State House Station
Augusta, Maine 04333-0003

Representative Roberta Beavers
House of Representatives
2 State House Station
Augusta, Maine 04333-0002

**Re: Potential Liability and Expense Associated with Filing a Petition under
Section 126 of the Clean Air Act**

Dear Senator Hill and Representative Beavers:

You have asked for guidance from this Office concerning potential costs and legal exposure to the Town of Eliot if it were to file a petition under Section 126 of the Clean Air Act ("CAA"), seeking reductions in sulfur dioxide emissions from Schiller Station in Portsmouth, New Hampshire. I am happy to respond based on this Office's experience with Section 126 petitions and our knowledge of governing law, but our thoughts should not be construed as legal advice to the Town.

Section 126 provides a mechanism for states or municipalities to petition the U.S. Environmental Protection Agency ("EPA") to impose emission controls on one or more major upwind sources of air pollution that significantly contribute to the non-attainment of ambient air quality standards within the petitioning jurisdiction. 42 U.S.C. § 7426(b); *Appalachian Power Co. v. EPA*, 249 F.3d 1042 (D.C. Cir. 2001). Your letter raises three questions, as follows:

1. *If the Town of Eliot filed a petition with EPA under Section 126 of the Clean Air Act, would Eliot be subject to risk of non-frivolous countersuits?*

No. Assuming that the Town's petition is filed in good faith, and not maliciously or solely for the purpose of harassment, there is no risk of non-frivolous countersuit. A Section 126 petition initiates an administrative review process within EPA to determine if emissions from the source(s) identified in the petition trigger standards set forth in the CAA for EPA action. If the emissions trigger those standards, EPA must act to address the problem; if they do not, EPA has no such obligation. Regardless, the filing of a petition does not create a forum for "countersuit" or the equivalent against the petitioning party. Similarly, the good faith filing of a Section 126 petition would not give rise to a non-frivolous cause of action against the Town in state or federal court.

2. *If the Town of Eliot filed a petition with EPA under Section 126 of the Clean Air Act, would Eliot be forced to participate in a protracted and expensive administrative and appeals process?*

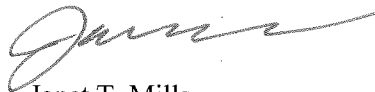
Not necessarily. The Town's participation in administrative or judicial proceedings following the filing of its petition would be discretionary. The Town may choose to participate in EPA's administrative review process, and doing so may enhance the prospect of obtaining a favorable result from the agency, but it would not be legally required to do so. Participation in subsequent judicial proceedings would work similarly. EPA's action on the petition would be subject to judicial review. That means any person aggrieved by EPA's decision could challenge it in court. If the decision were adverse to the Town, it could seek review of the decision in the U.S. Court of Appeals for the District of Columbia Circuit, but the Town would not be obligated to file such an appeal. Conversely, if EPA granted the petition, Schiller Station could pursue an appeal. Here again, the Town would have the option of intervening in the case to support EPA's decision, or it could choose not to participate. Either way, the U.S. Department of Justice would represent EPA in the appeal and provide an appropriate defense of the agency's action.

3. *Are there significant expenses associated with filing a petition with EPA under Section 126 of the Clean Air Act?*

Not necessarily. Under the law, EPA must base its action on a Section 126 petition on the technical and legal merits. Therefore, a petition should be accompanied by emissions information from the upwind source(s), actual air quality monitoring data from the petitioning jurisdiction and air quality modeling that demonstrates a causal connection between the upwind emissions and the downwind ambient air quality standard attainment problem. The expenses associated with preparing and filing such a petition will depend upon many factors, including strategic choices of the petitioner as it assembles supporting technical information. For example, a petition that relies solely on pre-existing and publicly available information would be less expensive than one that includes extensive modeling commissioned for the purpose of the petition. Also, the extent to which a petitioner is able to rely upon its own resources for technical and legal support, or otherwise to obtain those services on favorable terms, will influence the overall expense of the undertaking. In this way, the filing of a Section 126 petition can be either an extremely resource-intensive and costly effort or one with relatively minimal expense, depending on the circumstances and tactical choices of the petitioner.

I hope you find this guidance helpful, and I hope you will let me know if you have any other questions.

Sincerely,



Janet T. Mills
Attorney General