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June 19, 2006

By Fax (202) 501-1450 and email <johnson.stephen@epa.gov>
Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Mail Code: 1101A
Washington, D.C. 20460

Re: Petition for Reconsideration of "National Emission Standards for Hazardous Air Pollutants: General Provisions," 71 Fed. Reg. 20446 (April 20, 2006)

Dear Mr. Johnson:

This is a petition under Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B) on behalf of Coalition for a Safe Environment (CFASE). By this petition, CFASE requests that you reconsider certain aspects of the final action taken at 71 Fed. Reg. 20446 *et seq.* (April 20, 2006), entitled "National Emission Standards for Hazardous Air Pollutants: General Provisions." Specifically, CFASE requests that EPA reconsider its conclusion that a facility's Title V permit will assure its compliance with the general duty to minimize emissions during startup, shutdown, and malfunction ("SSM") events merely by requiring the facility to file a report after such an event documenting the steps the facility took to minimize emissions. As explained below, EPA's conclusion and associated rulemaking is unlawful and arbitrary and must be withdrawn.

Please note that CFASE believes that the objection described below already was raised with reasonable specificity during the public comment period on the proposed rule. Even if it was not, CFASE does not believe that this rule is subject to § 307(d)(1), and thus, CFASE may file a lawsuit based on new objections arising out of changes between the proposed and final rules without first filing a reconsideration petition. Specifically, this rule is not among those enumerated in CAA § 307(d)(1), and EPA has never determined that § 307(d)(1) applies to this rulemaking. Nonetheless, CFASE submits this reconsideration petition as a precautionary measure in the event that a Court finds that this objection was not already raised with reasonable specificity and that § 307(d)(1) applies to this action. Nothing in this petition should be construed as an admission by CFASE that this issue was not already raised with reasonable specificity or that § 307(d)(1) applies to this rulemaking.

Difference Between the Proposed and Final Rules

In its 2005 proposal, EPA proposed to retract the pre-existing requirement that a source implement its SSM plan, and to allow a permitting authority to deny public access to such plan unless the permitting authority already has a copy of the plan on file. *See* 70 Fed. Reg. 43992, 43993/2-43995/2 (July 29, 2005). Further, EPA proposed to clarify that the only associated

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requirements to be included in a Title V permit are the requirements to (1) prepare an SSM plan, and (2) minimize emissions during SSM periods. *Id.* Among other things, public commenters explained that a Title V permit cannot assure a facility's compliance with its general duty to minimize emissions during SSM events if it does not require the facility to implement its SSM plan, and if the plan is unavailable for public review. *See* Comments by Environmental Integrity Project and Earthjustice dated September 12, 2005 (Docket ID OAR-2004-0074), at 7-15. In the final rule, EPA responded by amending the rule to require a source to file a report after each such event documenting the steps that it took to minimize emissions. *See* 71 Fed Reg. at 20448/2-3. EPA contended that these reports would be sufficient to enable the public to determine if a facility is complying with its general duty. *Id.* Specifically, EPA explained:

> EPA's intention is that the recordkeeping and reporting requirements will provide the permitting authority and the public with information to determine whether the general duty to minimize emissions has been satisfied any time there is an exceedance (or could have been, in the case of malfunctions). We have evaluated the recordkeeping and reporting requirements in light of comments on the availability of information necessary to evaluate compliance with the general duty requirement and have decided to amend the recordkeeping and reporting requirements to clarify that a source must keep records of and report actions taken during an SSM event any time there is an exceedance. Revisions to § 63.10(d)(5)(i) and (ii) require that a description of actions taken to minimize emissions be included in SSM reports whether or not the SSM plan was followed. We are amending these rules today to clarify that such records or checklist must include all actions taken during the SSM event to minimize emisisons. ...
>
> With these clarifications, any time there is an exceedance of an emission limit (or could have been in the case of malfunctions) and thus a possibility that the general duty requirement was violated, there will be a report filed that will describe what actions were taken to minimize emissions that will be available to the public. Any member of the public could use the information in these reports to evaluate whether adequate steps were taken to meet the general duty requirement. This information is likely to be of as much if not more use in determining compliance with the general duty requirement that a facility's general SSM plan because the information will be specific to the particular SSM event that caused the exceedance. We note that the public can also request that the permitting authority obtain the SSM plan if information in the SSM report suggests that the contents of the SSM plan would help determine if there was a violation of the general duty requirement. However, even if the permitting authority is not willing to obtain the SSM plan, the required reports should provide adequate information to determine whether there is a violation of the general duty requirement and thus a basis for a citizen suit.

71 Fed Reg. at 20448/2-3. EPA further stated, "[w]e do not believe prior review and approval of plans are necessary; rather, in most cases, review of reports required to be submitted by a facility when emission limitations are exceeded (or could have been in the case of malfunctions) will

allow the permitting authority and the public to determine whether emissions were minimized during periods of SSM." *Id.* at 20449/2.

CFASE's Objection to EPA's Claim that a Post-Exceedance Report is Sufficient to Assure Compliance with the General Duty to Minimize Emissions.

Contrary to EPA's claim, a report submitted after an SSM event leads to the release of toxic air pollution is insufficient to assure the source's compliance with its general duty to minimize emissions. *See* Clean Air Act § 504(a)(directing that a Title V permit must include "conditions as are necessary to assure compliance with applicable requirements of this chapter.")(emphasis added).

First, the plain meaning of statutory phrase "assure compliance" is to make certain that a source will comply with a requirement—not just that the source will document any violations in post-event reports. For example, the Merriam-Webster Online Dictionary defines "assure" as:

> **1 :** to make safe (as from risks or against overthrow) **: INSURE**
> **2 :** to give confidence to <and hereby we know that we are of the truth, and shall *assure* our hearts -- 1 John 3:19 (Authorized Version)>
> **3 :** to make sure or certain **: CONVINCE** <glancing back to *assure* himself no one was following>
> **4 :** to inform positively <I *assure* you that we will do better next time>
> **5 :** to make certain the coming or attainment of **: GUARANTEE** <worked hard to *assure* accuracy>

http://www.m-w.com/cgi-bin/dictionary (visited June 19, 2006). A permit that omits any information about what a facility will do to comply with its general duty to minimize its emissions during an SSM event will not make the public feel "safe," "certain," or "confiden[t]" that the source will attain compliance with that duty. Rather, for a permit to "assure compliance" the permit must document what a facility must do to minimize its emissions during an SSM event and subject those measures to public review, *i.e.*, by requiring compliance with an SSM plan and making that plan reviewable as part of the Title V permit proceeding.

Second, the plain language and structure of Clean Air Act Title V demonstrates that Congress intended for the Title V permit itself to lay out what a facility must do to comply with applicable requirements—not a separate, unenforceable SSM plan, the contents of which can be kept secret from the public until after an emissions limit is exceeded. CAA § 504(a) refers to "conditions as are necessary to assure compliance with applicable requirements," and CAA § 304 makes each such condition enforceable in a citizen suit. *See also* CAA § 504(a)(requiring that a permit include "enforceable" emission limits and standards). CAA § 502(b)(6) directs that the public must be given a chance to review and comment on draft permits prior to issuance and challenge final permits in state court, while CAA § 505(b)(2) grants members of the public the right to petition the EPA Administrator to object to a deficient permit, and to challenge the Administrator's denial of such a petition in the federal court of appeals. The Act specifies that the Administrator "shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter."

CAA § 505(b)(2). In light of these quite extensive statutory procedures for public involvement at the time of permit issuance, Congress plainly did not intend for EPA to keep details about what a facility will do to comply with toxic emission limits secret until after permitting is complete and after the public is exposed to excess toxic emissions. At a minimum, such an interpretation of the statute is unreasonable and arbitrary.

Third, the plain statutory language makes it clear that "assur[ing] compliance" entails more than just requiring a facility to submit reports documenting potential violations. Significantly, CAA § 504 directs that a permit must include "such other conditions as are necessary to assure compliance with applicable requirements" in addition to periodic monitoring reports. Likewise, the legislative history confirms that Congress expected for vague, generalized requirements such as a general duty to minimize emissions to be supplemented with permit conditions sufficient to explain how the requirement applies specifically to the permitted facility. As the 1990 House Report explains, "[t]here should not be matters applicable to the source under the Act that are not addressed in the permit ... [T]he permit is the document that everyone should look at to know what a permittee should do to comply with the [Act]." H.R. Rep. No. 101-490, at 351 (1990). Similarly, the 1990 Senate Report explains, "[o]nce a permit is properly issued to a source ... the permit becomes a comprehensive statement of the source's Act obligations," S.Rep. No. 101-228, at 355 (1990). *See also id.* 347 ("The first benefit of the title V permit program is that, like the CWA program, it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations – ranging from emissions controls and monitoring requirements to recordkeeping and reporting requirements – are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations. In addition, SIP regulations are often written to cover broad source categories, and may not make clear how a general regulation applies to a specific source.")(emphasis added); S.Rep. No. 101-28, at 347 ("The air permit program will ensure that all of a source's obligations with respect to each of the air pollutants it is required to control will be contained in one permit document. In many cases, the permit will simply incorporate the requirements of the existing SIP or other Clean Air Act requirements, but in other cases, the permit will tailor and clarify how the general rules apply to the specific source. In addition, the source will file periodic reports, as determined by EPA regulations, identifying the extent to which it has complied with those obligations.")(emphasis added); *id.* at 346 ("Operating permits are needed to ... better enforce the requirements of the law by applying them more clearly to individual sources.")(emphasis added). EPA's new rule flies directly in the face of the statutory language and legislative history, making it so that a source will have no idea whether the public or the government agrees that its measures for minimizing emissions are legally sufficient until after a violation may have already occurred.

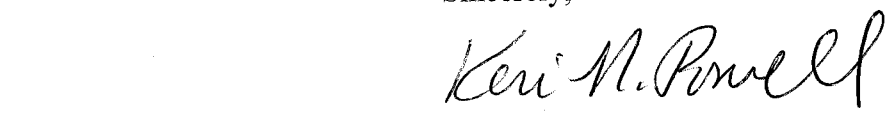
Finally, EPA's Title V regulations also confirm that a permit needs more than just post-violation reporting requirements to "assure" a source's compliance—rather, the regulations specify that a permit also must include "those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.6(a)(1). A facility's SSM plan plainly falls within the category of "operational requirements and limitations that assure compliance" with applicable requirements. As noted in comments on EPA's proposal, EPA has repeatedly acknowledged the role of SSM plans in assuring compliance with the general duty to minimize emissions. *See* Comments by Environmental Integrity Project and Earthjustice dated September 12, 2005 (Docket ID OAR-2004-0074), at 8-

10. Indeed, such statements are present in the preamble accompanying the final rule. *See* 71 Fed. Reg. at 20449/2 ("Plans will help sources more expeditiously address SSM events to minimize emissions during those periods. Once the plans are developed, sources will have every incentive to follow the plans if appropriate, or face additional scrutiny if the plans are not followed."), 20449/3 ("[W]e believe that in most cases following the SSM plan should help establish that the source was minimizing emissions."), 20450/1 ("[W]e note that the SSM plan is a useful tool for sources to demonstrate—and for permitting authorities to confirm—that the general duty to minimize emissions is met.").

A recent toxic release from several refineries located in Southern California illustrates why EPA's approach to SSM events fails to assure compliance with the duty to minimize emissions. As described in the attached declaration from Jane Williams, on September 12, 2005 these refineries spewed a plume of toxic air pollution that spread for miles after a power blackout cut the electricity from air pollution control devices. *See* Attachment A, ¶ 1. Though these facilities had SSM plans, their plans apparently did not require them to install backup power generators to operate their pollution controls during a blackout. *Id.* If such a requirement had been in their plans, it is likely that this massive toxic release would not have occurred. *Id.* In light of the lessons learned from this event, local citizen groups wish to review SSM plans to ensure that adequate measures are in place to protect the public against future toxic exposures. Under EPA's new rule, however, these plans could be kept secret, shielded from public scrutiny and challenge. Especially in light of these recent events, no local resident could trust that a secret plan will be sufficient to assure the refineries' compliance with their general duty to minimize emissions.

In light of the above, as well as for the other reasons provided in comments on the proposal, EPA should withdraw this illegal and arbitrary rule.

Sincerely,



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cc:
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EPA E-Docket (via online submission to http://www.epa.gov/edocket, ID No. OAR-2004-0094)

Attachment: Declaration of Jane Williams

DECLARATION OF JANE WILLIAMS

I, Jane Williams, do declare and attest to the following:

1. Jesse Marquez, a close colleague and leader of an environmental justice community group that works on refineries and port pollution reported to me that on September 12, 2005 some of the refineries in his community released a huge plume of toxic gases. The plume of pollution spread many miles and many people in his community were sickened by the event.

2. Newspapers widely reported that a Department of Water and Power worker cut the wrong power line, plunging much of Los Angeles in a power blackout. The refinery releases were caused by the power blackout because many of their production systems rely upon power from the grid—including their air pollution control devices. Because the refineries did not have power from the grid, they vented raw toxic gases into the air.

3. Peter Meiras, the head of enforcement for the air pollution control district (the South Coast Air Pollution Control District), indicated to me in a subsequent conversation that the refineries do not have backup power generators to supply power in the event of a power blackout. He further indicated to me that the district could not prosecute the refineries for the major toxic gas releases during the September 12 blackout because they occurred as a result of an upset/malfunction event.

4. Though the refineries had prepared startup, shutdown, and malfunction ("SSM") plans prior to the September 12 power blackout, it is my understanding that these plans did not require the refineries to install backup power that would have enabled them to operate their pollution controls during the blackout.

5. The environmental justice leaders that I work with in Los Angeles are interested in what the refineries can do to prevent these types of events. We are anxious for refinery operating permits and accompanying SSM plans to come up for public review so that we can comment on these plans and ensure that the refineries install backup power generations systems that can be used in the event of future power blackouts or other power interruptions. We are also aware that many other types of "malfunctions" can occur at refineries. To protect local communities, neighborhood groups and individuals need to know what types of problem cause these "malfunctions," what steps the refineries are taking to prevent them, and what they will do to control toxic releases when they occur.

6. If community members are able to review and comment on a facility's SSM plan, they can identify plan deficiencies before a startup, shutdown, or malfunction event, thereby preventing a toxic gas release from occurring. For example, even an untrained reviewer could have identified the lack of any mechanism in the refineries' SSM plans for controlling toxic emissions during a power blackout.

7. Under EPA's new SSM rule, these SSM plans never come up for public review. Indeed, the new rule altogether blocks public access to a facility's SSM plan unless the permitting authority happens to have a copy of the plan on file. Thus, community members are denied an opportunity to protect themselves by identifying problems in a facility's SSM plan before toxic gases released into their schoolyards, daycare playgrounds, parks, and neighborhoods.

Dated: June 18, 2006
San Francisco, CA

Signed: