

March 17, 2015

VIA REGULATIONS.GOV

Gina McCarthy, Administrator
United States Environmental Protection Agency
EPA Docket Center (EPA/DC)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on EPA's proposed rule "National Emission Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Product Manufacturing" (Docket No. EPA-HQ-OAR-2013-0291).

Dear Administrator McCarthy:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency's (EPA's) December 18, 2014, notice of proposed rulemaking on "National Emission Standards for Hazardous Air Pollutants (NESHAP) for Brick and Structural Clay Product Manufacturing."¹ Advocacy commends EPA for its small business outreach during the development of this proposed rule but has significant concerns about the impact this rule will have on small businesses. In particular, Advocacy is concerned that EPA has underestimated the number of small businesses that will be adversely affected, including the number that would be put out of business. Advocacy recommends EPA adopt the small business flexibilities discussed in the proposed rule and continue to explore flexibilities that will minimize the impact on small businesses consistent with the Clean Air Act and EPA's mission.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before federal agencies and Congress. Because Advocacy is an independent office within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.² The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),⁴ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on

¹ 79 Fed. Reg. 75621 (December 18, 2014), Docket No. EPA-HQ-OAR-2013-0291.

² 15 U.S.C. § 634a, *et. seq.*

³ 5 U.S.C. § 601, *et. seq.*

⁴ Pub. L. 104-121, Title II, 110 Sta. 857 (1996) (codified in various sections of 5 U.S.C. § 601, *et. seq.*).

a substantial number of small entities,”⁵ EPA is required by the Regulatory Flexibility Act to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,⁶ and to consider less burdensome alternatives.

Background

Clean Air Act (CAA) section 112 requires EPA to establish a National Emissions Standard for Hazardous Air Pollutants (NESHAP) for each category of emission sources of Hazardous Air Pollutants (HAPs).⁷ EPA must set the first NESHAP for a category of major sources based on the Maximum Achievable Control Technology (MACT), calculated by considering “the average emission limitation achieved by the best performing 12 percent of the existing source (for which the Administrator has emissions information),”⁸

EPA issued a NESHAP for Brick and Structural Clay Products Manufacturing (“brick production”) in May 2003.⁹ That rule set emission limits for Particulate Matter (PM) (as a surrogate for HAP metals), HF, and HCl and required existing sources to comply before May 16, 2006.¹⁰ At that time, there were 89 companies producing brick, of which 76 were small businesses.¹¹

This rule was vacated and remanded by the Court of Appeals for the D.C. Circuit in March 2007,¹² returning EPA to the drawing board and resetting the requirement to set the NESHAP based on the MACT. This decision came down almost a year after the industry had come into compliance with the vacated NESHAP,¹³ meaning that “the best performing 12 percent” were now even better performing and significantly raising the bar for everyone.

⁵ See 5 U.S.C. § 609(a), (b).

⁶ Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.C. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁷ CAA § 112(c)(1) (42 U.S.C. § 7412(c)(1)).

⁸ CAA § 112(d)(3) (42 U.S.C. § 7412(d)(3)). The CAA provides an exception the “12 percent” rule when there are fewer than 30 sources in the category or subcategory.

⁹ 68 Fed. Reg. 26690 (May 16, 2003).

¹⁰ *Id.* at 26707

¹¹ *Id.* at 26719. EPA certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. “Although small businesses represent 86 percent of the companies within the source category, they are expected to incur about 21 percent of the total industry engineering compliance costs of \$24 million. Additionally, 61 of the 76 small businesses will incur no costs. Under the final rule, we estimate that three small firms in this source category may experience an impact less 1 percent of sales, nine small firms in this source category may experience an impact between 1 percent and 3 percent of sales, and 3 small businesses (or 20 percent) may experience an impact greater than 3 percent of sales.”

¹² *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007).

¹³ See, e.g., Letter from Harold Newman, Pine Hall Brick (May 10, 2010), *available at* regulations.gov, document ID EPA-HQ-OAR-2013-0291-0197.

On March 16, 2010, EPA advised Advocacy of its intent to convene a SBREFA panel.¹⁴ EPA hosted a pre-panel outreach meeting on April 20, 2010.¹⁵ After this meeting, small entities and their trade association, the Brick Industry Association (BIA), raised significant concerns about whether EPA was prepared for meaningful consultation.¹⁶ Further consultations related to the SBREFA panel were temporarily suspended as EPA continued work on the proposed rule.

On December 7, 2012, EPA published in the Federal Register a notice of consent decree under the Clean Air Act. This consent decree required EPA to propose a NESHAP by August 20, 2013. Advocacy submitted public comments advising EPA to request more time to complete the rulemaking.¹⁷

EPA reinitiated panel consultation with a second pre-panel outreach meeting on March 14, 2013. EPA convened the panel on June 12, 2013, and held the panel outreach meeting on June 26, 2013. EPA continued discussions with small entities and the BIA after these meetings and explored additional flexibilities. The members of the panel signed the final report on December 6, 2013.¹⁸

The SBREFA panel recommended that EPA:

- propose work practice standards for dioxins and request comment on work practice standards for other HAPs;
- co-propose health-based standards and MACT-based limits for acid gases;
- propose to subcategorize kilns based on size and type and request comment on other subcategorization options;
- propose a non-mercury metal HAP emissions limit as an alternative to a PM emissions limit;
- propose a work practice standard for emissions at startup and shutdown; and
- determine MACT floors based on performance of the entire industry rather than a more limited subset.

At the time of the panel report, EPA identified 46 companies producing brick, of which 38 were small, half the number in 2003.

EPA published this proposed rule on December 18, 2014.¹⁹ In the proposal, EPA responded to all panel recommendations, and, in general, adopted those recommendations. EPA also

¹⁴ 5 U.S.C. § 609(b)(1).

¹⁵ See Memorandum from RTI International, “Minutes of the April 20, 2010 SBREFA Pre-Panel Outreach Meeting for the Brick and Structural Clay Products Industry” (April 28, 2010), *available at* regulations.gov, Document ID EPA-HQ-OAR-2013-0291-0235.

¹⁶ See Letter to Deputy Administrator Bob Perciasepe (May 4, 2010), *available at* regulations.gov, Document ID EPA-HQ-OAR-2013-0291-0199.

¹⁷ See Letter from Dr. Winslow Sargeant to the EPA Docket, January 10, 2013, *available at* <https://www.sba.gov/content/comments-epas-proposed-consent-decree-sierra-club-v-jackson-no-108-cv-00424-rwr-d-dc-docket-no-epa-hq-ogc-2012-0905>

¹⁸ “Report on EPA’s Planned Proposed Rule “National Emissions Standards for Hazardous Air Pollutants Maximum Achievable Control Technology for Brick and Structural Clay Products Manufacturing” (December 6, 2013), *available at* regulations.gov, Document ID EPA-HQ-OAR-2013-0291-0172.

¹⁹ 79 Fed. Reg. 75621 (December 18, 2014), Docket No. EPA-HQ-OAR-2013-0291.

expanded on the panel's work, further exploring the panel's recommendations and requesting comment on the specific issues that would limit EPA's ability to adopt additional flexibilities.

Nonetheless, EPA estimates that approximately 2 of the 38 small businesses would go out of business under the proposal and that approximately 9 of the remaining 36 would experience costs over 1 percent of revenue.²⁰ This could be a significant impact in an industry with such low capacity utilization²¹ and demand well below historical averages.²² Further, EPA recognizes that it may have underestimated disruption to the industry, as it assumes the availability of private financing at 7 percent interest in order to spread out the cost of compliance over multiple years.²³

Advocacy Comments

Advocacy welcomes EPA's renewed efforts to engage and consult with small businesses and their representatives in the course of this rulemaking. Advocacy greatly appreciates the extent to which EPA continued to explore small business flexibilities after conclusion of the panel.

However, Advocacy believes the burden a new MACT would impose on small businesses in this industry exceeds the purpose and intent of the Clean Air Act. MACT is a technology-based standard, set without respect to costs and benefits.²⁴ Subsequent changes to the NESHAP must take into account costs.²⁵ While the Clean Air Act provides no guarantees that all sources should be able to continue operating under a MACT-based standard, this particular industry had already complied with a MACT, and the need to set a new, more stringent MACT is due to the court's decision to vacate and remand the previous rule rather than simply remand. Advocacy therefore believes that EPA should exercise its discretion under the Clean Air Act to the maximum extent possible to minimize the impacts on these already-struggling small businesses.

Therefore, Advocacy supports EPA's proposals to set work practice standards and health-based emission standards in all instances allowed by statute.

Mercury Emission Standards

Advocacy also recommends EPA continue to explore flexibilities with respect to mercury. According to the BIA, "no emissions controls have been demonstrated to be effective in controlling mercury emissions from the brick industry."²⁶ The BIA suspects that any measured mercury emissions are the result of the input clay rather than any process

²⁰ See Regulatory Impact Analysis: Proposed Brick and Structural Clay Products NESHAP, Table 5-3. "Small Business Screening Assessment Results and Closure Estimates" pp. 5-15, available at regulations.gov, Document ID EPA-HQ-OAR-2013-0291-0114. [hereinafter, RIA]

²¹ *Id.* at pp. 2-1.

²² *Id.* at pp. 2-12.

²³ *Id.* at pp. 5-17.

²⁴ CAA § 112(d)(3).

²⁵ CAA § 112(d)(6) [technology review] and CAA § 112(f).

²⁶ Memorandum to Jeff Telander from the Brick Industry Association MACT Task Force, October 22, 2014, available at regulations.gov, Document ID EPA-HQ-OAR-2013-0291-0202

differences between kilns or installed emissions control equipment.²⁷ This raises the question of whether any controls available to the industry would have any impact on mercury emissions. While the courts have emphasized that the statute uses the word “achieved,” not “achievable,”²⁸ Advocacy believes that mercury emissions from this industry cannot be considered “achieved” or “achievable.” In other words, a source that takes no action to reduce mercury emissions should not be considered “best performing.”

For this reason, Advocacy recommends that EPA pursue subcategorization by input type. Such a subcategorization may need to be combined with a significantly longer averaging time in order to avoid penalizing small businesses for the natural variation of clay at their location. Advocacy suggests that EPA may need to delay promulgation of a mercury emission standard in order to gather the information necessary to establish such a standard.

Economic Analysis

Advocacy is concerned that some of EPA’s assumptions in the economic analysis lead to significant underestimates of the disruption this rule would have on small brick producers.

First, as noted above, EPA’s cost estimates are annualized at seven percent over 20 years.²⁹ Advocacy appreciates that this may be appropriate for a cost-benefit analysis but believes it is usually inappropriate when considering the small business impacts. Annualization of costs assumes the availability of financing at these same terms, seven percent over 20 years. Advocacy has heard from small businesses and BIA that financing is generally unavailable to small firms in the industry, even to expand productive capacity, and definitely not at these terms. However, if financing is unavailable, then the small business must finance the initial capital costs out of cash-on-hand and profits. Given the size of the businesses involved (around half with annual sales less than 20 million dollars)³⁰ and the capital costs required (at least one million dollars),³¹ most small businesses would have difficulty complying without financing.

Second, Advocacy is concerned that EPA has underestimated the impact of the rule by assuming a number of small business can avoid compliance with the MACT by reclassifying themselves as “synthetic minor” sources, i.e., sources that do not emit enough to be major sources. EPA estimates that 15 of the 86 facilities³² affected by this rule would only need to submit paperwork to come into compliance.³³ However, Advocacy is concerned that this oversimplifies the decision. If a small entity is already emitting below the threshold, it is unclear why they would not already have been classified as a “synthetic minor” when

²⁷ *Id.*

²⁸ *See, e.g., Sierra Club v. EPA*, 479 F.3d 875, 880 (D.C. Cir. 2007).

²⁹ RIA, pp. 3-6.

³⁰ RIA, Table 2-4.

³¹ RIA, Table 3-3.

³² Each firm may have multiple facilities, and each facility is considered a separate source for the purposes of determining whether a source is major or a “synthetic minor.”

³³ Memorandum to Jeff Telander from Kristin Sroka, RTI Interational, “Development of Cost and Emission Reduction Impacts for the BSCP NESHAP,” November 6, 2014, *available at* regulations.gov, Document ID EPA-HQ-OAR-2013-0291-01117, pp. 5.

negotiating their Clean Air Act permits. Given the permitting requirements that accompany the “major source” designation, Advocacy believes it more likely that small entities have other reasons for remaining “major source,” such as the desire to maintain capacity in the hope that demand for bricks will recover to pre-2007 levels. If so, reclassification can have real costs to the future viability of the firm.

Third, EPA makes assumptions about the cost of reducing mercury emissions that affect its estimated impact on small entities. EPA has mercury emission data for less than 10 percent of kilns³⁴ but assumes some mix of controls used in other industries will be effective in bringing all sources into compliance with the mercury standard. Given BIA’s assertion that the industry does not currently control for mercury emissions, EPA’s estimates may not accurately capture the range of costs that would be imposed on small entities. In addition, small entities may not have the ability to develop a compliance strategy or understand what control equipment may be necessary, and providers of control equipment may be unwilling to guarantee performance.

Advocacy is concerned that EPA has not recognized the significant disruption this proposed rule would have on the industry. The economic analysis should reflect the practical difficulties this industry will likely experience in planning for compliance.

Conclusion

Small brick producers are very concerned that EPA’s proposed NESHAP for their industry will put many of them out of business. EPA should use its discretion to “minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. . . .”³⁵ Advocacy recommends further consultation with small businesses to gather the data necessary to justify greater flexibilities, including, if necessary, a delay in promulgating a mercury emission standard to better understand the sources and possible controls for mercury in this industry.

Advocacy looks forward to continuing to work with EPA as this rulemaking progresses and strives to be a resource to the agency for all small business-related concerns. If my office can be of further assistance, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or david.rostker@sba.gov.

Sincerely,

/s/

Claudia R. Rodgers
Acting Chief Counsel for Advocacy

³⁴ *Id.* at pp. 8.

³⁵ 5 U.S.C. § 604(a)(6).

/s/

David Rostker
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget