

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 63 and 65

[EPA-HQ-OAR-2004-0094; FRL-8301-2]

RIN 2060-AO40

**National Emission Standards for Hazardous Air Pollutants:
General Provisions: Notice of Decision Denying Petition
for Reconsideration**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision Denying Petition for
Reconsideration

SUMMARY: On April 20, 2006, EPA published final rules entitled, "National Emission Standards for Hazardous Air Pollutants: General Provisions." Following that final action, the Administrator received a petition for reconsideration from Coalition for a Safe Environment (CFASE). CFASE's petition for reconsideration can be found in the rulemaking docket under Docket ID No. EPA-HQ-OAR-2004-0094. After carefully considering the petition and information in the rulemaking docket, EPA is denying CFASE's petition for reconsideration.

ADDRESSES: The docket for EPA's denial of CFASE's petition for reconsideration is Docket ID No. EPA-HQ-OAR-2004-0094. All documents in the docket are listed on the

www.regulations.gov web site. Although listed in the index, some information may not be publicly available, i.e., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, Docket ID No. EPA-HQ-OAR-2004-0094, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Mr. Rick Colyer, U.S. EPA Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Program Design Group (D205-02), Research Triangle Park, NC 27711; telephone number (919) 541-5262; fax number (919) 541-5600; e-mail address: colyer.rick@epa.gov.

SUPPLEMENTARY INFORMATION:**I. General Information**

In addition to being available in the docket, an electronic copy of today's notice of EPA's decision denying CFASE's petition for reconsideration will also be available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of this notice will be posted on the TTN's policy and guidance page for newly promulgated rules at <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control.

Outline. The information presented in this preamble is organized as follows:

- I. General Information
- II. Background Information
- III. Basis for Denial of Reconsideration

II. Background Information

On April 20, 2006, EPA issued certain amendments to the 40 CFR parts 63 and 65 startup, shutdown, and malfunction (SSM) general provisions requirements affecting sources subject to the National Emission Standards for Hazardous Air Pollutants (NESHAP). On June 19, 2006, EarthJustice filed a petition for review challenging those amendments in the United States Court of Appeals for the District for Columbia Circuit on behalf of Environmental

Integrity Project, Friends of Hudson, Louisiana Environmental Action Network and Coalition for a Safe Environment (CFASE). On the same day, CFASE filed a petition for administrative reconsideration with EPA pursuant to section 307(d)(7)(B).

CFASE appears to base its petition for reconsideration on a claim that it did not receive adequate notice of certain changes EPA made in the final rule to the SSM recordkeeping and reporting requirements. EPA made changes to the recordkeeping and reporting requirements in the final rule to address comments on the proposed rule submitted by EarthJustice and Environmental Integrity Project. In comments on the proposed rule, EarthJustice and Environmental Integrity Project asserted that the proposed rule's elimination of the requirement that a source implement an SSM plan renders the SSM rule's general duty to minimize emissions vague and unenforceable and violates the Clean Air Act (CAA) Title V requirement that permits contain enforceable limits and standards and conditions necessary to assure compliance. (Docket number EPA-HQ-OAR-2004-0094, items 29 through 32.)

The General Provisions to 40 CFR part 63 require that "at all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and

maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty to minimize emissions requires that the owner or operator reduce emissions from the affected source to the greatest extent which is consistent with safety and good air pollution control practices."¹ In the proposed rule preamble, we explained that the reporting and recordkeeping requirements would allow the permitting authority and the public to determine compliance with the general duty clause. 70 FR at 43394 (July 29, 2005). However, in an effort to address the above-mentioned concerns raised by commenters, we reevaluated the recordkeeping and reporting requirements and made minor revisions to those requirements to clarify that the information required in SSM records and reports include a description of the "actions taken" at the facility during SSM events that involve an exceedance of the applicable standard.² The final rule preamble explained the revisions as follows:

¹ This petition denial describes the general duty to minimize emissions as it applies during SSM events and does not address the application of the general duty to minimize emissions at other times.

² EPA responded to the comments by revising 40 CFR 63.10(d)(5)(i) and (ii) to require that a description of

With these clarifications, any time there is an exceedance of an emission limit (or could have been in the case of malfunctions) and thus a possibility that the general duty requirement was violated, there will be a report filed that will describe what actions were taken to minimize emissions that will be available to the public.

Any member of the public could use the information in these reports to evaluate whether adequate steps were taken to meet the general duty requirement. This information is likely to be of as much if not more use in determining compliance with the general duty requirement than a facility's general SSM plan because the information will be specific to the particular SSM event that caused the exceedance.

71 FR 20448 (April 20, 2006).

In its petition, CFASE argues that EPA's reliance on the revised recordkeeping and reporting requirements to assure compliance with the general duty to minimize emissions is insufficient. CFASE further argues that the SSM rule violates the CAA section 504(a) requirement that title V permits contain "conditions as are necessary to assure compliance" with the general duty to minimize emissions and that reliance on reporting alone does not

actions taken to minimize emissions be included in SSM reports whether or not the SSM plan was followed. EPA also revised the recordkeeping requirement at 40 CFR 63.10(b)(2)(v) (the requirement to keep a record of "all information necessary to demonstrate conformance" with the SSM plan when actions taken during SSM events are consistent with the SSM plan) to require that such records include all actions taken during the SSM event to minimize emissions. 70 FR at 20448.

"assure compliance." CFASE also asserts that a vague generalized requirement such as the general duty to minimize emissions must be supplemented with permit conditions sufficient to explain how the requirement applies specifically to the permitted facility.

III. Basis for Denial of Reconsideration

EPA denies CFASE's petition for reconsideration. Section 307(d)(7)(B) of the CAA requires EPA to convene a proceeding for reconsideration based on objections that were not raised during the public comment period only if "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment...and if such objection is of central relevance to the outcome of the rule..."

Petitioner has failed to establish that the objections raised are based on grounds that "arose after the public comment period." As noted above, the preamble to the proposed rule clearly articulates EPA's reliance on recordkeeping and reporting to allow the permitting agency and the public to determine compliance with the general duty to minimize emissions. Specifically, the proposal provides:

These periodic and immediate SSM reports provide the permitting authority with adequate information to determine if the facility has SSM problems above and

beyond what might normally be expected. The types and frequency of SSM events will vary from source category to source category. Sources that report much higher number of SSM events than other sources within the same source category would be subject to higher scrutiny by the permitting authority, by EPA, and presumably by the public. Inspectors would examine the facility's records and its SSM plan to determine its adequacy and whether it conformed to the general duty clause. If not, the facility could be cited for violating the general duty clause and required to revise its plan to minimize emissions to the satisfaction of the permitting authority. As such, the reports identify potential problems that can be followed up with appropriate action.

70 FR at 43394.

Nor were CFASE's objections to the recordkeeping and reporting requirements "impracticable to raise" during the public comment period. Indeed, the arguments raised by CFASE in its petition for reconsideration are merely a variation of the arguments raised in its comments on the proposal. The revisions to regulatory language made in the final rule were made by EPA in direct response to the comments of EarthJustice and Environmental Integrity project concerning enforceability of the general duty to minimize emissions.

As explained in the preamble to the proposed and final rules (70 FR at 43994 and 71 FR at 20448-9), the recordkeeping and reporting requirements adequately assure compliance with the general duty to minimize emissions. As we explained in the preamble to the proposed rule, the

general duty clause is the applicable requirement under MACT standards for emission reductions during periods of SSM and "...is designed to recognize that technology-based standards may not always be met, as technology fails occasionally beyond the control of the owner or operator... If standards cannot be met during a period of SSM, then the owner or operator must take steps to minimize emissions to the extent practicable." 70 FR at 43993.

The exception to technology-based emission standards during SSM events, which applies when a source cannot meet the technology-based standard using all practicable steps to minimize emissions that are consistent with safety and good air pollution control practices, is appropriate and may be necessary to preserve the reasonableness of the underlying MACT standards. Essex Chemical Corporation v. EPA, 486 F.2d. 427, 432-33 (D.C. Cir 1973)(addressing exemption from New Source Performance Standards during SSM events); Portland Cement Association v. Ruckelshaus, 486 F.2d. 375, 398-99(D.C. Cir. 1973)(same); Marathon Oil v EPA, 564 F.2d.1253, 1272-73 (9th Cir. 1977)(discussing need to provide upset defense for technology-based effluent limits to account for technology failure).

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As discussed above and in the preamble to the proposed and final rules, the general duty to minimize emissions is sufficiently specific (71 FR 20448-49), and the SSM recordkeeping and reporting requirements are sufficient to assure compliance with the general duty clause. We note that in the Title V context, EPA's regulations specifically provide that recordkeeping requirements can adequately assure compliance. In particular, 40 CFR 70.6(a)(3)(i), which implements the statutory requirement of section 504(a) of the CAA, specifies that periodic testing and monitoring to determine compliance with an applicable requirement "may consist of recordkeeping designed to serve as monitoring." Moreover, 40 CFR 70.6(a)(3)(i)(b) (which requires title V permits to include monitoring and testing provisions when an underlying applicable requirement does not contain provisions) specifies that "[r]ecordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B)."

Dated: April 12, 2007.

Stephen L. Johnson,
Administrator.