April 21, 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 "Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements" (Docket No. EPA-HQ-OPA-2006-0090).

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) January 22, 2015, notice of proposed rulemaking on "Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements."[1] This rule would revise the testing requirements for listing products that may be used to mitigate the effects of oil spills covered by the National Contingency Plan (NCP). Advocacy has concerns about the impact this rule will have on small businesses and believes that EPA lacks a factual basis upon which to certify that this rule would not have a significant economic effect on a substantial number of small entities. In particular, Advocacy is concerned that EPA has underestimated the number of small businesses that will be adversely affected by new testing requirements and underestimated the other costs that will be imposed on small businesses, such as research and development, lost intellectual property, and lost sales due to removal from the NCP schedule. Advocacy recommends EPA re-propose this rule after conducting an Initial Regulatory Flexibility Analysis and considering small business flexibilities to minimize the impact on small businesses consistent with the NCP 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

[1] 80 Fed. Reg. 3379 (January 22, 2015), Docket No. EPA-HQ-OPA-2006-0090.
[2] 15 U.S.C. § 634a, *et. seq.*
[3] 5 U.S.C. § 601, *et. seq.*

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 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

Subpart J of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) requires EPA to maintain a schedule of dispersants, other chemicals, and oil spill mitigating devices and substances that may be used to remove or control oil discharges. EPA has proposed revisions to Subpart J that would require all listed chemicals to undergo a new round of toxicity and effectiveness testing in order to remain on the schedule. EPA also proposed to significantly limit confidential business information (CBI) protections for products submitted for inclusion on the list.

EPA identified 81 businesses with products currently on the list that would be affected by this rule, of which 61 are small businesses and 30 are businesses with fewer than 10 employees. EPA certified that this rule would not have a significant economic impact on a substantial number of small entities.

Advocacy Comments

Advocacy believes that EPA's certification of this proposed rule lacks a factual basis. EPA's Regulatory Impact Analysis (RIA) makes assumptions about compliance costs that do not apply to many small businesses. In addition, the RIA overlooks other sources of new costs – arising from compromised trade secrets, research and development expenses to maintain listed products, and lost sales in the event of delisting. The analysis does not address these adverse effects.

1. The cost of testing is significant for a substantial number of small entities.

EPA has understated the impact of retesting all products currently on the NCP schedule. EPA estimates only three firms of the 30 smallest businesses would have testing costs between one and two percent of annual revenue, assuming the availability of 20-year financing at seven percent interest.

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

EPA's assumption is not reasonable for small businesses. As Advocacy has commented in the past and based on Advocacy's own research in the credit market, EPA should not assume the availability of credit at such favorable terms, particularly for minority- and women-owned small businesses. For this reason, Advocacy believes that EPA's presentation in Exhibit 7-2 understates the relevant impact on these 30 smallest businesses. If the cost of retesting is considered to be imposed upon promulgation of the final rule, then 16 of the 30 smallest firms analyzed would have costs greater than one percent of revenue, and 11 of these would have costs greater than three percent. Two firms would have costs greater than 19 percent of revenue. Advocacy believes that this is a substantial number of small entities.

In addition, Advocacy has heard from a small business that disputes EPA's estimates of per-product testing cost. This small business states that there is currently only one testing firm available to conduct the testing required for a bioremediation product and that testing to the current requirements cost over $28,000, excluding time spent by the small business and legal fees. This is double the EPA estimate and casts further doubt on EPA's certification.

2. EPA should consider the cost of more stringent listing thresholds

EPA's analysis of costs to small entities assumes that all products currently on the NCP schedule will remain on the schedule after retesting. EPA does not project the costs of improving products currently on the schedule or the costs to small entities of their products being excluded from the schedule. At the same time, EPA asserts that one of the benefits of this proposed rule will be improved efficacy of products on the NCP schedule. It is not clear how this is possible.

Advocacy is concerned that EPA has not estimated the number of products currently on the NCP schedule that would not qualify under the new testing requirements. This is problematic because EPA appears to be imposing significant re-testing costs on small entities without an expected health or environmental benefit. In order for there to be benefits through safer and more effective products on the schedule, small entities will need to expend significant resources in research and development to maintain their listing, and EPA does not account for this cost. It is also unclear to what extent delisting of a small business's product will result in lost sales if a business is unable or unwilling to commit the necessary resources to improving their product.

For these reasons, EPA has underestimated the impact of revising the testing requirements and listing thresholds on small businesses.

3. **EPA should consider the economic impact of limiting Confidential Business Information protections.**

The proposed rule requires disclosure of all chemical components, microbiological cultures, enzymes, or nutrients used in a submitted product. This will have a significant adverse impact

on small businesses. As EPA acknowledges in the preamble, there are significant and reasonable business justifications for maintaining trade secrets.

EPA's RIA does not evaluate the impact of weakened intellectual property protection for products submitted for listing on the NCP schedule. The value of intellectual property that small businesses must forfeit to maintain their product on the NCP schedule should be considered when evaluating whether there is a significant economic effect on a substantial number of small entities.

These costs are particularly high for small businesses that have a larger marginal cost of production but who maintain their market advantage through superior products. By requiring the release of all product information except concentration, EPA opens the way for larger firms to reverse engineer their products. If small businesses are unable to recoup their investments in research, development, and regulatory compliance, they lose the incentive to make the innovations in safe and effective oil dispersants that EPA is hoping for with this rule.

Recommendation

Based on the information available to EPA, Advocacy questions the factual basis of its certification. Short of exempting small entities on a long-term basis, Advocacy does not believe that EPA has the factual basis to certify the final rule.

Nonetheless, Advocacy recommends the following flexibilities for small businesses to reduce the adverse impacts of this proposed rule on small businesses:

- **Extend the testing and compliance period** – small businesses should have additional time to complete testing to ensure the availability of laboratory capacity and timely submission of testing data to EPA for review.
- **Short-term extension for products recently added to the schedule** – small businesses whose products have been recently listed are still recouping the costs of testing. EPA should provide time sufficient for these businesses to recoup their investment.
- **Retain protections for trade secrets** – Advocacy believes that CBI protections serve a valuable purpose. They encourage innovation in safer and more effective products and allow small businesses to recoup their investments in new products. EPA should retain CBI protections for the identification of all active components.

Conclusion

Advocacy believes that EPA lacks a factual basis for its certification under section 605(b) of the Regulatory Flexibility Act. EPA should re-propose this rule after consultation with small businesses and preparation of an Initial Regulatory Flexibility Analysis.

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

/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