September 20, 2000

<u>VIA FACSIMILE AND EMAIL</u>

Ms. Carol Connell
U.S. Environmental Protection Agency
National Vehicle and Fuels Emission Laboratory
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RE: EPA's Notice of Proposed Rulemaking on Control of Emissions of Hazardous Air Pollutants from Mobile Sources (65 FR 48058, August 4, 2000)

On August 4, 2000, the EPA published a Notice of Proposed Rulemaking (NPRM), to address mobile source air toxics (MSAT) pursuant to Section 202(l) of the Clean Air Act. The proposed rule sets "anti-backsliding" standards for benzene in conventional gasoline (CG) and reformulated gasoline (RFG). The anti-backsliding standard states that, beginning in 2002, the average benzene content in gasoline produced by any refiner can no longer exceed the average content produced between 1998-1999. The rule also commits the Agency to considering more stringent standards by 2004 for benzene in the on-road market, and standards for benzene in off-road markets and for other MSATs identified in the rule in on-road and off-road markets. In the meantime, EPA will study the need for, and feasibility of, such standards.

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities.[1] The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities, the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings demonstrate a complete analysis of the impact that their decisions will have on small businesses. The Chief Counsel is also authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views regarding compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities.

Justification for the Rule

Advocacy has serious concerns regarding this proposed rule. First, the benzene content of gasoline is already limited under reformulated gasoline and anti-dumping rules,[2] and it is not clear from the NPRM why this level of control is not sufficiently protective of public health. EPA expects the average level of over-compliance to continue and improve for the next several years.[3] By the Agency's own estimates, the existing rules are expected to reduce benzene by 75 percent by 2020.[4] So why the need for a new rule?

Compliance Costs of the Proposal

Second, there are compliance costs associated with the rule that are not appropriately considered. EPA argues that, because the standards are set to levels already achieved in 1998-1999, it should cost refiners little, if anything, to achieve and maintain these levels into the future. However, the Agency fails to recognize that, in order to comply with the existing rules on a consistent basis, small refiners have had to over-compensate for variability inherent in production. This rule will not change the inherent variability of production (if anything, the variability would increase). This means then that the small refiners will have to adopt measures to over-comply in order to ensure compliance consistently and risk free with the *new* standards for 2002 (its 1998-1999 average). Otherwise, they might not be able to avoid the significant penalties associated with a violation.[5] In effect, small refiners will have to meet a more stringent standard in order to comply with the new standard and meeting the standard could involve additional costs.

Nor does EPA take into consideration the potential changes in the market that could make

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1 Regulatory Flexibility Act, 5 U.S.C. ' 601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

2 See 59 Fed. Reg. 7716.

3 See 65 Fed. Reg. 48078.

4 See 65 Fed. Reg. 48070-48073.

5 If a refiner violates the standard, the refiner would have to pay over $9 million, or $25,000 per day for every day in the averaging period (365 days). See proposed 40 C.F.R. ' 80.805.

maintaining past levels of over-compliance more costly. For instance, the demand for gasoline is estimated to grow by at least 1 percent a year over the next twenty years.[6] To meet this increased demand, refiners will likely have to increase reformate throughput, which would reduce octane. To make up for reduced octane, refiners would have to increase reformer severity, which would increase benzene. It is unclear how a refiner would be able to increase reformer severity and still meet its 1998-1999 average for benzene, without additional equipment to accommodate the increase. There is no discussion anywhere in the NPRM as to what this projection's impact would be on production and reduced benzene content.

It is also not clear how a small refiner would be able to comply with this rule, as well as with a phase down of methyl tertiary butyl ether (MTBE) and the gasoline sulfur rule, without acquiring additional equipment to ensure compliance with all three. Both desulfurization and MTBE removal will reduce octane, and refiners will have to make up for this reduced octane but still meet the 1998-1999 benzene average. The alternative would be for refiners to change their product mix and whether they could maintain the same profit levels would depend on the market. Finally, it is not clear how a small refiner would be able to obtain the financing for any required equipment when all such refiners would have to meet the gasoline sulfur rule and some would also need to satisfy the diesel sulfur rule in virtually the same timeframe.

The totality of the regulatory burdens, with admittedly worthwhile environmental objectives, should not be ignored. Preserving competition in the oil refining industry is also a national objective which EPA rules need to take into account. Small refiners have indicated that, under different market conditions, meeting the lowest average benzene level from 1996-1999 would cost each refiner $5-10 million more on additional equipment than the highest level would. If so, the impact could be significant, taken together with the cumulative and contemporaneous impacts of the gasoline sulfur rule, diesel sulfur rule, an MTBE phase down, and maximum achievable control technology (MACT) standards. And small refiners are less able relative to the industry to obtain financing for any needed equipment and/or to take advantage of the chemical

6 See the U.S. Department of Energy's website at http://www.eia.doe.gov/oiaf/aeo/demand.html#trans.

markets for benzene, to mitigate these impacts, because of the shipping costs.

Alternatives that Should Have Been Analyzed for Public Comment

EPA could offer small refiners or any refiner a choice: a refiner could adopt as its baseline either their average benzene level in 1998-1999 or their highest average level from the last five years. Alternatively, the refiner's baseline choice could be between the 1998-1999 average or an average based on any two years of the refiner's choice from the last five years.

Offering refiners a baseline choice might provide some flexibility. However, this would not fully address the likely future changes in the baseline beyond 2000. We anticipate that, by 2008, the benzene content of gasoline will have to change to reflect compliance with the gasoline sulfur rule. By then, it will probably also need to change, to reflect an MTBE phase down. And it will continue to change as gasoline demand continues to grow.

Conclusion

The cumulative effect of these rules could have a significant impact on the competitive structure of the refining industry. To forestall any adverse anti-competitive effects, there is another alternative that EPA should consider. EPA should defer consideration of any anti-backsliding standards for small refiners until 2003-2004. A delay would allow EPA to study the impact of this rule on the balance of the industry and to understand its interaction with the gasoline sulfur rule and any MTBE phase down. This information might suggest ways to provide meaningful flexibility for small refiners and preserve competition while accomplishing the environmental objective. Small refiners represent such a small percentage of the gasoline market (less than 4 percent) that we would not expect any backsliding to have a significant effect on public health.

In formulating this proposal, we recognize that EPA has attempted to minimize the small business impacts associated with this rule. However, small refiners believe that this rule could still require significant capital investments and we question whether small refiners would be able to obtain the necessary financing for multiple rules in virtually the same timeframe.

If there are any questions, please contact my staff person working on these issues, Austin Perez, at 202-205-6936. We stand ready assist EPA in developing a rule that will protect the environment and at the same time preserve small businesses and competition in the refining industry.

Respectfully,

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