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August 18, 2004

Ms. Kimberly Nelson
Assistant Administrator
Office of Environmental Information
Environmental Protection Agency
2810 A
U.S.EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: National Paint and Coatings Association (NPCA) Request for Correction of Information, June 2, 2004

Dear Ms. Nelson:

The Ozone Transport Commission (OTC) writes in response to the Sherwin Williams Company request made through the National Paint and Coatings Association (NPCA) asking EPA to not approve certain OTC member State Implementation Plans (SIPs) as an alleged violation of the Data Quality Act.

OTC urges EPA to reject this request as it is without merit, inaccurately summarizes the data in question along with our state's and EPA's use of it, and attempts a third "bite at the apple" that the industry organizations seek, having failed in their first two attempts to undermine the Architectural Industrial & Maintenance Coatings rules at the state administrative, and subsequently state judicial, levels.

We will not attempt to address detail of the issues here, because we do not believe such extensive re-discussion on the points raised is warranted, and because the legal aspects of this matter have been very well presented to EPA by the Center for Progressive Regulation associated with the University of Maryland School of Law in its recent brief to Administrator Leavitt and Dr. Graham dated August 3, 2004.

I do want to take the opportunity to review for you how the states and EPA use the data in question, and what the data is. The information being challenged appears to be a report developed by an independent contractor on behalf of OTC, summarizing the emission benefits (based on population) of a suite of model rules as well as a survey of compliant product availability. The Request for Correction also challenges the spreadsheet used to calculate the total emission benefit from the AIM rule based on reductions from multiple coating categories. This spreadsheet was developed during the EPA Regulatory Negotiation process and will be discussed in more detail later.

For context, we address briefly the Data Quality Act requirement and EPA's process for notice and approval of a member's State Implementation Plan.

The Data Quality Act and Applicable Guidelines

The Data Quality Act, or Act, is a few paragraphs included in the Appropriations act of 2001 (Section 115 PL 106-504 (2001)), and calls on OMB and in turn, other federal agencies to issue guidance for "ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies…" (id at Sec. 515(a)). EPA developed and issued its guidance following OMB's in October 2002.

The OMB Guidance provides some useful principles that agencies are to consider when developing their own guidelines, including:

- Guidelines should be flexible enough to address all communication media and variety of scope and importance of information products.
- Some agency information may need to meet higher or more specific expectations for objectivity, utility, and integrity. Information of greater importance should be held to a higher quality standard.
- Ensuring and maximizing quality, objectivity, utility, and integrity comes at a cost, so agencies should use an approach that weighs the costs and benefits of higher information quality.
- Agencies should adopt a common sense approach that builds on existing processes and procedures. It is important that agency guidelines do not impose unnecessary administrative burdens or inhibit agencies from disseminating quality information to the public.

In its Guidelines, EPA defines that it "disseminates information to the public" when EPA initiates or sponsors the distribution of information to the public in one of the following ways:

- EPA initiates a distribution of information if EPA prepares the information and distributes it to support or represent EPA's viewpoint, or to formulate or support a regulation, guidance, or other Agency decision or position.
- EPA initiates a distribution of information if EPA distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA endorses or agrees with it; if EPA indicates in its distribution that the information supports or represents EPA's viewpoint; or if EPA in its distribution proposes to use or uses the information to formulate or support a regulation, guidance, policy, or other Agency decision or position.
- Agency-sponsored distribution includes instances where EPA reviews and comments on information distributed by an outside party in a manner that indicates EPA is endorsing it, directs the outside party to disseminate it on EPA's behalf, or otherwise adopts or endorses it.

These sections are reproduced in their entirety because the NPCA seems to selectively cite provisions, and thus obfuscate the overall intent of the Act and its implementation.

These sections are also important to accurately reflect how the Act should be integrated with existing administrative procedures and the normal weight-of-evidence record building in administrative rulemaking proceedings.

There are probably a score of reasons why this "Request for Correction" is unsupportable under the Act, but with respect to the OMB principles and three EPA criteria above, these reasons include:

- The Act and guidance apply to federal agencies. The SIPS are developed and submitted by state, not federal agencies. The states are not subject to the law or the guidance;
- EPA did not initiate or sponsor the distribution of the questioned information to the public;
  In approving the applicable state SIP's EPA certainly did not suggest or express support for the information questioned, nor state that the information represents EPA's viewpoint on the subject;
- In approving a state-specific SIP, EPA does not "disseminate" any specific information used by the state as a basis of its SIP development;
- Approval of the SIP cannot be reasonably interpreted to suggest EPA agrees with all the specific spreadsheet or the underlying data used by the State to support its SIP submission, or, for that matter, any other specific piece of data or evidence in the administrative record of either the state or the EPA.
- EPA did not direct the state to include the questioned information in its submittal, there is no evidence it was or is a key or even relevant component to EPA's approval; and
- EPA certainly did not direct the states to distribute the information on its behalf; and
- Each state has its own Quality Management Plan to address data integrity and quality issues, as a requirement for receiving EPA grants funding, which is far more advanced than the Act's guidelines. To implement the Act as OMB suggests in a "common sense approach that builds on existing processes and procedures" the Act's obligations must be integrated and consistent with the state QMP and the administrative processes used by states to adopt rules.

The illogical outcome of granting the request of NPCA and Sherwin Williams is to make it possible for anyone participating in the rulemaking process, intentionally or unintentionally, to poison any administrative process simply by submitting a piece of information into the administrative record that is in any way inaccurate or incomplete, whether or not the state or EPA uses that piece of information or relies on it in their decision. Such an outcome turns the Administrative Procedures Act on its head. The Data Quality Act cannot be reasonably interpreted to supersede or "trump" the more detailed and well-established rules of administrative procedure that guide a federal or state rule-making process.

Finally, for the reasons discussed in the next section below, OTC maintains the information questioned is in fact accurate, and sufficiently representative and complete for the purposes for which it was used. The petitioners had, and availed themselves of, amply opportunity to raise their concerns in each state's administrative process on the rules. They raised the specific points submitted as part of their Request for Correction more than once in multiple state proceedings. Whenever raised, these points were

addressed by each state in its response to comments, and the NPCA claims were time-and-time-again rejected, not only by the individual states in completing their respective administrative proceedings, but thus far by reviewing courts as well.

States' rights and responsibilities will not be served by EPA substituting its judgment for the state agencies responsible for implementing the SIP related Clean Air Act requirements, or state court review of those decisions.

The Pechan Report and its Use by the States

In 2000, OTC contracted with E.H. Pechan and Associates (Pechan) to assist the states in estimating emission reductions to be gained from the suite of Volatile Organic Compounds (VOC's) and Nitrogen Oxides (NOx) rules endorsed by the Commission as part of its March, 2000 Memorandum of Understanding (MOU) among the states.

Pechan produced its report entitled "Control Measure Development Support Analysis of Ozone Transport Commission Model Rules" (March 31, 2001).

The information questioned by Sherwin Williams through NPCA is related to one of the five VOC rules analyzed by Pechan in its report, the Architectural and Industrial Maintenance (AIM) Coatings Rule. Specifically, the petitioners question the use of survey data and a spreadsheet used to estimate emission reductions.

Although clearly explained in the report itself, we want to clearly and concisely relay what this information was, and how it was used by Pechan.

There are two surveys a spreadsheet and the Pechan report which NPCA and Sherwin Williams conveniently discuss as "the survey" and "the spreadsheet", developed by Pechan. In doing so, they obfuscate the distinction between product availability and quantification of emission reductions conclusions of the report. They are very different surveys, performed by different entities, and used for different purposes.

The first survey and spreadsheet were products of the EPA Regulated Negotiation (reg-neg) process and are conventionally referred to as the "Industry Insights" survey and reg-neg spreadsheet, respectively.

The second was developed by Pechan, but is very different in scope than the two aforementioned. The purpose of the survey performed by Pechan was to gain a sense of compliant products, while the report calculated the total emission benefit of the six OTC model rules across the nonattainment areas based on population data.

The "Industry Insight" survey was a voluntary manufacturer survey orchestrated by NPCA during the EPA regulatory negotiation ("reg -neg") process with AIM coating manufacturers. This survey was used to calculate emission benefits of an AIM rule, and its voluntary methodology with a trade association intermediary was designed to encourage participation and protect trade secrets and competitive marketing information of the manufacturers. This approach to gain insight into company trends, capabilities and products in development is a common and accepted one.

Results of the survey were used to calculate emission reductions. The survey and reg-neg spreadsheet were accepted and used by industry, environmental groups, and regulatory agencies during the two year process of developing the National rule.

It is ironic indeed that NPCA is challenging the "accuracy, reproducibility and transparency" of the survey and criticizing its voluntary nature: EPA in developing its national AIM rule relied on a survey performed with the active assistance of NPCA.

Also, the mandatory California Air Resources Board (CARB) surveys, mentioned in the petition, would not be a better substitute because the coating requirements in individual air quality districts have varied historically for years and California does not have the same baseline as the northeast and mid-Atlantic states. Finally, in developing the OTC Model Rule from 2000-2001, multiple request were made for an updated regional survey in meetings with NPCA and Sherwin Williams. NPCA and Sherwin Williams did not follow through on providing the information to the states.

In short, this survey and spreadsheet are inappropriately challenged under the Act for many reasons. Among them:

- The reg-neg data and spreadsheet are not in error;
- The methodology used, rationale, and limitations are clearly and accurately articulated;
  The methodology is documented, and so reproducible;
- The data quality and reliability is adequate for the intended purpose;
- It is EPA-developed data that has been used before, and subject to quality assurance and management in those contexts;
- Its voluntary and manufacturer-generalized nature is a necessary feature of the methodology, not a flaw. An independent surveyor applying the same method would get similar results;
- The premises of the survey and limitations of it are clearly identified in the Report. Pechan makes no misrepresentation about it, and nether OTC nor Pechan misuse or misrepresent the survey, its underlying data, or use it inappropriately.
- Any alleged errors in the spreadsheet are explainable through review of underlying data and any typographical errors are minor in nature, not substantively affecting the usefulness of the report, its conclusions, or its reliability.

The Pechan survey was used solely to assess the availability of compliant coatings in the OTR. This was the only survey performed by Pechan. It was performed by using a CARB survey (through a confidentiality agreement) as the baseline, with subsequent spot-checks and phone interviews of retailers throughout the OTR. No data as part of this survey were used to calculate emission benefits. It concludes that compliant coatings are available in all categories. That is the only question the survey was intended to answer; it is also a conclusion not disputed by Sherwin Williams or NPCA.

Finally, though not an Act issue, the fact of the matter is that:

- The Sherwin Williams company and NPCA do not dispute that compliant coatings are available for each category of coatings subject to the rule, which is what the survey was conducted to determine, and what conclusion Pechan reached as a result of its work. If NPCA and Sherwin Williams had information to the contrary they could have submitted it to the record of the administrative process;
- Disagreement over the conclusion about the data does not make the data inaccurate.

Regarding the reg-neg spreadsheet specifically, the several "inconsistencies" raised in the petition have straightforward explanations. There are no errors that rise to the level of fundamentally changing the interpretation of the data or the conclusions of the report. The negative values are a product of several categories where existing coatings are already below proposed limits. In this case, the emission change is negative. In cases where the emission change is negative, the values were not subtracted from the emission benefits, they were assumed to be zero, as shown in the spreadsheet. There is nothing wrong with use of the negative values – and in fact, they prove the main point of the Pechan survey – that compliant coatings are already available!

Regarding the emission factor, the methodology is transparent, reproducible, and generally accepted. New York did develop a separated emission factor for the New York Metropolitan non-attainment area because the significant population density skewed the amount of coatings actually used on a per capita basis -- and most people are living in large brick and steel multi-unit dwellings versus single family units with painted siding. This was a reasonable and prudent adjustment documented and addressed as part of their state rulemaking process.

We conclude that the Request for Correction is not appropriate for numerous reasons which include:

- The data are not in error. Any alleged errors in the spreadsheet are identifiable through review of underlying data and any typographical errors are minor in nature, not substantively affecting the usefulness of the report, its conclusions, or its reliability;
- The specific "errors" and "inconsistencies" identified by the petitioners are, in fact, not errors at all;
- The methodology used, rationale, and limitations are clearly and accurately documented, and so are reproducible;
  The report is not a major research item that rises to the level of peer review envisioned by the EPA guidance, even if this was an EPA disseminated report, which it is not;
- The Pechan report summarizing emission benefit information is not the information itself, but presents simple calculations that are reproducible and understandable;
- The range of emission reductions anticipated are based on sound models, the work was previously performed by EPA, and in fact is being supported as

feasible by the Industry. The actual emissions reduced will be measured over time, but the estimates provided by this report are reasonable for the purposes of supporting the rule and the emission reductions claimed there under;
- Each state used this report as part of its rulemaking to varying degrees. No state relied on it exclusively to determine how much reductions it could expect as the sole basis for the rule; and
- States addressed Sherwin Williams' and NPCA concerns about the data, spreadsheets and conclusions in each of its individual state rulemaking administrative processes where those issues were raised.

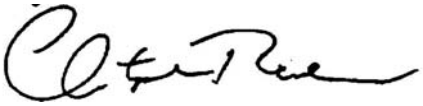
Conclusion

EPA should reject Sherwin Williams' and NPCA's Request for Correction because:

- Sherwin Williams and NPCA are disingenuously asking for a "correction" when, in fact, what they request is for EPA to disapprove SIPs containing the AIM rule;
- The Act is an inappropriate vehicle for addressing this matter, because:
    - EPA is not disseminating or endorsing any information
    - The states are not subject to the Act, but even if they were, they have independent Quality Management Plans (QMP) and responsibilities that more than adequately cover the spirit and intent of the Act;
    - There is nothing wrong with the information used by the states to support its SIP submittals;
    - The Act is not intended to supplant state or federal administrative procedures or existing information quality practices, such as a state QMP;
- The issues raised by Sherwin Williams through the NPCA that have been raised in individual state forums have been responded to as part of the formal rulemaking processes;
- Sherwin Williams and NPCA have recourse available to them through state administrative procedures and appeal processes through state court systems. They are taking advantage of those opportunities, and the fact that their arguments are losing the day does not mean they are entitled to some other administrative relief, or even the opportunity to present their position, before EPA;
- Any action by EPA on this matter other than rejection of the attempt to use the Act in this way interferes with states' rights to implement the Clean Air Act requirements as states deem necessary under the law;
- EPA review is limited. It cannot substitute its judgment for that of the state's in determining whether the basis of a duly-adopted rule is supported by a flawless administrative record – a test far greater than the administrative review "arbitrary and capricious" standard;
- The mere presence of faulty, incomplete or even inaccurate information in an administrative record cannot be a litmus test for rejecting the outcome of that administrative process;
- The Act cannot be allowed to serve as yet another forum for aggrieved parties to seek relief where all else has failed. That review should stop at the State Supreme Court – not go on to be revisited at the EPA Office of Environmental Information.

Thank you for your consideration of these comments. Please contact me if you have any questions.

Sincerely,



Christopher Recchia, Executive Director

cc: OTC Members
The Hon. Michael O. Leavitt, Administrator, EPA
Dr. John Graham, Administrator OIRA, OMB
Mr. Jeffrey Holmstead, Assistant Administrator, OAR
Mr. Carl Dierker, Office of Regional Counsel, EPA Region I
Mr. Walter Mugden, Division Director of Environmental Planning, EPA Region II
Ms. Flaire Mills, Office of Regional Counsel, EPA Region II
Ms. Marcia Spink, Associate Director, EPA Region III
Mr. Neil Bigioni, Office of Regional Counsel, EPA Region III