



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, Acting  
Rhode Island Office of Air Resources, Stephen Majkut  
Vermont Air Pollution Control Division, Richard Valentinetti

January 15, 2004

Air and Radiation Docket  
U.S. Environmental Protection Agency  
Mail Code 6102 T  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460  
*Attention: Docket # OAR 2003-0090*

Re: Proposed Rule to Defer Effective Date of Nonattainment Designations

Dear Administrator Leavitt:

The Northeast States for Coordinated Air Use Management (NESCAUM) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed rulemaking, published on December 16, 2003 in the Federal Register (68 FR 70108-70119), entitled *Deferral of Effective Date of Nonattainment Designations for 8-Hour Ozone National Ambient Air Quality Standards for Early Action Compact Areas*. NESCAUM is a regional association of the eight states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

In April 2004, EPA intends to designate areas as either attainment, nonattainment, or unclassifiable for 8-hour ozone National Ambient Air Quality Standard. In the December 16<sup>th</sup> Federal Register notice, EPA states its plan to defer, until September 30, 2005, the effective date of the nonattainment designation for areas that are in violation of the 8-hour ozone standard and have entered into an "Early Action Compact" with EPA pursuant to procedures as outlined in memoranda dated November 14, 2002<sup>1</sup> and April 4, 2003,<sup>2</sup> provided those areas meet the milestones of the Early Action Compact. EPA indicates that the Early Action Compacts were developed in response to a "need for added flexibility in implementing the 8-hour ozone NAAQS." (See 68 FR 70111). EPA plans to grant future deferrals of the nonattainment designations (i.e., until December 31,

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<sup>1</sup> Memorandum from Jeffrey Holmstead, Assistant Administrator, to Regional Administrators, Regions I-X, "Schedule for 8-Hour Ozone Designations and its Effects on Early Action Compacts," November 14, 2002.

<sup>2</sup> Memorandum from Lydia N. Wegman, Director, Air Quality Strategies and Standards Division, "to Air Directors, Regions III, IV, VI, and VIII "Early Action Compacts (EACs): The June 16, 2003 Submission and Other Clarifications," April 4, 2003.

2006 and April 15, 2008), provided those areas continue to meet all milestones of the Early Action Compact.

While NESCAUM supports EPA's efforts to afford nonattainment areas a degree of flexibility in achieving the 8-hour ozone standard, we believe that the specific mechanism that EPA has developed to provide flexibility, i.e., the Early Action Compact framework, is inappropriate, in that, we believe, it violates sections of the Clean Air Act as well as conflicts with existing obligations under the Act. Assuming we are correct, we do not believe EPA has the authority to (1) defer effective dates of designations; (2) enter into Early Action Compacts with areas; and (3) allow areas to be relieved of obligations under Title I, Part D of the Clean Air Act while they are violating the 8-ozone standard or are designated nonattainment of that standard. We believe that Congress was clear in prescribing requirements for states specifically to ensure progress toward attaining and maintaining the ozone standard, and that EPA's memoranda describing the Early Action Compact approach do not meet those requirements and are inconsistent with them.

In addition, we are concerned that transported ozone or ozone precursor emissions that impact areas downwind areas are not addressed within the Early Action Compact protocol, and appropriate and timely backstop mechanisms are not in place in the event that an Early Action Compact area either fails to meet its milestones or achieve the ozone standard by 2007. We also are concerned with EPA's stated intent to "not commit to redesignate" areas that subsequently violate the 8-hour ozone standard to nonattainment provided as the area continues to comply with the compact requirements.<sup>3</sup> According to Title I, Part D of the Clean Air Act, if an area meets the technical criteria for nonattainment status, then it must be subject to the requirements prescribed within the Act.

We also believe that EPA has not adequately addressed the impacts of Early Action Compacts in Section VII of the notice (see 68 FR 70116). We believe EPA's analysis must be quantitative, with emphasis on those programs that are designed to control growth in emissions. We also believe EPA must provide analyses with respect to Subpart 2 requirements, as those are the appropriate requirements that would apply to those areas under the Clean Air Act.

We do not concur with EPA's assessment that the proposed rule does not constitute a "significant regulatory action" (see 68 FR 70117), as we believe that criteria 4 of that finding has been met.<sup>4</sup>

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<sup>3</sup> "Should an area participating in the program that is designated attainment in April 2004 subsequently violate the 8-hour ozone standard during the term of the compact, EPA would not commit to redesignate the area to nonattainment for so long as the area continues to comply with the compact requirements and meet all compact milestones." (68 FR 70113)

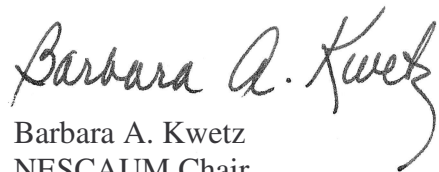
<sup>4</sup> "Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order." (68 FR 70117)

If you or your staff has any questions about the issues raised in this letter, please contact Ms. Leah Weiss through the NESCAUM office at 617-367-8540.

Sincerely,



Kenneth A. Colburn  
NESCAUM Executive Director



Barbara A. Kwetz  
NESCAUM Chair

Cc: NESCAUM Directors  
David Cole, USEPA