



Connecticut Bureau of Air Management, Anne Gobin, Acting
Maine Bureau of Air Quality Control, James Brooks
Massachusetts Bureau of Waste Prevention, Barbara Kwetz
New Hampshire Air Resources Division, Robert Scott
New Jersey Division of Air Quality, William O'Sullivan
New York Division of Air Resources, David Shaw
Rhode Island Office of Air Resources, Stephen Majkut
Vermont Air Pollution Control Division, Richard Valentinetti

July 7, 2004

The Honorable Michael O. Leavitt
Administrator
U.S. Environmental Protection Agency, 1101A
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Public Review and Comment Process for the Supplemental Proposal for the Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone

Dear Administrator Leavitt:

The Northeast States for Coordinated Air Use Management (NESCAUM) are writing to express our serious concerns regarding the manner in which the U.S. Environmental Protection Agency (EPA) is conducting its public process with respect to the Clean Air Interstate Rule (Transport Rule). We also request an extension of the deadline for submitting comments into the docket for the June 10, 2004 Supplemental Notice of Proposed Rulemaking (69 FR 32684) (SNPR), as well as a meeting with you prior to that deadline to discuss our concerns. We believe that EPA's current rulemaking approach is not serving the public well, and significantly impedes opportunity for an informed and meaningful public review and comment process.

Overall, our concerns are with: (1) the exceedingly short time-frames that are provided for public review and comment; (2) EPA's piecemeal approach to rulemaking; (3) the difficulty in accessing data that EPA used to develop the proposal; (4) EPA's characterization of important changes in the SNPR as mere clarifications; (5) the inclusion of proposed substantive revisions to other regulatory programs within the context of the Transport Rule proposal; and (6) new and substantive changes that have been proposed without apparent underlying technical support.

EPA published its first draft of the Transport Rule in the Federal Register on January 30, 2004 with a 60-day comment period. Rather than releasing a regulatory proposal, EPA released preamble language, with a range of broad program elements and options on which to comment. Because the NESCAUM states have successfully developed and implemented regional cap-and-trade programs, we understand that clearly structured and detailed program components are needed in order to evaluate the effectiveness and adequacy of any such proposals. Given that the January proposal lacked clear structure and detailed program elements, we could not fully assess the program at that time.

On May 18, 2004, EPA provided access to a pre-publication version of the SNPR on the Transport Rule that for the first time provided draft regulatory language. On June 10, 2004, the SNPR -- consisting of 37 pages of preamble and 50 pages of regulatory text -- was published in the Federal Register with a 45-day comment period. This latest step in the rulemaking process further undermines the public review process in the following ways.

First, EPA chose to hold a public hearing on the proposal on June 3, 2004, one week prior to the proposal's eventual publication in the Federal Register, and only 16 days after an unofficial version

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was made publicly available. This clearly did not provide adequate time for review and assessment of the contents of the document, evidenced by the fact that only 11 people testified at the public hearing. With a longer lead time, many of the NESCAUM states and other interested groups would have likely participated in the public hearing process.

Second, EPA's release of a series of piecemeal regulatory proposals over time, making it difficult for interested persons to comprehend the whole, greatly hinders the ability of EPA to solicit and receive public input. EPA has acknowledged, for instance, that the SNPR does not reflect public input received during the comment period for the January 2004 proposal. Therefore, potential improvements or clarifications to the proposed program based on public comments were not incorporated. This has exacerbated confusion for reviewers of the SNPR. It has created more work by essentially requiring the public to reiterate comments on the unchanged program elements of concern that were rearticulated in the SNPR, and unfairly requires the public to scrutinize the various publications for distinctions that may or may not have significant ramifications on public health and welfare and compliance with existing regulatory programs.

Third, EPA is not making crucial data publicly available in a timely and appropriate fashion. By the June 3rd public hearing, EPA had not made available many of the technical support documents that are critical to properly assessing the proposal. This still holds true: as of the date of this letter, while technical support documents that contain data summaries are available, much of the data underlying EPA's technical analysis is still not available in any type of organized format that allows for in-depth review of EPA's results. Staff from the NESCAUM states requested data for both the January and the June proposals (e.g., pre-gridded unmerged emission files), in order to analyze and comment on EPA's modeling results. In the case of the January data files, access was not granted until after the close of the comment period. For the SNPR data files, as of this writing, state staff has not been granted access to these files. It is critical that such data be made available at the start of the comment period rather than near its end or after the comment period closes in order to provide the public opportunity for a meaningful review of the data.

Fourth, EPA's general characterization of the SNPR as primarily clarifying and correcting a few program elements with very few substantive changes from the January proposal is a vast understatement at best, and misleading at worst. In the SNPR, EPA indicates that the proposal "fills in certain gaps in the January 2004 proposal and revises it or its supporting information in specific ways" (69 FR 32686). Our assessment is that, at minimum, EPA is proposing new and significant regulatory revisions to the Acid Rain Program, the NO_x SIP Call Program, emissions reporting requirements (through changes to the Consolidated Emissions Reporting Rule or CERR), and the Regional Haze Program's Best Available Retrofit Technology (BART) Rule. We question the appropriateness of EPA proposing new substantive changes that were not included in the January Federal Register notice.

We further question the appropriateness of EPA proposing significant changes to other regulatory programs within the context of the Transport Rule. For example, in the SNPR, EPA indicates that it "proposes several revisions of the Acid Rain Program regulations... These proposed revisions would facilitate the interaction for the Acid Rain Program with the proposed CAIR trading program. However, because these proposed modifications also would benefit the implementation of the proposed Acid Rain Program, EPA is proposing to adopt them regardless of whether other rules proposed in the CAIR are adopted." (69 FR 32698). Similar substantial changes are found throughout the SNPR. Notwithstanding our views on these suggested changes -- and we plan to comment on the substance in forthcoming submissions to the docket -- we believe EPA should not propose significant changes to separate and distinct regulatory programs only within the context of the Transport Rule. Such proposed changes should occur within a Federal Register Notice that specifically explains the

proposed changes in detail and delineates the impacts of the proposed changes on the specific regulatory program under discussion.

In the SNPR, EPA solicits comments on over 50 separate, substantive issues or program options. Thoroughly responding to the array of issues EPA has presented is extremely difficult, given the 45-day review and comment period. While we recognize the need to get these long awaited rules promulgated in a timely manner, there is a need to ensure an adequate public review and input commensurate with the importance of this critical air pollution mitigation program.

Finally, in many instances, EPA "invites comment" on program concepts that are either not specifically proposed, or for which there is no apparent underlying technical support. While this is certainly one way to raise new concepts, it places commenters in a difficult position because little or no context or technical basis is provided upon which to comment. Such concepts should be initially proposed early in the process, i.e., through an Advance Notice of Public Rulemaking (ANPR), so that by the time EPA issues a Notice of Proposed Rulemaking (NPR) there is specific, precise, and detailed regulatory language on which the public can comment.

Taken together, we believe that EPA's public process is no longer as transparent or as responsive as it once was and needs to be. Further, it denies EPA useful input from the interested public that it purports to solicit. It is particularly troubling to observe similar dynamics -- piecemeal proposals, lack of access to data, short timeframes for review, new and substantive changes proposed without apparent underlying technical support -- with other EPA proposals, including draft rules to implement the 8-hour ozone standard, New Source Review, and the air toxics program.


Given the significance of the Transport Rule and its long-term impacts on public health and the environment, we -- the state agencies who bear the primary responsibility to protect the public and the environment against the adverse impacts of air pollution -- believe that additional time for public review and comment is reasonable and necessary. We urge you to extend the deadline for the comment period on the SNPR for at least an additional 60 days from the time that all data referred to in the Technical Support Documents are publicly available.

We further urge you to re-examine and modify your procedures for issuing proposed rules and soliciting public comment, as well as to create better mechanisms for making technical support data publicly available in a timely manner. We appreciate your approach to environmental stewardship through the "Enlibra Principles," which emphasize the importance of partnership, collaborative processes and stakeholder input. It is in that spirit that we raise these concerns and ask for the opportunity to meet with you to discuss in greater detail these issues and possible solutions.

Sincerely,



Kenneth A. Colburn
Executive Director



Barbara A. Kwetz
NESCAUM Chair

Cc: Jeffrey R. Holmstead, EPA, Office of Air and Radiation
Jessica Furey, EPA, Office of Policy, Economics, and Innovation
EPA Docket # OAR-2003-0053
NESCAUM Directors