

**Alicia Meads**

Director  
Energy and Resources Policy

**Mahta Mahdavi**

Director  
Energy and Resources Policy

April 4, 2011

Improving Regulations Docket  
Environmental Protection Agency  
EPA Docket Center  
Mailcode: 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Dear Sir or Madam:

### **Introduction**

The National Association of Manufacturers (NAM) respectfully submits these comments on the Environmental Protection Agency's (EPA) periodic retrospective review of existing significant regulations.

The NAM appreciates the opportunity to provide comments on these proposed agreements. The NAM is the largest manufacturing association in the United States, representing over 11,000 small, medium and large manufacturers in all 50 states. We are the leading voice in Washington, D.C. for the manufacturing economy, which provides millions of high-wage jobs in the U.S. and generates more than \$1.6 trillion in GDP. In addition, two-thirds of our members are small businesses, which serve as the engine for job growth.

Our mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. Manufacturers are attempting to fully recover from the steepest economic downturn since the 1930s and bring back high-wage jobs, but they are facing an unprecedented regulatory onslaught. The EPA's aggressive approach has caused tremendous uncertainty for the industrial sector. Companies are virtually paralyzed and unable to make capital investments for fear that they will either have to make additional investments due to changing requirements, or worse, have stranded capital that cannot be utilized. Manufacturers strongly urge federal policymakers to create conditions that will lead to economic expansion and not stifle the industrial and manufacturing vitality necessary to create jobs and spur innovation.

### **General Regulatory Issues of Concern**

#### ***Reporting Requirements***

The EPA's broad requests for data reporting (IUR, HPV, GHG) should be reviewed. Specifically, Manufacturers encourage the EPA to consider whether the data collected are being used and evaluated by the agency. If the data requests are not being used, they should be eliminated. Where only some data are being evaluated in a report, the NAM

*Leading Innovation. Creating Opportunity. Pursuing Progress.*

suggests streamlining the data request to focus on only the information that is useful to the agency and is being evaluated. This would eliminate costs for the agency to review unnecessary data and allow both the agency and the regulated community to focus resources on the most appropriate data.

Furthermore, with the increased pressure to make information available to the public, having useful and streamlined data points would allow for greater understanding by the public and eliminate the need to protect sensitive information (through CBI claims) that may not be useful or necessary for evaluation. The EPA should be aware that increasing the availability of information coupled with broad data requests will drive companies' need to protect sensitive information.

### ***Ongoing Draft Regulations***

Manufacturers recommend that the EPA's Office of Policy evaluate proposed rulemakings and eliminate non-priority draft rules the agency does not plan to finalize. Given technology and industry changes, we recognize that some draft/proposed rules have become obsolete or are no longer applicable to the regulated community. To provide clarity to manufacturers, these rules should be eliminated from consideration and deleted from the EPA's list of proposed rules.

### ***Proposed Regulations the EPA Never Finalized***

The agency's failure to finalize a proposed rule is especially problematic in the case of new source performance standards that become effective at the proposal date and not the final date. For example, subpart YYY (NSPS for new, reconstructed or modified process units within the synthetic organic chemical manufacturing industry) was proposed in 1994 and has been neither finalized nor withdrawn. In this case, the information that formed the basis of the proposal may no longer be valid. In addition, such delay creates uncertainty for the regulated community as to what requirements will apply and when.

### ***Need for Detailed Policy Analysis***

The EPA needs to more closely follow the existing requirements for promulgating regulations and actually conduct detailed analysis prior to rulemaking. This analysis would include: a review of the EPA's Information Quality Act Guidelines, where applicable; a detailed Regulatory Flexibility Act analysis to determine the impact of a regulatory action upon small businesses before certifying that there is no significant economic impact; Unfunded Mandates Act analysis to determine the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule; and Paperwork Reduction Act analysis to determine if Office and Management and Budget approval is needed to meet information collection requirements.

## **Clean Water Act**

### ***EPA's Numeric Nutrients Criteria – State-By-State Implementation***

The EPA's process to establish numeric nutrient criteria (NNC) in the state of Florida is of great concern. The NAM is concerned that this is a template for how the EPA will structure and impose similar nutrient requirements nationwide. In fact, there are indications that the EPA

may impose this model in other states, such as those in the Mississippi River watershed, which encompass the middle of the United States. These criteria have tremendous negative economic ramifications and are based on unsound science.

Various entities in Florida, both governmental and private, have performed economic analyses on this rule. One privately funded, independent economic analysis concludes that in the "most likely scenario," the first phase of the rule will impose statewide costs ranging from \$3.1 billion to \$8.4 billion per year for the next 30 years. Another study by the Florida Department of Environmental Protection estimates that the EPA mandates will, in part, impose \$21 billion in capital costs on municipal wastewater treatment and storm water utilities. This could raise Florida household water bills by approximately \$700 annually. Another study by the Florida Department of Agriculture and Consumer Services concludes that Florida's agricultural community will lose 14,545 full-time and part-time jobs and lose \$1.148 billion annually. For the phosphate industry alone, compliance with the EPA's nutrient criteria is estimated at \$1.6 billion in capital costs and \$59 million in annual operation and maintenance expenses. The EPA internally calculated and published a total economic impact on the state's economy of only \$135.5 million to \$206.1 million per year. This is an order of magnitude less than state and expert assessments.

Experts in Florida continue to question the scientific basis for these standards and whether they are even attainable with existing technologies. The methodology the EPA used to develop the rule fails to show a cause and effect relationship between nutrient loads and impairment. The EPA's own Science Advisory Board criticized the EPA's methodology. Florida has existing nutrient water quality programs that are more effective than the new EPA regulations because the state's current policies are based on scientific evaluations of the state's vast, varied and unique ecosystems.

### ***Clean Water Act Guidance***

In 2008, the EPA and the U.S. Army Corps of Engineers issued a joint guidance document outlining jurisdictional determination under the Clean Water Act (CWA). Recently, the agencies drafted new guidance that applies a broader interpretation of existing Supreme Court precedent and that the agencies expect to significantly increase the number of waters found to be subject to CWA jurisdiction compared to current practices. The impacts will be "economically significant." The EPA and the Army Corps can expect to receive tens of thousands of additional jurisdictional determination requests and permit applications, with the potential to create significant permitting delays, impose billions of dollars in costs and endanger job growth opportunities. The document is expected to be released shortly for public comment, but it is unclear whether the Administrative Procedure Act notice and comment process will be applied because the document is still presented as guidance and not a formal rule. Such changes must be addressed in the regulatory definition of the term "waters of the United States" and be subject to administrative procedural requirements, including appropriate cost-benefit analysis, consideration of state impacts, interagency review, notice and comment and appropriate judicial review. Also, the EPA should not lose the exemptions for grandfathered lagoons/wastewater treatment systems.

### ***CWA – Total Maximum Daily Load***

The EPA recently updated its 2002 memorandum on the subject of "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLA) for Storm Water Sources and

NPDES Permit Requirements Based on Those WLAs." The update revises the EPA's previous stance on using numeric limits in stormwater permits -- where numeric limitations in stormwater discharges were used only in rare instances, the current memo recommends using numeric effluent limitations where feasible to control for stormwater discharges. For such a major change in permitting policy, the EPA should have initiated formal rulemaking rather than updating a guidance document. (Note that the updated memo is now available for public comment, but it is still not slated for formal rulemaking.)

Further, the memo calls for using surrogate parameters, such as flow rate or impervious cover, as a measure of stormwater pollutant loading. This guidance is overly burdensome. Stormwater discharge flow rates cannot always be controlled depending on storm size. If flow rate limits are given, there are concerns that flow rate limits would be continually reduced on subsequent permitting cycles, potentially resulting in increased noncompliance (if storm is large enough) or necessitating the construction of large retention facilities that require a large footprint to build upon. The implications are large, and a formal rulemaking process should be initiated.

### ***TMDL for the Chesapeake Bay***

At the end of 2010, the EPA issued the final TMDL for the Chesapeake Bay. A TMDL is a calculation of the maximum amount of a pollutant a water body can assimilate and still maintain water quality standards. As part of the TMDL process, the EPA usurps the states' traditional role of TMDL implementation by threatening heavy-handed measures if certain cleanup milestones are not met.

### ***Safe Drinking Water Act***

The EPA appears to have no process in place to seek agency review of a determination to regulate a chemical under the Safe Drinking Water Act (SDWA), despite the statutory requirements that must be satisfied to make that regulatory determination. Rather, an affected party must wait until the actual drinking water standard is proposed to formally appeal the EPA's having met its statutory threshold to proceed with regulation. The EPA should modify its regulations to allow parties to seek reconsideration when the EPA makes a positive determination to regulate, with respect to whether it satisfied the SDWA criteria.

In February 2011, the EPA announced that it will regulate a chemical that clearly does not meet the criteria of the SDWA (adverse health effects on humans, frequency of occurrence in public drinking water and a meaningful opportunity to improve public health through regulation). There is clearly no scientific or legal justification for the EPA's decision. This is in direct opposition to President Obama's Executive Order issued January 18, 2011, which establishes a set of principles that all departments and agencies are to follow when promulgating regulations. It is also in opposition to the White House Office of Science and Technology Policy memorandum of December 17, 2010, providing implementation guidance to departments and agencies on the Administration's scientific integrity policies.

### **Toxic Substances Control Act Reform**

Manufacturers believe that the EPA should eliminate or streamline burdensome and unnecessary reporting in the Toxic Substances Control Act (TSCA).

### ***TSCA Inventory Update Rule Regulations***

The NAM is concerned that the EPA's continuous revision of its Inventory Update Reporting (IUR) regulations results in rules that are increasingly complex and burdensome without demonstrated purpose and value. Recently proposed (and, possibly, soon to be finalized) changes that would render the IUR even more burdensome than in the past include:

- Mandatory electronic reporting using a web-based system being introduced for the first time;
- Retroactive reporting of production volumes (data from 2006 to 2009 without notice until 2010 that such data might be required);
- Replacement of the current "readily obtainable" reporting standard with a "known to or reasonably ascertainable by" standard for reporting processing and use information;
- Changes to threshold determinations such as introducing a zero threshold for chemicals subject to TSCA rules or orders and eliminating the 300K lb. threshold for reporting processing and use information; and
- Increasing the reporting frequency from once every five years to once every four years.

Reporting requirements such as the IUR require significant resources from companies that submit data and government offices that receive it. Regulations that impose a reporting burden must be justified by a specific and clearly demonstrated need for the information and be targeted to the entities in the chemicals supply chain that have easy access to the data. The EPA should set priorities and gather data it needs for specific purposes and programs, rather than casting a wide net from which data may be drawn for undefined future uses.

### ***TSCA Section 12(b) Export Notification Requirements***

The export notification requirement at 40 CFR Part 707 Subpart D is of little or no health or environmental benefit, and it is a good example of a burdensome requirement on industry that should be eliminated. In addition to the burden on industry, the EPA expends resources to process and record the export notifications companies submit, so eliminating the current system of notifications would promote government efficiency.

Eliminating TSCA export notification requirements on businesses is justified because three decades of experience with the requirements have shown them to have little or no value. Amending TSCA export notification requirements would reduce unnecessary paperwork for the regulated community and the government without sacrificing protection of human health and the environment. Because export notifications requirements pose significant burden with little or no resulting benefit, they are ripe for reform.

## **Air Quality**

### ***Regulation of Greenhouse Gas Emissions***

On January 2, 2011, the EPA began regulating greenhouse gas (GHG) emissions from stationary sources under the Clean Air Act. While only the largest facilities will be regulated at first, this action sets the stage for future regulation of much smaller sources. The new permitting requirements have discouraged manufacturers from building new facilities or expanding their current facilities, hurting competitiveness and discouraging job creation. Furthermore, additional

facilities – including hospitals, agricultural establishments and even the smallest businesses – will be phased in to the onerous permitting requirements in the near future.

The EPA also announced that it had settled litigation with states and environmental groups that sought to compel the agency to establish New Source Performance Standards (NSPS) for GHG emissions from fossil fuel power plants and petroleum refineries. In addition to the potential for modified and reconstructed sources being subject to standards upon the proposal dates this year, the Agency has announced plans to regulate existing sources from other industry sectors in the near future. Because the EPA is considering an emissions cap program similar to the one Congress rejected, regulatory uncertainty is making it difficult for manufacturers as they make investment decisions.

### ***GHG Mandatory Reporting Rule***

Manufacturers have had problems with accessing the EPA's e-GRRT system and believe an alternative reporting system is needed, such as paper reports. In addition, there is the potential for double-counting emissions when a source is subject to multiple subparts.

### ***NSPS***

The EPA must change its stance or seek a congressional change, if needed, of the interpretation that a change to the NSPS is effective on the date of the proposal. This interpretation adds great regulatory and compliance uncertainty when industry does not know what the standard will be until the very end of the process but still must comply with the proposed requirements.

### ***Boiler MACT Rule***

The EPA recently finalized a rule that establishes more stringent emissions standards on industrial and commercial boilers and process heaters (i.e. Boiler MACT). This broad-reaching final rule will likely cost manufacturers billions of dollars in compliance costs and will place thousands of jobs in jeopardy. The EPA's new pollutant-by-pollutant policy for setting the minimum level of control forces the EPA to adopt limits without any consideration of feasibility. The Clean Air Act requires that the minimum level of control be set at what the average of the best 12 percent of existing units in the subcategory are achieving in practice, but **not a single unit** in some subcategories, such as island liquid units, can meet all five of EPA's final emissions limits. Some facilities may shut down.

Manufacturers are also very concerned with the Commercial and Industrial Solid Waste Incinerator rule (CISWI) and the definition of "solid waste" contained in the identification of non-hazardous secondary materials rule (NHSM), both of which were finalized in conjunction with the Boiler rule. These rulemakings compound the confusion for what sources are considered "incinerators" regulated under Section 129 of the Clean Air Act versus other sources regulated under Section 112. In particular, cement kilns utilize a wide variety of alternative ingredients in lieu of virgin raw material (e.g., foundry sand, blast furnace slag, or mill scale).

The new definition of solid waste would subject cement kilns using these ingredients to the incinerator provisions because the criteria for demonstrating "legitimacy" of the alternative material are extremely difficult. The rule is also unclear and subject to various interpretations as it pertains to alternative fuels such as biomass. Facilities burning biomass may have to install expensive "add-on" controls or stop using alternative fuels like biomass in their boilers.

## ***Ozone NAAQS***

Despite being midway through the ongoing five-year National Ambient Air Quality Standards (NAAQS) review process, in January 2010, with no new information, the EPA proposed lowering the 2008 standard to within the range of 60 parts per billion (ppb) to 70 ppb. At any point in the EPA's proposed range, the number of "non-attainment areas" will dramatically increase nationwide. For local communities, a non-attainment designation can mean a loss of industry and economic development, plant closures, loss of federal highway and transit funding and increased fuel and energy costs. The EPA estimates that the proposed new standard could add as much as \$90 billion per year to the already high operating costs of manufacturers and other sectors. Changing the 2008 standard outside of the normal five-year review process is unwise and unfair to businesses and consumers.

## ***SO<sub>2</sub> and NO<sub>x</sub> NAAQS***

The EPA set much more stringent standards for both SO<sub>2</sub> and NO<sub>x</sub> in 2010. In so doing, the EPA failed to recognize the implementation issues that have been demonstrated over the past year. The EPA should revisit these decisions.

Concerning the SO<sub>2</sub> standard, the EPA has changed the basis for establishing non-attainment areas to use modeling methodologies instead of monitoring. The EPA should revert to the existing methodology and use monitoring to establish these areas.

## ***Utility MACT***

The proposed Utility MACT rule is an example of an excessive regulation that will cost billions of dollars, lead to higher electricity prices and could cause significant job losses in the manufacturing sector. In addition, electric system reliability could be compromised by coal retirements and new environmental construction projects caused by this proposed rule and other EPA regulations. Stringent, unrealistic regulations such as these will curb the recent economic growth we have seen.

## ***Clean Air Act***

The EPA should streamline the process for a company to be removed from Title V permit requirements once compliance has been reasonably demonstrated. Or, in the alternative, the EPA should seek a legislative change to permit that streamlining.

## **Hazardous Materials and Solid Waste**

### ***Coal Combustion Residuals or "Coal Ash"***

The EPA has proposed to regulate coal combustion residuals (CCR) from the electric utility industry as either hazardous or non-hazardous solid waste. Although industrial sources would be exempt under the current proposal, there are no guarantees that these same requirements would not be mandated in the future. The EPA could regulate these materials

under the non-hazardous waste provisions and modify the proposal to make those requirements consistent with the degree of harm posed by such residuals.

### ***Non-Hazardous Secondary Materials***

In February, as part of the Boiler MACT rules, the EPA promulgated definitions for non-hazardous secondary materials for the first time. This rule has the potential to significantly alter the energy sources many facilities count on. This will have the effect of forcing facilities to switch to more traditional fuels, avoid alternative fuels and generate more solid waste. These potential impacts appear to be in direct conflict with stated energy goals within other parts of the Administration.

### ***Financial Assurance Requirements under CERCLA Section 108(b)***

The EPA is planning to issue financial assurance requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for the petroleum and coal products manufacturing sector, in addition to the hard rock mining sector, the chemical sector and the electric power generation sector. We believe that before the EPA proposes these regulations, it should carefully consider the requirements of Executive Order 13563.

First, the EPA must consider the costs, benefits and burdens associated with any such rulemaking. The EPA has not made the case that any level of financial assurance is necessary to address the risks of using hazardous substances that remain under modern environmental regulations. Moreover, because the EPA cannot turn back the clock, it cannot take the position that financial assurance requirements imposed today will address risks posed by legacy contamination.

Second, the EPA should be careful to avoid duplicative regulation. Financial assurance is required under a variety of federal and state laws and under the Resource Conservation and Recovery Act (RCRA).

Third, if financial assurance requirements are imposed on any sector, they must be flexible, allow a variety of ways to meet the requirements and allow the use of compliance options that do not tie up capital. Generally, such requirements remove capital from the economy. During these difficult financial times, the money spent on financial responsibility requirements often could be better spent on capital projects, such as new plants and proactive pollution control technology, rather than merely taken out of circulation to guard against a future spill that may never occur.

### ***Reconsideration of RCRA Subtitle C Definition of Solid Waste Final Rules***

The EPA is planning to propose revisions to the October 2008 Definition of Solid Waste rule under Subtitle C of the RCRA by June 30, 2011. In doing so, the EPA must ensure that this proposal complies with Executive Order 13563.

First, the EPA must take into account all the costs, benefits and burdens associated with the rulemaking. The October 2008 rule was estimated to result in economic savings of approximately \$95 million a year. In any estimate of the costs of any proposed revisions, the EPA should include the benefits foregone due to the delayed effective date of the rule

throughout much of the nation, as well as any reduced benefits that would be caused by the EPA's proposed changes. In any estimate of potential environmental benefits, the EPA must consider the experience of these four states that have adopted the rule to date - where it is likely that no environmental harm follows from the October 2008 rule.

Second, the EPA must embrace the President's mandate that agencies should reduce burdens and maintain flexibility. Any regulatory changes that increase burdens and reduce flexibility fail to implement the President's directive.

Third, we believe that materials legitimately and beneficially reclaimed or otherwise reused, such as by being burned for energy recovery, used as ingredients in combustion units, or used to create products applied to the land, are neither disposed of nor abandoned, do not meet the "plain-English meaning" of "discard" and thus are not solid waste. Any reconsideration of, including revisions to, the October 2008 RCRA Subtitle C Definition of Solid Waste rule (or any other RCRA Definition of Solid Waste rule, such as the March 21, 2011 rule under RCRA Subtitle D defining Non-Hazardous Secondary Materials that are Solid Waste) should continue to embrace this principle.

### **Conclusion**

Accordingly, we ask the EPA to stop its aggressive regulation of manufacturers. As manufacturers try to recover from one the worst recessions of our nation's history, it is imperative that the EPA slow down and review the regulations that it has in place and those that are not yet finalized to ensure predictability within the regulatory realm. We thank you for the opportunity to comment.

Sincerely,



Alicia L. Meads  
Director, Energy & Resources Policy  
National Association of Manufacturers



Mahta Mahdavi  
Director, Energy & Resources Policy  
National Association of Manufacturers

---

<sup>i</sup> "Economic Analysis of the Proposed Federal Numeric Nutrient Criteria for Florida," Cardno ENTRIX, 2010, pg. 28-31.