

May 4, 2007

By Facsimile

U.S. Environmental Protection Agency
Air and Radiation Docket and Information Center
EPA West Building, Room B102
1301 Constitution Avenue, NW
Washington, DC 20460

RE: Comments on EPA's Proposed Rule "National Emission Standards for Hazardous Air Pollutants: General Provisions," 72 Fed. Reg. 69 (Jan. 3, 2007), Docket ID No. OAR-2004-0094

The National Association of Manufacturers (NAM) is pleased to submit the enclosed comments on the EPA's proposed rule entitled "National Emission Standards for Hazardous Air Pollutants: General Provisions (HAPs)," 72 Fed. Reg. 69 (Jan. 3, 2007).

The proposed rule is an important reform of the current "Once-In, Always-In" (OIAI) policy regarding MACT applicability to sources of hazardous air pollutants. The EPA's proposal responds to many calls by state and local regulators and industry to eliminate the legally and environmentally unsound OIAI policy. As explained in the attached comments, the NAM supports the EPA's proposed amendments and appreciates the opportunity to comment on this important rulemaking.

Sincerely,

Bryan L. Brendle
Director, Energy and Resources Policy

Enclosure

COMMENTS OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

on

**PROPOSED AMENDMENTS TO 40 CFR PART 63 GENERAL
PROVISIONS REGARDING THE “ONCE-IN, ALWAYS-IN”
POLICY FOR NATIONAL EMISSION STANDARDS FOR
HAZARDOUS POLLUTANTS**

72 Fed. Reg. 69 (Jan. 3, 2007), Docket ID No. OAR-2004-0094

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I. Introduction

The National Association of Manufacturers (NAM), which represents small and large manufacturers in all 50 states and a \$1.5 trillion share of the nation's annual economic output, submits the following comments on the EPA's proposed rule for the "Once-In, Always-In Policy" for the National Emission Standards for Hazardous Air Pollutants program, 72 Fed. Reg. 69 (Jan. 3, 2007).

The NAM has long been an interested party in air toxics program of the Clean Air Act (CAA) and has worked with the EPA in the creation and implementation of MACT standards. The flawed "Once-In, Always-In" (OIAI) policy impacts many members of the NAM both directly, and indirectly. For the reasons explained below, the NAM supports the proposed reforms and urges the Administrator to eliminate the legally and environmentally unsound OIAI policy.

II. Proposed Rule - Overview

The EPA proposes to amend selected individual NESHAP, 40 CFR Part 63 Subpart A General Provisions, and rescind the OIAI policy described in the May 16, 1995 EPA memorandum entitled "Potential to Emit for MACT Standards – Guidance on Timing Issues," from John Seitz, Director, Office of Air Quality Planning and Standards, to EPA Regional Directors. The OIAI policy provides that a "major source" of hazardous air pollutants (HAP), which is subject to stringent control measures, may become an "area source" of HAP, which is subject to less stringent requirements than "major sources," for purposes of an applicable major source MACT standard only up to the first substantive compliance date for the MACT standard. After that date has passed, EPA believes that the source cannot limit its potential to emit HAP in order to become an area source for purposes of the applicable MACT standard.

The proposed amendments to repeal the OIAI policy would allow a major HAP source to become an area source at any time by limiting its potential to emit HAP to a level below the major source thresholds. The proposal's impact would expressly allow a major source to become an area source at any time and, consequently, no longer be subject to major source MACT standards.

III. Proposed Rule - Comments

A. The Proposed Rule Applies the Plain Meaning Principle to Relevant Sections of the Clean Air Act and Includes a Comprehensive Rationale to the Definition of "Major Source."

The NAM supports EPA's analysis included in the preamble and applauds the legal and regulatory analysis included therein for the following reasons:

(1) In Sec. 112 of the CAA, Congress clearly defines the terms “major” and “area” sources. The Act states that “a major source as a stationary source that emits or has the potential to emit considering controls” HAP above certain thresholds and all other stationary sources as “area sources.” Also, regulators adopted virtually the same definition when promulgating regulations pursuant to Sec. 112. Furthermore, the EPA states that the definition of a major source does not refer to the compliance date of an applicable MACT standard nor does it include a prohibition on sources changing from major source status to area source status. If federal lawmakers had intended the above result, they could have easily referred to the date EPA promulgates an applicable MACT standard or to the date such a standard becomes a requirement for the source. Therefore, there is no “gap” in the language that regulators must bridge in order to define the term “major source,” and the EPA has no authority to reference other criteria such as prevention of “backsliding” or other policies for added meaning.

(2) The EPA’s OIAI policy provides no flexibility and gives no credit for technological changes or advancements that may result in reduced HAP emissions. As applied, OIAI results in “permanent” major source classification that leads to an illogical outcome by applying major source MACT standards to sources regardless of their operational ability to emit HAP above thresholds for major sources. According to OIAI, a source must still comply to stringent recordkeeping, reporting and monitoring requirements even after a major source undergoes physical changes that render the source an area source. The CAA clearly does not contemplate such a result.

(3) Because of other established programs under the CAA, the OIAI policy, especially the backsliding assumptions, lacks a sound statutory foundation. The NAM believes that the EPA is correct that by deploying emission controls to meet other federal, state or local requirements, many sources have achieved area source status, and by applying those controls, would avoid reclassification as major HAP sources. Many facilities would also maintain those controls to comply with other federal, state, and local air quality programs or to benefit from emissions trading and netting regimes. These facilities are regulated through air permits that often contain emissions limits on criteria pollutants and priority pollutants which also effectively control HAP. Ultimately, some sources changing their status will also become subject to future area source standards that work to control HAP emissions from exceeding major source thresholds.

(4) The EPA recognizes the fact that the CAA does not require the OIAI policy in order to accomplish its policy objectives. By establishing total and partial exemptions to OIAI, such as the Remediation NESHAP and Printing and Publication NESHAP, for example, federal regulators have effectively acknowledged that the OIAI policy does not promote the overall policy objectives of the CAA air toxics programs when attempting to advance other environmental objectives.

B. The Proposed Rule Will More Effectively Reduce HAP Emissions By Promoting Innovation and Reducing Regulatory Compliance Burdens.

There is a general consensus that the OIAI policy stifles voluntary pollution abatement efforts and other technological innovations that actually reduce HAP emissions.

The NAM supports the EPA's assertion that through the elimination of major source MACT compliance burdens, the proposed rule would create meaningful incentives for many types of sources to undertake voluntary pollution prevention efforts that result in reduced HAP emissions and enhanced air quality. Because OIAI has for so long discouraged facilities from identifying and implementing HAP pollution abatement and emission reduction projects, it is logical to assume that there is an untapped inventory of such projects available to be deployed. Sources responding to the rule would initially focus their efforts on the most effective HAP emission reduction projects, so it is reasonable to anticipate significant positive short term environmental and economic impacts from the rule. The significance of longer term impacts would depend largely on "product/process innovations" that are difficult to predict but reasonable to expect. There appears to be no evidence suggesting that allowing major sources to become area sources will result in higher overall HAP emissions. For the reasons outlined in the EPA's analysis (72 Fed. Reg. 73-74), we agree that the proposed rule should result in equal or greater HAP emissions reductions than would be expected from any sources increasing their HAP emissions to near major source thresholds.

C. The NAM Supports the EPA's "Immediate Compliance" Proposals for Sources Changing Between Major and Area Source Status.

The EPA outlines a framework for facilities that switch between major and area source classification more than once. The proposal states that a major source switching to area source classification, following the first substantive compliance date of an applicable MACT standard, and subsequently returning to major source status, would be immediately subject to major source MACT. This provision includes few exceptions. Immediate compliance exceptions include a situation whereby the MACT has become more stringent since the source was last subject to the MACT. Another scenario includes a situation when the MACT has been revised to apply to more emissions points or additional HAPs, in such a manner that the source must undergo a physical change, install additional controls, or implement new control measures. Under these circumstances, the facility would have the same period of time to comply with the revised standards as is allowed for existing sources subject to the revised standard.

The NAM supports the proposed revisions as long as regulators keep these important exceptions. Existing sources should be treated similarly for purposes of coming into compliance with revised standards, whether or not the source has switched more than once between major and area source status. We also urge the EPA to maintain the exceptions for switching back to major source status free of case-by-case determinations that will unnecessarily slow the permitting process and burden sources and permitting authorities.

D. The EPA Should Clarify that Regulators Will Consider Changes in Source Classification as a Mitigating Factor in Penalty Assessments

The proposed rule includes a key provision addressing changes in status by sources that have past or pending violations. Section 63.1(c)(6)(iii) of the proposal states, for example, that classification as “an area source does not absolve a source subject to an enforcement action or investigation for major source violations or infractions from the consequences of any actions occurring when the source was major.” The section includes another provision addressing violations of area source standards for sources switching to major status. At 72 Federal Register 77, the preamble states that

Although sources that are the subject of an investigation or enforcement action may still seek area source status for purposes of future applicability, they are not absolved of any previous or pending violations of the CAA that occurred while they were a “major source,” and the source must bear the consequences of any enforcement action or remedy imposed upon it, which could include fines or imposition of additional emission reduction requirements. Accordingly a source cannot use its new area source status as a defense to MACT violations that occurred while the source was a major source.

The NAM supports the assertion that changes in major and area source status should not absolve a source of liability for past violations. However, we are concerned that the proposed language “does not absolve a source ... from the consequences of any actions occurring” when the source was major. For example, voluntary HAP emission controls or pollution prevention measures that allow a major source to limit its potential to emit to area source levels may constitute Supplemental Environmental Projects (SEPs) that become available and attractive to sources and enforcement authorities following elimination of the OIAI policy. EPA’s policy is to encourage the use of SEPs because they can play an important role in achieving environmental benefits beyond legal compliance, and EPA should be careful in this rule not to foreclose new opportunities to achieve HAP emission reductions.

We urge the EPA to revise Section 63.1(c)(6)(iii) to clarify that a change from major to area source classification does not absolve a source from liability for past or pending violations of major source MACT but to include a statement asserting that regulators may consider a change from major to area source in reducing or eliminating civil penalties for past or pending violations.

IV. Conclusion

The NAM welcomes the EPA’s proposed amendments to repeal the OIAI policy. With the additional recommendations and clarifications articulated in the above comments, the NAM believes the much-needed reforms will promote voluntary emission control projects and pollution prevention measures while still achieving the HAP emission reductions mandated by Sec. 112 of the CAA.