

September 17, 2013

BY REGULATIONS.GOV and ELECTRONIC MAIL

Environmental Protection Agency  
Docket Center  
[oei.docket@epa.gov](mailto:oei.docket@epa.gov)

**RE: Comments on EPA's Notice of Proposed Consent Decree on the NESHAP for Petroleum Refineries (78 Fed. Reg. 51186 (August 20, 2013), Docket No. EPA-HQ-OGC-2013-0580)**

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Environmental Protection Agency's (EPA's) notice of proposed consent decree under the Clean Air Act published on August 20, 2013. In this notice, EPA invites public comment on a proposed consent decree that would require rulemaking under sections 112(d)(6) (technology review) and 112(f)(2) (residual risk review) to revise the National Emission Standards for Hazardous Air Pollutants (NESHAP) for petroleum refineries. Advocacy is concerned that the timeline for rulemaking required by this consent decree does not provide sufficient time for EPA to fully comply with the Regulatory Flexibility Act (RFA), including, if necessary, the requirement to re-initiate a Small Business Advocacy Review (SBAR) Panel in support of the proposed rulemaking, if EPA is unable to certify that the rulemaking would not have a significant economic impact on a substantial number of small entities.

**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 body 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.<sup>1</sup> The RFA,<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),<sup>3</sup> 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," EPA is required by the RFA to conduct a SBAR Panel<sup>4</sup> to assess the impact of the proposed rule on small entities,<sup>5</sup> and to consider less

<sup>1</sup> 15 U.S.C. § 634a, *et. seq.*

<sup>2</sup> 5 U.S.C. § 601, *et. seq.*

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

<sup>4</sup> 5 U.S.C. § 609(b).

<sup>5</sup> 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

burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.<sup>6</sup>

## **Background**

EPA developed two NESHAPs under section 112(d)(3) (Maximum Achievable Control Technology (MACT) standards) for Petroleum Refineries. EPA issued the first (MACT 1) in 1995. EPA issued the second (MACT 2), covering additional equipment used in petroleum refineries, in 2002.

The Clean Air Act requires EPA to perform two reviews of NESHAPs after promulgation: a technological review of advancements in HAP emissions control technologies within eight years of the promulgation of a standard and every eight years thereafter (section 112(d)(6)); and a review to assess the residual health risk within eight years of promulgation of a MACT standard (section 112(f)(2)). EPA conducted this risk and technology review (RTR) and proposed RTR amendments for MACT 1 in 2007. While a final action was signed on January 16, 2009, EPA proposed to withdraw it due to insufficient emissions information.

On August 4, 2011, EPA convened a Small Business Advocacy Review (SBAR) Panel under section 609(b) of the Regulatory Flexibility Act. EPA included RTR amendments to MACT 1 and MACT 2, including the withdrawn final action, within the scope of that Panel. Advocacy expressed concerns that EPA had not provided sufficient information to the small entity representatives. (See Advocacy letters of June 6, 2011, and August 4, 2011, both attached.) The SBAR Panel met with small entity representatives, but it did not complete the required report with recommendations to the EPA Administrator.

In September 2012, EPA submitted a draft proposed rule covering the RTR amendments to the Office of Management and Budget (OMB) for interagency review under Executive Order (EO) 12866. EPA withdrew it from OMB review in March 2013. The draft proposed rule is not available to the public.

On August 20, 2013, EPA announced a proposed consent decree that would resolve a lawsuit seeking to compel EPA to take final action on these RTR amendments. This consent decree would require EPA to propose action by February 14, 2014, and take final action by December 19, 2014.

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(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.

<sup>6</sup> 5 U.S.C. § 604, *as amended by the* Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

## **Advocacy seeks to ensure sufficient time for RFA compliance**

Advocacy is concerned that five months would not be enough time for EPA to reconvene the SBAR Panel, complete its work, and engage in EO 12866 interagency review if it is unable to certify that the rule would not have a significant economic impact on a substantial number of small entities. Although some small entities have expressed concern about the economic impact of this rule, Advocacy is not currently asserting that EPA can or cannot certify the rule.

However, in the absence of such information, Advocacy advises EPA to allocate time to re-convene the SBAR Panel and re-engage the small entity representatives with more up-to-date information about EPA's plans for the rulemaking. This information should include details about and results from the risk assessment EPA has performed to support its residual risk review and any information gathered in support of the technology review, with a particular emphasis on the costs of emission reductions.

EPA should also ensure that it has sufficient time to develop an Initial Regulatory Flexibility Analysis (IRFA) that is fully responsive to the Panel's findings prior to a robust interagency review. The Panel Report itself is intended to be an input into the Initial Regulatory Flexibility Analysis, which should be completed and available for comment with the proposed rule.

Accounting for preliminary consideration and analysis of regulatory options, time for a Panel, at least two months for development of the IRFA and rule, and up to 90 days for EO 12866 interagency review, Advocacy believes that EPA should allow itself significantly more than a year to develop a proposed rule that fully complies with and benefits from the RFA, if it lacks the factual basis to certify the rule under RFA section 605(b). Advocacy appreciates that EPA has completed significant work on this rule, as evidenced by its prior submission to OMB. This prior work will aid development of materials for the Panel and small entities to consider and of the subsequent IRFA, but will not necessarily shorten the time necessary for the Panel and interagency review.

## **Conclusion**

For the reasons above, Advocacy advises EPA to request more time to complete the rulemaking required by the consent decree. Advocacy believes that the five months provided are not sufficient to allow for full compliance with the procedures required by the RFA, including an SBAR Panel Report and development of an IRFA, or to ensure that the Administrator, in exercising her policy discretion, can benefit from the agency's understanding of the rulemaking's economic impact on small entities.

Please do not hesitate to call me or contact Assistant Chief Counsel David Rostker ([david.rostker@sba.gov](mailto:david.rostker@sba.gov) or (202) 205-6966) if we can be of further assistance.

Sincerely,

A handwritten signature in cursive script that reads "Winslow Sargeant".

Winslow Sargeant, Ph.D  
Chief Counsel for Advocacy

cc: Howard A. Shelanski, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget



June 6, 2011

Via Electronic Mail

Mr. Alexander Cristofaro (MC-1804A)  
Small Business Advocacy Chair  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

**Subject: SBAR Panel for Petroleum Refinery Sector Risk and Technology Review and NSPS**

Dear Mr. Cristofaro:

The Office of Advocacy (Advocacy) has received your May 23, 2011, formal notification regarding the Small Business Advocacy Review Panel (Panel) for the forthcoming regulatory proposal, "Petroleum Refinery Sector Risk and Technology Review and NSPS."

Advocacy concurs with the list of potential small entity representative (SERs) that EPA has provided and has no additions at this time.

However, Advocacy is concerned that the formal notification does not include "information on the potential impacts of the proposed rule on small entities," as required by section 609(b)(1) of the Regulatory Flexibility Act. Although there is a section in the formal notification labeled as such, the substance of the section is a listing of "potential requirements the proposed rule may contain." The list is further described as requirements that "may result from this comprehensive rulemaking and they all have the potential to apply to small refiners, with concomitant economic impacts."

Advocacy believes that this list does not fulfill the letter or purpose of section 609(b)(1). In place of potential impacts, EPA has provided a vague catalog of regulatory provisions or classes of emission limits, with almost no guidance on the scale or scope of the economic impacts of this rulemaking. Advocacy is particularly concerned with this guidance gap since EPA does not have any experience in implementing section 111 of the Clean Air Act with respect to greenhouse gases from which Advocacy or potential SERs could extrapolate future agency actions. With listing entries such as "fenceline monitoring" or "boiler/process heater efficiency improvements," EPA leaves too much to the imagination. Therefore, it is Advocacy's opinion that EPA has not described "potential impacts of the proposed rule on small entities" in this notification.

Advocacy expect that the materials EPA prepares for future discussion and distribution to the SERs will be more forthcoming in describing the specific range of regulatory alternatives EPA is analyzing and in presenting the potential economic impacts of these alternatives. If EPA does not provide the panel and the SERs a robust description of regulatory alternatives and impacts, the SBAR panel cannot fulfill its statutory purpose.

Please feel free to call me or Assistant Chief Counsel David Rostker ([david.rostker@sba.gov](mailto:david.rostker@sba.gov)) if you have any questions.

Sincerely,

/s/

Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

cc: The Honorable Cass R. Sunstein, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget



August 4, 2011

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency

The Honorable Cass R. Sunstein  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

**RE: SBAR Panel – Convening of Panel on Petroleum Refinery Sector Risk and Technology Review and NSPS**

Dear Administrators Jackson and Sunstein:

Today, EPA convened a Small Business Advocacy Review (SBAR) panel on its upcoming rulemaking, “Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards (NSPS).” The Office of Advocacy (Advocacy) does not agree that this panel should have convened at this time. We believe that EPA is not yet ready for this panel, since it has not provided the other panel members with information on the potential impacts of this rule and will not provide small entity representatives (SERs) with sufficient information upon which to discuss alternatives and provide recommendations to EPA. It is Advocacy’s position that EPA is not in compliance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) due to the lack of information provided and that a panel conducted under these circumstances is unlikely to succeed at identifying reasonable regulatory alternatives, as required by the Regulatory Flexibility Act (RFA).

Advocacy acknowledges that EPA is conducting this rulemaking under court-agreed deadlines as part of negotiated settlement agreements, deadlines to which Advocacy objected in a public comment letter to EPA on January 19, 2011. EPA cannot rely on these deadlines to justify an inadequate SBAR panel.

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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 body 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.<sup>1</sup> The RFA,<sup>2</sup> as amended by

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<sup>1</sup> 15 U.S.C. § 634a, *et. seq.*

SBREFA,<sup>3</sup> 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,”<sup>4</sup> EPA is required by the RFA to conduct a SBAR Panel to assess the impact of the proposed rule on small entities,<sup>5</sup> and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule.<sup>6</sup>

## Background

Since the passage of SBREFA in 1996, EPA has been a “covered agency” under section 609 of the RFA. In that time, EPA, OMB, and SBA have jointly conducted almost 40 panels. EPA has also published valuable guidance to its program offices on compliance with the RFA, including the conduct of SBAR panels.<sup>7</sup>

SBAR panels give Small Entity Representatives (SERs) an opportunity to understand a covered agency’s upcoming proposed rule and provide meaningful recommendations to aid in the agency’s compliance with the RFA. The process starts with the covered agency notifying Advocacy with “information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected[.]”<sup>8</sup> Upon convening of the panel, the RFA states that “the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c)[.]”<sup>9</sup>

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<sup>2</sup> 5 U.S.C. § 601, *et. seq.*

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

<sup>4</sup> *See* 5 U.S.C. § 609(a), (b).

<sup>5</sup> 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.

<sup>6</sup> 5 U.S.C. § 604, *as amended by the* Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

<sup>7</sup> *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act*, OPEI Regulatory Development Series, U.S. EPA, November 2006.

<sup>8</sup> § 609(b)(1).

<sup>9</sup> § 609(b)(4). Section 603(b), paragraphs (3), (4), and (5) read:

“(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

“(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

“(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.”

Section 603(c) reads:

“(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as –

Advocacy believes that these requirements, read together and in the context of activity to be conducted prior to proposed rulemaking, require the agency to provide sufficient information to the SERs so that they can understand the likely form of the upcoming rulemaking, evaluate its potential economic impacts, and recommend alternative regulatory options that would minimize any significant economic impact while preserving the agency's regulatory objectives. Advocacy also believes that the statute clearly intends that the agency provide deliberative information as part of this process.

## **SBAR Panel**

Advocacy received formal notification of EPA's intent to convene this panel at the end of May, 2011, and EPA convened the panel on August 4, 2011. Draft outreach materials provided to Advocacy and OIRA for review since May and the draft outreach materials the SERs will soon receive do not describe potential economic impacts or regulatory alternatives under development. The description of the proposed rule is a discussion of EPA's statutory obligations. The outreach materials also present a spectrum of technologies that could be required by the proposed rule, based on work developed for separate section of the Clean Air Act, without any indication of which technologies could be required by an NSPS, new MACT standards or the RTR..

EPA has broad discretion to design a regulatory program to regulate GHGs under section 111 of the Clean Air Act. For that reason, Advocacy believes that SERs have not been provided enough information to project how EPA will structure this regulation or establish the relevant standards. In the absence of information, SERs will be unable to understand potential impacts of the rulemaking and make recommendations about regulatory alternatives that would minimize the impacts on small entities while fulfilling EPA's goals. Advocacy raised this concern at the convening of the SBAR panel for the EGU GHG standards of performance rulemaking earlier this year.

For the revisions EPA intends to make to the Petroleum Refineries NESHAP, both the new standards and the RTR, Advocacy believes that the information presented is inadequate because EPA has not provided more than generalized statements of possible regulatory pathways. EPA has convened this panel before industry data from the ongoing information collection request (ICR) is due, so the SERs lack a factual basis upon which they could project potential impacts of this rule, even if they had the time and resources to conduct such an analysis and could successfully predict EPA's preferred regulatory approach. In addition, for the Residual Risk portion of the NESHAP revisions, EPA must complete a risk assessment to justify revisions to the existing major source NESHAP, but EPA does not have the risk assessment or even the data to perform the risk assessment, so the SERs have no ability to consult on regulatory alternatives that would fulfill the objective of the statute.

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“(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

“(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

“(3) the use of performance rather than design standards; and

“(4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

In the absence of information sufficient for SERs to appreciate the impact of the proposed rule and to identify regulatory options that would fulfill EPA's statutory objectives, Advocacy believes that convening this panel is premature. The benefits of the SBAR panel cannot be realized if the stakeholders are not presented and equipped with such regulatory options.

For these reasons, Advocacy believes that convening this panel is premature, and that EPA should delay this panel until it has a clearer set of available regulatory options and potential impacts available for discussion by the panel members and the SERs. EPA should request that the litigants agree to an extension of the court-agreed deadlines for this rulemaking to ensure that EPA can fully comply with its statutory obligations.

## **Conclusion**

Advocacy states its objection to the convening of this panel because we believe EPA is not providing sufficient information to the SERs. As a result, the SBAR panels will likely be unable to identify specific regulatory alternatives that would "accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." We believe input from small entities will be valuable in this important rulemaking, and we want to ensure SERs on this SBAR panel are able to contribute effectively to this process.

I look forward to working with you to make sure the voice of small business is heard and considered. When done well, the SBAR panel process is an important channel for that voice, and it works to the benefit of all stakeholders. If you have any questions regarding this letter or if Advocacy can be of any assistance, please do not hesitate to contact David Rostker at (202) 205-6966.

Sincerely,

/s/

Winslow Sargeant, Ph.D  
Chief Counsel for Advocacy

cc: Small Entity Representatives participating in the SBAR Panel on Petroleum Refinery Sector Risk and Technology Review and NSPS.