September 25, 2002

The Honorable Jeffrey R. Holmstead
Assistant Administrator for Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: *General Provisions and Clean Air Act Sections 112(g) and 112 (j); Comments on Proposed Settlement with the Sierra Club; 67 Fed. Reg. 54804 (August 26, 2002).*

Dear Assistant Administrator Holmstead:

The Office of Advocacy of the U.S. Small Business Administration 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, who oversees the Office of Advocacy, participates in agency regulatory actions when he deems it necessary to ensure proper representation of small business interests.

As you know, we have been monitoring and working closely with the U.S. Environmental Protection Agency's ("EPA") Office of Air Quality Planning and Standards and with many small business representatives regarding the development of the remaining National Emission Standards for Hazardous Air Pollutants ("NESHAPs") under section 112 of the Clean Air Act ("Act" or "CAA"). These NESHAPs are to be based on the application of air pollution reduction measures known as "maximum achievable control technology" ("MACT"). We are writing to oppose EPA's proposed settlement with the Sierra Club that would shorten the time available for facilities to file their applications by modifying the current section 112 rules.

Due to limited resources, EPA was unable to promulgate numerous MACT standards by the May 15, 2002 deadline. Under EPA's previously existing rules, section 112(j) of the Act would have imposed extremely burdensome requirements on states, industry, and EPA due to a failure to meet this "hammer" deadline. However, EPA promulgated a revised final rule governing the General Provisions and CAA sections 112(g) and (j), which bifurcated the permit application procedure to give EPA 24 months to promulgate the remaining MACT standards and the states and industry enough time to prepare for the standards. By allowing the additional time, EPA eliminated the need for unnecessary and extremely burdensome case-by-case determinations.

The Office of Advocacy is concerned with the provision in the settlement that shortens the time between the Part 1 application and the Part 2 application from 24 months to 12 months.[1] This action would force an estimated 80,000 facilities (based upon the already filed Part 1 applications), many of which are small businesses, to complete the burdensome, needless, and counterproductive Part 2 applications. These complex applications require expertise far beyond the technical and economic capabilities of small firms. This will be particularly so in light of the accelerated timeframe imposed by the proposed settlement. The Part 2 applications could cost each of the 80,000 affected facilities anywhere from $10,000 - $50,000 or more if they need to prepare case-by-case MACT permit applications, with an aggregate cost to industry in the billions of dollars. Such an impact far surpasses the $100 million dollar threshold for rules subject to review by the Office of Management and Budget under Executive Order 12866. We also surmise that such a proposal would have a significant economic impact on a substantial number of small businesses, thus triggering the requirement to convene a Small Business Advocacy Review Panel under the Small Business Regulatory Enforcement Fairness Act of 1996.

We are further concerned with the adverse impacts on the financially strapped state agencies who must complete the "case-by-case" MACT determinations. State permitting agencies will be unable to handle this avalanche of case-by-case permit applications and resulting MACT determinations. Since 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, these massive government and business expenditures are completely unnecessary. Therefore, EPA should not accept the settlement agreement and should return to the final rule granting facilities 24 months between the Part 1 and Part 2 applications. Absent this, provisions must be made in any proposed or final rule to ameliorate this enormous burden that EPA would impose on industry and states, or EPA must comply with SBREFA and convene a Federal panel for this rulemaking.

[1] The Office of Advocacy had asked EPA to allow between 18 and 24 months in our letter dated February 5, 2002 to Governor Whitman. Advocacy was pleased by EPA's adoption of the 24 month time period in its final rule.

We appreciate your attention to this matter and look forward to working with EPA and interested parties in resolving this matter. You can reach me or Kevin Bromberg of my staff at 202-205-6533 or kevin.bromberg@sba.gov.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Kevin Bromberg
Assistant Chief Counsel for Environmental Policy

cc: John Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget
Tom Gibson, Assistant Administrator, Office of Policy, Economics and Innovation, Environmental Protection Agency
Robert Fabricant, General Counsel, Environmental Protection Agency