

March 12, 2012

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: Comments on EPA's Proposed Rule, "National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plans," 77 Fed. Reg. 6628 (February 8, 2012), Docket No. EPA-HQ-OAR-2010-0600**

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Environmental Protection Agency's (EPA) supplemental notice of proposed rulemaking, *National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plans*.<sup>1</sup> EPA's notice presents a new technology review and a new residual risk analysis. Based on this information, EPA proposes revisions to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) that would result in stricter emissions limits for hexavalent chromium. Although EPA has certified that this proposed action would not have a significant economic impact on a substantial number of small entities, Advocacy is concerned that this certification lacks a sufficient factual basis. Further, EPA has not demonstrated that the proposed requirements are technically feasible. Small businesses recommend that EPA delay further action on this rulemaking until EPA can demonstrate that the proposed emissions standards are achievable.

**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>2</sup> The Regulatory Flexibility Act (RFA),<sup>3</sup> as amended by the Small Business

<sup>1</sup> 77 Fed. Reg. 6628 (February 8, 2012).

<sup>2</sup> 15 U.S.C. § 634a, *et. seq.*

Regulatory Enforcement Fairness Act of 1996 (SBREFA),<sup>4</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>5</sup> EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities,<sup>6</sup> and to consider less burdensome alternatives.

## **Rulemaking Background**

The Clean Air Act<sup>7</sup> (CAA) regulates air emissions from stationary and mobile sources. EPA’s authority for this proposed rulemaking arises under CAA Section 112. Section 112 requires EPA to issue technology-based emissions standards for major sources and some area sources based on a maximum degree of reduction in emissions of hazardous air pollutants (HAP). Subsection 112(f)(2) requires EPA, within 8 years of the implementation of standards, to evaluate the residual risk associated with those sources to ensure an ample margin of safety to protect public health or adverse environmental effects. Subsection 112(d)(6) requires EPA, within 8 years of the implementation of standards, to conduct a review of emission standards, taking into account developments in technology, to determine whether standards should be revised to address residual risk.

EPA has regulated the chromium electroplating industry, consisting mostly of small entities, for emissions of hexavalent chromium since the original NESHAP were promulgated in 1995. Facilities control hexavalent chromium emissions by either reducing the facility’s emissions by using add-on air pollution control devices (APCD), or by decreasing the electroplating tank surface tension levels using wetting agent fume suppressants (WAFS). Some facilities use a combination of both. The choice of compliance method often depends on the source category. For example, decorative chromium electroplating facilities primarily use WAFS to control their emissions while hard chromium electroplating facilities often use a combination of APCD and WAFS. The use of WAFS to decrease surface tension level is at issue in this letter.

Currently, many facilities are operating below the existing surface tension level limits. A number of facilities are also operating at the new proposed limits. However, these facilities are achieving these targets with the use of perfluorooctyl sulfonates (PFOS) based WAFS. In addition to lowering the surface tension limits, this rulemaking is also proposing to ban PFOS-based WAFS, requiring small businesses to use alternative WAFS. EPA believes that non-PFOS alternatives are effective, reasonably priced, and capable of reducing surface tension levels to meet the new proposed NESHAP standards. Although small businesses support the ban on PFOS, they do not feel that the proposed

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<sup>3</sup> 5 U.S.C. § 601, *et. seq.*

<sup>4</sup> Pub. L. 104-121, Title II, 110 Sta. 857 (1996) (codified in various sections of 5 U.S.C. § 601, *et. seq.*).

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

<sup>6</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.C. § 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>7</sup> Clean Air Act of 1963, Pub.L. 88-206, 77 Stat. 392, 1963-12-17.

new standards are achievable using alternative WAFS. Neither EPA nor small businesses have data to determine whether facilities can meet the stricter surface tension levels using non-PFOS WAFS.

### **Advocacy Comments**

Advocacy is concerned that EPA's certification lacks a factual basis. In order to meet RFA standards a certification must include a description of the affected entities, as well as the anticipated impacts that clearly justify a finding of "no significant impact" on a substantial number of those affected entities. EPA has not demonstrated that this rulemaking is either technically feasible or that it will not have a significant economic impact on a substantial number of small entities and, therefore, cannot certify at this time.

There is concern that EPA has not provided data demonstrating that proposed surface tension levels are achievable using non-PFOS WAFS. Instead, the data collected to support technical feasibility relies on the same PFOS-based WAFS which the rule is banning. To make up for the lack of necessary data EPA relies on two studies to show that non-PFOS WAFS are a feasible substitute. However, the first study is based on the ability of facilities to meet the current limits, not the proposed stricter limits.<sup>8</sup> The second study focuses on non-PFOS WAFS used in non-decorative hard chromium electroplating. Hard chromium electroplaters, however, would be the least affected by the PFOS ban. The source category most affected is decorative chromium electroplating, as these facilities rely on WAFS the most heavily.<sup>9</sup> This second study also notes that the usefulness of the PFOS-alternatives is limited to automated hard chrome processes, as the WAFS require continuous addition to the tank.<sup>10</sup> Neither the data nor the studies show whether facilities are meeting, or will be able to meet, the new surface tension limits employing non-PFOS WAFS. EPA should not rely on this data to support a certification under the RFA, as it does not accurately provide information on the achievability of the proposed levels.

EPA has not successfully demonstrated that the rulemaking will not have a significant economic impact on small entities. EPA obtained limited data on the costs of non-PFOS WAFS. In the economic analysis, EPA assumes that the cost of using non-PFOS WAFS will be 15 percent higher than the cost of using PFOS-based WAFS. This assumption includes an estimation of the increased amount of non-PFOS WAFS needed because non-PFOS WAFS are depleted at a higher rate. However, more data on the cost of non-PFOS WAFS, and how their faster depletion rate will affect the amount of WAFS used in the electroplating process, is needed before EPA can certify the rule as having no significant economic impact on a substantial number of small entities under the RFA.

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<sup>8</sup>Barlowe, G. and Patton, N., 2011. "Non-PFOS, Permanent Mist Suppressants for Hard Chromium Plating, Decorative Chromium Plating and Chromic Etch Applications". March 1, 2011.

<sup>9</sup>Danish, EPA. 2011. Substitution of PFOS for use in non-decorative hard chrome plating. Pia Brunn Poulsen, Lars K. Gram and Allan Astrup Jensen. Danish Environmental Protection Agency. Environmental Project No. 1371 2011.

<sup>10</sup> *Id.* at 72.

## Conclusion

Advocacy appreciates the opportunity to comment on this EPA rulemaking. Small businesses are concerned that EPA has not presented a sufficient factual basis to support its certification under the Regulatory Flexibility Act. Even though EPA is under a court-ordered deadline to publish a final rule, Advocacy recommends delaying further action on this rulemaking until EPA can complete a full review of the technical feasibility of substituting non-PFOS WAFS, as well as a more complete account of the costs to small business, to ensure that EPA is in compliance with the RFA.

If my office can be of any further assistance, please contact me or Sarah Bresolin Silver at (202) 205-6790 or [sarah.bresolin@sba.gov](mailto:sarah.bresolin@sba.gov).

Sincerely,

/s/

Winslow Sargeant, Ph.D.  
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/s/

Sarah Bresolin Silver  
Assistant Chief Counsel  
Office of Advocacy

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