



Office of Advocacy

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August 18, 1999

Mr. Robert Perciasepe (6101)  
Assistant Administrator for Air and Radiation  
United States Environmental Protection Agency  
401 M Street, S.W.  
Room No. WT937  
Washington, D.C. 20460

Re: EPA's Proposed Gasoline Sulfur Rule; Definition of Small Refiner  
64 Fed. Reg. 26,003 (May 13, 1999)

Dear Mr. Perciasepe:

I would like to restate our support for the small refiner phase-in that was developed in the panel process last year. That recommendation, developed with the help of the small refiners who participated in the process, is the appropriate regulatory solution to achieving the desired environmental results, without unnecessarily jeopardizing small firms in the refinery business. We reaffirm our support for small business relief, using the definition of small refinery as promulgated by the Small Business Administration (SBA). I again would like to take this opportunity to thank you and your staff for the cooperative efforts in working in the panel process, and in the later development of the proposed rule.

I also need to specifically address the matter of the appropriate size standard for small businesses in the proposal. Beryl Anthony sent me a copy of his June 15, 1999 letter to you about EPA's proposed use of our small refiner definition and the necessity to use the average number of employees over 12 months. I have now seen Margo Oge's July 2 response to Mr. Anthony, and I'm concerned that EPA may have misunderstood our regulations and the applicable law. I and Gary Jackson, Assistant Administrator of Size Standards agree with Mr. Anthony's contention about the SBA size standard: EPA must use a 12-month average, unless the SBA Administrator agrees otherwise.

The Small Business Act spells out how Federal agencies must set size standards for small business concerns. 15 U.S.C. § 632(a)(2)(C). Where number of employees is used as a size standard, as you proposed for small refiners, the Act requires that the size determination be based on the average number of employees for all pay periods during the preceding 12 months. Specifically, section 3(a)(2)(C)(ii)(I) of the Act says that size determinations based on number of employees must look to

the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months . . . .

Id. (emphasis added). The SBA regulations follow that statutory language by providing that where a size standard is based on number of employees, the method for determining a business' size is the average number of employees using the "numbers of employees for each of the pay periods for the preceding completed 12 calendar months." 13 C.F.R. § 121.106(b)(1). Thus, the number of employees "as of" a particular date (e.g., January 1, 1999 under the proposed gasoline sulfur rule) must be determined by the average number of employees for all pay periods during the prior completed 12 months.

As we read the proposal, it at least implies that a small refiner's number of employees would have to be based on a single date — January 1, 1999. See 64 Fed. Reg. at 26,110-11 (proposed 40 C.F.R. § 80.225(a) defines a small refiner as any person "which, as of January 1, 1999 . . . employed no more than 1500 people"). Nowhere does the proposal require 12 months' worth of payroll data for purposes of averaging. Determining the number of employees based on that single day, if that is what was intended, is not authorized by statute and has never been approved by the SBA Administrator.

I also share EPA's concern about not allowing companies to "game" the system. However, SBA solved this problem specifically by using the average employment over 12-months.

I regret that my staff may have overlooked this issue in reviewing the draft proposed rule. However, the apparent oversight by EPA and SBA staff is not cause for promulgating an improper size standard. As a final point, if EPA promulgates the final rule using a small business definition without incorporating the averaging approach (using any end date), the agency would need approval from the SBA Administrator, pursuant to 13 CFR 121.901-903 and section 13(a)(2) of the Small Business Act. That will implement the Small Business Act, avoid "gaming" and give relief where it is needed.

Sincerely,

Jere W. Glover  
Chief Counsel for Advocacy

cc: Mr. Gary M. Jackson  
Assistant Administrator of Size Standards