ATTACHMENT A
Detailed Comments from the Northeast States for Coordinated Air Use Management (NESCAUM) on the U.S. Environmental Protection Agency's (EPA's) Supplemental Proposal for the Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 69 FR 32684 – 32772 (Docket # OAR 2003-0053)

Implementation Schedule

At 69 FR 32690, EPA requests comment on "all aspects of the issues concerning the timing of the proposed…compliance dates in relation to NAAQS attainment dates." We believe that the proposed compliance dates are insufficient (i.e., too far into the future), and that the deadline for meeting phase I of the cap should be moved to the 2007-2008 timeframe. Only by moving up the dates will states that are affected by transport from upwind areas have an opportunity to meet their mandated ozone attainment deadlines under recently promulgated EPA regulations.

EPA has improperly represented states' position in the event they are not able to meet attainment ozone deadlines by indicating in the SNPR that states would "choose to be reclassified to higher classifications with longer attainment dates" (69 FR 32690). This is certainly not the NESCAUM states' position. Our interests transcend the imposition of sanctions; we are more concerned that the proposed deadlines will delay the expeditious public health protection guaranteed to our citizenry by the Clean Air Act. The solution to reconciling attainment dates to the Transport Rule dates should be solved by obtaining real reductions that advance public health by moving up the Transport Rule compliance deadlines rather than through administrative relief of public health obligations.

EPA states that moderate ozone nonattainment areas that bumped up to serious classification could apply for a one-year extension of their attainment dates, thus meshing with the Transport Rule: "CAIR implementation by the 2013 or 2014 ozone season could facilitate attainment by a serious area receiving one-year extensions." (69 FR 32690). We disagree with this approach. We urge EPA to ensure that the final Transport Rule achieves reductions in a timeframe consistent with the ozone National Ambient Air Quality Standard (NAAQS) for moderate nonattainment areas and the mandated attainment deadline for the fine particulate (PM-fine) NAAQS (i.e., not factoring in a possible five-year extension, as EPA does routinely in analyzing and presenting arguments on the timeliness of the Transport Rule reductions). By proposing inconsistent timeframes, EPA both misses out on a streamlining opportunity and compromises its commitment to timely attainment and public health protection.

In this proposal, EPA fundamentally appears to take no responsibility for areas not reaching attainment. EPA's proposed strategy -- having states apply for waivers and extensions -- also places an additional economic, regulatory, and administrative burden on downwind states, and takes resources away from implementing or enforcing programs that will protect public health. EPA's approach will also confuse the public, as it sends a message that government's dedication toward timely public health protection is not as strong as ensuring that the Transport Rule provides "flexibility for the regulated community" (see 69 FR 32709).

We are puzzled by EPA's assessment of how PM-fine attainment deadlines might coincide with the Transport Rule. EPA has failed to provide the technical basis for its assertion at 69 FR 32690 that "EPA projects substantial early reductions in SO2," such that states might be able to make substantial progress toward attaining the PM-fine NAAQS. We disagree with EPA's statement, and believe that the targeted reductions will not occur until well after 2020 due to the large

number of currently banked sulfur dioxide (SO2) allowances in the allowance bank. As proposed, SO2 reductions will not be sufficient for many states to attain the PM-fine NAAQS, and EPA should change the implementation dates to the 2007-2008 timeframe in order to assist states in meeting the health-based PM-fine standard.

Cap Levels, Budgets, and Allocations

EPA's proposed cap levels, as identified in the January 30, 2004 NPR, are inadequate remedies for a section 110 (a)(2)(D) finding under the Clean Air Act for the Northeast. In order for the NESCAUM states to be able to attain and maintain the ozone NAAQS, more stringent reductions should be adopted, particularly for nitrogen oxides (NOx), According to EPA, as a result of the Transport Rule as proposed, many nonattainment areas in the Northeast will achieve air quality improvements on the order of one part per billion of ozone or less, and will not achieve attainment. We believe that greater reductions are necessary. EPA can and must set a more stringent NOx cap that is still highly cost-effective and will achieve greater air quality benefits. EPA's economic analyses indicate that the program is relatively inexpensive. Final cap levels should be consistent with the *Multi-Pollutant Strategy of the Ozone Transport Commission* of January 27, 2004 and the State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials' (STAPPA/ALAPCO's) May 7, 2002 *Principles for a Multi-Pollutant Strategy for Power Plants*, as further elucidated in its March 15, 2004 analysis of those principles.

In section 96.142 (see 69 FR 32750), EPA provides an example input-based allocation methodology for states to allocate NOx allowances to sources, but it has not provided any output-based methodology. This omission runs counter to EPA's position as a proponent of energy efficiency, having spearheaded efforts to develop and offer output-based allocation methodologies for states to use for the NOx SIP Call program. In the final Transport Rule, EPA should add regulatory language for an example output-based allocation methodologies to provide assistance to and incentives for states to promote more efficient generation.

We also question why EPA has not proposed to develop states' NOx budgets using output-based methodologies. Doing so is a logical extension of EPA's energy efficiency efforts to date. We urge EPA to adopt an output-based allocation for states NOx budgets in the final Transport Rule.

EPA should set and implement an SO2 cap and allowance trading program separate and distinct from the Acid Rain Program. As part of this program EPA should explore and provide output-based allocation methodologies for SO2.

At 69 FR 32687, EPA has failed to justify the inclusion of an additional 250,000 SO2 allowances in the SO2 budget. There appears to be no reason allowing these additional emissions. We oppose inclusion of these additional allowances in the final budget. Such an inflation of the Transport Rule's SO2 cap will only further hamper states' ability to attain the PM-fine standard.

At 69 FR 32689, EPA indicates that other commenters have proposed that it should adjust heat input data based on certain factors that reflect the inherently higher emissions rate of coal-fired plants. We oppose this approach, and urge EPA not to adopt it. It is a poorly constructed concept that provides the most leeway to the highest emitting fuel, as well as to those states with the most coal-fired units. This in effect means that bigger polluters are subsidized. The NESCAUM states support a fuel-neutral approach.

At 69 FR 32690, EPA proposes an option for partial year allocations for the first year of the program. If EPA is proposing this as a backstop in the event that implementation of the Transport Rule program is delayed, then we would support implementation that involves partial year allocations rather than wait an additional year for the program to commence. In this way, EPA could insure the expeditious implementation of this program.

Linkages to the Acid Rain Program

The State NOx budgets identified at 69 FR 32689 are not reflective of the average heat inputs included in the EPA Excel Spreadsheet entitled *Heat Input Data Used in the Calculation of State Budgets*, April 14, 2004 (Docket # OAR-2003-0053-1409). It appears that EPA failed to factor in heat inputs from non-acid rain units that will be subject to the Transport Rule program into the budget values most recently proposed in the SNPR. It is our understanding that EPA is aware of this calculation error and will likely be issuing correction to the State NOx budgets in the near future. Given that issuance of that correction will be after the close of public comment period for the SNPR, and since the budgets are a critical element of the overall NOx program, NESCAUM requests that EPA republish the revised budgets and reopen the docket to accept comments on the revisions.

The NESCAUM states strongly believe that linking the Transport Rule to the Acid Rain program is unwise and may present serious legal issues which could prevent the rule from being implemented in a timely manner. EPA should set and implement an SO2 cap and allowance trading program separate and distinct from the Acid Rain program. By proposing linkage to the federal Acid Rain Program, EPA is effectively prohibiting states from achieving additional SO2 reductions on their own for attainment or maintenance of the NAAQS because as currently proposed, states cannot impose more protective SO2 budgets and still participate in EPA's program. If further reductions prove necessary, states will need to impose unit-specific emission limits on Transport Rule sources, abandon participation in the Transport Rule program, or seek SO2 reductions from other source sectors that may not be as cost-effective.

At 69 FR 32686, EPA indicates that its original retirement ratio for SO2 allowances of 3-to-1 "results in slightly more reductions than EPA has proposed are necessary to eliminate the significant contribution of an upwind State." EPA therefore proposes either a new retirement ratio of 2.86-to-1 or maintaining the 3-to-1 ratio and "permitting States to convert these additional reductions into allowances in their rules" so that those allowances could be distributed by the States "however they deem appropriate." (69 FR 32686).

NESCAUM urges EPA to at least maintain the retirement ratio of 3-to-1 as proposed in the January 30, 2004 NPR, if not adopt a higher retirement ratio. EPA has already determined reductions under the 3-to-1 scenario are highly cost-effective. According to its own economic analysis, EPA has still not maximized the potential cost-benefits of the program.. EPA could thus set more stringent caps and retirement ratios and achieve greater benefits while still having low costs. There is no economic reason not to at least maintain the 3-to-1 retirement ratio. By doing so, EPA could provide a greater level of assurance with regard to achieving actual emission reductions. Given that there are still a great number of allowances in the allowance bank, an even higher retirement ratio would reduce the number of those banked allowances, and therefore result in more timely real reductions, public health, and environmental benefits. Conversely, the 2.86-to-1 proposal would result in less timely reductions. EPA's proposed 2.86-to-1 allowance retirement ratio abdicates responsibility to cost effectively expedite attainment of the NAAQS..

Given that EPA is electing to use the Acid Rain allocations to further control SO2 through the Transport Rule, one way to improve this linkage would be through an enhanced retirement ratio, whereby EPA would employ an allocation retirement mechanism that varies the retirement ratio on an output-basis in order to account for unit efficiency. For example for EGUs, the retirement ratio would be based on megawatt hours generated. This approach would help promote energy efficiency, as well as address some of the issues that the NESCAUM states have identified with the Acid Rain Program, including basing current allocations on outdated, 1980's data.

EPA proposes at 69 FR 32718 that allowance banking occur without restrictions, and indicates that it wants to keep the program "as simple and easy as possible" by not employing such mechanisms as flow control. We strongly oppose this approach. EPA has not established or analyzed the impacts of flow control mechanisms for the NOx and SO2 banks, as we have previously recommended. We believe that flow control is crucial to ensuring the integrity of the cap and protection of public health and the environment. Our experience with the Ozone Transport Commission (OTC) NOx Budget Program indicates that flow control works well and cost-effectively.

We remain concerned that EPA has not presented a detailed discussion on leakage issues. We understand that EPA has conducted some analyses indicating that leakage will occur. EPA should explain to what extent the SNPR addresses the leakage issue and how. EPA should also make the technical analyses and its conclusions publicly available, and allow time to for comment on this issue.

Linkages with Regional Haze and Best Available Retrofit Technology (BART)

EPA is in the process of finalizing its BART rule. NESCAUM's comments on that proposal were submitted to the docket on July 15, 2004 by the Mid-Atlantic/Northeast Visibility Union (MANE-VU). While states and tribes have broad and general authority to obtain emissions reductions from all source categories to achieve reasonable progress objectives, Congress provided explicit authority to regulate BART-eligible sources for the purposes of obtaining needed emissions reductions early in the 60-year program in order to ensure reasonable progress is achieved.

At 69 FR 32702-32707, EPA proposes that "BART-eligible EGUs in any State affected by CAIR may be exempted from BART controls for SO2 and NOx if that State complies with the CAIR requirements through adoption of the CAIR cap-and-trade programs for SO2 and NOx emissions" (69 FR 32702). We strongly oppose this proposal. The Transport Rule should not be used to supplant or be deemed to automatically meet the public health and environmental goals of another, distinct mandated air pollution control program such as BART. As proposed, EPA is allowing the Transport Rule to supersede installation of control technology on all BART-eligible sources. While the Transport Rule, if finalized, will likely result in emission reductions and assist states in meeting their 2018 visibility goals, these reductions should not replace Congressionally mandated source-specific controls..

It is also inappropriate and premature to eliminate the BART provisions for EGUs and replace them with a program that has not yet been fully analyzed with respect to environmental benefits, and may not achieve the same reductions from the same sources. If and when the Transport Rule is finalized, states will consider the emissions reductions that will accrue under that program before assessing the reductions that would result through installation of BART for Regional Haze State Implementation Plans (SIPs).

Cap-and-trade programs do not provide adequate safeguards in situations where source-specific reductions are necessary. Cap-and-trade programs are excellent tools to augment regulation by allowing flexibility for regulated sources. This is exemplified with the OTC's NOx Budget Program, whereby Phase I of the program required the installation of RACT on EGUs and large industrial boilers greater than 250 MMBtu/hr in order to establish a benchmark control level. Only after RACT was installed at all participating sources were additional reductions pursued using a cap-and-trade program. EPA should adopt a similar approach to ensure adequate environmental and public health protection. We urge EPA to maintain the integrity of the BART provisions as envisioned by Congress, and to insure that the Transport Rule is not allowed to supplant the BART program.

Requirements for Participating in the Cap-and-Trade Program

While we agree with EPA that certain minimum criteria should be met in order to participate in the Transport Rule program, we disagree with EPA's overall approach to program participation. In the SNPR, EPA proposes to require a prescribed set of program components, including restrictions on the source categories that may be regulated, in order for SIPs to be approved for participation in the program. At 69 FR 32688, EPA indicates that "if a State chooses to achieve emissions reductions from non-EGUs, then that State's EGUs may not participate in the EPA administered cap-and-trade program." This makes no sense, environmentally or pragmatically. We urge EPA to design a program that provides for the inclusion, at a state's election, of non-electric generation unit (non-EGU) sources, so that those sources currently controlled through the NOx SIP Call and/or the OTC NOx Budget programs can continue to be a part of the robust NOx cap-and-trade market that was established under those programs during the 1990s.

At 69 FR 32691, EPA proposes that, "[i]f States choose to control EGUs but not to allow them to participate in EPA-administered NOx and SO2 emissions trading programs, States must still impose an emissions cap...." and further states at 69 FR 32692 that "EPA would not administer a State-designed program, so the States (or States) would need to administer such programs." EPA further proposes to require that "States that choose to participate in the EPA-managed cap-and-trade programs must adopt the complete model cap-and-trade rules in order to participate in the program and to have it constitute an approvable remedy for achieving the mandated SO2 and NOx emissions reductions" and to require that "States… achieve all of the mandated emissions reductions from large EGUs if they wish to participate in the EPA-managed cap-and-trade programs. In other words, the States that achieve all or part of the emissions reductions from large non-EGUs, may not participate in the EPA-managed cap-and-trade programs. More specifically, the rules must apply to all fossil-fuel fired boiler and turbines serving an electrical generator with a nameplate capacity greater than 25MW and producing electricity for sale (except for certain cogeneration units)."(69 FR 32709). This approach is unnecessarily operating against the very flexibility EPA seeks to embrace in its rule making. Coupled with the provision that does not allow states to lower their SO2 budgets, this program design could leave states participating in this program unable to address EGU- or non-EGU-related emissions that interfere with nonattainment or maintenance in the future.

At 69 FR 32691, EPA proposes to modify its previous position about states wishing to impose control measures on non-EGUs. Instead of allowing states to adopt a hybrid approach that includes a "budget" approach and an "emissions reductions" approach, EPA proposes that states choosing to control their EGUs must impose an emissions cap on the sources. We oppose this

prescriptive approach of mandating program design, especially for sources that EPA decided not to regulate through the Transport Rule cap-and-trade program.

The requirements mentioned above raise questions, particularly in light of the court decision in Virginia v. EPA, 108 F.3d 1397 (D. C. Circuit. 1997) which held that "EPA may not condition approval of a SIP on the state's adopting a particular control measure." While EPA is allowing states the option to participate or not participate in the Transport Rule program, and is allowing states to select their own means of compliance with the mandated reductions, EPA's choices are very limiting. Notwithstanding its claims that participation in the cap-and-trade program is voluntary, in the SNPR, EPA has made any other possible form of compliance with the Transport Rule so onerous as to be no option at all. Therefore, the practical effect of the SNPR is to mandate the states' adoption of EPA's preferred means of compliance, contrary to the court's conclusions in Virginia v. EPA.

At 69 FR 32713, EPA solicits comment on whether opt-in provisions for units not otherwise subject to the Transport Rule should be included in the final rule and includes a description of a potential opt-in approach. We have several concerns with this approach. First states should be able to make the decision as to which units should be in the program, not the sources. Second, by allowing sources to opt into the Transport Rule program, EPA may reduce the effectiveness of the Acid Rain Program because, as written, the proposed retirement ratios would not apply.

Despite EPA's desire to keep the program "as simple and easy as possible" (69 FR 32718), EPA is proposing to create and/or manage four types of currencies: CAIR-specific SO2 allowances that are separate from Acid Rain Program allowances through the opt-in program, non-EGU NOx allowances through the summertime NOx SIP Call program, Acid Rain SO2 allowances, and NOx CAIR year-round allowances. We believe that it would be more practical and environmentally protective to adopt a SO2 currency separate and distinct from the federal Acid Rain Program. This would provide more flexibility to states that may want to impose different retirement ratios or need to lower their caps in future for attainment or maintenance needs. EPA's approach creates administrative and potential legal complications, especially given potential problems using Acid Rain allowances for a separate regulatory program and given that the current Acid Rain cap is insufficient for protecting public health and the environment.

<u>Significant Contribution Test</u>

We oppose EPA's new proposed threshold for the "significant contribution" test. At 69 FR 32720, EPA proposes that when a multi-state call for SIP revisions to address interstate transport of air pollution is at issue, a source category should be included "only if the proposed level of additional control of that category would meet a specified threshold." EPA provides an example that first indicates that a threshold will be met when "at least 0.5 percent of U.S. counties and/or parishes in the lower 48 States" were brought into attainment with a NAAQS as a result of the proposed level of control for that source category. According to EPA's example, this equates to a threshold of at least 16 counties coming into attainment as a result of the proposed level of control. EPA seeks comment on whether this test should be incorporated into the "highly cost effective" component of the "significant contribution" test. The proposal states that states "retain authority to decide which sources to control to achieve the required amount of reductions, but EPA considers the costs of controls for more sources in determining what is a significant contribution."

We have several serious concerns with this proposal. EPA has failed to address a number of critical issues, including: (1) how EPA arrived at the 0.5% figure; (2) how EPA expects to apply its proposed test; (3) how EPA would model the contribution of each source category (e.g., individual categories or the incremental impact of regulating each category along with other source categories (e.g., EGUs non-EGUs, mobile sources)); (4) whether EPA knows how 0.5% translates to tons of NOx per day and whether EPA has provided these data to the public; and (5) whether EPA knows which source categories would be excluded, based on this test and whether EPA has made these data publicly available.

More importantly, based on our reading of the SNPR and absent further information, we believe EPA's proposal fails to address situations where nonattainment is clearly a result of transport even if fewer than 0.5% is impacted. This approach to defining "significant contribution" is arbitrary and capricious, and represents a vast departure from the goals and intent of the Clean Air Act. EPA's proposed approach substantially differs in intent and manner from the approach it used to determine significant contribution and highly cost-effective controls for the NOx SIP Call.

In the NOx SIP Call, EPA emphasized repeatedly that, while emissions from specific sources could seem inconsequential, the combined emissions from an area could be significant. Indeed, EPA specifically rejected arguments that emissions from particular sources must be found to be significant. The test proposed in the SNPR as a measure of significance is inconsistent with this framework. Moreover, if emission reductions for a source bring even one area into attainment, how can EPA conclude that emissions from that source category are not significant contributors to nonattainment in that area?

Unless source categories are uniformly distributed throughout the region, it is arbitrary to say that a source category cannot be contributing significantly to nonattainment downwind just because it is not a significant contributor region-wide. A source category that is concentrated in a single area or a few areas may be significant to source downwind areas. Section 110(a)(2)(D)'s focus on area-specific impacts makes a test tied to broaden regional impacts arbitrary.

In the SIP Call, EPA defined the highly cost-effective test in terms of cost per ton of NOx removed (or not emitted). If emissions reductions for a source can be achieved at a cost below the threshold, what difference would it make that total reductions from the individual source might not be large? Insofar as EPA proposes its new test as an element of the "highly cost-effective" criterion, it has no relationship to it as defined previously, and so would be arbitrary.

While one can imagine the proposed Transport Rule as an administratively convenient way of focusing on the most significant source categories, tests such as the one proposed have no place in the determination of significant contribution, which focuses on the impact of emissions in upwind areas on attainment in downwind areas. Such a test should not be used in any event until EPA first determines the level of reductions needed to ensure that, when combined with area level controls, source emission reductions will be sufficient to enable all areas to attain the NAAQS.

Furthermore, EPA's new proposed approach of looking at the impacts of particular source categories and assessing impacts based on whether or not 0.5% of counties and/or parishes downwind reach attainment considerably raises the bar for making findings of significant contribution, thus depriving downwind states of needed upwind reductions for attaining and maintaining the NAAQS. As constructed, we believe this approach is designed to rule out certain source categories from being regulated under a 110(a)(2)(D) finding. In addition, the 0.5% threshold and its application bears little to no relation to the notion that the remedy is supposed to

address significant contribution to any and all affected areas, not just a grouping of 16 of the impacted counties or parishes. It appears to render the 110(a)(2)(D) finding insufficient by definition. Furthermore, it does not address the requirement that impacts on maintenance be addressed in remedying a finding of significant contribution.

In offering this proposal, EPA indicates that "some have recommended a further refinement of this concept" (69 FR 32720). EPA should disclose from where this proposal came, and to provide the public with the scientific and technical basis for the proposal and the specific threshold discussed.

Proposed Changes to the Acid Rain Compliance Program

We are concerned about the proposed changes to the Acid Rain Program that are solely included in the SNPR (see 69 FR 32698 - 32701). We believe that EPA did not properly caption and notice the proposed changes in the SNPR that affect multiple programs. Those changes include proposed modifications to EPA's current interpretation of the Acid Rain Program, including some "stand-alone" changes. As delineated in our July 7, 2004 letter to EPA Administrator Leavitt, these types of substantive changes should not be pursued within the context of the Transport Rule program. They should be analyzed within the context of the Acid Rain Program and proposed within that context. Given that EPA has chosen to include them in the SNPR, we believe that EPA should have clearly characterized the proposed changes as substantive, and described its actions up front, in the Summary section of the notice. Furthermore, since these proposed changes constitute significant amounts of new information -- including modifications to the interpretation of policy, and the SNPR is allegedly a clarification and further discussion of the January proposal, we question the adequacy of EPA's public notice.

At 69 FR 32699-32701, EPA proposes several changes including:

1. A proposal to switch from unit-specific to source-specific compliance for the Acid Rain Program. We can accept such a switch, provided that these are consigned to the Transport Rule program only, and do not affect New Source Review. EPA must continue to require unit-level or stack-level (for common stack units) emissions data monitoring and reporting. States need access to unit-specific data in order to develop, implement, and ensure compliance with various regulatory programs and initiatives.

2. At 69 FR 32701, EPA discusses proposed modifications to the definition of cogeneration units. In fact, what EPA is proposing raises multiple issues concerning which facilities are subject to the new proposed NOx and SO2 trading programs, the Acid Rain Program and the NOx SIP Call Program. EPA has not addressed the fact that states have adopted NOx SIP Call rules that contain applicability definitions that may be unique to each state. EPA has not provided any detailed analysis of what the implications of its proposed applicability criteria (including treatment of co-generation units) in Section 96.10 and 96.204 would be and given the short comment period EPA has allowed, we are not able to fully analyze this issue.

3. With respect to proposed revisions to certification language and certificate of representation forms, there should be consistency between the Acid Rain Program, the NOx SIP Call Program, and the Transport Rule program. We therefore agree with EPA's proposed approach to make the language consistent.

4. At 69 FR 32701, EPA proposes changes to the end of year reporting requirements whereby sources execute and submit to EPA a form certifying that the submitted data are good data. EPA has made a statement in the SNPR that such a requirement is "superfluous." We agree, but are concerned about the enforceability of electronic signatures in cases where the signature date is not updated in an electronic data report resubmitted to correct errors. EPA must also add automatic checks of the signature date to address this issue.

While we have commented on these proposed changes, we point out that the SNPR did not go into detail on many of their specifics, and request that EPA provide more in-depth detail. Reviewing the full array of proposed changes within the 45-day comment period has proven to be burdensome, and so our comments necessarily reflect only a partial response to the full array of responses requested by EPA.

Proposed Changes to the Consolidated Emissions Reporting Rule (CERR)

In the SNPR, EPA has proposed several significant changes to the CERR. We are concerned that these changes to the CERR are being proposed solely in the context of the Transport Rule. A full airing of these proposed changes should be done within the context of a distinct NPR for the CERR. In addition, reviewing these proposed changes within the 45-day comment period is burdensome, and so our comments necessarily reflect only a partial response to the full array of responses EPA has requested.

At 69 FR 32695-32698:

1. EPA proposes that states should be required to provide EPA with Mobile Model inputs only, and should no longer be required to provide EPA with the Mobile Model emission results. We oppose this proposal, as we believe it provides a disincentive for states to use the Mobile Model and make those numbers publicly available for review for SIP development and conformity purposes. From first-hand experience, we know that state-run Mobile modeling provides quality assurance of EPA's running of the model. It further provides incentive for EPA to use state-specific inputs as appropriate, rather than relying solely on national defaults. In addition, states such as New York use roadway-specific traffic speeds and vehicle miles traveled, which EPA's NMIM (i.e., EPA's Mobile6 pre/post-processor) is unable to handle, because NMIM is designed solely for national default modeling, rather than state-specific inputs required for SIP planning.

2. At 69 FR 32698, EPA proposes to retain summer day emissions reporting requirements for ozone nonattainment areas only. We oppose this proposal. We believe these reporting requirements should apply to all areas. The data will be helpful in assessing environmental benefits in upwind, attainment areas and useful to downwind areas in addressing ozone transport. EPA's proposal does not serve to account for areas that may be nonattainment in the future, or for the Early Action Compact areas, which are nonattainment areas that EPA has temporarily excused from certain nonattainment area requirements.

3. At 69 FR 32698, EPA invites comment on whether it should eliminate the reporting requirement for carbon monoxide (CO) emissions. We believe CO emissions reporting should be retained, especially since CO is an ozone precursor.

4. At 69 FR 32698, EPA proposes eliminating a series of reporting requirements under the CERR, namely heat content, ash content, activity, and operational attributes. EPA should

recognize that many of these data elements are critical for states to conduct photochemical and permitting modeling, as well as to develop, implement, and conduct compliance activities on regulatory programs. Many states are precluded from establishing requirements more stringent than EPA, and if EPA were to eliminate those reporting requirements, then those states would be unable to obtain those important data elements on their own. We would be especially concerned if there was a resultant loss of data that could not be replaced, and urge EPA not to eliminate those reporting requirements.

5. EPA invites comment on whether reporting requirements on controls installed on facilities, including primary and secondary control efficiency, are adequate. We believe these data are critical for assessing program compliance, effectiveness and adequacy of SIPs.

6. EPA invites comments on which, if any, of three particular data elements for point source stacks – stack diameter, exit gas velocity, and exit gas flow rate -- should be eliminated. We believe that all three data elements should be retained. There are cases where the three parameters do not match up when the appropriate equations are calculated; in these cases, having all three parameters provides quality assurance. We urge EPA not to eliminate these data requirements. In addition, EPA makes no mention of temperature of stack gases and stack height; we believe that those are also critical data elements to retain.

Due to the inadequate 45-day comment period, we are not able to fully analyze and comment on several related proposals, including the two alternative methodologies for calculating 2010 and 2015 emissions reductions from non-EGUs which can be counted toward satisfying the rule, and on the issue of whether states should be required to report point sources "potential-to-emit" levels rather than actual levels for EGUs. These are significant issues that require more time for analysis than was allotted by EPA.

<u>Proposed Changes to the NOx SIP Call Rule</u>

We also question the appropriateness of EPA's proposing substantive changes to the NOx SIP Call solely within the context of the Transport Rule program. The manner in which these changes are proposed does not provide for a full analysis of the impacts on the SIP Call Program and the OTC NOx Budget Program, nor does it provide for meaningful public review and comment.

Based on some of EPA's proposed changes, we are concerned about the short- and long-term viability of this important regional, ozone season cap-and-trade program that has only just commenced in the past two years. For example, on 68 FR 32701-32702, it appears that EPA proposes to dismantle the ozone season reduction requirements of the NOx SIP Call, providing that states that participate in the Transport Rule program automatically meet the ozone season requirements of the NOx SIP Call. EPA further states that any seasonal reduction cap and trade program would only exist if a state chooses to retain it. In the event a state wishes to maintain that requirement, the onus is fully on the state, and is no longer shared with EPA, to administer the program. We disagree with this approach on several fronts.

First, it is critical that the Transport Rule establish and maintain separate ozone season and non-ozone season caps for NOx, that EPA track ozone and non-ozone season allowances, and that EPA should not permit non-ozone season allowances to be used during the ozone season. While we support annual NOx controls, we do not believe they should be achieved through an annual NOx cap since that approach insufficiently addresses summer ozone exceedences. We seriously

question EPA's assumption that an annual cap will not result in adverse impact during the ozone season (see 69 FR 32701-32702). We understand that EPA has based its proposal to institute annual caps on IPM modeling. While IPM modeling is a useful tool, it cannot guarantee adequate protection to states during the ozone season. Our experience leads us to believe that summer peaking units are a problem, and we do not want such high-emitting sources using non-ozone season NOx allowances during the ozone season, resulting in higher ozone levels and inadequate public health protection. In addition, we understand that for many facilities, it is cheaper for them -- from a power consumption and ammonia consumption perspective -- to run their SCR units during the fall and spring "shoulder seasons." This means that those sources would not be reducing NOx emissions during the summer days during which ozone exceedances are most likely to occur. By having one annual cap and not differentiating between the different types of protection needed during the ozone season, EPA will create incentives for sources to shut down their pollution control devices during the ozone season and use banked allowances to meet the annual cap, resulting in increased ozone pollution and nonattainment risks during the summer months.

Second, EPA has an obligation to the States, the non-EGUs, and public health to maintain an ozone cap for non-EGU sources. At 69 FR 32692, EPA proposes not only that non-EGUs be excluded from the Transport Rule program, but that those states wishing to regulate non-EGUs under the Transport Rule program not be allowed to participate in the EPA administered cap-and-trade program. This proposed approach dismantles the NOx SIP Call. We urge EPA to find a way to harmonize the Transport Rule with the highly successful, existing OTC NOx Budget Program and the EPA NOx SIP Call Program so that the public health protection promised from these programs during the ozone season will continue to occur, be tracked, and demonstrated. EPA has touted the emission reductions and health protection achieved from the OTC NOx Budget Program and the significant reductions achieved from EGUs and non-EGUs. Harmonization of these programs with the Transport Rule should not and does not have to result in fewer sources being regulated or less accountability during the ozone season. EPA has provided no basis to contradict its 1998 determination of the importance of controlling non-EGUs.

EPA has proposed to continue administering an ozone season only NOx cap and trade program only for non-EGUS included in the SIP Call (69 FR 32702). We do not support this approach of separating out the non-EGU sources, as it removes them from the robust trading market of which they are currently an integral part (through the OTC NOx Budget and the NOx SIP Call programs).

If EPA were to choose what we consider to be true harmonization with the OTC NOx Budget Program and the NOx SIP Call, it could do so at little additional cost. We urge EPA to establish a two-season trading program for NOx: a seven-month non-ozone season cap and a separate five-month ozone season cap. Furthermore, if EPA were to maintain these two accounts, it could easily accommodate non-EGU accounts into the ozone season account.

While we understand that EPA may be reluctant to manage two different currencies in this program, the public health protections provided by the two caps outweigh the minor incremental costs of managing these caps. We also note that EPA's proposal establishes new currencies, including "CAIR NOx allowances," distinct from the NOx SIP Call ozone season NOx allowances. By implementing the program in the streamlined manner we propose, EPA will help protect the integrity of ozone SIPs as well as that of the existing NOx cap-and-trade programs.

In the SNPR, at 69 FR 32702, EPA seeks comment on the use of NOx Early Reduction Credits.

While we have always encouraged early reductions in principle, the early reduction credits in the context of a cap-and-trade program can be extremely problematic and actually run counter to the program's environmental and public health protection goals. As proposed, we do not support early reduction credits. It may be that under certain conditions, e.g., with separate ozone and non-ozone season caps and allowances, coupled with mechanisms to limit how many and when they are used, e.g., ozone season allowance tracking, flow control, and early reduction credits limited to the non-ozone season, EPA could ensure that early reductions are used in an appropriate non-ozone season timeframe. Given that the OTC NOx Budget Program and the EPA NOx SIP Call allowance cap-and-trade programs are already in place for the ozone season, we cannot support an early reduction program during the ozone season, as there is no way that EPA could ensure that real, permanent reductions take place. If EPA is concerned about achieving reductions earlier than 2010, it should move the compliance date up to the 2007-2008 timeframe.

We are concerned as to whether there are viable options for states, should they wish to continue controlling non-EGU sources as obligated under the NOx SIP Call. Since EPA has made it clear that it is proposing to no longer support the NOx SIP Call program as a whole program once the Transport Rule program takes effect, states that need additional non-EGUs reductions beyond the SIP Call will have to make significant resource outlays in order to maintain a cap-and-trade approach with non-EGUs and track compliance for this program. In addition, EPA has not addressed concerns such as how to deal with emissions leakage from the Transport Rule into those states that opt not to participate in the program. Since EPA appears to be assuming that all states will participate in the program, it appears that there will be significant implementation challenges if they do not do so, challenges that could threaten the integrity of the program.

Public Process

Please refer to our letter of July 7, 2004, which was submitted into this docket. We believe that EPA has not allowed enough time for states to review this technically complex and substantive proposal, and request additional time for comments. We take issue and disagree with EPA's approach of proposing significant substantive changes to other regulatory programs within the context of this SNPR. EPA has not been timely in allowing access to information. EPA has posted four technical support documents on its website but to date has not supplied all of the supporting data needed to fully analyze the proposed rule. Given these serious deficiencies in the public process, we do not believe the states or the public have been given adequate notice and opportunity to review the proposal in full and provide meaningful comment.

In the SNPR, EPA appears to draw many of its conclusions from the modeling it has performed, yet the data and data files for this modeling have not been made available to the public. Staff from some of the NESCAUM states requested access to the modeling and the modeling results, and were informed that they could not be told what modeling EPA had or exactly when it would be released. They were informed that the data would likely be provided to states in August, i.e., after the close of comment period on July 26, 2004. This type of response effectively prevents meaningful public review and comment. As a general practice, EPA should not announce proposed rules and open comment periods until it is prepared to make the supporting technical information, including modeling data and results, publicly available.

Technical Analyses

In addition to our concerns that EPA has not made data available in a timely manner so that the public can assess the various technical analyses performed by EPA in developing both the Technical Support Documents and the SNPR, we have other concerns about EPA's technical analyses. These include:

1. EPA performed modeling for this SNPR using a new and different base year (i.e., changed from 2001 to 2002) from the January 30, 2004 NPR for the same rulemaking. The states have not had enough time to be able to fully analyze the differences and how those differences might manifest themselves in policy decisions about the transport rule as a whole.

2. EPA performed a completely new cost analysis from the January NPR, and in the 45-day comment period allotted, have not provided states with enough time to fully analyze the differences and how those differences might manifest in policy decisions about the transport rule as a whole.

3. EPA indicates at 69 FR 32689 that it has updated Acid Rain Program data for 2002 subsequent to its analysis for the January 2004 NPR. EPA indicates that the updated data were included in the calculation of the new budgets proposed in the SNPR. The states have not been provided enough time to fully analyze the updates and the data differences, as well as subsequent policy implications. EPA should provide a detailed explanation as to what has changed, as well as additional time to analyze the changes.

4. EPA's new heat inputs in the Technical Support Document reflect that, for non-Acid Rain sources, EPA has filled in some heat-input rates as zeroes, and others as blanks without any apparent explanation as to why it has done so. The states need an explanation of these heat inputs in order to understand how EPA has used the data to support its policy determination. The states are not able to provide meaningful comment without the supporting rationale and adequate time to review the underlying data.

5. A number of the NESCAUM member states have tried unsuccessfully to employ EPA's modeling files in order to do their own assessment of the modeling and have had difficulty obtaining those files in a timely manner. In addition, it appears that EPA is constantly updating the files, thus making it impossible for states to analyze the same data sets that EPA used (e.g., States now have the January data files, but EPA updated them for the June SNPR). EPA's failure to provide updated files in a timely manner precludes states from fully analyzing and assessing what EPA is proposing.

6. Apparently, EPA has relied on some technical results from the modeling performed for the "Clear Skies Initiative." The states are concerned about using those particular sets of modeling, particularly for SIP Call purposes, because that modeling does not conform with most of EPA's own guidance on SIP modeling. In addition, the NESCAUM states that have tried to analyze this modeling have had difficulty replicating EPA's results, calling into question some of EPA's practices involved in this particular set of modeling exercises.