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09/13/2005 08:25 AM To
Group A-AND-R-DOCKET@EPA
cc
Dave Darling <ddarling@paint.org>, coyler.rick@epamail.epa.gov
bcc

Subject RE: Docket OAR-2004-0094

Please file the comments below submitted under #OAR-2002-0038 to the intended Docket for this rulemaking, Docket #OAR-2004-0094. Thank you for your attention to this matter, I apologize for any inconvience. A correct hard copy will be sent by mail.

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From: Alison Keane
Sent: Monday, September 12, 2005 9:17 AM
To: a-and-r-docket@epa.gov
Cc: Dave Darling; coyler.rick@epa.gov
Subject: Final Comments on SMMP Reconsideration.doc

September 12, 2005

Air & Radiation Docket Information Center
Attn: Docket # OAR-2002-0038
US EPA Mailcode 6102(T)
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: National Emission Standards for Hazardous Air Pollutants; General Provisions; Proposed Rule

To Whom it May Concern:

The National Paint and Coatings Association (NPCA)[1] submits these comments in response to the above referenced rulemaking (hereinafter referred to as the "Proposed Rule")[2]. While NPCA supports the Proposed Rule's revisions and clarifications to the Clean Air Act's (CAA) General Provisions, NPCA objects to EPA's granting of the Proposed Rule's underlying Petition for Reconsideration.

In addition to NPCA's work with the EPA on numerous National Emissions Standards for Hazardous Air Pollutants (NESHAP), such as the Miscellaneous Organic Chemical and Miscellaneous Coating Manufacturing Maximum Achievable Control Technology (MACT) standards, as well as the various Surface Coating MACT standards, NPCA has been closely involved in the numerous rulemaking activities regarding the General Provisions and is an intervenor on behalf of EPA in current Circuit Court case. NPCA reiterates here many of the points raised in previous comments on the original proposed rule, as well as subsequent settlement agreement and proposed amendments to the General Provisions. Unlike NPCA, the National Resources Defense Council (NRDC) has not participated in these rulemakings. Thus, while the outcome of EPA's further consideration of

the final rule ended up being to the benefit of NPCA member companies, NPCA continues to object to EPA's consideration of petitions from organizations that do not participate in the underlying rulemakings. This violates the CAA, the Administrative Procedures Act (APA), and generally accepted procedures of meaningful stakeholder involvement in Agency rulemaking.

The Petition for Reconsideration Should Have Been Denied

As stated, the Proposed Rule is in response to a Petition for Reconsideration filed by NRDC. This Petition for Reconsideration was in response to final amendments promulgated pursuant to a settlement agreement with the Sierra Club in response to a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit of a final rule promulgated in 2002. Among other things, Sierra Club demanded changes to the General Provisions language with respect to Start-up, Shut-Down and Malfunction (SSM) plans. Sierra Club, however, had not adequately exhausted its administrative remedies before filing its petition, as Sierra Club did not comment on the underlying rulemaking. Instead of addressing the lack of jurisdiction the Court had over Sierra Club's Petition for Review, EPA proposed a settlement agreement and proposed changes to key provisions of the final rule. Appropriately, based on comments received on the proposed rule, the settlement agreement changes were rejected in a final rule promulgated in 2003.

Now comes NRDC, who had ample opportunity to participate in any one of the numerous rulemakings and iterations of the subject General Provisions amendments, but chose not to do so, requesting reconsideration of a final rule vetted through no less than 3 notice and comment periods. Despite this, EPA granted NRDC's Petition, which opposes the 2003 final rule specifying that public access to SSM plans would only be afforded when requests for such were "specific and reasonable." It was not impracticable for NRDC to comment on this approach during the first two rulemakings. Nor did the grounds for this objection arise after the period for public comment on the previous rulemakings. Simply put, this information was available at the time of the various proposals – thus, NRDC did not meet the CAA criteria for reconsideration and EPA should have denied the request.

EPA's consistent disregard for administrative procedure in this case is objectionable and while NPCA supports the Proposed Rule's provisions, we continue to object to these clear contraventions of the CAA and APA.

NPCA Supports Reliance on the General Provisions "General Duty" Clause to Minimize Emissions During SSM Periods

The MACT standards require facilities to develop and implement written SSM plans (SSMP) that describe general procedures for operating and maintaining the source during periods of SSM. The SSMP is a tool utilized by facilities specific to their operations in an attempt to comply with the General Duty Clause to minimize emissions during SSM periods – it is not an applicable requirement per se. In order to delineate this, EPA inserted language in the General Provisions in order to clarify the intent – establishing that a source remains in compliance with regulations as long as it meets the current standard or complies with their SSMP. This parenthetical language was specifically inserted by EPA in order to make clear that the general duty to minimize emissions meant compliance with the actual emission standards or compliance with a properly drafted SSMP, even though compliance with the MACT standards themselves during a period

of start-up, shut-down, or malfunction may not be practicable. This is the correct interpretation, given the fact that the purpose of the SSMP is to minimize emissions when the source is experiencing an event during which compliance with the emission standards is not feasible – the duty imposed by the general duty clause. Without this language facilities may be subject to enforcement actions even though they have met their duty to minimize emissions during SSM periods under the General Duty Clause.

Given that the plan is in anticipation that certain events and malfunctions can have unanticipated outcomes, these plans must remain flexible and be changed in response to specific scenarios. The SSMP is meant to provide for minimizing emissions during an event where the source can not maintain applicable emission standards. While the SSMP may in fact effectuate this outcome, it can not ensure this outcome. Thus, it can not be construed as an applicable requirement, but only as evidence as to whether a source met its obligation under the General Duty Clause. Similarly, a source could not use the plan itself as sole proof of compliance with the general duty to minimize emissions. Sources must report periods of SSM and reliance on the SSMP – following a deficient plan, for instance, would be evidence that a source does not have an adequate program to comply with the General Duty Clause. Thus, NPCA supports EPA's further clarification, retracting the provision that the SSMP must be implemented during periods of SSM, appropriately relying on the CAA's General Duty Clause as the applicable requirement for the minimization of emissions.

NPCA Supports Reliance on CAA Section 114(a) For Submission of SSMP

NRDC, and Sierra Club before them, proposed making the SSMP an applicable requirement, however, and to mandate that the SSMP be publicly available. For the reasons stated above, mandating the SSMP as an applicable requirement and making the plans available to the public may subject facilities to unwarranted enforcement actions, including citizen action suits under the CAA, not to mention costly and burdensome recordkeeping and reporting requirements. SSMP are often lengthy documents with large amounts of cross-referencing to other source specific documents and processes. In addition, they generally contain material that is deemed to be confidential business information (CBI). Furthermore, as discussed, they are revised appropriately in response to SSM events, as well as process modifications, operational changes and a facility's ongoing responsibility to use good air pollution control practices. Submission of the original and even subsequently revised SSMP, on the off-chance that some member of the public requested it, is unduly burdensome, costly, and places CBI information in jeopardy for no environmental gain. In fact, mandating that the plans and revisions are submitted to the permitting authority appears to undermine the Government Paperwork Elimination Act (GPEA),[3] which serves to protect stakeholders from regulations where there is insufficient justification for stringent and expensive provisions governing recordkeeping and reporting. Lastly, mandating public submission of SSMPs poses a security risk to facilities and provides a disincentive for sites to specify sensitive operational information in their plans. As SSMPs are not only road maps on how to shut-down a facility, they are also road maps to obstructing plans on corrective actions to address SSM events. Thus, in the hands of someone with wrongful intent, these plans pose a security risk that far outweighs any perceived benefit to making them public. Addressing the information request on a case-by-case basis, as Section 114(c) allows – providing that EPA or an authorized permitting authority can request information such as an SSMP, whereby that information is then accessible by the public –

provides the requisite access needed, while not further burdening facilities and diverting needed resources that could be used in compliance with the actual standards. Thus, NPCA supports EPA's removal of the provision in the final rule that requires a permitting authority to obtain an SSMP under certain conditions, denying NRDC's request to mandate unlimited access to SSMPs.

NPCA Supports Conforming Change to Start-Up and Shut-Down Recordkeeping Requirements

NPCA supports EPA's decision to correct the language of the General Provisions, relieving a facility from recordkeeping requirements for start-up and shut-down events, which do not exceed applicable standards. The inclusion in the current regulation of recordkeeping for these events, when reporting these events was already addressed in the final rule was clearly inadvertent and unnecessary, EPA appropriately corrected this problem. NPCA remains concerned, however, that the proposed language still requires this added reporting burden for malfunctions. This information is redundant given the requirements under 40 CFR 63.10(e)(3)(v) for continuous monitoring. This provision requires facilities to report malfunctions that result in an exceedance of emission limits. Thus, requiring a report of such under both provisions is duplicative and unnecessary.

NPCA appreciates the opportunity to submit these comments on the Proposed Rule. In advance, thank you for your consideration. If you have any questions or need further information, please do not hesitate contact me or Dave Darling at 202.462.6272.

Sincerely,

/s/ /s/

Alison A. Keane, Esq. David F. Darling, P.E.
Counsel, Government Affairs Director, Environmental Affairs

cc: Rick Colyer, EPA

** Sent electronically and in hard-copy **

[1] NPCA is a voluntary, non-profit industry association originally organized in 1888 and comprised today of over 400 member companies who manufacture consumer paint products and industrial coatings, and the raw materials used in their manufacture. NPCA membership companies collectively produce some 90% of the total dollar volume of architectural paints and industrial coatings produced in the United States. As the preeminent organization representing the paint and coatings industry in the United States, NPCA's primary role is to serve as ally and advocate on legislative, regulatory and judicial issues at the federal, state, and local levels.
[2] 70 Federal Register 43992 (July 29, 2005).
[3] Pub. L. No. 105-277, Title XVII (Oct. 21, 1998).