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October 1, 2004

U.S. Environmental Protection Agency  
Mailcode 6102T  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Attention: Docket No. OAR 2003-0079

Re: *Nitrogen Oxides Exemption Guidance for the Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard*

Dear Administrator Leavitt:

The Northeast States for Coordinated Air Use Management (NESCAUM) submits these comments in response to the U.S. Environmental Protection Agency (EPA's) notice of availability for *Draft Nitrogen Oxides (NO<sub>x</sub>) Exemption Guidance for Proposed Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard*, as published in the Federal Register on September 1, 2004 (69 FR 53378-53380). The NESCAUM member states are: Connecticut, New Hampshire, New Jersey, New York, Maine, Massachusetts, Rhode Island, and Vermont.

We have concerns about the appropriateness of issuing NO<sub>x</sub> exemptions and the methodology and approach used by EPA in evaluating and acting on petitions for NO<sub>x</sub> exemptions, as well as some process concerns.

In 1990, Congress enacted section 182(f) of the Clean Air Act in response to concerns regarding potential NO<sub>x</sub> "disbenefits." In its draft guidance, EPA characterizes the provisions as "a prudent safeguard to avoid unnecessary emissions reductions."<sup>1</sup> We believe that it is more prudent to err on the side of public health and environmental protection when making decisions as to whether mandated emission control requirements should be waived. Referring to comments submitted by the State of New Hampshire to the Ozone Transport Assessment Group (OTAG) in 1996, "[t]he granting of [NO<sub>x</sub>] waivers implies that more pollution is preferable to less pollution. If we were already in the state of less pollution, would EPA seriously consider approving a request to increase NO<sub>x</sub> emissions as an ozone control strategy? Surely, the solution to pollution is not more pollution."<sup>2</sup>

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<sup>1</sup> "Guidance on Limiting Nitrogen Oxides Requirements Related to 8-Hour Ozone Implementation" (Draft), US Environmental Protection Agency, OAQPS, July 2004, p. 6.

<sup>2</sup> Letter to Mary Gade, Illinois EPA; Chair, OTAG Policy Group & Mary Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, from: Rep. Jeffrey C. MacGillivray, NH House Committee on Science,

While the case for NOx “disbenefits” has yet to be proven, both atmospheric chemistry and photochemical modeling are conclusive: the benefits of deep NOx reductions far outweigh any potential “disbenefits.” In assessing potential NOx “disbenefits,” it is critical to consider the overall context in which they may occur. Analyses should not be constrained in terms of spatial extent, should also include temporal extent or character, and should be on a larger scale than EPA has previously considered. For example, a modeled grid cell that indicates a NOx “disbenefit” at one hour of one day of an ozone episode may, in fact, show ozone “benefit” (i.e., air quality improvement) at many other more important hours on other days of the same episode. In the spatial and temporal context, if this grid cell has more benefits than “disbenefits” over the episode, then the net effect is a benefit from NOx controls. This approach has been underscored by the work of OTAG and the North American Research Strategy for Tropospheric Ozone (NARSTO). When assessing the appropriateness of granting a NOx exemption to the 8-hour ozone NAAQS requirements under section 182(f) of the Clean Air Act, EPA must broaden its analysis, both temporally and spatially, beyond the evaluation of localized impacts. At minimum, EPA should perform a robust air quality impact analysis using the “weight of evidence” approach developed during OTAG in combination with 8-hour ozone modeling.

EPA’s track record for NOx exemptions under the 1-hour ozone standard shows a fundamental flaw in the way it has approached section 182(f). EPA has oversimplified and overstated the case for potential NOx “disbenefits,” which in turn has produced disastrous results with respect to public health protection. For example, EPA approved a provisional section 182(f) exemption for the Dallas/Fort Worth nonattainment area in November 1994, but then had to rescind it in May 1999, when it became apparent that NOx reductions were, in fact, necessary for this area to meet the 1-hour ozone NAAQS. The Dallas-Fort Worth nonattainment area was ultimately reclassified to “serious,” with the consequent imposition of additional NOx control requirements. We now have experience in the effects of NOx exemptions: they have clearly not proved beneficial in achieving the ozone NAAQS.

We concur with EPA’s assertion in the draft guidance that areas previously granted a NOx exemption under the 1-hour ozone standard should not automatically be granted an exemption under the 8-hour ozone standard; a new assessment is needed. This is underscored by the number of areas where NOx exemptions were rescinded based on the need for NOx reductions to attain the 1-hour ozone standard. Given that EPA is now looking at NOx exemptions under the more robust and stringent 8-hour ozone standard, there is a clear need for regional, consistent, and significant NOx reductions to achieve that standard in most parts of the country. The science upon which NOx exemptions were originally conceived is now obsolete and robust modeling (including the development of appropriate episodes) for the 8-hour ozone standard is still in its infancy. As a result, the case for granting NOx exemptions under the 8-hour ozone standard is tenuous at best. Note that the studies completed in December 1991 and July 1993, pursuant to Section 185B of the Clean Air Act<sup>3</sup> and conducted by EPA and the National Academy of Sciences – and which were considered in the development of the current guidance – were done within the context of the 1-hour ozone standard. At a minimum, EPA must revisit these studies within the context of the more stringent 8-hour ozone standard, as doing so would no doubt inform and impact the final form of this guidance.

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Technology, and Energy and Kenneth A. Colburn, Director, NH DES/ARD, *NOx Disbenefits: An OTAG Distraction*, December 9, 1996.

<sup>3</sup> This included: *Rethinking the Ozone Problem in Urban and Regional Air Pollution*. National Academy of Sciences, December, 1991.

In the draft guidance, there is no discussion of the linkages between 182(f) NOx exemptions and certain other regional NOx reduction requirements such as the NOx SIP Call and the proposed “Clean Air Interstate Rule.” The relationship between findings under section 110 of the Clean Air Act has a critical bearing on how EPA should make findings under section 182(f) of the Act. To be consistent and to assure the efficacy of its regional NOx reduction programs, EPA has an obligation to assess the impact of any section 182(f) exemption request under the provisions of section 110(a)(2)(D), including the potential for emissions exempted from controls to contribute to downwind nonattainment or to interfere with the maintenance of any national ambient air quality standard.

We agree with EPA that integration of ozone and fine particulate matter (PM2.5) planning should be considered in the context of 182(f) exemptions. The “net air quality benefits” that must be considered when reviewing a petition for a NOx exemption should include the role of NOx in producing PM2.5 pollution.

Please note that NESCAUM believes that EPA’s approach of implementing the ozone NAAQS pursuant to Title I, Part D, Subpart 1 of the Clean Air Act is inappropriate. Therefore, we correspondingly believe that EPA’s approach to applying NOx exemption guidance to “basic” areas (i.e., nonattainment areas that EPA has designated pursuant to Subpart 1) is similarly inappropriate.

We also have several process concerns:

First, EPA did not provide the title of the draft guidance document in the Federal Register notice. As a result, accessing the document through the EDOCKET proved to be difficult. We urge EPA in future to provide complete information that will enable the public to locate documents in the EDOCKET by providing a full and accurate title of the relevant draft documents that are being noticed, as well as making them more accessible through the EPA website by providing the specific webpage address (i.e., the URL). The documents should be easily accessible in order to provide appropriate opportunity for public comment.

Second, In the Federal Register, EPA indicates that this draft guidance “accompanies” the Proposed Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard, which was published in the Federal Register on June 2, 2003 (68 FR 32802 – 32870). It is unclear to us what this relationship is, precisely, and whether this is a reopening of the comment period on those sections of the proposed rule’s draft preamble language. The NESCAUM states would appreciate your response in this regard so we can better understand EPA’s regulatory intent.

Third, due to the importance of a strong, consistent approach for granting NOx exemptions under section 182(f) of the Clean Air Act, we urge EPA to promulgate a regulation for implementing the NOx exemption program, rather than rely on guidance that “does not impose binding, enforceable requirements on any party” and “is a living document and may be revised periodically without public notice.”<sup>4</sup> Given the public health and environmental ramifications of inappropriately issued NOx exemptions, EPA must develop specific criteria – with adequate public input – that can rigorously support any determination that NOx emissions slated for reduction can safely go unabated.

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<sup>4</sup> *Guidance on Limiting Nitrogen Oxides Requirements Related to 8-Hour Ozone Implementation*” (Draft), US EPA/OAQPS, July 2004, pp. 5-6.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Kenneth A. Colburn". The signature is written in a cursive style with a large initial 'K' and a distinct 'A'.

Kenneth A. Colburn  
Executive Director

cc: NESCAUM Directors  
Doug Grano, EPA  
Lydia Wegman, EPA