



February 16, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Residual Risk and Technology Review (Docket ID EPA-HQ-OAR-2017-0015)

Dear Administrator Regan:

On January 5, 2023, the Environmental Protection Agency published a proposed rule titled National Emission Standards for Hazardous Air Pollutants (NESHAP) for Lime Manufacturing Plants; Residual Risk and Technology Review.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

According to EPA's analysis, this proposed rule would impose millions of dollars in costs on an industry that does not appear to pose an appreciable public health risk. EPA has erroneously certified that the rule will not have a significant economic impact on a substantial number of small businesses and must immediately convene a SBREFA panel to consult with these small businesses. In its final rule, EPA should exercise the maximum flexibility permitted by the Clean Air Act, including the use of health-based standards and work practice standards, to allow small businesses to continue operating without requiring investment in expensive emission control equipment that will have no appreciable public health benefit.

¹ 88 *Fed. Reg.* 805 (January 5, 2023).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. In addition, EPA is required by the RFA to conduct a SBREFA Panel to consult with small entity representatives before issuing such an assessment.⁴

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁶

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁷

B. Background

Under section 112 of the Clean Air Act (CAA), EPA is required to establish a NESHAP for lime manufacturing and review those standards on a regular basis. Initial standards under this section are based on the emissions from best performers in an industry.⁸ The statute gives EPA some flexibility to set standards based on health impacts or work practice standards where circumstances warrant.⁹

² 5 U.S.C. §601 et seq.

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

⁴ 5 U.S.C. §609(b).

⁵ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁶ *Id.*

⁷ *Id.*

⁸ Clean Air Act § 112(d)(3); 42 U.S.C. § 7412(d)(3).

⁹ CAA § 112(d)(4), § 112(h).

As part of the regular review, EPA conducts a risk assessment to determine whether there remains an unreasonable risk from hazardous air pollutants¹⁰ and whether technology has advanced sufficiently to justify more stringent standards.¹¹ EPA concluded this most recent review in July 2020 and made no changes to the NESHAP.¹² In the supporting risk assessment, EPA found that, for the 22 million people living within 50 kilometers of the 35 facilities within the source category,

The total estimated cancer incidence based on whole facility emissions is 0.004 excess cancer cases per year, or one excess case in every 250 years. Approximately 30 people are estimated to have cancer risks above 1-in-1 million from [Hazardous Air Pollutants (HAP)] emitted from all sources at the facilities in this source category. . . . No one is exposed to noncancer hazard index levels above 1, based on whole facility emissions from the 35 facilities within this source category.¹³

EPA also found that there were no changes in technology that required revisions to the standards.¹⁴

C. The Proposed Rule

Due to an April 2020 court decision, EPA has been reviewing all NESHAPs and setting new standards for previously unregulated pollutants that it had determined in previous rulemakings did not pose a public health risk.¹⁵ On January 5, 2023, EPA published a proposed revision to the NESHAP, setting new NESHAPs for emissions standards for hydrogen chloride (HCl), mercury, total hydrocarbon (THC) as a surrogate for organic HAPs, and dioxin/furans (D/F). EPA estimates that this rule would cost industry \$27 million in capital costs and \$30 million a year in operations and maintenance.¹⁶

¹⁰ CAA § 112(f)(2).

¹¹ CAA § 112(d)(6).

¹² 85 *Fed. Reg.* 44960 (July 24, 2020).

¹³ Residual Risk Assessment for the Lime Manufacturing Source Category in Support of the 2020 Risk and Technology Review Final Rule, USEPA Office of Air Quality Planning and Standards (OAQPS), Office of Air and Radiation (OAR) at 7 (February 2020), *available at* regulations.gov Document ID EPA-HQ-OAR-2017-0015-0057.

¹⁴ 85 *Fed. Reg.* at 44962.

¹⁵ *See LEAN v. EPA*, 955 F.3d 1088 (D.C. Cir. 2020) (EPA has an obligation to set standards for unregulated pollutants as part of technology reviews under CAA section 112(d)(6)).

¹⁶ Memorandum to the Docket, *Economic Impact and Small Business Screening Assessments for Proposed Amendments to the National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Facilities*, Table 5 (November 3, 2022), *available at* regulations.gov Document ID EPA-HQ-OAR-2017-0015-0108.

EPA conducted a small business screening analysis in support of a certification under section 605(b) of the RFA.¹⁷ It identified three small businesses in the industry. In the preamble to the proposed rule, EPA stated that the impact on these small businesses would be between 0.5 percent and 0.9 percent of annual sales,¹⁸ but the screening analysis provided no further detail. EPA assumed efficacy and costs for emissions control equipment based on economy-wide averages.¹⁹

II. Advocacy's Small Business Concerns

Advocacy has consulted directly with the three small businesses likely affected by this rule and has two main concerns with the rule.

A. The proposed rule would likely have a significant economic impact on all the small entities affected.

EPA certified that this rule would not have a significant economic impact on a substantial number of small entities and thus did not convene a SBREFA panel or prepare an Initial Regulatory Flexibility Analysis (IRFA). However, EPA made this certification based on an analysis that significantly underestimated the capital costs small businesses will be required to spend to ensure compliance. As a result, EPA must convene a SBREFA panel and prepare an IRFA before the final rule is promulgated.

1. EPA has underestimated the cost of compliance with its proposed standards.

All three small businesses have expressed significant concern that EPA's analysis significantly underestimates both the equipment and effort necessary to comply with the proposed standards and the costs of that equipment.

For example, EPA has proposed standards for mercury, total THC, and D/F that it says would only require an activated charcoal injection (ACI) system. It projects that 90 such systems would need to be installed across the industry. Further, only 4 systems would require the additional installation of a Regenerative Thermal Oxidizer (RTO). EPA modeled effectiveness and cost of these systems based on EPA handbooks that are not sector specific.²⁰

All three small businesses separately informed Advocacy that ACI systems do not operate effectively at the temperatures and humidity of their operations. Kilns operate at over 300 degrees hotter than the temperatures at which ACI systems are considered effective. Two small businesses already believe they would need to install RTO systems to meet the proposed standards, and the third is still evaluating.

¹⁷ *Id.* at pp 6-7.

¹⁸ 88 *Fed. Reg.* at 819.

¹⁹ See Memorandum from RTI International, *Development of Impacts for the Proposed Lime Manufacturing Plants NESHAP* (November 2022), available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0134.

²⁰ *Id.* at 6.

However, EPA has also underestimated the cost of RTO systems. EPA has modeled RTO systems to include the cost of natural gas.²¹ However, not all facilities that need to install an RTO have ready access to a natural gas pipeline. The two small businesses that believe they must install RTO systems would need to get permits, contract, and build new natural gas pipelines at costs of several million dollars. One business estimates the capital costs for just RTO systems would be almost double EPA's cost estimates for the entire industry's compliance with the proposed rule.

2. Industry averages hide disproportionate costs on small businesses.

EPA relies on industry averages to develop its cost estimates. As discussed above, EPA uses averages across all industries to model costs and effectiveness of control equipment. EPA also uses national average wage and energy costs. However, small businesses have significant disadvantages that raise costs and make compliance more challenging than for large businesses in the same industry. Industry averages hide these impacts.

First, the use of industry averages put small businesses at a disadvantage. Generally, for similar sets of regulatory requirements, small businesses face a greater cost of compliance. For example, when a new regulation requires additional human resources, identifying, hiring, and retaining employees becomes a major concern for small entities, especially in the current tight labor environment.

In addition, larger businesses have the size and scale to offer benefits packages that smaller businesses generally cannot offer, which may lead to higher search costs. For example, while 92 percent of businesses with more than 500 employees offer retirement plans, 73 percent of businesses with 50 to 99 employees, and 53 percent of businesses with less than 50 employees offer retirement plans.²² Paid leave, quality of healthcare, and other benefits packages are also more generous at larger businesses, leaving smaller businesses at a disadvantage when hiring compliance staff.

Similarly, small businesses have expressed concern that when new regulations require the purchase and installation of new equipment, they are last in line with suppliers. They also believe that they pay more per unit because they are generally purchasing fewer identical items and require more customization per installation. For example, small businesses that need to install one or two ACI systems will be at a disadvantage compared to a large business that may be installing six to ten systems. The large business will get a more competitive price and likely priority on equipment and labor for the installation.

²¹ See, e.g., Air Pollution Control Cost Estimation Spreadsheet for Thermal and Catalytic Oxidizers, available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0134, attachment 3.

²² Dep't of Labor, Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2021 [Employee Benefits in the United States, March 2021 \(bls.gov\)](https://www.bls.gov/news.release/comp202103.pdf) (last visited Feb. 15, 2023).

Finally, a small business will also lose more revenue during installation of control equipment, both in absolute terms and as a share of their business, since they have fewer kilns across which to spread the lost production.

3. EPA must convene a SBREFA panel and prepare an initial regulatory flexibility analysis.

The RFA requires agencies to prepare an initial regulatory flexibility analysis when it publishes a proposed rule, and SBREFA requires EPA to conduct a panel prior to publishing an IRFA. Under § 605(b) of the RFA, an agency may avoid the requirements of an initial and final regulatory flexibility analysis, including a discussion of significant, burden-reducing alternatives, if the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.

In this proposed rule, EPA made a certification that the rule would not have a significant economic impact on a substantial number of small entities. However, as discussed above, all three of the small entities affected by the rule, which is a substantial number, have stated that EPA has underestimated the economic impact of the rule and that the economic impacts will be significant under EPA's RFA guidance. Therefore, Advocacy believes that EPA's certification lacked a factual basis, and EPA is required to convene a SBREFA panel and prepare an IRFA.

Because the proposed rule has already been published, EPA should immediately convene a panel, accept the panel's report, prepare an IRFA, and publish the IRFA for public notice and comment prior to issuing the final rule and a final regulatory flexibility analysis.

B. EPA should use the fullest extent of its discretion under the CAA to minimize burden.

EPA's assessment of the public health risks posed by lime manufacturing indicate that the industry poses no unreasonable risk. Nonetheless, EPA has proposed strict new emission limits that will be costly and have no appreciable public health benefits. This proposal would waste valuable economic resources and raise prices on industry and consumers.

In multiple communications with EPA during the development of this rulemaking, the National Lime Association presented three regulatory alternatives that would significantly reduce the cost of the rule.²³ EPA should adopt these alternatives to make it possible for the small businesses to comply with the amended NESHAP without significant new capital investments and operating costs.

1. EPA should adopt a health-based standard for HCl.

In general, section 112 aims to eliminate HAPs. For example, the regular technology reviews are not limited by how much risk HAPs pose. However, Congress did recognize that some HAPs

²³ See, e.g., Memorandum, *Summary of Meeting with National Lime Association (NLA)* (November 21, 2021), available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0067.

may not pose any risk at low concentrations, i.e., below a certain threshold, and thus allowed EPA to establish standards for these chemicals considering these threshold levels.

EPA determined HCl to be a threshold pollutant in the first NESHAP for this industry in 2002, and there has been no evidence gathered since that would dispute this conclusion. The risk assessments demonstrate that all facilities in the industry would be able to meet a health-based standard without further investment. However, EPA has resisted setting health-based standards for any NESHAP. Given the significant costs that this rule imposes without associated public health benefits, it is unclear when would be a more appropriate time to do so.²⁴

2. EPA should use a mercury variability factor to set the NESHAP.

Mercury emissions from lime manufacturing comes from the natural deposits of limestone. As EPA found in 2002, emissions are extremely low, and thus no facility currently has equipment to control for mercury. This is a problem, because EPA looks to the best performers in an industry to determine the emission standard. EPA is looking not at facilities that have the most effective controls but rather the facilities that are using limestone deposits with lower mercury. This is even more problematic because mercury levels within deposits can be variable.

In the NESHAPs for Portland Cement and for Brick and Structural Clay Products, EPA included a factor in its calculations to account for this issue. Doing so for this rule would reduce the number of facilities that would need to install mercury controls without impacting public health.²⁵

3. EPA should adopt a work practice standard for D/F.

Emissions of D/F from lime manufacturing are so low that most of the tests have not detected its presence (a result known as “non-detects”). The CAA allows EPA to set a work practice standard in lieu of a numerical NESHAP in these cases. EPA’s current guidance requires “at least 55% of the test data, including those outside the group of best performing sources, must be non-detect in order to justify a work practice standard (versus setting a limit).”²⁶

EPA had valid test information upon which to base its analysis for seven kilns. However, in applying this test, EPA excluded tests from five kilns. EPA “determined that these one-run tests were valid for estimating expected emission rates, but were not valid for use in determining

²⁴ See Memorandum from David Friedland, Beveridge & Diamond, PC, *EPA Should Issue a Section 112(d)(4) Health-Based Standard for Hydrogen Chloride in the Revised Lime Manufacturing NESHAP* (November 30, 2021), available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0072.

²⁵ See Memorandum from Trinity Consultants, *Proposed MACT Emission Limit Calculations for Mercury from Lime Kilns*, available at Document ID EPA-HQ-OAR-2017-0015-0074.

²⁶ Memorandum from Steffan Johnson, Measurement Policy Group, SPPD, *Determination of “non-detect” from EPA Method 29 (multi-metals) and EPA Method 23 (dioxin/furan) test data when evaluating the setting of MACT floors versus establishing work practice standards* at 4 (June 5, 2014), available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0117.

proposed standards using the UPL method.”²⁷ This, however, is a misapplication of EPA’s guidance, which is not dependent on how the emission standard is calculated. What matters is that the test is not a reliable measure of emissions. A standard based on this test will require small businesses to install emission controls as a precaution to avoid enforcement rather than to serve public health.

Because EPA risk assessment showed no appreciable risk to public health from D/F emissions, EPA should adopt a D/F work practice that allows small businesses to continue operating without changing processes or installation of costly equipment.

III. Conclusion

This proposed rule is likely to impose significant economic costs on all three of the small businesses affected. EPA’s certification of the rule under section 605(b) of the RFA lacks a factual basis, and, therefore, EPA must convene a SBREFA panel and prepare an IRFA. Because this proposed rule would impose significant costs without an appreciable public health benefit according to EPA’s analysis, EPA should be adopting the maximum flexibilities allowed under the Clean Air Act to minimize the burden, including a health-based standard for HCl, considerations for mercury variability within limestone deposits, and work practice standards for D/F.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Dave Rostker
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

²⁷ Memorandum from Matt Hakos, RTI International, *Proposed Maximum Achievable Control Technology (MACT) Floor Analysis for the Lime Manufacturing Plants Industry* at 22 (October 2022), available at regulations.gov Document ID EPA-HQ-OAR-2017-0015-0135.

Copy to: Richard L. Revesz, Administrator
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