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July 25, 2020

VIA EMAIL & Overnight Courier

The Honorable Andrew R. Wheeler
Administrator, U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Petition for Reconsideration and/or Revision

Dear Administrator Wheeler:

On behalf of the Packaging Corporation of America ("PCA"), please find attached a Petition to Reconsider and/or Revise the *National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category; Final rule*, 63 Fed. Reg. 18,504 (Apr. 15, 1998).

We look forward to discussing the Petition with you and moving forward to expeditiously resolve the issues raised herein. Please contact me at SBroome@HuntonAK.com or 415-975-3718 to discuss at your convenience.

Sincerely,



Shannon S. Broome

Attachments

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IN RE: NATIONAL EMISSION STANDARDS)
FOR HAZARDOUS AIR POLLUTANTS) DOCKET NOS.
FOR SOURCE CATEGORY: PULP AND PAPER) A-92-40; A-95-31
PRODUCTION; EFFLUENT LIMITATIONS)
GUIDELINES, PRETREATMENT STANDARDS,)
AND NEW SOURCE PERFORMANCE)
STANDARDS: PULP, PAPER, AND)
PAPERBOARD CATEGORY; FINAL RULE,)
63 FED. REG. 18,504 (APR. 15, 1998))

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (“CAA” or “the Act”)¹ and Section 553(e) of the Administrative Procedure Act (“APA”),² the Packaging Corporation of America (“PCA”) respectfully petitions the U.S. Environmental Protection Agency (“EPA” or “the Agency”) to reconsider and/or revise the nationally applicable final action entitled *National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category; Final rule*, 63 Fed. Reg. 18,504 (Apr. 15, 1998) (“1998 Final Rule”).³

² 5 U.S.C. § 551 *et seq.* The D.C. Circuit has explained in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), that “the public’s right to petition the Administrator for revision of a standard of performance and the Administrator’s duty to respond substantively to such requests *exist completely independently* of Section 307.” 515 F.2d at 667 (emphasis added). *See also, e.g., PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (counseling that amendment or repeal of a CAA regulation could be sought under APA Section 553(e) in conjunction with Section 307(d)(7)(B) even well outside the 60-day review window). Thus, regardless of the additional provisions for reconsideration under Section 307(d) (*i.e.*, for those issues of central relevance for which it was impracticable to raise issues during or for which grounds arose after the close of the public comment period), the APA provides an independent basis for members of the public like PCA to petition EPA to reconsider and revise the 1998 Final Rule.

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PCA owns and operates a pulp and paper mill in Wallula, Washington (“Wallula” or “the facility”) that is subject to 40 C.F.R. Part 63, Subpart S (“Subpart S”), the relevant provisions of which were originally established in the 1998 Final Rule. PCA informs EPA that it has also filed a petition for judicial review of the 1998 Final Rule in the United States Court of Appeals for the District of Columbia Circuit⁴ and that it intends to raise in that litigation the issues on which reconsideration is requested below.

Executive Summary

In a May 26, 2020 Applicability Determination, EPA announced an interpretation of the 1998 Final Rule that not only was unanticipated during the public comment period but also is inconsistent with the regulatory language, intent, and rulemaking record. It was impracticable for PCA to raise objections to this interpretation during the public comment period for the proposed rule because neither EPA’s proposed nor final regulatory language provided notice of the interpretation EPA advanced in the May 26, 2020 Applicability Determination. Indeed, EPA’s assertion that secondary exhaust from certain equipment used in the kraft pulping process—specifically, Bauer rotary valves that are the functional equivalent of a chip steamer and use exclusively fresh steam—are subject to the collection and control requirements of Subpart S is irreconcilable with the regulatory language finalized in the 1998 Final Rule.

PCA has been forthright and transparent in its communication with the relevant state and federal regulatory agencies regarding its operations and emissions, and affirmatively sought clarification of rule applicability as far back as 2000. The record shows concurrence of regulators with PCA’s interpretation. Now, nearly 20 years later, EPA has offered a new reading of the regulations that is inconsistent with the text and not supported by the record. This shows, at a

⁴ PCA is also seeking judicial review of the May 26, 2020 Applicability Determination.

minimum, an instance of regulated entities not being fairly apprised in advance of the rules by which EPA will judge their behavior. The surprise created by the May 26, 2020 Applicability Determination, given the regulatory language and record, runs contrary to fundamental principles of fairness and at a minimum represents a failure of EPA to publicly state its interpretation and to act transparently.

For the foregoing reasons, PCA respectfully petitions the Administrator to convene a reconsideration proceeding for the 1998 Final Rule to address whether the Applicability Determination constitutes a reasonable interpretation of the regulatory language in the 1998 Final Rule and intended scope of Subpart S control requirements. In doing so, the Agency must withdraw the Applicability Determination at this time, thereby re-affirming the plain language of the 1998 Final Rule with a determination that Bauer valves using exclusively fresh steam are not regulated as part of a “digester system” as defined in the regulations. To the extent that, following reconsideration, the Agency determines that Bauer valves using exclusively fresh steam *should* be encompassed within the regulatory definition of “digester system,” PCA submits that this can be accomplished only after complying with the applicable procedural requirements of the CAA and the APA and the directives of Executive Order (“EO”) 13892 by establishing a rulemaking docket and proposing for public comment regulatory language to amend the 1998 Final Rule, which would only be enforceable prospectively.

Background

The 1998 Final Rule was issued pursuant to CAA Section 112's directive for EPA to establish standards applicable to the emission of hazardous air pollutants ("HAPs") from certain major and area sources of HAPs.⁵ As a National Emission Standard for Hazardous Air Pollutants ("NESHAP") established under CAA Section 112, Subpart S standards apply to new and existing sources within the source category. For existing sources, EPA is required to determine a "floor" level of control that reflects the emissions limitation achieved by the best performing sources in the category.⁶ Section 112 rulemaking dockets, therefore, contain extensive analysis of the performance of existing sources for those emission points being regulated.

Accordingly, in the 1998 Final Rule, EPA established control requirements for vent and condensate streams at certain types of pulp mills, specifying standards for the four types of pulping processes it determined were subject to the NESHAP.⁷ For kraft pulping, the process used at the Wallula facility, EPA finalized a requirement to control HAP emissions from certain specifically-named "equipment systems," including "each [low volume, high concentration ("LVHC")] system."⁸ The regulations define an LVHC system as "the collection of equipment including the digester . . . system[], and any other equipment serving the same function . . ."⁹ "Digester system" is in turn defined to include various types of equipment, including—in relevant part—"chip steamer(s) not using fresh steam . . . and any other equipment serving the same function."¹⁰

Read together, these provisions of the 1998 Final Rule plainly indicate to regulated entities that chip steamers using exclusively fresh steam are *not* part of the "digester system" and are thus

⁵ 42 U.S.C. § 7412(b).

⁶ *Id.* § 7412(d)(3).

⁷ 63 Fed. Reg. at 18,518.

⁸ *Id.* at 18,619 (codified at 40 C.F.R. § 63.443(a)(1)(i)).

⁹ *Id.* at 18,618 (codified at 40 C.F.R. § 63.441).

¹⁰ 63 Fed. Reg. at 18,618 (codified at 40 C.F.R. § 63.441).

not subject to the control requirements in 40 C.F.R. § 63.443(a)(1)(i)—and that the same is true for “any other equipment serving the same function” as a chip steamer, such as the Bauer rotary valves that have been used at Wallula since the 1998 Final Rule took effect to feed wood fiber (chips or sawdust) from fiber storage bins and dry feed screws to each digester vessel. Unlike many similar facilities, PCA’s facility operates, and has always operated, a dry feed system—meaning that the wood fiber fed to the digesters is not pre-conditioned with white or black liquor, and in fact no cooking liquor whatsoever enters the feed screws or the Bauer valves at any point in the process.

While rotating their positions from the feed screw to the digester opening and back to the feed screw, the Bauer valves serve the same function as a chip (or sawdust) steamer.¹¹ They use exclusively fresh steam for pre- and post-pocket purges and are engineered to prevent digester gases from back-feeding into the pocket feeder and from being vented through the secondary exhaust line (*i.e.*, the pressure of fresh steam supplied to the Bauer valve is consistently maintained at a pressure of 25 p.s.i. greater than the digester working pressure, creating motive force of steam *into* the digester and not the other way around). Because the Bauer valves are the functional equivalent of a chip steamer and use, and have always used, exclusively fresh steam (and because the valves are engineered to prevent digester gases from back-feeding into the Bauer valve and escaping via the secondary exhaust line), PCA has never considered them to be part of the digester systems at the facility. And, as explained further below, that conclusion was confirmed by the

¹¹ See **Attachment 2**, Andritz, *M&D Continuous Digester System* (rev. Mar. 3, 2004) at 6 (“Compared to the more-familiar Kamyr digester system, the rotary valve, in spite of the deceptively simple name, performs the roles of the low pressure feeder, steaming vessel, high pressure feeder and top separator.”).

Washington Department of Ecology (“Ecology”) in an Applicability Determination dated June 13, 2001,¹² consistent with EPA’s intent.¹³

As a result, statements in a 2019 Notice of Violation (“NOV”) issued by EPA Region 10 alleging that the facility was in violation of 40 C.F.R. § 63.443 based upon the inspector’s “observation” that digester gases were vented from the Bauer rotary valve feeding M&D Digester # 1 to the atmosphere via a secondary “relief” line came as a complete surprise to the company because there was no indication of what interpretation of the regulatory language could lead to such a conclusion.¹⁴ This led PCA to confer with EPA’s Office of Air and Radiation—specifically its Office of Air Quality Planning and Standards (“OAQPS”), the office at EPA that authored the regulations—regarding its intent in issuing the 1998 Final Rule. PCA submitted a letter to OAQPS on January 24, 2020 detailing its operations and interpretation of Subpart S with respect to operation of the Bauer valves.¹⁵ The January 24, 2020 letter explained the configuration of PCA’s digesters and the company’s long-standing understanding that any emissions from the secondary exhaust line that might be emanating from the Bauer rotary valve were not covered by Subpart S control requirements. It provided extensive information regarding the relevant regulatory provisions and EPA guidance, as well as a previous determination PCA had received from Ecology.¹⁶ The January 24, 2020 letter concluded by seeking EPA’s concurrence in the analysis

¹² **Attachment 3**, Letter from Teddy V. Le, Ecology to Kevin Scott, Boise Cascade Wallula Mill (June 13, 2001).

¹³ **Attachment 4**, E-mail from Penny Lassiter, EPA to Bill Dameworth, Pope and Talbot (Apr. 21, 1998) (explaining that EPA “did not intend to capture situations where only fresh steam is used.”).

¹⁴ **Attachment 5**, Notice of Violation, *In re Packaging Corporation of America, Inc., Wallula, Washington*, (EPA Region 10 Aug. 8, 2019). EPA’s NOV alleges, based upon the inspector’s review of a piping and instrumentation diagram (P&ID) provided by the facility, that M&D Digester # 2 had the same configuration as M&D Digester # 1 but was out of service during the 2018 inspection on which the NOV was based. Thus, the NOV allegations with respect to M&D Digester # 2 are based upon the configuration observed by the inspector in the P&ID.

¹⁵ **Attachment 6**, Letter from John Piotrowski, PCA to Robin Dunkins, EPA, OAQPS (Jan., 24, 2020).

¹⁶ See Attachment 3.

of regulatory applicability previously agreed to by Ecology. PCA also sent a written response to EPA Region 10 on January 29, 2020, rebutting the allegations in the 2019 NOV.¹⁷

On May 26, 2020, EPA's Office of Enforcement and Compliance Assurance ("OECA") sent a response (the "Applicability Determination") to PCA's January 24, 2020 letter.¹⁸ The Applicability Determination expressly recognized that "the Bauer rotary valve on [the facility's] M&D digester is not specifically addressed in the definitions in Subpart S" and that the Agency "intends to address this emission source specifically through a notice and comment rulemaking as part of the next technology review of Subpart S required by CAA section 112(d)(6)."¹⁹ The Applicability Determination did not, however, address the aforementioned gaps in the regulatory language that, based upon a plain language reading, exclude secondary exhaust emissions from the Bauer rotary valve from Subpart S regulation. Rather, EPA simply concluded that "[i]f HAP emissions originated from the digester are exiting through the Bauer rotary valve at PCA, Subpart S requires these emissions to be captured and controlled."²⁰

The Applicability Determination reflects EPA's new interpretation that the Bauer valves fall within the "digester system" definition in the regulations, notwithstanding that EPA concedes that it should undertake notice and comment rulemaking to address this issue in the regulation.

Bases for Reconsideration

I. EPA Must Convene a Reconsideration Proceeding Where, As Here, Objections of Central Relevance to the Outcome of a Rule Were Impracticable to Raise During the Comment Period and/or Arose After It Closed.

The CAA requires reconsideration of EPA final rules upon petition by an interested party when the terms of Section 307(d)(7)(B) are met, specifically where:

¹⁷ **Attachment 7**, Letter from Dawn Blancaflor, PCA to Julie Vergeront *et al.*, EPA Region 10 (Jan. 29, 2020).

¹⁸ **Attachment 8**, Letter from Martha Segall, EPA, OECA to John Piotrowski, PCA (May 26, 2020).

¹⁹ *Id.* at 3.

²⁰ *Id.* (emphasis added).

the person raising an objection can demonstrate to the Administrator that it was *impracticable to raise such objection* within [the time provided for public comment] or *if the grounds for such objection arose after the period for public comment* (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.²¹

These criteria for convening a reconsideration proceeding are plainly met. First, the 1996 proposal on which the 1998 Final Rule was based did not provide notice that EPA intended to regulate components like Bauer rotary valves that are using fresh steam and are functionally equivalent to a chip steamer. Thus, it was not practicable to raise an objection to such regulation. Even if that were not the case, the grounds for PCA's objection arose after the close of the comment period, with the issuance of the May 26, 2020 Applicability Determination, which for the first time reflected EPA's interpretation that the Wallula facility's Bauer valve, serving the function of a chip steamer using exclusively fresh steam, would fall within the scope of digester system definition. Third, this issue is of central relevance to the outcome of the rule because the consequence is significant control cost and, had such an intent to regulate been provided in the 1996 proposed rule on which the 1998 Final Rule was based, EPA would have received comments on this aspect of the regulation that would have disputed the basis for such regulation, including comment on any analysis of whether the best performing 12 percent of existing sources were controlling such emissions (to the extent they existed) and on the cost-effectiveness of going beyond such minimum control requirements under CAA Section 112(d)(2)-(3).

In light of these considerations, which are explained in more detail below, EPA must convene a reconsideration proceeding in order to reconsider and/or revise the 1998 Final Rule consistent with the applicable provisions of the CAA and APA. The proceeding should result in a determination that Bauer rotary valves (as described above) are excluded from the regulatory

²¹ 42 U.S.C. § 7607(d)(7)(B) (emphases added).

definition of a “digester system” (as PCA establishes herein), and withdrawal of the Applicability Determination.

II. To the Extent EPA Interprets the 1998 Final Rule to Regulate Bauer Valves Using Fresh Steam as Part of the Digester System, EPA Did Not Provide Notice of that Interpretation, It Was Not Reasonably Ascertainable During the Public Comment Period, and the Interpretation Arose with Issuance of the May 2020 Applicability Determination.

As discussed above, PCA disputes that the rule language provides for regulation of the Bauer valve using fresh steam as part of the digester system. Given that the language of the 1998 Final Rule does not cover this equipment, and that the proposed rule on which the 1998 Final Rule was based did not provide notice that the equipment would be covered, it was impracticable for PCA to raise this issue during the public comment period on the relevant proposal, which means that this criterion for mandatory reconsideration under Section 307(d)(7)(B) has been met. Moreover, given the interpretation that the control requirements in the 1998 Final Rule apply to the Wallula facility’s Bauer valve (which performs the same function as a chip steamer and exclusively uses fresh steam) was announced for the first time in the May 26, 2020 Applicability Determination, the grounds for reconsideration arose after the close of the public comment period, which means that the alternative, second criterion for mandatory reconsideration has also been met.²²

As explained above, the 1998 Final Rule requires owners and operators of kraft pulping systems to control total HAP emissions from certain “equipment systems,” including “[e]ach LVHC system.”²³ LVHC system is defined to mean “the collection of equipment *including the digester*, turpentine recovery, evaporator, steam stripper *systems*, and any other equipment serving

²² *Id.*

²³ 63 Fed. Reg. at 18,619 (codified at 40 C.F.R. § 63.443(a)(1)(i)).

the same function as those previously listed.”²⁴ The most natural reading of this definition is that it encompasses the “digester . . . systems” at the facility, which are in turn defined as follows:

Digester system means each continuous digester or each batch digester used for the chemical treatment of wood or non-wood fibers. The digester system equipment includes associated flash tank(s), blow tank(s), **chip steamer(s) not using fresh steam**, blow heat recovery accumulator(s), relief gas condenser(s), prehydrolysis unit(s) preceding the pulp washing system, **and any other equipment serving the same function as those previously listed**. The digester system includes any of the liquid streams or condensates associated with batch or continuous digester relief, blow, or flash steam processes.²⁵

A plain language reading of these provisions of the 1998 Final Rule indicates to regulated entities that chip steamers using fresh steam are not part of the “digester system,” and thus *not* subject to the control requirements in 40 C.F.R. § 63.443(a)(1)(i)—and that the same is true for “any other equipment serving the same function” as a chip steamer.

This reading of the regulations was confirmed for PCA in the years following issuance of the 1998 Final Rule. In correspondence immediately following the 1998 Final Rule’s issuance, Penny Lassiter of EPA’s OAQPS (who currently heads the Sector Policy and Programs Division of OAQPS, the division responsible for promulgation of all NESHAPs and at the time was the Agency official responsible for Subpart S) confirmed PCA’s reading of the regulation, explaining that “[t]he intent of the rule is to control venting of the chip steamers and venting off of the chip bin if the chip steamer vents through the chip bin where waste or flash steam is used,” but that EPA “**did not intend to capture situations where only fresh steam is used**.”²⁶ This was further confirmed in Question and Answer guidance issued by EPA in 2000, in which EPA stated explicitly that “[i]f a chip bin serving the same function as a chip steamer, and the steam entering the chip bin is not fresh steam, then it is considered a chip steamer” and that “chip steamers not

²⁴ *Id.* at 18,618 (codified at 40 C.F.R. § 63.441) (emphases added).

²⁵ *Id.* (emphases added).

²⁶ See **Attachment 4** (emphasis added).

using fresh steam are included as part of the digester system definition and would therefore be required to be controlled as part of the [LVHC' system].”²⁷ This is the “one circumstance,” EPA stated, in which chip bins are subject to the NESHAP.²⁸

PCA’s interpretation was further supported and confirmed by Ecology in June 13, 2001 correspondence, in which Ecology—the permitting authority to which implementation of CAA Section 112 has been delegated—agreed with the facility that “the No. 1 M&D pocket feeder vent *is not subject to the LVHC collection requirements* when using only fresh steam in the pre-steaming process.”²⁹ Ecology has re-affirmed this statement over the past nineteen years, in the facility’s Title V Permit Statement of Basis—most recently on April 1, 2018, where Ecology stated that “[t]he No. 1 M&D Digester chip/sawdust bin was determined to be an insignificant source of HAPs emissions and to be exempt from regulation under the MACT I [Subpart S] regulatory requirements (Letter dated June 15, 2001).”³⁰ The Applicability Determination is based upon a

²⁷ EPA, “Questions and Answers (Q&As) for the Pulp and Paper NESHAP, Second Volume (40 CFR Part 63, subpart S)” (Mar. 31, 2000) at 5, available at https://www.epa.gov/sites/production/files/2017-05/documents/10_mact_pulp_and_paper_qa_v2_march_2000.pdf.

²⁸ *Id.* There is no question that EPA issued Subpart S with gaps. Indeed, the Question and Answer document reflects EPA’s intent not to cover certain emission points but rather to target significant emission points in pulping process equipment, and to exclude others from Maximum Achievable Control Technology (“MACT”) applicability where they were not being controlled at most facilities. Question 7, for instance, addresses whether 40 C.F.R. § 63.443(a)(1)(i) requires emissions from batch digesters to be controlled when they are uncapped. As EPA explains, “Digester uncapping processes *are not subject to any requirements under the NESHAP*. We *did not cover the uncapping process* because we are aware of only 2 mills that control uncapping emissions. Additionally, essentially all of the contents (pulp and digestion gases) of the batch digester are blown under pressure to the blow tank, and the digester is now at atmospheric pressure. If this is the case, controlling uncapping emissions would not be cost-effective control option for existing or new sources.” *Id.* (emphases added). This reflects EPA’s consideration of what types of emission points to include in the MACT and its judgment to exclude certain points where the control costs were disproportionate to the benefits of collection.

²⁹ See **Attachment 3** at 1 (emphasis added). Ecology’s June 13, 2001 letter confirming the inapplicability of Subpart S was the culmination of several months of correspondence between Boise Cascade (then-owner of the facility) and Ecology. In a May 15, 2001 letter, for instance, Boise Cascade explained in detail the Bauer valve configuration in relation to the facility’s M&D digester and specifically requested Ecology’s “approval and determination that the secondary exhaust line of the No. 1 M&D Digester is not subject to MACT § 64.554(a)(1)(i) further controls beyond use of fresh pocket purge steam in its present operating configuration.” See **Attachment 9**, Letter from Kevin Scott, Boise Cascade to Merley McCall, Ecology (May 15, 2001). As noted above, on June 13, 2001 Ecology provided its approval and determination of inapplicability, as Boise Cascade had requested in the May 15, 2001 letter.

³⁰ See **Attachment 10**, Ecology, Title V Permit Statement of Basis, Air Operating Permit No. 0003697 (Mar. 30, 2018) at 35. The 2018 Statement of Basis also lists several “systems” that must meet “existing source” requirements of Subpart S, including LVHC systems—reflecting Ecology’s implicit assumption that the Bauer valves are not part

regulatory interpretation that departs significantly from the plain language of the 1998 Final Rule and EPA’s (and other permitting authorities’) subsequent guidance on the scope of Subpart S applicability. If the Applicability Determination indicates EPA’s intent to expand such applicability beyond the plain language of the regulation, EPA must amend the regulatory language accordingly so that, in the future, regulated entities are on notice of what is subject to the rule.

In sum, reconsideration is mandated and would result in one of two outcomes: (1) EPA reaffirming the plain language of the 1998 Final Rule with a determination that Bauer valves using exclusively fresh steam are not regulated as part of a “digester system,” as defined in the regulations and withdrawing the Applicability Determination; or (2) EPA determining that Bauer valves using exclusively fresh steam *should* be encompassed within the regulatory definition of “digester system,” which can only be accomplished by revising the regulation. If EPA adopts the second path, it can only enforce that conclusion prospectively.

III. EPA Failed to Provide Regulated Entities With Notice that the 1998 Final Rule Would Be Interpreted as the Applicability Determination Now States.

As originally proposed in 1993 (“the 1993 Proposed Rule”), Subpart S collection and control requirements would have applied to “all” emission points in the pulping process, with exception for certain minor emission points where emissions were below numerical applicability levels set forth in the proposed rule.³¹ The rationale behind this methodology for the selection of regulated emission points was to cover “all significant points in the pulping . . . process[],” which

of the LVHC or digester “system.” *Id.* See also Ecology, Title V Permit Statement of Basis, Air Operating Permit No. 0003697 (July 1, 2010) at 19 (reciting nearly the same language of the 2018 Statement of Basis that “[t]he M&D digester was determined to be an insignificant source of HAPs emissions and to be exempt from regulation under the MACT I regulatory requirements).”

³¹ EPA, *Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category; National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Proposed rule*, 58 Fed. Reg. 66,078, 66,175 (Dec. 17, 1993) (proposing to exclude certain emission streams from collection and control requirements based upon volumetric flow rate and mass flow rate).

would be controlled at the MACT floor.³²

EPA abandoned this approach in an ensuing 1996 proposal (“the 1996 Proposed Rule”), which was the last opportunity for public comment before EPA issued the 1998 Final Rule.³³ In the 1996 Proposed Rule, EPA expressly disclaimed its original proposal to require enclosure and control of “all” pulping component emissions with the exception of certain emission points below the proposed specified applicability thresholds.³⁴ Explaining that it had re-evaluated the method for establishing control applicability based upon comments and data received in the 1993 Proposed Rule, EPA proposed to “establish control applicability for kraft pulping process equipment systems . . . by specifically defining the equipment systems . . . subject to the MACT standard (*i.e., only the equipment systems and wastewater streams specifically enumerated would be subject to the standard*).”³⁵ It further explained that “[t]he named pulping process systems that EPA is considering for control are: *the LVHC vent system*, pre-washer knoter and screening system, the brownstock washing system, weak black liquor storage tanks, and the oxygen delignification system.”³⁶ Without proposing a specific LVHC system definition, EPA explained that “[t]he LVHC vent system includes . . . the digester blow heat recovery vents, batch digester relief steam condenser vents, continuous digester relief steam vents, turpentine condenser(s) vents, continuous digest blow tank vent, evaporator vacuum system vents, liquor concentrator vacuum system vents,

³² *Id.* at 66,135.

³³ EPA, *National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Announcement of availability of supplemental information, proposed rule, and opening of the public comment period for these actions*, 61 Fed. Reg. 9383 (Mar. 8, 1996).

³⁴ *Id.* at 9389.

³⁵ *Id.* (emphasis added).

³⁶ *Id.* (emphasis added); *see also id.* at 9385 (“EPA is considering specifically defining the following systems as requiring enclosure and venting to a control device: the low volume-high concentration (LVHC) vent system (*i.e.*, the digester, turpentine recovery, and evaporator systems); weak black liquor storage tanks; the pre-washer knotting and screening system; the brownstock washing system; and the oxygen delignification system. Enclosure and vent control requirements would not change from proposal. *Only these enumerated systems would be subject to the rule.*”) (emphasis added).

pre-evaporator vacuum system vents, steam stripper feed tank vents, and steam stripper off gas vents.”³⁷

There was no discussion of or proposal to include secondary exhaust ports from chip steamers (or their functional equivalent) using only fresh steam.³⁸ EPA requested public comment on this proposal by April 8, 1996, and no further public notices or opportunities for comment were provided before the 1998 Final Rule was issued.³⁹

The 1998 Final Rule reflects EPA’s efforts, explained in the 1996 Proposed Rule, to identify with specificity those emission points required to be controlled, in order to provide compliance clarity and make the standard more cost-effective to implement. As EPA explained in the 1998 Final Rule, the “applicability cutoffs in the [1993] proposed rule [were] replaced in favor of *specifically naming process equipment and condensate streams that would be required to meet the rule.*”⁴⁰ The rationale behind this “revised approach” was that the same result would be

³⁷ 61 Fed. Reg. at 9389.

³⁸ A review of the administrative record for the 1998 Final Rule supports PCA’s reading of the plain regulatory language. Indeed, EPA’s floor analysis did not encompass the collection of M&D Digester pocket feed exhaust or Bauer valve secondary exhaust. Specifically, the floor analysis was based primarily upon a pulp and paper industry survey conducted in 1992 by the National Council for Air and Stream Improvement (“NCASI”). See **Attachment 11**, Mem., from Danny Greene, Radian Corp. to Penny Lassiter, EPA, “Baseline Level of Controls” at 1 (Feb. 29, 1996), Docket A-29-40, II-D-27 (explaining that the principal data used in the baseline level of control analysis for kraft pulping and other processes were obtained using the 1992 NCASI voluntary mill survey). This survey contained no discussion or inclusion of such exhaust streams. See **Attachment 12**, 1992 NCASI Voluntary Survey Excerpt (collecting information on the “fate” of vent gases from various pulping components, not including secondary exhaust). There was no attempt to address Bauer valves on M&D digesters, nor does the survey (or any other Subpart S support documents in the docket) provide information that controls were in place for secondary exhaust from M&D Digester Bauer valves. Rather, the survey data indicate that for continuous digesters, only the primary vents (the digester relief gas vent and digester blow gas vents) were collected and included within the LVHC system vent collection systems at pulp and paper mills, and therefore only those primary vents could have been included in EPA’s MACT baseline or floor. EPA did not find any beyond-the-floor controls as cost effective at the time of Subpart S promulgation. An informal survey of mills in the Pacific Northwest and Southwest Canada conducted by Boise Cascade engineering staff in 2000 indicated that no mills that employed M&D continuous digesters for cooking chips or sawdust collected or controlled secondary exhaust from the Bauer rotary valve. Furthermore, at that time, contact with vendors who built vent collection systems for the pulp and paper industry indicated that there were no off-the-shelf systems in place that collected and controlled M&D Digester secondary exhaust and that, if this were to be completed, controls would have to be designed and engineered as entirely new systems. All of the above shows that EPA’s floor analysis did not include secondary exhaust and supports the conclusion that the regulatory language cannot be fairly interpreted to include it.

³⁹ 61 Fed. Reg. at 9384.

⁴⁰ 63 Fed. Reg. at 18,519 (emphasis added).

achieved and would be “easier and less costly to implement, for both the affected industry and the enforcement officials, since extensive emission source testing is not required to identify the vent and condensate streams to be controlled.”⁴¹ The 1998 Final Rule specifically defined the process equipment intended to be subject to Subpart S standards, and these definitions are still operative today.⁴²

This “equipment-specific” approach was clearly articulated throughout the 1998 Final Rule, as it was in the 1996 Proposed Rule on which EPA took public comments. Nowhere did EPA propose—nor did commenters have a chance to consider—that EPA might apply Subpart S collection and control requirements to emission components other than the equipment specifically identified in the 1996 Proposed and 1998 Final Rules. EPA’s interpretation in the Applicability Determination was thus not subject to public comment, notwithstanding the fact that it bears on an issue of central relevance to the rule: the scope of Subpart S collection and control requirement applicability. EPA should thus revisit the 1998 Final Rule to solicit public comment on this issue, and ultimately to revise its Subpart S standards to state which process equipment is subject to the standards on a going-forward basis. EPA’s alternative is to withdraw the Applicability Determination and return to its original longstanding interpretation of Subpart S consistent with the plain regulatory language.

⁴¹ *Id.* at 18,520. As EPA noted, the revised approach adopted in the 1998 Final Rule did “not significantly change the number of emission points controlled from those intended to be controlled in the proposed rule,” as “[t]he emission points and condensate streams that are being controlled in the final rule are fundamentally the same emission sources that EPA intended to be controlled in the proposed rule.” *Id.* at 18,519.

⁴² *Id.* at 18,618 (codified at 40 C.F.R. § 63.441) (defining “LVHC system” and “digester system”).

IV. In Addition to the Foregoing, EPA Should Convene a Reconsideration Proceeding Because the New Interpretation Reflected in the Applicability Determination Creates Unfair Surprise and Is Therefore Inconsistent with Executive Orders.

On October 9, 2019, the White House issued EO 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, reprinted at 84 Fed. Reg. 55,239 (Oct. 15, 2019) (“EO 13892”). EO 13892 supports PCA’s position that EPA should convene a reconsideration proceeding on this regulation, providing in relevant part:

- “The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions.”⁴³
- “Agencies shall act transparently and fairly with respect to all affected parties, ... when engaged in civil administrative enforcement or adjudication. ***No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency’s jurisdiction over particular conduct and the legal standards applicable to that conduct.*** ... Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.”⁴⁴
- “When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, ***it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.***”⁴⁵
- “‘Unfair surprise’ means a ***lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires.*** The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 & n.15 (2012).”⁴⁶

The Applicability Determination creates unfair surprise and represents a failure of notice to the regulated community and therefore cannot support enforcement in accordance with fundamental principles of due process and the terms of EO 13892. After more than two decades

⁴³ EO 13892, § 1.

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at § 4 (emphasis added).

⁴⁶ *Id.* at § 2(e) (emphasis added).

of implementation, with full and transparent communication by PCA with its permitting authority, EPA's Applicability Determination creates a new interpretation that PCA respectfully maintains mandates convening a reconsideration proceeding.

Relief Requested

For the foregoing reasons, PCA respectfully petitions the Administrator to convene a reconsideration proceeding for the 1998 Final Rule to address whether the Applicability Determination constitutes a reasonable interpretation of the regulatory language in the 1998 Final Rule and intended scope of Subpart S control requirements. In doing so, the Agency must withdraw the Applicability Determination at this time, thereby re-affirming the plain language of the 1998 Final Rule with a determination that Bauer valves using exclusively fresh steam are not regulated as part of a "digester system" as defined in the regulations. To the extent that, following reconsideration, the Agency determines that Bauer valves using exclusively fresh steam *should* be encompassed within the regulatory definition of "digester system," PCA submits that this can be accomplished only after complying with the applicable procedural requirements of the CAA and the APA and the directives of EO 13892 by establishing a rulemaking docket and proposing for public comment regulatory language to amend the 1998 Final Rule, which would only be enforceable prospectively.

Respectfully Submitted,

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Attachments

1. *National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production; Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category; Final rule*, 63 Fed. Reg. 18,504 (Apr. 15, 1998).
2. Andritz, *M&D Continuous Digester System* (rev. Mar. 3, 2004).
3. Letter from Teddy V. Le, Ecology to Kevin Scott, Boise Cascade Wallula Mill (June 13, 2001).
4. E-mail from P. Lassiter, EPA to Bill Dameworth, Pope and Talbot (Apr. 21, 1998).
5. Notice of Violation, *In re Packaging Corporation of America, Inc., Wallula, Washington*, (EPA Region 10 Aug. 8, 2019).
6. Letter from John Piotrowski, PCA to Robin Dunkins, EPA OAQPS (Jan., 24, 2020).
7. Letter from Dawn Blancaflor, PCA to Julie Vergeront *et al.*, EPA Region 10 (Jan. 29, 2020).
8. Letter from Martha Segall, EPA, OECA to John Piotrowski, PCA (May 26, 2020).
9. Letter from Kevin Scott, Boise Cascade to Merley McCall, Ecology (May 15, 2001).
10. Ecology, Title V Permit Statement of Basis, Air Operating Permit No. 0003697 (Mar. 30, 2018).
11. Mem., from Danny Greene, Radian Corp. to Penny Lassiter, EPA, “Baseline Level of Controls” (Feb. 29, 1996), Docket A-29-40, II-D-27.
12. 1992 NCASI Voluntary Survey Excerpt.

CERTIFICATE OF SERVICE

A copy of the preceding was sent on July 25, 2020 to the following via e-mail:

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A courtesy copy is being sent via commercial mail carrier.

/s/ Shannon S. Broome

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