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Docket **EPA–HQ–OAR–2004–0489**
U.S. Environmental Protection Agency
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RE: Revisions to the Air Emissions Reporting Requirements ("AERR"); PROPOSED RULE: 88 Fed. Reg. 54,118 (Aug. 9, 2023); amended by 88 Fed. Reg.

Introduction – The Flexible Packaging Association ("FPA") appreciates this opportunity to comment on proposed changes to the Air Electronic Emissions Reporting Rule (AERR) in the Notice of Proposed Rulemaking ("NPRM" or "Notice"). FPA is a national trade association, established in 1950, comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials to manufacture bags, pouches, labels, liners, wraps, rollstock, and tamper-evident packaging for food and medicine. Flexible packaging, a $42.9 billion industry, employs roughly 85,000 people in the United States and is the second largest and fastest growing segment of the U.S. packaging market.

Background – FPA's members own and operate both major and non-major manufacturing facilities throughout the U.S., and if this rule is finalized, they would be required to electronically report their annual actual HAP emissions to the EPA using CEDRI, and/or to the respective air pollution control authorities in states in which they operate. Notably, some major HAP sources operating in states like Wisconsin, Minnesota, California, Texas and Maryland, report certain HAP emissions periodically to their states, but none of FPA's members report HAP based on the applicability criteria in this rule (and hence if this reporting requirement is finalized, they will have duplicative but inconsistent reporting schemes to implement). Further, the applicable National Emission Standards for Hazardous Air Pollutants ("NESHAP," a/k/a "MACT standards"), to which this industry is subject, also do not require this type of reporting, but instead performance-based compliance reporting with the MACT limits via CEDRI to the EPA.[1] Notably, the Monitoring, Recordkeeping, and Reporting components of the MACT rules, to which our members are subject, do not include annual reporting of actual emissions—principally because those standards are based on end-of-the-stack control compliance (e.g., combined 95% capture and destruction efficiencies) or material substitution. In fact, nearly all

[1] FPA's members that are "major sources of HAP," comply with 40 CFR Pt. 63, Subpt. KK (Printing and Publishing) and Subpt. JJJJ (Paper and Other Web Coatings).

of FPA's members have eliminated the use of coatings and inks that containing intentionally added HAP from the production of flexible packaging. As a result, a number of FPA's members also are no longer "major HAP sources," and have been reclassified as "area HAP sources." Unfortunately, under the proposed Notice of Proposed Rulemaking ("NPRM" or "Notice"), they will still be required to report HAP if any one or more HAP is emitted from a release point in their plant exceeds the health-based thresholds in Table 1.B of Proposed Appendix A of the rule, which would still require analysis of stack and fugitive emissions if the rule is finalized.

In summary, the FPA finds the proposed rule both overwhelming and confusing because it creates new terminology that is not consistent with current permits or CAA regulations, and the Association urges the EPA to withdraw it.

DISCUSSION OF COMMENTS

A. <u>FPA Has Five Overriding Concerns About the Proposed Collection of HAP Data in the Proposed Rule.</u>

The proposal presents five fundamental elements of concern to FPA members: (1) the applicability of the rule to unregulated sources of HAP; (2) the appreciable costs of complying with the rule, based on estimates in the proposed Economic Impact Analysis for the rule;[2] (3) the basis for the health-based thresholds that have proposed to be applicable to area/non-major sources as the basis for reporting; (4) the absence of a legal basis for the rule in the Clean Air Act; and, (5) the absence of a discussion regarding EPA's plans to communicate perceived environmental threats to nearby communities without input from emission sources, particularly when numerous facilities could contribute to that impact. We discuss each of our concerns below.

1. FPA believes that the applicability of the proposed rule is confusing, and the association does not believe that it should be applied to non-major sources that are not otherwise regulated by the CAA.

a. <u>*To understand the applicability of the proposed rule, FPA requests clarification on the following questions*</u>:

- Must any major source of a criteria air pollutant ("CAP") report all HAP emissions listed in Table 1B, regardless of whether they exceed the de minimis levels in Table 1B?

- If a non-major stationary source (i.e., a source that is neither a major HAP or CAP source) does not belong to the NAICS-codes listed in Table 1C of proposed Appendix A, must it report HAP if it does not exceed any of the thresholds in Table1B? (For instance, a mall or shopping center does not appear to be in one of the listed NAICS codes, but it might be a major source of NOx, so we understand all of its HAP would need to be reported. On the other hand, if the mall is not a major source of CAP or HAP, and it is

[2] Cite to Summary at 88 Fed. Reg. at 54,193-196 and Docket No. EPA-HQ-OAR-2004-0489-0107

not classified under a NAICS code in Table 1C, but it emits a HAP over a threshold level in Table IB, it appears that it would not be required to be report. Is that correct?

- If a non-major CAP source exceeds a threshold for one or more of the pollutants in Table 1B, must it report? If so, what is the relevance of Table IC to applicability to a non-major source's obligation to report under the proposed rule?

b. EPA should not regulate non-major sources under AERR if they are not already regulated by the CAA.

EPA's analysis of the applicability of the proposed rule would require about 115,000 more non-major sources of HAP could be added to EPA's Air Emissions Reporting Requirements ("AERR"), which currently affect about 13,400 major sources. See 88 FR 54,136.[3] Most of these sources do not appear to be currently regulated under the federal Clean Air Act, and FPA does not believe that they should be regulated under AERR by having to annually estimate and report their emissions if they exceed the values in Table 1B. We discuss this legal basis in section A.4 of our comments below. Our point here is that the Clean Air Act Amendments of 1990 very specifically avoided regulating most "area" sources unless they belonged to a category of area sources that were identified by the agency under the elements of the National Toxics Strategy set forth at CAA Section 112(k), even though the Congress was clearly aware of the potential threats of these sources. CAA Section 112(f)(1).

The Notice of Proposed Rulemaking, describe the purposes of the proposed regulatory reporting of HAP by non-major source, based on the potential exposure of communities to HAP that exceed the proposed thresholds to protect the health and welfare of Americans, *id.* at 54,148*;* to set future standards for non-major sources of HAP under Section 112(f) (2*, id. a*t 54,147, 54,194; to develop future monitoring approaches for stack emissions; *id.*, and to development multi-pathway exposure models, *id.,* at 54,136, FN 28, and for other purposes. Not only did Congress seem to prevent the agency from regulating most area sources HAP, by strategically and intentionally circumscribing how area sources could be regulated, but the basic structure of Section 112 was restyled to prevent the regulation of "major sources" of HAP based on risk until the agency had imposed technology based standards on major sources, largely it seems in the hindsight of EPA's failure to meet its 1970 CAA obligations to set risk-based NESHAPs for all but seven HAP.

Hence, Congress rewrote Section 112 of the Act and imposed a three-step process for major sources and it wrote entirely separate provisions for "certain" area sources, both of which this proposed rule seems intended to evade. First, the agency was required to identify and list categories of HAP sources that included one "major source of HAP under Sections 112(e) and

[3] The agency also considered including another 11,000 collision-damage repair shops, but was persuaded by a Small Business Advocacy Review (SBAR) Panel that they should not be regulated based on several reasons See 88 FR 54,144. EPA estimated that a smaller number of the largest collision repair facilities - about 2,000- are estimated to fall within the emissions reporting thresholds under consideration. Given that the EPA is already receiving data through States from about 2,300 of such sources, the EPA is unlikely to reduce the number facilities for which emissions data must be reported below the number it is already receiving.

112(c). In step 2, the agency was required to establish technology-based-NESHAP standards under Section 112(d) of the Act, which reflected the best achievable emission reduction achieved by the top 12 percent of the industry category. Not until eight years later, in step 3, the EPA was tasked with revisiting those technology-based standards on a category-by-category basis to issue risk-based standards on an industry category-by-category basis, if the category presented a residual risk to the public under CAA Section 112(f), although it was allowed to tighten technology-based requirements for each NESHAP based on further reductions achieved in the industry achieved in the industry category periodically under Section 112(d)(8).

Congress authorized any different path for EPA to regulate "non-major" HAP sources, but it also was based on category-by-category technology standard-setting. Pursuant to Section 112(k)) of the Act, EPA was directed to identify and list sources of urban air toxics; to list those categories that contributed to 90 percent of threats under Section 112(c)(1) of the Act; and to set technology standards for those categories based on General Air Control Technology ("GACT), pursuant to Section 112(c)5. Notably, under CAA Section 112(f)(5), the Act provides *no* provision for the examination of health-based standards for non-major sources, in contrast to Section 112(f)(2) risk-based standards for certain categories of major sources.

Further, the proposed regulation does not appear to fit within this Congressionally mandated construct without additional authority from Congress because the 1990 Amendments nowhere provided EPA authority to collect data from unregulated area sources based on "risk," which is the predicate in the proposed rule for collecting data on non-major CAP and HAP sources. In fact, Congress also contemplated in 1990 that the EPA might need more information and authority to regulate area sources of HAP under CAA Section 112(f)(2). Section 112(f)(1) required, EPA to notify Congress no later than nine-years following the adoption of the legislation of additional risks and recommend additional authorities that Congress should grant the EPA to address those risks. EPA failed to report to Congress in a timely manner by the year 1999, that it required such additional authority and although it submitted a lengthy risk report to Congress, the agency appears to have declined Congress's invitation.[4]

Thus, while the legislative history of the 1990 CAA Amendments does make clear, that Congress was intensely aware of the risks of air toxics from "non-major" sources of HAP, see CAA Section 112(k)(1) (Findings and Purpose), it intentionally granted the agency, a very limited authority to regulate such "sources," under the urban air toxics provision of the Act in CAA 112(c), following a required study to identify the source categories to identify the type of sources and describe their potential cumulative impact on urban areas, with firm directions for the agency in CAA Section112(f)(1), on how to inform the Congress of additional needed authority to regulate other risks, which the agency was not able to do. Rarely in the legislative history of an environmental law is there an express recognition of risk from hazardous pollutants of any kind, that the Congress expressly declines to regulate, unless it receives further information and recommendations from EPA on how to address such risk. For this statutory reason, FPA believes that the purposes of the proposed regulation and the risk-based approach on which it is

[4] The 112(f)(1) Study that EPA delivered to Congress in 1999, declined to make such recommendations. See Residual Risk Report to Congress, EPA- 453/R-99-001.

predicated are not authorized by the Clean Air Act.

2. **The Costs of The Proposed Rule Also Are Not Reasonable, and FPA Finds No Assurance in The EPA's Statement That the Benefits of the Rule Will Exceed Its Costs--Even Though the Agency Admits That It Cannot Estimate the Value of The Benefits of the Proposed Rule.**

The agency's Regulatory Impact Analysis ("RIA") for the proposed AERR amendments acknowledges that the estimated compliance costs of implementing the rule would be high, but the agency concedes that it cannot estimate the value of benefits from the rule.[5] On the other hand, the agency asserts that these costs will be more than offset "by the value of the information to the EPA."[6] That statement in itself is startling vague and suggests that the EPA is not only unmindful of the potentially catastrophic effect of the rulemaking on small and large businesses in general, or the costs of reasonably foreseeable cascading effects from the rule on the public and other institutions, but has ignored the adage that collecting "data for data's sake" is not a laudable purpose for any information request and/or regulatory endeavor, particularly one that even the agency projects will be this costly.

Indeed, the RIA estimates that the proposed rule's total cost impact will be $117.4 million on average annually from 2024 to 2026, and $477.9 million annually in 2027 and thereafter. *For states alone*, EPA has estimated their costs to be $28.5 million on average annually from 2024 to 2026, and then $27.7 million in 2027 and the following years. *For owners and operators of affected sources*, at least 115,000 of which it appears are unregulated currently under the Clean Air Act for HAP (and CAP), who will be required by federal law to measure or estimate actual HAP from a regulated "point source," every year—even if they do not have to report their emissions because they don't exceed a proposed exposure-based health threshold, the proposed rule's cost is estimated at $89.0 million on average annually from 2024 to 2026 (when it will only affect regulated HAP sources), and thereafter, $450.1 million in 2027 when it would affect all HAP emitters.[7] FPA considers these to be stunning costs for any regulation, much less an information request, much of which will met by thousands of previously unregulated sources under the Clean Air Act.

Because the estimated costs of the proposed rule are so high, FPA believes that the proposed amendments to AERR are arbitrary and capricious and unreasonable under established principles of administrative law *Motor Vehicle Mfrs. Assn. of U.S., Inc. v State Farm Mut Auto Ins. Co,* 463 U.S. 29, 51 (1983), particularly, when less costly alternatives could be adopted simply by narrowing the final rule's scope, or by collecting air emissions data from segments or categories of small industry identified by the Agency under CAA Sections 112(c) 3) and (c)(5) one at a time, and/or by phasing in the proposed requirements over a longer period based on

[5] *Id.* at 54,193-54,195.
[6] See Summary of RIA in proposed rule at 88 Fed. Reg. 54,195. Footnote a in Table 1 concedes however, "We have determined that quantification of benefits cannot be accomplished for this proposed rule. This is not to imply that there are no benefits of the proposal; rather, it is a reflection of the difficulties in monetizing the benefits for the listed categories with the data currently available.
[7] *Id.* at 54,194.

prioritizing a list of industries.[8] There will also be other ways of acquiring additional information that the agency is proposing than is currently collected in AERR for CAPs. FPA, therefore, believes the costs of the proposed rule are excessive and arbitrary, and appear mainly to satisfy the agency's modeler's desire for information to model cumulative risks from a variety of sources not addressed in this rulemaking. We note that several efforts across the agency, including ongoing risk examinations on a pollutant-by-pollutant basis by EPA's Office of Pollution Prevention and Toxic Substances that are even costlier than those presented in the NPRM, but also others based on cumulative risk methodologies that this rulemaking does not consider.

3. The Basis for The Health-Based Reporting Thresholds for Applicability of the Proposed HAP Reporting Rule Is Inconsistent with the Clean Air Act and Arbitrary and Capricious.

Pursuant to proposed § 63.25, the proposed rule's non-major" HAP source applicability thresholds are based on risk-exposure values of a 1-in-100,000 cancer risk level that were derived from EPA's Integrated Risk Information System (IRIS) program values or California EPA values for each of the 188 HAP identified under the Act at a distance of 5 kilometers ("km") distance from an environmental justice community's to a HAP point source.[9] In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process like that used by the EPA, the agency also states that it may use such dose-response values in place of, or in addition to, other values, if appropriate.[10] The Notice also states that the agency selected 5-km because it was between 2 km and 10 km.[11]

The agency appears to invite comment on the methodology that the agency used to create the threshold values for each HAP, although the methodology and other basic assessments are contained in a background information document in the docket for the rulemaking.[12] However, FPA submits that the selection of any of these values is not adequately explained. But we believe the EPA does not have the authority to utilize IRIS and California EPA values for these thresholds, because they have not been adequately reviewed, and that EPA's selection of a distance of 5 km from an environmental justice community as the basis for determining the health-based thresholds in Appendix A, Table 1B is arbitrary and capricious.

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[8] The agency has analyzed a list of categories generally as a basis for the RIA and for the materials that the agency distributed to a Small Business Advocacy Review Panel on the EPA draft for this rulemaking. PANEL REPORT of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Revisions to the Air Emissions Reporting Requirements January 3, 2023. Docket # EPA-HQ-OAR-2004-0489-0096.

[9] *Id. at* 54,122, 54,138, FN. 30.

[10] 88 Fed. Reg. 54135-136, FN 26

[11] *Id.* at 54,140. he Notice states, for this analysis, the EPA used a 5-km distance to try to capture the appropriate demographics for near-field exposures. Based on previous air dispersion modeling of HAP emissions from over 1,600 facilities in 22 source categories, the average distance of the maximum individual cancer risk (MIR) is about 2 km from the facility. A distance of 5 km was chosen because it captures 95 percent of MIR locations for these 1,600 facilities.

[12] See, *e.g.*, 88 Fed. Reg. 54133-34, FN 26,

FPA's understanding of IRIS values is that the agency's Science Advisory Board and outside EPA consultant advisors review them and that this process is frequently fraught with controversy because the reviewers are EPA consultants, and the IRIS values are not themselves subject to public notice and comment. California EPA values, present an even more questionable legal basis for a CAA threshold applicability value because they have been adopted by a state and are totally outside the regulatory ambit of the EPA and the administrative procedures for notice to the public and the opportunity for public comment in CAA Section 307. The proposed AERR rulemaking does not remedy that integral administrative law deficiency for the use of these values, by allowing the public to comment on them now, even though they are not individually discussed on a case-by-case basis in the Notice of Proposed Rulemaking.

Moreover, the approach to applicability of the CAA risk methodology in this proposal also is inconsistent with Section 112 of the 1990 CAAA. First, many of the proposed thresholds are based on an assessment of 1-in-a-million cancer risk, although the U.S. Court of Appeals for the District of Columbia held that the EPA was not required under CAA Section 112(f) to set emission standards to reduce lifetime excess cancer risk to one-in-a-million. *NRDC v. EPA,* 529 F.3d 1077 (D.C. Cir. 2008). In another very recent case, the court also recently ruled that the NAS/EPA Joint Committee's Formaldehyde Risk Assessment was arbitrary and capricious, lacked scientific integrity, breached the Federal Advisory Committee Act, and improperly relied on data in EPA's Integrated Risk Information System (IRIS). *Am. Chemistry Council v. Nat'l Academies of Scis., Eng'g, & Med.,* D.D.C. No. 1:23-cv-02113 (June 20, 2023). We believe that these decisions have applicability to this rulemaking and underscore its arbitrariness.

Finally, the choice of an admittedly arbitrary selection of a value of 5 km, as a mid-point between 2 and 10 km, the basis for which also does not appear to be explained, suffers from an even more apparent defect. The basis for CAA health-based standards—although as FPA has discussed above, not Section 112 (d) or (f) HAP standards—are based on risk to sensitive populations, including the old, ill, or very young. They are *not* based on distances between point sources and people with low incomes, lower median education, or for whom English is a second language, per President's Executive Order 12898, which is dissonant with the purpose of the CAA. Executive policies, no matter how heartfelt, do not eclipse enforceable Congressional mandates, and the selected basis for the proposed rule–and particularly the proposed health thresholds, is a legal vulnerability, not a strength in this rulemaking.

4. **A Continuing Reporting Regulation Is Not An "Information Collection" Request, Authorized by Section 114 of the Clean Air Act, Because It Is Not Related to the Enumerated Purposes in Section 114(A)(1), and Even It Was Related to Any of Those Purposes, It Would Still Need to Be A "Reasonable" Information Collection – Which This is NOT**.

The agency summarizes the purpose of the proposed rule on page 54,121 of the Notice, thusly:

> *The proposed amendments in this action would ensure that the EPA has sufficient information to identify and solve air quality and exposure problems. The proposed amendments would also allow the EPA to have information readily available that the*

> *Agency needs to protect public health and perform other activities under the Clean Air Act (CAA or ''the Act''). Further, the proposed amendments would ensure that communities have the data needed to understand significant sources of air pollution that may be impacting them—including potent carcinogens and other highly toxic chemicals linked with a wide range of chronic and acute health problems. * * * Thus, EPA proposes that these revisions to reporting requirements to require submission of HAP from point sources are based on EPA's need for emissions for risk assessment and air quality modeling.*

CAA Section 114 has been in the Act since 1970, and thus is not a new-found legal authority. Importantly Section 114(a) 1), only authorizes "the Administrator to *** require certain persons on a one-time, periodic, or continuous basis to keep records, make reports, undertake monitoring, sample emissions, or provide such other information as the Administrator as he may *reasonably* require." Also, the information may be required by the Administrator are limited to the purposes of (1) developing an implementation plan such as those under sections 110 or 111(d); (2) developing an emission standard under sections 111, 112, or 129; (3) determining if any person violates any standard or requirement of an implementation plan or emissions standard; or (4) *''carrying out any provision''* of the Act (except for a provision of Title II with respect to manufacturers of new motor vehicles or new motor vehicle engines). *Id (emphasis supplied).*

a. *The purposes of a Section 114 collection request are broad, but they are limited to the specific requirements of the CAA.*

On its face, the purposes of the CAA Section 114(a)(1) statutory provisions are broad, but FPA submits that the reasonableness of an information request, nonetheless, is tethered to the Clean Air Act's authorities because it plainly delimits the purposes for which "the Administrator may reasonably require" the submission of information. To the extent that this proposal most certainly is not intended for the adoption of an SIP or 111(d); is not intended for developing a risk-based standard under sections 112, at least as is currently permitted by the CAA for purposes of a major HAP source; and is also not based on compliance with emission standards, EPA's proposal must be based on "carrying out any provision" of the Act,[13] which we presume would generally be based on EPA's authority to regulate listed HAP (but not other HAP that are regulated by some states, but not listed consistent with Section 112(c), or some other purposes besides the need to model cumulative inhalation or other exposure risks of point sources that emit HAP to EJ communities, neither of which are discussed in the *Act. On these bases, FPA asserts, that the proposed rule is not authorized by the CAA.*[14]

[13] Although most courts have allowed the EPA's use of 114 requests for limited purposes although at least one has found that an enforcement subpoena, based on Section 114 was overly broad because it required information that the Administrator was not authorized by the Act to collect.[13]
[14] *West Viginia v. U.S. EPA*, __ U.S. __, 142 S. Ct. 2587 (2022)

b. The proposed information regulation/request also is not reasonable.

Even if the proposed AERR rule was based on a purpose of the Clean Air Act, it must also be reasonable. The general authority the agency possesses under section 114(a)(1) of the Clean Air Act under clause (iii) of Section 114(a)(1), is the limited by the phrase, "as [the Administrator] may require. Clearly, 114(a)(1) has been used often by the Agency as the basis for collecting source-specific source emissions-related information in CAA enforcement proceedings, and it also has been used to collect HAP-related data on existing and new major source controls in specific industry sectors as the basis for standard-setting under section 112(d) and (f). These historic uses of the Administrator's section 114 authority, however, pale in contrast to the scope of this proposed annual information collection regulation for both regulated and currently unregulated sources of HAP, particularly since those purposes are not authorized by the Act.

To FPA's knowledge, the proposed rule is unprecedented, and hence, it is arguably thus unreasonable on its face. Further, two other facts also speak to the facial "unreasonableness" of the proposed rule. First, the agency was unable to describe the exact benefit of collecting all the information that the proposed regulation contemplates, even though the EPA assured the White House Office of Regulatory Impact Assessment ("OIRA"), that surely those benefits exceeded its conservatively estimate, but nonetheless eye-popping costs. Second, the unprecedented reach to far more than 115,000 non-major sources that the agency estimates may ultimately need to report HAPs, just to assure that they do not meet the health-based thresholds in Table 1B is terrifically more burdensome than EPA seems to have accounted for. Even if the agency believes that only 115,000 non-major sources would be required to estimate the applicable species of HAP using currently unregulated CAA non-major sources, requiring them to measure or estimate the quantity of individual HAP species, using "best estimating techniques,"[15] and did not have to report them, that would costly and likely affect a small business's profits and potentially also its ability to hire staff, which FPA submits is unreasonably and a breach of the public's trust in EPA. Indeed, the proposed information request would create a perpetually continuing and enforceable requirement for at least 115,000 non-major sources to test and/or estimate and to speciate HAP, just to prove they are not emitted in amounts that exceed the proposed health-based thresholds.

c. <u>Proving the negative every year at every emission source is an unreasonable basis for a Section 114 request.</u>

This obligation also could require the installation of monitoring equipment or more likely, requiring a degree of knowledge about how to access the best estimation practice to measure HAP and speciate HAP emissions in order to comply with the proposed rule that is well beyond

[15] It is not clear that non-major sources could avail themselves of "best estimating techniques," and thus to comply, they would likely have to hire a technical consultant to do any estimations, much less understand the use of "best estimating techniques," using WebFIRE or even AP-42, the latter which generally only covers combustion sources at non-major source sites. For this reason, the agency has assured the Small Business Administration that the Agency is working on a calculator for nonmajor sources, which it says will be released before the effective date of the rule, if it is finalized.

most of us who are not environmental engineers. Non-major sources will need to hire "consultants" who can help them. They also must spend money to keep the necessary records to prove they were not required to report and/or to handle CEDRI reporting obligations if the emissions actually exceed the exposure-based reporting thresholds for each HAP. (According to our members, who are environmental engineers, large businesses also will have to hire consultants to manage CEDRI submissions because of the breadth of the data that this proposed rule will requirement them to report.)

d. The powers vested in the Administrator under CAA Section 301(a) also are not unlimited and must be related to a specific authority granted by the Act

The agency also contends that this regulatory rulemaking is undertaken under the authority of CAA Section 301(a), which states that "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Chapter." See *e.g.*, 88 Fed. Reg. at 54122. None of the places where this authority is cited in the Notice explain what such "functions under this Chapter," are in the context of the proposed rule. But, for the same reasons as recounted above, this generalized authority is bound by the reasonableness of the regulations and the authority of the Administrator under the particular statute pursuant to which the Administrator uses his authority. Since we do not believe that the agency is authorized by the CAA to collect information on HAP emissions related to non-major sources, except under Section 112(c), which does not authorize the proposed collection of data. Further, we do not believe that CAA's "Declaration of Purpose," includes stand-alone monitoring, recording, and reporting of HAP as a means to "protect and enhance the quality of the Nation's air resources to promote the public health and welfare and the productive capacity of its population, absent an express grant of authority by the Congress for same. See Section 101(b). Further, the U.S. Appeals Court for the District of Columbia has ruled that Clean Air Act Section 301 does provide the Administrator "carte blanche" authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes. *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979). The proposed rule seems to FPA to be just that.

5. FPA is Concerned and Believes it is Unreasonable that if the Principal Purpose of the Proposed AERR Rule is to Provide Information to Communities About Public Health Risks, the NPRM Does Not Discuss How This Issue Will be Approached and/or Handled by the Agency.

It is clear to FPA's members that the proposed rule is meant ultimately to inform the public of risks from plants, and in the future, the cumulative risks of multiple plants' emissions on the public. What is disappointing and unreasonable in FPA's opinion, is the lack of foresight on the part of the agency to present a proposed plan for sharing this information with communities, except for declaring that none of it will be considered confidential business information since it is "emissions related." Nor does the agency request comment on such matters. This is a grave short-coming of the proposed rule, and we hope that the agency will consider and outline its options in this regard sooner than later because the information will not affect businesses and communities process the information that EPA intends to collect.

B. FPA Has Specific Comments and Questions About Several Proposed Definitions.

Proposed amended §51.50 creates new nomenclature for identifying the source of emissions numerous new data elements that must be reported for each HAP emitted or for each point source that emits one or a combination of HAP, most of which are not measured by FPA's members, including most of the "release point" characteristics and the individual species of HAP that must be reported for major Title 5 or a major MACT source. However, the fact that the majority of our industry comply with its applicable MACT standards at 40 CFR Part 63, Subpart KK and JJJJ by using non-HAP coatings and inks does not appear to absolve individual facilities from testing, although we would like the agency's clarification regarding whether we would need to monitor and test various release points for ozone precursors or other pollutants if we buy materials to make packaging that do not intentionally contain a HAP

With respect to specific definitions, FPA has the following suggestions and/or comments. Below are a few terms that needs to be clarified or modified to the existing terms being used. We suggest that EPA review all terms and ensure they are consistent with the existing air permit terminology.

1. *"Point Sources"*

The term "point source" is unclear, and we are not sure whether it is different than a facility or it is a "stack" or "vent," although the latter seem to be described as "release points" in the proposed rule. Air practitioners in FPA's member companies use the term differently, and we cannot tell if HAP emissions would be reported under AERR by release point or by point source, although it appears that it would be the former, because each stack or fugitive release points would have different "release" characteristics and geophysical locations (which also would need to be reported.) To prevent this confusion, we suggest that the agency change the phrase "point source" to "affected facility" and define it in the rule, if adopted, as stationary and/ or portable sources subject to the rule.

Because of our confusion with the use of a term point source, and the fact that we would not consider a point source to be portable source since it is not a stationary source, we also want to make clear FPA's view that EPA should not require emissions from a portable source or a mobile source, to be reported because we believe it would be very difficult for an environmental manager to track emissions from the use of portable sources such as reciprocating engines or portable generators because of their intermittent use. By the same token, it is not entirely clear to FPA if emissions from mobile sources at a stationary source, such as forklifts, employee and employer-owned vehicles, idling delivery trucks, or loading trucks destined for consumers, should be excluded from reporting because their emissions would be extraordinarily difficult to track their emissions reliably given their variable operations such as how long they are at a site, how long they operate, and what fuels they utilize. Third, even at some of the threshold levels in Appendix A, for most industries, actual annual HAP emissions from portable sources are likely to be de minimis and thus impose an unnecessary burden to track. In other words, the public is

exposed to more HAP in our daily lives than would be presented from mobile sources or portable sources at a manufacturing site.

2. *"Release Points" and Reportable Release Point" Data Fields*

The proposed regulations require the identification of numerous release point characteristics, without ever defining what a "release point" is. We assume that they are stacks or chimneys at a stationary source based on context, as opposed to a fugitive release point, which is separately defined in proposed § 51.50, but a definition would be most helpful.

Release point data fields that are defined separate in in proposed § 51.50 and Table 2A, include GPS data for their latitude and longitude, height stack diameter, which are not problematic. However, a number of other reporting data requirements for release points including air flow volume or exit flow gas rate, exit gas velocity, exit gas temperature are problematic for this industry, because flexible packaging plants batch numerous types on the same presses that vary by the number of applied coatings and inks, and by run and batch size, so that the emissions from an oxidizer used for VOC destruction using method 25 *is highly variable* depending on the product being made, and ambient air conditions. Therefore, FPA requests additional guidance on how to interpret these reporting requirements for batching industries, particularly those that use material substitution to comply with applicable major MACT compliance.

3. *Fugitive Release Points*

The current AERR requires parameters to characterize the shape of the fugitive release as 2- or 3-dimensional, and the width, length, and height of the emissions release, and the orientation of the release shape. However, it does not require that release point locations be specific to each release point. Are the AERR current reporting data requirements replacing or adding midpoint latitude and midpoint longitude as proposed in the term *fugitive release spots*? Also note that fugitive sources can include very large warehouses with windows and some of these characteristics are not pertinent to such sources. Moreover, by the nature of fugitive emissions, it may not be possible to identify an average longitude or latitude for certain releases.

FPA believes that it is not possible to measure the latitude or longitude of fugitive release points unless these are actual windows or doors, and that by their nature, fugitive emissions are heavily influenced by the weather, making some of the fugitive release point reporting requirements not pertinent. We believe the best estimation technique for measuring fugitive emissions, therefore, are based on mass balances or the calculation of emissions using emission factors (although we are not aware of any for HAPs). If the EPA is going to require non-major sources to report fugitive emissions escaping from buildings with windows and doors like restaurants or sheds or combustion sources at a mall, the agency should reassess whether they should be reported by release points at all and how the emissions would be calculated using material balances, particularly for buildings that do not have hoods or stacks for releases. Also, the rule's definition should recognize that fugitive emissions by their nature may vary depending on how they are released and ambient conditions such as weather. That makes them

particularly difficult to calculate or describe by attributes such as temperature, exit velocity, etc. It may be necessary for the rule to acknowledge that many of the proposed release point variables do not apply to fugitive emissions.

4. *Activity data*

In the proposed definitions, the term "*activity data*" means "data needed to calculate emissions using an emission factor or emissions calculation tool. This is a term that the current permits or State regulations does not use. Activity data varies depending on the emissions calculation approach and therefore the emissions source. Examples of activity data include fuel consumed for combustion emissions, landing and takeoff data for airport emissions, acres burned, material used for solvent evaporation emissions, and vehicle miles traveled for on-road mobile source emissions." FPA suggests that the definition is good but the term "activity data," itself should be changed to "basis for emissions calculation" or "emissions basis," which would help distinguish it from other release point data.

5. *Control identifier*

The term *control identifier* would mean a unique code for a facility that identifies a control device, process specialization, or operational practice used to reduce emissions (e.g., wet scrubber, low NOX burner, flaring, process change). This is a term not used today by the States or used in Title 5 or state permits issued to plants. FPA's members are not certain if this is the identifier a state assigns to a control or operational practice in a State Title 5 Operating Permits or if "control identifier" means a serial number on a control device, which most pollution controls have on their nameplate. If this refers to serial number on a pollution control device this would be confidential information to avoid competitors knowing the exact type of device being used. However, if a facility reports HAP using material balance compliance alternatives in a MACT or GACT rule, by eliminating any intentional use of a HAP-containing material like most of FPA's members, they likely do not have any control identifiers. Additional discussion of the meaning of this term would be helpful.

Relative to the term "control identifier" generally, FPA also is concerned about potential permitting consequences that are related to equipment changes, particularly pollution control modifications. Presumably, those concerns are important for major sources and probably irrelevant to previously unregulated area sources. It would be helpful for the EPA to acknowledge that these "identifiers" (depending on what they are) may change from year to year and generally would not raise permitting issues – if that is true.

D. FPA Responses to Other Agency Requests for Comment

1. PFAS

The agency requests comment on the inclusion of certain PFAS in the reporting rule, on the basis that it has derived chronic, noncancer reference doses (RfD) for oral exposure to perfluorooctanoic acid, perfluorooctyl sulfonate, GenX, and perfluorobutane sulfonate, with

assessments for several additional PFAS compounds in progress. While PFAS are not currently HAP, the notice states that "current evidence suggests a need for better identification and characterization of PFAS point source emissions in air." *Id. at* 54148.

FPA opposes the addition of PFAS to this reporting rule, as PFAS are not regulated HAP or CAP precursors, and health exposure mortality and morbidity from inhalation of PFAS have not been established. Moreover, source testing for PFAS is crude at this time because it is based almost exclusively on the detection of fluorine, so it would be unreasonable to use such data for developing emission factors, much less for PFAS inventories or air standards.

2. **Other "HAP" that the EPA has added to the AERR rule because they are reported and regulated by some states.**

EPA's list of thresholds includes pollutants that are not among the HAP identified by Congress, as amended (rarely during the past 23 years) by the agency. In the Notice, the EPA explains it has added these because states (particularly California, we assume) regulate them as toxic air pollutants. These compounds should be removed, because the EPA lacks authority under the CAA to regulate them until they meet other requirements of the law, including requirements for notice and public comment on adding individual candidate species to the HAP list.

3. **Duplicative and Inconsistent EPA and State Reporting**

EPA's proposed reporting rule, according to the notice, is needed because of problems that the EPA experiences with the state regulatory programs. *Id.* at 54157-54158. That came as a surprise to our members, since many states in which FPA members operate such as Wisconsin, Minnesota, Texas and Maryland have robust air toxics programs. More importantly, our members are very concerned about the cost of duplicative reporting, so FPA would prefer to allow states to collect HAP information under their existing programs and report to EPA under proposed §51.15, instead of reporting to EPA separately under proposed § 51.25.

From an overall perspective, if the agency finalizes this rule, our uppermost concern is the potential for inconsistency and/or duplicative state and federal reporting, and how such inconsistencies might be misunderstood by the public with the collection of two different sets of data. In response to the EPA's specific request for comments, we prefer reporting to state and local air pollution control agencies, because they are familiar with our facilities and how they operate. States and local agencies also surely have a better understanding of smaller local entities that potentially would be captured by this proposed program. The entirety of the NPRM, however, suggests that the EPA already decided that reporting to the state and local air pollution control agencies is not really an option. Therefore, we urge the EPA to synchronize reporting with the states to avoid inconsistencies, and that is particularly important in states like Maryland, California, Texas, New Jersey, and Wisconsin, which have collected information on toxic air pollutants based on entirely different operating principles.

The proposed regulation creates many new terms that are not used in the existing federal (or state) air regulation, which are not consistent with the Air permits that facilities current

maintain and report to States emission data yearly. All new terms developed in this rule need to be modified to the existing terms being used or alternatively, EPA should reference them or create a "cross-walk" to them.

4. **HAP or TRI?**

Although the agency attempts to make the case for reporting HAPs under revisions to the AERR, instead of using existing TRI mechanisms, asserting in the Notice that using TRI values is problematic for many reasons, including the role of emissions controls in reducing the amount of HAP emitted to air is very different from the amount manufactured, processed, or otherwise used by a facility, see *id* at 54134, FPA prefers TRI reporting because it is based on industry types, and actual emission measurements with mass-based *de minimis* exclusions, rather than health-based thresholds. Further FPA's members also have dramatically more experience using it rather than reporting through CEDRI.

5. **Submission of source testing reports and performance evaluations through CEDRI? (88 Fed. Reg. 54125)**

FPA does not believe that the AERR should mandate submission of source tests through CEDRI because of the volume of the data, the necessity for interpreting the data -- and the likelihood of it being misinterpreted, depending on the conditions under which a stack or other performance test is conducted and the unreliability of some applicable EPA Reference methods. While FPA and its members have discussed the need for better emission factors for decades with EPA officials, we do not think that source tests are necessarily accurate or pertinent to reliable emission factor development because they are based on static operating variables. And we also believe that the GAO Report, cited in the Notice as a basis for submission of source tests, [16] is both dated and does not consider the resources that would be required to submit data from stack tests, let alone their interpretation.

6. **Reporting Deadlines (88 Fed. Reg. 54193)**

The EPA proposes that reporting from owners/operations would be phased-in by allowing reporting to be optional in the first year and then mandatory after that, as follows: Starting in the 2024 emission inventory year, owners/operators of facilities could optionally submit annual emissions data and any required daily fuel consumption for specific units by May 31, 2025. This would allow those owners/operators to report data directly to the EPA for any reason. The EPA additionally proposes any required daily fuel consumption for small generating units by May 31, 2026. Other owners/operators could continue voluntary reporting for the 2025 inventory year and then be subject to mandatory reporting through CEDRI for the 2026 inventory year, on May 31, 2027, and on March 31st for every succeeding reporting year.

[16] Report: EPA Can Improve Emissions Factors Development and Management | Office of Inspector General OIG (epaoig.gov)

FPA supports the proposed phase-in of new AERR reporting deadlines, although we would like to see another year of voluntary reporting allowed to "test-run" the program, familiarize plant personnel, train technical consultants, and familiarize EPA and local air permitting agencies with how this reporting is done. Although we think that this is the first time that EPA will have attempted to initiate any CAA regulatory program in this manner, we think its burdens merit a more gradual phase-in, given the unprecedented scope and attendant burdens of the proposed rule. For these reasons, and to make sure that the proper training is provided for all sources, but particularly for those that have not been regulated under the Clean Air Act in any capacity, and thus may not even know that they emit covered HAP, FPA suggests that the proposed first reporting year in 2025 is too aggressive, and at least another year of voluntary reporting, if not two years, should be allowed for purposes of training and dialogue. EPA also could consider during the second and third year, phasing the reporting obligations in by NAICS code, so the agency's personnel that are familiar with those industries can spot problems to avert any train crashes.

Finally, it is of critical importance that if the timing is adopted, the final rule must provide that none of these "trainee" reports will be published. First, the reports may not contain accurate data. Second, the reports, without some interpretation and discussion with our own communities, may agitate the reporters and the public.

7. Confidentiality of Submitted Information (88 Fed. Reg. 54163)

EPA proposes that none of the information that it proposes to collect could be claimed confidential, regardless of the value of such information or machinations that entities have gone through to protect proprietary information about their processes and products. The proposal is a departure from the current AERSR rule and also a departure from CAA Section 114 responses, which both acknowledge that some information to the agency can be submitted as confidential information and redacted from public versions of AERR reports. To the extent we can understand the data fields that EPA would require under the CAERS program—and we have been quite clear in these comments that we do not—it appears that some of the data being requested with respect to mapping a process and emitting equipment, supplying information about material balances as the basis for emissions calculations, information about the use and development of emissions factors for certain products, verges on and crosses the line into confidential business information that could be mined by global competitors to rob our companies of intellectual property. Secondly, we have security concerns for some of this logistical information. Finally, as already noted, we think for everyone's sake, trial reports under the proposed programmatic phase-in of the program, should not be made public. For these reasons, FPA urges the EPA to retract this proposed "amendment" to current related regulations and to make clear that certain information may be confidential and that such claims will be evaluated under the confidentiality provisions of the existing rule and general EPA rules at 40 CFR §1.4. EPA will still get the information for the many purposes and goals presented in the NPRM, but the public should not.

CONCLUSION

FPA believes that this rule should not be finalized because it is too broad and burdensome for all reporters. Few of the potentially affected 115,000 small entities that the agency estimates will be or may be "new reporters" are aware that this obligation is on their horizon. It also would not be unlikely for such requirements to be injurious to these businesses, particularly in this teetering economy and given the avaricious competition from abroad. In this regard, we note of the 8 participants in the SBREFA Panel convened by the SBA, one at least managed to "plead out" 11,000 collision damage centers, simply based on compliance costs and threats to communities who would not only lose an employer but also a place to repair their vehicles.

Everyone deserves a safe and healthy environment, but this rulemaking is very unlikely to accomplish that overarching goal by itself. Instead, it appears driven by the wants and desires of air modelers and emission factor developers, stack testers and consultants, computer analysts, and a few lawyers. The proposal has clearly consumed a large amount of effort and thought, for which its authors deserve praise, but respectfully, it is not well-thought-out, and we think some of its objectives could be accomplished by tailoring it and removing some of the technical costs of compliance. For instance, we are not sure how anyone can measure, or afford to measure, 0.0007 tons of HAP, and how a community 5 kilometers would react to that exposure. Compliance with the rule, if finalized, will present overwhelming burdens to affected entities, including those who already have considerable expertise in emissions data collection and quite a few who have no experience at all in that department. Very simply its goal can be summed up to read "data for data's sake."

FPA urges the Agency to withdraw the proposed rule because of its costs and because we believe it is not a reasonable or legal exercise of its authority.

Respectfully submitted,

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