BEFORE THE
U.S. ENVIRONMENTAL PROTECTION AGENCY

National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources; Final Rule; 40 C.F.R. Part 63, Subpart VVVVVV 74 Fed. Reg. 56008 (Oct. 29, 2009)	))))))	EPA-HQ-OAR-2008-0334

PETITION FOR RECONSIDERATION AND ADMINISTRATIVE STAY

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Background

On October 6, 2008, EPA proposed national emission standards for hazardous air pollutants for chemical manufacturing area sources (the "CMAS Rule"). 73 Fed. Reg. 58352. Because the proposed CMAS Rule would have imposed significant regulatory obligations on most of their member companies, the Society of Chemical Manufacturers & Affiliates (SOCMA) and the American Chemistry Council (ACC) filed extensive comments. Those comments outlined a variety of ways in which the impacts of the proposed regulations could be minimized while still achieving the emission reductions to be accomplished by the proposal and required by the Clean Air Act.

On October 29, 2009, EPA published the final CMAS rule. 74 Fed. Reg. 56008 (to be codified at 40 C.F.R. Part 63, Subpart VVVVVV). While the final rule helpfully adopted many of the suggestions of SOCMA and ACC, the final rule also included numerous provisions that were neither contained in the proposed rule nor a logical outgrowth of it. These provisions will unnecessarily compound the compliance burdens of the final rule. The final rule also failed to adopt several of the ameliorative (and legally permissible) features proposed in SOCMA's and ACC's comments.

Section 307(d)(7)(B) of the Clean Air Act provides that EPA "shall convene a proceeding for reconsideration of [a] rule" where, *inter alia*, the grounds for an objection to the rule arose after the period for public comment but within the period specified for judicial review. 42 U.S.C. § 7607(d)(7)(B). As demonstrated below, the final rule contains six objectionable features that meet this criterion, as they were presented to the public for the first time in the final rule. These features are of central relevance to the outcome of the rule. EPA therefore must grant this petition for reconsideration and propose those new features for public comment. (In two cases, EPA may only need to clarify its interpretation of the final rule.) In such a proposal, EPA can and should also seek comment on three additional features that SOCMA presented in its comments on the proposed rule.

EPA should also stay the effectiveness of the final rule by 90 days to save many facilities from needlessly having to file two initial notifications.

This petition is intended to describe the issues it discusses in sufficient detail that the Agency can understand the relief that SOCMA and ACC seek and the reasons therefore. Petitioners would be happy to provide additional information or explanation if EPA so desires.

Discussion

I. Six Aspects of the Final Rule Were Neither Contained In, Nor a Logical Outgrowth of, the Proposed Rule. These Aspects Are Procedurally Invalid Unless and Until (i) They Are Repromulgated After Notice and Comment, or (ii) EPA Clarifies Its Interpretation of the Final Rule

A. *The final rule's application of the Title V permit requirement to sources that voluntarily installed control equipment after enactment of the 1990 CAA Amendments and, as a result, became area sources* (§ 63.11494(e))

1. The proposed rule correctly concluded that Title V permitting is unnecessarily burdensome for CMAS sources

EPA originally proposed to exempt CMAS sources from the requirement to obtain a Title V permit, as EPA had authority to do, and as it had done in every prior area source rulemaking. EPA justified that decision with a full discussion of its four-factor test for assessing whether Title V permitting would be unnecessarily burdensome for an area source category:

1. *Whether Title V would result in significant improvements to the compliance requirements.* The proposed rule correctly noted that, for most CMAS-regulated facilities, the bulk of the rule's requirements consist of management practices, that the recordkeeping required by the CMAS rule "would assure compliance with the requirements of the proposed rule," that "[m]onitoring by means other than recordkeeping for the management practices is not practical or appropriate," and that "title V would not significantly improve th[e rule's] compliance requirements." 73 Fed. Reg. 58372.
2. *Whether Title V permitting would impose significant burdens on the area source category.* The proposal also accurately concluded that Title V permitting would impose significant burdens on regulated sources and that obtaining compliance assistance would be difficult. *Id.* at 58372-73. Both SOCMA's and ACC's comments highlighted this discussion, agreeing that, "[a]s EPA correctly noted in its preamble to the proposed rule, many of the facilities that would be affected are small entities which 'lack the technical resources that would be needed to comply with permitting requirements and the financial resources that would be needed to hire the necessary staff or outside consultants.'" SOCMA at 34 (quoting 73 Fed. Reg. 58372-73); ACC at 42.
3. *Whether the costs of Title V permitting would be justified.* For the foregoing reasons, EPA found that Title V permitting would not be justified for CMAS sources. *Id.* at 58373.

4. *Whether existing implementation and enforcement programs are sufficient to ensure compliance.* The Agency explained that existing mechanisms "are sufficient to assure compliance with these proposed standards without relying on title V permitting." *Id.*

Additionally, the proposal concluded that exemption from Title V for synthetic minor sources would not adversely affect public health, welfare or the environment, since Title V imposes no new substantive requirements, and since such adverse effects could, by contrast, be caused by shifting state permit resources from regulating major sources to regulating minor sources. *Id.*

2. The final rule erred in applying Title V to synthetic area sources that added control equipment

With no forewarning, the final rule did an about-face and imposed the Title V requirement on any source that added control equipment after enactment of the 1990 CAA Amendments and, as a result, became an area source. It based this dramatic reversal on an "oversight" – that EPA "did not consider" the number of facilities that are synthetic minors. 74 Fed. Reg. 56013. The final rule did not tie this fact to any of the Agency's four factors for assessing whether Title V permitting would be unnecessarily burdensome, but merely declared that, given the "uncontrolled" emissions from these *controlled* sources, "requiring additional public involvement and compliance assurance requirements through title V is important to ensure that these sources are maintaining their emissions at the area source level. . . ." *Id.* at 56014.

SOCMA and ACC submit that the Agency's initial proposed analysis was rational and supported by substantial evidence, and that its final analysis is neither:

- Not only was the approach that EPA finally adopted not contained in the proposal, it was based on a consideration that the Agency completely omitted from that analysis.

- On the significant burden factor (#2), the final rule opines that many of the sources that added control equipment to become synthetic area sources "are large facilities with comprehensive compliance programs in place" and "are generally larger and more sophisticated than the natural area sources and sources that took operational limits to become area sources." 74 Fed. Reg. 56014. The Agency never attempts to reconcile this statement with its earlier finding that "many of the facilities that would be affected by this proposed rule are small entities [that] lack the technical resources that would be needed to comply with permitting requirements and the financial resources that would be needed to hire the necessary staff or outside consultants." 73 Fed. Reg. 58372-73.

SOCMA and ACC maintain that EPA cannot reconcile these positions because the earlier finding was correct. Over 87% of SOCMA members meet the applicable small business size standard established by the SBA, with nearly half (47%) grossing less than $10 million in annual revenues and about one third (31%) earning less than $4 million per year. Approximately 45% of ACC's members are also small businesses, and the subset of ACC's membership owning CMAS facilities is also significant. We therefore dispute the assertion that facilities that have added control equipment to become synthetic area sources are "generally larger and more sophisticated."

- On the sufficiency of implementation and enforcement programs factor (#4), the final rule utterly fails to recognize that, in order for a facility to be treated as a synthetic minor due to the installation of control equipment, the obligation to use that equipment must be federally-enforceable. *See* 40 C.F.R. § 63.2 (definition of "potential to emit"). Such sources therefore have a legal duty to comply with their emissions limitations, which are enforceable by EPA *and citizens. Id.* (definition of "federally enforceable"). In order to have been approved by EPA, a state operating permit program that imposes a federally enforceable requirement to use control equipment must provide the public with notice and an opportunity to comment on draft permits, *id.* (definition of "federally enforceable," ¶ (6)(v)), and must also provide for emissions reporting and public availability of reported information, *id.* (definition of "federally enforceable," ¶ (6)(i)); *see also* 40 C.F.R. §§ 51.211, 51.230(f). The final rule's rationale is also contrary to the teaching of *Alabama Power Co. v. EPA*, which held that, for determining a source's potential to emit, EPA must take into account not only its design capacity, but also the "anticipated functioning of the air pollution control equipment." 636 F.2d 323, 353 (D.C. Cir. 1979). Thus, for regulatory purposes, it should not matter whether a source is a "natural" area source or whether it attained that status through operational limits or the installation of add-on controls.

- Just this past December, EPA twice determined that "State-delegated programs are sufficient to assure compliance with," and that "EPA retains authority to enforce," two other area source rules: one for asphalt processing/asphalt roofing manufacturing, and another for paint and allied products manufacturing. *See* 74 Fed. Reg. 63253 (Dec. 2, 2009) and 63520 (Dec. 3, 2009), respectively. In both final rules, EPA also found that "States and EPA often conduct voluntary compliance assistance, outreach, and education programs to assist sources and that these additional programs will supplement and enhance the success of compliance with this NESHAP." *Id.* at 63253 and 63520. EPA also "dispute[d] . . . assertions that it is more difficult for citizens to enforce the NESHAP absent a title V permit." *Id.* at 63253 and 63250. These statements are all equally, if not more, true of CMAS-regulated synthetic minor sources.

Title V permit obligations (particularly modification requirements) will impose substantial transactional and compliance costs on covered CMPUs. Potentially more important, they will limit the speed and flexibility with which those units can respond to market opportunities – a major issue for SOCMA members, who primarily operate batch and specialty businesses with diverse and rapidly-changing product mixes.

Based on the foregoing, ACC and SOCMA believe EPA should propose eliminating the Title V requirement for synthetic minor sources. At a minimum, if it is still EPA's position that certain area sources should be treated differently than others and subjected to Title V permitting, EPA must propose that approach and seek comments on its practicability, feasibility, and burdens. Only then will EPA have the benefit of receiving comments from the regulated community, states, and other stakeholders on the significant negative impact Title V permitting will place on these area sources' ability to conduct business and remain competitive. We believe that operational flexibility will be severely hampered by Title V permitting, with quite likely no environmental benefit. Based on the Agency's treatment of this issue in the final rule, it is clear that EPA has not fully considered all the ramifications of subjecting controlled synthetic minor chemical manufacturing area sources to the Title V permitting program. Only through notice and comment can EPA be adequately informed of these ramifications and able to consider them before making a final decision on whether these area sources should be subject to the Title V permitting program.

B. *The final rule's requirement that sources subject to CMAS and some other overlapping provisions comply either (i) independently with each or (ii) with the most stringent requirements of each* (§ 63.11500)

The proposed rule did not address the circumstance of a CMAS-regulated CMPU also being subject to other rules governing the same air emissions, even though, as ACC noted in its comments on the proposed rule, the Information Collection Request (ICR) that EPA submitted to OMB for this rule recognized that some CMAS facilities will also be subject to various NSPS and to 40 C.F.R. Parts 260 – 270. ACC argued that the proposed rule did not adequately address all of the overlap provisions identified in the ICR and urged EPA to minimize any burdens associated with overlapping provisions. ACC also commented on specific overlaps. ACC at 42-43.

SOCMA's comments pointed out that some of its members' facilities had processes that would be regulated under the CMAS rule and that used, as control devices, combustion devices subject to the RCRA rules applicable to boilers and industrial furnaces. (Even more commonly, SOCMA-member facility CMPUs that are subject to the CMAS rule are subject to RCRA Subpart CC or to NSPS rules.) SOCMA's comments urged EPA to clarify that the CMAS rule would impose no additional requirements on them, since they are already subject to effective, federally-enforceable controls. Pp. 21-22. SOCMA's comments also urged EPA to state that a facility subject to the CMAS rule and any other applicable area source rule could opt

to comply with either one. Pp. 28-29. As the comments noted, EPA has taken these approaches in many other rules -- for example, the MON. *See* 40 C.F.R. § 63.2535.

The final rule instead required CMPUs subject to the CMAS rule and another federal air rule either to comply with both rules or, at best, to comply with the most stringent requirements of each rule, on a requirement-by-requirement basis. This requirement is unprecedented, burdensome and highly problematic. Obviously, complying in every respect with two overlapping rules addressing the same equipment and emissions is bound to involve substantial duplication and wasted effort. In some cases, it may not even be possible, due to conflicts between the two rules.

The "most stringent" option is little better. First, many applicable air requirements are expressed in terminology or measurement periods that do not match precisely with CMAS, so that there can be substantial questions about how to match up requirements and compare their stringency. For example, would quarterly NSPS reporting supersede semiannual CMAS reporting? Second, each source will remain at risk that EPA or a delegated state will subsequently announce its disagreement with the source's determinations. Finally, but equally important, the sheer challenge of constructing the matrix of applicable requirements and determining which is more stringent will be beyond the staff or budgetary resources of many area sources, effectively eliminating the option, unattractive as it may be.

For these reasons, EPA should propose eliminating this requirement, or at least seek comments on it, so that regulated sources can explain how compliance with it is simply not possible in many cases, because of the incommensurability of some rules with the CMAS rule. These comments would also explain how hugely burdensome the new requirement is and how it is unnecessary.

C. *The final rule's requirement that LDAR inspection include "direct and proximal (thorough) inspection of all areas of potential leak within the CMPU"* (§ 63.11495(a)(3))

EPA proposed that CMAS area sources conduct an audio/visual/olfactory (AVO) equipment leak program that included certain requirements but did not address how close a person conducting an LDAR inspection would need to get to the relevant equipment. ACC submitted a number of comments on these proposed LDAR requirements, including a request that EPA clarify that the required visual inspections may be done from a distance when equipment is either inaccessible or unsafe for close visual inspection. P. 72.

The final rule, however, contained the surprise phrase quoted above, which EPA has not included in any other LDAR requirements, and which EPA has stated informally could mean a requirement to construct scaffolding so that inspectors could get up next to pipes travelling high above the ground. EPA did not explain in the final rule why this language was included or how it should be interpreted, except to say in the

Response to Comments Document that inspection procedures should be "safe and otherwise appropriate for the equipment." P. 7-1.

As EPA knows, in a number of rules applicable to chemical manufacturing, the Agency has included provisions exempting areas that are "difficult" to inspect or monitor, or "unsafe" to inspect or monitor, from regular inspection requirements. *See, e.g,* NSPS Subpart VV, 40 C.F.R. § 60.486(f)(1) and (2). Similar exemptions were not included in the final CMAS rule, only the requirement that inspections must be "direct and proximal," without any regard to safety or difficulty of access. For these reasons, ACC and SOCMA believe EPA should propose eliminating this requirement, or at least seek comments on it, so that the regulated community can explain how dangerous, infeasible and cost-ineffective it is.

D. *The final rule's requirement that process vessels in HAP service "be equipped with a cover or lid that must be in place at all times when the vessel contains HAP, except for material addition and sampling"* (§ 63.11495(a)(1))

With respect to batch, continuous, and metal HAP process vents, the proposed rule said in each case that

> all process equipment in which organic HAP is used to process material [sic] must be covered when in use, and closure mechanisms on other openings and access points in process equipment must be in the closed position during operation, except when operator access is necessary.

73 Fed. Reg. 58377 (proposed § 63.11495(a), (b), (c)). ACC's comments on this issue explained that:

- While covering or enclosing certain types of equipment may be common in pharmaceutical manufacturing, process equipment in the chemical industry differs substantially in design, size, placement, etc. from that found in the pharmaceutical industry;
- Some process equipment in the chemical industry is allowed to have atmospheric vents open for safety reasons, and because emissions are low and any potential controls are very expensive; and
- If EPA finalizes this provision it must address the functionality of openings and safety concerns for process equipment used in chemical manufacturing.

ACC also informed EPA that a specific round of checks of "openings" is not a common practice in the chemical industry and does not reflect generally available control technology (GACT). Pp. 31-34.

The final rule adopted the much more stringent language quoted in italics above, without explanation. We are very concerned that it does not appear to allow openings for any type of maintenance, even after the process is shut down and only

trace levels of HAPs are present. ACC and SOCMA believe EPA should propose reverting to the prior language, or at least seek comments on the current approach, so that impacted sources can explain how compliance with this requirement as written is impossible, due to safety issues and the needs to take material out of vessels and conduct maintenance, among other things.

E. *The final rule's apparent requirement that LDAR inspections occur while equipment is in HAP service* (§ 63.11495(a)(3))

The proposed rule's LDAR requirements spoke simply of "an affected source" and "process equipment," and said such sources "must conduct inspections at least quarterly." 73 Fed. Reg. 58377 (proposed § 63.11495(a)-(d)). Neither SOCMA nor ACC commented specifically on this language because it was reasonable. The preamble to the final rule says "[t]he proposed inspections for equipment leaks are included without change in the final management practice requirements," 74 Fed. Reg. 56022, but the text of the final rule can be read to imply that the equipment must be in HAP service when the inspection is conducted, *see* 40 C.F.R. § 63.11495(a)(3), and EPA staff have informally confirmed that interpretation. This is especially problematic for batch processors, who may only operate equipment in HAP service for very short periods of time. It could be highly difficult for these companies to accomplish the required inspections during those narrow windows of time, especially since many of their facilities have limited operating personnel. If this was not EPA's intent, ACC and SOCMA would welcome clarification. Otherwise, EPA should propose reverting to the prior language, or alternatively propose language allowing quarterly LDAR inspections to occur whenever the equipment is in VOC service, not just HAP service.

F. *The role of the concept of "family of materials" in distinguishing between CMPUs* (§ 63.11494(b))

The application of the final rule on a CMPU basis was very helpful overall, but some residual ambiguities have been created by importing that concept to this rule. The definition of "CMPU," apparently modeled on the MON, speaks of "a process that produces a material or family of materials." *See* 40 C.F.R. § 63.11494(b); *cf. id.* § 63.2435(b). The "family of materials" concept does not present problems in the MON rule. It does, however, in the CMAS rule, since that rule includes processes that would not be covered by the MON if the sources were major. Thus, it often can be very difficult under the CMAS rule to determine what constitutes a family of materials.

More important, it is unclear what relevance the "family of materials" concept even has to the CMAS rule. In operation, it appears that the only function of the term is to sweep within the scope of a CMAS-regulated CMPU equipment that (i) is used only to process non-Table 1 HAP products, but (ii) is connected to other equipment that also processes Table 1 HAPs in making other products. Since the scope of the CMAS

rule is limited to Table 1 HAPs, SOCMA and ACC believe there is no policy justification for applying the CMAS rule this broadly.

Based on informal conversations with EPA staff, it is unclear whether EPA officially takes the view that the "family of materials" concept requires multiple overlapping configurations of equipment used to make multiple products to be the same CMPU if one product contains a Table 1 HAP above the applicable threshold and the other products, though they do not contain a Table 1 HAP, are of the same family of materials. The use of the phrase "a specific product" in footnote 4 of the final rule (74 Fed. Reg. 56008-09), and the example used there, would suggest not. SOCMA would like EPA to publish an interpretation that the "family of materials" concept does not operate in this rule to draw into regulation equipment that is not used to process a Table 1 HAP. If EPA determines that it cannot do so under the current language of the rule, SOCMA would like EPA to propose, and seek comments on, eliminating the phrase "or a family of materials" from the rule text.

II. A New Proposal Should Also Seek Comments on Three Approaches That Would Greatly Alleviate the Burdens of the Final Rule and Still Enable EPA to Meet Its Area Source Regulatory Obligations

A. *An across-the-board "de minimis" exemption*

Both ACC's and SOCMA's comments on the proposed rule argued strongly for EPA to establish a minimum threshold below which the CMAS rule would not apply to a source. Pp. 20-21 and 10-13, respectively. SOCMA's proposed threshold was based on either (i) 2,000 lb/yr actual (controlled) total Table 1 HAP emissions facility-wide or (ii) 25,000 lb/yr facility-wide manufacture or process of total Table 1 HAPs. ACC advocated an exemption for sources emitting less than 50 lb/yr total Table 1 HAP. ACC's comments also included legal support for EPA to establish a de minimis threshold. SOCMA submitted a lengthy memo to EPA (attached) explaining how EPA has the legal discretion to establish such a de minimis exemption.

The final rule did not include this exemption, stating in the preamble that "we do not believe we can satisfy our requirement to regulate sources representing 90 percent of the emissions of the chemical manufacturing urban HAP unless we subject all sources that emit those HAP to regulation in this rule." 74 Fed. Reg. 56017. SOCMA and ACC urge EPA to reconsider this issue and to propose a de minimis exemption so that commenters can explain how EPA could meet its statutory obligation even with a de minimis exemption for CMAS sources.

B. *SOCMA's proposed interpretation of Section 112(c)(7)'s definition of "research or laboratory facilities" to include commercial development activities*

In its comments, SOCMA explained how the statutory definition of "research or laboratory facilities" could and should be interpreted to encompass commercial

development and optimization activities that use the same equipment and operating conditions as conventionally understood research labs. P. 35.

The preamble to the final rule contained no discussion of SOCMA's proposal. The Response to Comments Document did note SOCMA's proposal, as well as SOCMA's request that the rule not apply to R&D equipment that only uses Table 1 HAPs for production activities, but it only responded to the latter comment (fortunately, positively). *See* p. 3-11.

SOCMA is concerned that, as a result, the final rule will pose very substantial compliance challenges to many SOCMA member companies that engage in commercial development for customers such as major pharmaceutical companies. These members conduct this development work using the same equipment and operating conditions that are commonly used in laboratories and research (e.g., use of glassware, operation under open hoods). These activities generate no more emissions than comparable research would. Applying the CMAS rule to them would be extremely difficult.

To alleviate these serious challenges, SOCMA again urges EPA to publish an interpretation of Section 112(c)(7) for purposes of the CMAS rule that encompasses any activities conducted by a source using the same equipment and operating conditions that "research" or "laboratory" activities would use.

C. *A pollution prevention alternative*

SOCMA's comments urged EPA to give facilities credit for recent pollution prevention activities, along the lines of the MON (specifically, 40 C.F.R. § 63.2495), the Pharma MACT, and similar rules. The Response to Comments Document says that EPA declined to do so because (i) "we do not believe that such an alternative would be of interest to many area sources," (ii) "it would not be a productive use of EPA resources," (iii) "we do not have the detailed emission point-specific emissions information needed to establish a HAP consumption reduction requirement that will achieve emission reductions at least equivalent to GACT," and (iv) the court-ordered deadline did not give EPA time to develop options. P. 4-8.

Now that the fourth point is irrelevant, SOCMA urges EPA to propose a P2 alternative and to seek comments on the first and third points above. SOCMA believes there would be broad interest in the alternative and that facilities would be willing to supply the emissions data necessary for EPA to specify requirements like those spelled out in the MON.

III. EPA Should Stay the Effectiveness of the CMAS Rule for 90 Days

Clean Air Act Section 307(d)(7)(B) authorizes EPA to stay the effectiveness of a rule by up to three months while it reconsiders that rule. 42 U.S.C. § 7607(d)(7)(B). Currently, a CMAS-regulated source is obligated by the Part 63 General Provisions to

file an Initial Notification with EPA or its delegated state within 120 days of the effective date of the final rule; i.e., by February 26. 40 C.F.R. § 63.9(b). Such a notification must contain, *inter alia*, "a description of the nature, size, design, and method of operation of the source and an identification of the types of emissions points subject to the relevant standard . . . ." *Id.* § 63.9(b)(2)(iv). However, if EPA grants the relief sought in either Part I.B or I.F above, the universe of sources and types of emissions points covered by the rule could change. (This could occur if EPA provided either (i) that the CMAS rule does not apply when another comparable rule applies; or (ii) that the family of materials concept is not relevant to the definition of a CMPU.) Notably, the latter issue is one that could be resolved by a new interpretation that does not require notice and comment. A large number of currently regulated sources could be affected by either of these two changes. It would promote efficiency and save private and government resources if EPA were to stay the effectiveness of the final rule for 90 days and, within that period, make a determination regarding these two issues. Under this approach, many affected sources could be spared from having to file two initial notifications.

Conclusion

For the reasons explained above, EPA should grant this petition, stay the effective date of the final CMAS rule for 90 days, and issue a new proposed rule proposing or seeking comment on the aspects of the rule discussed above.