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To: OIRA_BC_RPT@omb.eop.gov
cc: Dave Darling <ddarling@paint.org>, lhunt@omb.eop.gov
Subject: Letter to OMB on Fed Regs 2004.doc

May 20, 2004

Lorraine Hunt
OIRA, OMB
NEOB Room 10202
725 17th Street, NW
Washington, DC 20503

RE: Draft 2004 Report to Congress on the Cost and Benefits of Federal Regulations; Notice of Availability and Request for Comments

Dear Ms. Hunt:

The National Paint and Coatings Association (NPCA) submits these comments on the Office of Management and Budget's (OMB) Report to Congress on the Costs and Benefits of Federal Regulations. NPCA is a voluntary, nonprofit trade association representing some 350 manufacturers of paints, coatings, adhesives, sealants, and caulks, as well as raw materials suppliers to the industry and product distributors. NPCA membership companies collectively produce some 90% of the total dollar volume of architectural paints and industrial coatings produced in the United States. As the preeminent organization representing the coatings industry in the United States, NPCA's primary role is to serve as ally and advocate on legislative, regulatory and judicial issues at the federal, state, and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support.

The paint and coatings industry is heavily regulated by the Federal Agencies, particularly the Environmental Protection Agency. As many of our members are small businesses – over 50% by Small Business Administration definition – with limited staff and resources, they are particularly disadvantaged by many of the administrative requirements under EPA regulations. In addition, whether small or large, companies are able to better focus resources and activities on substantive environmental improvements when regulatory administrative burdens are lessened. Therefore, NPCA supports OMB's efforts to identify reforms to regulations where the costs to administer such outweigh any associated benefit. NPCA suggests four such regulations under EPA's authority, namely, the Integrated Urban Air Toxics (Area Source) strategy under the Clean Air Act; the Spill Prevention, Control, and Countermeasures (SPCC) regulations under the

Oil Pollution Prevention section of the Clean Water Act; the Toxic Release Inventory (TRI) under the Emergency Planning and Community Right-to-Know Act; and the Hazardous Waste (Subtitle C) provisions under the Resource Conservation and Recovery Act.

Integrated Urban Air Toxics Strategy

On November 22, 2002 EPA promulgated revisions to its area source category list under the Integrated Urban Air Toxics Strategy.^[1] The notice added 23 new area source categories to the list of industries to be regulated by air toxic standards, including the paint and coatings category (there are approximately 71 source categories listed total). Even though EPA states in the first paragraph of the notice that “[t]he Strategy’s area source category list *constitutes an important part of EPA’s agenda for regulating stationary sources of air [toxics] emissions*” (emphasis added), industry was not afforded the opportunity to comment on the area source category list. In addition, despite attempts by several industries, EPA has yet been unwilling to make any changes to the list, regardless of reason. These rules will regulate area sources (i.e., minor sources under the Clean Air Act – those with the potential to emit less than 10 tpy of any hazardous air pollutant (HAP) or less than 25 tpy of aggregate HAPs), which are typically small businesses.

These regulations will place stringent and costly air pollution control requirements on these small businesses that EPA has yet to demonstrate warrant such or would produce the environmental benefit envisioned by the Strategy. For example, the National Emission Inventory (NEI) database that EPA used to develop the source category list is fraught with errors, thus, EPA’s determinations that this list accounts for 90% of the emissions of the 33 listed air toxics is suspect. Furthermore, even though EPA has started preliminary analyses for many of the source categories, it has not articulated a rational approach to the rulemakings. EPA may select Generally Available Control Technology or Maximum Achievable Control Technology standards under the area source rules, but has not identified which it will use. In addition, EPA may regulate just the 33 listed urban air toxic chemicals under the rule, or all 188 HAPs listed in the Clean Air Act, but again have not identified what list it will use. Lastly, EPA has stated that alternative voluntary standards may be available, but has provided few details of what these alternative standards will look like or how they will work.

These are considerable issues that must be resolved before EPA continues with these rulemakings. As stated, the area source rules will primarily regulate small minor source facilities, so the impact will be focused on small business. But because EPA is currently in litigation over the timeline for these rules, it is likely that EPA will be forced to push through these rulemakings, arbitrarily regulating sources without proper justification and taking emission reduction credit where little or no environmental benefit actually exists. The cost associated with these regulations, however, will be significant. For comparison, similar standards recently promulgated for major sources in our industry will cost individual facilities up to \$1 million over the next three years. Therefore, NPCA recommends at the very least, that EPA take comment on its listing determinations and convene Small Business Administration panels (under the Small Business Regulatory Enforcement and Fairness Act) to ensure that any subsequent rules are technically sound and fair. NPCA believes that OMB can appropriately recommend this in its Report to Congress.

Spill Prevention, Control, and Countermeasures

On Wednesday, July 17, 2002,^[2] the EPA promulgated a final rule with various new requirements under the SPCC program. Over the past two years, through stakeholder meeting, correspondence and litigation, industry has worked with EPA to correct several significant problems with the rule and its ultimate implementation. An amendment to the rule is expected this spring that will address these points, however, key issues remain. The new SPCC program calls for expensive and burdensome integrity testing on small storage tanks and while a Professional Engineer can certify that certain systems are “environmentally equivalent” to the mandated integrity testing, EPA needs to further clarify its intent in this regard.

Small shop built storage tanks are found throughout industry in large numbers – thousands in the coatings manufacturing industry alone. This would mean that each tank would need to be taken offline, cleaned and tested at a cost approaching anywhere from \$1,000 - \$10,000 per tank depending upon the size of the tank and the number of tanks that can be tested in a given time period. Considering the fact that facilities are operating almost on a continuous basis, the cost of integrity testing may be closer to \$10,000 per tank. Assuming there are 2,000 oil storage tanks in the coatings manufacturing industry, the cost to perform integrity test on these tanks could exceed \$20 million dollars for our industry.

History indicates that there have been few ruptures or leaks associated with these small tanks (generally less than 40,000 gallons in size) in our industry. In addition, these tanks are manufactured on a factory shop floor in controlled conditions which offers the best opportunity for quality assurance and quality control, as opposed to the very large tanks that are manufactured on site. Finally, these small tanks have much less hydrostatic pressures than large storage tanks so catastrophic releases are very uncommon. Therefore, expensive integrity testing would be performed for little or no environmental benefit. More importantly, EPA’s concern with these tanks is primarily corrosion (due to tanks sitting directly on the ground), when most of these tanks are placed on concrete pads within secondary containment areas, so the possibility of corrosion of the tank bottom is greatly diminished. In addition, as stated, since there is a secondary containment area under the tanks, oils would be contained in the unlikely event of a leak.

If over the concerns of NPCA, EPA does not allow visual only for concrete pads NPCA suggests a pedestal option for tanks that are outside and a building option for tank within buildings. These options are presented below.

While PE’s must certify that the plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, they must rely on EPA guidance to do so, including testing requirements. Thus, NPCA requests clarification as to whether a PE could conclude that combining visual inspection of a shop built tank with the following conditions provides “equivalent environmental protection.”

1. An outside shop built tank (less than 30,000 gallon shell capacity) with no external visual signs of integrity problems (e.g. corrosion);

2. Sitting on a “pedestal” concrete pad or slab with no visual signs of cracking;
3. Within a secondary containment unit; and
4. In fact, in many cases this type of containment is superior to the synthetic liners EPA does qualify as equivalent environmental protection. Synthetic liners are susceptible to tearing, sunlight and chemical breakdown, whereas concrete is not. Thus, a synthetic liner placed under a tank will not provide any additional environmental protection than a sound concrete pedestal. Furthermore, a synthetic liner will not provide any additional assurance that leaks are immediately detected than concrete pedestals since the amount of time a leak takes to seep from under a tank is not dependent on the containment method, but the viscosity of the product. Lastly, while EPA states that its major concern with concrete pads is that the portion of concrete pad under a tank cannot be inspected, this concern is also present with synthetic liners – since there would still be a portion of the liner under the tank that cannot be inspected. Therefore, the above stated conditions – provide equivalent environmental protection to integrity testing.

Second, with regard to clarification on the definition of “equivalent environmental protection,” NPCA requests confirmation that shop built tanks installed within buildings and covered structures provides this basis so that integrity testing beyond visual inspection is not needed. Tanks are installed within buildings or other covered structures for various reasons including security, energy conservation (e.g. heated tanks), and corrosion prevention (from external elements). Since such tanks are not exposed to the environment, the likelihood of rust or corrosion is greatly diminished. Further, detection of leaks and/or overflows generally occurs more rapidly as employees often work within the vicinity of the tanks and have a greater opportunity to detect such occurrences quickly. Response time in reacting to these occurrences is then also more quickly facilitated. In addition, the building structure itself constitutes additional (back-up) spill containment mechanism – the building floor acts as a back-up secondary containment unit. Given that enclosed buildings and tanks containing flammable liquids are also subject to stringent Occupational Safety and Health Administration Process Safety Management regulations and National Fire Protection Association codes specifically addressing potential health, safety and fire concerns associated with flammable liquid spills within buildings, it is even more unlikely that a spill occurrence in these circumstances would go undetected and uncontained. Thus, the expense of integrity testing of tanks within buildings and covered structures does not provide any additional protection to human health or the environment and should also be considered equivalent environmental protection to integrity testing.

NPCA has consistently commented in the past that the new integrity testing requirements for shop built tanks will have a great economic impact on industry – especially small business. As stated, NPCA has estimated the new requirements could exceed \$20 million dollars for our industry alone. In addition, the current integrity testing requirements will increase waste generation – approximately 10 drums of waste per tank. Thus, one company alone will generate millions of pounds of additional hazardous waste complying with the rule. This requirement will also actually increase the likelihood of spills from temporary tanker/tanks used while main tanks are out of service during cleanout and inspection. Additional spills could also occur during

waste transportation. Lastly, EPA has not accounted for the additional health/safety threats to workers from entering tanks for cleaning/inspection purposes. Considering these impacts, which are not commensurate with the impact to human health and the environment, NPCA urges OMB to review this rulemaking for the costs and burdens associated with it but not commensurate to its environmental benefit and include such in its Report to Congress.

Toxic Release Inventory

NPCA and its member companies have commented on various TRI rulemakings in the past as well as on the Phase I and Phase II dialogue EPA has held for reducing the burden TRI reporting places on industry. To date, however, little has changed. NPCA member companies have historically complied with the Toxic Release Inventory (TRI) and submitted the subject reports to EPA. Many more were mandated to do so recently with EPA's final rule lowering the TRI reporting for lead and lead compounds and eliminating the de minimus exemption levels (hereinafter referred to as the "TRI Lead Rule").^[3] Many of these newly impacted companies are small businesses, disproportionately burdened with completing the TRI program's Form R.

EPA continues to underestimate the true burden associated with the TRI program. Namely, EPA dismisses the burdens associated with the elimination of the de minimus exemption in the TRI Lead Rule, which not only increased the number of reporters but the burdens associated with reporting as well since the TRI Lead Rule eliminated the use of the burden reducing Form A. In addition, EPA does not account for the burdens associated with the elimination of range reporting. These eliminations increased the burden associated with TRI reporting significantly and impact facilities not just with one-time costs and resources, but on a yearly basis.

NPCA appreciates the need for EPA to balance the regulatory burden on industry from the TRI with the need for collecting and reporting chemical releases and other waste management methods utilized by industry. However, NPCA does not believe EPA's current program appropriately strikes this balance. NPCA believes that the options outlined and discussed in EPA's Phase II Dialogue begin to rectify the inequities of the program. Thus, NPCA urges OMB to review the TRI program and the numerous comments EPA has received on burden reduction initiatives over the last three years and include them in its Report to Congress the significant opportunities for burden reduction without loss to human health or environment that have yet to be implemented by EPA.

The most significant opportunity is to reestablish the de minimus level exemptions (consistent with the 1% and 0.1% levels still available for suppliers under Occupational Safety and Health Administration regulations) and the use of the expedited Form A for PBT chemicals, especially, lead. The de minimus exemption allowed facilities to disregard for the purposes of threshold and release calculations constituents that were not reported on Material Safety Data Sheets even though they might be found in trace amounts as contaminants or impurities, or in the case of lead, as a naturally occurring substance. Eliminating this important exemption has created significant burden on facilities attempts to estimate these levels and/or obtain the relevant data with which to calculate possible thresholds and releases. EPA can not appropriately claim, therefore, that the information reported on these de minimus constituents is constructive or consistent with the goals of the program – as it is based upon mere guesswork. In addition, there

is no reason to disallow the use of Form A to expedite reporting for these constituents. As evidenced by the lead reporting attained to date, a large number of facilities have reported zero releases as well as releases of one pound or less; thus, reestablishing the de minimus exemption and the use of Form A will not result in the loss of appreciable information and should therefore be viewed as viable burden reduction option.

Subtitle C Hazardous Waste Requirements

EPA recently published a proposed rule that would decrease the regulatory burden of treating hazardous secondary materials as waste, necessitating costly and resource intensive hazardous waste tracking and disposal instead of environmentally beneficial recycling and reclamation. The proposal titled, Revisions to the Definition of Solid Waste,^[4] would revise the definition of solid waste to define certain recyclable hazardous secondary materials as not discarded and thus no longer “waste” subject to regulation under Subtitle C of RCRA. NPCA supports reducing the costs and burdens associated with Subtitle C regulations and providing greater incentive and certainty for recovery and reuse of beneficial materials. NPCA therefore encouraged EPA in our comments to the proposed rule to adopt the broad based reform outlined in the Proposed Rule’s Preamble, defining legitimate recycling within the RCRA regulatory framework to exclude those materials legitimately recycled or reclaimed from Subtitle C RCRA jurisdiction. NPCA provided comment on how this can be done without impacting human health or the environment. Promoting the legitimate recovery and reuse of secondary materials in lieu of disposal is inherent to RCRA and part of EPA’s long-standing pollution prevention and waste minimization policy mandates. Providing the requisite criteria by which to do so provides for the safeguards dictated by RCRA while preserving the life-cycle benefits of resource recovery.

However, EPA did not include a full analysis of this proposed option, instead focusing on several other narrow options. NPCA believes OMB should review this attempt at true RCRA reform and provide information on the proposal in its Report to Congress. EPA has a very real opportunity with this rulemaking to lessen the burdens associated with one of the most complex and costly regulations impacting industry today while demonstrating its commitment to increasing environmentally beneficial recycling and promoting materials reuse and recovery over land disposal. As stated above, beneficial product reuse is consistent with the goals of RCRA as well as U.S. Energy policy. In fact, the legislative history on the Hazardous and Solid Waste Amendments (HSWA) of 1984 states that the Committee “believes that recovery of materials and energy from solid waste that would otherwise be discarded are vital alternatives to land disposal and should be given equal emphasis in solid and hazardous waste planning and management at the national, state, and local levels.”^[5] Not reusing materials increases hazardous waste transportation and disposal costs, greenhouse gases, and the burden on industry, all to the detriment of the environment. Not recycling, reclaiming and reusing product increases the amount of wastes being land disposed. Thus, Congress should be alerted to the costs and benefits of this regulations and EPA’s proposed rule in this regard, articulating its recommendations for reform.

Inventory Update Rule

On January 7, 2003, EPA published the final rule for the Inventory Update Rule Amendments (IURA).^[6] The final rule will affect manufacturers and importers of organic and inorganic chemicals, as well as downstream users, beginning with IUR reporting for calendar year 2005 (submission year 2006). The IUR mandates certain reporting requirements to EPA for manufacturers and importers of specified chemicals. Significant changes from previous IUR requirements were made in the IURA, including the phase-out of the exemption for inorganic compounds; increased reporting requirements for manufacturers and importers of chemicals above the baseline threshold (25,000 pounds per year – raised from 10,000 pounds per year); and the establishment of an entire new threshold tier (300,000 pounds per year) with extensive new requirements for reporting of downstream processing and use information for that baseline. Thus, the new rule not only impacts manufacturers and importers of the specified chemicals, but all downstream users of these chemicals, as they will need to report this information to their suppliers.

The use and exposure portions of the IURA will be significantly burdensome, and as stated, this burden will be borne by downstream users as well as the chemical manufacturers and importers. Despite this burden it appears that EPA's new tier threshold of 300,000 was chosen arbitrarily as it does not correlate with any other EPA regulation. In addition, EPA has yet to identify what the new data collected will be used for. Therefore, the imposition of this burden on various industries who process and use chemicals is not related to any stated commensurate benefit. At the very least EPA must analyze the impact of the regulation on downstream users. Furthermore, EPA must identify the uses to which the data collected will be put. Thus, NPCA request that OMB add this regulation to its Report to Congress not only because of this disproportionate cost/benefit issue, but because of its great potential for reform – since the data has not yet been collected or reported, there is still time to mitigate the rule's impact in this regard.

In advance, thank you for considering NPCA's comments on OMB's 2004 Report to Congress. NPCA appreciates the opportunity to comment and to provide OMB with additional opportunities for regulatory reform. Please do not hesitate to contact us should you have any questions or need additional information.

Sincerely,

/s/

Alison A. Keane, Esq.

Counsel, Government Affairs

/s/

David F. Darling, P.E.

Director, Environmental Affairs

*** Sent via e-mail and regular mail ***

^[6] 67 Fed. Reg. 70427 (November 22, 2002). See 64 Fed. Reg. 38706 (July 19, 1999) for Integrated Urban Air Toxics Strategy.

^[2] 67 Fed. Reg. 47042 (July 17, 2002).

^[3] 66 Federal Register 4499 (January 17, 2001).

^[4] 68 Fed. Reg. 61558 (October 28, 2003).

^[5] H.R. Rep. No. 98-198, 98th Cong., 2nd Sess., pt. 1, at 24 (1984).

^[6] 68 Fed. Reg. 848 (January 7, 2003).