



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 7 2007

OFFICE OF  
AIR AND RADIATION

The Honorable John D. Dingell  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20015-6115

Dear Mr. Chairman:

Thank you for your letter of February 23, 2007, requesting information and analyses concerning a proposed rule (Proposed Rule) that would replace the Environmental Protection Agency's (EPA) policy commonly referred to as "Once In, Always In" (OIAI). This letter responds to the points raised in the body of your letter. Due to the detailed nature of the analyses requested, EPA requests additional time to respond to the questions presented in the attachment to your letter. We anticipate responding to the questions in the attachment by March 30, 2007.

I assure you that EPA does not believe that the Proposed Rule, if adopted, would either result in significant increases in emissions of hazardous air pollutants or adversely affect EPA's ability to ensure that companies comply with all applicable requirements for reducing their emissions of such pollutants. EPA remains committed to achieving and maintaining substantial reductions in emissions of hazardous air pollutants. EPA is also committed to reducing or eliminating unnecessary burdens that might otherwise be placed on companies.

Provided below is some background on the OIAI policy and our rationale for issuing the Proposed Rule. The Proposed Rule, issued on January 3, 2007, proposes to replace a policy for National Emission Standards for Hazardous Air Pollutants (NESHAP) that we instituted in 1995. EPA intended for this transitional policy to remain in effect only until the Agency could undertake and complete notice and comment rulemaking on the issues addressed by the policy. The policy was designed to address pressing questions being raised at the time, which concerned when, and for how long, a source would be subject to a major source NESHAP.

We issued the Proposed Rule based on more than ten years of our experience with the air toxics program and implementation of the OIAI policy. Application of the OIAI policy has led to inequities and inconsistent results. We provide two specific examples of this in the preamble to the Proposed Rule. The OIAI policy creates an uneven playing field, insofar as it treats similarly situated sources differently. Specifically, it allows a source to limit its potential to emit (PTE) hazardous air pollutants to below major source levels (i.e., 10 tons or more per year of any individual hazardous air pollutant or 25 tons or more per year of any combination of hazardous air pollutants) prior to the first substantive compliance date of a major source NESHAP in order to be classified as an area source. Sources can limit their potential to emit through a variety of

mechanisms, including installing and operating control equipment and obtaining limitations on potential emissions. Whatever mechanism is chosen, it must be legally and practically enforceable. Sources that successfully limit their potential to emit are not subject to major source requirements. By contrast, sources that reduce their potential to emit hazardous air pollutants emissions to below the major source thresholds at any point in time after the first substantive compliance date of a major source NESHAP will remain forever subject to that NESHAP, regardless of whether the source later reduces its actual or potential emissions to below the major source thresholds. Under both scenarios emissions are reduced below major source thresholds; the difference is only the date by which the reductions occurred.

In response to the specific points you raised in the body of your letter, adoption of the Proposed Rule would not hinder EPA's ability to ensure that companies are complying with all applicable air toxics requirements. While the nature of those requirements may change, their enforceability would not. Sources that are currently subject to major source NESHAP are required to comply with the requirements of the NESHAP by two different mechanisms. First, the NESHAP itself is a nationally applicable, independently enforceable requirement under the Clean Air Act. Second, the requirements of the NESHAP are incorporated into the source's title V operating permit and are also enforceable on that basis. In order to avail itself of the option to limit its potential to emit below the major source thresholds in lieu of complying with the requirements of an otherwise applicable major source NESHAP, a source must obtain and maintain a limit on its potential to emit hazardous air pollutants. The potential to emit limit must be enforceable as a legal and practical matter. To ensure that a limit is practically enforceable, the limit, among other things, must be accompanied by appropriate testing, monitoring, reporting, and recordkeeping requirements. A legally and practically enforceable potential to emit limit ensures that the source maintains its hazardous air pollutants emissions at the specified levels below the major source thresholds.

If we implement the approach in the Proposed Rule, sources that have reduced their emissions of hazardous air pollutants to below the major source thresholds through compliance with an applicable major source NESHAP could choose to obtain a legally and practically enforceable limit on their potential to emit that is below the major source thresholds, but above their current emission levels. Thus, we recognize that some sources may increase actual emissions above the level required under the major source NESHAP. In such instances, in order for the source to remain an area source, it must obtain and maintain a limit on its potential to emit. The source would then be subject to that potential to emit limit instead of the major source NESHAP.

In this context, it is important to understand that major source NESHAP are generally expressed in terms of percent emission reduction, emissions per unit production, concentration, etc., and not in terms of absolute emission levels. As a result, compliance with an applicable NESHAP may or may not reduce emissions of hazardous air pollutants to below the major source thresholds; that outcome is dependent on the initial level of hazardous air pollutant emissions from the source. However, even if emissions are reduced to below major source levels as a result of applying the NESHAP, there is nothing to prevent the source from expanding its operations and increasing emissions to above major source thresholds unless the source chooses to become an area source and limit its potential to emit. The PTE limitations that an area source

would take have the benefit of guaranteeing that emissions do not exceed major source thresholds as long as the limitations are in place.

We do not believe that such actual emission increases would be widespread for a number of reasons. First, we believe that many sources that currently have actual emissions below the major source thresholds as a result of complying with the requirements of an applicable major source NESHAP would, in response to the proposed rule, continue to operate their existing controls as they were designed to be operated and thereby maintain their actual emissions at their current levels. Given the capital expense of the controls and the way in which many of them work (i.e., as long as they are operating, they reduce emissions to their design capacity), it is reasonable to assume that many sources currently emitting below the major source thresholds to comply with the NESHAP would not increase their actual emissions. Second, the major source NESHAP for existing sources are often based on the performance of controls already being used by similar sources. In many instances, the controls at a source were installed prior to the compliance date of the major source NESHAP in order to meet other requirements of the Clean Air Act, such as New Source Performance Standards. Accordingly, the existing controls cannot be removed or operated in a less efficient manner because they are needed for compliance with other legal requirements. Emissions would, therefore, not increase at such sources.

As explained in the preamble, we believe there would be actual emission reductions resulting from sources that currently have emissions of hazardous air pollutants above the major source thresholds, but are nevertheless in compliance with an applicable NESHAP. A source that is currently emitting hazardous air pollutants at levels above the major source thresholds in compliance with a major source NESHAP would be required to reduce its hazardous air pollutants emissions to below major source thresholds to attain area source status, resulting in a net decrease in emissions of hazardous air pollutants at that facility. As discussed in more detail elsewhere, the reductions would be legally and practically enforceable and, therefore, retained.

Further, sources that may increase their actual emissions as a result of taking a limit on their potential to emit in lieu of complying with an otherwise applicable major source NESHAP won't necessarily be able to maintain the emission increase. Such sources would still be required to comply with any applicable area source NESHAP. By June 2009, we will have issued area source standards for 70 source categories, many of which are the same source categories for which we have already issued major source NESHAP.

You express concern in your letter that certain analyses you request were not completed prior to issuing the Proposed Rule. Comprehensive information on hazardous air pollutant sources is not available and we do not have information on what individual sources will do in response to the Proposed Rule. We, nevertheless, have substantial supporting information and policy justification for the Proposed Rule and are using the notice and comment process to ask for interested parties to submit other relevant information and data which will be taken into account as we formulate any subsequent final rule.

Finally, consistent with your request that we extend the public comment period on the Proposed Rule, on February 28, 2007, I signed a notice extending that comment period by 60 days to May 4, 2007. By the end of March, we intend to place in the docket answers to your questions, along with any associated analyses or other supporting information.

Again, thank you for your letter. If you have any further questions, please contact me, or your staff may call Josh Lewis, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-2095.

Sincerely,

A handwritten signature in black ink, appearing to read 'W L Wehrum', with a long horizontal flourish extending to the right.

William L. Wehrum  
Acting Assistant Administrator