

February 7, 2005

EPA Docket Center (EPA/DC)
EPA West Building, Room B108
1301 Constitution Avenue, NW
Washington, DC 20460
Attention Docket ID No. OAR-2003-0156

Re: Standard of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units. 69 Fed. Reg. 71,472 (December 9, 2004).

Dear Sir or Madam:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments to the U.S. Environmental Protection Agency (EPA) regarding EPA's Notice of Proposed Rulemaking, Standard of Performance for New Stationary Sources and Emission Guidelines for Existing Sources; Other Solid Waste Incineration Units (OSWI), 69 Fed. Reg. 71,472 (December 9, 2004). The proposed rule would require, among other things, existing incineration units located at institutional facilities such as schools to comply with new permitting requirements and meet stringent emission limitations or, alternatively, to shut down their incineration units.

Advocacy was established pursuant to 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), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), gives small entities a voice in the rulemaking process. For all rules which will have a significant economic impact on a substantial number of small entities, EPA is specifically required by the RFA to conduct

small business review panels to assess small entity impacts and alternatives that would minimize these burdens. Moreover, on August 13, 2002, President Bush signed Executive Order 13272, which requires Federal agencies to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

EPA has certified, under section 605(b) of the Regulatory Flexibility Act (RFA), as amended, that the proposed rule will not have a significant economic impact on a substantial number of small entities. *See* 69 Fed. Reg. 71,493 (December 9, 2004). Small entities include small businesses, small governmental jurisdictions (a government of a city, county, town, school district or special district with a population of less than 50,000 persons) and small nonprofit organizations. The Office of Advocacy is concerned that the basis for this certification, as required by section 605(b) of the RFA, ignored the proposal's impact on existing incineration units located in small school districts, other small governmental jurisdictions, and small organizations. For example, EPA does not know how many Institutional Waste Incinerators (IWI) are currently in operation in the United States, and EPA acknowledges that it does not know how many IWIs are operated by small entities. ("It is uncertain how many affected IWI units that are [Other Solid Waste Incineration] units are owned by small entities . . ."). *Id. at 71493*. Also, EPA's estimates of the economic impact of the proposed rule are based largely on average national costs, rather than on the specific costs that would likely have to be borne by individual small entities such as small school districts. ("The annual cost of landfilling is typically less expensive than the annual cost of using an OSWI unit for waste disposal.") *Id.* EPA's economic analysis, although substantial, fell short in analyzing the effects on the actual IWI owners: the small governments and the small nonprofit organizations. Small entity outreach by EPA, prior to certification, would have revealed how the small IWI owners would be affected by the rule.

EPA's use of national average costs did allow EPA to conclude that the typical IWI would not face any adverse impact; indeed, the facility would save money by switching to landfill disposal, according to the agency's study. However, while EPA looked at the typical IWI, we are concerned that EPA may have overlooked the impact this would have on small local governments and small nonprofit organizations that own these schools in rural America.

In the certification that appears in the rule preamble, EPA asserts that "the likely response will be for small entities to ... close the units and use an alternative waste disposal method." *Id.* It further states that it believed that "most small entities" that are not eligible for certain exclusions specified in the rule would not be adversely affected by this rule. Also in the preamble, EPA acknowledges that it does not know how many are affected by the rule, and therefore, also could not determine how many are affected by the proposed exclusions. EPA relies on average national costs to demonstrate that the average IWI would save money by closing and sending wastes to the landfill. If EPA evaluates the actual ownership and individual costs that apply to IWIs owned by the school districts, local governments and nonprofit organizations, it may find a proper basis for a certification. Additional analysis in a supplemental proposal could alleviate this problem without slowing down the rulemaking process.

In sum, the Office of Advocacy is concerned that EPA's certification is not based on an adequate analysis of IWIs operated by small entities or the likely impact of the proposed rule on those small entities. EPA should provide an adequate factual basis for its certification statement or withdraw its certification and assume that the rule will have a significant economic impact on a substantial number of small entities.

If EPA decides to withdraw its certification, in a supplemental proposal, my office will help identify Small Entity Representatives who can advise the small business review panels required under the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121). If EPA certifies that the proposal, even with a more thorough analysis that covers the impact on all small entities, will not significantly impact a substantial

number of small entities, my office will continue to work with you to ensure that such small entities are adequately addressed as EPA proceeds to a final rule.

If you have any questions about this, please contact Keith Holman of my staff at (202) 205-6936 or keith.holman@sba.gov.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Keith W. Holman
Assistant Chief Counsel for Advocacy

cc: The Honorable Jeffrey Holmstead
Assistant Administrator of the Office of Air and Radiation
U.S. Environmental Protection Agency

The Honorable John Graham,
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget