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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

JOHN D. DINGELL, MICHIGAN
CHAIRMAN

May 3, 2007

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The Honorable Stephen L. Johnson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Dear Administrator Johnson:

Thank you for the Environmental Protection Agency's (EPA) March 30, 2007, response to my February 23, 2007, letter to you. My letter raised several questions about the emissions and enforcement consequences of your December 21, 2006, proposal to change the air toxics program. I am writing to seek clarification of several answers that failed to fully respond to my questions.

Under the current EPA air toxics policy adopted in 1995, sources are required to meet the applicable Maximum Achievable Control Technology (MACT) air toxics standard if, on the date that the MACT standard went into effect, the source emitted more than 10 tons of one air toxic or 25 tons of any combination of air toxics annually (the "10/25 ton threshold"). You proposed to change this so that sources that currently comply with MACT air toxic standards would have the option of getting out of all MACT requirements if their emissions are below the 10/25 ton threshold – even if the source is currently subject to a MACT standard that requires emissions below that threshold.

My February 23, 2007, letter to you asked questions and requested documents related to the emissions and enforcement consequences of the proposed change to EPA's 1995 air toxics policy. A number of your answers appear evasive or ambiguous. For example, Question 4 requested "all documents dated prior to issuance of the proposal that contain, relate to, or refer to analysis, calculations, or data regarding quantification of the potential reduction or increase in air toxic emissions that could result from this proposal." The Agency's response is ambiguous as to why it did not provide any responsive documents. The response could be interpreted to mean that there are no responsive documents because the Agency did not attempt to quantify the

emissions effect of its proposed rule prior to issuing it. Alternatively, the response could imply that EPA has responsive documents, but is not releasing them because EPA had previously determined that whatever attempt it made at quantifying emissions was not "suitable" for public release. EPA should either clarify that it does not have documents responsive to this request or it should produce the documents it has, regardless of whether EPA thinks they are "suitable" for release. With respect to this issue and others, I request that you answer the attached questions to clarify the record.

In addition, I continue to have concerns as to whether you are providing an appropriate opportunity for informed public comment on the proposed rule, including the Agency's rationale and factual basis. From the answers and documents the Agency provided, it appears that the Agency intended to use the public comment period as a fact-gathering exercise, in hopes of gathering factual or analytical support for its proposal. For example, with respect to quantification of the potential air toxic emission changes, the Agency's March 30 response (emphasis added) states:

At [the time we developed the proposal] we were not able to identify any information which we felt was suitable for use in performing a realistic and reliable analysis. We, therefore, decided to *use the proposed rule as a vehicle for obtaining information* that is suitable for that purpose. Any such information received in response to the proposal will be considered in taking final action on the proposed rule.

Additionally, in cautioning that one should not "overstate" the reasons why EPA expects that sources will not increase emissions, a staff draft "Background" section for a Question and Answer on this proposal states "We're asking for public comment and information *to test our theories.*"¹

Given the great extent to which EPA's proposal relied on "theories" and "beliefs" in search of factual support, I urge that the Agency issue a supplemental notice of proposed rulemaking that describes EPA's rationale in light of the facts that EPA gathered during the rulemaking process. The public should have an opportunity to understand and comment on EPA's understanding of the facts and how they affect the proposed rule and its rationale.

Pursuant to Rules X and XI of the Rules of the House of Representatives, the Committee on Energy and Commerce is conducting an inquiry into the Agency's December 21, 2006, proposal to change the air toxics program. In furtherance of the Committee's inquiry and

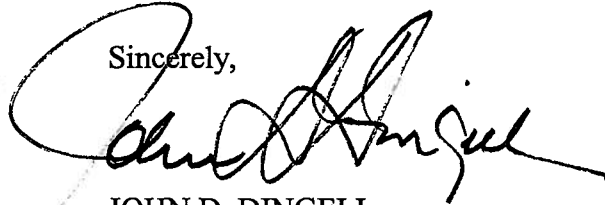
¹ See "Revision of 'Once In Always In Policy: Questions and Answers" (Jan. 29, 2007) (emphasis added) attached to January 30, 2007 e-mail from Rick Colyer to Michael Regan. See also "Once in Always in Q's and A's" (Dec. 13, 2006) (emphasis added) attached to Dec. 21, 2006 e-mail from Rick Colyer to Wendy Blake (explaining why EPA believed that sources would not increase emissions, but failing to provide factual support for those beliefs).

The Honorable Steven L. Johnson
Page 3

investigation, I request that the Agency respond to the attached questions and document requests no later than Friday, May 11, 2007.

Should you have any questions regarding this request, please contact me or have your staff contact Lorie Schmidt with the Committee on Energy and Commerce staff at (202) 225-2927.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Dingell", written over a large, stylized circular flourish.

JOHN D. DINGELL
CHAIRMAN

Enclosures

cc: Mr. Bill Wehrum, Acting Assistant Administrator
Office of Air and Radiation
Environmental Protection Agency

Mr. Granta Nakayama, Assistant Administrator
Office of Enforcement and Compliance Assurance
Environmental Protection Agency

The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

**Follow-up Questions for the Honorable Stephen L. Johnson
Administrator, Environmental Protection Agency**

These are follow-up questions to the questions accompanying the February 23, 2007, letter from Chairman John D. Dingell to Administrator Stephen L. Johnson, and to the responses provided as an attachment to the March 30, 2007, letter from Acting Assistant Administrator William L. Wehrum to Chairman Dingell. The question numbers below relate back to this previous set of questions and responses.

Question 2: The preamble to this proposal states that EPA does not believe the maximum potential increase in air toxic emissions will occur and provides a rationale. Please state how much of the potential decrease EPA believes will materialize if the proposal is finalized, and provide your rationale.

Response: As noted in the response to question 1.b., we are unable to provide a quantifiable nationwide HAP emission impact. We have estimated a potential impact for the SO₂ source category.

It is the EPA's best professional judgment, based on more than ten years of experience in implementing the air toxics program, that many sources that currently emit less than the 10/25 tpy major source threshold as a result of complying with an applicable MACT standard are not likely to increase emissions for the reasons provided in the preamble.

Follow-Up: Given that EPA's press release describes the proposal as a policy seeking reductions in air toxic emissions, it is surprising that EPA cannot quantify this potential reduction in emissions. EPA's responses refer back to the preamble explanation for why *increases are unlikely* does not answer the question as to why EPA believes that *reductions are likely*.

- (a) Does EPA believe that emission reductions are likely if this proposal were finalized?
- (b) If so, please explain why they are likely and how much of the potential reductions would likely occur. If you cannot answer this question quantitatively, please do so qualitatively. In particular, please explain precisely all the incentives this proposal would create for sources to reduce their emissions.

Question 4: Please provide all documents dated prior to issuance of the proposal that contain, relate to, or refer to analysis, calculations, or data regarding quantification of the potential reduction or increase in air toxic emissions that could result from this proposal.

Response: In developing the proposed rule, we tried to identify available information that would allow us to perform the types of analyses identified in your question. At that time we were not able to identify any information which we felt was suitable for use in performing a realistic and reliable analysis. We, therefore, decided to use the proposed rule as a vehicle for obtaining information that is suitable for that purpose. Any such information received in response to the proposal will be considered in taking final action on the proposed rule.

Follow-up: This answer is non-responsive and ambiguous. It could mean that EPA did not do any analysis or collect any information on potential changes to air toxics emissions prior to proposing the change to its air toxics program, and thus does not have any responsive documents. Alternatively, it could mean that EPA conducted some initial additional analysis or data collection and decided for some unknown reason that it was not "suitable" and decided not to make it public in the hope that EPA would get information more to its liking during the public comment period.

- (a) Prior to the date of the proposal, did EPA have any analysis, calculations or data regarding quantification of the potential reduction or increase in air toxic emissions that could result from this proposal?
- (b) If the answer to (a) is yes, please provide all documents dated prior to issuance of the proposal that contain, relate to, or refer to such analysis, calculations or data. Please provide these documents regardless of EPA's belief about the "suitability" of the analysis, calculations, data or emissions quantification. If the answer to (a) is yes and you have no responsive documents, please explain why you do not have any such documents.

Question 11: If the proposal were finalized and sources chose to avail themselves of the regulatory provisions of the rule and accept a Potential to Emit (PTE), please describe the Federal requirements for these sources:

[a., b. and c. omitted]

d. sources' Title V permitting obligations; and

Response: All title V permits require prompt reporting of deviations, reporting of required monitoring every 6 months, and an annual compliance certification associated with the PTE limitations.

Follow-Up: Unlike the response to Question 10.d., which clearly states that MACT regulations and standards applicable to the source would have to be included in its Title V permit, the response to 11.d is evasive. This response fails to state whether a source that chose to avail itself of the proposed rule change by accepting a PTE would still be subject to Title V and, if so, whether the PTE limit would have to be in the Title V permit.

- (i) Are there circumstances under which a source would not need a Title V permit if the source chose to avail itself of the proposed rule change by accepting a PTE limit? If so, please describe those circumstances.
- (ii) If a source chose to avail itself of the proposed rule change by accepting a PTE limit, under what circumstances would a source still need a Title V permit? If such a source did need a Title V permit, under what circumstances (if any) would the PTE limit not be required to be in its Title V permit?

Question e. citizens' right to bring enforcement actions against sources that are not complying with their PTE.

Response: Section 304 of the Clean Air Act provides citizens with the authority to commence civil action against any person who is alleged to have violated or to be in violation of an emission standard or limitation under section 112 of the Clean Air Act or an order issued by the Administrator or State with respect to such a standard or limitation. This authority would apply to violations of a MACT standard and of federally-enforceable PTE limitations.

Follow-Up: This response is peculiar in that it refers to "federally-enforceable" PTE, but the proposal does not appear to be limited to "federally-enforceable" PTEs. The response appears to be carefully worded to avoid addressing citizens' rights to bring enforcement actions when the PTE limit is not federally enforceable.

- (i) Is EPA's proposal limited so that only a source that takes a federally-enforceable PTE limit could avail itself of the proposal and get out of MACT?

- (ii) Even if that is the case under current regulations, is EPA anticipating or considering changing regulations in a way that would allow PTE limitations to be set in a way that is not federally-enforceable?
- (iii) If EPA were to allow PTE limitations to be set in a way that is not federally-enforceable, would the air toxic proposal allow sources to get out of MACT using a PTE that is not federally-enforceable?
- (iv) If EPA were to allow PTE limitations to be set in a way that is not federally-enforceable and it finalized this air toxics proposal in a way that allowed the use of those non-federally-enforceable limitations to get out of MACT, would citizens have the right under the Clean Air Act to enforce that PTE limitation?

Question: Please also state whether EPA would have the ability to bring an enforcement action against sources that are not complying with their PTE.

Response: The OIAI proposed rule is not intended to address the requirements for establishing PTE limits. Instead, it deals with the timing of when sources can take PTE limits in order to not be required to comply with the provisions of one or more MACT standards. As a result, the OIAI proposed rule has no impact on the source's requirements resulting from taking a PTE limit.

Current requirements related to PTE limits for HAP emissions are outlined, among other places, in the January 25, 1995 memorandum

Importantly, the concept of "enforceability" -- whether it be by a state or the EPA -- incorporates two separate fundamental elements that must be present in all limitations on a source's potential to emit. First, the limitation must be enforceable by a governmental entity, and not merely voluntary. . . . Second, limitations must be enforceable as a practical matter or "effective." . . . Over the years, EPA has issued numerous statements regarding elements of a limitation that is enforceable as a practical matter (e.g., effective).

EPA can enforce federally-enforceable PTE limits and MACT standards.

Follow-Up: This response provides a clear and concise answer with respect to EPA's enforcement authority for federally-enforceable PTE limits, but fails to provide the same with respect to non-federally-enforceable PTE limits.

- (i) Is EPA's proposal limited so that only a source that takes a federally-enforceable PTE limit could avail itself of the proposal and get out of MACT?
- (ii) Even if that is the case under current regulations, is EPA anticipating or considering changing regulations in a way that would allow PTE limitations to be set in a way that is not federally-enforceable?
- (iii) If EPA were to allow PTE limits to be set in a way that is not federally-enforceable, would the air toxic proposal allow sources to get out of MACT using a PTE that is not federally-enforceable?
- (iv) If EPA were to allow PTE limits to be set in a way that is not federally-enforceable and it finalized this air toxics proposal in a way that allowed the use of those non-federally-enforceable limitations to get out of MACT, would EPA have the right under the Clean Air Act to enforce that PTE limit?

Question 12: Please provide all documents (including those from regional offices, the Office of Enforcement and Compliance Assurance, the Office of General Counsel, or the Department of Justice) discussing, regarding, or relating to the potential effect of the proposed rule, if adopted, on:

- a. sources' recordkeeping, reporting, monitoring, or Title V obligations; or*
- b. on EPA's or citizens' ability to enforce air toxic requirements (including PTEs).*

Response: Please find attached a copy of the documents that we believe are responsive to your request.

Although a number of documents were attached, there was not one memorandum or set of comments on the proposal from a regional office, the Office of Enforcement and Compliance Assurance (OECA), the Office of General Counsel or the Department of Justice. Several of the documents, however, indicate that at least some of these offices had comments and that some of them were in writing.

For example, Rick Colyer wrote "We're dealing with numerous internal comments --OECA and regions, as you can guess" in a January 10, 2006, e-mail from Rick Colyer responding to an e-mail from Leslie Sue Ritts (LSRitts@HHLAW.com) wondering "what's happening with the once in MACT proposed rule?".

In addition, one of the documents EPA produced requesting responsive documents from the regions says that "OAQPS already has the regions' comments on the first 2 drafts of the proposal that was sent out in December 2005 and Feb 2006, so you don't need to worry about those." (March 14 e-mail to Carlton Nash et al. from Dave Campbell). A September 14, 2006, e-mail from William Nickerson to Rick Kolyer also references a memo from the Regions.

- (i) If EPA inadvertently neglected to produce responsive documents, please provide them now.
- (ii) Did regional offices or OECA provide any comments in writing on the OIAI air toxics proposal? If so, please provide the documents containing those comments and any documents that relate or refer to these comments. If the Agency no longer has these comments, please identify the author(s) and recipient(s) of any missing comments.
- (iii) Did regional offices or OECA write any memorandum or other documents "discussing, regarding, or relating to the potential effect of the proposed rule, if adopted, on sources' recordkeeping, reporting, monitoring, or Title V obligations; or on EPA's or citizens' ability to enforce air toxic requirements (including PTEs)? If so, please provide the memorandum or other documents and any documents that relate or refer to those documents.

From: William Nickerson/DC/USEPA/US
To: Rick Colyer/RTP/USEPA/US@EPA

Date: Thursday, September 14, 2006 04:27PM

Subject: Re: Once In Always In draft for review

History:  This message has been replied to.

Rick,

Thanks for the reminder. Sorry I'm a bit late. Feel free to call if you'd prefer to give me the rundown by phone.

First, some factual clarifications.

Sources only have to notify EPA of a change in their status, as opposed to getting approval for that change. Correct? Sources would get the approval for a change to minor source status from their permitting authority, right?

Have all MACT compliance deadlines passed?

If a major source takes a PTE limit and becomes a minor source, all major source requirements would cease to apply, correct? What monitoring or recordkeeping information would still be available for the source, assuming it did not become subject to an area source standard? What if it was also not subject to title V?

Other questions about the draft.

Back in April, the leaked memo from the Regions caused a bit of a stir. Have we made a point of addressing the substantive issues they raised? For example, in the 1995 memo we claimed the policy outlined then flowed "most naturally" from the language and structure of the statute. Now we claim that "there is nothing in the statute which compels the conclusion that a source cannot attain area source status after the first compliance date of a MACT standard". The Regions raised the question of whether we have an adequate rulemaking record to support that change. Do we? Assuming we are sued on this when it goes final, how confident are we in being able to prevail against a legal challenge?

The Regions also suggested that in their experience sources requesting synthetic minor limits are often given limits of 9 or 24 tpy. Yet the preamble claims sources are likely to adopt PTE limitations at or near their current levels of emissions. Do we disagree with the regional experience, or do we think that even if sources obtain permit limits of 9/24 tpy that their emissions will probably remain unchanged?

Does it matter how we describe the 1995 memo? Throughout the preamble, we refer to it as establishing policy, guidance, transitional policy, and transitional policy guidance. Are there implications for the Agency if we claim that an OAQPS memo established an Agency policy in 1995 that lasted 10 years? For legal defensibility, is there any significance in how that memo is described? Why don't we use consistent terms to describe it?

What impact would a change to minor source status have on the applicability of residual risk standards? Shouldn't we directly address that point in the preamble, similar to how we address the potential applicability of area source standards?

Bill

William Nickerson
Office of the Administrator
Office of Policy, Economics and Innovation
Regulatory Analysis and Policy Division
U.S. Environmental Protection Agency
Phone: (202) 566-0326
Fax: (202) 564-7322
nickerson.william@epa.gov
▼ Rick Colyer/RTP/USEPA/US

**Rick
Colyer/RTP/USEPA/US**

09/01/2006 10:48 AM

Charlie Garlow/DC/USEPA/US@EPA,
ToScott Throwe/DC/USEPA/US@EPA,
William Nickerson/DC/USEPA/US@EPA
Rob Brenner/DC/USEPA/US@EPA, Rick
Vetter/RTP/USEPA/US@EPA, Patricia
ccEmbrey/DC/USEPA/US@EPA, Wendy
Blake/DC/USEPA/US@EPA, Elaine
Manning/RTP/USEPA/US@EPA

SubjectOnce In Always In draft for review

Dear OIAI Work Group members,

Please find attached the most recent redraft of the Once In, Always In proposal. Sorry this has taken so long, but I have been working closely with OGC on numerous discussions in the preamble and we have gone through several iterations. We are at a point, though where we look to your feedback. My management wants to move quickly from here on out. The meat of the notice is not very long or complicated; most of the regulatory language is repetitive and addresses the General Provisions table contained in most of the part 63 subparts. Thus, we are seeking your comments from your office by Wed, 9/13 . Please do not pass this draft along to any other offices or regions at this point. You will notice a few internal notes within the draft most of which refer to the potential to emit proposal; we are still debating whether or not to tie the two together as far as timing, but it's really not relevant to your review. Please let me know if you have any questions.


Thanks
Rick

Attachments:

OIAIproposal_9-1-06.wpd



Rick Colyer/RTP/USEPA/US
01/11/2006 07:04 AM

To "Ritts, Leslie Sue" <LSRitts@HHLAW.com>
cc
bcc
Subject RE: Rick - what's happening with the once in MACT
proposed rule? 

Nothing for you to do at this point. I think things will pick up now that we're moving up the chain. The proposal won't specifically answer all the questions but as currently drafted will solve a lot of your issues. Of course the devil will be in the details. I suspect we'll end up preparing some kind of guidance as well at promulgation.

Rick
"Ritts, Leslie Sue" <LSRitts@HHLAW.com>



"Ritts, Leslie Sue"
<LSRitts@HHLAW.com>
01/10/2006 03:32 PM

To Rick Colyer/RTP/USEPA/US@EPA
cc
Subject RE: Rick - what's happening with the once in MACT
proposed rule?

I'm disappointed but not surprised. I am getting calls from MEK users that they have a bunch of area sources since the delisting. Do you want me to write any of this up for you or others. I gather also since MTBE is no longer being used as an oxygenate, a lot of loading terminals subject to that MACT are area sources as well.

Let me know.

From: Colyer.Rick@epamail.epa.gov [mailto:Colyer.Rick@epamail.epa.gov]
Sent: Tuesday, January 10, 2006 12:58 PM
To: Ritts, Leslie Sue
Subject: Re: Rick - what's happening with the once in MACT proposed rule?

Moving slowly. We're dealing with numerous internal comments--OECA and regions, as you can guess. We'll be briefing Steve Page this week.

Rick

-----"Ritts, Leslie Sue" <LSRitts@HHLAW.com> wrote: -----

To: Rick Colyer/RTP/USEPA/US@EPA
From: "Ritts, Leslie Sue" <LSRitts@HHLAW.com>
Date: 01/10/2006 11:45AM
Subject: Rick - what's happening with the once in MACT proposed rule?

Any information?

Thanks,
Leslie

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From: Rick Colyer/RTP/USEPA/US
To: Michael Regan/RTP/USEPA/US@EPA

Date: Tuesday, January 30, 2007 07:18AM
Subject: Fw: Re: OIAI QA -- long version

FYI. You weren't cc'ed on this one.

-----Forwarded by Rick Colyer/RTP/USEPA/US on 01/30/2007 07:18AM -----

To: Jenny Noonan/RTP/USEPA/US@EPA
From: Nancy Ketcham-Colwill/DC/USEPA/US
Date: 01/29/2007 08:49PM
cc: Lora Strine/DC/USEPA/US@EPA, Michael Ling/RTP/USEPA/US@EPA, Penny Lassiter/RTP/USEPA/US@EPA, Peter Tsirigotis/RTP/USEPA/US@EPA, Rick Colyer/RTP/USEPA/US@EPA, Fred Thompson/RTP/USEPA/US@EPA, Wendy Blake/DC/USEPA/US@EPA
Subject: Re: OIAI QA -- long version

You all did a tremendous job filling in all the blanks in short order. Wendy kindly reviewed this after hours. Thanks so much to everyone. Here's what went forward with a few additional edits by me. May this do it for OIAI!

Jenny Noonan/RTP/USEPA/US

**Jenny
Noonan/RTP/USEPA/US**

01/29/2007 04:55 PM

To Nancy Ketcham-Colwill/DC/USEPA/US
Lora Strine/DC/USEPA/US@EPA, Peter Tsirigotis/RTP/USEPA/US@EPA, Rick Colyer/RTP/USEPA/US@EPA, Michael
cc Ling/RTP/USEPA/US@EPA, Penny Lassiter/RTP/USEPA/US@EPA, Thompson.Fred@epamail.epa.gov@EPA
Subject OIAI QA -- long version

Nancy --

This piece incorporates Rick's responses to your edits from this weekend and the extra questions Stephanie asked.

Thanks,
Jenny

[attachment "oiai qa -- long version.doc" deleted by Nancy Ketcham-Colwill/DC/USEPA/US]

Jenny Noonan
US EPA
Office of Air Quality Planning and Standards
919/541-0193 (phone)
919/541-2464 (fax)

Attachments:

2-6-07 hrg.OIAI full Q&As.v3.doc

REVISION OF "ONCE IN, ALWAYS IN" POLICY

Question: Why is EPA proposing to relax its policy for whether major sources of toxic air pollutants can avoid complying with stringent technology-based standards?

Answer:

- The proposed change would create incentives for many sources to further reduce their emissions of toxic air pollutants.
- It would also "level the playing field" by allowing sources to reduce their emissions to below major source levels at any time and thereby avoid MACT and related requirements.

Background:

- The proposed change would create incentives for further emission reductions in the case of sources that have MACT-controlled emissions above major source threshold levels.
 - Sources that could reduce their potential to emit below major source threshold levels would no longer be required to meet major source MACT standards and related requirements, such as residual risk standards and the more stringent compliance assurance monitoring, and might also avoid the requirement to have a Clean Air Act operating permit (if the source does not need a permit for any other reason).
- Under the current policy, only sources that reduced their potential to emit below major source levels by the compliance date of the applicable MACT standard could avoid MACT requirements. Under the proposed policy, sources could achieve those reductions at any time and avoid MACT requirements from that time on.

Question: Wouldn't the proposed change also allow many sources to increase their emissions of toxic air pollutants?

Answer:

- The proposed rule would make it theoretically possible for some area sources to increase their emissions, but we anticipate that few sources would "backslide."
- We have several reasons for believing that the approach would not result in many facilities increasing their emissions:
 - Sources would likely continue to use the control devices they installed to meet MACT. It is generally unwise and difficult to "tweak" such devices in order to adjust emission levels.
 - Many facilities must maintain emission levels to meet other requirements under the CAA (e.g., SIP limits).
 - Sources would generally want to retain a "cushion" with respect to major source thresholds.
 - Many sources will be required to meet area source standards.
- We are soliciting public comment and information to help us better assess the net effect of the proposal.

Background:

- "Backsliding" could occur to the extent a source's MACT controls reduced its emissions (or potential to emit) to below major source threshold levels. Under the proposal, such a source could increase its emissions (or potential to emit) to just below those thresholds. For example, a source that with MACT controls has the potential to emit 15 tpy of a combination of HAPs could, under the proposed approach, raise its potential to emit (and thus its actual emissions) to 24 tons per year.
- Our reasons for anticipating that few sources would backslide apply to many but not all sources. For example, some MACT controls involve equipment or techniques that could be "dialed down" in terms of hours of operation or maintenance. Also, the Regions in their memo stated that sources typically don't build in much cushion when taking limits to keep them below major source levels. It is therefore important not to overstate the reasons that we expect backsliding to be the exception rather than the rule. We're asking for public comment and information to test our theories.

Question: Why doesn't this proposal include anti-backsliding provisions?

Answer:

- This is a proposal. We asked for comment about whether anti-backsliding provisions would be necessary and appropriate.
- We are soliciting public comment and information to help us better assess the net effect of the proposal.

Question: Your regional offices expressed strong concerns about the environmental impact of the proposal, but few changes were made to address those concerns. Were the Regions simply wrong?

Answer:

- The Regions commented on early drafts of the proposed rule. Their views were carefully considered, and a number of changes were made to address several of the enforcement issues they raised.
- It is not unusual for us to engage in vigorous internal debates in the course of policy development. I welcome the expression of diverse viewpoints. The exchange of ideas and views strengthens our regulatory process and products.
- The proposal is consistent with the CAA. The statute's definition of major source requires controls to be considered and is silent with regard to when a source must apply controls for purposes of determining major or area source status.
- We have asked for public comment and information on what the net emissions impact of the proposal would be.

Background:

- The Regions reviewed two early drafts of the proposed rule in keeping with EPA's usual process for providing internal review drafts to EPA offices and regions.

Question: Did the regions comment formally or informally on the version of the proposal that was published in the Federal Register?

Answer:

- EPA's regional offices had the opportunity to comment on two drafts of the proposal.
- While we did not send it to them a third time, we understood their comments on the earlier drafts.

Question: The Regions stated in their memo that there has been a disturbing trend towards cutting them out of regulatory and policy development, at least in the case of air issues. To reverse this trend, they asked for a process to be created to ensure their future involvement. In the case of this rule, they asked for the opportunity to discuss their comments with Headquarters. Where do things stand now?

Answer:

- The Regions were involved in the development of this proposal.
- In fact, the Regions reviewed and commented on 2 drafts of the proposal. We responded to many of their concerns. We discussed the comments with the Regional office coordinator.
- In some cases, we disagreed with the comments or were otherwise unable to fully address the comment where there was insufficient information.
- The current review process provides for Regional Office review whenever possible.
- We continue to involve the Regional offices in rule development unless time constraints (such as court-ordered dates or settlements) dictate otherwise.

Background:

- Regional Offices are an integral part in our standards development process.
- We routinely seek Regional Office input especially in Regions that contain sources to be regulated as well as other EPA headquarters offices with a stake in the outcome. This is and always has been a part of EPA culture.
- While there has been some disappointment expressed in the comment memos, we believe the “process” comment is really a manifestation with the policy issues that are not resolved to their satisfaction.
- For this proposal, we are changing an established policy, and some in the Regions simply do not agree with the change; hence the perceived tone in the comment memos.

Question: Are there any States that have requested a change in the OIAI policy? Is there anything in writing?

Answer:

- No, but the comment period on our proposal has not ended.
- We expect to learn more from states when they submit their comments on the proposal.

Question: Do we have a State saying that backsliding is a problem? Is there anything in writing?

Answer:

- No, but the comment period on our proposal has not ended.
- We expect to learn more from states when they submit their comments on the proposal.

Question: Did industry recommend this change?

Answer: We received several requests from industry to revisit the policy.

Question: Has anyone ever sued EPA over the original policy?

Answer: No.

Question: EPA relied on only a few pieces of anecdotal information and vague theories of what facilities would be more or less likely to do if the proposal is adopted. How is this an adequate basis for a proposal? Shouldn't EPA have issued an ANPR as a first step in determining whether a change was needed and if so, what its impact would be?

Answer:

- We received some information from industry illustrating how the OIAI policy could work against facilities wanting to further reduce their emissions.
- We did not attempt to quantify the potential emissions impact of the proposal, because the proposed provisions are optional, so we do not know how many or what types of sources would take advantage of them.

Background:

- Preparing credible analyses requires information and we are soliciting additional information from the public as part of this proposal.
- As of now, we do not have information of the types and numbers of sources that would avail themselves of the opportunity to decrease or increase emissions.
 - Developing an impact analysis would require us to use a database such as the National Emission Inventory, which while quite comprehensive, does not parse the information to the necessary degree for us to prepare a credible analysis.
 - In addition, we would have to make significant assumptions on which sources would or would not avail themselves of the OIAI policy change, and to what degree.
 - Despite the Region's comments, they offered no credible approaches for doing such an analysis. We concluded the better course of action was to seek comment on the impacts a substantive proposal.

Question: Aren't the alternative limits that facilities would take on to avoid MACT less enforceable than MACT standards? Would they be federally enforceable?

Answer:

- Under this proposal, sources seeking area source status would have to limit their potential to emit to area source levels. Under current CAA regulations, potential to emit limits must be federally enforceable.
- Federally enforceable potential to emit limits are as fully and effectively enforceable as MACT standards.

Background:

- Sources that take on alternative limits may be able to monitor less frequently or use alternative monitoring methods, or they may be subject to fewer or less frequent recordkeeping requirements. But they are still subject to limits on potential to emit, which by definition is federally enforceable under EPA's current regulations.
- Area sources are typically subject to less stringent monitoring, record keeping and reporting requirements, so to the extent a major source can become an area source, there's no reason to apply more stringent requirements to it.

Question: Wouldn't this rule get sources out of the health-based part of the air toxics program called residual risk?

Answer:

- It depends on the source and the standard applicable to it.
- Under the proposed change, major sources that became area sources subject to less stringent GACT standards (as opposed to MACT standards) would not be subject to residual risk standards.

Background:

- EPA has the discretion to subject areas sources to less stringent GACT standards.
- The Agency is not required to conduct a residual risk analysis for area sources not required to meet MACT standards.

Question: Why didn't the proposal consider toxicity along with tons of emissions as criteria for qualifying as an area source? Nine tons of HCl may not be cause for concern, but nine tons of chromium would, and a source with such emissions should certainly be subject to residual risk.

Answer:

- Under the OIAI policy, sources need not consider the relative toxicity of their HAPs in deciding whether and how to reduce their emissions to below major source thresholds. The proposed approach is no different in this regard.
- Major sources of higher toxicity HAP are very likely to be subject to area source standards if they become area sources.

Question: Hasn't EPA already proposed a rule that would allow major sources to escape MACT through pollution prevention measures? If that's right, wouldn't that rule on its own create incentives for significant emission reductions? What additional incentives for emission reductions would the proposed revision of the OIAI policy create?

Answer:

- The Pollution Prevention (P2) alternatives for MACT (proposed May 2003 and soon to be finalized) is targeted at "affected sources," not "major sources." It would allow an "affected source" to no longer be subject to an otherwise applicable MACT standard if it eliminates all HAP emissions.
- We think the proposed change to the OIAI policy would create far greater incentives to reduce emissions than the P2 option, as it is easier to reduce emissions than to eliminate emissions. Also, under the OIAI proposal, a source can reduce emission by any means, not just P2.
- We think the proposed change to the OIAI policy would result in greater emission reductions than emission increases for the reasons stated in a previous answer.

Background:

- Although the P2 proposal is in some ways similar to the proposed revision of the OIAI policy, there are differences:
 - The P2 option would apply to the "affected source" at a facility. The affected source is the identified emission point at a facility to which a MACT standard applies. A facility can have multiple affected sources subject to different MACT standards.
 - To determine whether or not a facility is a major or area source, one must consider the whole facility's emissions, not just the affected source emissions.
 - Under the P2 option, the source must completely eliminate HAP from the affected source using P2 measures. Doing so may or may not reduce emissions at the entire facility to area source levels, i.e., a major source could eliminate HAP emissions from one of several affected sources at the facility and still be a major source subject to major source requirements.

From: Rick Colyer/RTP/USEPA/US
To: Wendy Blake/DC/USEPA/US@EPA

Date: Thursday, December 21, 2006 08:49AM
Subject: Communication stuff

Wendy,

Here are the communication pieces. We mad edits to everything but the fact sheet. Let me know if the PTE definition answer is OK, and then I will send to our communications people.

Thanks
Rick

Attachments:

Fact Sheet -
OIAI 12.18.06.doc

Qs&As.doc

Brief -
ONAI 12.13.06.doc

CommStrat12-21-
06.doc

AMENDMENTS TO THE GENERAL PROVISIONS FOR AIR TOXICS STANDARDS

FACT SHEET

ACTION

- On December 21, 2006, the Environmental Protection Agency (EPA) proposed to amend the General Provisions to the air toxics standards. The proposed amendment would clarify how and when an industrial facility can switch its status from “major source” to “area source.”
- Major sources are those that have the potential to emit more than 10 tons per year of a single toxic air pollutant or 25 tons per year of any combination of toxic air pollutants. If sources emit less than these amounts, they are called area sources.
- The proposed amendment would allow a major source to become an area source at any time by limiting its potential to emit toxic air pollutants to below the major source thresholds. The limit would be enforced through a permit. The amendment would allow this change either before a standard is in place or after a standard is already in place.
- Once a major source becomes an areas source, it would no longer need to comply with the major source standards. The source would be required to comply with any area source standards for that industry.
- The amendment would replace EPA’s so-called “once in, always in” policy established in May, 1995. The once in always in policy stated that once a source was subject to a major source standard, it would always be subject, regardless of the source’s subsequent toxic air pollutant emissions.
- EPA is proposing this change to provide an incentive for industry to reduce emissions below major source threshold.
- EPA will accept comments for 60 days after the proposal is published in the Federal Register.

BACKGROUND

- Under the Clean Air Act, EPA is required to regulate sources of 187 listed toxic air pollutants. On July 16, 1992, EPA published a list of industrial source categories that emit one or more of these air toxics.
- EPA originally promulgated General Provisions for air toxics rules in 1994. The General Provisions contain general requirements regarding applicability, compliance, testing, monitoring, reporting, recordkeeping that apply to most or all of the Maximum Achievable Control Technology (MACT) Standards.

**Once in Always in
Q's and A's**

Q: What is the once in always in policy?

EPA's current policy is that if source is subject to a MACT standard when the standard goes into effect, then the source will always be subject to the requirements of that regulation.

Q: How will EPA prevent "backsliding"? If MACT requirements cause a facility to reduce emissions well below the major source threshold, what is keeping the facility from emitting more, right up to the major source level?

The permitting authority – not the facility – sets the level of emissions allowed. The permitting authority is most often the state, and they provide the facility with a permit.

We believe most states are unlikely to allow increases in current emissions. We also believe that facilities will not request the permit authority to increase emissions just below the threshold because:

- If an emission level is set too high and a source repeatedly exceeds the permitted level, that could cause if the permit being revoked;
- We believe that a permitting authority would impose more stringent requirements for monitoring, reporting, and recordkeeping the closer a source is to the major source threshold. We believe this would be a deterrent for a facility to seek an increase in emissions levels.
- In many cases the source will need to retain current emission reductions in order to comply with other standards that affect the facility, (e.g., standards to control volatile organic compounds), or to remain in certain programs (e.g., trading programs).
- Many sources who will take an emissions limit to get below major source status will have to meet area source standards. Currently EPA has issued area source standards for about 20 industries. Over the next three years EPA is required to issue 50 more.
- We believe most companies would want to avoid the negative publicity associated with increases in toxic air pollutants.

It is also important to not that it is often not technically possible to increase emissions incrementally. Many of the control devices required by MACT either operate effectively or they don't. They cannot be adjusted to achieve partial emissions.

Communication Strategy and Planning Check List

1. **Title of Action:** National Emission Standards for Hazardous Air Pollutants: General Provisions; Proposed Amendments

2. **Projected Date of Action:** Dec 2006

2a. What's Driving the Date (Regulatory, Court, Report Requirement, Event, etc.):

There is no deadline.

3. **Brief Description of Action Being Taken:**

These proposed amendments would establish when and how a major source of hazardous air pollutants (HAP) could become an area source and thus no longer subject to major source HAP requirements.

4. **Core/Key Messages for this Action:**

- ✓ The so-called "once in, always in" policy is being replaced
- ✓ A major source may become an area source at any time by any means
- ✓ The source must take potential to emit limitations

5. **Primary Audience(s) for Action Being Taken:**

- State, local and Tribal air pollution control agencies
- Industry representatives
- Environmental groups

6. **List All AAships, Offices or Regions Involved/Affected and Other Agencies (e.g. USDA, DOI) and How Coordination is Taking Place:**

Office of Air and Radiation,
Office of Air Quality Planning and Standards
Office of General Counsel
Office of Enforcement and Compliance Assurance
Office of Policy, Economics and Innovation
All Regional Offices

(All coordination will take place through review.)

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13. External Materials Planned for Announcement – (check all that apply and attach drafts or date when drafts will be ready) (Also, please see # 17-Hispanic Outreach, and #18-Public Liaison):

- Web info to be posted (must be done for every action; see Web check list below)
- Press Release or Weekly Advisory
- Media Advisory (invitation)
- Fact Sheet
- External Questions and Answers
- Quality assure data in line with Information Quality Guidelines
- Graphics (please list all materials)
- Updating of materials after the event including removing material from the Web
- Other (please list all materials)

14. Web Site Information for Action Being Announced (Also, please see # 17-Hispanic Outreach, and #18-Public Liaison):

- Rule and Fact Sheet will be posted under recent actions on the Office of Air and Radiation Policy and Guidance Website www.epa.gov/ttn/oarpg
- Provide URL for test site before posting
- Provide URL (alias if appropriate) for Web Site for action being taken
- Conduct product review for Web Site and materials (Enter on PROTRAC for regional or program review and oversight by OPA)
- Secure approval for Web materials from persons listed above
- Following the action/event, remove outdated materials from Web site

15. Notification and Distribution Planning to Interested Stakeholders – list who is responsible, what will be distributed, how notified or distributed and when it should be done for each group (this may be done in table format).

INTERNAL AND INTER-AGENCY NOTIFICATION			
Whom to Notify	When	Notifier	Action/Material
EPA Regional Offices	Upon Signature	Maura Cantor (202) 564-1931	Fact Sheet
OGC	“	“	“
OEI	“	“	“
OPPTS	“	“	“
OECA	“	“	“
OW	“	“	“
OPAR	“	“	“

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Environmental Groups	After Signature	OPA Amy Dewey (202) 564-7816	Fact Sheet
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