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Arthur N. Marin, Executive Director

May 4, 2005

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 6102T
Washington, DC 20460
Attention: E-Docket #OAR 2003-0079

Re: Proposed Rule on New Source Review Implementation under the 8-Hour Ozone Standard

Dear Administrator Johnson:

The Northeast States for Coordinated Air Use Management (NESCAUM) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) *Nonattainment Major New Source Review Implementation Under 8-Hour Ozone National Ambient Air Quality Standard: Reconsideration* (70 Fed. Reg. at 17018-17027, April 4, 2005) (Reconsideration). NESCAUM is a regional association representing the air quality control divisions of the states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont.

Beginning in 2003, EPA initiated a series of proposed rulemakings for its 8-hour ozone national ambient air quality standard (NAAQS) implementation rule. The preamble was published in the Federal Register on June 2, 2003 and public comment closed on August 1, 2003; draft regulatory text for Phase I of the rule was published on August 6, 2003 and public comment closed on September 5, 2003; and an alternative proposal for classifying nonattainment areas was published on October 21, 2003 with public comment closing on November 5, 2003. In these Federal Register notices, EPA offered no draft regulatory language on nonattainment New Source Review (NSR). In the June 2, 2003 Federal Register, EPA proposed that major NSR would generally be implemented in accordance with an area's 8-hour ozone nonattainment classification, except for areas that were designated nonattainment for the 1-hour ozone NAAQS at the time of designation for the 8-hour standard. See 68 Fed. Reg. 42302, 42321 (June 2, 2003). If the classification for a 1-hour ozone nonattainment area was higher than its classification under the 8-hour ozone standard, then the major NSR requirements in effect for the 1-hour standard would have continued to apply under the 8-hour standard even after EPA revoked the 1-hour standard. See 68 Fed. Reg. at 32821.

However, in EPA's final ozone implementation rule, Phase I, which was published on April 30, 2004, EPA revised the implementation approach for major NSR under the 8-hour ozone standard. EPA determined that major NSR would be implemented in accordance with an area's 8-hour ozone nonattainment classification. The Agency announced, contrary to its position set forth in the proposed rule, that "when we revoke the 1-hour standard, a State is no longer required to retain a nonattainment major NSR program in its state implementation plan (SIP) based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard." See 70 Fed. Reg. at 17020. In response to this change in position, as well as other issues, several environmental groups filed a petition for reconsideration. On September 23, 2004, EPA granted the petition for reconsideration.

In these comments, NESCAUM addresses EPA's conclusions (1) that the Clean Air Act (Act) does not compel EPA to retain 1-hour ozone NAAQS major NSR requirements in implementing the 8-hour ozone NAAQS because major NSR is not a control measure; and (2) that no state's removal of 1-hour

NSR requirements from the state's SIP will interfere with any applicable requirements under § 110(*l*) of the Act. See 70 Fed. Reg. at 17018. EPA's conclusions hinge on EPA's faulty distinction between control measures that reduce emissions and emissions growth measures that prevent emissions increases. By labeling 1-hour major NSR requirements as growth measures, EPA concludes that such requirements are not subject to the anti-backsliding provisions of the Act. EPA further concludes that removal of 1-hour NSR requirements from a SIP will not interfere with any applicable requirements concerning attainment and reasonable further progress (RFP).

The NESCAUM States find both of EPA's conclusions erroneous based on the plain language of the Act, Congress's stated intent, EPA's own rulemakings and the likely results of implementing EPA's conclusions. The language of the Act clearly demonstrates that the NSR provisions are aimed at reducing emissions. EPA's new interpretation that NSR is only a measure to control growth in emissions is contrary to its previous interpretations of NSR as a control measure or requirement. The removal of NSR requirements in 1-hour ozone nonattainment areas will result in a backsliding of control measures or requirements at the least by raising the tonnage thresholds for triggering NSR and by reducing the ratio of emission offsets required. Such removal will result in emission increases, and thus will interfere with RFP as well as attainment.

I. BACKGROUND

The NSR program[1] is a critical component of the Act's strategy to control emissions from large industrial sources. The program requires all newly constructed industrial facilities -- such as power plants, refineries, and chemical manufacturers -- to install state-of-the-art pollution control equipment. Historically, the NSR program has also required existing facilities to install modern pollution controls when undertaking major modifications or renovations. For many years, NSR has served as the chief regulatory lever to require old sources, "grandfathered" by the 1977 Clean Air Act Amendments, to clean up when modernizing or expanding their operations.

While the NSR program has been criticized by some in industry and by some regulators for being unduly burdensome, complicated and time-consuming, the program has a proven track record of being an effective control strategy, yielding significant emission reductions. In the early 1990s, EPA began investigating potential violations of NSR. Before this time, only a handful of cases had been pursued under this rule. In 1996, EPA and several States invested significant resources toward NSR enforcement efforts, focusing first on the power generation sector and then on other industrial sectors. In the course of these enforcement efforts, EPA settled with 27 companies. These settlements required the companies collectively to reduce their emissions by approximately 557,000 tons per year of sulfur dioxide (SO_2); 242,000 tons per year of nitrogen oxides (NOx); and 113,000 tons per year of volatile organic compounds (VOC), particulate matter and other pollutants.[2] In addition to the settled suits, EPA has filed ten lawsuits in various courts, filed 47 notices of violation, and begun investigations at 164 electric generating units. An analysis conducted by the Environmental Integrity Project estimates that if the pending enforcement actions and investigations were settled in a similar manner, SO_2 emissions could be reduced by 3.65 million tons per year. This equates to a thirty-three percent reduction in SO_2 pollution from the entire

[1] The collective NSR provisions include the Prevention of Significant Deterioration (PSD) provisions applicable to sources in attainment or unclassifiable areas, and Nonattainment NSR provisions applicable to sources in nonattainment areas.

[2] Environmental Integrity Project, *Race to the Top*, January 12, 2004, page 3, http://www.environmentalintegrity.org/pub134.cfm.

utility sector.[3] Overall, these NSR enforcement initiatives have resulted in reductions of criteria pollutants emissions by hundreds of thousands of tons per year.

II. THE ANTI-BACKSLIDING PROVISIONS OF THE ACT, COMBINED WITH CLEAR EVIDENCE THAT NSR IS A CONTROL MEASURE OR REQUIREMENT, COMPEL EPA TO RETAIN 1-HOUR OZONE NAAQS MAJOR NSR REQUIREMENTS

A. Antibacksliding

EPA's decision that States need not retain nonattainment NSR requirements that were applicable as a result of their classification under the 1-hour standard is contrary to the two "anti-backsliding" provisions in the Act, Sections 172(e) and 193, 42 U.S.C. §§ 7502(e) and 7515. The first, Section 172(e), provides that if EPA relaxes a NAAQS, it must within twelve months "promulgate requirements . . . [that] provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). As EPA recognizes, Section 172(e) applies here because that provision expresses congressional intent that States cannot remove control measures in areas that are not attaining a NAAQS when EPA revises the standard to make it more stringent. 70 Fed. Reg. at 17021. The second applicable anti-backsliding provision in Section 193 of the Act similarly provides that no "control requirement" in effect in any nonattainment area before November 15, 1990 may be altered unless the revision insures equivalent or greater emission reductions. 42 U.S.C. § 7515. Although EPA does not acknowledge the applicability of Section 193, there can be no dispute that each NESCAUM State with an ozone nonattainment area had a nonattainment NSR program in effect prior to November 15, 1990.

EPA's decision to allow for the removal of NSR requirements applicable to sources in 1-hour nonattainment areas will result in a backsliding of control measures or requirements by raising the tonnage thresholds for triggering NSR and by reducing the ratio of emission offsets required. EPA has indicated that major source thresholds for areas that were classified as "severe" nonattainment of the 1-hour ozone standard and that are now classified as "moderate" nonattainment of the 8-hour standard and are in the Ozone Transport Region (OTR) will change from 25 tons to 100 tons for NOx and that offset requirements will change from 1:3 to 1:1.15. Such areas include southwestern Connecticut, New York City, Long Island, northern and southern portions of New Jersey, southeastern Pennsylvania, Wilmington, Delaware and Baltimore, Maryland. For "serious" 1-hour ozone nonattainment areas in the OTR (Massachusetts, Rhode Island, greater Connecticut, portions of southeastern New Hampshire, and the District of Columbia) that are now classified as "moderate" nonattainment of the 8-hour ozone standard, the major source thresholds will change from 50 to 100 tons for NOx and the offset ratio will change from 1:2 to 1:1.5. Such changes will allow sources to emit more NOx than previously allowed. At the same time, EPA has not identified – as required under both Section 172(e) and Section 193 of the Act – alternative measures that are equal to or more stringent than the nonattainment NSR requirements in place under the 1-hour ozone standard.

EPA's action is founded on the assumption that such backsliding would not conflict with the statute because the nonattainment NSR program is not a "control" requirement or measure subject to the anti-backsliding provisions. As discussed in the next section, this assumption is untenable.

[3] The EIP report estimates that SO_2 emissions from the utility sector totaled 11.2 million tons in 2000.

B. The NSR Program Contains Control Measures or Control Requirements

EPA's conclusion that nonattainment NSR requirements are not control requirements or measures is based on the assumption that the NSR permitting program is merely intended to curb excess emissions growth, not reduce total emissions. In support of this position, EPA draws an artificial distinction between a "growth measure," which EPA defines as a limit on the growth of new sources of emissions in an area, and a "control measure," which the agency defines as a measure that reduces emissions below an area's baseline "inventory" for purposes of attaining a NAAQS. EPA argues that the major NSR program does not impose "control measures." 70 Fed. Reg. 17021.[4]

EPA's interpretation of NSR is too limited because, as explained below, NSR operates *both* to reduce emissions and to control emissions growth.[5] An examination of the language and purpose of the Act's nonattainment NSR provisions, pertinent legislative history, and EPA's own past decisions on SIP revisions demonstrates that EPA's interpretation is flawed.

1. Statutory Language

Congress intended that the nonattainment NSR program would control emissions from new and modified sources. Additionally, Congress intended that a control measure or requirement would compel sources to control emissions of a pollutant, regardless of whether this affects the total emissions in the area's baseline inventory. The plain language of the Act reflects this intent. Control measures or requirements contained in the NSR program include emission limitations and emission offsets.

Section 173(a)(2) of the Act requires that States have in place permitting programs that require, for each construction of a new major stationary source or modification of an existing major stationary source, that the source comply with an emission limitation determined to be the lowest achievable emission rate (LAER). 42 U.S.C. § 7503(a)(2). An emission limitation is a control measure or requirement. See, e.g., 42 U.S.C. § 7502(c)(6) (nonattainment "plan provisions shall include enforceable emission limitations, *and such other control measures*, means or techniques . . . as may be necessary or appropriate to provide for attainment of such standard")(emphasis added). Therefore, in addition to ensuring that an area can accommodate new emission sources, see, e.g., CAA § 172(c)(4), 42 U.S.C. § 7502(c)(4), a new or modified major source of air pollution that is subject to NSR must comply with LAER to minimize emissions. 42 U.S.C. § 7501(3).

In addition, emission offsets required under Section 173(c) are also control measures or requirements. For nonattainment areas, new or modified sources must obtain offsets for emission "*reductions*." 42 U.S.C. § 7503(c)(1) (emphasis added). In order to obtain a nonattainment NSR permit, a source must

[4] Later, however, EPA indicates that the NSR program imposes control measures under 42 U.S.C. § 7502(c)(1) and (6), see 70 Fed. Reg. 17022, but that the NSR permitting program is not a control measure based on the fact that the permit requirement is listed separately from control measures in Section 172, 42 U.S.C. § 7502, nonattainment plan provisions. 70 Fed. Reg. 17021-22. In addition to the fact that EPA cannot under the Act support its proposition that the NSR permitting program only manages "growth" and does not achieve emission reductions, this subtle distinction highlights an inconsistency in EPA's argument.

[5] Furthermore, because measures relating to control of emissions growth work in conjunction with measures relating to control of baseline emissions, weakening of growth related control measures would inevitably tend to defeat baseline related control measures and would therefore, result in backsliding. Baseline related control measures--even though untouched--would be inadequate to reach the same level of emission control and thus unreliable for attainment purposes.

arrange for emissions from other sources to be controlled sufficiently to represent a net reduction in emissions. See 42 U.S.C. § 7503(c).[6]

The prevention of significant deterioration (PSD) provisions of the Act, although not directly at issue here, are also instructive to show that Congress intended NSR to control emissions. For example, several of the enumerated purposes of the PSD provisions are geared towards reducing air pollution.[7] See 42 U.S.C. §§ 7470(1) ("to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [sic] to occur from air pollution . . ., *notwithstanding attainment and maintenance of all national ambient air quality standards*") (emphasis added); 7470(2) ("to preserve, protect, and *enhance* the air quality in national parks, national wilderness areas . . . and other areas of special national or regional . .. value") (emphasis added); 7470(4) ("to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State").
In addition, sources subject to NSR in attainment areas must install best available control technology (BACT) to control emissions, 42 U.S.C. § 7475(a)(4), which is defined under § 169(3) of the Act, 42 U.S.C. § 7479(3) as "an emission limitation based on the maximum degree of *reduction* of each pollutant . . ." (emphasis added). Furthermore, as existing plants come into compliance with BACT, the resulting decrease in overall emissions allows for the introduction of new sources into the air quality control region, thereby furthering Congressional intent "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3).

2. *Legislative History*

The legislative history of the Act further demonstrates that Congress viewed NSR requirements as control measures or requirements. See H.R. Rep. No. 101-490, 101st Cong., 2d Sess. 272 (referring to BACT and LAER as "control requirements"). Contrary to EPA's narrow interpretation of a control measure, in the Senate floor debate on the 1990 amendments, Senator John Chafee emphasized the breadth of the concept when, in the context of describing the purpose of Section 193, stated that this antibacksliding provision "was intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a [SIP] in the past, or that EPA has added to State plans on its own initiative or pursuant to a court order or settlement." 136 Cong. Rec. S17,232, S17,237 (Oct. 26, 1990). EPA's narrow interpretation of control measure cannot be reconciled with this broad definition.

Moreover, the purpose of nonattainment NSR is not just to prevent emissions from new or modified sources from increasing, but to reduce emissions from those sources in nonattainment areas, ensuring that RFP is made toward attainment. See 45 Fed. Reg. 52676, 52697 (Aug. 7, 1980) (Congress intended

[6] EPA argues that offsets help to reduce regional pollutant transport, "but may achieve no actual reductions in the area where the new emissions are locating." 70 Fed. Reg. 17023. Even if this statement was correct, EPA does not address the fact that offsets do reduce emissions, especially in downwind states. Further, even if a State cannot, in advance, quantify the emission reductions to be achieved from offsets, this does not take away from the fact that NSR offsetting requirements are designed to reduce emissions, help states to attain the NAAQS, and therefore are control measures as well as growth measures. See, e.g., Hall v. EPA, 273 F.3d 1146, 1160, n.11 (9th Cir. 2001) (identifying NSR requirements concerning particulate matter and carbon monoxide as "control measures.").

[7] While the rule applies to nonattainment State Implementation Plans, EPA concludes that "major NSR" provisions are not "controls;" therefore, the language and structure of the entire NSR program, which refers to NSR as well as the parallel PSD provisions, is relevant for this discussion.

nonattainment NSR to be used as "an important tool in the drive toward attainment of ambient air quality standards.").

That NSR merely contains "growth measures" is also at odds with the legislative history showing that, in enacting PSD and nonattainment NSR, Congress sought to foster the development of control technology. See S. Rep. No. 95-127, 95th Cong., 1st Sess. 31 (1977). Control technology that improves over time will better *control*, or reduce, emissions, not simply maintain an existing emission level. Cf. Union Electric Co. v. EPA, 427 U.S. 246, 256-257 (1976)("[The Act is] expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible").

3. EPA's Previous Interpretations of NSR as a Control Measure or Requirement

EPA argues "our revised approach is more consistent with our longstanding treatment of NSR as a growth measure. We have historically treated control measures differently from measures to control growth." 69 Fed. Reg. 23986. However, EPA's new interpretation is contrary to its longtime interpretations of nonattainment NSR as containing control measures or requirements.

First, statements by EPA demonstrate that EPA has viewed NSR requirements as control measures or requirements. See, e.g., 64 Fed. Reg. 70652, 70653 (Dec. 17, 1999) ("LAER is a technology-based emission *control requirement* which is implemented through the nonattainment area new source review permitting program mandated by sections 172(b)(5) and 173")(emphasis added); 67 Fed. Reg. 64582, 64586) (NSR, including an offset ratio of 1:1.2, for VOC and NOx is listed as a "key element" in order for EPA to approve a 1-hour attainment demonstration for New Hampshire. "These elements [including NSR] are control measures required by the CAA that provide reductions toward and measures relied on in the modeled attainment demonstration SIPs…"); 61 Fed. Reg. 51599, 51602 (Oct. 3, 1996) ("While the term 'control requirement' is not defined in the Act, it is generally viewed as a discrete regulation directed at a specific source of pollution, *e.g.*, an emission limitation on a smoke stack at a power plant.").

In addition, EPA recently credited Pennsylvania for emission reductions from the State's major NSR program. On March 2, 1995, EPA issued a policy establishing an alternative attainment process whereby states could commit to a two-phase approach to meet the Act's statutory requirements of § 182.[8] The Phase I requirements included adoption of specific control strategies necessary to meet the post 1996 rate-of-progress (ROP) plan through 1999. The Phase II requirements included participation in a two-year regional consultative process with other states in the eastern U.S. with EPA to identify and commit to additional emission reductions necessary to attain the health-based ozone standard by the Act's deadlines. As a result, Pennsylvania was required to submit the Phase I portion of the SIP revision, including the 1999 24% reduction milestone of § 182(c)(2)(B) of the Act requiring an RFP demonstration that "will result in … emissions reduction from the baseline emissions… equal to… at least 3 percent of baseline emissions each year." As part of that SIP revision, Pennsylvania identified source and process shutdown emission reduction credits (ERCs) at a 1:1.3 offset ratio, under 25 Pa. Code Subchapter E (related to NSR), as a control measure used to attain the 1999 ROP requirements. This means that sources that have "banked" ERCs may use no more than 77% of these emissions at a later date. In addition, as part of the Phase II SIP revision, Pennsylvania identified its New Source Review program as a control measure put in place to reduce emissions through this offset requirement and through the implementation of LAER.

[8] Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, EPA to Regional Administrators entitled "Ozone Attainment Demonstrations" dated March 2, 1995.

On October 26, 2001, EPA fully approved as meeting the requirements of section 182(c)(2) and (d) of the Act, the post-ROP plans (Phase I) and the 1-hour attainment demonstration SIP (Phase II), which included the NSR program elements as control measures necessary to achieve the 1-hour ozone NAAQS in the Philadelphia area. Moreover, EPA specifically identified the offset ERCs as a control measure, which was credited in the attainment plan.

As further example, until recently it was EPA's practice when reviewing SIP revisions concerning state nonattainment NSR programs to evaluate whether the revisions complied with Section 193 of the Act. See 67 Fed. Reg. 64582, 64586 (Oct. 21, 2002) (NSR requirement, including an offset ratio of 1:1.2, listed as a "key" control measure in New Hampshire 1-hour attainment demonstration for ozone and NOx. "These elements [including NSR] are: control measurers required by the CAA that provide reductions towards attainment and measures relied on in the modeled attainment demonstration SIP…"); 64 Fed. Reg. 29563-64 (June 2, 1999) (analyzing Rhode Island's SIP revisions, including changes to NSR applicability requirements, in light of Section 193); 59 Fed. Reg. 56019, 56026 (Nov. 10, 1994) (finding that "New Jersey's revised NSR rule contains three modifications to control requirements," including changing offset ratio and changing applicability threshold for triggering NSR); 58 Fed. Reg. 10694-95 (Feb. 23, 1993) (Massachusetts' SIP revision consistent with Section 193 because it would "insure equivalent reductions with Massachusetts' prior NSR program"). If the NSR program did not contain "control requirements," there would be no need for EPA to evaluate whether SIP revisions to NSR met the standard under Section 193. EPA statements in reviewing other SIP revisions further undercut EPA's argument that NSR requirements are not control measures. See 68 Fed. Reg. 25442, 25465 (May 12, 2003) (in approving Illinois SIP revisions, noting that "NOx emission control measures (with the exception of NSR, which will be replaced by PSD) which are currently in place will remain as SIP requirements following redesignation to attainment."); 60 Fed. Reg. 41, 44 (Jan. 3, 1995) (approving Florida SIP revision that "contain[ed] a contingency to implement additional control measures such as reinstatement of NSR . . . ").[9]

For these reasons, NSR is a key part of the Act for preserving and protecting air quality through the reduction of air emissions, in addition to minimizing emission increases. As a result, EPA is incorrect that NSR requirements are not control measures or requirements subject to the Act's antibacksliding provisions.

III. REMOVAL OF 1-HOUR NSR REQUIREMENTS WILL INTEREFERE WITH APPLICABLE REQUIREMENTS

EPA's proposed blanket determination that all States may remove NSR requirements from their SIPs without interfering with applicable requirements concerning attainment, RFP, or other requirements of the Act, is equally misguided.[10]

EPA reasons that because NSR applies to new sources, whereas other control measures apply to existing sources, therefore NSR is fundamentally distinguishable from such other control measures. Since NSR is only a restraint on growth of emissions, EPA argues, it is not a measure for reducing

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[9] In addition, if NSR requirements are not a control measures or requirements, that would call into question the legitimacy of EPA's decision to require States to adopt minor NSR programs and enforce them as part of their SIPs.

[10] *See* CAA § 110(*l*), 42 U.S.C. § 7410(*l*):

> The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter.

emissions and so does not contribute to attainment of the NAAQS.[11] EPA also points out that most SIPs do not explicitly rely on NSR in attainment planning, in the sense that most SIPs do not quantify the effect of NSR on emissions growth, but instead project emissions growth without reference to NSR.

The fact that States do not in general quantify the benefits of NSR in their attainment demonstrations does not prove that NSR is not an important tool used to achieve attainment. For example, as noted above, EPA's NSR enforcement initiative has reduced emissions of various criteria pollutants by hundreds of thousands of tons per year and promises hundreds of thousands of tons of additional reductions. Likewise, application of LAER and offset requirements to new sources will predictably reduce emissions growth even if the amount of the reduction cannot be reliably predicted, and elimination of NSR will result in additional emissions growth, even if the amount of such incremental growth cannot be reliably predicted. EPA's reasoning is, thus, illogical: elimination of NSR will certainly result in some degree in growth of emissions, and thus will interfere to some degree with RFP as well as attainment. Further, control measures can apply to all sources, including new sources. See, e.g., 42 U.S.C. §§ 7511a(c)(3)(enhanced vehicle inspection and maintenance program applicability is not limited to existing sources); 7511a(b)(3)(gasoline vapor recovery applies to "motor vehicles"); and 7545(k)(reformulated gasoline requirements apply to "gasoline-fueled vehicles").

It is no answer to argue that NSR is unnecessary since States must demonstrate RFP and attainment with or without NSR. In the first place, whether a particular SIP revision meets the standard of § 110(*l*) cannot be determined *a priori*, without case-by-case review of such revisions upon submission and the verification of the RFP and attainment demonstrations. As construed by the courts and EPA's own past practice, review of SIP revisions under § 110(*l*) of the Act is SIP-specific and fact-intensive. See Hall v. EPA, 273 F.3d 1146, 1156-1160 (9th Cir. 2001) (EPA cannot make determination under this section without considering effect of change in the specific area in light of other provisions of plan and existing emissions levels), *citing*, *inter alia*, Train v. NRDC, 421 U.S. 60, 90, 93 (1975). In Hall, the Court vacated EPA's approval of NSR revisions in Nevada's SIP because it was not supported by empirical analysis of the effects of the change. So here, because EPA is purporting to make a determination without empirical analysis of the effects of eliminating NSR in particular nonattainment areas, in light of the other measures in effect in such areas, the determination is inconsistent with § 110(*l*) and cannot be sustained. If EPA's response to this objection is that its determination is a conditional one, and that States proposing SIP amendments must still demonstrate that removal of NSR will meet the standards of § 110(*l*), that response would essentially turn EPA's determination of noninterference into a tautology and drain it of all substance. In that case, it would be better by far to make no such determination in the Reconsideration, but instead to await a proposal to amend a SIP, thereby avoiding unnecessary confusion and litigation.

EPA's proposed determination is also inconsistent with the Act because it would allow States otherwise subject to NSR requirements by operation of law to dispense with those requirements. A SIP amendment that eliminates statutorily required measures necessarily "interfere[s] with an[ ] applicable requirement concerning attainment and reasonable further progress . . . or [an]other applicable

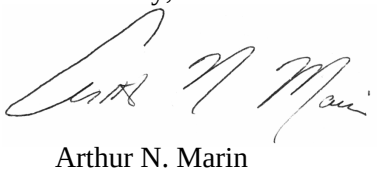
[11] For reasons stated above, we believe there is no textual, functional, or historical support for EPA's proposed distinction between control measures and growth measures. In Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001), for example, EPA clearly treated NSR as a control measure, and clearly recognized that changes in NSR requirements are subject to approval under 110(*l*) as changes in control measures that could potentially affect ROP and attainment.

requirement of this [Act]." EPA argues that it can avoid this problem by imposing currently undefined 8-hour NSR requirements on States in lieu of the statutorily defined and in effect 1-hour NSR requirements. But, again, EPA cannot rationally make this judgment in the abstract without considering the impact of any change on a particular State's ability to meet its RFP and attainment obligations. Moreover, this reasoning runs up against the Supreme Court's mandate in Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 484-86 (2001). There, the Court held that the promulgation of a new ozone NAAQS "cannot be thought to render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory." Yet the effect of EPA's approach to Subpart 2's NSR requirements is to "completely nullif[y]" those "textually applicable provisions meant to limit [EPA's] discretion." *Id.* at 918-19.

IV. CONCLUSION

For the above reasons, the NESCAUM States request that EPA revert to its position on major NSR as enunciated in the draft ozone implementation rule. The Act compels EPA to retain 1-hour major NSR thresholds in 8-hour nonattainment areas; the 8-hour ozone NAAQS is not an adequate substitute, legally or practically. Thank you again for the opportunity to comment. If you or your staff have any questions about these comments, you can contact me at the NESCAUM office at 617-259-2000.

Sincerely,



Arthur N. Marin
Executive Director

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