

May 7, 2007

Stephen L. Johnson, Administrator  
U. S. Environmental Protection Agency  
EPA West (Air Docket), Mailcode: 6102T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Attention: Docket ID #EPA-HQ-OAR-2001-0004

RE: *EPA's proposed rule regarding the "reasonable possibility" recordkeeping and reporting standard of the 2002 New Source Review (NSR) reform rule*

Dear Mr. Johnson:

NESCAUM offers the following comments on the U.S. Environmental Protection Agency's (EPA's) notice of proposed rulemaking entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reasonable Possibility in Recordkeeping* and published in the Federal Register on March 8, 2007 (72 FR 10445-10453). NESCAUM is a regional association representing the air pollution control programs of the states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont.

The NESCAUM states view a strong, sound NSR program as a critical component for controlling emissions from large industrial sources. The program requires that existing facilities install modern pollution controls when undertaking major modifications or renovations. In 2002, EPA revised the NSR program and moved the responsibility of determining when major NSR applies from the state permitting authority to the facility. The rule required facilities that had determined that a modification was not subject to major NSR to maintain records only when there was a "reasonable possibility" that major could NSR apply (the reasonable possibility standard). The NESCAUM states did not support EPA's final revised rule, as it resulted in a significant weakening of the NSR program.

In 2005, the D.C. Circuit Court of Appeals remanded the reasonable possibility standard contained in the 2002 NSR Reform Rule to EPA "because EPA has failed to explain how it can ensure NSR compliance without the relevant data..." (New York v. EPA, 413 F.3d 3 (DC Cir. 2005)). In its decision, the Court charged EPA to "devise an appropriately supported alternative" to the reasonable possibility standard rule. NESCAUM's position is that this proposed rulemaking does not adequately address the Court's concerns. Furthermore, adopting either of EPA's proposed options would limit states' ability to enforce key provisions of the NSR program as they apply to existing sources by limiting states' ability to monitor modifications of existing process equipment. The following are specific comments on the proposed rule.

### Actual Emissions Trigger

In the proposal, EPA identified the actual emissions calculation as its preferred option for defining whether or not a facility has a reasonable possibility of triggering NSR. This option would trigger the reasonable possibility standard if a facility determines that the proposed change would result in an actual emissions increase equal to or greater than 50 percent of significance levels for major NSR. The proposal relies on the discretion of the source in deciding which changes would equal or exceed 50 per cent of the significance level, without review or approval by the permitting authority. First, NESCAUM does not support any NSR trigger for reporting based on actual emission increases. Second, without documentation, enforcement authorities would have no means of discovering whether the exercise of such judgment by a source was, in fact, accurate. Third, the proposed construct is vulnerable; sources could easily conclude that a significant emissions increase was not reasonably possible, for example, by understating projections for emissions associated with malfunctions, or overstating the demand growth exclusion. The D.C. Circuit Court of Appeals recognized that the proposed actual emissions calculation is problematic, and required substantial forecasting of future emissions, including forecasting of actual future emissions, emissions from startup, malfunction or shutdown, and demand growth. Adopting EPA's preferred trigger would result in limited reporting of actual emissions, including only when a source decides to make such reports. Such lack of transparency and accountability, coupled with an inadequate trigger, would result in diminished NSR compliance.

In its final rulemaking on March 8, 2007 (72 FR 10367-10380), EPA included the actual emissions trigger in Appendix S, which applies in newly designated non-attainment areas prior to submission of an approvable attainment plan. NESCAUM does not support the use of a less protective trigger in new non-attainment areas. Furthermore, EPA's failure to provide any opportunity for public review and comment on the reasonable possibility recordkeeping requirements published in Appendix S and prior to finalizing this proposed action creates the impression that EPA has already made a final decision on the reasonable possibility trigger and would not be open to other views. At minimum, EPA must afford a comment period on the recordkeeping requirements, and make changes to Appendix S as appropriate.

### Potential Emissions Trigger

In the proposal, little detail is provided on the proposed "potential emission" trigger to determine if there is a reasonable possibility for triggering NSR. NESCAUM could support this trigger if it were based on the applicability test for NSR that applied prior to promulgation of the 2002 final rule. Under those provisions, if a facility triggered major NSR under the "actual to potential" test, there is a reasonable possibility that it could trigger major NSR and should therefore be subject to the recordkeeping and reporting requirements under the reasonable possibility standard. NESCAUM's support for this option is contingent on appropriate requirements regarding recordkeeping and reporting to the permitting/enforcement authorities.

## Reporting Requirements for “Reasonable Possibility” Triggers

The D.C. Circuit Court of Appeals recognized that EPA’s NSR Reform rules significantly increased the complexity in accurately determining whether or not major NSR applied to sources after changes undertaken in an existing facility. It was the Court’s opinion that knowledge of the source’s calculations in determining the reasonable possibility trigger is essential to determine compliance with the law.

It has been NESCAUM’s position that the actual-to-projected-actual methodology included in the 2002 NSR rule changes amplifies, rather than reduces, the need for independent review by a permitting agency. Of particular concern are provisions that allow sources, in projecting whether a physical or operational change will cause a significant emissions increase, to ignore emission increases attributable to “demand growth.” This is a factor that can be easily determined for electricity generating units (EGU’s) but is nearly impossible to verify in many other industrial facilities. In short, the demand growth concept creates a mechanism for facilities to bias the data to avoid NSR. Another example of this is the inclusion of “quantifiable” fugitive emissions as well as “emissions associated with startups, shutdowns, and malfunctions” in the calculation of baseline emissions. By giving sources the ability to increase their pre-change emissions, the likelihood that post-change emissions increases will be deemed large enough to trigger NSR through such calculations is lessened. Although EPA has included a parallel provision that requires sources to also consider fugitive emissions and emissions from malfunctions, start-ups and shutdowns in calculating post-change emissions, it will be much more difficult for sources to estimate predicted emissions from these events, and for regulators to check whether those predictions are reasonable. Given that companies will have strong incentives to lower their emission estimates, it is likely that the analysis will almost certainly result in consistent underestimations of future actual emissions. States enforcement authorities must therefore have access to calculations associated with baseline emission analysis and future emission estimates in order to accurately determine if a facility is complying with the reasonable possibility standard.

Furthermore, NESCAUM disagrees with EPA’s statement in the proposal that states will have access to documents to verify information necessary to recreate the reasonable possibility calculation. In many instances, states do not have access to the necessary information nor the appropriate skills to adequately recreate the information necessary to determine compliance with the rule. NESCAUM recommends that EPA adopt the following requirements in order to provide authorities with appropriate documentation under the reasonable possibility provisions:

1. When it plans to modify its facility, a source must report to the state a description of the change and the analysis conducted to determine that the change was not major and did not trigger “reasonable possibility” recordkeeping and reporting requirements. Given the complexities of the applicability equation developed under the 2002 NSR rules, the only clear ability for states to ensure that a facility has completed the determination correctly is to require that the facility retain the calculation used to make determinations and submit them to the permitting/enforcement authorities;

2. For facilities that trigger the reasonable possibility requirements, recordkeeping and reporting should be harmonized with the 10-year “look back allowance” created in the 2002 NSR rules. Facilities that trigger the reasonable possibility standard would therefore be required to report actual emissions for a period of at least 10 years, and;

As has been demonstrated in the NSR enforcement and litigation actions against certain power plants over the years, the public cannot solely depend on the good faith of facility owners and operators to substitute for clear and protective environmental laws. In sum, we believe EPA’s current proposal is profoundly misguided and does not address the courts remand to EPA. Therefore, NESCAUM suggests that EPA abandon its preferred approach and re-examine its proposal in light of these and other comments. Meanwhile, we appreciate the opportunity to provide input. If you or your staff has any questions about these comments, you can contact me at the NESCAUM office at 617-259-2000.

Sincerely,

Arthur N. Marin  
Executive Director

cc: NESCAUM Directors  
Lynn Hutchinson, EPA OAQPS