

## ATTACHMENT A

### **Detailed Comments from the Northeast States for Coordinated Air Use Management (NESCAUM) on EPA's Proposed Rule for Implementing the 8-hour Ozone Standard (68 FR 32802-32870)**

#### **Designations and Classifications**

NESCAUM urges EPA to designate all ozone nonattainment areas under subpart 2 of the Clean Air Act. We do not agree with EPA's assessment that it has discretionary authority to designate ozone nonattainment areas under subpart 1. By opting to classify some areas under subpart 2 and other areas under subpart 1, EPA would create an unlevel playing field at the outset, whereby areas with identical 8-hour ozone values would be subject to distinctly different sets of requirements. We believe that areas with similar air quality levels should be subject to similar requirements. In 1990, Congress created subpart 2 with prescribed control measures and mechanisms to ensure emissions reductions occurred in a timely fashion. This subpart was developed in response to past failures to attain the ozone standard in the 1980s, and has provided significant progress toward attaining the ozone standard.

If EPA opts to implement under subpart 1, it will lose one of the major incentives that has kept states on track with their ozone requirements during the 1990s: the bump-up provision. By eliminating the threat of more requirements for failure to do what is necessary to attain the standard, there is less assurance that states will stay on target in a timely manner.

As proposed, EPA's preferred option creates a disconcerting disparity with respect to attainment dates for areas under subparts 1 and 2. Subpart 1 areas (which would ostensibly have less to do than subpart 2 areas) will have five years to attain the standard. Subpart 2 marginal areas will have three years to attain, and many of those areas will likely be relying on reductions from many upwind subpart 1 areas in order to attain the standard. Allowing two different classification schemes for the same pollutant with differing requirements and flexibilities creates barriers for subpart 2 areas to attain in a timely manner. The subpart 1 approach even runs counter to EPA's statement in the proposal (with which we concur): "Moreover, an upwind area that contributes to nonattainment in a downwind area may need more reductions in a shorter time in order for the downwind area to reach attainment by its required attainment date" (see 68 FR 32833).

NESCAUM disagrees with EPA's preferred approach to designate areas based on a combination of 1-hour design values and modeling. While modeling is a helpful tool, and represents an important element of technical support for attainment demonstrations, it should not be used as the sole descriptor of air quality for designations and classifications. We also question the appropriateness of basing 8-hour ozone

designations on 1-hour ozone design values. The Clean Air Act is clear, in section 181(a), that design values should be basis for designations, not modeling.

Under EPA's preferred option for classification, most subpart 2 areas would be classified as marginal or moderate. We would like EPA to provide the scientific basis and analysis for this scheme. As it did during the development of the 1990 Clean Air Act amendments, we believe that EPA should study the ozone problems within the 8-hour nonattainment areas to assess what types of controls could produce attainment, and from there assess reasonable subpart 2 classifications. Basing classifications on a curve, on percentages above the standard, or on the 1-hour standard does little to ensure that the most appropriate classification scheme is in place to address ozone nonattainment problems.

In summary, EPA's preferred option creates unacceptable inequities and does not adequately ensure attainment of air quality standards in a timely manner.

### **Early Incentive Feature**

The NESCAUM states cannot support EPA's proposed "early incentive feature." While modeling has been used to demonstrate transport, EPA should not rely solely on modeling for classification purposes. To allow an area to be subject to the less rigorous requirements of a lower classification than what is required in the Clean Air Act is unacceptable. In the proposal, EPA recognizes that the Clean Air Act "was not originally structured to allow lower classifications based on an area being projected to attain earlier" (see 68 FR 32816). EPA's preferred option allows certain states to do less planning, and essentially enables them to postpone implementing controls without apparent penalty if they do not meet their clean air goals by the initial deadline. In the case of moderate areas that would face only marginal requirements, no contingency measures (or attainment plan) would be required as backup.

The early incentive feature, if implemented in accordance with EPA's preferred option to classify areas under subpart 1, would further exacerbate the unlevel playing field previously mentioned. Under this scheme, *attainment* areas in the Ozone Transport Region (OTR) would be required to implement more control measures than many areas outside the OTR that have monitored violations of the 8-hour standard.

Since the Supreme Court decision of February 2001 (*Whitman v. American Trucking*) allows EPA to develop a "reasonable interpretation" of the ozone nonattainment provisions, we believe EPA can find an appropriate level of flexibility in interpreting how it should implement the prescribed control measures of subpart 2. We believe that EPA's interpretation that an area classified under subpart 2 can only avoid application of a requirement listed in subpart 2 if it can show an "absurd result" is too limited. EPA may be able to allow substitution of certain subpart 2 requirements if there were a demonstration that the substituted measures would achieve the same or more effective environmental results.

We are open to EPA exploring substitution of certain subpart 2 control measures – excluding the New Source Review (NSR) requirement<sup>1</sup> – and would be happy to work with EPA on what types of equivalencies might be acceptable for such programs as enhanced inspection and maintenance.

### **Addressing Ozone Transport**

In its proposal, EPA clearly sidesteps the need for a framework to address transport on a proactive and ongoing basis. Instead, EPA limits its discussion of transport to control measures, and indicates that certain control measures (i.e., the NOx SIP Call and the Section 126 rules) will address transport up front. While the NOx SIP Call may adequately address transport for the 1-hour standard, it does not do so for the stricter 8-hour standard. Even with the NOx SIP Call's significant reductions and stringent controls recently adopted in many Northeast states (e.g., portable fuel container and consumer product rules), EPA's preliminary modeling indicates that ozone concentrations in air being transported to the Northeast will be at levels near or above the 8-hour standard. It is clear that adequate national and regional controls have not been adopted that will reduce background ozone levels to the point where local controls will be able to address these areas' problems. It is also clear that a framework must be in place for assessing the adequacy of State Implementation Plans (SIPs) to address the transport problem on an ongoing basis.

One component of such a framework that the NESCAUM states strongly support is a two-tiered SIP approval process that includes an assessment of downwind contributions pursuant to section 110 (a). Another component we urge EPA to develop and adopt is modification of the classification process to fully comply with section 107(d)(1)(A)(i) of the Clean Air Act to designate, as “nonattainment,” areas that contribute to air quality problems in nearby downwind areas. Please refer to Attachment B for a more in-depth discussion of these components, as well as other options, NESCAUM developed with the Ozone Transport Commission and submitted to EPA Assistant Administrator Holmstead on April 22, 2002 (*Principles for Implementing the Eight-Hour Ozone Standard and Proposal for Implementing the Eight-Hour Ozone Standard*).

In its proposal, EPA indicates that it intends to “investigate the extent, severity and sources of interstate transport that will exist after the NOx SIP Call and the Section 126 rule are implemented in 2004” (see 68 FR 32828). We request that EPA elucidate how and when that investigation will be done, and urge that it be undertaken as soon as possible. Once the investigation is completed, the results should be the subject of public comment, and EPA would be required to make findings and impose SIP obligations under section 110(a)(2)(D), as appropriate. Ideally, EPA should assess transport and incorporate such findings in its SIP approval process.

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<sup>1</sup> We do not believe that the NSR requirement is an appropriate candidate for substitution. Since the extent of NSR reductions is a function of actions taken to modify a facility, one cannot predict the actual tonnage reductions from this program.

In its proposal, EPA also indicates that additional reductions could be realized through the Clear Skies Act. Clear Skies is proposed legislation only, and cannot be integrated in any assessment of addressing transport “up front.” EPA’s own analysis indicates Clear Skies would deliver only marginal ozone benefits, and would deliver them more than a decade after attainment dates. Clear Skies would also essentially eviscerate Section 126 as a tool states could use to address transported air pollution. Notwithstanding the need for a transport framework, the NESCAUM states also need commitments to real and significant regional or national NOx reductions that coincide with our attainment dates. To this end, we urge EPA to move expeditiously to propose, by the end of 2003, a NOx/SOx regional transport rule.

### **Transitioning to the New Standard/Anti-Backsliding/Conformity**

The NESCAUM states do not support either of the options proposed by EPA with respect to revoking the ozone standard. EPA proposes revoking the 1-hour standard, either partially or in full, within one year of designations under the 8-hour ozone standard. We believe that it is inappropriate to revoke the 1-hour standard when there is no regulatory framework to take its place.

Transportation conformity should not be the driver for removing 1-hour ozone regulatory requirements before 8-hour ozone requirements are adopted or become effective. Any regulatory program that reduces emissions to achieve the 1-hour standard also makes progress toward achieving the 8-hour standard. It is therefore inappropriate to adopt a scheme that would provide an incentive for states to abandon their 1-hour SIP obligations, as EPA’s proposal does. It is also inappropriate to revoke the 1-hour standard if the monitored data clearly show violations of that standard and there are no immediately effective regulatory control measures to take the place of 1-hour requirements.

We believe that the 1-hour standard should not be revoked until an 8-hour SIP (with control measures) has been approved. This sends the signal that 1-hour ozone control measures are assumed to be the building blocks for 8-hour ozone SIPs. It also ensures that those measures are effective at least until an area meets the 1-hour standard or the area is implementing more stringent 8-hour SIP-approved controls.

If EPA’s proposal was adopted and revocations occur and the 8-hour implementation rule is subject to legal challenge, states might find themselves once again in a situation where there is no operative standard. This supports NESCAUM’s position that the 1-hour standard must be in place until there are other federally enforceable requirements in place to address the 8-hour standard.

The NESCAUM states urge EPA to develop changes to the conformity rule that allow areas to be subject to only one conformity budget for purposes of conformity actions during the transition time between 1-hour SIP obligations and 8-hour SIP obligations, however long that period may be.

Our reading of EPA's proposal indicates that it would abandon the Clean Air Act's section 175A maintenance plan requirement. Rather than requiring states to ensure the 1-hour and 8-hour ozone standards will be maintained for up to 20 years, EPA allows states to submit maintenance plans under section 110. In this regard, EPA's proposal also allows too much flexibility (i.e., one year) in terms of when states may petition to change certain of their one-hour SIP measures into contingency measures under section 110(l). Under EPA's proposal, the 110(l) demonstration that rescinding control measures will not affect maintenance of the standard is based on modeling. We disagree with this approach. Since emission reduction measures for the 1-hour ozone standard will aid in attaining the 8-hour ozone standard, we believe these control measures should remain as SIP obligations at least until the 8-hour ozone standard is met and an area is designated as being in attainment. We further believe that appropriate Clean Air Act maintenance requirements should stay intact. However, in the case where an area is in attainment of the 1-hour standard and in nonattainment of the 8-hour standard, then a 1-hour maintenance plan should not be required if the area is taking action to achieve the 8-hour standard.

We disagree with EPA's approach and interpretation that, under its proposed approach, conformity would no longer apply when an area submits a maintenance plan under section 110. We believe that conformity would and should continue to apply.

### **Modeling**

The NESCAUM states have serious concerns about EPA's proposal to rely on modeling to designate areas under the 8-hour standard. EPA proposes to use modeling as cornerstone for many key determinations, including designating and classifying areas under subpart 1, allowing lesser classifications under the "early incentive feature," and approving section 110(l) demonstrations, which allow areas to shift their SIP control strategies from required to contingency measures. As states that have been performing modeling for many years, we understand its uses and value. Modeling is, and should be used as, a tool for projecting, but not for determining, attainment. While modeling is an appropriate tool for demonstrating transport, EPA's reliance on modeling for its proposed uses is inappropriate.

EPA must rely on and incorporate other metrics, such as ambient monitoring data, in addition to modeling data for critical determinations and demonstrations. EPA must also ensure that modeling criteria are well defined, as they are not well-defined in the proposal.

### **Monitoring**

As mentioned above, EPA's proposal is based on a policy decision to rely less on ambient monitored data and to shift to a heavier reliance on modeling results. This approach is questionable, as discussed above. We urge EPA to reconsider its decision to rely so heavily on modeling, and rather, to use monitored ambient air quality data on which to base designation, classification, and attainment decisions.

However, EPA's National Air Monitoring Strategy is already based on its presumption that less criteria pollutant monitoring is needed and that resources must be shifted into measurements that support other analyses. In order to meet program requirements, many states have already curtailed their criteria pollutant monitoring networks. This presents significant challenges to states in terms of being able to analyze trends and track progress toward expeditious attainment. We need to be able to monitor air quality and use those data as the basis for determinations. Supporting and maintaining the ozone monitoring network is therefore crucial, especially since many new areas must now deal with the 8-hour standard and be able to track progress as well.

In the proposal, EPA states that it will be modifying existing ozone monitoring requirements as part of the National Air Monitoring Strategy. We believe that any changes to the strategy should not imply that level 2 National Core (Ncore) monitoring sites will be the most appropriate locations for making high sensitivity nitrogen oxide and carbon monoxide measurements or for making total reactive oxides of nitrogen measurements. Many level 2 Ncore sites will be located in urban areas and may not be suitable or appropriate for this type of monitoring. EPA must maintain the integrity of its monitoring system so that states can accurately assess their air quality as well as use that data to determine the types of control measures that would best suit a particular area. For purposes of designation, classification and attainment determinations, modeling cannot replace a monitoring network.

### **Reasonable Further Progress**

The NESCAUM states strongly support reasonable further progress requirements, and believe that mandated percentage reductions achieved in a prescribed, timely manner is an important step for states to meet the more protective 8-hour standard

### **Midcourse Review**

EPA proposes that a midcourse review would be due in 2007. While we agree that a midcourse review of an area's progress toward attainment is valuable, we do not believe that areas classified moderate or lower under subpart 2 should be required to submit a midcourse review. The attainment date for a moderate area is six years after designation (i.e., 2010). In 2007, when the midcourse review is due, the 8-hour ozone attainment demonstration SIP as well as the fine particulate matter attainment demonstration SIP will be due. We believe that marginal and moderate areas should focus their resources on adopting measures to attain the ozone and PM-fine standards in a timely fashion, rather than to prepare a review of progress in that same timeframe.

### **Reasonably Available Control Technology (RACT)**

As the NESCAUM states do not support the subpart 1 approach in general, we also strongly disagree with EPA's proposed approach for RACT for subpart 1 areas. We believe that RACT is a useful emission reduction tool that should not be abandoned

through flexibility mechanisms, as EPA has proposed. Instead, we believe that EPA should re-evaluate RACT in light of the more stringent 8-hr standard and 10 years of technology improvements. EPA should augment and update Control Technology Guidelines (CTGs) as quickly as possible. Without consistent guidelines by which to implement RACT, each state could make its own determinations, which in turn would result in a patchwork of requirements and inconsistent health protection near and downwind of major source operations.

We strongly disagree with EPA's proposal that sources complying with the NOx SIP call would be automatically found to be complying with RACT requirements. Because the NOx SIP Call – as a cap and trade program – does not require emission control technologies to be installed at a particular source, RACT requirements are necessary and appropriate to ensure that all sources implement at least a minimum level of control. This approach, in which source-by-source RACT requirements provide the first tier of reductions, with additional reductions achieved using market-based reductions has a precedent in the Ozone Transport Commission's three-phase NOx program. In that program, phase 1 consists of RACT while phases two and three involved progressively more stringent caps under a cap and trade framework.

Moreover, EPA's interpretation that marginal areas under subpart 2 should not be subject to RACT unless they were subject to pre-1990 Clean Air Act Amendment RACT is inappropriate. New marginal nonattainment areas should be subject to RACT under the 8-hr standard just as they would have been subject to the 1-hr RACT immediately prior to the CAAA of 1990. We believe that EPA should interpret "immediately prior to the Clean Air Act Amendments" (i.e., Sec 182 (a)(2)(A)) as the designation date under the 8-hr NAAQS (i.e., 2004).

In sum, we believe that cap and trade programs like the NOx SIP Call should be considered a complement to – not a substitute for – RACT applicability and requirements. Maintaining small source RACT will help to further level the playing field and will ensure that all areas can count on a certain minimum level of emission reductions. By comparison, EPA's proposal seems to be encouraging a "race to the bottom" with regard to RACT requirements.

### **New Source Review**

The NESCAUM states do not support EPA's use of the 8-hour implementation guidance as a way to further revise the federal New Source Review (NSR) program. To the extent EPA wants to propose further revisions to federal NSR, it should do so in a separate rulemaking.

EPA's proposed "transitional" and "Clean Air Development Areas" options represent a substantial departure from traditional NSR as mandated by the Clean Air Act. In our view, adopting either of these approaches will substantially relax existing NSR requirements, likely causing significant increases in emissions. We do not believe that

Congress intended for EPA to relax NSR requirements, or any of the Act's requirements, as a consequence of issuing a revised and more stringent NAAQS.

Regarding EPA's "transitional" approach, we believe there is no sound legal basis for this option in the current Clean Air Act. Once areas are designated as either attainment or nonattainment under the 8-hour standard, traditional NSR should apply (i.e., for attainment areas, this means applying federal, or SIP approved, PSD requirements; for non-attainment areas this means applying federal "major" NSR requirements).

Under 40 CFR 52.24(k), full Appendix S requirements should apply to NSR eligible sources for the 18 month interim period until NSR part D SIPs can be submitted and approved by EPA in new 8-hour nonattainment areas which were previously part of a 1-hour nonattainment designation. We do not support any revision to 40 CFR 52.24 (k) which would alter Appendix S requirements to allow for EPA's proposed "transitional" approach. Under the 8-hour standard, we believe the Clean Air Act requires that each States' nonattainment SIP must include the full suite of NSR requirements, including LAER and offsets for new or modified major stationary sources. See §110 (a)(2) and Parts C and D of Title I of the Act.

EPA's reliance on Appendix S, §VI as legal justification for the "transitional" approach is misplaced. This section is intended to apply only to new and modified sources located in areas where a *secondary* NAAQS is not yet attained. It applies only in situations where a *secondary* attainment date has not yet passed. It should not be modified to accommodate EPA's "transitional" approach.

With regard to EPA's Clean Air Development Communities (CADC) proposal, while some of the outlined ideas may have merit as new control measures, they should not be presented as a substitute for traditional NSR. This type of intermodal in-fill development is directionally correct, and can provide many co-benefits, especially for climate change. We believe EPA should develop the CADC concept in a separate rulemaking, or in guidance to the states, as a control measure available to the States to help meet the new 8-hour ozone standard.

### **Regulatory Language**

EPA's proposal lacks proposed regulatory language. Instead, it is a preamble that offers options for major ozone implementation program components. In many cases, several of the options are not "stand-alones," but are based on assumptions made in another program option. This has made the proposal, at best, challenging to read and understand – at best – and very difficult to discuss as a whole. It is difficult to provide cogent comments without a cogent proposal. The NESCAUM states want prescribed language on which to comment.

We are also concerned that the lack of regulatory language invites legal challenge to the rule and further delays in implementation of the 8-hour ozone standard.



EPA has indicated that it plans to release proposed regulatory language. However, we are confused as to what the relationship will be between the Federal Register notice on which we are commenting and the forthcoming regulatory language. Prudent public policy dictates that EPA release draft regulatory language for public comment, with a clear explanation of context, so that an informed public is afforded the opportunity to comment on EPA's proposal.