



January 10, 2013

BY REGULATIONS.GOV and ELECTRONIC MAIL

Docket Center
U.S. Environmental Protection Agency.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Consent Decree for Sierra Club v. Jackson, No. 1:08-cv-00424 RWR (D. DC), Docket No. EPA-HQ-OGC-2012-0905.

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Environmental Protection Agency (EPA) notice of proposed consent decree under the Clean Air Act, published on December 7, 2012. In this notice, EPA invites public comment on a consent decree that would require rulemaking under section 112(d) of the Clean Air Act to establish a National Emission Standard for Hazardous Air Pollutants (NESHAP) for brick and structural clay products manufacturing facilities and clay ceramics manufacturing facilities. 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 the requirement to conduct a Small Business Advocacy Review (SBAR) panel in support of a notice of proposed rulemaking.¹

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.² The 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 a substantial number of small entities,”⁵ EPA is required by the RFA to conduct a SBAR Panel to assess the impact of the proposed rule on small entities,⁶ and to consider less

¹ 5 U.S.C. § 609(b).

² 15 U.S.C. § 634a, *et. seq.*

³ 5 U.S.C. § 601, *et. seq.*

⁴ Pub. L. 104-121, Title II, 110 Stat. 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.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.⁷

Background

EPA promulgated a NESHAP for brick and structural clay products manufacturing facilities in May 2003. The U.S. Court of Appeals for the D.C. Circuit vacated the NESHAP in March 2007. In response, EPA reinitiated rulemaking in 2009, and notified Advocacy of its intent to convene a SBAR panel in March 2010. EPA hosted a preliminary meeting with potential small entity representatives, including trade associations, in April 2010. However, many potential small entity representatives believed EPA lacked the data to support the rulemaking. EPA has held no further public meetings in preparation for an SBAR panel since.

On December 7, 2012, EPA published for public comment a proposed consent decree in litigation brought by the Sierra Club seeking establishment of a NESHAP to replace that which the D.C. Circuit vacated in 2007. The consent decree would require EPA to propose a NESHAP by August 30, 2013 and issue final regulations by July 31, 2014.

Based on the information provided by EPA and relevant trade associations, Advocacy believes that this rule would have a significant economic impact on a substantial number of small entities. Advocacy therefore wants to ensure that EPA provides itself with sufficient opportunity to comply with the requirements of the RFA. EPA's November 2006 guidance on the Regulatory Flexibility Act states that "the entire Panel process – once begun in earnest with focused small entity outreach, through SBA notifications, preparation for and convening of the Panel, and the completion of the Panel Report – will usually take between four and ten months." The Panel Report itself is intended to be an input into the Initial Regulatory Flexibility Analysis (IRFA), which should be completed and available for comment with the proposed rule.

Advocacy is therefore concerned that the proposed settlement agreement does not provide sufficient time for a full panel process and subsequent development of an IRFA prior to a robust interagency review under Executive Order 12866. Given the concerns of small businesses regarding the robustness of EPA's data, it is important that EPA's presentation to the small entity representatives be clear and complete. Accounting for preliminary consideration and analysis of regulatory options, time for a Panel, with at least two more 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 more than the eight months required by the consent decree to develop a proposed rule that fully complies with and benefits from the RFA.

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

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 time allotted for publication of the proposed rule is 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 Assistant Chief Counsel David Rostker (david.rostker@sba.gov or (202) 205-6966) if we can be of further assistance.

Sincerely,

/s/

Winslow Sargeant, Ph.D
Chief Counsel for Advocacy

/s/

David Rostker
Assistant Chief Counsel

cc: Boris Bershteyn, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget