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PUBLIC HEARING ON PROPOSED RULES

FOR THE NOx FEDERAL IMPLEMENTATION PLANS

AND SECTION 126 PETITIONS

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OCTOBER 28, 1998

EPA Auditorium, 401 M Street, Southwest

Washington, D.C.

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(Whereupon, the Public Hearing on Proposed Rules for the NOx Federal Implementation Plans and Section 126 Petitions was called to order on Wednesday, October 28, 1998, at 9:07 o'clock a.m. in the EPA Auditorium, 401 M Street, Southwest, Washington, D.C.)

INTRODUCTION

MR. SEITZ: Thank you for attending the Environmental Protection Agency's Public Hearing on the proposal on the federal implementation plan for the Ozone Transport Rule and the proposal for Section 126 petitions.

My name is John Seitz. I'm the Director of EPA's Office of Air Quality Planning and Standards.

We are here today to listen to your comments and analyses of these two proposals to reduce regional transport of ground-level ozone and its principle precursor, nitrogen oxide or NOx. These proposals were signed by the Administrator on September 24th.

The proposals rely on the same proposed federal NOx budget trading program as the primary control strategy for reducing NOx. Therefore, as a courtesy to the commenters, EPA is combining the public hearing for the Section 126 proposal and the FIP proposal. This will

avoid the need for speakers to give duplicative presentations and will simplify scheduling arrangements for the speakers.

These proposals are also related to the final rulemaking action on transport of ozone in the twenty-two eastern states and the District of Columbia and known as the NOx SIP call.

Before taking comments this morning, I would like to highlight the proposed actions. In the event that the affected states do not respond to the NOx SIP call, EPA -- John is going to reread this.

In the event that the affected states do not respond to the NOx SIP call with the acceptable strategies to meet the NOx budgets, EPA intends to expeditiously promulgate the federal implementation plan known as the FIP to achieve the NOx emission reductions called for in the NOx SIP call.

The FIP proposal relies on the federal NOx budget trading program to reduce NOx emissions from utilities and other large industrial sources. This trading program is the same as the model trading program that EPA developed for the states to use, except for changes necessary to account for the federal

implementation plan.

The FIP proposal also includes regulations to control NOx emissions from cement kilns and stationary and internal combustion engines. States in the Northeast Transport Region have been particularly concerned about transport of ozone.

In August of 1997, Connecticut, Massachusetts, Maine, New Hampshire, New York, Rhode Island, Pennsylvania and Vermont filed petitions with EPA citing Section 126 of the Clean Air Act or the Interstate Pollution Abatement section.

The petitioners have asked EPA to make a finding that utilities and other sources of NOx located in upwind states exacerbate the ozone problems in the petitioning states. All of the petitions target sources in the midwest.

Some of the petitions target additional sources in the south and southeast and northeast. In total, the petitions target sources in thirty-one states.

If EPA grants any of the petitions, EPA is authorized to establish federal emission limitations for all sources. The Section 126 petition varied with regard to the control requirements they recommend for controlling

the interstate transport. Several recommended a NOx trading program.

In evaluating the Section 126 petitions, EPA relied on the technical-analyses information that was used for the NOx SIP call. The EPA is proposing that the sources in the nineteen states and the District of Columbia that are significantly contributing to nonattainment problems in the petitioning states.

The number of states is smaller than the number found to be significantly contributing under the NOx SIP call because EPA took into account -- EPA can only consider nonattainment problems in the petitioning states, which are located in the northeast.

Under the NOx SIP call, EPA considered ozone nonattainment problems throughout the eastern half of the United States. To reduce the transport of pollution in response to the 126 petitions, EPA is proposing the same federal NOx budget trading program as it is being proposed in the FIP.

The EPA envisions that there would be a common trading program among the Section 126 sources, FIP sources and NOx SIP call sources in states that choose to participate in the trading program.

I want to stress that EPA has not made any final decisions regarding the proposals on the FIP and the Section 126 petitions. We are interested in hearing your opinions.

For those who would like to submit written comments, the public comment period for both of these proposals closes November 30th of this year.

A transcript of today's hearing will be prepared. It will be available for inspection and copying at EPA's Air and Radiation Docket Office and on the Internet in approximately thirty days.

Now, I would like to state the ground rules for this hearing. I will call the scheduled speakers to the witness table in groups of two.

As I said earlier, for your convenience, we are combining the public hearing for the Section 126 proposal and the FIP proposal. However, because there are unique issues related to each proposal, we ask you to clearly identify which parts of your testimony are related to each proposal.

We also request each organization to limit his or her testimony to a total of ten minutes. Please remain at the witness table until both speakers have finished.

We are happy to take your full written statement today if you have brought one with you, and we will review it. Please leave five copies of your statement at the registration table, if you haven't done so already.

Also, please note that the FIP rulemaking is not inviting comment on issues covered in the NOx SIP call, including Section Two, EPA's analytical approach, Section Three, Determination of Budgets, Section Four, Air Quality Assessment, and Section Five, NOx Control Implementation and Budget Achievement Dates, except for the portions of those sections that address the feasibility and cost effectiveness of control measures and projections of the emission reductions that various control measures would achieve.

If there is anyone in the audience who would like to testify but has not yet registered, please sign up at the registration table.

For those of you who have already registered to speak, we have tried to accommodate your requests for specific time slots. We ask for your patience as we proceed through the list. Some minor adjustments may be necessary due to either late arrival or, in some cases, no

arrival at all.

We have a timekeeping system which consists of a green -- you'll be able to see it both here and at the witness table -- a green light, which would indicate the start of your presentation, a yellow light that indicates one minute left in the presentation, and a red light which, of course, means that your time is complete.

Please respect the timetable because it is just a courtesy to the other speakers for everyone to try to stay on schedule.

The schedule for the hearing today is as follows: We will take testimony through noon, then break for lunch. We will resume testimony at one-fifteen. Testimony is scheduled to be complete by two-thirty this afternoon.

Due to the number of speakers who have registered, we have canceled the second day of the hearing.

I'd also like to introduce the people at the table with me today. To my left is Brian McLean, with the Office of Atmospheric Programs. To my right is Lydia Wegman, the Deputy Director of the Office of Air Quality Planning and Standards.

Also with us we have a number of support staff and technical staff. At the table we have Tommy Helms, with the Office of Air Quality Planning and Standards, Carla Oldham, Doug Grano and Norm Possiel, all with Office of Air Quality Air Planning and Standards; Howard Hoffman with the Office of General Counsel, and David Cole with the Office -- Peter Lidiak with the Office of Mobile Sources and --

Well, there's a few EPA people. At any rate, this group will be the ones that will provide any technical input we need.

So, I'd like to call forward the first panel of speakers. That is David Flannery and Marcus Spatafore.

DAVID FLANNERY

MIDWEST OZONE GROUP

MR. FLANNERY: Thank you, Mr. Seitz. I'm David Flannery. I am with the law firm of Jackson & Kelly. I'm here today on behalf of the Midwest Ozone Group.

We, the Midwest Ozone Group, are alarmed about EPA's proposal to impose massive new emission reductions on sources that are located throughout the midwest and southeast in response to what we gather are five remaining

of the eight petitions, which seem to implicate sources in our regions.

More significantly, we're concerned that EPA seems to be more interested in this proposal in advancing its own NOx emission reduction agenda than it is in being an objective decision-maker on the merit of the pending petitions.

Significant legal errors exist throughout EPA's proposal. Principal among these errors are such matters as EPA's resort to describing the provisions of Section 126 of the Clean Air Act as containing a "scriveners error" in what we consider to be a vane effort on the agency's part to bolster the legal sufficiency of these petitions; as well as EPA's misplaced reliance on the new eight-hour ozone NAAQS at a time when no state has yet been allowed the opportunity to follow the processes set forth in the Clean Air Act for implementing that standard.

As significant as these concerns may be, our greatest concern is that EPA seems to have lost sight of the real issue -- attaining the ozone ambient air quality standard.

The controls which EPA proposes to implement

on sources located outside the Northeast Ozone Transport Region will have virtually no impact, and certainly no significant impact, on air quality in the states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont. In the case of Pennsylvania in the Pittsburgh area, the emission reductions that are being proposed by EPA are much greater than are needed to achieve compliance with the one-hour standard there.

These conclusions are supported by CAMx modeling results that have been sponsored by the Midwest Ozone Group that examined how the peak one-hour concentrations in each of the petitioning states would be affected by initially imposing a point-one-five-pound-per-million Btu emission rate only on electric generating units located in the Inner Zone of the Northeast OTR and then by examining what additional benefits, if any, would result from imposing emission reductions of fifty-five, sixty-five and eighty-five percent on sources in upwind states.

Finally, we examined what the added air quality benefits would be of reducing low level NOx and VOC emissions within the Inner Zone of the Northeast OTR

by an additional thirty percent.

Using Connecticut to illustrate the results of this modeling for both the 1991 and 1995 episodes, it is apparent that the baseline is significantly lowered by imposing a point-one-five emission rate only on NOx sources located entirely within the Inner Zone of the Northeast OTR.

Imposing controls on sources located outside the Inner Zone of the Northeast OTR at increasing levels of stringency result in little or no additional air quality improvement. An additional thirty-percent reduction in the low level VOC and NOx sources located entirely within the Inner Zone also show significant air quality improvement.

With respect to Pennsylvania, the results of this modeling for both the 1991 and 1995 episodes indicate that emission reductions of sixty-five percent on sources in certain states located outside the Northeast OTR are more than sufficient to achieve compliance in Pittsburgh with the one-hour ozone air quality standard.

In addition to this modeling data, the Section 107 of the Clean Air Act also points to the petitioning states as having the primary responsibility to clean up

their own air. If, having implemented mandatory Clean Air Act requirements, including the submittal of an approvable attainment plan, the petitioning states cannot attain the standard, then it may be appropriate for those states to turn upwind for additional reductions.

But, no such conclusion can be reached in the case of the five remaining petitions -- Connecticut, Massachusetts, New York, Rhode Island and Pennsylvania -- that EPA finds are adversely impacted by sources in the midwest and southeast.

A review of the tarnished record of meeting Clean Air Act requirements demonstrates that they do not have clean hands with which to point the finger of culpability to the midwest and southeast.

Even though the Clean Air Act placed an obligation on Connecticut to have all mandatory measures implemented by 1992, Connecticut is not scheduled to do so until May 31, 1999. Moreover, in the greater Connecticut Ozone Attainment SIP Revision filed with EPA on July 24, 1998, Connecticut concedes that additional emission reductions beyond mandatory measures and EPA's SIP call will be needed. However, Connecticut offers no controls, no further controls, on its own sources.

Indeed, Connecticut offers to be a part of a mid-course review scheduled for 2001/2002. Incredibly, the Connecticut submittal, instead of demonstrating compliance by the statutory attainment date of 1999, actually requested EPA grant an extension of that deadline until 2007 -- four years after the date by which the controls would be imposed under EPA's proposed 126 action.

Connecticut explains that its request is based on the statutory attainment date for its nearest upwind neighbor, New York. Clearly, Connecticut is a victim of transported air pollutants from an upwind state, namely, New York. There's no basis for believing, however, that any of the problems in Connecticut are related to sources in the midwest and southeast.

The circumstances in New York are very similar to Connecticut. After years of missing deadlines on the implementation of mandatory measures under the Clean Air Act, New York submitted its Phase Two Alternative Attainment Demonstration to EPA on June 26th of this year.

Even though conceding the possibility that additional emission reductions may be needed, New York offered no further controls on its sources and, instead, committed only to the same mid-course review in the

2001/2002 time period that Connecticut had committed to.

New York explains that this will allow it to assess the effect of the EPA NOx SIP call, thus ironically EPA's proposal to place controls first on the upwind sources is providing New York with an excuse for not regulating its sources first.

On July 27th of this year Massachusetts submitted its attainment plan. It too failed to offer any additional controls on its sources as part of that plan, even though it could not demonstrate attainment by the statutory deadline.

Massachusetts has asked EPA, as has now Connecticut and New York, to revise its attainment deadline to 2007, again four years after the date of implementation of the SIP controls and the controls that are proposed under EPA's 126 action.

Clearly the need for a 2007 attainment date is not related to emissions from the midwest and southeast, but, rather, to the nearby New York area -- the nonattainment area of New York -- which by statute has a 2007 attainment date. This inadequate submittal and its failure to have met the statutory dates for implementing mandatory measures provides a proper basis for denying the

Massachusetts petition, as well.

Rhode Island too has failed to meet all the deadlines for implementing mandatory measures under the Act and, in the case of Rhode Island, they haven't even bothered to file an attainment demonstration this year. Accordingly, the Rhode Island petition ought to be rejected for failure on its part to deal with its primary responsibility of regulating its own sources.

After much delay of its own in implementing mandatory measures, Pennsylvania now appears to be capable of achieving attainment with the ozone standard. The Attainment Demonstration which Pennsylvania has filed for Pittsburgh on December 29, 1997, demonstrates attainment even without additional control measures at the boundary.

Pennsylvania's petition calls on EPA to impose a moderate level of control of fifty-five percent -- speaking now of Pennsylvania's 126 petition -- and then to model to determine what more might be needed. As stated above, we believe that modeling demonstrates that controls in the range of fifty-five to sixty-five percent on only certain sources upwind of Pittsburgh is all that is needed to address that area.

With respect to Pennsylvania, it appears based

on our modeling that controls on sources outside the Northeast OTR Inner Zone will not help that area's air quality.

With respect to the proposed Federal Implementation Plan, we find it puzzling that EPA would be in favor of a FIP to be implemented automatically to enforce the SIP call, when no such action has yet been taken with respect to any of the Section 126 petitioning states, even though they have missed statutory deadlines for years.

By comparison, the midwest and southeast states have a demonstrated record not only of meeting statutory deadlines, but also of achieving clean air standards. We urge EPA not to adopt the FIP. We are willing to work with you to impose whatever alternative control measures may be necessary to deal with the near-field effects in Pittsburgh.

Thank you for your time.

MR. SEITZ: Mr. Flannery, one question. I know, I think, in the supplemental notice here I asked this question, and I'm a little confused.

Your testimony seems to indicate that the 126 notice is an attainment. You seemed to indicate it,

anyway, in your verbal testimony, and I guess in your written testimony, that this is an attainment -- EPA's primary action should be an attainment.

126 is a transport reduction, rather than an attainment SIP call. I mean, do you agree with that, or -- I'm a little confused as to what your reading --

MR. FLANNERY: I do agree with that. The threshold issue, obviously, is to find whether the upwind sources are significantly contributing to the downwind sources; and, if you conclude that that is the case, then the next question is to eliminate the significance of that contribution.

My point is that there is no indication that we can find that there is a significant contribution on those sources and that, in any case, in the one circumstance where we believe that there may be such a significant contribution, namely Pittsburgh, that that significance can be eliminated by control strategies at the fifty-five-to-sixty-five-percent level and not the eighty-five-percent or point-one-five level that's the heart of your SIP call.

MR. SEITZ: What about Pennsylvania -- Philadelphia?

MR. FLANNERY: Well, again, with Philadelphia, as with the rest of the petitioning states, the data indicate to us that what is needed there are controls on the local sources. Controls within the Inner Zone of the OTR seems to be more than sufficient to take care of the needs there.

Or, stated differently, to impose controls outside the OTR to get air quality benefits in Philadelphia and the rest of the petitioning states doesn't appear to be the answer to the question.

MR. SEITZ: Just, so, in terms of transport, you're acknowledging it as an issue, it's the level -- as it relates to attainment -- is your question?

MR. FLANNERY: Well, if we look, for example, at Connecticut, I suppose I have to concede to you that we can show that the first molecule of material clearly is moving out of the Ohio River Valley and getting to Connecticut. I mean, that appears there, and we can't deny that.

It is a question of degree, but we think that's what 126 is about. You have to find not that there is transport, but that it results in a significant contribution; and, if you find that it's a significant

contribution, the question is what kinds of controls need to be put in place to eliminate that significant contribution.

The agency has not done that. All the agency has done is to say, "We like a point-one-five control strategy applied in all twenty-two states from Massachusetts to Alabama, and that's the strategy we want to impose."

You're not making -- you're not answering the question of which sources are culpable and what level of control needs to be placed on those sources to eliminate the significant contribution those sources may have to the petitioning states, if any.

MR. SEITZ: Thank you.

MR. FLANNERY: Thank you.

MR. SEITZ: Any other?

(No response.)

MR. SEITZ: Next? Marcus?

MARCUS SPATAFORE

WEST VIRGINIA CHAMBER OF COMMERCE

MR. SPATAFORE: Good morning. My name is Mark Spatafore with the law firm of Jackson & Kelly. I'm here on behalf of the West Virginia Chamber of Commerce to

comment upon the protections that should be afforded to small business in these rulemakings under the Small Business Regulatory Enforcement Fairness Act of 1996, which is commonly referred to as "SBREFA."

The West Virginia Chamber of Commerce has as its mission the goal of being an action-taking business organization. It is the state's largest trade organization, but its members are principally small businesses.

This is not surprising, since small businesses comprise ninety-seven percent of all West Virginia business concerns. We seek not only to improve the state's business climate for these members, but also to improve the state's quality of life.

It is no understatement that small businesses are the lifeblood of West Virginia. They are the catalysts for employment, as small businesses have created jobs over the past five years, whereas large businesses have cut their workforces in the state.

While small businesses are West Virginia's greatest strength, however, their fragile nature creates a formidable challenge in weathering financial difficulties.

It is this particular vulnerability of small

businesses that gave rise to SBREFA. Congress recognized that the small-business sector is critical to job creation in today's economy.

But, in many cases, it shoulders more costs and burdens than necessary in complying with uniform national regulation. Thus, SBREFA was intended to make federal agencies more responsive to the unique characteristics and capabilities of small businesses.

Accordingly, it is without question that these rulemakings require the protective process of SBREFA. While Section 126 petitions attack various areas of the Midwest and Southeast United States, it is notable that all of the petitions target West Virginia.

Under the NOx SIP call, for which the FIP is intended to be a backstop rulemaking, West Virginia is subject to greater burdens than any of the other twenty-one states affected by EPA's proposal.

Overall, West Virginia faces NOx reductions of forty-four percent, with certain categories of sources potentially required to reduce emission in excess of eighty-five percent. The heavy burden imposed on West Virginia is exactly the type of agency activity for which SBREFA is necessary.

Furthermore, the small entity NOx emitter represents a broad range of West Virginia activity. The NOx-related industry segments of stone, clay, glass and concrete products, and lumber and wood products, are central to the state's economy, having ranked among the fastest-growing small business segments in West Virginia, according to the most recent data.

In certain other NOx-related segments, the West Virginia small-entity populations are high. The only portland cement plant in West Virginia is a small entity. Most of the lime plants in West Virginia appear to be small entities, as with the case of West Virginia's coal preparation plants.

The proposed rulemakings would have cost impacts on all of these small-entity NOx sources, as indicated in our comments in response to the initial SBREFA Outreach Meeting on potential small-entity impacts of the then pending FIP and Section 126 ozone transport rulemakings.

These impacts may be extrapolated to yield even larger impacts on the higher populations of small, NOx-emitting entities in many other FIP states. Consequently, we believe the results demonstrate

potentially major economic impacts on a substantial number of small entities requiring the application of SBREFA protections to these rulemakings.

With respect to the subject of this hearing, we commend EPA for the steps it has taken to ensure the participation of small entities in the rulemaking process. Notably, the Small Business Advocacy Panel's recommendations have provided a useful backdrop against which to fashion appropriate alternatives to minimize the impact on small entities.

It is clear, however, that the only alternative consistent with SBREFA and the Clean Air Act is that small businesses outside nonattainment areas should be exempted completely from the FIP rules which will effectively implement the NOx Transport SIP call and the Section 126 proceedings.

A complete exemption comports with the intent and purpose of SBREFA, as the compliance costs for small entities in West Virginia and similarly situated states particularly would be devastating. Currently, no small entities in West Virginia incur any appreciable expenditure for NOx control.

There is virtually no NOx-control experience

in the state for manufacturing entities. The only significant current experience is with low-NOx burners on large electric generating units -- and these control measures do not approach the reductions required under a FIP.

As SCR is already RACT in the Northeast for combustion turbines and certain other existing units, SCR may de facto become the standard for large segments of West Virginia's non-utility economy. The direct and indirect costs of SCR for such entities, especially small entities, appear prohibitive, with a major negative effect on West Virginia's export-driven economy.

In general, small entities are typically unable to secure debt or equity to finance what is still seen by most lenders or investors as non-productive pollution control costs. If small entities cannot finance such controls out of working capital, it will be very hard pressed to meet such requirements.

Few small entities in West Virginia have such reserves, nor are we likely alone with respect to the predicament facing small entities in other states.

EPA can achieve its transport-related goals even with such an exemption. In prior comments to the

Panel, the Chamber identified roughly all the plant-level small entities in West Virginia potentially affected by these rulemakings. We also attempted to identify the total NOx emissions and their associated transport effects from this entire universe of small entities.

The overwhelming majority of such small entities are non-major NOx emitters. Nearly all appear to be low or non-elevated NOx sources with short effective stack heights below one hundred meters and below the two-hundred-seventy-meter thermal mixing layer.

Their total NOx emissions appear trivial compared to the state's total base year inventory and proposed reduction budgets. Also, the minuscule long-range transport contribution is consistent with major small entity emitters located outside the OTR and the Northeast Corridor.

Thus, the most straightforward way to satisfy the Agency's obligations under SBREFA would be to adopt such an exemption, since few if any transport gains would be compromised thereby.

EPA would forego only an inconsequential amount of NOx emission reductions compared to the overall state-by-state inventory budgets. Importantly, EPA would

forego even less in terms of transport impacts, as almost all the potentially affected small entities are low sources with short stacks and plume heights.

Moreover, the trivial environmental benefits of regulating any small entities are far outweighed by the associated administrative and compliance costs. EPA has neither the need nor the resources to chase the last possible pound of reduction where it could otherwise achieve NOx transport goals. The exemption would save the agency and implementing states substantial resources both up front and thereafter.

While this exemption generally should apply to all small businesses, we believe that its scope should be limited to only those small entities that do not clearly and significantly contribute to ozone transport. Exemption of small entities purely for the purposes of transport regulation is appropriate and justified.

Such sources can be addressed later through orderly SIP development if and when further NOx reductions are shown to be necessary and cost effective for attainment purposes. Where small entities are physically located within serious and severe ozone nonattainment areas that have not submitted complete attainment

demonstrations, however, they should not be exempted.

This narrow exception to the exemption is necessary for localized attainment purposes, and additional control of NOx emissions should remain an option in future SIP development or similar actions. Indeed, such reductions appear no different than those required in the past by EPA under its general Clean Air Act authorities where a SIP has not assured attainment.

This is particularly true with respect to many of the Section 126 petitioning states. For example, the State of Massachusetts only last year passed legislation to implement a vehicle inspection and maintenance or I/M program that has been required by the Clean Air Act for several years.

To date, EPA has yet to approve the Commonwealth's latest I/M SIP submittal, and the Massachusetts I/M program remains an unfulfilled obligation. Similarly, neither Rhode Island nor New Hampshire has an approved I/M SIP.

In addition, Rhode Island has yet to file its attainment demonstration due in 1994 under the Act. The State of New York's most recent attainment submittals admit that, even with the implementation of the NOx SIP

call, it will not achieve attainment.

EPA has for too long allowed the northeast to delay in the implementation of the Clean Air Act and should insist on full compliance with the Act before any sources in such states receive an exemption from NOx reductions that would further compound their local nonattainment problems.

We therefore urge EPA to exempt small entities located outside of serious and severe nonattainment areas in connection with these proceedings. The West Virginia Chamber of Commerce values the opportunity to work with EPA to assess these important issues involving critical interactions between SBREFA and the protections of the Clean Air Act.

Thank you.

MR. SEITZ: Just a few clarifications, if you could submit for the record. You indicated -- you talked about "Consequently, we believe the results demonstrate potentially major economic impacts on a substantial" -- could you submit for the record the analysis behind that, if you haven't done so already, with your written comments?

MR. SPATAFORE: Yes, we would.

MR. SEITZ: In addition, you talk about "complete exemption comports with the intent and purpose of SBREFA." Could you also submit for the record the legal analysis on that?

MR. SPATAFORE: Yes.

MR. SEITZ: Go ahead, Lydia.

MS. WEGMAN: You know, of course, we did the SBREFA Panel, and we actually have exempted a very large number of the sources you identify in your initial comments.

A large number of those were participants in the SBREFA process, and we did reduce the number substantially. So, there are very few small entities that are actually left to potentially be covered.

So, it's important when you submit this analysis that you focus not on all small entities, but on those that remain that may potentially be affected by the rule. We'd like you to focus on that.

MR. SPATAFORE: I understand. I'd like to add to that, SBREFA covers the remaining entities, as well.

MS. WEGMAN: Right, but, we've already exempted them. So, that's why, from our standpoint, going to a further exemption is what we need the data on.

MR. SEITZ: This is for clarification. When you referred to "in prior comments to the panel," were you talking about the SBREFA panel in your testimony?

MR. SPATAFORE: Yes.

MR. SEITZ: Okay, thank you.

Okay, thank you very much.

The next two presenters would be Ms. Kathy Beckett and David Wooley.

Thank you very much, Ms. Beckett?

KATHY BECKETT

TRINET

MS. BECKETT: Yes. My name is Kathy Beckett. I'm an attorney with the law firm of Jackson & Kelly, and offer the following comments on behalf of the Tristate Industrial Network, TRINET. The following comments of TRINET are offered in response to EPA's proposed NOx FIP and EPA's proposed response to the 126 petitions.

First of all, TRINET is a business group representing the metals, petroleum, natural gas and utility industries located in Ashland, Kentucky, Ironton, Ohio and Huntington, West Virginia. TRINET was originally formed to respond to the need to develop an attainment SIP to address the moderate ozone nonattainment in that

region.

Today, TRINET wishes to address five primary issues of concern with regard to EPA's proposals.

First of all, EPA's proposals are technically deficient. TRINET directs EPA's attention to the comments filed by the Midwest Ozone Group which are based upon the detailed report prepared by Alpine Geophysics and Environ, titled, "Analysis of the Effects of VOC and NOx Emission Reductions in the Eastern United States on Peak One-Hour and Eight-Hour Ozone Concentrations" which supports the following:

The benefits of imposing additional controls on sources located outside the Northeast Ozone Transport Region will have no significant impact on air quality in the northeast.

Application of EPA's -- quote -- "significant contributor" control strategy will not result in attainment of the ozone standard in any of the selected states.

Application of EPA's "significant contributor" control strategy to sources located in the Inner Zone of the OTR accounts for virtually all air quality benefits in the selected states that are related in any way to the EPA

NOx SIP call.

Application of controls to sources outside the OTR do not produce air quality benefits in any of the selected states.

Application of a thirty-percent additional reduction in VOC and NOx beyond SIP call levels to low level sources within the Inner Zone, however, do result in significant additional air quality benefits that are comparable to the benefits of applying the SIP call, the FIP and the Section 126 response to sources in the same region.

It is undeniable that sources in the midwest and southeast have extremely little impact on air quality in the northeast and, therefore, do not warrant the across-the-map designation as significant contributors.

The imposition of controls on sources in the midwest and southeast would leave the northeast with virtually the same level of air quality for ozone; there is little choice but to act immediately to take action on a local basis to regulate the sources that are actually causing the significant contribution.

Secondly, EPA's FIP and Section 126 response are evidence of EPA's selective enforcement of the Clean

Air Act. EPA has proposed the NOx FIP with the stated purpose of having it available to immediately impose upon failure of the affected states to implement the NOx SIP call by the fall of 1999.

This action is a significant departure from the historical actions of EPA in working with states to develop and implement their SIPs. There is no precedent nor justification for EPA's heavy-handed FIP proposal.

This proposed FIP is a departure from the time allowed in the Clean Air Act for the implementation and modification of SIPs. EPA's proposed FIP raises the question of why it has applied a policy of leniency to the ozone nonattainment Northeast states with regard to their failures to implement their SIPs, but proposes to apply a policy of enforcement to the twenty-three jurisdictions identified in the ozone transport analysis, many of which are in attainment for ozone.

EPA concluded from all of the available information that twenty-three jurisdictions contain sources that make a significant contribution to nonattainment in, or interfere with maintenance by, one or more petitioning states under the one-hour and/or eight-hour NAAQS to include states very remote from the

northeast, as far away as Alabama.

Interestingly, EPA represents that sources in New Hampshire and Vermont do not make a significant contribution to nonattainment in, or interfere with maintenance by, any of the petitioning states under the one-hour and eight-hour NAAQS. EPA proposes that with regard to Maine, New Hampshire and Vermont, that it intends to conduct further analyses on these states.

It is difficult to fathom that the data available for Maine, New Hampshire and Vermont is any less reliable or less conclusory than the data which is being relied upon to justify regulation of many of the other more remote jurisdictions.

EPA's selective enforcement and arbitrary actions will be called into question, if the Agency elects to continue to pursue these proposals.

Third, one-size-fits-all control measures bring -- to bring sources into compliance is not justified. EPA has referenced its one-size-fits-all strategy in the NOx SIP call, the proposed FIP and Section 126 response as the strategy for large utility and industrial boilers, internal combustion engines, and cement manufacturing facilities.

The modeling that has been conducted by MOG specifically calls into question the application of one control strategy for sources that obviously have varied impacts on the petitioning states and on ozone attainment.

EPA's participation in the attempt to level the economic playing field throws the administration of the Clean Air Act into an unprecedented and unlawful scheme. TRINET continues to be critical of EPA's economic political strategy, when protecting the nation's health is supposed to be the agency's primary goal.

Fourth, cost effectiveness assessments are entirely beyond the scope of the Clean Air Act. EPA's reliance upon the selection of controls and its determination of significant contribution based on a highly-cost-effectiveness criteria is not supported by the Clean Air Act.

The concept of imposing controls based on an economic criteria rather than attainment of the ambient air quality standards simply is not supported by law. EPA's movement from the purview of the Clean Air Act with regard to this issue is one of the primary legal flaws in EPA's proposed FIP and Section 126 Response.

Then, finally, a few comments about a national

trading program: TRINET is supportive of the concept of emissions trading. TRINET continues to believe, however, as I've stated many times before, that a one-size-fits-all control strategy simply does not make sense, nor is it justified.

As EPA has acknowledged, sources that are closer to areas violating the air quality standards have larger effects on air quality than sources far away. In spite of the technical and legal obstacles that have been identified for EPA's consideration, the final NOx SIP call and the proposed FIP and Section 126 response will or propose to implement a uniform emission control strategy.

In light of EPA's arbitrary and capricious uniform control strategy, TRINET concedes the point that open and free trading is the only reasonable manner in which to establish a trading program.

The members of TRINET are prepared to work with EPA to reform the FIP and Section 126 proposals to address these issues. We will be filing more detailed comments at the close of the comment period.

MR. SEITZ: Thank you, Ms. Beckett.

MS. WEGMAN: I have one question. You say in page two of your testimony that, "The imposition of

controls on sources in the midwest and southeast would leave the northeast with virtually the same level of air quality for ozone."

Are you going to be submitting data to support that? Because, that is not supported by what we've done and the modeling we've done.

MS. BECKETT: Sure. Yes, I will.

MS. WEGMAN: Okay. Several of your technical points are in conflict with our modeling.

MS. BECKETT: Okay.

MR. SEITZ: Thank you, very much.

Mr. Wooley?

DAVID WOOLEY

CLEAN AIR TASK FORCE

MR. WOOLEY: Good morning. My name is David Wooley. I'm a Professor of Environmental Energy Law at Pace University School of Law, and I serve as counsel to the Clean Air Task Force, which is a foundation supported -- an education and advocacy project focused on air pollution problems in the United States.

I'm appearing this morning on behalf of the American Lung Association, the Michigan Environmental Council, the Ohio Environmental Council, the Illinois

Environmental Council, the Izaak Walton League of America, both its Midwest and National Offices, the Citizen Action Coalition of Indiana, the Wisconsin Environmental Decade, the Clean Air Council based in Pennsylvania, Environmental Advocates, the Appalachian Mountain Club, Clean Water Action/New England, the Natural Resources Council of Maine, the New York Public Interest Research Group, the Center for Energy Efficiency and Renewable Technologies and the Pace University, Center for Environmental Legal Studies.

These groups have participated in two previous public hearings on EPA's proposals to take action against interstate air pollution under Sections 110 and 126. We filed written comments on several occasions. Many of these groups joined in an amicus brief that was filed in the United States District Court supporting approval of a settlement agreement between EPA and a number of the northeastern states, which I understand was approved by the Judge on Monday.

The sixteen health and environmental groups I am representing today generally support EPA's actions under Section 110 and 126 where the actions will reduce health damages from ozone and fine particles, will also

have the collateral benefits of reducing acid rain, crop losses, visibility impairment, and coastal water nitrification.

As stated by the *Atlanta Constitution* in its September 28th, 1998, editorial -- quote -- "All in all, better breathing for a few pennies a day seems like a good tradeoff."

The rule subject to today's hearings address a key question. What will EPA do if states fail to submit implementation plans that are consistent with the NOx SIP call?

Unfortunately, in the history of the Clean Air Act, there have been many occasions when states have failed to fully carry out the requirements of the Clean Air Act, of EPA regulations, or even their own SIPs. This is true throughout the country, including the northeast.

EPA is right to propose a federal implementation plan that will go into effect immediately upon the failure of a state to submit or implement a plan. EPA is right to put into place Section 126 findings and a remedy that creates a separate authority to move forward on these pollution problems, if the 110 process breaks down.

These send powerful signals that will encourage faithful compliance with the SIP call throughout the twenty-two states, it will discourage delay in implementing these rules.

I want to reinforce that the NOx SIP call already has a four-and-a-half-year period of implementation. It will be 2003 ozone season before the controls take effect to reduce health and environmental damages. So, any further delay is of grave concern to these groups.

Health and environmental groups closely monitor the development of the state SIPs in the midwest, northeast, southern and mid atlantic regions. They will be meeting with their state officials encouraging and supporting the filing of effective SIPs. They will continue to educate the public, particularly on the need for modernization of air pollution controls in the electric power sector.

We sincerely hope that the Section 126 and federal implementation plan options will be unnecessary and that environmental groups, states, EPA and industrial representatives will work together to achieve this historic reduction that is so badly needed to protect

health and the environment. In fact, we're hearing that many states do not intend to fight the SIP call and to move forward with controls.

The *Cincinnati Post* editorial of September 29th of this year puts the case very well. Quote -- "Rather than fight the rules in Congress or the courts, midwestern states and utilities should hunker down and comply. The sooner they do, the sooner the air will improve here in Greater Cincinnati and throughout the midwest.

"The benefit to the midwest will outweigh the cost. What's so bad about improving the health of midwestern residents?"

In my remaining time, I'd like to make a few specific comments on the proposal for the 126 findings and the federal implementation plan. Many of these groups are still studying the details in the documents and plan to file more detailed written comments by the November 30th deadline.

We support EPA's interpretation of the relationship between Sections 110 and 126. Congress clearly intended for there to be a comprehensive remedy for all forms of interstate air pollution. Any limitation

on Section 110 or 126 which would limit EPA action to the impacts of new sources is inconsistent with that clear Congressional intent.

We agree that it makes sense for EPA to coordinate the controls and rulemakings under 110 and 126. We disagree with EPA's interpretation of Section 126 in regard to the consideration of cost and cost effectiveness. We do not believe that cost should be considered in making the initial finding; rather, the cost should be considered in developing the remedy only.

We disagree with EPA's plan to deny Section 126 petitions so long as the Section 110 process is -- quote -- "on track." We understand that this could occur as early as 1999. This is a mistake.

The filing of implementation plans is only the first step in a process to control these pollutants. Many things can go wrong. EPA should make the finding and keep it in place until the controls are in effect in 2003.

We agree with EPA's conclusion to base the 126 findings on the impacts on the eight-hour standard. We see no basis in the statute that would limit EPA's ability to consider the eight-hour standards. It would be, in our view, nonsensical to only focus on the one-hour standard,

given the revisions to the standard which were finalized in 1997.

We agree with the control levels proposed in the Section 126 and federal implementation plan rules. We agree with the plan to do additional modeling of the impacts of sources in New Hampshire, Maine and Vermont, but we disagree with EPA's manner of proceeding after the study.

We think that EPA needs to formally propose a resolution one way or another in a supplemental rulemaking and not as EPA's rule appears to suggest to simply only go forward if EPA intends to make a 126 finding in regard to those sources.

(Interruption to proceedings caused by a fire alarm.)

MR. SEITZ: As you all know, this is Fire Awareness Month. We were alerted to the fire drill.

David, we had hoped you'd get done. You have two minutes left. Unfortunately, they're on time and we have to leave.

So, we will pick up and give you two more minutes when we return to the room. We all do have to evacuate, however.

(Whereupon, the proceedings were recessed, and thereafter reconvened following the fire drill.)

MR. SEITZ: Mr. Wooley, when we left, you had two minutes remaining. So, if you've got yourself together and know where you want to begin again, we will start the clock or roll down another two minutes, whenever you get going.

MR. WOOLEY: Okay, I think I can finish in less than two.

I've mentioned before, we have strong support for the proposal of the federal implementation plan. We're very concerned about the potential for delay, if that is not in place and ready to go, in the case of noncompliance.

I also want to strike a tone of hoping that there's cooperation and movement together on this among parties that have traditionally been adverse. I think it's time to come together, and that there's an opportunity to really achieve something historic here. We also agree with EPA's decision to use Section 179 sanctions, if necessary, in these situations.

This is the first time in history that EPA has exercised its authority under the Interstate Air Pollution

provisions to tackle a very serious air pollution problem. It's an historic achievement in United States environmental law that will have increasing importance for the future.

Awareness of long-range air pollution transport is growing. The public no longer sees air pollution as strictly a local problem. On this fiftieth anniversary of the Denali air pollution disaster, I think that's a measure of how far we have come in this country in controlling air pollution and in public consciousness.

I believe that this precedent that's being set with these rulemakings will be important as we face other pollution problems that transcend state and national boundaries.

I want to finish with a personal comment, and convey on behalf of all these groups a commendation to the staff and leadership of EPA for their hard work and creativity on this important rule.

MR. SEITZ: Thank you. I believe Lydia has a question.

MS. WEGMAN: I just wanted to ask you, David, for the record, when you say that we should not be considering economic factors in our determination of

significant contribution, whatever support you have for that position -- case law or any other arguments you may have -- would be helpful to us, because we've struggled over this issue.

MR. WOOLEY: Okay, I will go back and review the comments we made on that subject and the 110 SIP call and see if I can amplify those.

MS. WEGMAN: Okay, thank you.

MR. SEITZ: Thank you very much, Mr. Wooley.

MR. WOOLEY: Thank you.

MR. SEITZ: The next two presenters, Thomas McGuire and Gerald Yamada.

THOMAS McGUIRE

NY STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

MR. McGUIRE: I am Tom McGuire from the New York State Department of Environmental Conservation. I am testifying today on behalf of New York State regarding EPA's proposed rulemaking which involves EPA's action with regard to New York State's Clean Air Act Section 126 petition which was submitted to EPA during August of last year. I will not be particularly addressing EPA's FIP proposal.

Initially, I wish to express New York's

general support of the Section 126 proposed rulemaking and our appreciation of the massive effort on the part of EPA staff that went into its production. We are also very encouraged by EPA's timely action on the petitions in accord with the time frames set forth in the Section 126 consent decree which was approved two days ago by the U.S. District Court for the Southern District of New York.

In the remainder of my testimony, I will generally describe New York's petition and EPA's action with regard to it, and will discuss two aspects of EPA's proposal which New York finds troubling.

In its petition, New York requested EPA to make a finding pursuant to 126(b) that a certain category of sources in upwind areas was significantly contributing to nonattainment in, or interfering with maintenance by, New York with respect to the one-hour ozone NAAQS.

The relevant upwind sources were characterized as fossil-fuel-fired boilers having a maximum rated heat input of two hundred and fifty million Btu per hour and greater and fossil-fuel-fired electric generating units with maximum rated output of fifteen megawatts or greater located in New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Virginia, West Virginia, Ohio,

and portions of Michigan, Indiana, Kentucky, North Carolina and Tennessee.

As the technical basis for a finding of significant contribution, New York relied on information and analysis drawn from ambient air monitoring studies, New York's 1994 attainment demonstration modeling results, OTAG modeling results and new supplemental modeling performed by New York which focused on the contribution to downwind pollution by a subset of the above-described sources which are located in OTAG Subregions Two, Six and Seven.

In light of the mandate of Section 126 (c) that EPA impose emission limitations and compliance schedules that must be complied with within three years of the date of any finding, New York recommended that EPA either extend participation in the OTC NOx Budget Program to the relevant upwind sources or impose on these sources a regulatory program consistent with the principles and provisions of the OTC NOx MOU and NOx Budget Program.

In this regard, New York was not suggesting that EPA impose any requirements on upwind sources to which New-York-based sources would not also be subject.

New York is pleased that EPA has proposed to

find that the bulk of New York's petition is technically meritorious. Furthermore, New York generally believes that the proposed NOx cap and trade program that would constitute the Section 126 remedy is consistent with New York's recommended remedy.

Implementation of the proposed cap and trade program without the proposed compliance supplement pool feature would be in accord with the mandate of Section 126(c). The proposed cap and trade program would constitute a cost-effective mechanism to eliminate the significant contribution of all relevant upwind sources to nonattainment in New York.

I now turn to the two aspects of the proposed rulemaking that especially trouble New York.

First, New York is deeply concerned about EPA's proposal that it may withdraw a finding or deny a petition based on EPA's approval of an upwind state's SIP revision or imposition of a FIP. This proposed action by EPA is impermissible under the terms of the Act and reflects EPA's misunderstanding of both the role that Section 126 plays in the Act and the terms of the consent decree which was recently approved by the District Court.

Section 126 constitutes a jurisdictional basis

for EPA regulation of interstate pollution which is independent of the Section 110 SIP process. Section 126 is a mechanism for federal control of major stationary sources or groups of stationary sources that are responsible for interstate transport of pollutants.

Section 110, on the other hand, encompasses all sources of any type which may be subject to state control. The only linkage between Section 126 and Section 110 is the fact that Section 126 incorporates the Section 110(a)(2)(D) significant contribution test to determine source or category culpability for downwind nonattainment.

In no way is Section 126 subordinate to or dependant on the Section 110 SIP revision or submittal process. That said, New York believes that the approved SIP revisions of upwind states or FIPs that adequately control relevant emissions within three years may ultimately be deemed to constitute the remedy required to be imposed under Section 126(c) once EPA makes a finding of significant contribution.

Because FIPs are federally imposed and because approved SIP revisions are federally enforceable, such measures may simultaneously constitute a Section 126 remedy. However, approved SIP revisions or FIPs will not

obviate the requirement for a Section 126 remedy.

Nothing in the consent decree allows EPA the option to simply deny petitions after EPA has made an affirmative determination with respect to certain sources. The consent decree does defer the effective date of a finding for any sources identified by EPA's April 1999 final action.

Once EPA has made a determination of technical merit, it must carry through with measures to address the significant contribution that it has determined to exist in April 1999. The consent degree merely defers implementation of the remedy that corresponds to the subject sources in light of the possibility that an imminent approved SIP revision or FIP may also be characterized as the Section 126 remedy. In this manner, the parties to the consent decree allowed for coordination of the independent and ongoing NOx SIP call and Section 126 processes.

Furthermore, EPA's conclusion that sources subject to an approved SIP revision that has not yet been implemented are no longer significantly contributing to downwind nonattainment has no support in the Act or in logic. It is irrelevant that EPA may believe that the

subject sources are on track to compliance with Section 126 because of the approval of SIP revisions aimed at regulating the sources.

It is actual compliance within three years that Section 126 requires. No anticipated or hypothetical future compliance can substitute for the imposition of a remedy under Section 126.

New York's second area of concern involves EPA's proposed use of a compliance supplement pool which allows up to an additional two hundred thousand tons of emissions over and above the reductions called for by application of the emissions criteria used to set the budgets for sources in each state.

While New York is sensitive to the concerns that reductions called for under the proposed cap and trade system would adversely impact the reliability of electricity supply, New York does not believe EPA has any authority under the Act to provide for such a pool of extra tons to be emitted after May 2003.

Section 126 provides that significant contribution to downwind nonattainment must cease within three years of a finding. The compliance supplement pool, as conceived, may delay compliance for an additional two

years. In other words, the compliance pool allows for a five-year compliance period instead of the mandated three-year period.

New York especially takes issue with the proposed distribution option based on a need for a compliance extension. Section 126 allows for no extension of the three-year compliance period.

From a policy standpoint, New York has no objection to the distribution of tons to reward early reductions. This is akin to the operation of the OTC NOx Budget Program.

New York believes that the emissions of these tons after May 2003 would be offset by the environmental benefit realized by early reductions that might not have otherwise occurred. However, New York does not at this time see how even the early reduction distribution allowance may be allowed by the terms of the Act.

My testimony today will be supplemented by a more detailed written submission before the end of the comment period. New York wishes that EPA also consider New York's earlier comments submitted on issues raised by the Advanced Notice of Proposed Rulemaking.

Thank you for providing the opportunity for me

to testify today.

MS. WEGMAN: I just want to ask one question. I just want to make sure I understand your position as to the relationship between a SIP, a FIP and 126.

Is it your position that, even if there is an approved SIP or a FIP in place, that 126 remains in place as sort of a backstop, but nothing actually happens as long as the SIP and FIP are being implemented?

MR. McGUIRE: I agree with your statement that it remains in place. The SIP and FIP can -- we acknowledge that the SIP and FIP can form a Section 126 remedy if they do address the sources and get compliance within three years.

But, it has to be -- it will be also labeled as a Section 126 remedy. It has its own independent jurisdictional basis.

MS. WEGMAN: Okay, so, if the SIP -- if we were to approve a SIP, and from your standpoint -- or I'll just say -- and this constitutes the 126 remedy. That would be acceptable to you, as opposed to having an independent, free-standing 126 remedy out there? That's where I'm confused.

MR. McGUIRE: Yes, they would be one and the

same.

MS. WEGMAN: Okay.

MR. SEITZ: I'm glad you two are clear. I'm not now.

Would you in your comments just, on this point, for the record, clearly identify how that remedy -- if 126 stayed in place, what the form of satisfying that would be, which is what I think you were just talking about.

I don't want to get into any more here today; but, if you could just expand on how you believe that remedy -- the form of that remedy -- would take place under a SIP or -- an approved SIP, it would be helpful to me.

You don't need to do it today. I mean --

MR. McGUIRE: Well, I can just say briefly that the 126 remedy is aimed at major stationary sources or groups of such sources in upwind areas that contribute to downwind nonattainment.

Those sources, which we see as elevated sources, tall stacks in upwind states, would have to be adequately controlled by the SIP revision that's submitted and approved or the FIP that is imposed.

MR. SEITZ: So, that may answer my question. So, a SIP in a neighboring state that chose to satisfy the NOx budget by low-level sources would not necessarily satisfy the 126 remedy, as you see it?

MR. McGUIRE: I can't say that for every single state. I suppose it depends on where they are and, you know, the exact mix. But, that's essentially our belief.

MR. SEITZ: Okay, I understand.

I had one, and it was on the compliance pool, just to make sure I understand. You are, New York is, aware and sensitive to the issue of the electricity liability and the electricity supply. You object to the pool but would do it with an early-reduction program -- just to make sure I understand your testimony.

MR. McGUIRE: We don't see any authority in the Act right now that would support -- you know, in our initial analysis -- that would support the use of this pool. However, we don't have as a policy concern any problem with use of it for early reductions. The problem is, is that we just haven't found a way yet to see how you can legally do that.

MR. SEITZ: So, I assume you're going to think

more about that and give us alternative approaches?

MR. McGUIRE: We would like to help you think of an alternative approach that could allow that.

MR. SEITZ: We'd appreciate that. Thank you.

Mr. Yamada?

GERALD YAMADA

FIRSTENERGY CORPORATION

MR. YAMADA: Good morning. My name is Gerald Yamada. I am appearing here on behalf of FirstEnergy Corporation. FirstEnergy is the twelfth largest electric utility in the United States, deriving two-thirds of its electric generating capacity from burning fossil fuels.

As EPA is aware, FirstEnergy recommended that EPA adopt an output-based approach that is generation neutral for allocating NOx allowances to the states as a part of the SIP Call Rule. We applaud EPA for recognizing the environmental benefits of the output-based approach and for issuing a supplemental notice to take comment on the approach before making a final decision on the SIP Call Rule.

The output-based, generation-neutral approach is a progressive way to administer a cap and trade program. It simply is a better way for a market-based

program. This approach improves on the acid rain model by eliminating government-supported preference for fossil-fuel-fired generation of electricity over non-emitting generators and encouraging sources to make efficiency improvements in the generation of electricity without losing allowances.

There has been a groundswell of support for the output-based, generation-neutral approach since it was first proposed at EPA's initial hearing on the model NOx cap and trade program. Support has developed from states, other utilities, natural gas producers, hydro and renewables, academic community, environmental groups, and even a coal company.

EPA has proposed the output-based, generation-neutral approach as one of three options for the FIP and in response to the Section 126 petitions. I am here today on behalf of FirstEnergy to urge EPA to adopt the output-based, generation-neutral approach or EPA's option three for the FIP and EPA's response to the Section 126 petitions.

EPA has an extensive history of promoting the efficient use of natural resources, particularly energy. In key emission standards, such as the standards for new

vehicles and the recently-promulgated new source performance standards for new power plants, EPA has adopted output-based, generation-neutral performance standards that promote the efficient use of energy.

Along these same lines, option three promotes the efficient use of energy, levels the playing field among sources for all different forms of generation, provides incentives for the development of clean sources of generation in the future, offers comparable economic benefits to emitting and non-emitting sources, and allows allocations to be made using actual generation and actual growth.

In contrast, EPA's option two maintains the status quo by giving a preference to fossil-fuel-fired generation and provides no incentives for the development of clean sources of generation. EPA identified three obstacles that EPA believed prevented the immediate adoption of the output-based, generation-neutral approach in the SIP Call Rule.

These obstacles should not prevent the early adoption of the output-based, generation-neutral approach because EPA has the authority to take the necessary steps to overcome them in implementing the FIP or responding to

the 126 petitions.

As a first obstacle, EPA was concerned that a low effective emission limitation may not be technically achievable if a state chooses not to join an interstate allowance trading program. For the FIP and 126 rules, EPA has created the Federal NOx Budget Trading Program. Hence, sources have the option of buying allowances to meet an effective emission limitation.

As a second obstacle, EPA provided three-year fixed budgets to the states to allow for compliance planning. For the FIP and Section 126 rules, early adoption of option three will facilitate compliance planning.

There are reasons why EPA decisions should not be made twice. It complicates compliance planning because companies may defer long-range planning until the second decision is made. Adoption of option three for the initial control period will alleviate the need to revisit this decision.

Adoption of option three for the initial control period will allow three additional years for compliance planning and will provide incentives to improve energy efficiency, as well as air quality, three years

earlier.

We believe that adopting an output-based, generation-neutral approach is a significant improvement to market trading. Hence, EPA should not be asking whether it should adopt the output-based, generation-neutral approach but, rather, EPA should be asking how soon can it be adopted.

Although not germane here, we will continue to ask EPA to amend state budgets to allocate allowances on an output-based, generation-neutral system for the initial control period starting in 2003 because we believe that there is still sufficient time.

As a third obstacle, EPA was concerned about data availability because EIA withheld some of the electricity-generation information it collects from non-utility generators in order to protect source confidentiality.

For the FIP and Section 126 rules, EPA could collect the information from the sources directly. Requiring companies to submit output-based information does not create a burden.

Companies already have the output-based information. Hence, it is merely a matter of requesting

the output-based information already collected.

EPA has authority under Section 114(a) of the Clean Air Act to collect output-based information from companies as a condition of the companies' receiving NOx allowances. The confidentiality of output-based information can be protected by EPA where needed. EPA is required to keep any confidential business information confidential under Section 114 or under the Trade Secrets Act.

We commend and support EPA for providing notice and comment on EIA's data. Although EIA data should be good enough to propose an allocation, EPA is wise in giving companies the opportunity to verify the accuracy of their data. This provides added safeguards beyond governmental sanctions against submitting false information.

We also believe adoption of an output-based, generation-neutral approach is important for utility restructuring. As the utility industry transitions to competition, the adoption of an output-based, generation-neutral approach allows the marketplace to make choices on the advantages and disadvantages of the sources of electricity generation.

In conclusion, the output-based, generation-neutral approach is feasible and cost effective; it promotes energy efficiency and achieves better air quality.

We look forward to working with EPA on the adoption of the output-based, generation-neutral approach.

MR. SEITZ: Thank you. Thank you very much.

Next, Joel Bluestein and Kyle Danish, please? First, Mr. Bluestein, do you have any written testimony to submit, or --

MR. BLUESTEIN: I did.

MR. SEITZ: Oh, this is his.

I'm sorry. Okay, thank you. Go ahead.

JOEL BLUESTEIN

COALITION FOR GAS-BASED ENVIRONMENTAL SOLUTIONS

MR. BLUESTEIN: I'm Joel Bluestein here for the Coalition for Gas-Based Environmental Solutions -- not gasoline, as was listed on the website. Maybe at the next hearing I'll do that. I'm commenting primarily on the FIP, although in part on the other portions, as well.

We're pleased to submit the following comments on the FIP. We'll file additional, more complete written comments at a later date. But, we have the following

immediate comments.

We are a group of natural gas producers, pipelines and local distribution companies advocating policies that recognize the environmental benefits of gas and gas technologies.

We support the NOx Budget approach to control NOx emissions related to regional ozone transport because we think it's a cost-effective way to provide verifiable emission reductions for large stationary sources.

In addition, one of the benefits of that approach is that it encourages and rewards efficiency once it's running, and it should further promote a positive environmental outcome and overall efficiency by incorporating fuel-neutral, output-based allocation of allowances.

Allocating based on output relates the emissions to the product, rather than the heat input, and it encourages efficient, low-emissions delivery of the product, rather than subsidizing high fuel users or polluters. This is particularly important if allowances are continually reallocated, as proposed by the EPA.

The EPA has acknowledged the value of output-based regulation in the SIP call and committed to moving

toward such an approach. However, we think this process needs to be expedited so as to encourage output-based allocation in 2003, rather than 2006 or later, because of the schedule under the SIP call.

On the topic of allocation systems, we would support the second and third options proposed in the FIP. However, we think the second should include all fuels, not just fossil fuels. Byproduct, waste and biomass fuels all produce NOx and should be included in the program. Otherwise, the cap has a big hole in it.

Allocating based on output to all sources including renewables, the third option, provides inherent support for renewables without the need for separate set-asides or mandates.

EPA has raised a number of questions regarding the mechanics of output-based allocation, and we've discussed many of them in the past, and we will address them all in our written comments. However, we remain convinced that an appropriate output-based allocation system can be in place at least for electric generating units by 2003 either for the FIP or the SIP call, and that the EPA should ensure that such an approach is available for both programs.

In addition, we'll address the treatment of cogeneration facilities. These facilities can provide thermal and electric energy with higher efficiency and lower emissions than any other combustion source. They therefore have the potential to significantly reduce emissions of NOx and all other pollutants, and their use should be encouraged.

In an output-based regulation system, these facilities should receive the same credit as separate facilities which provide the same service. But, the methodology proposed in the FIP is much less than equitable in its treatment of cogeneration facilities, and we will propose some alternative approaches.

We recognize that EPA is moving forward on these issues, but we also believe that we must see some concrete application of output-based regulation at the outset of this program in order to realize the potential environmental advantages before the end of the decade. Some states are already moving ahead on this issue and we'll have programs in place in 2003.

We believe that the EPA can and should move at least as quickly and encourage all states to move to this more appropriate form of regulation. I think that clearly

there can be a process to improve the approaches that we can have in place by 2003, but that shouldn't stop us from doing what can reasonably be done in 2003 and going ahead from there.

I think if we can have something in place for the FIP, as I suggested, we can also have something in place for the states to use in their SIP plans, as well.

So, thank you for the opportunity to comment here. We'll provide more detailed comments in writing.

MR. SEITZ: That would be helpful. Just as a follow-up to that point, when you particularly talk about the cogeneration facilities, would you not only provide the alternatives but actually the mechanism how you view it working?

MR. BLUESTEIN: Sure, yeah.

MR. SEITZ: Okay, thank you.

Mr. Danish?

KYLE DANISH

VIRGINIA POWER ENVIRONMENTAL POLICY & COMPLIANCE

MR. DANISH: My name is Kyle Danish, and I'm reading this statement on behalf of Lenny Dupuis of Virginia Power. Mr. Dupuis could not be here today.

Virginia Power is disappointed with EPA's

recently-promulgated NOx SIP call ruling and the agency's unwillingness to work with several affected states to identify alternative workable compromise solutions.

These states had proposed solutions that offered meaningful emission reductions from utility and large industrial sources and committed to further reductions based on science, which would have resulted in attainment of the new eight-hour standard, elements decidedly absent from EPA's SIP call and related rulemakings.

It is unfortunate that EPA intends to move forward with its preconceived agenda to force significant NOx reductions exclusively on utility and large industrial sources based largely on -- quote -- "relative economic ease" -- unquote -- of implementing controls instead of air quality improvements, where they are needed most, ignoring the important role of both NOx and VOC emissions from low-level, mobile and area sources in both formation and transport of ozone.

EPA's recent notices of proposed rulemaking on the federal implementation plans and the Section 126 petitions serve primarily as additional fall-backs to secure the agency's strategy. Regrettably, EPA's approach

will not, by its own admission, solve the nonattainment problems of the urban northeast corridor.

Virginia Power has many concerns regarding the notices of proposed rulemakings, on the federal implementation plans and the Section 126 petitions, and will submit written comments to the docket within the sixty-day comment period associated with these proposed rulemakings.

Thank you.

MR. SEITZ: Just a point of clarification. In your statement you're saying EPA's admission that it will not realize attainment -- for the record -- and, since you're reading the statement, I assume your comments will address the issue that this is a transport reduction we're talking about, and the ability to interfere with or frustrate the ability to attain so --

Your statement seems to indicate that the basis is attainment, so, could you clarify that in your written submission, please?

MR. DANISH: I certainly will.

MS. WEGMAN: Actually, I just have one. I don't quite understand which element is decidedly absent from our SIP call, in your first sentence, since we do

believe we achieve attainment of the eight-hour standard in a large number of areas. So, I assume your written comments will elucidate that.

MR. DANISH: Sure.

MR. McLEAN: Just a clarification of the -- one of the phrases here was ignoring the important role of NOx and VOC emissions. Did you mean that during the OTAG in all the modeling we didn't consider NOx and VOC from mobile sources and the reductions from those categories? Is that the implication?

MR. DANISH: That will be something that Virginia Power will address in its comments.

MR. SEITZ: Any other?

(No response.)

MR. SEITZ: Thank you very much.

The next presenters, Andrea Field and Norman Fichthorn.

ANDREA FIELD

UTILITY AIR REGULATORY GROUP

MS. FIELD: Before I start, I just want to understand the ground rules from David that I start reading, and then I end and I immediately throw the baton to Norm, and we get ten minutes total? Is that right?

MR. SEITZ: That's my understanding. So, as long as you've got those rules straight -- and the people over our left shoulder say that's right -- it's okay.

Andrea, go ahead, please.

MS. FIELD: I'm Andrea Bear Field. I'm presenting UARG's initial comments on EPA's proposal to impose federal implementation plans, or FIPs, on states that do not accede to EPA's demands to adopt specific NOx SIP call responsive comments (sic) by September 24th, 1999.

The preamble to the FIP proposal says that, if a state fails to respond to the NOx SIP call by adopting and submitting a complete revised SIP by September, 1999, EPA intends to take final rulemaking action on the FIP immediately thereafter. This is in several ways inconsistent with Congress' intent in enacting the Clean Air Act, Section 110(c) FIP provisions.

First, this suggests that, if a state does not submit a SIP by the September, 1999, deadline, then, no matter what the reason, even if it was not possible for the state to have done so in the less-than-adequate time provided by EPA, the agency will immediately promulgate a FIP for that state.

This contravenes Congress' intent that affected states and EPA be able to take the time needed to develop appropriate state programs. Specifically, the Act gives up to two full years in which the states and EPA are to complete the cooperative task of implementing FIPs, and the statute does not mandate any federal takeover in less than two years.

Congress understood that this time was needed to allow EPA and states to work together to consider fully an affected state's proposal and to give that state time to revise its proposed SIP in response to federal concerns. EPA should not contravene Congress' intent in this regard by cutting in half the time Congress wanted the parties to have to make the process work.

Second, EPA's proposal suggests that, even if a state develops and submits a proposed SIP for federal approval by the regulatory deadline, EPA will nevertheless immediately promulgate a FIP for that state, if the agency determines that the state's plan does not meet each requirement of the federal SIP call rule. This was not Congress' intent in enacting Section 110(c)(1) of the Act.

Congress made it clear that the promulgation of a FIP is to be a last resort after a state has been

given every reasonable opportunity to develop its own plan. Under the carefully-crafted statutory approach to developing and approving state plans, states are primarily responsible for devising or revising SIPs which regulate the specific details of how the implementation of nationally-set standards is to be achieved.

These SIPs and SIP revisions must be submitted by the state to EPA for approval. Upon submission of a state plan, the administrator must approve it or determine that it does not satisfy the requisite criteria. If the state plan does not meet federal scrutiny, then EPA must specify exactly what needs to be done in order to cure the deficiencies.

Section 110(c)(1) of the Act and Section 307(d)(1)(B) contemplate that EPA will step in and promulgate a federal plan only if the state does not submit an approvable SIP. In other words, Congress clearly contemplated that, if and when a state submits a deficient SIP revision, EPA will then propose a FIP responsive to the specific deficiencies of that state plan and tailored toward the specific needs of that state.

Congress did not envisage and EPA should not adopt a cookie-cutter approach to FIP implementation, an

approach in which EPA indicates that it will reject any version of a submitted plan that differs from its current one-size-fits-all FIP requirements.

In addition, the FIP proposal contravenes Clean Air Act requirements and Congressional intent in the way in which it precludes a meaningful opportunity for notice and comment on the proposed FIP rules.

The only chance that EPA offers for comment on the program is now. The program currently available for comment, however, may differ substantially from the one that EPA publishes in the fall of 1999.

This is clear from the number of issues upon which EPA is taking comment. For example, EPA is taking comment on and thus might well change its approach on which initial NOx allocation methodology should be used, which units should be covered by the program, the percentage of the new-source-set-aside program that EPA should establish, approaches for distributing the compliance supplement pool, and the methodology for calculating and issuing early-reduction credits.

If EPA should change key components of its FIP program based on the comments that it receives on these and other issues, then the final FIP program for a state

will look very different from the one being proposed. EPA's proposal, however, does not now provide any opportunity to comment on any such major substantive changes to the FIPs before they become final.

In other words, affected parties including affected states may now comment on one FIP program but, come next fall, they may find themselves saddled with a very different FIP program, a program upon which they've had no meaningful chance to comment.

In summary, when considering situations in which it might be necessary for EPA to impose a federal implementation plan on an individual state, Congress made it clear that it intended the individual state to be given every opportunity to work with EPA to develop its own unique implementation plan before EPA would be permitted to step in to promulgate a federal plan.

Under EPA's FIP proposal, however, that Congressional desire for give and take takes a back seat to EPA's over-arching quest for the speedy implementation of what the EPA believes to be the best approach to assure the agency's desired NOx reductions in affected states.

These concerns could be addressed if EPA were to treat its FIP proposal as an advance notice of proposed

rulemaking. Then, if any affected state should submit a plan that EPA believes is deficient, EPA could then adhere to the Clean Air Act's carefully-crafted statutory scheme for working with a state to address any real deficiencies.

NORMAN FICHTHORN

UTILITY AIR REGULATORY GROUP

MR. FICHTHORN: My name is Norman Fichthorn. I am here on behalf of the Utility Air Regulatory Group to provide initial comments on EPA's proposed Section 126 rule.

It is by now quite clear that EPA views the Section 126 petitions as one vehicle though which the agency can secure its clearly-announced, predetermined policy objective: to force substantial further NOx emission reductions on electric utilities throughout the eastern United States, beyond the reductions already mandated under Titles One and Four.

Nearly six months ago, EPA in court papers already was describing the Section 126 petitions as an integral element of its calibrated and strategic approach to reducing ozone pollution in the northeastern United States. These and other statements raise serious questions about whether those who oppose the EPA's

calibrated and strategic plan have any hope of obtaining a fair hearing before this agency.

EPA relies on a typo theory of Section 126. According to this theory, first, all of Section 126's references to 110(a)(2)(D)(ii) are drafting errors; second, wherever Section 110(a)(2)(D)(ii) appears, Congress actually intended to write 110(a)(2)(D)(i); and, third, EPA has authority to act unilaterally to correct Congress' supposed error. This theory is fatally flawed on several counts.

First, there is no reason to conclude that the plain language of the statute is contrary to Congressional intent. In the 1990 amendments, Congress changed Section 126, deleting all references to 110(a)(2)(E)(i) and inserting references to 110(a)(2)(D)(ii), not 110(a)(2)(D)(i).

At the same time, Congress enacted Sections 176(a) and 184, provisions that create new, nonconfrontational means of addressing concerns about interstate pollution through interstate commissions. It is entirely understandable, therefore, that Congress would want simultaneously to make a change to the nature and scope of Section 126.

EPA argues and makes much of the fact that the word "prohibition" in Section 126(b) preceding the reference to 110(a)(2)(D)(ii) shows that Congress must have intended to refer to 110(a)(2)(D)(i) because 110(a)(2)(D)(i) uses the word, "prohibiting" while 110(a)(2)(D)(ii) uses the word "requirements."

This argument ignores other statutory language in 126 itself. The reference to 110(a)(2)(D)(ii) in Section 126(c) refers to compliance with the requirements in 110(a)(2)(D)(ii). It does not use "prohibiting" or "prohibition" at all. Thus, the statutory language itself suggests that Congress used "prohibition" and "requirements" interchangeably, refuting EPA's textual theory.

Even if Section 126 does contain a drafting error, there is no evidence that Congress delegated to EPA the power to correct such errors; and EPA has not provided support for its apparent theory that administrative agencies can rewrite references to statutory provisions that appear in Congressional enactments. Indeed, EPA's own contemporaneous interpretation of the 1990 amendments was that EPA has no choice but to implement the statute as written.

In addition, even if Section 126 has an error, EPA has not shown that its preferred interpretation is the only, or even the best, possible correction of that error. If there is an error, it is at least as plausible that Congress intended to insert a reference to Section 110(a)(2)(D)(i)(II), which is not at issue in this proceeding.

That there are plausible alternative corrections to the alleged drafting error simply reinforces the conclusion that, while EPA is free to propose that Congress fix the statute, if EPA believes that there's an error in the statute -- and EPA has not, apparently, asked Congress to fix the statute -- EPA cannot arrogate to itself the power to redraft the statute to suit its current policy preferences.

In any event, even if one assumes for the sake of argument that Section 110(a)(2)(D)(i) applies to Section 126, EPA has failed to acknowledge a key criterion of Section 110(a)(2)(D)(i) added by Congress in 1990. Section 110(a)(2)(D)(i) provides that a SIP is to contain adequate provisions prohibiting, consistent with the provisions of Title One, a source from emitting a pollutant in amounts that will contribute significantly to

nonattainment in another state.

As a result, if Section 126 refers to 110(a)(2)(D)(i), then a Section 126 petition could be granted only if it were necessary to address a violation of a prohibition that is consistent with the provisions of Title One.

(Time signal.)

MR. FICHTHORN: The proposed rule has other serious deficiencies --

MR. SEITZ: Mr. Fichthorn, you have to wrap up.

MR. FICHTHORN: -- which we will address in detail in our written comments.

Thank you.

MR. SEITZ: Thank you very much.

All right, next Quinlan Shea and Donna Boysen.

QUINLAN SHEA

NATIONAL MINING ASSOCIATION

MR. SHEA: Good morning. My name is Quinlan Shea, and I'm Senior Counsel and Director of Environmental Affairs with the National Mining Association based in Washington, D.C. NMA is the industry association comprising over four hundred producers of most of the

nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering, consulting, transportation and financial institutions and other firms providing service to the mining industry.

NMA intends to submit detailed comments on both of the issues before us today by the November 30th deadline. In the interim, I'd like to bring to your attention several issues of concern relative to the proposed FIP call. I will not spend much time on the 126 procedure, instead deferring to my colleagues in UARG and the Midwest Ozone Group.

John, as I mentioned outside, I'd rather be elsewhere today. I'd like to be working with several companies in a couple of states on perfecting Title Five permits. I'd like to be working with a number of your staff on a couple of MACT standards of importance to the mining industry.

I'd like to be down at RTP playing in the wind tunnel or working up at the FETSE (phonetic) lab, working on PM monitoring programs, things that we have been working on cooperatively.

Most of all, I'd like to be working on the regional Haze proposal, where I do think that there is a solution that's within our grasp. I didn't want to be here, and I suspect neither did you.

NMA urges this panel today, and other EPA officials subsequently, to carefully consider issues raised by those midwestern and southern states that have the most to lose from implementation of these technically-insupportable and policy-barren proposals, as well as comments made by my colleagues in the mining, utility, rail and labor sectors. Given the substantial overlap between the 110 SIP call rulemaking and the FIP and 126 issues, NMA adopts by reference everything that's said about 110.

As a threshold matter -- and I've said this a number of times -- NMA supports sound public policy. We support laws and rules that meet several specific criteria. Those include rules that are based on sound science.

With regard to the NOx transport rule, it doesn't meet the test. If you look at the OTAG data, what EPA did subsequently, you look at the ongoing subregional modeling, the king has no clothes. With respect to

economics, no bang for the buck. Once you reach about sixty-five percent, the cost curve goes vertical, and we have no additional benefits.

So, what does NMA conclude? Well, let me start by pointing out last week I was at the ELI dinner, which was purportedly to honor a great ex-EPA employee and now currently the President of Lithuania, Valdas Adamkus. But, I thought I was at the Carol Browner gala, and I thought I was getting a preview maybe of her resume. I forgot for a moment why we were there.

It seems to me that, under this Administrator, a number of EPA rules are now being driven by policy and, in fact, politics -- ivory-tower, economically-damaging, condescending mentality that is pervading particularly these air rules, clearly linked to the Administrator, and we have no regrets about pointing that out any time.

The fact that Carol Browner would spend most of her time talking about what EPA was doing, talking about the diesel penalties that had been levied on five engine manufacturers that day, and then finally -- finally -- getting around to the guest of honor was shameful.

The fact that she then went on to ask all present and former EPA employees, including myself, to

stand up was an outrage. I looked around the room -- very limited applause. A lot of folks were upset; a lot of people were very frustrated to be there. It was with my head down that I stood.

Relative to 126, NMA believes that the 126 proposal does not -- that 126 does not provide authority for addressing ozone transport complaints received from any northeastern or any other state. The mechanisms for addressing this issue were identified by Congress and are contained in the new interstate transport region provisions of Sections 184 and 176A of the amended Clean Air Act -- period.

Relative to the FIP proposal -- let me skim through several issues before my closing remarks.

EPA's authority to issue a final SIP disapproval without notice and comment -- as NMA noted in its SIP comments, EPA's intent to disapprove SIPS without following notice-and-comment rulemaking is inconsistent with past practice and contrary to both the Clean Air Act and the Administrative Procedures Act.

In fact, the APA requires an agency to publish a notice of proposed rulemaking in the *Federal Register*, and to provide interested persons with an opportunity to

comment on that proposal prior to promulgation of any final rule. The APA provides a limited exception to this requirement where an agency shows good cause why such notice is impracticable, unnecessary or contrary to the public interest.

Courts have narrowly examined this limitation. Unfortunately, NMA has concluded that EPA can draw no solace from this exception, and certainly not from the APA for what it is doing.

The Section 110 rulemaking process has been flawed, if not illegal. Hence, the Section 126 and FIP proposals are, in my opinion, the fruit of that poisonous tree, and they should be withdrawn.

EPA's authority to immediately impose a FIP upon SIP disapproval -- NMA views EPA's NOx regulatory paradigm -- and this includes the ozone NAAQS, the NOx new-source-performance standard, the 110 SIP call rule, FIP and 126 -- as a thinly-veiled attempt to pressure states into adopting the agency's choice of control measures through its threat of immediately imposing a FIP on states whose SIP submissions do not conform precisely to the final SIP call.

To put it mildly, this effort is in tension

with the allocation of responsibilities contemplated by the Clean Air Act and makes a mockery of the so-called federal-state partnership. The Act is designed to provide states with as much opportunity as possible to correct deficiencies and retain control over implementation of the NAAQS.

EPA's intention to immediately promulgate a FIP without allowing a state to cure its SIP submission, if it wants to cure such -- and I'll come back to that point -- is directly in tension with this regime.

Third point -- EPA's authority to disapprove a SIP based solely on whether it meets the NOx budgets in the SIP call -- NMA's view of applicable case law is that states have great discretion in developing SIPs, so long as those SIPs meet the minimum requirements set forth in the Act.

Conversely, available case law indicates the agency has limited discretion to disapprove SIPs, again, so long as the minimum requirements of the Act are met. The Clean Air Act specifies only that the SIP must prohibit sources within the state from contributing to nonattainment in other states; it does not require states to meet any particular emissions budgets the agency claims

will mitigate downwind nonattainment.

The Act grants states maximum discretion in determining what levels of emissions reduction are needed to mitigate downwind nonattainment. So long as those emissions reductions are developed using approved modeling approaches and demonstrate that the SIP will mitigate significant transport, EPA lacks the legal authority to disapprove the SIP submittal based solely on the fact that the submittal does not conform to the budget identified in the SIP call.

EPA's scope of authority in issuing a SIP -- review of EPA's proposal leads this reader to believe there exists essentially unfettered discretion under the Act to pursue FIPs. Ironically, however, EPA historically has viewed FIPs as extraordinary remedies to correct legitimate deficiencies in SIPs. In fact, maybe zero times it's been used.

Accordingly, the FIP rule should include provisions that are only as stringent as is necessary to correct these supposed deficiencies. To the extent that EPA is implying that it may impose controls that are more stringent than necessary to address downwind nonattainment, EPA has exceeded its authority under the

Act.

In this regard, NMA also believes that EPA's view could result in widespread and improper disapproval of SIP submittals. Specifically, if a SIP submittal demonstrates that the proposed emissions reductions are sufficient to address downwind nonattainment, and therefore to meet the terms of 110(a)(2)(D)(ii), EPA has no authority to disapprove the SIP.

Under these circumstances, NMA believes firmly the agency will have acted improperly by disapproving that SIP simply because it did not meet the budget identified in the SIP call.

I was going to go through a number of points relative to the viability of the NOx trading program, but I'm not going to do that. We'll have those in our detailed written comments.

Input versus output bases for allowance allocations -- a number of my colleagues in the utility industry have to be careful addressing this issue; I do not.

The most likely basis for allowance allocations in the FIP is each unit's fossil-fuel input during electricity production and application of a

standard emission rate after allowing for projected growth in fuel utilization to 2007. However, EPA is continuing to pursue an alternative, output-based approach to calculating allowance allocations advanced by a number of utilities -- parens -- (principally those with nuclear units.)

Under the output-based approach, the allocations under a FIP could be apportioned among all electricity-generating units whether fossil-fuel fired or not, based on total electrical generation or output, as opposed to fossil-fuel input. This would have the effect of allocating a potentially sizable number of allowances to nuclear and hydro energy units, thereby substantially reducing the allocations for coal and other fossil-fuel generating facilities.

In effect, this approach could dramatically decrease the effective emissions rate required to be met by fossil-fuel-fired units to far below the point-one-five-pound-per-million Btu rate, while granting a windfall in terms of unneeded allowances to nuclear and hydro units.

Such units could then sell these allowances, use them to substantially under-control NOx emissions at

co-owned fossil-fuel-fired plants, or simply hold on to them and thereby place increased environmental control pressure on competing fossil-fuel-fired units.

Closing thoughts -- two thoughts -- one for EPA; one for our state brethren in the midwest and south. Well, you've heard my thoughts about EPA before on this.

MR. SEITZ: Very supportive, I might add.

MR. SHEA: Very supportive.

I have to again depart with my utility allies. There is no disagreement on the merits of today's incomparable rulemakings under a worst-case scenario. It is important to remember that our customers do have fuel options. We don't mind gas.

Accordingly, let me move on -- message for the states whose rights and economies are about to be trampled on. Just say no. To civil disobedience? Maybe. Even lawyers need to do it once in awhile. Just say no.

If the EPA is going to have the gall to try to stick you with the FIP, let them try. Let's see what happens. Do what you feel is necessary to meet the requirements of the Clean Air Act and to keep your state's economy in tact.

FIP? Again, bring it on. Challenge legal

110.

Last point. You've heard the commercials about American Express and Visa, John? Well, my suggestion to you is this. If you want to implement a FIP, bring your American Express card to these states, because you're going to need to get home, because they're going to be checking your visas at the border.

MR. SEITZ: Well, thank you. I'm glad to see we're welcome.

Just as a -- we didn't have your written statement, and you certainly covered the waterfront, some of which was editorial, I might add.

MR. SHEA: Some of the best stuff was.

MR. SEITZ: Some of the best stuff that, if you did use, I'm looking forward to reading it, and was indeed editorial.

But, just getting back to some of the points I listened to -- and you clearly covered a lot of issues in there that addressed your interpretation or your association's interpretation of the reading of the Clean Air Act, and I hope that, as you go back through it, at each of those points where you make a finding, you submit the associated legal analysis in support of it.

One point that I think you said -- and again I may have -- did you say that -- did I hear you to say that the agency, before it can address its remedies of transport or a state has the ability to file a 126, that you believe the agency must form a transport commission first? Is that what you said early on?

I may not have followed that, but it sounded like you said before the agency could honor a 126 or in fact use its 110, the transport authorities, the prerequisite requirement is transport commission? Did I understand that correctly?

MR. SHEA: Hopefully we're not confusing a little bit of our discussion outside. Relative to 126 --

MR. SEITZ: No, I was listening to right here. You covered the waterfront, though.

MR. SHEA: Real clear on 126, the authority's not there for you to utilize 126, whether as a backstop or as an issue of first impression to go after the midwestern states. It's simply not there, and I would agree with comments made by my colleagues in that regard.

MR. SEITZ: You referenced something in your testimony about transport 184 --

MR. SHEA: And 176A.

MR. SEITZ: What did you -- the reference to the relationship of those to 126?

MR. SHEA: Did I link those, John?

MR. SEITZ: I thought -- again, it was hard taking notes here. That's why I was --

MR. SHEA: Well, I was simply making the point that your authority is relative to -- that 126 doesn't provide the authority you're seeking, and that Congress has spoken to the mechanisms that you had to -- that you currently have to address interstate problems. I mentioned those as being two of the remedies that you have.

MR. SEITZ: I understand now.

MR. SHEA: 126 is not a remedy, as far as Congress is concerned.

MR. SEITZ: Okay. Again, where you make those assumptions, I'd really -- with the legal analyses -- we look forward to reading it.

MR. SHEA: I've got some clerks very upset with me right now. We're dedicating a lot of time on this issue. So, I'll promise we'll get into it for you.

MR. SEITZ: Very good. We look forward to the comments.

Ms. Boysen?

DONNA BOYSEN

OZONE ATTAINMENT COALITION

MS. BOYSEN: Thanks. Good morning. My name is Donna Boysen. I am providing testimony today on behalf of the Ozone Attainment Coalition.

The Coalition is composed of twelve organizations, including seven northeast-based electric utilities, a major pharmaceutical company, and national northeast-regional and state-based environmental advocacy groups. It supports cost-effective actions to reduce the regional transport of ozone precursors across the eastern half of the United States.

My comments today will address both proposals but will be brief. The Coalition will be submitting more detailed written comments on both the FIP and the 126 findings before the close of the comment period.

First, for the proposed FIP, the Coalition believes that the FIP plays an important role by providing EPA with a backstop that ensures timely implementation of the needed regional NOx reductions. Thus, if a state fails to comply with the NOx SIP call by submitting an approvable SIP by September '99, the FIP provides EPA with

a backstop that is simple and direct, allowing NOx reductions to be achieved on the same timetables as those which are included in the SIP call.

The proposed FIP adequately and fairly serves this propose. The Coalition agrees that the FIP is legally well grounded in the Clean Air Act and aligned with the NOx reductions required in the final NOx SIP call that was adopted by EPA in September -- September 24th, 1998.

Although we hope the FIP provisions will not need to be activated by EPA, the provisions will act as an important deterrent for states that might otherwise seek to delay NOx implementation. While the Coalition plans to submit more detailed comments on the proposed FIP, we commend EPA for proactively taking this step to provide an effective backup mechanism to the NOx SIP call.

With regard to 126, Section 126 is a Clean Air Act provision which was strengthened in 1990 in the Amendments and was intended by Congress to provide effective recourse to states that are impacted by emissions released from upwind states. The Coalition believes that the eight petitioning states have made a compelling case and have acted responsibly in working with

EPA to align the 126 timing provisions with the NOx SIP call implementation schedule.

With regard to EPA's proposed 126 findings, the Coalition views the 126 process as another important fall-back mechanism to ensure that downwind states obtain, in a timely manner, the regional NOx reductions that they'll need to achieve attainment of the ozone health standards.

Mindful of that goal, the Coalition believes that the 126 remedy should remain available or be put on stand-by until the point in time when the requirements of the NOx SIP call are fully implemented either via SIPs or FIPs, rather than having the 126 petitions denied in advance of control actions.

The Coalition views the 126 process as an insurance policy on the NOx SIP call and, as with most insurance policies, we hope that this one will not be required to be used.

This concludes the Coalition's comments at this time. We look forward to the continuing efforts of both EPA and the states in implementing the rules necessary to achieve cost-effective regional NOx reductions.

MR. SEITZ: One clarification. I was a little confused on your last point. You said "hold 126." Are you suggesting it's just sort of held in abeyance while these other take place? I was unclear what you meant by that.

MS. BOYSEN: I know. I wasn't using a proper legal term there, was I? But, I think --

MR. SEITZ: Well, I'm not a lawyer, so, I mean --

MS. BOYSEN: That point struck me -- this point strikes me as being very similar to the one that Tom McGuire made from New York DEC, and I think David Wooley also made the same point -- just that it should not be denied so that it's gone, until we get to a point where we're certain that the implementation of those NOx reductions are being effectively achieved by SIPs or FIPs, via 110.

MS. WEGMAN: In your comments I think it's important to clarify -- this is similar to what I was asking Tom about, exactly how the two would sit there together. If there were an approved SIP and it had a slightly different strategy from what a 126 remedy might be, how they would ride together and how facilities would

deal with potentially two different remedies.

MS. BOYSEN: Okay.

MR. SEITZ: Thank you very much.

The next two presenters are Jeff Crawford and Jonathan Peress.

Mr. Crawford?

JEFF CRAWFORD

STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

MR. CRAWFORD: Thank you for the opportunity to testify today on EPA's notice of proposed findings of significant contribution and rulemaking on the Section 126 petitions. I'm Jeff Crawford from the Maine Department of Environmental Protection, and I'd first like to commend EPA for its recent efforts in addressing transported emissions through the NOx SIP call and Section 126 notice of proposed rulemaking.

Implementation of the budgets and controls should go far towards mitigating the ozone transport problems of Maine and many other states, and is a necessary step in meeting the eight-hour ozone standard.

Last year, Maine and seven other northeastern states filed petitions under Section 126 of the Clean Air Act requesting the imposition of control requirements on

electric-generating facilities and major industrial sources of NOx emissions. At the time, we felt that our petition would provide a useful complement to EPA's efforts under Section 110.

A year later, we continue to believe that the Section 126 petitions are a valuable adjunct to EPA's NOx SIP call, are necessary to ensure the certainty and timeliness of upwind emissions reductions, and should move forward on a parallel track.

EPA should move forward with its approval of the Section 126 petitions and impose control requirements on named sources and source categories. Although the Section 110 process establishes a time line for submission of SIP revisions, there is little certainty that the controls contained within these revisions will actually be implemented by May 15th, 2003.

Significant delays in the implementation of controls are a strong possibility, and even likelihood, as affected sources seek redress through the courts, and compliance time lines are extended by states and EPA.

Unlike the Section 110 NOx SIP call, Section 126 provides a date certain by which controls must be in place. Given the likelihood of implementation delays,

Maine opposes EPA's proposal to link denial of the 126 petitions with the submission of an approvable SIP revision.

Section 126 is clear in its requirements; sources found to contribute significantly to downwind nonattainment must implement controls in the statutory time line. Once there has been a finding of significant contribution, a Section 126 petition cannot be denied unless and until there are real reductions at the named sources.

Any significant contributor that has not yet implemented controls and reduced its emissions remains a significant source of transported emissions. EPA's proposal could very well result in dismissal of our petition before upwind sources reduce their emissions, a result we believe is neither contemplated nor legally permitted under the Clean Air Act.

Similarly, Maine continues to harbor strong concerns over EPA's use of cost-effectiveness to define significant contribution. The proposal to use cost-effectiveness of emissions reductions as a basis to determine that a source, or group of sources, is emitting in violation of Section 110(a)(2)(D), and therefore

contributing significantly to downwind nonattainment, is technically inappropriate and legally indefensible in the context of the Section 126 petitions.

We believe that Congress intended the prohibition set forth in Section 110(a)(2)(D) to be based solely on air quality impacts of a source or group of sources. Significant contribution should and must continue to be determined through the weight of evidence, considering the entire spectrum of positive and normative air quality data; not the economics of control.

There's simply no evidence to support the contention that those sources whose emissions cannot be controlled through highly-cost-effective control measures do not have a significant contribution.

EPA's reliance on cost-effectiveness may also limit our ability to undertake future actions under Section 126. Transported emissions from upwind sources and states have an overwhelming impact on Maine, and the state of our air quality is inexorably linked to the control of air emissions from all significant contributors.

In its Section 126 petition, Maine called for the imposition of controls on two categories of named

sources, namely, electric-generating facilities and large industrial boilers, and we continue to support the implementation of controls on these sources. Unfortunately, additional controls on upwind sources of emissions may be needed.

We're concerned that EPA's proposal will limit our ability to pursue additional upwind emission reductions even in the face of overwhelming transport, simply because these sources have already implemented the highly-cost-effective controls.

On a related issue, Maine also rejects EPA's partial denial of the Section 126 petitions on the grounds that controlling electric-generating units between twenty-five and fifteen megawatts and large industrial boilers is not highly cost effective. Once again, we believe that the petitions clearly demonstrate these sources do have a significant impact on downwind attainment and maintenance.

While we support the consideration of cost effectiveness as it applies to determining an appropriate remedy, its use is inappropriate when determining significant contribution.

The State of Maine would like to support the proposed remedy of a cap and trade program. In our

petition, we requested the implementation of a regional cap and trade program for named sources, and we continue to believe the proposal can provide for both significant cost savings and emission reductions.

At the same time, we're concerned that a trading program could allow reductions from unnamed sources to satisfy the control requirements of those sources named in the petitions. The Section 126 petitions have made a technical finding that specific sources or groups of sources have a significant impact on air quality.

We're supportive of a regional trading program as a mechanism to lower compliance costs for the named sources, but again have reservations concerning substitution of emission reductions from unnamed sources if, in fact, it could lead to reduced emission reductions at the named sources.

Attaining and maintaining the ozone standards in Maine will require additional emission reductions from all sources -- point, area and mobile. Substituting reductions from unnamed sources could ultimately result in fewer upwind controls and more transported emissions.

Finally, while Maine continues to have both

nonattainment and maintenance areas under the one-hour standard, we believe that EPA has the authority to consider the eight-hour ozone standard before acting on our petition. We are currently projecting nonattainment of the eight-hour ozone standard in a number of our counties, and feel that it is critical for EPA to consider the eight-hour standard.

A failure by EPA to take the standard into account would be a gross elevation of form over substance, and would appear completely without justification. Maine, along with many other states, will probably seek transitional nonattainment designation under the new ozone standard, expecting to attain the eight-hour standard by 2003 through the implementation of regional NOx controls.

The timely implementation of these controls is critical to our air quality planning efforts. The preparation and submission of another Section 126 petition is simply not warranted, given that EPA has already considered the eight-hour standard in its Section 110 NOx SIP call rulemaking.

In closing, Maine believes that the Section 126 petitions can play a vital role in reducing ozone transport, and are critical to the ultimate success of

EPA's recent section 110 NOx SIP call. The Section 126 petitions provide a safety net for the petitioning states, and ensure that transported emissions are reduced sooner, rather than later.

Neither denial nor the ultimate dismissal of the petitions is an option until these sources have implemented the required controls and they no longer contribute significantly to our nonattainment or interfere with the maintenance of our ozone air quality.

Thank you again for this opportunity to testify, and we will be providing you with additional comments.

MR. SEITZ: Two questions. One with respect to specific sources or groups -- and I'm trying to think of your petition -- you identified specific sources and the associated modeling from those. I mean, in your response I'd like to see that linkage. You said that -- your underlying specific sources here, and I just hope your --

MR. CRAWFORD: We will, we will.

MR. SEITZ: -- your petition and what data you submitted.

The other issue was, you're saying that in

response to, I assume, Maine's 126 petition, the eight-hour standard should be considered. I'm assuming from that paragraph -- and I don't recall whether you petitioned under the eight-hour standard.

MR. CRAWFORD: We did not.

MR. SEITZ: Okay, just for the record.

MR. McLEAN: I was just curious about the discussion about unnamed sources. I wondered whether they had any names, but --

Why do you believe substituting reductions from unnamed sources would ultimately result in fewer controls?

MR. CRAWFORD: In a nutshell, our belief is that the substitution of reductions from these unnamed sources could result in fewer controls of named sources. The State of Maine, the petitioning states, have relatively limited avenues to pursue upwind controls under Section 126. As we know, it's restricted to point sources or groups of point sources.

Given the difficulty of the process, we would like to be able to take advantage of as much as we can get, if you will, to put it in simple terms. We're afraid that if these sources that we have named in our petition

are able to avoid controls, our opportunity to effect a change will essentially be lost.

MR. McLEAN: I don't understand how it alters the emissions.

MR. CRAWFORD: The point being my contention is that we will have to have not only controls on these sources, but controls on other point sources and other mobile and area sources, okay? The entire spectrum.

If, in fact, reductions from the named sources, the large point sources, are essentially substituted for by smaller point sources, area mobile sources, that represents a groups of sources, a group of emissions, transported ozone, we will be unable to effect a change on in the future. It's a potential loss there, from where we stand.

MS. WEGMAN: On the eight-hour standard, your petition did not ask us to address the eight-hour standard. Are you in your testimony asking us to address the eight-hour standard as to Maine, even though you didn't petition us?

MR. CRAWFORD: We believe it's appropriate, yes.

MS. WEGMAN: Okay, well, you may want to be

real clear about that in your submission.

Just one other --

MR. SEITZ: So, that was a yes.

MR. CRAWFORD: That was a yes.

MS. WEGMAN: One other quick question, the same one I asked to David Wooley on the cost-effectiveness point, you obviously believe as a policy matter it's not appropriate to consider cost effectiveness, but if your written comments would address why you don't think we have authority to do that under the statute, that would be helpful.

MR. SEITZ: Mr. Peress?

JONATHAN PERESS

STATE OF VERMONT AGENCY OF NATURAL RESOURCES

MR. PERESS: Good morning. I'm Jonathan Peress, Associate General Counsel for the Vermont Agency of Natural Resources. Thank you for providing Vermont an opportunity to testify on EPA's notice of proposed rulemaking in response to Vermont's and other states' Section 126 petitions. Vermont intends to provide more detailed written comments prior to the end of the comment period.

Vermont appreciates the efforts that EPA is

making to address and alleviate the regional transport of ozone throughout the eastern United States. Vermont strongly supports EPA's final NOx SIP call and congratulates EPA for its substantial efforts to achieve and safeguard air quality throughout the region.

We are particularly appreciative of EPA's willingness to require emission reductions in areas upwind of Vermont that impose adverse environmental impacts on Vermont caused by NOx and other emissions from large, fossil-fuel-fired electric generating facilities. While not diminishing EPA's efforts underlying the final NOx SIP call, Vermont suggests that additional analysis is warranted in accordance with Section 126 of the Act prior to finalizing action on Vermont's Section 126 petition.

Specifically, in ruling on Vermont's petition, EPA should take into account the full range of evidence available to EPA, including that put forward in support of the respective Section 126 petitions. Vermont is concerned that the weight-of-evidence test used by EPA to determine significant contribution in the final NOx SIP call may not be appropriate to determine whether emissions from sources in upwind states interfere with maintenance of the one-hour and eight-hour standards in Vermont.

In its proposal, EPA proposes -- quote -- "to rely on the conclusions it drew in the final NOx SIP call rulemaking to determine whether the emissions in named upwind states contribute significantly to the one-hour and eight-hour nonattainment and maintenance problems in the petitioning states." -- end quote.

To evaluate the air quality impacts in the final NOx SIP call rulemaking, EPA used a weight-of-evidence approach involving three sets of modeling information -- the state-by-state UAM-V zero-out modeling, the CAMx source apportionment modeling, and the OTAG subregional modeling and other information such as emission density and transport distance.

Vermont is concerned that EPA's analysis for significant contribution with respect to the SIP call is simply not applicable to a review of Vermont's petition alleging interference with maintenance of the standards.

As provided in the technical support document submitted with Vermont's petition, reliance on the UAM-V or CAMx modeling leads to a substantial underestimate of the transport contributions to, and absolute concentrations of, worst-case ozone levels in Vermont.

Specifically, the selective model episode periods do not represent worst-case one-hour or eight-hour ozone concentrations in Vermont, or meteorological flow conditions typically associated with worst-case ozone concentrations in Vermont.

In addition, numerous aspects of the model performance indicate its tendency to understate the transport contributions to ozone for Vermont for the selected episode periods. Thus, the model-based analysis EPA conducted for the NOx SIP call and which EPA relied upon in reviewing the 126 petitions was simply not designed or intended to evaluate interference with maintenance in an attainment area like Vermont as it must be considered under Section 126.

It is for this very reason that Vermont's petition relies primarily on real-world data in addition to model runs. Vermont suggests that that data underlying Vermont's petition, as it is geared to demonstrating regional transport that interferes with attainment of the ozone standards in an attainment state, provides a more appropriate basis for analysis of its petition than does the model runs relied upon by EPA.

As set forth in the technical support document

included in Vermont's petition, Vermont's NOx emissions, whether on a per-capita basis, per-unit-area basis or in sum, rank among the lowest in the OTAG region.

When severe atmospheric stagnation keeps local emissions at home and impedes transport from upwind areas, Vermont's ozone season concentrations measure very close to natural tropospheric background levels of forty parts per billion.

Substantially higher concentrations are measured in Vermont when relatively high winds emanate from the southwest.

Vermont maintains attainment status with the one-hour standard by the slim margin of three parts per billion. As recently as 1997, Vermont's fourth highest eight-hour maximum measured ozone concentration was eighty-one parts per billion, and the three-year average forth highest measurement was eighty-six point three parts per billion in the years 1991 through 1993.

The facts alleged in Vermont's petition plainly demonstrate that Vermont attains both the one-hour and eight-hour standards by the slimmest of margins and that regional transport of ozone and its precursors is the cause for the highest measured concentrations of ozone in

Vermont.

It is not necessary to rely on models to determine whether upwind sources are significantly contributing to nonattainment or interfering with maintenance in Vermont. Vermont asserts that, in order to render a determination with respect to Vermont's Section 126 petition, EPA analysis should address the facts and data presented in Vermont's petition.

Vermont is also concerned that EPA's proposal to deny Vermont's petition simply because Vermont is in attainment and the model runs do not predict future nonattainment in Vermont is inconsistent with the requirements of Section 126. Section 126 does not call for projected nonattainment as a prerequisite for a finding of interference with maintenance.

As I previously stated, the models used by EPA are of limited value for evaluating air quality and transport into and out of Vermont.

The suggestion that 126 doe not recognize interference with a standard for which the petitioner is in attainment disregards the plain meaning of the statute. The phrase -- quote -- "interfere with maintenance by any other state with respect to" -- end quote -- the ozone

NAAQS encompasses areas for which the Act imposes a continuing obligation to maintain air quality in compliance with the relevant standard -- as opposed to the obligation to come into compliance with the standard.

Accordingly, Section 110(a)(2)(D) requires that an upwind state's SIP must prohibit its sources from jeopardizing Vermont's ability to maintain ozone concentrations at levels that comply with the ozone NAAQS.

Vermont is required by the Act to implement numerous programs mandated in nonattainment areas by virtue of its statutory designation within the ozone transport region. Such emission control programs include RACT for stationary sources, vehicle I/M, and vapor recovery on gasoline pumps.

Despite implementing these programs, Vermont attains the one-hour standard by only three parts per billion and is very close to nonattainment with the eight-hour standard. There is little doubt that it is transport that jeopardizes Vermont's maintenance of the standard.

Vermont believes that there is not a sound technical basis for EPA's conclusion that Vermont will experience no future nonattainment of the eight-hour standard or will experience no difficulty in maintaining

its current attainment status. The eight-hour standard includes both threshold -- point eight parts per million for eight hours -- and frequency -- the fourth-highest day averaged over three years -- components.

The threshold has often been exceeded in Vermont, including on eight separate days in 1991. The frequency of exceedances in Vermont is highly variable and, as demonstrated in Vermont's technical support document, is dependent on the frequency of meteorological conditions conducive to the buildup and transport of ozone and precursor concentrations from the upwind source regions identified in Vermont's petition.

Let me repeat that. Vermont's attainment status is dependent on the frequency of meteorological conditions conducive to the buildup and transport of ozone and precursors from the upwind source regions identified in Vermont's petition.

Vermont questions whether there is any technical basis sufficient to forecast the frequency with which such meteorological conditions will occur in any future year and, consequently, suggests that there is no basis to conclude that Vermont's concerns regarding maintenance of the eight-hour standard are invalid.

Had the eight-hour standard been in place in recent years with a high frequency of midwest to northeast flows such as in 1991 through 1993, Vermont would have violated the eight-hour standards. If similar meteorological conditions occur in the future, Vermont will exceed the standards unless the impacts from the identified source regions are substantially reduced.

These facts and the facts alleged in Vermont's petition are the basis of Vermont's interference-with-maintenance argument, and EPA has not provided any technical documentation demonstrating that this concern is unwarranted.

Vermont suggests that the position proposed by EPA, that nonattainment must be predicted or present in order to grant a petition, has the effect of improperly nullifying the statutory language that authorizes maintenance areas to petition under Section 126.

As I sated, Vermont supports EPA's NOx SIP call and its efforts to decrease upwind emissions. Vermont believes, however, that EPA is obligated to analyze and rule on Vermont's petition based on the merits of Vermont's petition.

We do not believe that the SIP call and the

analysis EPA conducted therein obviates EPA's need to act on the merits of the 126 petitions, nor do we believe that EPA's prediction that the NOx SIP call will alleviate the ozone transport problem in the future satisfies EPA's current duty to act on the petitions in accordance with Section 126.

Vermont believes that affirmative findings made on the responsive 126 petitions should continue in full force and effect after states submit SIP revisions pursuant to the SIP call. As a matter of law, a 110 SIP revision does not necessarily address emissions from sources that are the basis for findings on the respective petitions.

It is only after emissions from sources identified in the petitions are reduced or eliminated so that they do not contribute significantly to nonattainment or interfere with maintenance that an affirmative finding under Section 126 may no longer apply. Vermont asserts that there is no basis in the Act for EPA to grant but subsequently deny a finding under 126 once a SIP is approved or a FIP is promulgated.

Any affirmative findings under Section 126 must remain in force until actual emission reductions

occur.

To sum up, Vermont strongly supports EPA's regional strategy embodied in the NOx SIP call. However, we do not believe that the methodology used for the SIP call is transferable to review of Vermont's section 126 petition.

We acknowledge the resource burden that review of the respective petitions and the NOx SIP call place on EPA. Nevertheless, Vermont urges EPA to carry out its statutory duty to act on and review Vermont's petition on its merits and in accordance with the requirements of Section 126.

Thank you for providing the opportunity to comment today.

MS. WEGMAN: The same thing I've asked before, which is a further understanding of how you view 126 and 110 SIP or FIP working together.

MR. PERESS: Okay, we will address that in our written comments.

MR. SEITZ: That's it. Thank you very much.

Oh, Norm has a question?

MR. POSSIEL: Do you plan to provide any additional technical analyses along with your comments in

terms of episodes or other ways of looking at contributions?

MR. PERESS: We submitted a technical support document that I think definitely --

MR. POSSIEL: We have your technical support document from your written submittal. My question is are you going to be submitting to us any additional information?

MR. PERESS: We have not decided that we are going to submit any additional information, although we may. Do you think that would be appropriate?

MR. POSSIEL: Is there any modeling that you plan to do or that you will cite? Your document basically addresses air quality analyses. Will there be any modeling that you will cite or submit to us relative to the concerns that you've raised?

MR. PERESS: Not that I'm aware of. Are you suggesting that we do that?

MR. POSSIEL: No, I'm not. I'm just asking whether you plan to.

MR. PERESS: Okay.

MS. WEGMAN: If I could just follow up on that one. You know, you obviously think that you've already

submitted sufficient information for us to determine that there is an interference-with-maintenance problem. I guess what Norm is asking and what I'd also like to know is whether there's any additional information you have, modeling or otherwise. What you've noted here is that you think you're close to the standard.

As I read this, that should be sufficient basis for us determining there may be a maintenance problem apart from any modeling. I guess we were just asking, is there any additional information you're going to submit, or do you want us to reconsider in light of your view that that should be a sufficient basis?

MR. PERESS: What we would like is we would like the facts that we have asserted in our petition and in the technical support document to be addressed in any final decision on our petition. We note that they were not addressed in the proposal.

MS. WEGMAN: Okay, thanks.

MR. SEITZ: Thank you very much. We are now at the break point for lunch.

We have at this point, I guess, only four more speakers that are in the advance sign-up. If anybody in addition would like to make a presentation, please

identify yourself to the registration desk and we will add you to the list for after lunch.

As of this point, as I said, there are only four additional presenters that will present after lunch, and we are scheduled to reconvene at one-fifteen.

Thank you very much.

(Whereupon, at approximately 11:50 o'clock a.m., a luncheon recess was taken.)

A F T E R N O O N S E S S I O N

(Whereupon, the Public Hearing on Proposed Rules for the NOx Federal Implementation Plans and Section 126 Petitions was reconvened at approximately 1:37 o'clock p.m.)

MR. SEITZ: We have found two of our witnesses in Blimpies. They were trying to eat lunch, but they've agreed to come in. So, let us reconvene.

The next two speakers are Ken Colburn and Nancy Seidman.

Since you both had arrived a little late, you're asked to limit your testimony to ten minutes. If you have any written statements, I hope that you had the opportunity to leave them at the registration desk. If you have a copy of your written statement -- hold it a second. We're getting a copy.

(Pause in proceedings.)

MR. SEITZ: Mr. Colburn?

KENNETH COLBURN

NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

MR. COLBURN: Thank you very much. Had I known we had visual aids, as well, I undoubtedly would have brought some.

Thanks for taking us early.

I have six or eight points that I want to comment on, so I'll just run through them and then the state will be submitting written comments or testimony separately by the expiration of the comment period.

The first point is regarding denial or, in particular, the denial trigger. Denial of the Section 126 petitions should not be triggered by approval of state implementation plans.

SIPs are simply plans to implement control measures. Instead, denials should be at least contingent on actual reductions achieved by the implementation of control remedies or, more appropriate, contingent on improved air quality, as monitored by ambient air quality monitors.

Concerning timing, the Section 126 action is still necessary, independent of the 110 SIP call, to ensure that needed remedies will be in place by the year 2003. Section 110 allows EPA to grant extensions, whereas Section 126 requires remedies to be in place by a date certain; *i.e.*, three years after the petitions are granted.

In terms of cost considerations, the Act does

not give the EPA the authority to consider costs as part of the qualitative significant contribution test. Cost considerations should be removed from this test.

However, in order to minimize overall costs, relative cost considerations should be included in the quantitative remedies imposed on the significant contributors.

Regarding the eight-hour NAAQS, New Hampshire intentionally submitted its Section 126 petition based on the one-hour ozone standard. Until this standard is officially revoked by EPA, New Hampshire will remain subject to the burdens imposed on areas designated as serious nonattainment under it.

New Hampshire's 126 petition must remain in place, therefore, at a minimum, until the one-hour standard is revoked in the state. New Hampshire does believe, however, that the transport problems documented in New Hampshire's petition for the one-hour standard apply equally, if not to a greater extent, under the eight-hour standard.

To avoid the prospect, then, of a second 126 petition from the State of New Hampshire under the eight-hour standard, EPA should include consideration of

remedies that address the eight-hour standard, as well. New Hampshire believes EPA has the authority to consider the eight-hour standard when acting on New Hampshire's petition.

In terms of assessment of contribution, my understanding is that EPA's analysis of significant contribution still focuses almost exclusively on proximity. Techniques now exist to relatively precisely quantify the relative combinations of upwind sources on any given downwind receptor area. Such techniques should be made an integral part of EPA's contribution analyses.

Then, finally, a general category of other considerations -- first, while New Hampshire supports the 110 SIP call as a good first step, New Hampshire reminds EPA that EPA's own analyses indicate that not all cases of interstate transport will be solved by the SIP call.

Further, EPA's analyses also indicated that a lower regional NOx budget could still be highly cost effective. My understanding is EPA defines "highly cost effective" as less than two thousand dollars per ton, and its analyses include a point-one-two-pounds-per-million Btus of NOx as costing only seventeen hundred and sixty dollars. So, even that lower level would still be cost

effective, as defined.

Second, EPA's analyses used growth factors that are projected to 2007, but they're applied in 2003. This means that the 2003 budget is inflated by about one-third allowing sources to emit about one-third more, or about point two pounds per million Btus of NOx in 2003, and still meet the budget obligation. Obviously, a further reduction would be necessary to accommodate growth between 2003 and 2007, if any.

Third baselines could be set by averaging all three of the years used -- 1995, '6 and '7 -- instead of just picking the highest two out of those three.

Then, finally, if bad faith is evident under Section 110 in that some jurisdictions may use the 126 backstop as a way to effectively delay complying with the 110, it might be appropriate for EPA to consider an automatic ratcheting down of the applicable NOx budget for each year after 2003, if sources fail to install adequate controls -- perhaps point-one-two or a similar fixed percentage reduction -- so that there's additional incentive to comply with 110 in a timely fashion.

Thank you very much.

MR. SEITZ: Just a couple clarifications.

It's my understanding that your original petition did not address the eight-hour. Is that correct?

MR. COLBURN: That is correct, and -- I'm sorry, do you have a follow-on?

MR. SEITZ: Go ahead.

MR. COLBURN: My comment here indicated that -- two things. One, we believe that EPA can look at the NAAQS, inasmuch as the NAAQS now include the eight-hour standard that you are -- you do have the authority to look at the eight-hour standard.

We did that consciously, think of this as a focused, incremental approach, and we recommend that you look at the eight-hour standard as well as the one, to avoid the prospect of a second eight-hour 126 petition, should that become necessary.

MR. SEITZ: So, you're recommending we are looking at it. You are not saying that you're going to amend your petition or otherwise to ask EPA to look at it for the purpose of New Hampshire?

MR. COLBURN: Not at this time.

MR. SEITZ: Okay. You also -- I would hope in your comments, when you talk about there are now other techniques that are available to take a look at the

cumulative impacts, I guess, of transport; and I'm assuming you're talking -- I'm assuming you're talking about some of the demonstrations that were discussed through the OTAG process, or are you talking new tools?

MR. COLBURN: Actually, both. There were some that were done by both Gary Dorsey and Hagler Bailly that I know you're aware of, and I believe used to some extent. There were some that New Hampshire engineered through the good offices of Representative Jeff McGilvery.

Since that time, we've done a significant amount of additional modeling which calibrates such things as ozone impact per ton of emissions in given areas, and also time -- impact of a ton given its time of day. So, there are several refinements that I think are really advancing the state of this art.

MR. SEITZ: Just to make sure, I would appreciate to make sure that your either submission or referencing other submissions that all those tools are in the record. So, could you make sure that the most recent you're talking about are submitted, just to make sure that we have advantage to see all of them?

MR. COLBURN: Well, I think they're too

voluminous to submit the whole thing, but we'll certainly make clear reference to it.

MR. SEITZ: That's fine, too, just as long as we know where -- particularly with the most recent ones. I'm familiar with, clearly, the Dorse and what Representative McGilvery did, but I'm not quite sure I've seen the most recent.

MR. COLBURN: I'll be glad to do so.

MR. SEITZ: Okay, thank you.

Finally, you said 110 equalling bad faith and 126 as a reason to delay. Could you expand that a little bit? I'm not quite sure I followed it.

MR. COLBURN: We're concerned that 110 has a compliance period and that people operating in good faith would naturally seek to comply during that period. Others who are less motivated may wish to see that time period expire and then wait for either the threat or the reality of the hammer falling from EPA to actually motivate their behavior into compliance. That could presumably take the form of the federal implementation program or activities under Section 126.

We would hope that, if jurisdictions use that as a strategy -- that approach as a strategy -- let me

rephrase.

It may be wise for EPA to contemplate an incentive or an additional reason for which jurisdictions would not want to use that strategy. If there is a penalty for trying to stretch out the clock until EPA's patience or states that filed petitions' patience has absolutely worn thin, then it might be advantageous to have an additional hammer at the end of that so that states don't entertain that thought.

MR. SEITZ: Okay, any other questions?

MS. WEGMAN: On the eight-hour standard, if you actually do -- if New Hampshire does want EPA to consider it, it would be helpful for us to have that in writing, in a letter or in your comments, when you submit comments in writing.

MR. COLBURN: It will certainly be in the comments. If additional clarity would assist in your deliberations beyond those comments and that explicit statement, then please advise us, and we'll clarify as necessary.

MS. WEGMAN: Yes, we would need explicit direction from New Hampshire as to how you wanted us to address the eight-hour standard.

The other point, just a follow-up to what John was saying about the new techniques, if you can also tell us how you think those techniques should be used and what affect they might have, that would be helpful, too -- as to how you think we should be considering them, if you feel we haven't adequately considered them in these rulemakings.

MR. COLBURN: If you ask me include that, I can certainly do so. Just to give you a sense of that, I'm somewhat limited in ability to do that from two respects. One is that the data which is available -- these techniques operate using as raw input grid-cell-by-grid-cell, hour-by-hour, modeling-run data.

That data has not been easily available for this kind of analysis. So, I don't want to represent that I have the results of several episodes' worth of those kinds of analyses.

The other reason that I'm hindered in clarifying that is that simply precisely how EPA went about quantifying contribution, I'm not certain of, so I can't entirely reflect on, you know, any errors or precisely appropriate ways that you did go about it.

MS. WEGMAN: Okay.

MR. SEITZ: Now you've just triggered another follow-on on the same issue.

To the extent you said this methodology that exists, grid cell to grid square, and you need that level of data, I'm assuming then you've tested the methodology some and employed it some to a limited extent. To what extent has the methodology been, if you will, peer reviewed?

MR. COLBURN: The methodology was primarily in the form of a computer program, and we've made the source code available to anybody who inquired about that.

MR. SEITZ: Just, when you submit it, we'd appreciate having that level of -- to the degree there's been any review of it, so that we're aware.

Okay, thank you, very much.

Ms. Seidman?

NANCY SEIDMAN

COMMONWEALTH OF MASSACHUSETTS

MS. SEIDMAN: Good afternoon. Thank you for this opportunity to testify. I am Nancy Seidman from the Massachusetts Department of Environmental Protection. I am testifying on behalf of the Department and the Massachusetts Attorney General's Office on EPA's notice of

proposed findings of significant contribution, on Section 126 petitions for purposes of reducing interstate ozone transport.

Massachusetts intends to provide more detailed written comments to EPA before the end of the comment period. Today I will be directing my comments solely to the Section 126 proposal.

Before I do, I would like to congratulate EPA on its final NOx SIP call. We believe that the SIP call is a necessary and excellent step in mitigating regional ozone transport in the eastern United States.

Massachusetts appreciates the thought and effort that EPA has devoted to reviewing our petition, as well as the timeliness of this proposal. Massachusetts supports EPA's proposal in that it acknowledges the impacts of ozone transport and proposes findings of significant contribution by midwestern power plants and other industrial sources outside the ozone transport region to Massachusetts' nonattainment problem.

Despite EPA's action under Section 110, we believe the success of the SIP call also requires EPA to fully consider and act upon our 126 petition. Sections 110 and 126 are complementary provisions. Both sections

address ozone transport between areas and both provide tools for attacking that problem.

Section 110 establishes the test for determining whether transport from upwind areas is serious enough to require redress under either section. Naturally, there is a relationship between EPA's action under Section 110 and its response to our petition.

But, there is significant differences between the two sections that make it impossible to regard remedial action under Section 110 as eliminating the need for action under Section 126. In fact, our need for a remedy under Section 126 will be as strong in May 2000 as it is now, whether or not the SIP-call states submit timely and approvable SIP revisions.

We would like to take this opportunity to elucidate Section 126's different objectives, requirements and processes. Section 126 was enacted to provide an expeditious remedy targeted at sources or groups of sources that represent a particular impediment to nonattainment in a downwind region.

Section 110, in contrast, focuses more broadly on emission activities, large stationary sources or area or mobile sources. Consistent with its focus, Section 126

provides a direct EPA-established remedy against the troublesome sources. Section 110, in contrast, provides the more systematic and indirect state implementation plan or SIP process.

Section 126 prescribes a strict time limit for implementing a remedy. Indeed, the 1990 Amendments eliminated EPA's authority to grant an extension under Section 126.

Section 110, in contrast, establishes a time limit on submission of a SIP revision but leaves implementation to the enforcement processes, where substantial leeway to assign time for compliance is given to EPA and the courts.

Because these differences are so clearly delineated in the Act, Massachusetts does not and cannot agree with EPA's opinion expressed in footnote five of its proposal. In the footnote, EPA claims that Congress did not intend Section 126 to be used to shorten time frames for action when other regulatory mechanisms are available.

Following this interpretation, EPA proposes to handle the Section 126 finding and remedy through its NOx SIP call process rather than by dealing directly with the specific sources in our petition and prescribing a

schedule for implementing controls within the required three-year time frame. Massachusetts disagrees with this approach and believes that EPA has misconstrued Congressional intent in this regard.

Even if EPA were correct in its interpretation of Congressional intent, however, its proposal would result in dismissal of the petitions at a point long before Massachusetts receives relief from ozone transport. EPA proposes that sources will be considered -- quote -- "not in violation of the prohibition;" *i.e.*, sources will not be considered to be contributing or interfering with attainment or maintenance of a standard, if they are -- quote -- "on track" to meet the goals of the NOx SIP call.

Under this interpretation, sources may continue to pollute and contribute to downwind nonattainment so long as they meet administrative time frames. At the same time, EPA proposes to find sources that do not yet exist to be significant contributors.

We believe EPA has strayed from the original intent of Section 126 in both cases. We believe that the test for no longer violating the prohibition should be when emission reductions occur, upon implementation of controls, and not upon an administrative action.

Section 126 provides a remedy against sources that are contributing significantly to downwind nonattainment, whether or not they are complying with the applicable SIP. For example, the sources named in our petition may be in compliance now with their state SIPs, but that does not mean they are not contributing significantly to downwind nonattainment.

Furthermore, EPA's interpretation could result in dismissal of the Section 126 petitions before upwind sources reduce their emissions to permissible levels. If the sources then go off track, the petitioners would not be in a position to ensure enforcement of Section 126's three-year deadline.

Massachusetts believes that Section 126 is clear on both points. Polluting sources are in violation of the prohibition referred to in the section until they abate their pollution, whether or not the applicable SIP allows them to pollute, and sources that do not yet exist cannot be in violation of that prohibition.

Massachusetts is also concerned that EPA may be proposing to define significant contribution in terms of whether highly-cost-effective controls are available. In our comments on the advance notice, Massachusetts

commented that cost effectiveness is not relevant to the question of whether a source or region is contributing significantly to downwind nonattainment.

EPA would be justified in limiting abatement measures in an upwind region to highly-cost-effective controls if -- but only if -- the downwind region would not be required to adopt less-cost-effective -- *i.e.*, more costly -- measures in order to attain the NAAQS.

However, if we correctly understand EPA's proposal, EPA could conclude that, once upwind sources have implemented highly-cost-effective controls, they will have discharged their statutory obligations even if comparable sources in the downwind area are forced to adopt more expensive controls to enable the downwind area to attain. Massachusetts believes this conclusion is contrary to the purposes of the Clean Air Act.

Finally, Massachusetts believes that the proposed remedy of the cap and trade program across a twenty-two-state region is not necessarily appropriate for our petition. Given that Massachusetts has invoked Section 126 to expedite action on specific stationary sources within a defined geographic region, the appropriate remedy, as suggested by Section 126, is

source-specific limits.

If a multi-state banking and trading program is implemented for the purposes of remedying a Section 126 finding, it may not result in emission controls at the named facilities, as Section 126 demands. However, if a twenty-two-state regional cap and trade program were fully and effectively implemented in a timely manner, it could obviate the need for a remedy at the specific sources.

Given the magnitude of EPA's tasks in issuing the final rule on the 110 SIP call and this notice of proposed rulemaking simultaneously, we understand EPA is still interested in considering our comments on the advance notice published in spring of '98. We request that EPA carefully consider those comments along with this testimony and our forthcoming written comments before taking action on our petition.

In addition, we would like EPA to state the technical basis for its findings under Section 126, taking into consideration the evidence provided in the petition.

In conclusion, Massachusetts strongly supports EPA's efforts to reduce ozone transport through a regional NOx reduction program, as promulgated in its NOx SIP call. We intend to comply with those requirements.

However, EPA's apparent plan to use the NOx SIP call as a surrogate for a Section 126 action on our petition seems premature, raises legal concerns, and may not afford the public health protection Section 126 was designed to provide.

Thank you for this opportunity.

MR. HOFFMAN: I just have a thought for both of you, for your written testimony -- I'm Howard Hoffman. I'm with the General Counsel's Office.

It would be helpful to us, I think, on your point that 126 should stay alive even after approval of a SIP, it would be helpful, I think, to walk through what that would look like, in terms of competing provisions.

Assume a case where EPA -- where a SIP is submitted and approved that does not regulate the same sources to the same extent as you've requested in the 126 petitions, so that in, say, May of 200, a SIP is approved which regulates certain sources in a certain way and a 126 petition is approved -- as I think you're recommending -- in which EPA regulates different sources, perhaps some overlap, but to a different extent.

Under the rules of 126, those controls would have to take effect within a certain period of time, and

sources subject to those controls would begin to incur costs, you know, and begin to incur capital expenditures to plan for those controls having to be effective at a certain point in time.

Would those costs end up being wasted, if in fact the SIP ends up being implemented? If you could sort of walk through a scenario like that, that would be helpful to us in figuring out the relationship between 126 and 110.

MS. SEIDMAN: Okay, so, I just want to make sure I understand the question correctly. You'd like us in our written comments to sort of lay out this kind of scenario and explain how we would address that type of an issue?

MR. HOFFMAN: Yeah.

MS. WEGMAN: How it would work if there were potentially two different sets of controls, and what you would envision. Because, as Howard said, the sources would be moving along one track, and then there would be this other track riding there with a potentially different set of requirements.

MS. SEIDMAN: Yeah, I think we could certainly consider -- I mean, I think the central point is,

obviously, our concern that the controls actually be implemented in May of 2003, which EPA's approval of a state's SIP doesn't in a sense guarantee.

MS. WEGMAN: We understand the point. We just don't understand how it would work practically.

MS. SEIDMAN: Okay.

MS. WEGMAN: The other question I have is about your view of the regional cap and trade program. I can't quite tell whether you support it as a remedy or whether you're saying you don't want it as a remedy and you want us to be requiring specific reductions from specific sources.

MS. SEIDMAN: I think we're holding -- we're on the fence, at this point. We're envisioning a scenario where that happened, but we can also envision that, if states' SIPs do go forward and end up getting sort of the overall level of reduction, that it could satisfy the -- we're on the fence.

I think we'd like to think that that could happen, but we're not convinced yet that that will be the case and wanted to raise that as an issue with you at this time. You're correct in reading that we're saying both things.

MS. WEGMAN: All right, thank you.

MR. SEITZ: Thank you very much.

Once again, if there is anyone else in the audience who would like to make a presentation, please identify yourself to the registration desk.

Our final two presenters at this time are Tina Kaarsberg and David Green.

TINA KAARSBERG

NORTHEAST MIDWEST INSTITUTE

MS. KAARSBERG: I do have some exhibits, but I only have one copy, so I'll give them to you afterwards.

MR. SEITZ: Okay, Ms. Kaarsberg?

MS. KAARSBERG: I'm Tina Kaarsberg. I'm the Senior Scientist at the Northeast-Midwest Institute Center for Regional Policy. I actually do have testimony but I was unable to print it out before I got here, so I'm going to have to read it off my laptop.

We're a nonprofit organization devoted to improving the region's economy and environment. We're concerned that our current electric-generation system is highly inefficient, polluting and expensive, and we have tried to promote ways to regulate electricity generation that encourage innovation and result in least-cost

pollution reduction.

Today I am commenting specifically on the FIP, federal implementation plan, Chapter Six, Federal NOx Budget Trading Program, Section B, Subsection three, paragraph c, subparagraph 4, NOx Allowance Allocation Methodologies.

MR. SEITZ: Oh, yes.

(Laughter.)

MS. KAARSBERG: It's way down there. It's indented six times.

We really applaud the general idea of a market-based system. However, we have serious qualms about the initial and annual allocation schemes that are proposed. We believe they would lock in the current inefficient electric generation at the expense of efficient, cleaner generators.

For a market-based system to work, the initial allocations must be fair and as close as possible to the desired outcome. We believe the current electric system is quite far from the cost-effective, optimum efficiency.

Here I have Exhibit A. This, along the horizontal axis, shows the years 1940 to the latest year for which data is available, 1997. What this shows is

that the electric -- this is the electric efficiency of the entire U.S. electric system. Basically, we have not improved at all since the late fifties.

This is partly due to the fact that more than two-thirds of electric generators were built prior to 1970, but there's a lot more to it. What I'm submitting also is Exhibit B, an article I co-authored with the Executive Director of the Northeast-Midwest Institute entitled, "Unleashing Innovation in Electricity Generation," and this describes the multitude of reasons that our electric system is not as clean, innovative or as efficient as it could be.

My Exhibit C -- this is a little harder to read -- shows the historical improvement in various electric-generation technologies. This one here is the steam turbine, and it's over a little longer time period than the previous chart. I meant to merge the two; I apologize.

But, essentially, this curve here shows the efficiency over time of the steam turbine, which bears a remarkable resemblance to the efficiency over time of our electric-generation system. This lower curve here is the efficiency over time of a simple-cycle gas turbine you

refer to as a combustion turbine in there.

This plot right here refers to the efficiency over time of the combined-cycle gas turbine. I've also plotted a few of the heat rates that are used in Table One for calculation -- for comparison -- and I will get back to that later.

The point I want to make right now is that it is not for lack of technological improvement that we are so inefficient. It really has to do with our system of regulating efficiency. If we do it the right way, we can achieve pollution reductions by increased efficiency.

So, I guess the point I'm trying to make here is that any system in which you base initial allocations on historical data is going to be very far from the optimum that you want to get to.

Unfortunately, all three methods suffer from that problem, because they're based on historical data. The methods one and two are based on historical emissions and method three is based on historical electricity generation, if I understand it correctly.

In our view, the most cost-effective way to reduce emissions is to use the market to reward those who produce the most electricity for the least NOx emissions.

Thus, a perfect market-based NOx allocation would be to grant allocations weighted by the electricity generated per pound of the NOx emitted. We're going to submit some written testimony that goes into that and how that might work in detail.

I'd like to just sort of comment on each of them, given that I understand there's a need to provide states with more than one option.

Method one includes no measure of electricity output. It gives the most initial allowances to generators that use a lot of energy and have historically high emissions, which is not great; but, at least, it doesn't do what method two does, which gives the allowances to the least efficient generators that use a lot of energy and have an historically high output-based emissions rate.

In the annual update that's proposed, those generators that improve their efficiency are further penalized by having their allocations lowered by the amount by which they improve their efficiency.

To paraphrase a famous philosophy, the allocations are given from each according to his ability, to each according to his need -- not exactly a market

approach. In fact, method two does exactly the opposite of what we want as a society. Thus, the Northeast-Midwest Institute strongly opposes this method and urges EPA that EPA delete it from the recommended list of options.

The only one of the three proposals that rewards what society actually wants, which is electricity, is the third option. However, we are concerned with two aspects: first, the proposed method of measuring the amount of electricity generation for non-utility electric generators; and, second, the extension of emissions allocations to non-fossil generators.

For measuring the generation, which is used to weight the NOx emissions, the EPA uses an indirect method where the non-utility generator is classified as one of six possible types that are shown in table one. Then, its generation is calculated from the energy input and one of these average heat rates.

The point I want to make here is that your state-of-the-art combined-cycle-gas turbine, which is nearly sixty-percent efficient, would be weighted by the thirty-percent efficiency of table one. They list heat rates, but I've converted them to efficiency units. Thus, it would receive credit for only half of its generation.

So, you know, that's a problem. It doesn't reward -- this method of calculating for non-utility generators does not reward the more efficient generators.

We do understand that the data is not currently available, but the data will no be needed until 2002 or '3, and we're working with the Energy Information Administration and with Congress to ensure that this data is available.

In addition, since much of the expected rapid growth in the non-utility generation will be third-party owned and operated, we expect that the contractual data required to be published by the Securities and Exchange Commission is likely to be available.

Finally, to the second concern, we agree in principle that granting non-fossil generators -- with the principle of granting non-fossil generators NOx allowances. However, we are concerned that much of this generation, which is grater than fifty megawatt non-fossil fuel, which is essentially hydro and nuclear, already has some sort of state subsidy -- federal or state subsidy -- and states should take care not to over reward non-fossil generators.

Additionally, if this method were used to

allocate allowances nationally, we would be concerned as a regional organization that the inclusion of non-fossil generation would weight the state allocations so as to result in regional inequity.

Finally, you request information on steam heat rates as a way to deal with cogeneration. My colleague, David Green, will address cogeneration in detail in his testimony, but I must protest your description of cogeneration as simply diverting steam from electric generation.

Cogeneration or, as we prefer to call it, combined heat and power, uses thermal energy that otherwise would have been wasted. That's why it is so efficient, from thermodynamics -- and I do have a Ph.D. in physics, but you don't need to have one to know this. I happen to know that heat is always produced when electricity is produced.

Furthermore, thermodynamics limits electrical efficiency to about sixty-five percent maximum. That's the only way to ever be more than sixty-five-percent efficient is to recover waste heat.

Combined heat and power is not new. It's been used for decades and accounts for six percent of the

United States' electricity generation. In Denmark, combined heat and power systems generate nearly fifty percent of the country's electricity needs.

The fuel use efficiency of electricity generation in Denmark is sixty percent, or twice the U.S. efficiency. They do this not with some gee-whiz, far-out technologies, but just using off-the-shelf, available technologies.

To just illustrate this, this is from a paper I did looking at cogeneration and what it could do for manufacturers. It shows why combined heat and power is more efficient than our current separate heat and power system.

Up on the top here shows -- this is actually the amount of energy the manufacturers use to produce the electricity that they need and the steam that they need. It required seventeen exajoules.

If we were to change this to combined heat and power, where thermal was derived from waste heat from electricity generation, it would require only nine point three exajoules. So, you can see there's an enormous energy saving from using -- and equivalent emissions reductions -- from using combined heat and power.

So, that concludes my testimony.

MR. SEITZ: Thank you very much.

Just for the purpose of when you submit your written statement -- and I'm assuming you have the analysis -- you talked about the issue about you think in the future the data will be there to be able to do it another way.

MS. KAARSBERG: Yeah.

MR. SEITZ: I'd appreciate that you point specifically in your written testimony or your comments you submit to how you believe those data sources will be available.

MS. KAARSBERG: Yeah, I will provide more details on the type of -- you know, typically, especially with cogeneration, when you are doing on-site generation, for example, you do not sell them the machine; you sell them the service, and you bill them according to this service. So, you have to know pretty precisely what it is that you have, and it's a public thing.

In fact, our indications are that in some ways what we suggest would result in less proprietary data being available than other ways, so --

MR. SEITZ: Just in terms of your comment, I

need that detail you're talking about. I'd really appreciate having that.

MS. KAARSBERG: Okay, I make note of that. My understanding is we have six months comment period -- how long is it? Sixty days.

MR. SEITZ: Comment period ends November 30th. The record of this hearing will be available in about thirty days.

MS. KAARSBERG: I confess that someone else in my Institute, Diane Duvall, is the expert on that. But, that's -- you know, we are putting together some written testimony to submit for the record.

MR. SEITZ: To the extent that the alternatives proposed are not -- I did not hear a lot of support for -- the alternative that you are proposing, we need to understand how it would not only be conceptually, but how it would be operationally. Okay? Appreciate that.

Mr. Green?

DAVID GREEN

COMBINED HEAT AND POWER ASSOCIATION

MR. GREEN: Thank you. My name is David Green. I'm the Director of the Combined Heat and Power

Association in London. I'm in Washington to give a paper at a conference the EPA was sponsoring earlier in the week, so I'd like to take the opportunity to talk in more detail about cogeneration and why it's important in terms of emissions reduction.

Most of the experience I will talk about will obviously be the experience I've had in the U.K., and it is increasingly relevant to the U.S. situation with the liberalization of the energy markets that are taking place in the United States, indeed, across the western world.

Just very briefly to describe the technology in a little bit more detail, as Tina has outlined, CHP is not a new technology. It's a technology that's been around for many years and it's been used extensively in some parts of America and also extensively in some European countries, including my own, the U.K.

The U.K. now has about seventeen hundred CHP units operating throughout the country varying from very small units of two or three hundred kilowatts up to large power stations of two hundred to three hundred megawatts. What unites them all is the energy efficiency.

All CHP systems in the U.K. in order to gain approval have to achieve a thermal efficiency of some

seventy percent, compared to a normal, conventional power station, which has a thermal efficiency of about thirty-four percent, or the new generation of gas-combined cycle-power stations, which have a thermal efficiency of about forty-six percent.

One of the reasons why there's been a massive growth in CHP in the U.K. has been because of the environmental benefits that have accrued from its use, and those environmental benefits that have been quantified have largely been in contributing to reducing a number of particulate emissions into the atmosphere, but in particular to form part of the U.K. government's climate change strategy where CHP is about to be deployed extensively as a way of reducing the U.K.'s contribution to global warming.

The U.K. has a target for the development of CHP of some five gigowatts of CHP by the year 2000, and every one megawatt of CHP that's brought on stream will reduce U.K. emissions of carbon dioxide by something like a thousand tons.

On Monday this week, the U.K. government released its draft climate change strategy. I'm afraid -- I can arrange for a copy to be sent to you, but I have my

only hard copy here with me.

I'm sure we can arrange for one to be submitted, but that sets out a strategy which is designed through a combination of regulatory measures and market-based mechanisms to stimulate the much wider use of combined heat and power as a specific way of reducing industrial emissions of CO2 and with it other emissions, as well.

It's anticipated in the government study that some fifty percent of the emission reduction that will come from U.K. industry to achieve the government's goal of something like a twelve-percent cut in all greenhouse gases will come from the wider use of CHP, and it will become increasingly significant as the U.K. moves towards its target of twenty-percent reduction in carbon dioxide emissions by the year 2010, as its own unilateral decision that the new government has decided to take, and it's obviously something that the industry is keen to support.

It may be of particular interest to this inquiry to know that there are new regulations coming up in Europe which will deal with all large combustion plants. The European Commission in Brussels has promulgated and now passed into law the Integrated

Pollution and Prevention Control Directive, which will affect the emissions from all large combustion plants, including plant or industrial sites.

The national legislation that will enact that is obliged to ensure that, when inspectors are carrying out assessments of emissions from industrial sites, they will take into account the efficiency with which energy is used on that site, because it's widely recognized if you can improve the energy efficiency of a site, particularly through technologies such as combined heat and power, you will contribute to cleaning up the emissions from that site.

The initial consultation that the U.K. Environment Agency has carried out -- and on their behalf it's been done as well by the Department of Environment -- is that they want to find a way in the regulatory structure of not only enabling emissions to be traded between sites, but also to ensure that, in delivering the new structure, they will be able to take account of any displaced pollution you have from the sites.

If a particular site deploys, for example, combined heat and power technology, and it displaces an older, inefficient power plant elsewhere in the country,

then the displaced pollution should be taken account of in the credits that accrue to that site. That is an approach that you may want to consider in the way in which you look at some of the concepts that are behind the paper that you're considering today.

CHP, as Tina has mentioned, is widely used throughout the western world and long-standing schemes in the United States, but the countries that have done particularly well in using combined heat and power technology are countries like Denmark, Sweden and The Netherlands.

In all those areas you can track the way in which the atmosphere in the cities, in particular, has been cleaned up dramatically through more efficient production of energy in those cities, and also through the wide use of district energy by reducing the emissions that would come from otherwise individual boilers that are located in the housing blocks and other areas.

I don't think there is much more I would like to say at this stage, other than to commend to you the work that has been done by the Northeast-Midwest Institute and also to say that I will be delighted to submit through them a copy of the information that the U.K. government is

using to assess emissions from power plants and, in particular, some of the ideas that have been floated in the U.K.'s own strategy for climate change, and how that has a knock-on effect to the evaluations that are carried out by the Environment Agency to deliver their goal of reducing emissions from U.K. industry across a range of particulates.

Thank you.

MR. SEITZ: Yes, I would like to take you up on your offer, particularly where you talk about the quantification of the benefits that have been done. I'd like to -- if you could submit those.

You talked about a number of analyses in your statement that had been done concerning the benefits. If you could ensure that they're submitted.

Finally, you said -- you made a comment about I guess it was the European Union had adopted the standard and now it's up to the international governments to adopt? Is that -- as I understand it?

MR. GREEN: That is correct. The way the system actually operates is the European Commission proposed the new directive, and it's up to the national governments to implement it once it's been agreed.

MR. SEITZ: Do national governments -- did the Union put a time line on that implementation?

MR. GREEN: It has to be done by 2002.

MR. SEITZ: 2002?

MR. GREEN: Yeah.

MS. KAARSBERG: That's a similar time frame for the SIP, is my understanding.

MR. GREEN: There are some elements that come in slightly earlier, about a year ahead. But, the majority is due to come in by 2002.

MR. SEITZ: That's helpful. I just would like to -- well, if it wouldn't be too much trouble, if we could get a copy of that resolution, as well.

MR. GREEN: I haven't yet discovered if the European Union has a very sophisticated webpage, but I'm sure I can arrange for a copy, a hard copy, to be sent through to you.

MR. SEITZ: I'd appreciate that very much.

MR. GREEN: No Problem.

MR. SEITZ: Thank you.

MS. WEGMAN: To the extent that you can tie what you've told us about the benefits of CHP to how we should do the allocation system under this particular

rule, the kinds of things Tina was talking about, the linkage between what you're talking about and how it would influence our proposed rulemakings would be helpful, because we do need to draw a connection between them.

MS. KAARSBERG: Am I allowed to say something, comment on this?

Can you yield me some of your -- I told him it wasn't like in Congress.

The point is that the heat rate --

MR. SEITZ: In the interest of international cooperation, you yield.

(Laughter.)

MS. KAARSBERG: Right. I think I will put some of that in there, but I think the idea is basically that, when you allocate based on generation, that you consider thermal generation and you consider it on a hundred-percent-equal footing, not multiplying by some factor. The reason that that's legitimate is because this is a service that has a value.

You know, if you have a hot water heater that's eighty-five-percent-efficient gas, is it better than a ninety-percent-efficient electric heater? Yes, it is, because electricity starts off by losing seventy

percent of its fuel value on the way to you.

So, I think there's a good case to be made that that should be the weighting. Then, of course, under that scheme, CHP would be greatly incentivized, because the output generation would be much greater proportionally under the scheme than I had talked about.

MR. SEITZ: Thank you, very much.

MS. WEGMAN: You'll be submitting comments specifically indicating how we could do this method of allocation, just in your written comments?

MR. SEITZ: Thank you very much for your presentations.

Are there any other members of the audience who would like to make a presentation?

(No response.)

MR. SEITZ: In that case, I would like to thank all the presenters. Once again, the agency has made no final decisions on this activity. The purpose of this hearing was to collect information from you to get additional analysis.

The record of this hearing should be available both in the docket -- Office of Air and Radiation's docket room, as well as on the Internet within thirty days. As

mentioned a few minutes ago, the formal public comment period for this activity closes on November 30th.

On the behalf of EPA and the members of the panel, we'd like to thank you for your input and for your participation in today's proceedings.

Thank you very much.

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(Whereupon, at approximately 2:25 o'clock p.m., the Public Hearing on Proposed Rules for the NOx Federal Implementation Plans and Section 126 Petitions was concluded.)

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CERTIFICATE OF REPORTER

I, Laura Anne Hall, the Certified Verbatim Reporter who reported the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of November, 1998.

_____
Laura Anne Hall, CVR-CM-PNSC-NSC
Certified Verbatim Reporter