

October 23, 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 supplemental proposed rule “Standards of Performance for Municipal Solid Waste Landfills” (Docket No. EPA-HQ-OAR-2003-0215) and 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) August 27, 2015, 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 supplemental proposed rule for its July 17, 2014, proposal to revise the New Source Performance Standards (NSPS) for MSW Landfills under section 111(b)¹, and (2) a notice of proposed rulemaking (NPRM) 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 of the proposed NSPS and recommends that EPA provide more small business flexibilities recommended by the Small Business Regulatory Enforcement and Fairness Act (SBREFA) panel, convened for these rulemakings. Advocacy appreciates the small entity outreach conducted for the Emission Guidelines NPRM and the small entity flexibilities proposed. Advocacy recommends some changes that will further help small entities consistent with the intent of the rulemaking.

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

¹ 80 Fed. Reg. 52,162 (August 27, 2015), Docket No. EPA-HQ-OAR-2003-0215.

² 80 Fed. Reg. 52,099 (August 27, 2015), Docket No. EPA-HQ-OAR-2014-0451.

³ 15 U.S.C. § 634a, *et. seq.*

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

⁴ 5 U.S.C. § 601, *et. seq.*

⁵ Pub. L. 104-121, Title II, 110 Sta. 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.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.

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).

pollutant. LFG is comprised of approximately 50 percent carbon dioxide and 50 percent methane, with trace amounts of nonmethane organic compounds (NMOCs). EPA established 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

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 would have been 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, and certified that the NSPS revisions would not have a significant economic impact on a substantial number of small entities. It therefore did not publish an Initial Regulatory Flexibility Analysis.²⁰ Advocacy filed public comments on the NPRM and ANPRM, raising concerns about the certification and recommending that EPA adopt the flexibilities recommended by the SERs.²¹

In April 2015, the panel conducted an additional outreach to the SERs in anticipation of a proposal to revise the Emission Guidelines. SERs reiterated their opposition to the changes

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. § 605(b).

²¹ See Comment submitted by Winslow Sargeant, Chief Counsel for Advocacy and David Rostker, Assistant Chief Counsel Office of Advocacy, SBA Office of Advocacy, regulations.gov Document ID EPA-HQ-OAR-2003-0215-0080.

proposed in the NSPS and expressed concern that EPA would similarly propose many of these changes in the Emission Guidelines.

The panel issued its report to the Administrator of EPA on July 21, 2015, covering revisions to both the NSPS and Emission Guidelines.²²

The Supplemental Proposal would make the NSPS more stringent.

EPA issued a supplemental proposal to its 2014 proposal to revise the NSPS. This supplemental proposal requests comment on reducing the NMOC emission threshold to 34 Mg/yr, lower than the 40 Mg/yr in the original proposal and the 50 Mg/yr in the current NSPS. This change would require more new landfills to install GCCS and require other new landfills to install GCCS sooner and keep them operating longer.

EPA has updated the small entity screening analysis, finding now that 13 small entities would be affected by the revisions to the NSPS, and of those, two would be subject to costs exceeding one percent of revenues. It affirms its certification of the proposed NSPS as not having a significant economic impact on a substantial number of small entities.

Advocacy Comment

Advocacy reiterates its comments previously submitted on the proposed NSPS. The concerns raised about the proposed rule remain.

First, although EPA has updated its small entity analysis, it certifies in part by asserting that 13 small entities is not a substantial number, and that impacts are not significant because only two of the 13 have annualized costs exceeding one percent of revenue. Advocacy has the same concerns about this certification as in the proposed rule. EPA should not assert that 13 small entities is not a substantial number because EPA projects that those 13 entities represent the universe of regulated small entities. EPA is projecting that 18 percent of regulated small entities for which it has data – a substantial number – will incur a significant economic impact as a result of this rule, and therefore should not have certified under section 605(b). In addition, EPA should not assume that small entities can annualize costs via financing or fee hikes to show no significant economic impact when the small entities are faced with significant startup and shutdown costs.

Second, the supplemental proposal does not address the significant concerns small entities had with the reduced emission thresholds, LFG treatment, more aggressive monitoring, and other changes that would increase the costs of compliance without a demonstrated emissions benefit. Advocacy reiterates its recommendation that EPA adopt the flexibilities proposed by

²² Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rules Standards of Performance for Municipal Solid Waste Landfills and Review of Emissions Guidelines for Municipal Solid Waste Landfills, regulations.gov Document ID EPA-HQ-OAR-2003-0215-0140. EPA certified the Emission Guidelines under 5 U.S.C. § 605(b), as the Emission Guidelines apply to states in their regulation of MSW Landfills. However, EPA may need to conduct an Initial Regulatory Flexibility Analysis in conjunction with any proposed Federal Implementation Plan of these Emission Guidelines. This panel report would apply to that proposal as well.

the SERs and incorporated into the SBREFA panel report. In the absence of these flexibilities, Advocacy continues to recommend that small entities be exempted from reductions in the emissions thresholds.

The Emission Guidelines Proposal includes important small entities flexibilities.

EPA has proposed revisions to the Emission Guidelines for MSW Landfills. These standards for regulation of these landfills by states (and the Federal government, if necessary) would revise the existing GCCS requirement by lowering the threshold for installation and operation from the current 50 Mg/yr to 34 Mg/yr, similar to the supplemental proposal for the NSPS. This would require a number of existing facilities to install GCCS where none was planned when they opened.

EPA has also proposed a number of revisions to the Emission Guidelines recommended by the SERs during the panel outreach, including:

- Elimination of wellhead operating limits;
- Case-by-case determination of treatment standards for LFG based on site-specific equipment;
- A subcategory of closed landfills that would be exempted from changes in the Emission Guidelines; and
- Alternative trigger for GCCS installation and removal based on surface monitoring (also known as Tier 4).

Advocacy Comment

Advocacy commends EPA for its efforts to engage in small entity outreach in this rulemaking and for adopting many of the flexibilities suggested by the SERs during the SBREFA panel outreach. Advocacy appreciates that EPA convened the SBREFA panel early enough to provide small entity input into the Emission Guidelines, even though the direct impacts on small entities would be triggered by later state regulation or, in some cases, eventual Federal plans. We believe that the end result of this early consultation on the Emission Guidelines will be a better rule for EPA, small entities, and the environment.

Advocacy offers the following recommendations to further improve this rule.

EPA should consider allowing more landfills to close and remain under the current regulations. By setting the cutoff date as of the date of the publication of the proposed rule EPA provided no practical notice to regulated entities of this flexibility. Facilities nearing the end of their useful life will have little ability to change their fees and plan for the longer operation of the GCCS required by lowering the emission threshold to 34 Mg/yr, and so may find an early closure to be preferable. Advocacy recommends providing the opportunity to be ‘closed’ under the Emission Guidelines up until the state or Federal regulations implementing the revised Emission Guidelines are effective.

EPA should ensure that the Tier 4 alternative is not overly strict and provides the flexibility intended. Small entities have expressed concern about two provisions of Tier 4. This

flexibility is very important if EPA finalizes the 34 Mg/yr emission threshold, since it has the potential to significantly reduce the costs imposed on small entities.

First, they are concerned that the limitations on wind and atmospheric conditions are too limited. Advocacy understands that for some landfills, such still air is rare. EPA does provide the ability to get a waiver to this limitation. However, small entities have had trouble in the past with such waiver provisions, believing that the regulatory bodies that issue such waivers are not sufficiently responsive to deal with day-to-day operational needs. It was this concern that led the small entities to advocate for elimination of the wellhead operating limits. EPA should reconsider these limits and, if such limits are necessary, significantly raise them to allow for greater weather and climate variability.

Second, small entities are concerned that Tier 4 appears to allow for no corrective action before the GCCS requirement is triggered. This is draconian, and risks requiring expensive planning and installation when a small or less expensive fix would be sufficient to meet the purposes of the regulation. Advocacy recommends providing a short period of time for corrective action and re-testing before the GCCS requirement is triggered.

EPA should allow small entities to incorporate startup, shutdown, and maintenance and repair activities into the GCCS design plan. As EPA has done in other recent Clean Air Act rulemakings, it is proposing that standards in the Emission Guidelines apply at all times, including periods of startup, shutdown, and malfunction (SSM). As EPA recognizes, landfills operate and emit pollution in a fundamentally different manner than traditional smokestack industries; there is no way to shut down or start up the emissions of the landfill. Therefore SSM in the case refers to operation of the GCCS.

Small entities have expressed concern that a narrow approach to SSM will impose a significant regulatory burden when a landfill engages in routine maintenance of the GCCS, particularly if that maintenance is in response to an unplanned but not unexpected incident. For example, if a valve breaks, the breakage is unplanned, but it should be a routine repair and one for which the landfill should have a plan. Advocacy suggests that a GCCS can be well-designed and well-operated if it has such a plan for exceptional events and complies with the plan.

Advocacy recommends that EPA allow landfills to incorporate unplanned but planned-for events into the GCCS design plan and provide that adherence to the plan would not be considered an SSM event.

Conclusion

Advocacy appreciates the efforts EPA has made to consult with small entities in the course of this rulemaking. Advocacy recommends EPA finalize the Emission Guidelines with the proposed flexibilities, with the changes discussed above. Advocacy further recommends EPA finalize the NSPS with the flexibilities consistent with the proposed Emission Guidelines and our recommendations.

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/

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/s/

David Rostker
Assistant Chief Counsel
Office of Advocacy

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