United States Environmental Protection Agency

Office of Transportation and Air Quality

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November 2005

Small Business Advocacy Review Panel (SBRFA) Letter from Panel to the EPA Administrator

Summary Report

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Office of Policy, Economics and Innovation
U.S. Environmental Protection Agency

Office of Transportation and Air Quality
U.S. Environmental Protection Agency

U.S. Office of Management and Budget

U.S. Small Business Administration

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Johnson:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or the Panel) convened for the proposed rulemaking on the Control of Hazardous Air Pollutants from Mobile Sources (or Mobile Source Air Toxics (MSAT) proposed rulemaking) that the U.S. Environmental Protection Agency (EPA or the Agency) is currently developing.

On September 7, 2005, EPA's Small Business Advocacy Chairperson (SBAC) convened this Panel under Section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. In addition to the Chair, the Panel consisted of the Director of EPA's Assessment and Standards Division within the Office of Transportation and Air Quality, the Chief Counsel for Advocacy of the Small Business Administration, and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget.

The Panel's findings and discussion are based on the information available during the term of the Panel. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comment on the proposed rule. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound, and consistent with the Clean Air Act, primarily sections 202(l) and 183(e).

Small Entities That May Be Subject to the Proposed Regulation

Highway Light-Duty Vehicles

In addition to the major vehicle manufacturers, three distinct categories of businesses relating to highway light-duty vehicles would be covered by the new vehicle standards: small volume manufacturers (SVMs), independent commercial importers (ICIs), and alternative fuel vehicle converters. SVMs are companies that sell less than 15,000 vehicles per year, as defined in past EPA regulations, and this status allows vehicle models to be certified under a slightly simpler certification process. Independent commercial importers are companies that hold a Certificate (or certificates) of Conformity permitting them to alter imported vehicles to meet U.S. emission standards. Alternative fuel vehicle converters are businesses that convert gasoline or diesel vehicles to operate on alternative fuel, and converters must seek a certificate for all of their

vehicle models. Based on a preliminary assessment, EPA identified about 14 SVMs, 10 alternative fuel vehicle converters, and 10 ICIs. Of these, EPA believes 5 SVMs, 6 converters, and all 10 ICIs would meet the small-entity criteria as defined by SBA (no major vehicle manufacturers meet the small-entity criteria). EPA estimates that these small entities comprise about 0.02 percent of the total light-duty vehicle sales in the U.S. for the year 2004.

Gasoline Fuel Industry

EPA's current assessment is that 15 refiners meet SBA's criterion of having 1,500 employees or less. It should be noted that because of the dynamics in the refining industry (i.e., mergers and acquisitions) and decisions by some refiners to enter or leave the gasoline market, the actual number of refiners that ultimately qualify for small refiner status under an MSAT program could be much different than these initial estimates. Current data further indicates that these refiners produce about 2.5 percent of the total gasoline pool and their contribution to mobile source benzene emissions is roughly 5 percent.

Portable Gasoline Containers

EPA conducted a preliminary industry profile to identify the manufacturers of portable gasoline containers (gas cans) – 98 percent are plastic containers and 2 percent are metal gas cans. Using this industry profile, EPA identified 4 domestic manufacturers and 1 foreign manufacturer. Of these 4 U.S. manufacturers, 3 meet the SBA definition of a small entity. One small business accounted for over 50 percent of the U.S. sales in 2002, and the other small entities comprised about 10 percent of U.S. sales.

Summary of Small Entity Outreach

Before beginning the formal SBREFA process, EPA actively engaged in talking to entities that would potentially be affected by the upcoming rulemaking. EPA was able to identify the small entities within the highway light-duty vehicles SVM, ICI, and converter sectors, using information from EPA certification databases and non-governmental sales and employment databases. After identifying these entities for the vehicle sector, EPA then began talking to these businesses to locate potential SERs to participate in SBREFA. For portable gasoline container manufacturers, EPA participated in a series of workshops held by the California Air Resources Board and established initial industry contacts. EPA then held several meetings and conference calls with individual manufacturers and with the manufacturers as a group to discuss their products and EPA's upcoming proposal. For gasoline refiners, based on information from past rulemakings, EPA began well in advance of the SBREFA process conducting phone conferences and face-to-face meetings with small fuel refiners that produce gasoline. This led to the selection of a set of potential SERs that represent a cross-section of small refiners.

EPA provided each business with EPA/SBAC fact sheets on the SBREFA process and background information on and the rulemaking process and the upcoming MSAT rule itself.

Once potential SERs were identified, EPA began having more discussions to better understand the needs of the small entities in more detail.

Outreach meetings were held with the potential SERs on July 19, 2005 and September 27, 2005 (gasoline refiners) and September 29, 2005 (light-duty vehicles and portable gasoline containers). On July 19, 2005 EPA held three separate 1.5 hour meetings with groups of potential SERs representing the highway light-duty vehicle industry, gasoline refiners, and portable gasoline container manufacturing' industry. Eleven potential SERs participated in the meetings in total. These outreach meetings were held to provide the industry representatives with information on the SBREFA process and the role of a SER, and to solicit feedback from the potential SERs on the upcoming rulemaking. EPA held additional outreach meetings on September 27, 2005 with the gasoline refining SERs and on September 29, 2005 with the light-duty vehicles and portable gasoline container SERs. A total of 11 SERs participated in the meetings either in person or by telephone, providing their input to the Panel on the material presented in the SER outreach packet. Following each of the outreach meetings, comments were received from the SERs. A summary and full text of these comments can be found in the Panel report.

Regulatory Approaches

For VOC and toxics control from light-duty vehicles (beyond the Tier 2 requirements), EPA is exploring the alignment of EPA evaporative emission standards with California low-emission vehicle (LEV) II standards and new cold temperature exhaust (VOC) emission standards. Despite numerical differences in evaporative emission standards, EPA and California programs essentially result in a comparable level of stringency today, due to differences in test requirements. Thus, harmonizing with California's LEV-II evaporative emission standards would streamline certification requirements and would be an anti-backsliding measure, which would add certainty that manufacturers would retain their current approach for producing the same level of evaporative system hardware nationwide. In addition, data suggests that VOC exhaust emissions (which include toxic organics) from vehicles are significantly higher under cold temperatures (20°F) than under normal testing temperatures (75°F). EPA is currently contemplating a cold temperature VOC standard in the range of 2 to 3 times the 75°F VOC "bin 5" exhaust standard (or a potential proposed standard of 0.2 to 0.3 grams/mile). This emission level can be achieved through calibration alone, and it would not force new emissions control hardware beyond that which manufacturers would be installing normally to reach full Tier 2 compliance. EPA is currently evaluating a program for highway light-duty vehicles that could become effective in 2009 for the evaporative emissions standards and 2010 for the cold VOC standards (with a possible 4-year phase-in period for the cold VOC standards).

From a fuel standpoint EPA is focused on controlling benzene emissions. Benzene emissions can be addressed through both the fuel benzene content and the fuel aromatics content. Exhaust benzene emissions are linked more strongly to fuel benzene content than any other fuel parameter. Fuel aromatics are also a significant precursor to benzene emissions, however, the

reduction of aromatics to achieve the same effect as a fuel benzene reduction is much more costly because of the deep impact on octane and volume. Therefore, EPA believes that fuel benzene control is the most effective approach. A detailed approach for timing and stringency of the fuel requirements has not yet been decided, however, EPA is considering implementation dates in the 2010 to 2012 timeframe.

For gas cans, there are currently not federal emission control requirements. California has a program for controlling fuel container emissions. EPA is considering performance-based requirements, which are similar to those of California, that lead to the sale of redesigned fuel containers nationwide. The bulk of evaporative emissions come from consumers not properly closing containers. Also, fuel will permeate through the walls of the container, contributing to overall evaporative emissions losses. Based on the use of automatically closing cans and permeation control, EPA is considering proposing a diurnal evaporative emissions standard of 0.3 grams/gallon/day. EPA expects that the manufacturers will need a few years of lead time after the standards are finalized in order to finalize their designs, certify products, and ramp up production to a national scale, and therefore EPA is considering a start date of 2009.

Panel Findings and Discussion

The Panel assessed each of the issues raised in the outreach meetings and in written comments by the SERs. For small entities within the light-duty vehicle sector, the Panel's key discussions centered on the identification of flexibilities which would reduce the burden on small entities to comply with the new standards. For small gasoline refiners, the discussions focused on the level of a benzene standard and the compliance costs associated with the standard, and how to mitigate its impact on small refiners. For small portable gasoline container manufacturers, the Panel discussion focused on current state programs and finding flexibility options that would help gas can manufacturers in their transition to eventual compliance with a new national program. The Panel also discussed regulatory approaches and agreed to request comment in the proposed rulemaking on such issues.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

At this point in the process, EPA has not yet fully defined a program of reporting, record keeping requirements, or compliance assurance for the engine and equipment entities that may be subject to the proposed rule. For highway light-duty vehicles, EPA expects to propose to continue the reporting, recordkeeping, and compliance requirements prescribed for this category in 40 CFR 86. Key among these are certification requirements and provisions related to reporting of production, emissions information, flexibility use, etc. For any fuel control program, EPA must have assurance that fuel produced by refiners meets the applicable standard, and that the fuel continues to meet the standard as it passes downstream through the distribution system to the ultimate end user. EPA expects that recordkeeping, reporting and compliance provisions of the proposed rule will be fairly consistent with those in place today for other fuel programs. For example, reporting would likely involve requiring that refiners submit pre-compliance reports

updating EPA on their plans to meet the MSAT standards. For gas cans, there currently are not federal emission control requirements, and thus, EPA is still developing reporting and record keeping requirements for gas can manufacturers that would be subject to the proposed standards. EPA is considering requirements that would be similar to those in the California program (e.g., emissions testing, data submittal).

Other Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The Panel is aware of a few other current or proposed Federal rules that are related to the upcoming proposed rule. The primary federal rules that are related to the proposed MSAT rule under consideration are the first MSAT rule (*Federal Register Vol. 66, p. 17230, March 29, 2001*), the Tier 2 Vehicle/Gasoline Sulfur rulemaking (*Federal Register Vol. 65, p. 6698, February 10, 2000*), the fuel sulfur rules for highway diesel (*Federal Register Vol. 66, p. 5002, January 18, 2001*) and nonroad diesel (*Federal Register Vol. 69, p. 38958, June 29, 2004*), and the Cold Temperature Carbon Monoxide Rulemaking (*Federal Register Vol. 57, p. 31888, July 17, 1992*).

In addition, the Evaporative Emissions Streamlining Direct Final Rulemaking is expected to be published by the end of this year. For gas cans, OSHA has safety regulations for gasoline containers used in workplace settings. Cans meeting OSHA requirements, commonly called safety cans, are exempt from the California program, and we are planning to exempt them from the EPA program.

Section 1501 of the Energy Policy Act of 2005 requires the Agency to implement a Renewable Fuels Standard (RFS) program. Beginning in 2006, this program will require increasing volumes of renewable fuel to be used in gasoline, until a total of 7.5 billion gallons is required in 2012. The most prevalent renewable fuel is expected to be ethanol. There are a wide variety of potential impacts of ethanol blending on MSAT emissions that will be evaluated as part of the RFS rulemaking process. In general, as ethanol use increases, other sources of octane in gasoline can decrease. Depending on these changes, the impact on benzene emissions will vary. The specific effects of ethanol on benzene will be addressed in the Regulatory Impact Analysis (RIA) to this rule and in future rulemakings, such as the RFS rule.

Regulatory Alternatives

The Panel considered a wide range of options and regulatory alternatives for providing small businesses with flexibility in complying with the MSAT standards. As part of this process, the Panel requested and received comment on many ideas that were suggested by both the Panel members and the SERs. Taking into consideration the comments received on these ideas, as well as additional business and technical information gathered from and about potentially affected small entities, the Panel summarizes the major options below. The complete set of recommendations can be found in section 9 of the full Panel Report.

Major Panel Recommendations

Small Light-Duty Vehicle Manufacturers

Regulatory Flexibility Options for Small Light-Duty Vehicle Manufacturers

For certification purposes (and for the sake of simplicity for Panel discussions regarding flexibility options), SVMs include ICIs and alternative fuel vehicle converters since they sell less than 15,000 vehicles per year. Similar to the flexibility provisions implemented in the Tier 2 rule, the Panel recommends that we allow SVMs (includes all vehicle small entities that would be affected by this rule, which are the majority of SVMs) the following flexibility options for meeting cold temperature VOC standards and evaporative emission standards:

> For cold VOC standards, the Panel recommends that SVMs simply comply with the standards with 100 percent of their vehicles during the last year of the 4 year phase-in period. For example, if the standard for light-duty vehicles and light light-duty trucks (0 to 6,000 pounds GVWR) begins in 2010 and ends in 2013 (25%, 50%, 75%, 100% phase-in over 4 years), the SVM provision would be 100 percent in 2013. If the standard for heavy light-duty trucks and medium-duty passenger vehicles (greater than 6,000 pounds GVWR) starts in 2012 (25%, 50%, 75%, 100% phase-in over 4 years), the SVM provision would be 100 percent in 2015.
>
> In regard to evaporative emission standards, the Panel recommends that since the evaporative emissions standards will not have phase-in years, we allow SVMs to simply comply with standards during the third year of the program (we have implemented similar provisions in past rulemakings). For a 2009 start date for light-duty vehicles and light light-duty trucks, SVMs would need to meet the evaporative emission standards in 2011. For a 2010 implementation date for heavy light-duty trucks and medium-duty passenger vehicles, SVMs would need to comply in 2012.

Hardship Flexibility Provisions for Small Light-Duty Vehicle Manufacturers

In addition, the Panel recommends that hardship flexibility provisions be extended to SVMs for the cold temperature VOC and evaporative emission standards. These provisions are:

> SVMs would be allowed to apply (EPA would need to review and approve application) for up to an additional 2 years to meet the 100 percent phase-in requirements for cold VOC and the delayed requirement for evaporative emissions. Appeals for such hardship relief must be made in writing, must be submitted before the earliest date of noncompliance, must include evidence that the noncompliance will occur despite the manufacturer's best efforts to comply, and must include evidence that severe economic hardship will be faced by the company if the relief is not granted.

Small Gasoline Refiners

Regulatory Flexibility Options for Small Gasoline Refiners

The Panel recommends that EPA propose certain provisions to encourage early compliance with lower sulfur standards. The Panel recommends that EPA propose that small refiners be afforded the following flexibility options to help mitigate the impacts on small refiners:

Delay in Standards- The Panel recommends that a four-year delay period be proposed for small refiners. A four-year delay would be needed in order to allow for a review of the ABT program, as discussed below, to occur one year after implementation but still three years prior to the small refiner compliance deadline. It was noted by the small refiners that three years are generally needed for small refiners to obtain financing and perform engineering and construction. The Panel is also in support of allowing for refinery expansion within the delay option, and recommends that refinery expansion be provided for in the rule.

Early ABT Credits- The Panel recommends that early credit generation be afforded to small refiners that take some steps to meet the benzene requirement prior to the effective date of the standard. Depending on the start date of the program, and coupled with the four-year delay option, a small refiner could have a total credit generation period of five to seven years. The Panel is also in support of allowing refiners (small, as well as non-small, refiners) to generate credits for any reductions to their benzene emissions levels, rather than credits only for meeting the benzene standard that is set by the rule.

The Panel supports and recommends a review of the credit trading program and small refiner flexibility options one year after the general program starts. Such a review could take into account the number of early credits generated, as well as the number of credits generated and sold during the first year of the program. Further, a review after the first year of the program would still provide small refiners with the three years that it was suggested would be needed for these refiners to obtain financing and perform engineering and construction for benzene reduction equipment. Should the review conclude that changes to either the program or the small refiner provisions are necessary, the Panel recommends that EPA also consider some of the suggestions provided by the small refiners (their comments are located in Appendix E of the Final Panel Report), such as:

» the general MSAT program should require pre-compliance reporting (similar to EPA's highway and nonroad diesel rules);
» following the review, EPA should revisit the small refiner provisions if it is found that the credit trading market does not exist, or if credits are only available at a cost that would not allow small refiners to purchase credits for compliance;

» the review should offer ways either to help the credit market, or help small refiners gain access to credits (e.g., EPA could 'create' credits to introduce to the market, EPA could impose additional requirements to encourage trading with small refiners, etc.).

In addition, the Panel recommends that EPA consider in this rulemaking establishing an additional hardship provision to assist those small refiners that cannot comply with the MSAT with a viable credit market. (This suggested hardship provision was also suggested by the small refiners in their comments, located in Appendix E, below). This hardship provision would address concerns that, for some small refineries, compliance may be technically feasible only through the purchase of credits and it may not be economically feasible to purchase those credits. This flexibility would be provided to a small refiner on a case-by-case basis following the review and based on a summary, by the refiner, of technical or financial infeasibility (or some other type of similar situation that would render its compliance with the standard difficult). This hardship provision might include further delays and/or a slightly relaxed standard on an individual refinery basis for a duration of two years; in addition, provision might allow the refinery to request, and EPA grant, multiple extensions of the flexibility until the refinery's material situation changes. The panel understands that EPA may need to modify or rescind this provision, should it be implemented, based on the results of the program review.

Hardship Flexibility Provisions for Small Gasoline Refiners

EPA has stated that it does intend to propose the extreme unforeseen circumstances hardship and extreme hardship provisions (for all gasoline refiners and importers), similar to those in prior EPA fuels programs. A hardship based on extreme unforeseen circumstances is intended to provide short term relief due to unanticipated circumstances beyond the control of the refiner, such as a natural disaster or a refinery fire; an extreme hardship is intended to provide short-term relief based on extreme circumstances (e.g., extreme financial problems, extreme operational or technical problems, etc.) that impose extreme hardship and thus significantly affect a refiner's ability to comply with the program requirements by the applicable dates. The Panel agrees with the proposal of such provisions and recommends that EPA include them in the MSAT rulemaking.

Small Portable Gasoline Container Manufacturers

Regulatory Flexibility Options for Small Portable Gasoline Container Manufacturers

Since nearly all gas can manufacturers are small entities and they account for about 60 percent of sales, the Panel plans to extend the flexibility options to all gas can manufacturers. Moreover, implementation of the program would be much simpler by doing so. The recommended flexibilities are the following:

Design Certification- The Panel recommends that EPA propose to permit gas can manufacturers to use design certification in lieu of running any or all of the durability aging cycles. Manufacturers could demonstrate the durability of their gas cans based in part on emissions test data from designs using the same permeation barriers and materials. Under a design-based certification program a manufacturer would provide evidence in the application for certification that their container would meet the applicable standards based on its design (e.g., use of a particular permeation barrier). The manufacturer would submit adequate engineering and other information about its individual design such that EPA could determine that the emissions performance of their individual design would not be negatively impacted by slosh, UV exposure, and/or pressure cycling (whichever tests the manufacturer is proposing to not run prior to emissions testing).

Broaden Certification Families- This approach would relax the criteria used to determine what constitutes a certification family. It would allow small businesses to limit their certification families (and therefore their certification testing burden), rather than testing all of the various size containers in a manufacturer's product line. Some small entities may be able to put all of their various size containers into a single certification family. Manufacturers would then certify their containers using the "worst case" configuration within the family. To be grouped together, containers would need to be manufactured using the same materials and processes even though they are of different sizes.

Additional Lead-time- Since it may take additional time for the gas can SERs to gather information to fully evaluate whether or not additional lead-time is needed beyond the 2009 start date, the Panel recommends that EPA discuss lead-time in the proposal and request comments on the need for additional lead-time to allow manufacturers to ramp up to a nationwide program.

Product Sell-through- As with past rulemakings for other source sectors, the Panel recommends that EPA propose to allow normal sell through of gas cans as long as manufacturers do not create stockpiles of noncomplying gas cans prior to the start of the program.

Small Portable Gasoline Container Manufacturers Hardship Flexibility Provisions

The Panel recommends that EPA propose two types of hardship programs for small gas can manufacturers. These provisions are:

Allow small manufacturers to petition EPA for limited additional lead-time to comply with the standards. A manufacturer would have to make the case that it has taken all possible business, technical, and economic steps to comply but the burden of compliance costs or would have a significant adverse effect on the company's solvency. Hardship relief could include requirements for interim emission reductions. The length of the hardship relief would be established during the initial review and would likely need to be reviewed annually

thereafter.

Permit small manufacturers to apply for hardship relief if circumstances outside their control cause the failure to comply (i.e. supply contract broken by parts supplier) and if failure to sell the subject containers would have a major impact on the company's solvency. The terms and timeframe of the relief would depend on the specific circumstances of the company and the situation involved. As part of its application, a company would be required to provide a compliance plan detailing when and how it would achieve compliance with the standards under both types of hardship relief.

Sincerely,

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Enclosure