



November 16, 2023

VIA ELECTRONIC SUBMISSION

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

Re: Revisions to the Air Emissions Reporting Requirements, 88 Fed. Reg. 54,118 (August 9, 2023), Docket ID. EPA-HQ-OAR-2004-0489.

Dear Administrator Regan:

On August 9, 2023, the Environmental Protection Agency (EPA) published a proposed rule entitled, “Revisions to Air Emissions Reporting Requirements.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy is concerned that the EPA’s proposed rule will impose an unreasonable burden on small entities if EPA cannot develop the tools small entities will need to comply in a reasonable timeframe. The EPA should reconsider this proposed rule and address each industrial sector and the needs of its small entities individually.

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) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. 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

¹ 88 Fed. Reg. 54118 (proposed Aug. 9, 2023).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ 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.¹⁰

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."¹¹

B. The Proposed Rule

The EPA has proposed a significant revision and expansion of the Air Emissions Reporting Requirements (AERR). In this proposed rule, the EPA expresses its need for more consistent and comprehensive emissions data. The agency aims to use the data to provide more information to the public about exposure to pollutants and to prepare for future regulatory efforts. To support these goals, the EPA proposes to require a broader range of sources to report on emissions of conventional pollutants (i.e., those covered by National Ambient Air Quality Standards, such as particulate matter and ozone) and on all Hazardous Air Pollutants (HAPs). This would cover numerous sources that do not currently report to the EPA or state authorities, including s in sectors the EPA currently regulates as stationary sources under the Clean Air Act and portable sources that remain within a single site.

The EPA's proposal recognizes that these new reporting requirements have the potential to be burdensome, especially since many sources already report some or all of the required information to state, local, and tribal regulators. Without the cooperation of these other authorities, businesses may be required to report similar information to two different places in different formats and with different thresholds for reporting.

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

Prior to publication of this proposed rule, the EPA convened a small business advocacy review panel as required by the RFA. The panel issued its report January 2023.¹² The panel made numerous recommendations, with a focus on the need for emissions estimation tools so small entities would not be required to conduct additional monitoring or testing or develop emissions estimates on their own.¹³

The EPA announced its intent to develop such emission estimation tools in response to these recommendations but declined to provide exclusions from reporting for small businesses in industrial sectors for which the tools were not yet available. “The EPA believes that adding a regulatory exemption based on emissions estimates generated by a yet to be established and evolving tool would add unnecessary complexity to the structure of the rule.”¹⁴ In addition, because the EPA proposed reporting requirement would be based on actual emissions, small entities might not be able to rely on the tool to satisfy the reporting requirement.¹⁵

II. Advocacy’s Small Business Concerns

Advocacy is concerned that the EPA’s proposed rule is not achievable for small entities and is not clear whether the EPA and industry can develop the tools small entities will need to comply with the proposed requirements. The EPA should revise this proposed rule and address each industrial sector and the needs of its small entities individually.

A. This proposal would create a significant burden for small entities, particularly those not already subject to reporting of HAP emissions.

One of the significant challenges that this proposed rule presents is an expansion in the number of small entities that will be subject to reporting emissions data for which they have never been responsible. In some cases, that is because their regulatory authority has not required it. In other cases, it is because their facility has not been subject to federal regulation. It is not clear whether the EPA has fully considered the impacts of these expansions because the EPA’s estimates of affected facilities seem limited to those who must report to either the EPA, another regulatory authority, or both, and not the burden on small entities who must determine first whether they need to report.

The EPA states that this proposal does not require any additional monitoring or testing, and that compliance, in the absence of such actual emissions data, must be based on the “Best Available Emission Estimation Method.” However, the EPA also proposed that where current guidance materials are outdated or are not applicable, owners/operators would develop and document new

¹² ENV’T PROT. AGENCY, PANEL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE REVISIONS TO THE AIR EMISSION REPORTING REQUIREMENTS, (Jan. 3, 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2004-0489-0096>.

¹³ *Id.* at 35-36.

¹⁴ 88 Fed. Reg. at 54,145.

¹⁵ *Id.* at 54,146 (“Further, if the facility was actually emitting at or above the applicable reporting threshold but not reporting those emissions, that too would be a violation of the proposed requirements. The EPA plans to develop this tool to assist facilities with determining whether they emit at or above the applicable reporting threshold (and thus would be required to report) and to help them estimate emissions for reporting. Use of the tool, however, does not excuse an owner/operator, or a State, from complying with all applicable requirements.”).

techniques for estimating emissions, which should rely on any available source measurements.¹⁶ The EPA would exempt some small entities from this requirement,¹⁷ but is not clear what small entities should do in the alternative. The EPA has stated its intent to provide emissions estimation tools, and the SBREFA panel stated that small businesses should not be required to report emissions where EPA had not provided an estimation tool. Nonetheless, the EPA declines to provide this assurance and structures the proposed rule to require reporting regardless of the availability of the promised tools.

The requirement that small entities comply regardless of the availability of the necessary emissions estimation tools is extremely problematic. Stakeholders with whom Advocacy has consulted emphasize that emissions estimation tools can be complex and expensive. They are generally industry and process specific. They require extensive and diverse testing data to develop and validate. Each estimation tool would need to cover every HAP, around 180 different chemicals, for which monitoring and detection methods vary widely. In addition, the EPA has proposed extending these requirements beyond traditional stationary sources to include a wide range of off-road and nonroad mobile sources for which emissions estimation tools are incomplete and in-use testing data is sparse.

The EPA estimates that this effort will require 0.5 FTE and \$400k.¹⁸ This seems optimistic given the diversity of sources and their emissions, as well as the need for emissions data upon which to base these tools. These tools will need to cover emissions from food manufacturing to shoe factories to large nonroad vehicles in mines. Small entities have reason to be concerned that this rule could take effect, and they would be required to determine themselves whether they must report and what to report without the benefit of the necessary tools that were promised. Small entities do not want to risk noncompliance, especially given how large Clean Air Act penalties can be. While the rule is unclear on what small entities should do in absence of up-to-date and applicable guidance, the obligation remains to determine whether they exceed the HAP thresholds and are obliged to report. Unless EPA provides greater accommodations to small entities in the absence of the promised tools, the impacts on small entities would be severe.

B. The EPA should reconsider this proposed rule and continue to rely on sector-by-sector rulemakings to ensure that burden on small entities is adequately considered and balanced with the EPA's need for the information.

The EPA should avoid taking a one-size-fits-all approach to this program. Each sector should be considered on its own, with focus on those HAPs most likely relevant to the facilities and processes in that sector. The EPA should consider its own resource constraints on developing emission estimation tools, and delay imposing requirements on small entities until it has a plan and committed resources to address the full scope of the needed tools on a sector-by-sector basis.

¹⁶ *Id.* at 54,201 (proposed 40 CFR § 51.5(a)).

¹⁷ EPA's proposal would not exempt all small entities, as defined by the SBA Size Standards or the Regulatory Flexibility Act. See ENV'T PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED REVISIONS TO THE AIR EMISSIONS REPORTING REQUIREMENTS 130-32 (July 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2004-0489-0107>.

¹⁸ *Id.* at 78.

The ability of small entities to comply with this proposal hinges on the availability of reliable and accurate tools. If the EPA does proceed with the scope of this proposed rule unchanged, it should delay finalizing the rule until the promised emission estimation tools are available to the public for notice and comment.

III. Conclusion

EPA has proposed an expansion of the AERR. Advocacy is concerned that this proposal would impose a significant burden on small entities, especially if the tools promised to small entities to reduce the burden of the AERR are not available in a timely fashion. Advocacy recommends the EPA address each sector individually, so that it can develop the necessary tools and prioritize efforts to improve emissions data and reporting.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker at (202) 205-6966 or 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

Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget