U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

February 5, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
Washington, D.C. 20460

Re: Impending MACT "Hammer" Under Clean Air Act § 112(j)

Dear Administrator Whitman:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (the "Office of Advocacy") was established by Congress in 1976 pursuant to Pub. L. 94-305 to represent the views and interests of small businesses in Federal policymaking activities. The Chief Counsel participates in agency regulatory actions when he deems it necessary to ensure proper representation of small business interests.

Over the past couple of years, the Office of Advocacy has been monitoring and working closely with the U.S. Environmental Protection Agency's ("EPA") Office of Air Quality Planning and Standards ("OAQPS") and with many small business representatives regarding the development of the remaining group of National Emission Standards for Hazardous Air Pollutants ("NESHAPs") under Section 112 of the Clean Air Act. These NESHAPs are to be based on the application of air pollution reduction measures known as "maximum achievable control technology" ("MACT"). The Clean Air Act required EPA to complete all of these remaining MACT standards by November 15, 2000. If EPA does not promulgate final standards by the so-called "hammer" date of May 15, 2002, then Section 112(j) of the Act under EPA's existing rules will impose extremely burdensome, needless, and counterproductive requirements on states, industry, and EPA.

The Office of Advocacy recognizes that OAQPS has been working hard to complete the MACT standards. We are very concerned, however, that EPA not only will be unable to promulgate or even propose many overdue MACT standards by the "hammer" date, but *also may not timely promulgate a rule appropriately finalizing EPA's proposed revisions to its NESHAP general provisions and Section 112(j) MACT "hammer" regulations.* (*See* 66 Fed. Reg. 16,318 (March 23, 2001), the proposed "MACT 'hammer' rule.")

As already noted, the Section 112(j) "hammer" will fall on May 15, 2002. Under EPA's existing regulations in 40 CFR Part 63, Subpart B, this would mean that *by only a little more*

than three months from now every one of the facilities that would potentially be covered by one or more of these overdue MACT standards would need to prepare and file (in most cases with their state permitting agencies) detailed case-by-case Title V permit applications which define the regulated category and applicable subcategories, derive MACT floors, and propose MACT-based emission limitations. In turn, the permitting agencies would need to develop and issue Title V permits, on a case-by-case basis, for each one of these applicants. Many of these applicants will be small businesses.

Based on past experience, such applications could cost each affected facility, on average, $10,000 - $50,000 or more per source category to prepare. Furthermore, many affected facilities contain more than one MACT category. Moreover, for most small businesses, preparation of these complex applications is far beyond their technical and economic capability, either within or outside the timeframes imposed by the current MACT "hammer" provisions. We estimate that case-by-case MACT applications will be due simultaneously for 8,000 - 10,000 or more facilities in the five dozen source categories for which EPA will not have promulgated MACT standards by the May 15th "hammer" date.

State permitting agencies will be equally unable to handle this avalanche of case-by-case permit applications and resulting MACT determinations. They also should not have to. EPA likely will issue proposed (if not final) national MACT standards well before such potentially divergent case-by-case proceedings could be completed by the states, making these massive government and business expenditures fruitless. This is an untenable situation for small businesses, state agencies, and other entities alike, to allow MACT rules to work at such cross purposes. States and regulated entities will suffer if EPA does not address the problem soon. We urge EPA to attend to this matter quickly.

EPA should promptly complete and finalize an appropriate MACT "hammer" rule, and should continue to issue as quickly as possible the remaining NESHAPs. As the Agency has recognized in (and after) the rule's proposal, EPA also should provide the States and affected facilities substantial additional time to prepare and file their case-by-case MACT permit applications. Last year's proposed MACT "hammer" rule revisions would have provided affected sources six months between a pro forma "Part 1" notice due on May 15, 2002, and a substantive "Part 2" case-by-case permit application due November 15, 2002. EPA now has recognized, and there seems to be broad consensus, that this additional 6 month window will be wholly inadequate to resolve this problem.

Hence, when finalizing the MACT "hammer" rule, EPA should extend the period between the deadlines for the "Part 1" notice and "Part 2" case-by-case permit applications from six to at least 18 and preferably 24 months, based on the comments it received. Twenty-four months should give EPA the time it needs to issue all the remaining MACT standards, and also should give regulated entities the time they need to prepare an adequate application for any standards not finalized in the next year or so.

Without this full period, facilities still will be obliged to file complete case-by-case MACT applications promptly, to protect themselves against irrational MACT outcomes based on incomplete evidentiary records. This is true even though EPA proposed that only "minimum

permit elements" would have to be filed under the MACT "hammer" rule. The MACT "hammer" rule proposal would include a new "anti-backsliding" provision that would "lock in" case-by-case MACT determinations. Such provision would require that facilities comply with their case-by-case MACT determinations, even if those determinations are far more stringent than the final national MACT standard when that standard ultimately is issued. In light of such consequences, applicants will need to be sure that their MACT determinations are based on the best and most complete applications possible.

We appreciate your attention to this matter and look forward to working with EPA and interested parties in the expeditious and sensible completion of the MACT "hammer" rule and the remaining NESHAPs.

Sincerely,

/s/

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/s/

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