

September 11, 2014

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 “Standards of Performance for Municipal Solid Waste Landfills” (Docket No. EPA-HQ-OAR-2003-0215) and advance notice of proposed rulemaking “Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills” (Docket No. EPA-HQ-OAR-2014-0451).

Dear Administrator McCarthy:

The U.S. Small Business Administration’s Office of Advocacy (Advocacy) submits the following comments in response to Environmental Protection Agency’s (EPA’s) July 17, 2014, notices of rulemaking on air emission standards for Municipal Solid Waste (MSW) Landfills under section 111 of the Clean Air Act. These notices are (1) a proposed rule to revise the New Source Performance Standards (NSPS) for MSW Landfills under section 111(b)¹, and (2) an advance notice of proposed rulemaking (ANPRM) on Emission Guidelines for existing MSW Landfills under section 111(d).²

Advocacy disagrees with EPA’s certification under section 605(b) of the Regulatory Flexibility Act and believes that EPA should have completed the Small Business Advocacy Review panel required by section 609(b). In addition, Advocacy believes that EPA should adopt flexibilities for small entities recommended by the Small Entity Representatives (SERs) if it moves forward with revisions to the NSPS or Emission Guidelines.

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.³ The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory

¹ 79 Fed. Reg. 41795 (July 17, 2014), Docket No. EPA-HQ-OAR-2003-0215.

² 79 Fed. Reg. 41771 (July 17, 2014), Docket No. EPA-HQ-OAR-2014-0451.

³ 15 U.S.C. § 634a, *et. seq.*

⁴ 5 U.S.C. § 601, *et. seq.*

Enforcement Fairness Act of 1996 (SBREFA),⁵ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a “significant economic impact on a substantial number of small entities,”⁶ EPA is required by the Regulatory Flexibility Act to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,⁷ and to consider less burdensome alternatives.

Statutory Background

Clean Air Act (CAA) section 111 requires EPA to identify each category of air pollution sources that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare” and issue performance standards for air emissions from these new sources.⁸ These New Source Performance Standards (NSPS) must reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated.”⁹ In certain circumstances in which measuring emissions is not practical, EPA may instead impose a design standard “which reflects the best technological system of continuous emission reduction,” including requirements for equipment and work practices.¹⁰

When an NSPS deals with an air pollutant that is neither a criteria pollutant (i.e., subject to the National Ambient Air Quality Standard (NAAQS)¹¹) nor a Hazardous Air Pollutant,¹² EPA issues Emission Guidelines under which states set performance standards for existing sources.¹³ These state-established performance standards are set considering the same factors as the NSPS, except that the State is also required to “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”¹⁴

Prior Rulemaking on MSW Landfills

In 1996, EPA issued an MSW Landfill NSPS (40 CFR part 60, subpart WWW) and Emission Guidelines (40 CFR part 60, subpart Cc).¹⁵ It identified Landfill Gas (LFG) as the relevant air pollutant. LFG is comprised of approximately 50 percent carbon dioxide, 50 percent methane, and trace amounts of nonmethane organic compounds (NMOCs). EPA established

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

⁶ *See* 5 U.S.C. § 609(a), (b).

⁷ 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.R. § 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.

⁸ 42 U.S.C. § 7411(b)(1).

⁹ 42 U.S.C. § 7411(a)(1).

¹⁰ 42 U.S.C. § 7411(h)(1).

¹¹ *See* 42 U.S.C. § 7408(a).

¹² *See* 42 U.S.C. § 7412(b).

¹³ 42 U.S.C. § 7411(d)(1).

¹⁴ 42 U.S.C. § 7411(d)(1)(B).

¹⁵ 61 Fed. Reg. 9905 (March 12, 1996).

size and emission thresholds for these standards: total landfill capacity (2.5 million megagrams and 2.5 million cubic meters) and the estimated NMOC emissions rate (50 Mg/yr). A landfill exceeding both these thresholds is required to install a well-designed and well-operated LFG collection and control system (GCCS) and to maintain it until estimated NMOC emissions drop below the threshold. Compliance is verified through a variety of monitoring, reporting and recordkeeping requirements, including surface monitoring of NMOC emissions and temperature and pressure monitoring of wellheads.

SBREFA Panel Convened but Not Concluded

On August 28, 2013, EPA advised Advocacy of its intent to convene a SBREFA panel.¹⁶ The scope of this panel included revisions to both the NSPS and the Emission Guidelines. EPA hosted a meeting with small entity representatives (SERs) on October 30, 2013, in advance of convening the panel.¹⁷ After EPA convened the panel on December 5, it hosted a second meeting with SERs on December 19. During both of these meetings, SERs provided oral comments in response to the information EPA presented and then provided written comments.¹⁸

In general, SERs opposed changes to the NSPS and Emission Guidelines because they were very costly and had not been demonstrated to lead to emissions benefits. To the contrary, SERs suggested additional flexibilities that would improve landfill operations while maintaining the emissions reductions achieved under the current rules.

On March 28, 2014, the White House released the “Climate Action Plan: Strategy to Reduce Methane Emissions,” which announced that EPA would issue a proposed rule for the NSPS and an ANPRM for the Emission Guidelines.¹⁹ EPA published these notices on July 17, 2014, without completing a SBREFA panel report, as required by statute.²⁰

NSPS Proposal

EPA has proposed the following significant changes to the NSPS.

- Reduce the NMOC emission threshold to 40 Mg/yr, requiring new landfills to install GCCS sooner and keep them operating longer. This would increase the amount of LFG captured over the lifetime of the landfill.
- Require LFG not combusted immediately be treated to meet specific numerical standards for filtration and dewatering. “The numerical specifications ensure that the treated gas is suitable for use in a wide range of applications. They also allow uniform national application of the NSPS, provide certainty to the landfill industry and

¹⁶ 5 U.S.C. § 609(b)(1).

¹⁷ See *Summary of Small Entity Outreach*, Regulations.gov Document ID EPA-HQ-OAR-2003-0215-0051

¹⁸ *Id.*

¹⁹ Available at

http://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf. See pp. 4-5.

²⁰ See 5 U.S.C. § 609(b)(5).

regulated agencies, and avoid case-by-case determinations that are likely to be complex, time consuming, and yield inconsistent results.”²¹

EPA also requested comment on a very wide range of other possible revisions to the NSPS and emphasizes that all information submitted in response to the Emission Guidelines ANPRM would be considered in the NSPS proposal.

Regulatory Flexibility Act Compliance

Under the RFA, EPA must complete the panel report before it publishes an Initial Regulatory Flexibility Analysis (IRFA).²² However, EPA does not need to publish an IRFA if it “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”²³

EPA made such a certification for the proposed revisions to the NSPS.²⁴ Although EPA does not have information on specific small entities that it expects will open new landfills in the next few decades, it estimates that there will be four new landfills opened by small entities. Of these four small entities, only two would trigger the NSPS, and one would be subject to compliance costs of nearly 12 percent of revenue in two consecutive years.²⁵ EPA states: “Only two small entities are potentially impacted, which does not constitute a substantial number.”²⁶ It certifies on this basis.

In the ANPRM, EPA requests comment on the impacts on small entities. The RFA does not require certification or specific analyses for ANPRMs. EPA has estimated that 100 small entities would be affected by changes discussed in the ANPRM.

Advocacy Comments: Proposed New Source Performance Standards

Advocacy has significant concerns about the factual basis for EPA’s certification. First, EPA’s cost analysis does not account for the effect of lowering the cutoff on the lifetime costs of the GCCS. Second, EPA has not considered the class of small entities currently excluded from the NSPS or Emission Guidelines, but likely to be subject to the NSPS in the future. Third, Advocacy disagrees that EPA can certify simply on the basis that there are only two small entities that would be affected by the rule.

Missing costs

EPA’s proposal would require a GCCS to be installed earlier and operated longer than the current rule. However, EPA’s analysis of the costs of the proposal is limited to 10 years from

²¹ 79 Fed. Reg. 41796, 41814(July 17, 2014).

²² 5 U.S.C. § 609(b).

²³ 5 U.S.C. § 605(b).

²⁴ 79 Fed. Reg. at 41828-29

²⁵ See also *Municipal Solid Waste Landfills: Economic Impact Analysis for the Proposed New Subpart to the New Source Performance Standards*, Section 4.2, Regulations.gov Document ID EPA-HQ-OAR-2003-0215-0045 [hereinafter *EIA*].

²⁶ 79 Fed. Reg. at 41829.

the date of the proposal.²⁷ The lifecycle costs of a landfill are highly dependent on how long a GCCS must be operated and how long before a facility can be closed. The natural reduction over time of LFG emissions from a landfill is not linear,²⁸ so lowering the cutoff from 50 Mg/yr to 40 Mg/yr can significantly extend the period over which the small entity bears the costs of compliance. In addition, EPA shows that back-end expenses can be significant,²⁹ and EPA does not discuss how the end-of-life costs may change with the drop in cutoff.

In EPA's small entity analysis, it presents an average of costs over 10-year periods, extending to 2043,³⁰ but these figures do not include the effect of operating a GCCS longer under the proposed rule or the end-of-life costs.

Missing small entities

EPA's analysis of regulated entities that would be affected by revisions to the NSPS focused entirely on new landfills. However, some entities may become subject to the NSPS through expansion.

One small municipality tells Advocacy that it may need to expand in the near future, and that its facility is not reflected in EPA's small entity analysis. An industry representative has also told Advocacy that some landfills obtain permits only as necessary to keep up with expansion rather than for the entire design at the beginning of the project and that this behavior is highly dependent on the relationship with state permitting authorities.

It is unclear how these additional small entities would be affected by revisions to the NSPS. While the proposed revisions would require GCCS installation earlier for entirely new facilities, expanded facilities are more likely to exceed immediately the current threshold. This would mean that the marginal impact of the rule change is the extended lifetime of the GCCS (see above), and this additional impact is not adequately explored in EPA's analysis.

Significant Economic Impact on a Substantial Number

The RFA provides that EPA is not required to conduct a SBREFA panel and prepare an Initial Regulatory Flexibility Analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."³¹ EPA's guidance implementing this provision recognizes that the absolute number of affected small entities is not the sole factor to consider.³² The guidance identifies three factors to consider:

²⁷ ERG, Memorandum to EPA, *Methodology for Estimating Cost and Emission Impacts of MSW Landfill Regulations* (April 2014), Regulations.gov Document ID EPA-HQ-OAR-2003-0215-0041.

²⁸ See EIA, Figure 2-3.

²⁹ See EIA, Figure 2-2.

³⁰ EIA, Table 4-1.

³¹ 5 U.S.C. § 605(b).

³² Regulatory Management Division, EPA Office of Policy, *EPA's Action Development Process: Final Guidance for Rulewriters: Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act*, (November 2006), p. 23.

“(1) magnitude of economic impact that may be experienced by regulated small entities; (2) total number of regulated small entities that may experience the economic impact; and (3) percentage of regulated small entities that may experience the economic impact.”³³

EPA relies too heavily on the second factor to justify its certification.

For the first factor, the magnitude of cost impact for one of four small entities is almost 12 percent of annual revenues in two consecutive years. The second of four small entities would experience an impact of over 2 percent of revenue in at least one year.³⁴ These are large impacts for small entities, even if their precise identity is unknown.

EPA discusses how averaging over 30 years affects this impact. “One landfill has impacts of up to 12 percent (as described above), but impacts of this magnitude only occur in two years of the 30 years. In general, average impacts over the 30-year timeframe are approximately 1 percent or less and maximum impacts are less than 3 percent.”³⁵ This however is not a factual basis upon which to certify. First, EPA has not shown that small landfills can finance such costs over an extended period of time. Second, EPA assumes the discretion to adjust fees to completely cover costs, something it recognizes as challenging due to a highly competitive market.³⁶

The third factor clearly weighs against certification. EPA recognizes that half of the small entities affected by the rule would experience a significant economic impact in two consecutive years.

Considering all three factors together, EPA’s analysis demonstrates that not only is there no factual basis for its certification, but that there is likely a significant economic impact imposed on a substantial number of small entities.

Recommendation

Advocacy suggests that EPA give greater consideration to the burdens this proposed rule imposes on small entities. If EPA promulgates this rule as proposed, Advocacy’s preferred solution would be for EPA to exempt small entities from any reduction in the emissions threshold.

Otherwise, Advocacy believes that the certification lacks a factual basis and that EPA must complete the SBREFA panel and develop and issue an IRFA for public comment prior to promulgation of the final rule.

³³ *Id.*

³⁴ See *EIA*, Table 4-1.

³⁵ 79 Fed. Reg. at 41829

³⁶ *EIA*, section 2.3.2.

Advocacy Comments: Emission Guidelines ANPRM

Historically, the NSPS and Emission Guidelines have been aligned. In the ANPRM, EPA requests comment on many of the issues presented in the NSPS. Because of the close relationship between the NSPS and the Emission Guidelines, Advocacy strongly recommends that EPA consider the impacts on small entities operating existing facilities in its decisions on the NSPS and whether to revise the Emission Guidelines to conform to these revisions. EPA should pay particular attention to the comments already received from the SERs during the uncompleted SBREFA panel.

Advocacy recommends that EPA consider adopting many of the policy recommendations the SERs made during the SBREFA panel outreach process. These recommendations include:

- Maintain existing numerical thresholds and timeframes for GCCS installation and operation;
- Maintain existing monitoring requirements;
- Remove wellhead operational standards; and
- Allow LFG treatment to meet the specifications required by equipment in use or LFG purchasers rather than impose one-size-fits-all numerical standards.

SERs believe that they can achieve the current level of emissions reductions more effectively with greater flexibility than the current rules allow.³⁷

In addition, SERs believe that the proposed NSPS requirement for LFG treatment would do more harm than good if applied to the Emission Guidelines. Small entities are already at a disadvantage for beneficial uses of LFG (e.g., generating electricity from LFG) because of the relatively low volumes of LFG generated by smaller facilities. Under one-size-fits-all treatment standards, small entities that currently put LFG to beneficial use could be required to replace existing equipment to work with LFG treated to EPA's numerical standards. Such replacement would have no emissions benefits. To the contrary, the major capital cost of additional LFG treatment could discourage small entities from investing in beneficial uses for LFG, imposing another barrier to cost-recovery for small entities. EPA should be cognizant of the "useful life"³⁸ of existing facilities before it imposes one-size-fits-all standards.

Advocacy appreciates EPA's concern that "case-by-case determinations that are likely to be complex, time consuming, and yield inconsistent results." However, the solution to such uncertainty in the permitting process should be a streamlining of the permitting process, not the imposition of unnecessary costs. EPA does not suggest in its analysis that there is an emission benefit to treatment of LFG to specific standards, so there should be no reason to impose a limitation on the design of a system for beneficial use.

Advocacy also encourages EPA to more aggressively identify and resolve other permitting bottlenecks. For example, the NSPS discusses a situation in which:

³⁷ See, e.g., Appendix, No. 4 (Letter from Michael Michels), pp. 4-5.

³⁸ 42 U.S.C. § 7411(d)(1)(B).

“any alternate operating value for temperature, nitrogen, or oxygen proposed by an owner or operator according to the proposed 40 CFR 60.763(c) must be submitted to the Administrator (i.e., the EPA Administrator or delegated authority) for approval. The request may be submitted separately from a design plan revision. However, the design plan would have to be updated on the schedule described in the next section.”³⁹

EPA should provide a mechanism by which small entities only need to submit this information once and be approved in the same process.

Conclusion

The proposed NSPS has the potential to disrupt significantly the participation of small entities in this industry, and adoption of these proposed revisions in the Emission Guidelines could harm existing small entities. Advocacy recommends that EPA consider exemptions for small entities in the NSPS and Emission Guidelines if EPA decides to move forward with its proposed NSPS revisions. Advocacy also recommends offering small entities greater operational flexibilities in wellhead performance and LFG treatment. Advocacy believes that these actions would “minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. . . .”⁴⁰

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 any further assistance, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or david.rostker@sba.gov.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

David Rostker
Assistant Chief Counsel
Office of Advocacy

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

³⁹ 79 Fed. Reg. at 41813.

⁴⁰ 5 U.S.C. § 604(a)(6).