NACAA
national association of clean air agencies

February 5, 2008

Docket ID No. EPA-HQ-OAR-2002-0058
Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 6102T
Washington, DC 20460

Dear Sir/Madam:

On behalf of the National Association of Clean Air Agencies, thank you for this opportunity to comment on the "Agency Information Collection Activities; Proposed Collection; Comment Request; Information Request for National Emission Standards for Industrial, Commercial, and Institutional Boilers and Process Heaters; EPA ICR No. 2286.01," which was published in the *Federal Register* on December 7, 2007 (72 *Federal Register* 69213). The National Association of Clean Air Agencies (NACAA) is the national association of air pollution control agencies in 53 states and territories and over 165 metropolitan areas across the country.

NACAA has reviewed the proposed Information Collection Request and has prepared the attached comments. Please contact us if we can provide additional information.

Sincerely,

Vinson Hellwig
Michigan
Co-Chair
NACAA Air Toxics Committee

Robert Colby
Chattanooga, Tennessee
Co-Chair
NACAA Air Toxics Committee

Attachment

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Comments of the National Association of Clean Air Agencies on EPA's Proposed Collection Comment Request; Information Request for National Emission Standards for Industrial, Commercial and Institutional Boilers and Process Heaters; EPA ICR No. 2286.01

February 5, 2008

Pursuant to the solicitation for public comment published in the *Federal Register* by the U.S. Environmental Protection Agency (EPA) on December 7, 2007 (72 FR 69213), the National Association of Clean Air Agencies (NACAA) is pleased to provide the following comments on the proposed request (1) for existing information necessary to identify and categorize all boilers and process heaters potentially affected by to-be-proposed standards for industrial boilers and process heaters under Sections 112 and 129 of the Clean Air Act (CAA) and (2) to require emissions testing as necessary of a subset of this category of sources.

SUMMARY

NACAA supports EPA's request for information. Based on our activities to date in developing a Model Rule for use by state and local agencies in implementing case-by-case MACT permitting under Section 112(j) of the CAA, we agree that the current information in EPA's rulemaking record concerning the number and nature of sources subject to regulation is grossly in error[1]. Additionally, our work to date on this matter suggests a strong need for additional emissions testing to support a rational, effective MACT standard for industrial boilers and process heaters. Unfortunately, EPA appears to have improperly read the provisions of Section 112 as somehow limiting its authority under Section 114 of the CAA to collect information needed to develop this standard. Such an interpretation would be at odds with the plain language of the CAA and would not be in the public interest since it may lead to inflated estimates of uncertainty and a final standard that is neither protective of the public health nor in conformance with the "MACT floor" requirements of Section 112.

Further, we believe that detailed design of this testing program should await the collection and analysis of existing information. As drafted, the EPA notice and supporting document would appear to constrain the design of the testing program in a manner that is not consistent with the emissions profile of the category. For this reason we recommend that the Information Collection Request (ICR) and supporting document be redrafted to provide EPA the ability to structure the testing program in a manner that makes sense considering the responses received from the initial EPA survey, the NACAA data base and other technical data developed prior to initiation of the testing program. We also recommend that the initial EPA survey be sent to all known major sources in the category, not just those sources that sent in a notice under the prior, now vacated, rule.

[1] See NACAA comments, dated January 2, 2008, concerning EPA ICR No. 1648.06, OMB Control No. 2060-0266 for additional detail on this point.

NACAA'S EXPERIENCE WITH THE INDUSTRIAL BOILER SECTOR

Section 112 of the CAA requires EPA to promulgate a National Emission Standard for Hazardous Air Pollutants,[2] often referred to as a "MACT Standard," for each identified category and subcategory of sources of emissions of a lengthy list of hazardous air pollutants (HAPs) in accordance with schedules developed pursuant to Section 112(e)[3] of the Act. The U.S. Court of Appeals for the District of Columbia has "vacated" several MACT standards promulgated by EPA, including the MACT standard for the Industrial Boiler category. EPA has determined that the Court's decision to vacate these standards triggers the obligations under Section 112(j) of the CAA[4].

Under Section 112(j) sources within the category must obtain Title V permits[5] issued by state permitting authorities on a case-by-case basis incorporating emission limits that the state determines are "the equivalent emission limitation" that would have applied if EPA had issued the MACT standard in a timely manner. Such permits must be issued within 18 months of receipt of a permit application from the source and must be based on "all available information." In addition, within 60 days of submittal of a Part 2 application, the permitting authority must notify the source operator in writing of its determination as to whether the application is complete. Under Section 112(g) sources must obtain a preconstruction permit from the permitting authority before commencing construction of a new, modified or reconstructed major source of HAPs.

Because of the potentially significant workload resulting from these activities, the large number of potentially affected sources and the relatively short deadlines for state action imposed by the CAA, the Board of Directors of NACAA has invested resources to assist the states in developing MACT permits for the Industrial Boiler and Process Heater category. A technical workgroup, with representatives from approximately 15 state and local air pollution control agencies, has been formed to review available information and provide recommendations for plant-by-plant MACT determinations and development of new and existing source MACT floors. A consultant has also been retained to assist the workgroup in gathering relevant information, collating this information in a usable format and drafting a "model rule" that individual states may draw from as they see fit.

As part of this effort NACAA has requested[6] that its members forward to the technical workgroup existing emissions data for (1) hazardous air pollutants identified by EPA as associated with this category and (2) criteria pollutants that may serve as

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[2] Such standards are required to be based on the application of "maximum achievable control technology" and are colloquially known as "MACT standards."

[3] 42 U.S.C. 7412(e)

[4] In a pleading filed with the Court of Appeals on May 4, 2007, seeking vacatur of the standard, the U.S. Department of Justice asserted on behalf of EPA that "EPA recognizes that vacatur of the standards will trigger the requirements of Clean Air Act Sections 112(g) for new sources and 112(j) for existing sources."

[5] This includes modifications to existing Title V permits as well as new Title V permits for sources.

[6] EPA has been and will continue to be involved in this process. NACAA representatives have met with EPA senior managers and technical staff on several occasions and have received excellent cooperation to date. EPA staff has been quite helpful in identifying existing sources of information. NACAA's intent throughout this process is to work with EPA to gather information in a manner that avoids duplication of effort and inconsistent data-gathering formats. However, as set out in the CAA, where EPA has failed to meet a statutory deadline for promulgation of MACT, case-by-case MACT permit determinations are state functions, not an EPA function. NACAA has neither sought nor obtained the consent of EPA for its efforts. NACAA's efforts were neither requested by nor directed by EPA. These efforts are by and for the states that are required by the CAA to issue permits within very tight timeframes.

regulatory surrogates. This information is currently being collated, formatted and reviewed and will be provided to EPA for inclusion in the public record on this matter when quality control processes have been completed. We believe that in most cases state and local permitting authorities will have copies of any reference method testing conducted by sources within their jurisdictions, but will likely not have copies of continuous emission monitoring (CEM) data. In addition, NACAA's effort relies on a voluntary response from permitting authorities that may or may not have resources available to provide information. In contrast, EPA's collection of existing emissions data is mandatory and should yield a higher response rate. However, there is no reason to suspect a bias in NACAA's data. We further believe that the NACAA data population is sufficient to characterize the national data set.

Based on the responses to date, we offer the following comments on the existing data set:

1. Much of the existing information concerning emissions of criteria pollutants that may serve as surrogates for HAP emissions is not in a form that can provide a mathematical correlation. In many instances, such emissions are reported in pounds per hour, pounds per unit of production or tons per year and cannot be used to compare emissions performance with others without additional information about the source's operations.

2. A substantial portion of the HAP data does not contain simultaneous measurements of criteria "surrogate" pollutants. For example, a number of emissions test reports recording HAP emissions from natural gas-fired units do not contain simultaneous measurements of CO, thought to be a candidate as a surrogate in this area.

3. Many sources reported HAP emissions based on emission factors rather than source-specific stack tests.

4. The data set relied on by EPA in its prior rulemaking is now obsolete and rife with error. It cannot serve as the basis for a new rulemaking in this area.

COMMENTS ON THE INITIAL SURVEY

1. This pre-proposal survey should not prejudge the results of the rulemaking that it commences. Specifically, the survey should be provided to all known sources within the category as described in EPA's listing document. If during the rulemaking EPA is able to determine that some subcategories, such as direct-fired process heaters, do not need to be regulated, then such data can be excluded. In its prior rulemaking attempt EPA suggested without support that many direct-fired process heaters are regulated under other MACT standards. EPA should now take reasonable steps to document this assertion. Similarly, EPA should survey, as far as is practicable, all major sources within the category. This should include any sources identified by state or local permitting authorities, all sources that have submitted applications for Title V permit that identify the source as "major" under Section 112 and all sources that have

submitted Part 1 or Part 2 applications under Section 112(j) or under Section 112(g).

2. Similarly, the survey should not limit the request for existing emissions data based on the pollutant considered in the vacated MACT standard, but should simply request that sources provide all emissions data. For example, data on acid gas HAPs, such as hydrogen fluoride, metals other than those listed and different forms of particulate matter, may be instructive in establishing a final rule in this area.

3. Our ability to comment on the ICR in general is constrained by the limited information provided in the EPA Supporting Statement, which sets out what EPA intends to ask, but does not explain why. For example, it is unclear why EPA is asking for certain information on non-fossil fuel and how this supports a MACT determination. All parties would benefit from a more detailed understanding of how EPA intends to approach the MACT standard-setting process. It would also be helpful to review the data fields in the referenced "Fuel Analysis Worksheet" and "Emissions Data Worksheet." Without this information, we cannot comment on the completeness of this portion of the information collection request. Nevertheless, where EPA seeks information respecting substitute options for the replacement of non-fossil fuel, we suggest that the form provide an option "purchase from another facility." We are aware of a number of facilities that purchase part of their steam needs from other nearby sources.

4. EPA has correctly determined that its stack testing program should be designed to avoid generating a bias by way of self-selection of participating sources. Similarly, EPA's survey should foreclose any opportunity for bias in the collection of existing emissions data. The ICR seeks "the results of the most recent CEM data or stack test." Unless clarified, this language is likely to cause substantial confusion within the regulated community, lead to inconsistent submissions and "cherry picking" of data. The use of the word "or" in the cited phrase would seem to either instruct sources to provide CEM data (which is likely to be more current) in lieu of stack test data or to allow sources to choose whether they would prefer to submit stack test data or CEM data. We doubt that EPA intends either of these results. EPA should be very clear as to what it is seeking.

We recommend that EPA request (a) the most recent stack test results and (b) any earlier stack tests that include a broader range of pollutants or different mix of fuels. Where a source has several stack tests in recent years, EPA may wish to average the results of those tests and so may wish to ask for all stack tests in, for example, the last five years. In particular, the request for CEM data would appear to require more thought and specificity. In our view, the phrase "the most recent CEM data" is not sufficiently specific in that it would allow a source the opportunity to "cherry pick" the time frame for such data and, assuming that different sources selected different time frames, might not allow the results to be directly compared with other CEM data or with stack test results. EPA's options would appear to include asking for a defined block of data (e.g., the 30 days in 2007 with the highest production), for such data on each fuel used or asking for CEM data that might correlate with the averaging period for anticipated surrogates (e.g.

data that is most closely replicates the highest three hours of operation on each fuel used by the source in 2008).

COMMENTS ON THE STACK TESTING PROPOSAL

NACAA supports the concept of conducting a limited number of stack tests in support of rulemaking to develop standards under Sections 129 and 112 with respect to sources in the Industrial Boiler and Process Heater category. We also believe that the EPA estimate of 350 source tests is reasonable. However, we believe that EPA should restructure its test program to provide information needed to develop a sound, protective and defensible MACT standard. If EPA limits its testing program as proposed and employs the same procedure for standard setting as in the vacated rule, it risks jeopardizing public health by under-regulating certain subcategories. It also risks imposing unnecessary costs on industry by over-regulating in other subcategories. Finally, if EPA fails to gather information that it knows is necessary to develop a rule based on an interpretation that is not mandated by the CAA, it runs a substantial risk that the end product of its multi-year rulemaking effort will again be overturned as arbitrary.

In its Supporting Statement for the stack testing proposal, EPA appears to advance an argument that, while it does have authority to require sources subject to regulation under Section 129 to conduct stack tests to support rule development, it does not have similar authority for sources that are subject to regulation under Section 112. For this reason EPA limits its stack testing program to sources that burn solid fossil fuels, including sources that burn such fuels in conjunction with other non-solid/non-fossil fuels. EPA acknowledges that it is aware of only "a small number" of MACT emission compliance tests but expresses a belief that there may be "several" other such tests conducted by sources but not made available to permitting authorities. If EPA employs the same methodology in considering a new MACT standard as it employed in the vacated standard, it may once again assert that the uncertainty associated with this very small data set justifies increasing the MACT floor by an order of magnitude over the performance level actually measured during the tests. Clearly, the preferred approach should be to reduce the uncertainty in the data set rather than reducing the protectiveness of the standard.

Section 112(d) states that the MACT floor for most categories shall be based on the "average emission limitation achieved by the best performing 12 per cent of existing sources (for which the Administrator has emissions information)" and that for small sub-categories (less than 30 sources) it shall be based on "the average emission achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information)". EPA seems to read these provisions as precluding it from requiring stack tests as part of the process of developing a standard under Section 112. However, this language only speaks to the process for calculating a MACT floor – it simply says that EPA does not need emissions data for **all** sources in a category in order to calculate a floor for that category. It also establishes a minimum amount of data that EPA must have – if a small source category has fewer than 30 sources and EPA does not have data for at least five sources in the category, it must obtain it if can reasonably do so. It would indeed be anomalous if EPA ***must*** require five stack tests in a subcategory of 10 sources, but ***may not*** require any stack tests if, as is likely here, it

has less than five stack tests in subcategories numbering over a thousand sources. The statute does not say that EPA must base its determination of the MACT floor on information that EPA had before it commenced its rulemaking. Indeed, if EPA is to comply with the Administrative Procedures Act and consider all materials submitted prior to the close of the comment period, then it is reasonable to assume that EPA is to base its determination of **the MACT floor** on the information it "has" as of the date of the close of comments[7]. Moreover, this language does not limit in any way the information that EPA may consider in setting **the MACT standard**.

EPA's authority to require stack testing is explicitly set out in Section 114, that provision of the CAA that addresses EPA's information-gathering authority generally. Section 114(a) provides:

> "For the purpose of (i) developing or assisting in the development of ….any emission standard under section 112 of this title or any regulation of solid waste combustion under section [129] of this title—
>
> **(1)** the Administrator may require any person who owns or operates an emission source …who the Administrator believes may have information necessary for the purposes set forth in this subsection …to—
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> **(B)** make such reports
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> ****
>
> **(D)** sample such emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator shall prescribe)
>
> ****
>
> **(G)** provide such other information as the Administrator may reasonably require.

Thus, EPA clearly has authority to require stack testing for the purpose of developing MACT standards under Section 112. It is also worth noting that, contrary to EPA's apparent interpretation, Section 114 does not differentiate between standards under Section 129 and standards under Section 112. Further, Section 114 does not differentiate between requiring reports (for which EPA apparently believes it has authority) and requiring emissions testing.

We anticipate that EPA's repromulgated MACT standard will once again attempt to rely on monitoring of certain criteria pollutants as surrogates for HAP emissions. We believe this may prove to be a sensible approach in that it makes use of existing monitoring equipment and can be readily implemented by state and local permitting authorities. However, in order to do so EPA will have to demonstrate that there is a clear correlation between HAP emissions of interest and the proposed surrogate(s) over a broad range of fuels and conditions. This issue is entirely separate from the issue of establishing the MACT floor (and hence, unaffected by EPA's argument) and is clearly

[7] Congress did limit the information that may be considered in setting the MACT floor for existing sources by requiring that emissions data for new sources be excluded from the calculation. Under relevant principles of statutory construction, this limitation suggests that Congress did not otherwise intend to constrain the data that may be obtained by EPA and used in performing the MACT floor calculation. Moreover, this limitation does not apply to the establishment of the MACT standard itself, leading to the conclusion that emissions data for sources that were constructed during the comment period of the standard may be obtained and considered by EPA in establishing the MACT standard for existing sources.

"necessary" for EPA to address in promulgating its standard. We believe that a substantial fraction of the budgeted 350 stack tests should be designed to evaluate this issue.

EPA's testing program for Section 129 sources seeks to stratify the Section 129 population according to the type of fuels and co-fuels burned and determine a MACT floor from such information. We suspect that establishing a single standard for "co-fired" units within each stratum may prove to be impossible because sources frequently vary the amount of the co-fuel combusted. For this reason, we suggest that EPA consider whether the approach utilized under the NSPS for sources that burn a variety of fuels has applicability in this instance. If so, it may be possible to reduce the number of sources tested for this purpose.

We anticipate that EPA will seek to examine whether different MACT standards should be established for different fuels and perhaps different types of boilers. In this regard it would seem prudent to establish the potential strata prior to commencement of the test program so that the random nature of the program is not compromised. Additionally, we believe that the appropriate sample size should be calculated for each strata identified rather than one calculation for the entire boiler population.

In several instances EPA sets out the nature of the anticipated testing program in great detail.[8] We are concerned that this level of detail will lead to the Paperwork Reduction Act governing this research effort, not the Clean Air Act. We trust that this is not EPA's intent and expect that EPA will respond to the information it receives in Phase One of this effort in the final design of the emissions testing program. For, this reason we recommend that EPA draft the ICR to set out the program as it is currently envisioned[9], but clearly indicate the items that it anticipates may need to be modified as the program proceeds.

CONCLUSION

EPA's primary obligation is to protect the public health. Here it is engaged in the process of setting emission standards for hazardous air pollutants in one of the most significant industry source categories. EPA should base its data-gathering decisions on sound science, not strained legalisms. EPA can satisfy both Section 112 and Section 114 by gathering the necessary information now and, then when it establishes a MACT floor, base its decision on the information it "has."[10] Further, EPA has the authority to require stack testing to allow it to examine the extent to which criteria pollutants may serve as surrogates in the development, monitoring and enforcements of this standard.

We strongly recommend that EPA redraft its ICR to identify its best estimate of the overall burden that it anticipates will be needed to properly calculate a MACT floor that is reflective of the emissions performance of the sources within the category, not

[8] For example, EPA lists the specific HAPs that will be tested, but fails to include several key HAPs, such as hydrogen fluoride.
[9] Modified, we hope, in response to these comments.
[10] The statute does not say that EPA must base its determination of the MACT floor on information that EPA had before it commenced its rulemaking. If EPA is to comply with the Administrative Procedures Act and consider all materials submitted prior to the close of the comment period, then it is reasonable to assume that EPA is to base its decision on the information it "has" as of the date of the close of comments.

the uncertainty associated with an inappropriately constrained data set. However, EPA's duty here goes beyond calculating a MACT floor. EPA should draft the ICR to reflect its obligation to obtain all of the information needed to properly establish MACT emission limits and monitoring methods for new and existing sources and to promulgate emission limits and monitoring methods under Section 129 for sources that it determines combust solid waste. In doing so, we recommend that EPA avoid language that would preclude it from modifying the stack testing effort to respond to new information that it receives.