



October 30, 2009

The Honorable Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

Re: Health Based Emissions Limitations Under § 112(d)(4) in Industrial Boiler MACT

Dear Assistant Administrator McCarthy:

The purpose of this letter is to urge you to make full use of Clean Air Act (“CAA”) § 112(d)(4) when you establish the National Emission Standard for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers (“Industrial Boiler MACT”). Section 112(d)(4) authorizes the Environmental Protection Agency (“EPA”) to set health-based emissions limitations when establishing standards for hazardous air pollutants (“HAPs”) under § 112(d). Section 112(d)(4) is a powerful tool that enables EPA to match the stringency of a HAP emissions limitation to the level determined necessary to fully protect human health. As a result, the standard is no more stringent and no less stringent than needed.

The American Forest and Paper Association (“AF&PA”) is the national trade association of the forest products industry, representing forest landowners, pulp, paper, paperboard, and wood products manufacturers. AF&PA’s members own and operate hundreds of boilers that will be subject to the Industrial Boiler MACT. AF&PA believes that, without full implementation of § 112(d)(4), the Industrial Boiler MACT will prescribe standards far in excess of what is needed to protect health and the environment, and as a result, impose unnecessary and inordinate costs on the industry.

Background

§ 112(d) generally requires MACT emissions limitations to be set at a level that reflects the performance of the better performing sources in the given source category or subcategory. Section 112(d)(4) provides an alternative to this basic approach for pollutants for which a health threshold has been established. For such pollutants, § 112(d)(4) authorizes EPA to “consider such threshold levels, with an ample margin of safety, when establishing emission standards” under § 112(d).

The default technology-based method of setting MACT standards is a cookie-cutter approach that can and does result in HAP emissions limitations that go well

beyond what is needed to protect the public from HAP emissions. The clear purpose of § 112(d)(4) is to prevent this from happening. The legislative history of § 112(d)(4) is abundantly clear on this point. In formulating § 112(d)(4), Congress recognized that, “[f]or some pollutants a MACT emissions limitation may be far more stringent than is necessary to protect public health and the environment.”¹ As a result, § 112(d)(4) was provided as an alternative standard setting mechanism for HAPs “where health thresholds are well-established ... and the pollutant presents no risk of other adverse health effects, including cancer....”²

When the first Industrial Boiler MACT was promulgated in 2004, it included health-based emissions limitations for two HAPs – hydrogen chloride (“HCl”) and manganese. Under both of these standards, a site-specific risk assessment had to be conducted to prove that emissions from the site were low enough that human health would be protected, with an ample margin of safety. Emissions or fuel testing for all affected emissions points was required to verify the emissions rates used in the risk assessment. All relevant site parameters were required to be recorded in the site’s Title V operating permit to provide assurance over time that public health would be adequately protected.³

In short, these health-based emissions limitations were rigorous standards that demanded accountability. They were a winner for the Agency and the public because public health would have been protected with an ample margin of safety. At the same time these standards were a winner for affected sources because the standards would not have blindly required emissions to be reduced far below the levels needed to assure that the public was protected. For example, a recent economic assessment by AF&PA (provided to EPA in August) found that these health-based standards would save over \$2 billion in capital costs largely for boilers burning biomass, as compared to the technology-based standards that otherwise might have applied. Many other sectors would similarly benefit from such an approach.

Discussion

As you know, the first Industrial Boiler MACT was overturned by the D.C. Circuit on grounds unrelated to these health-based emissions limitations. Notably, in defending the health-based emissions limitations, the Department of Justice concluded that, “Environmental Petitioners’ claim that the statute precludes EPA from establishing alternative standards for threshold pollutants (which petitioners mischaracterize as an exemption) is meritless.”⁴

¹ S. Rep. No. 101-228 (1990) at 171.

² *Id.*

³ See, generally, 69 Fed. Reg. 55218, 55227-55228 (Sept. 13, 2004).

⁴ Final Brief For Respondent United States Environmental Protection Agency, D.C. Cir. Case No. 04-1385 (Dec. 4, 2006) at 53-54. Note that certain petitioners were concerned that the health-based standard constituted an exemption rather than an emissions limitation – hence DOJ’s comment on this point. While we agree with DOJ that the prior health-based standard was not an exemption, we would be willing to

Now that the Agency has started to work in earnest on a new Industrial Boiler MACT, AF&PA requests that EPA include health-based standards in the upcoming proposed rule comparable to those included in the original standard. Including such standards in the proposed rule will allow for thorough vetting by industry and the public during the comment period and will position EPA to include health-based standards in the final rule.

Giving full consideration to the use of health-based standards is particularly important in the wake of the series of decisions from the D.C. Circuit that have somewhat limited EPA's discretion in setting MACT standards under § 112. As explained above, EPA's authority to set health-based standards under § 112(d)(4) is unassailable. For appropriate HAPs, and where the relevant facts substantiate its use, EPA can set health-based standards with full confidence that they will survive judicial review.

Furthermore, several of the Small Entity Representatives (SERs) on the panel that EPA consulted last winter concluded that the health-based standards were an ideal way to lessen the impact on small businesses of Boiler MACT and related area source rulemakings. Over a quarter of AF&PA's members qualify as small businesses and would benefit from this type of provision. The SERs recommendations were provided to Administrator Jackson in March.

Lastly, in one of the most recent MACT standards proposed by the Agency – the standard for the Portland cement plants – EPA raised the possibility of setting a health-based standard for HCl, but proposed not to do so.⁵ The Agency explained that a technology-based MACT standard would produce significant co-benefits because the HCl standard “is anticipated to result in a significant amount of control for other pollutants emitted by cement kilns, most notably SO₂ and other acid gases, along with condensable PM, ammonia, and semi-volatile compounds.”⁶

We agree that EPA should not wear blinders when it sets standards under any of the various CAA authorities. But, in this case, National Ambient Air Quality Standards (“NAAQS”) are in place for all relevant pollutants, including ozone, SO₂, and PM. A MACT standard is a very imprecise tool for helping attain and maintain such NAAQS because it imposes across-the-board requirements in circumstances where tailored solutions are needed. Each area has its own unique mix of sources and its own particular needs in terms of what reductions are needed and where such reductions should be achieved most cost effectively. EPA should rely on the SIP-based air quality programs to meet these needs rather than using such a blunt instrument as a MACT standard.

explore with the Agency other forms of a health-based standard that might reduce stakeholder concerns on this point.

⁵ See 74 Fed. Reg. 21136, 21154 (May 6, 2009).

⁶ *Id.*

The Honorable Gina McCarthy

October 30, 2009

Page 4

In closing, we ask that you allow the health-based alternative to be proposed for public comment. As noted above, billions of dollars are at stake for an industry that already is under extreme economic distress. We look forward to meeting with you on November 2nd to talk about this important issue.

Sincerely,



Paul Noe
Vice President, Public Policy

cc: Peter Tsirigotis, OAQPS
Robert Wayland, OAQPS
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Timothy Hunt, AF&PA