



TULANE ENVIRONMENTAL LAW CLINIC

September 12, 2005

VIA Electronic Mail

EPA Docket Center (Air Docket)
Attention E-Docket No. OAR-2004-0094
A-and-R-Docket@epa.gov
Environmental Protection Agency
Room B108, Mail Code 6102T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ref: 151-003

Re: Docket ID No. OAR-2004-0094: Comments on Behalf of St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade on Notice of Reconsideration and Proposed Amendments, National Emission Standards for Hazardous Air Pollutants: General Provisions (SSM Plans), 70 Fed. Reg. 43,992 (July 29, 2005)

To the EPA Docket Center (Air Docket):

St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade appreciate the opportunity to submit the following joint comments on EPA's Notice of Reconsideration and Proposed Amendments of the National Emission Standards for Hazardous Air Pollutants:

General Provisions, especially as those provisions relate to startup, shutdown, and malfunction ("SSM") plans. St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade also reserve the right to rely on comments submitted by any other person or entity in these proceedings. Members of St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade had expected to submit comments describing the frustration, fear, and potential health risks they experience due to malfunctions at the Chalmette and Murphy refineries in St. Bernard

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Parish, Louisiana. Both of those refineries experience frequent breakdowns, resulting in emissions of excessive amounts of hazardous air pollutants into the Chalmette neighborhood. As a result of Hurricane Katrina, however, undersigned counsel believes that those members will be unable to provide this information on or before September 12, 2005.

St. Bernard Citizens for Environmental Quality's goal is to reduce pollution and protect public health in St. Bernard Parish. The Louisiana Bucket Brigade is an environmental health and justice organization that works with the St. Bernard Citizens for Environmental Quality and other Louisiana communities that neighbor the state's oil refineries and chemical plants. Members of St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade live in Chalmette and suffer health risks from breathing air that Chalmette Refining has contaminated. Indeed, the Eastern District of Louisiana has determined that members of St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade have suffered legally cognizable injury from the Chalmette Refinery. St. Bernard Citizens for Environmental Quality, Inc. v. Chalmette Refining, L.L.C., 354 F. Supp. 2d 697, 702 (E.D. La. 2005).

St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade object to EPA's proposal to deny members of the public the right to review those portions of startup, shutdown, and malfunction plans that do not qualify as confidential business information. To support their objection, St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade note:

1. Members of the public have the right to review startup, shutdown, and malfunction plans. EPA admits that "an adequate SSM Plan must be developed consistent with the requirements of 40 C.F.R. § 63.6(e) and other 40 C.F.R. part 63 subparts that have SSM-related requirements." 70 Fed. Reg. at 43,993. The requirement to develop and maintain an

adequate startup, shutdown, and malfunction plan is therefore an “applicable requirement” under the Act. The public is entitled to permit conditions that “assure compliance with applicable requirements.” 42 U.S.C. § 7661c(a). The only way to assure compliance with the requirement that an adequate plan be developed and maintained is to require the facility to submit the plan to the regulatory authority and allow members of the public an opportunity to review the plan to ensure that it is adequate. An opportunity for public review is particularly important in light of EPA’s recognition that permitting authorities will not review all such plans. 70 Fed. Reg. at 43,994. Moreover, EPA admits that “determination of whether a source met its obligation during periods of SSM can be made in part by whether a source followed an adequate plan” and that regardless of whether a source is required to follow its plan, for periods of SSM “it still must report . . . whether the plan was followed.” 70 Fed. Reg. at 43,994. Denying public access to the plan, therefore, denies the public the information to determine whether the source is in compliance with applicable requirements. This is contrary to the purpose, letter and spirit of Title V and the Act’s provisions for citizen enforcement. Indeed, the Act’s legislative history stresses the need for clear evidence of compliance, accessible to the public. *See, e.g.*, S. Rep. No. 1196, 91st Cong. 2d Sess. 36-39, reprinted in NRDC v. Train, 510 F. 2d 692, 723 (D.C. Cir. 1975) (“the factual basis for enforcement of standards would be available at the time enforcement is sought . . . [and t]he information and other disclosure obligations required throughout the bill are important to the operation of this provision”).

2. EPA’s reliance on the burden to refinery operators of “untangling the [startup, shutdown, and malfunction] plans from operating procedures and CBI [confidential business information]” is without merit. First, if refinery operators cannot “untangle” their startup, shutdown, and malfunction plans from other procedures, they will not be able to quickly identify

and follow those plans in the event of a malfunction. Further, refinery operators must “untangle” their plans in any event because they must be prepared to respond to governmental requests for a plan. See 70 Fed. Reg. at 43,994 (“the Administrator (or an authorized permitting authority) may at any time require a facility owner or operator to submit a copy of an SSM plan”). Also, operators must make an untangled plan available for review and audit by governmental inspectors.

3. EPA’s reliance on the “significant paperwork burden that would be imposed on the permitting authority” is without merit. Permitting authorities could require that the plans be clearly marked and/or submitted in electronic (*e.g.*, “pdf”) format. A permitting authority that considered it a “significant burden” to keep track of such plans would not be competent to administer a Clean Air Act Title V program.

4. EPA’s reliance on its presumption that sources that have “an unusually high number of SSM events” will “be responsive to direct community requests without any governmental involvement at all” is unreasonable. EPA admits that “especially where a source has . . . an unusually high number of SSM events . . . public oversight of SSM plans could be useful to EPA, permitting authorities, and sources themselves.” 70 Fed. Reg. at 43,995. But rather than providing for such public access, EPA arbitrarily and capriciously assumes that such operators of unusually poorly run facilities (*i.e.*, facilities with “an unusually high number of SSM events”) will voluntarily provide the public with access to the plans.

5. People who share their neighborhoods with refineries (like members of St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade) bear a disproportionate share of the environmental burdens of industrialization. So that the rest of us may enjoy the benefits of relatively cheap energy, the refinery’s neighbors are asked to “shelter

in place” from industrial accidents, breathe air contaminated with carcinogenic chemicals, live with the fear of release of deadly chemicals such as hydrofluoric acid, and put up routinely with annoying and nauseating odors. In Chalmette, residents face the risk that their homes may be contaminated from oil spilled from the Murphy refinery in the aftermath of Hurricane Katrina. To would be outrageous for EPA to deny these people a right of access to the information that is necessary to determine whether refinery operators meet their planning obligations to minimize risks to the public from startups, shutdowns, and malfunctions.

For all of the foregoing reasons, EPA must require that startup, shutdown, and malfunction plans be accessible to the public. Thank you for the opportunity to submit these comments.

Respectfully Submitted By:

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* Due to Hurricane Katrina, these phone and fax numbers are temporarily out of service and mail sent to the Clinic address will not be accessible for some time. Adam Babich can be reached by cell phone at (504) 451-8863 or by e-mail at ababich@earthlink.net.