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www.regulations.gov
EPA–HQ–OAR–2023–0330
U.S. Environmental Protection Agency
Office of Air Quality Planning & Standards
D243–02, 109 T.W.
Alexander Drive, P.O. Box 12055
Research Triangle Park
North Carolina 27711
Attn: topham.nathan@epa.gov

RE: Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act: Proposed Rule; 88 Fed. Reg. 66,336 (Sept. 27, 2023).

Dear Mr. Topham:

Introduction - The Flexible Packaging Association (FPA) is respectfully submitting comments on EPA's proposed reconsideration of the "Major MACT to Area Source (MM2A)" regulation.[1] FPA is a national trade association, established in 1950, comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials to manufacture bags, pouches, labels, liners, wraps, rollstock, and tamper-evident packaging for food and medicine. Flexible packaging, a $42.9 billion industry, employs roughly 85,000 people in the United States and is the second largest and fastest growing segment of the U.S. packaging market.

Background - The MM2A rulemaking,[2] codifying EPA's 2018 MM2A Policy,[3] reversed the agency's 1995 "Once In/Always In (OIAI)" Policy,[4] which barred a major source of "hazardous air pollutants (HAPs)" from becoming an area source after the first substantive compliance date of an applicable National Emission Standard for Hazardous Air Pollutants ("NESHAP, a/k/a "MACT" [5] standard). This proposed rulemaking properly confirms, as FPA has argued since 1995, that the Clean Air Act (CAA or Act) does not place a time limit on reclassification, and we

[1] The EPA granted the Jan. 2021 petition of the Natural Resources Defense Council (NRDC) and other environmental groups to reconsider the rule ND THE 2018 MM2A Policy, EPA-HQ-OAR-2019-0282-0659_attachment_2.pdf, which also are pending legal challenges by NRDC and others in the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit"), *sub nom*. *California Communities Against Air Toxics v. EPA, D.C. Cir. # 21-1024*.
[2] 85 Fed. Reg. 73,854 (Nov. 19, 2020)/
[3] Memorandum: Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act (pdf)
[4] J. Seitz, Dir., EPA OAQPS, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act'' (Jan. 25, 1995).
[5] "MACT" standards are based under CAA Section 112(d)(4) on "maximum achievable control technology."

applaud EPA for not reopening that discussion. 88 Fed. Reg. 66,343. FPA's members long-objected to EPA's 1995 Once-In/-Always-In," Policy because we believed it to be inconsistent with CAA Sections 112(a)(1) and (a)(2), it was not adopted pursuant to a rulemaking, although it imposed significant economic and legal burdens on manufacturing sources. FPA also opposed the Once-In/-Always-In," Policy because it was inconsistent with incentives in the CAA to reduce air emissions.

FPA's GENERAL COMMENTS

The Proposed Rule - In the Notice of Proposed Reconsideration/Rulemaking (NPRM or Notice)," the agency proposes to require "safeguards" to ensure that reclassified sources cannot increase their emissions as a result of the reclassification, which appears to mean that emissions will be frozen below the CAA 10/25 ton per year thresholds that Congress used to define a "major source of HAP," in CAA Section 112(a)(1), at the levels that were achieved by compliance with a MACT standard. EPA also proposes to restore other safeguards, including the requirement for these emission limits to be "federally enforceable," so they can be enforced by the EPA and the public. *Id*. at 66,342. The agency also seeks public comment on "Subpart E changes" to the proposed rule, seemingly requiring states to acquire delegation under Clean Air Act 112(l) in order to approve or provide federal enforceability of area source reclassifications and/or require notice and public comment on each reclassification approvals. Finally, the EPA intends to require reclassified sources to electronically notify the EPA through CEDRI of changes in the HAP source status, applicable to sources that were reclassified before this rulemaking within 3-years of the effective date of a final rule, or for future sources reclassifications, immediately.

In FPA's view, the proposed changes to the reclassification rule, if they are adopted, could remove almost all of the incentives to become area sources, because they would require sources to meet the emission limitations and other applicable requirements in MACT requirements, so as not to increase HAP emissions to "major source" levels. FPA's members have made considerable investments in new printing technologies and printing techniques for the use of non-HAP coatings and inks, so we want to be absolutely clear in our opposition to any action to overturn the existing MM2A regulation, pursuant to which the Association's members have become "area sources."

DISCUSSION

A. FPA is Concerned that the Proposed Rule Focuses Almost Exclusively on Area Sources that are Created by Pollution Controls and Finds it Difficult to Determine How the Rule, if Adopted, Would Apply to Process Changes that Eliminate HAP by Material Substitution.

FPA's members who own and operate flexible packaging facilities are subject to CAA Section 112(d) MACT standards under 40 CFR Part 63, Subpt. KK (Printing and Publishing)-or-Subpt. JJJJ (Paper and Other Web Coatings). Both MACTs provide affected major sources that can comply by utilizing either pollution control devices *or* alternative compliance methods based on materials management. See Subpart KK at 40 CFR § 63.825(b)(1) - (10) or Subpart JJJJ at 40 CFR

§ 63.3370.[6] With the formulation changes away from HAP-containing coatings and inks, FPA's members almost exclusively demonstrate compliance with these MACT standards through materials management methods and recordkeeping, not pollution control devices. By doing so, FPA's members have largely eliminated HAPs from inks and coatings used to produce flexible packaging. [7] Elimination of the use of HAP is the most effective method of HAP emission reduction (if it isn't used, it can't be emitted). FPA urges the EPA to discuss the significant strides in material substitution as a net positive for the environment and for businesses, and an incentive for sources to become area sources and thus meet the purposes and goal of reclassifying major sources under the MM2A rule. This should be encouraged in every way possible by the EPA, not appear as an afterthought.

In what we believe is the Notice's only *possible* reference to material substitutions, proposed option 40 CFR 63.1 (c)(6)(iv) would require a source to ''continue to employ the emission control methods (*e.g.,* control device and/or emission reduction practices) required under the major source NESHAP requirements." See 88 Fed. Reg. 66346. While we think this option could be confusing because it could be easily mistaken for end-of-the-stack air emissions control technology instead of process changes, FPA suggests that if EPA finalized that option, it should include "(e.g., material substitution)," after the words "reduction practices." We also note that because FPA facilities probably used oxidizers for MACT compliance with the 1998 Subpart KK, before material substitution became prevalent across the industry, there could be significant confusion over adopting proposed § 63.1 (c)(6)(iv), because including oxidizers as prior MACT controls would be both confusing and arbitrary. (Most of FPA's members continue to use Method 204 for PTE capture compliance and Method 25 for thermal and/or catalytic oxidizers for state RACT compliance, which will compound potential confusion.) Thus, if the agency finalizes the proposed amendments of the MM2A rule, another option would be to provide a separate regulatory provision that would apply to alternative compliance methods such as material substitutions or process changes.

B. FPA Respectfully Submits that the Agency Lacks the Authority to Impose the Proposed Requirements on Reclassified HAP Sources.

While FPA appreciates that the EPA has not proposed to withdraw the MM2A interim rule and/or 2018 MM2A Policy, the Association also respectfully observes that the Clean Air Act only has two categories of HAP, "major sources," see CAA Section 112(a)(1) and "any stationary source of hazardous air pollutants that is not a major source," see CAA Section 112(a)(2). Moreover, unless a category of area sources was listed by the Administrator pursuant to CAA Section 112(c) and EPA undertook a rulemaking to promulgate a generally applicable control

[6] EPA has not promulgated any "area source MACT" (i.e., generally applicable control technologies standards, a/k/a/ GACT)" for printing or surface coating operations.

[7] In other words, these materials may not be 100% "HAP Free", as we can't control trace impurities, but our members routinely instruct our suppliers to eliminate HAP constituents or and/or to formulate them out completely. Replacement solvents are VOC, which are controlled under state implementation plans that generally require 98% combined VOC capture and control.

technique (GACT) for that category of area sources, the agency lacks any authority to regulate an area source of HAPs, which can–under the Act–emit up to 10 tons of any single hazardous air pollutant or up to 25 tons of a combination of hazardous air pollutants. Thus, we believe that EPA lacks Clean Air Act authority for the proposed regulation.

For these reasons, FPA opposes most of the proposed safeguards for maintaining area source limits, including maintaining the applicable requirements for major MACT in the source's permit, which we think would be unlawful, confusing, and unnecessary. Because of the nature of the flexible packaging business, which is driven by innovation and its ability to make different types and run sizes of packaging for its customers, we also would particularly oppose any limits on the use of specific materials if they were frozen at the time to the levels when the source became an area source. Generally, our members that have reclassified to area sources by accepting total emission limits below the Act's 10/25 "major source thresholds," (generally at a potential to emit of 9.4 tons per year of a single HAP (TPY) and 24 TPY of a mixture of HAPs). We think it would be confusing to maintain the existing MACT standards in a source's permits, it would require the added burden of re-permitting. Most important, however, is that state and local air pollution control agencies, the EPA, and the public have the ability to enforce the federal CAA definitions on any "major source" without the addition of the prior-applicable MACT standards or other conditions.

C. FPA Does Not Support Requiring States to Adopt Programmatic Revisions to State Law for Issuing "Federally Enforceable" Permits Because It is Unnecessary.

FPA does not support requiring states to adopt program revisions under Subpart E of the Act (i.e., delegations to administer one or more MACT programs under CAA Section 112(l) to impose federally enforceable conditions on reclassified sources. 88 Fed. Reg. at 66338, 66247-8. First, unless the agency has promulgated a MACT standard for a category of area sources, according to CAA Section 112(c), area sources are not subject to EPA's authority. More importantly, the EPA, a state or local air pollution control agency, and a citizen have the authority under the Clean Air Act to enforce the requirements of the CAA against any facility that exceeds the definition of a major source in Section 112(a)(1) of the Act. The only reason that EPA seems to be worried about federal enforceability of area sources HAP levels appears to be because of the additional standards that the agency wants to attach through this rulemaking to area sources. The Association also believes that federal enforceability is unnecessary, and a colossal burden on the states to require delegation to the States for each or all of the MACT standards pursuant to CAA 112(l). In fact, we believe that would have a chilling effect on reducing HAP emissions overall, which we can't envision being the agency's purpose.

The process by which sources have been classified into "area sources," at least in the case of FPA members, is through federally enforceable Title V state permits and according to our members, the area source definition and the conditions of compliance (i.e., revised emission limits) remain in the federally enforceable part of the federal operating permit. The Notice explains that many of the other "synthetic minor" reclassified MACT sources, were created by state minor permits, and possibly general state permits for classes of minor sources that citizens and EPA have no authority to enforce. Again, we believe that the agency and citizens

can, however, enforce the federal CAA's definition of a "major source" of HAP, without additional authority. Moreover, without additional federal authority to regulate an area source of HAP that is not part of the category listed by the Administrator under his/her authority in CAA Section 112(c), the EPA lacks the authority to curtail the instrument or permit pursuant to which the source operates as an area source of HAPs.

It also is apparent in the preamble of the proposed Notice that EPA believes that neither the federal government nor state agencies have the enforcement tools to monitor area sources, much less citizens (the latter because they may not have an opportunity for notices and the right to comment on the conditions of reclassification). In our experience, however, the EPA regions were thoroughly involved in reclassification requests and cast the vote on most, if not all, of our industry's MM2A applications, which to our knowledge, was the case for reclassifications of facilities in other industries. Still, the fact remains, for either concern, that the EPA does not have the authority to require the State and local air pollution control agencies to regulate these area sources, and it would be undeniably burdensome for states to obtain delegation of the MACT programs. (In response to EPA's request about why that is the case, we leave this to the state and local agencies to respond, other than to note that there appears to have been very few delegations since the MACT standards were promulgated more than 20 years ago because states already have authority to enforce the federal standards and no further funds, including EPA grant money, to take over the programs.)

D. In the Context of the Agency's Concerns Regarding Emission Increases from an Area Source, There Seems to be Some Confusion in the Notice About the Difference Between MACT Performance Standards and Actual Emissions Increases.

According to the Notice, the particular safeguards that EPA proposes to apply to reclassified sources' emissions are needed because the agency "shares" environmental groups' concern that reclassified sources can increase a facility's HAP emissions up to the applicable major source" definitions by utilizing the same controls. See 88 Fed. Reg. 66,343. FPA does not share this view since the CAA allows an area source to increase its emissions up to "major source" levels. Also, FPA does not think that retaining a performance standard in an area's source's permit is likely to reduce emission increases by themselves because as we explained above, pollution controls are based on capture and destruction efficiencies, but they allow for emissions to increase without limit. The predicate behind retaining these MACT performance standards seems to be that emissions might increase because controls can be "adjusted to reduce emissions below the major source thresholds to reclassify the source," appears to be flawed because a performance-based pollution control will still allow emission increases if the process is not changed. In other words, decreases in HAP, generally, are not dependent on the performance of pollution controls; they are dependent on process inputs (i.e., the potential of a process to emit HAPs, the inputs into the manufacturing process, etc.).

On the other hand, there may be instances where industrial processes are not changed, and by removing a pollution control component (e.g., scrubber packing), a major source with an 80% pollution control efficiency could become an "area source." That would be lawful under the CAA if the source's potential to emit was modified to include the new performance efficiency in

its permit so long as the source had enforceable monitoring or recordkeeping to ensure that the source would not exceed the 10/25 TPY "major source" definitions, although it is difficult to see why a source would eliminate its ability to increase HAP emissions up to whatever level it could achieve given its manufacturing design capability. (Moreover, it should be observed that for categories of "area sources" that EPA has regulated, GACT is consistently less stringent than MACT, so it would be unreasonable to require a "new category of area sources" to be subject to the same MACT standard for a category of "major sources.")

Overall, FPA thinks that requiring retention of MACT limits and/or freezing the performance of a plant to some PTE that it had with MACT requirements will deter most manufacturers from considering making more effective process changes, such as elimination of processes that require pollution controls, or material substitution, to reduce or eliminate HAP or even adopting a different type of pollution control (e.g., biofiltration). The MM2A policy is a major decision driver behind making such manufacturing decisions. Requiring a source to keep operation pollution control mandated by an applicable "major source" MACT in a permit, when the source has adopted new processes that do not require pollution controls (or possibly adopted an entirely different pollution control such as biodegradation) would be arbitrary and unreasonable.

E. Additional Specific Comments Requested

1. <u>EPA should not require sources that have already been reclassified between 2018 and the effective date of a future final rule if the instrument for reclassifying the source is already impractically enforceable.</u>

The EPA requests comment on "grandfathering" area sources that have been reclassified before the effective date of new requirements, on page 66348 of the Notice. FPA supports grandfathering sources that have reclassified before the effective date of new MM2A requirements because we believe that it may take two or three years for the facility to be re-approved, which interjects confusion about the legal status of the source's compliance during those intervening years. It also punishes environmental managers in our companies who stepped forward with ideas to take advantage of becoming an "area source," and it adds costs to compliance–particularly since so much additional public and administrative review would be involved, and it affects our communities inside and around plants. It also punishes material substitution and technology innovation, both important emphases of the Clean Air Act, and this Administration's environmental and national technology innovations.

An acceptable alternative for FPA members would be to allow additional federal enforceability for area source limits, if this requirement is ultimately adopted, would be acceptable for facilities that became area sources before the adoption of these new MM2A requirements. When a Title 5 permit comes up for review, let an affected source that is reclassified, add the new requirements for federal enforceability to its permit, which then will be publicly noticed and reviewable. If a source does not have a Title 5 permit because it is not subject to another federally applicable requirement such as a RACT, NSPS, or PSD/NSR requirement, let it apply for

an otherwise hollow Title 5 permit or administrative consent agreement to confer the federal enforceability of the new applicable standard.

2. EPA should not require any sources to add any additional federally enforceable requirements if its emissions will be limited in a federally enforceable instrument such as a minor permit that is included in a federally enforceable State Implementation Plan or Title 5 Permit.

EPA suggests in this Notice that besides operators cheating and increasing emissions, the other one of its two principal concerns about MM2A is that there has been a lack of opportunity for the public to comment on these plans or the opportunity to enforce these agreements. Frankly, we think there probably has been a lack of notice and public comment opportunity, and so, we support notice and public comment to celebrate reclassification. We honestly believe that there is no reason for the public to have to enforce terms of reclassifications, but that means that FPA is not opposed to adding federally enforceable elements in the future to these permits.

3. For sources that reclassify, the EPA should allow for the reclassification of major sources that retain practicably enforceable conditions from their previously applicable MACT standard(s).

As an alternative to reopening previous MM2A reclassifications, and as an alternative to a process that requires extensive administrative changes to state programs and examination of MM2A enforceability, FPA suggests that EPA should approve compliance measures from prior MACT that are already enforceable by allowing sources to incorporate them by reference in either state only or federal permits. Thus, while the state approval of the MM2A reclassification may not itself be federally enforceable, the compliance requirement would be enforceable.

4. FPA is seriously concerned that the EPA "believes" that only one-third of state and local CAA laws are enforceable by citizens, and therefore all MM2A classifications must be federally reviewed.

The proposed rule expresses the view that the agency understands or believes that two-thirds of the state air pollution programs are not enforceable by their citizens, and thus the requirement for federal enforceability is required to anchor MM2A reclassifications. *Id.* at 66346/3. FPA is assuming, however, that all the T-V permit programs are federally enforceable, or that EPA is the responsible permit authority if they are not, and this statistic has to do with state and local minor NSR permit programs. FPA does not think that most of these programs need to be federally enforceable unless they are required by a respective state's NAAQS implementation plan pursuant to CAA Section 110(a)(2),[8] where it would be odd to put an MM2A requirement. Perhaps the best strategy would be to require states in the future to put MM2A limits in a federally enforceable Title 5 permit. Concerning the Clean Air Act's Title III

[8] If that problem is confined, however, to state minor source air programs, then FPA believes that it was intended by Congress, which defined the parameters of the federal air program starkly, allowing only some room for EPA under CAA Section 110(a)(2) in certain nonattainment areas for reductions from minor sources to attain the respective National Ambient Air Quality Standard.

program, however, the urban air toxics program and the GACT program, which affect minor sources, was allowed to be delegated to States at the option of the individual states, but the rest of the program including regulation of urban toxics and GACT sources belongs to EPA, evidence that EPA should operate the MM2A program itself.

5. EPA should not adopt additional restrictions on MM2A for sources of persistent and bio-accumulative HAP, under CAA 112(c)(6).

On page 63345 of the Notice, EPA requests comment on whether sources that are subject to MACT for BPT should be allowed to reclassify and/or whether additional restrictions are needed for the reclassification of sources that emit BPT. The agency also seeks comment on whether any major HAP source that emits a BPT should allow such sources to reclassify pursuant to the proposed option in 40 CFR 63. 1 (c)(6)(iv) that requires a source to ‘‘continue to employ the emission control methods (*e.g.,* control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR).’’ See *id. at* 66,344-66,345.

FPA believes that the proposed “safeguards” in the NPRM, are sufficient safeguards without further restrictions, although we urge the agency to eliminate proposed 40 CFR 63. 1 (c)(6)(iv). If the MM2A rule operates properly, it should incentivize MACT sources to become area sources, through the adoption of innovative pollution control strategies–whether those are based on elements of existing MACT rules, or they are based on technological or material breakthroughs. With respect to proposed section 63.1(c)(6)(iv), there is absolutely nothing to be gained by requiring adherence to the past, if there is another way to reduce air pollutants, particularly PBT compounds.

CONCLUSION

Although FPA believes that the proposed rule changes will create further disincentives to the creation of area sources by interposing unnecessary stumbling blocks (some of which we have suggested could be eliminated or at least streamlined), we urge the agency to finalize “*an MM2A rule*,” to put to bed concerns about eliminating HAP. FPA’s members believe that the 2020 MM2A Interim Rule and the 2018 Policy are fully consistent with the Purpose Clause of the CAA, cited in the Notice on page 66,334, ‘‘to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.’’ CAA section 101(b)(1). While adding additional administrative burdens to the reclassification of area sources appears to our members to be counter to the clear desire of Congress for sources and the agency to eliminate HAPs as much as feasible, including completely if that is achievable, the agency would be spurring process and technology innovations that can reduce HAP by removing doubt that “Once In, Sources Can Never Get Out of MACT.”

FPA appreciates the opportunity to submit these comments and would be happy to hear from EPA officials if they would like to discuss how we monitor compliance with MACT and MM2A limits by using material substitution. Please contact me at (410) 694-0800 if you would like to schedule a call or a meeting to discuss these comments.

Respectfully submitted,

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