NESCAUM
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Arthur N. Marin, Executive Director

February 2, 2007

Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
EPA West (Air Docket), Mailcode: 6102T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket ID # EPA-HQ-OAR-2003-0079

Re: *Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard -- Notice of Reconsideration*

Dear Mr. Johnson:

NESCAUM offers the following comments on the U.S. Environmental Protection Agency's (EPA's) notice of proposed rulemaking entitled *Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard -- Notice of Reconsideration* and published on December 19, 2006 in the Federal Register (71 FR 75902-75916). NESCAUM is an association of state air quality agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

Effects of DC Circuit Court of Appeals Decision on Phase 2 Rule

The recent D.C. Circuit Court of Appeals decision in *South Coast Air Quality Management District v. Environmental Protection Agency* (2006 U.S. App. LEXIS 31451 (D.C. Cir. 2006)) (attached) has a direct impact on the issues being considered in this reconsideration notice, particularly with respect to the New Source Review (NSR) program. As of this writing, the D.C. Circuit has vacated the Phase 1 ozone implementation rule, which includes NSR-specific provisions. Consequently, EPA's request for comment on NSR program elements is premature. We urge EPA to conduct a review of issues raised by the Court and make a determination on the potential impacts of the decision on the Phase 2 eight-hour ozone implementation rule, including NSR-related aspects, and allow for public review and comment as appropriate.

The D.C. Circuit Court decision emphasized limits on EPA's authority where the Clean Air Act provisions are unambiguous and clearly reflect Congressional intent with respect to ozone attainment measures. We believe that Clean Air Act §172(c)(1) requirements related to Reasonably Available Control Technology (RACT) are unambiguous. We urge EPA to avoid taking action that is legally questionable. We are concerned that finalizing this reconsideration, as proposed, could disrupt the ability of states and EPA to appropriately exercise their responsibilities to protect public health and the environment through the attainment planning process.

Furthermore, we have previously commented that EPA should not propose substantive changes to the NSR rules as part of a rule to implement the eight-hour ozone standard. Substantive changes to NSR rules should be proposed in a stand-alone NSR rulemaking with clear cross references to other affected rules. The general public should be able to clearly identify when and how EPA proposes to amend NSR rules.

Proposed Determination of the Clean Air Interstate Rule (CAIR) CAIR/RACT Equivalency for NO_X Electric Generating Units (EGUs)

EPA requests additional comments on its the determination that "EGU sources complying with rules implementing CAIR requirements meet ozone NO_X RACT requirements in States where all required CAIR reductions are achieved from EGUs only" (71 FR 75906).

NESCAUM strongly disagrees with EPA's proposal that sources complying with CAIR would be automatically found to be complying with RACT requirements. RACT is required under §172(c)(1) of the Clean Air Act, which states that nonattainment State Implementation Plans "shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology)…"

Compliance with CAIR cannot be used as a substitute for RACT for EGUs. Cap-and-trade programs like CAIR should be considered a complement to, not a substitute for, RACT. Similarly, EPA has previously indicated that CAIR is designed to address the transport of pollutants, not nonattainment. Section 172(c)(1) requires emission reductions to be achieved from sources in the nonattainment area. Because CAIR, as a cap-and-trade program, does not require emission control technologies to be installed at a particular source in a nonattainment area, RACT requirements are necessary and appropriate to ensure that all existing major sources located in nonattainment areas implement at least a reasonable level of control.

RACT, as the acronym implies, is a source-specific, technology-based program. It is expected to evolve over time as more effective control technologies are developed at lower control costs. CAIR is a static requirement, solely based on implementing a two-phased NO_X emissions cap developed in 2005. As a result, no further reductions would be required under CAIR into the future (even in nonattainment areas), while under RACT requirements, advances in technology may require additional reductions in nonattainment areas (i.e., if a technology is now reasonably available, it must be installed on the subject sources). EPA's proposal essentially provides an incentive not to install such technologies in favor of purchasing cheaper allowances. Purchase of allowances does not meet RACT requirements. By concluding that CAIR, with its cap-and-trade program, satisfies the RACT requirements under the Clean Air Act, EPA is essentially removing any requirement for an EGU that is located in a nonattainment area to reduce its air pollution, as the EGU could buy allowances from outside of the nonattainment area to meet its CAIR

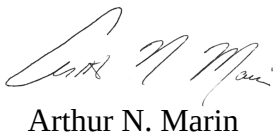
requirements. This could significantly interfere with the ability of states to attain and maintain the ozone and the PM2.5 National Ambient Air Quality Standards.

We also note that there are economic discrepancies between CAIR and RACT with respect to the definition of "reasonable." While CAIR uses "highly cost effective" as its metric, RACT requires an economically feasible level of control. Thus more controls pass the economic test under RACT than under CAIR.

EPA should adopt the Ozone Transport Commission's (OTC's) approach to cap-and-trade programs. When the OTC developed its NO_X Budget Program (which was the basis for EPA's NO_X SIP Call and subsequently CAIR), it assumed that RACT was applied *first.* Thus, the cap-and-trade program operates in an environment that assumes RACT is in force, not in lieu of RACT. In the OTC program, phase one of the NO_X reduction program was based on the application of RACT, and phases two and three involved progressively more stringent caps under a cap and trade framework.

The NESCAUM states also refer EPA to comments that are being submitted into this docket on their behalf by the National Association of Clean Air Agencies (NACAA). If you or your staff has any questions regarding the issues raised in this letter, please contact Leah Weiss at the NESCAUM office at 617-259-2000.

Sincerely,



Arthur N. Marin
Executive Director

Cc: NESCAUM Directors
John Silvasi, U.S. EPA
Denise Gerth, U.S. EPA
David Painter, U.S. EPA

Attachment