February 24, 2003

EPA West (Air Docket)
U.S. EPA (MD-6102T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. OAR-2002-0093

The Northeast States for Coordinated Air Use Management (NESCAUM) appreciate the opportunity to comment on the proposed NESHAP for Surface Coating of Automobiles and Light-Duty Trucks (SCALDT). The following comments focus exclusively on EPA's proposal to allow risk-based exemptions in the rule. For the past 35 years, NESCAUM has been providing scientific, technical and policy support to our member states on air pollution issues of regional concern. The member states include the New England states, New York and New Jersey. In 1982, the NESCAUM Directors established the Air Quality and Public Health Committee to support the coordination and successful implementation of state risk-based air toxic control programs. This committee consists of toxicologists, public health experts, and air toxics regulatory staff from the Northeast states' air quality and public health agencies and the two regional EPA offices. Since the federal air toxics program was mandated by Congress in 1990, the Air Quality and Public Health Committee has taken an active role in working with EPA and the regulated community to integrate the federal air toxics program with our existing state risk-based air toxic programs. Therefore, the Air Quality and Public Health Committee possess a wide-range of expertise and practical experience on the use of public health risk assessment and risk management practices in the regulation of hazardous air pollutants.

The Air Quality and Public Health Committee carefully reviewed and analyzed the proposal to include risk-based exemptions in the SCALDT NESHAP, as well as the American Forest and Paper Association (AF&PA) "white papers,"[1] and the comments submitted by the AF&PA law firm, Latham and Watkins, on this matter.[2] AF&PA represents one of the six source categories (i.e., plywood and composite wood products)

[1] AF&PA White Paper on Enforceable Agreement Allowing Risk-based Delisting of Sources in the Wood Products MACT, AF&PA White Paper on Risk-based DeMinimis Applicability Exemptions in the Wood Products MACT; and AF&PA White Paper on Concentrations-based DeMinimis Applicability Exemptions in the Wood Products MACT.

[2] To EPA docket on September 20, 2002 and November 5, 2002

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selected by EPA that would be allowed to use risk information to exempt certain facilities from the NESHAP requirements.

In September 2002, NESCAUM commented extensively on EPA's risk-based exemption scheme that was proposed in the brick/clay/ceramic tile NESHAP. Since these comments address the same issues EPA is requesting comment on in the SCALDT NESHAP proposal, we respectfully refer EPA to these comments, which are attached. In addition, we wish to supplement these comments with the following points.

First, we applaud the staff at OAQPS for requesting comments on all aspects of the proposal, including the legality of risk-based exemptions in the MACT program. We recognize that the notion of risk-based exemptions is embedded in the ongoing debate as to whether public health benefits of reduced human exposures to air toxics have been significant enough to justify the significant expenditure of agency and industrial resources that has taken place. However, we believe that allowing risk-based exemptions requires changes to existing law and that such a debate should take place within our democratic legislative process and not in the MACT standard process.[3]

Second, we reiterate our strong belief that the inclusion of case-by-case risk-based exemptions in the MACT standard process will negate the legislative mandate of the federal MACT program in establishing a level-playing field of air pollution control across the U.S. We believe that EPA's historical interpretation of Section 112(d)(4) has been correctly applied in that only categories of sources, not individual facilities, that emit only threshold pollutants would avoid further regulation if those emissions result in ambient levels that do not exceed the threshold, with an ample margin of safety.[4] After careful examination of over a decade of documents, testimony, and comments on EPA's MACT program, we simply have been unable to substantiate the basis for EPA's support for the regulatory relief sought by AF&PA through risk-based exemptions. In fact, the use of risk assessment at this stage of the MACT program is antithetical to any reading of Title III of the CAA by state and federal agencies or affected industries as far back as 1990. (To illustrate this point, we have attached an EPA fact sheet, testimony by John D. Graham of Harvard Center for Risk Analysis (currently at OMB), and testimony by Lee P. Hughes on behalf of the American Chemistry Council.[5])

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[3] For example, since 1997 certain members of Congress have attempted without success to pass the Regulatory Improvement Act, which would have required agencies to issue regulatory analyses for major rules which include: (1) cost-benefit analyses, including for regulatory alternatives; (2) risk assessments; (3) scientific or economic information relied upon in cost-benefit analyses and risk assessments; and (4) any scientific information on substantive risks to health, safety, or the environment.

[4] We object to EPA's scenarios exempting individual facilities that emit only threshold, emit threshold and non-threshold, or emit threshold and non-threshold below risk benchmarks from specific emission points.

[5] See EPA's Fact Sheet on Residual Risk; Statement of John D. Graham, Ph.D. Director, Center for Risk Analysis, Harvard School of Public Health, October 14, 1999 Senate *Committee on Environment and Public Works:* Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety ("EPA has made greater progress in regulation of air toxics through a technology-based approach that targets industry sectors ("source categories") rather than by determining acceptable risk on a pollutant-by-pollutant basis."); and excerpts from a statement of Lee P. Hughes, Vice President Corporate Environmental Control, Bayer Corporation on behalf of the American Chemistry Council before the Senate Environment and Public

Third, we have identified critical flaws in the methods proposed by EPA for issuing risk-based exemptions in the SCALDT proposal. The most obvious is that the risk-based exemption scheme does not comport with EPA's risk assessment and management guidelines and policies.[6] **This critical deficiency in the scheme reflects a fundamental misunderstanding of the use of public health and ecological risk assessments in the regulatory process**. The risk methods in the SCALDT proposal do not reflect the long-standing and deliberative scientific process for conducting risk assessments that EPA has developed over the past decade. We are, therefore, particularly concerned with EPA's risk estimates presented in the proposal as well as the use of population risks to ostensibly make risk management decisions.

The hallmark of the federal risk assessment guidelines is a series of policy memos that require EPA programs to conduct risk assessments consistently across all federal environmental programs with transparency, clarity, consistency, and reasonableness.[7] Of particular concern is that AF&PA's approach neglects to include such key tasks as risk characterization, which provides needed and appropriate information to decision-makers (see NAS report Understanding Risk: Informing Decisions in a Democratic Society.) The AF&PA scheme also fails to incorporate the critical recommendation of the Commission of Risk Assessment and Risk Management to establish a framework for stakeholder-based risk management decision-making. These recommendations are noteworthy since the Commission was established under the 1990 Amendments to provide guidance to EPA on risk assessment and management decisions for HAPs. The failure to abide by EPA guidelines and policies in the SCALDT proposal will prevent regulatory agencies from demonstrating to the public that such a scheme is adequately protective of the public's health and the environment, as required by state public health and environmental statutes.

Fourth, we are deeply concerned that EPA has not considered the intensive resource demand on state programs to implement risk-based exemptions. Of particular concern is that the proposal does not address the critical need for qualified public health risk assessors to evaluate the hazard, exposure and risks associated with emissions from a HAP source. We believe that qualified scientists skilled in risk assessment methods are required to evaluate the scientific and technical basis for exempting facilities from

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Works Committee on the Clean Air Act Residual Risk, October 3, 2000: "Our industry supports the Clean Air Act's approach for regulating air toxics, which first requires technology-based controls and then looks at any remaining or "residual" risks."

[6] We believe that these flaws are so extensive that it would be inappropriate to respond to specific requests for comments on various issues raised by EPA in the proposal. These include comments requested in the follow sections: Estimation of hazard quotients and hazard indices; Options for establishing an HI limit; Tiered analytical approach for predicting exposure; Accounting for dose-response relationships; and Subcategory Delisting under Section 112(c)(9)(B). We agree entirely with STAPPA and ALAPCO that it is unacceptable for EPA to defer to tools for conducting these risk-based exemptions that have not been available for review by anyone outside of the EPA to date and that are not likely to be available for some time in future. We believe that these methods must be available for review at the same time that EPA is proposing the use of risk-based exemptions in a particular NESHAP.

[7] These guideline memos are attached for the record.

regulation on a case-by-case basis. It is also important that EPA consider the regulatory costs that are associated with implementing a risk-based exemption program within the current Title V permit program. These costs are likely to be substantial because the infrastructure within the Title V programs is currently focused exclusively on implementing control technology standards. For example, EPA's cost impact analysis summarized in the proposal estimates the total annualized cost of the proposed rule is about $21.5 million, with approximately $267,500 of that amount for monitoring, record-keeping and reporting. We estimate that if 1 FTE were required per state to review risk-based exemptions, the costs would be an additional $7.5 million (50 states x $150,000 per FTE).

Finally, in addition to the issues cited above, we have identified numerous examples in the proposal where EPA did not provide a sufficient explanation or justification for their statements or conclusions. These include:

- Inadequate information on the selection of HAPs of concern from SCALDT sources based on mass of emissions.

- Inappropriate use of draft guidelines and toxicity profiles in the proposal that have not been subject to public review and/or are not publicly available. We are also particularly concerned with the proposal's reference to the use of non-linear carcinogenic risk values and toxicity profiles for HAPs that have not been finalized and are not available for review by the public. We note, for example, that EPA just closed the public review of the cancer risk guidelines on January 28, 2003. Therefore, these guidelines have not been finalized and should not be cited until the public comments have been appropriately addressed and EPA has issued final guidelines.

- Inadequate discussion of how environmental risks associated with SCALDT sources will be conducted. The Clean Air Act requires that EPA considers and protects the environment as well as public health. At a minimum, the facility would be required to conduct an assessment based on EPA's Guidelines for Ecosystem Assessment (1998). We refer EPA to Appendix A of the document "Generic Assessment Endpoints for Ecological Risk Assessment" for a detailed discussion on the legal basis from "such statutes as the Clean Air Act…that require EPA to consider and protect organism-level attributes or various taxa of organisms including fish, birds, and plants and more generally, animals, wildlife, aquatic life, and living things." EPA also needs to consider the resources and time necessary to conduct adequate ecosystem risk assessments in their proposal with respect to overall costs of exempting facilities, on a case-by-case basis, from MACT standards.

- Finally, we note that EPA has not discussed the need to assess cumulative risks, aggregate exposures, and health impacts associated with exposure to chemical mixtures emitted from SCALDT facilities. We refer EPA to the extensive progress that has been made in more completely addressing risks from exposure to air pollution and integrated decisionmaking in such areas as children's risk issues,

cumulative exposure ("Framework for Cumulative Risk Assessment" (EPA/630/P-02/001A, April 23, 2002), and chemical mixtures ("Supplementary Guidance for Conducting Health Risk Assessment of Chemical Mixtures (EPA/630/R-00/002), and request that these advancements be incorporated into the risk assessment methods and overall cost estimates associated with risk-based exemptions in the proposed SCALDT NESHAP.

Again, we sincerely appreciate your consideration of these comments. Please contact me if you have any questions.

Sincerely,

Margaret M. Round
Senior Air Toxics Program Analyst

Enclosures

cc: NESCAUM Board of Directors
Mary Douglas, STAPPA and ALAPCO Air Toxics Committee