

US EPA ARCHIVE DOCUMENT

**Section 126 Petitions and Federal Implementation Plans
for the NO_x State Implementation Plan
Small Business Regulatory Enforcement Fairness Act
Outreach Meeting**

REPORT ON PROCEEDINGS

**U.S. EPA Ariel Rios Building
6th Floor, Conference Room 6226
Washington, D.C.
Tuesday, April 14, 1998**

On April 14, 1998, the U.S. Environmental Protection Agency (EPA) held a Small Business Regulatory Enforcement Fairness Act outreach meeting concerning the §126 Petitions and the Federal Implementation Plans (FIPs) for the nitrogen oxide (NO_x) State Implementation Plans (SIPs). Representatives of the U.S. EPA, general business associations, and individual small business groups attended the meeting. A list of the meeting attendees with their affiliations, telephone numbers, and fax numbers are given in Table 1.

The morning session began with an introduction by meeting Co-chairperson Tom Kelly who noted that the meeting should be viewed as an informal get together and the beginning of an ongoing mutually beneficial relationship. All attendees introduced themselves and identified their professional affiliations. Co-chairperson Lydia Wegman provided an introduction to the morning's discussion. Tom Helms gave a slide presentation which included background information on Ozone and NO_x, the §126 Petition, and the SIP call rulemaking. Larry Sorrels' presentation concentrated on the impacts of the §126 petition and the options that might reduce those impacts.

Tom Kelly introduced the discussion of the afternoon session. Tom Helms made a brief presentation on the Federal Implementation Plans, including information on when a FIP would be required, and the SIP and FIP schedules. Larry Sorrels' presentation dealt with the impacts of a FIP and the options that might reduce those impacts.

Issues and Comments

Discussions were held throughout as EPA staff made their presentations, and likewise as the presentations were concluded. Questions were asked concerning the specifics of the NO_x SIP call and associated NO_x budget, the ozone transport assessment group (OTAG) modeling, the §126 petitions and the NO_x FIP. The other major issues raised are given below.

- identification of small entities and the relationship between the small entities and the emission sources
- cost and availability of control technology
- considerations given to small entities by the States when regulating controls to achieve the NO_x budget
- consideration of competitive equality in the impact analysis
- consideration of various kinds of indirect impacts on small businesses
- realistic expectations on the participation of small businesses in meetings such as these outside of a full SBREFA panel.

Discussion of the Issues and Comments

NO_x SIP Call, Associated NO_x Budget, and OTAG Modeling

A series of questions were asked concerning the emissions data used in the OTAG modeling. William Wemhoff asked about the source of the emissions data and whether the data were based on actual emissions or a facilities potential to emit. He also commented about the exclusion of small generators (defined as less than 25 MW) from the utilities in the State budgets. Eric Malès had questions about the specific definition of a source in the OTAG inventory. He also asked about the availability of the emissions data by SIC for the ~34,000 sources modeled by OTAG. Damon Dozier asked about the total number of different SIC codes involved.

Robert Bessett commented that it is very difficult to separate what is transported into an area and what is local. He also asked if 90% of the emissions come from 10% of the sources, is the transport really significant from that other 10%? Tom Helms responded by stating that the EPA is trying to get the total 34,000 sources down to a much lower number, because they don't want to waste time on sources that contribute very little to the problem.

Robert Bessett commented on the use of the UAM model for regulatory purposes. He stated his understanding that the model could be used to qualify, but not quantify ozone concentrations to the level that EPA has done and that the fine grid model was needed to define the true impacts. He further commented that the fine grid model was needed to determine the true impacts based on actual sites. Tom Helms responded by describing the three tests for significance that are used to determine the effect that a particular area has on a downwind area. These tests were based on the following: (1) air quality data, (2) rating of emissions on a state by state basis, and (3) zero-out model runs. These tests were used, not to determine attainment, but to address the transport issue. States may choose to do sub-regional modeling, which is why the comment period has been extended. Some analysis has been done to determine if doing sub-regional modeling would change the results of the significance tests.

William Wemhoff and Robert Bessett asked if stack height has been considered in the impact analysis and, if not, would it be considered in the final NO_x budget. Tom Helms responded that stack

height was not a factor in the impact analysis. He went on to state that three stack height types (modeling stack height, air quality stack height, and total emissions stack height) were considered as part of the tests to determine significance. Lydia Wegman and Larry Sorrels also commented that stack height could be considered more fully in a NO_x budget through impact analyses if they had the necessary data and the time to complete the additional modeling. Modeling tests previously done under OTAG did not show much impact from stack height. They do expect that some States will do some additional modeling. They also stated that stack height is a recognized problem.

Robert Bessett asked about the availability of the Industrial Coordinated Combustion Rule (ICCR) data and commented that he considers this to be a useful data source. He also commented that OTAG is limited by its one-size-fits-all approach. Larry Sorrels responded that the ICCR is currently under final review and will be released shortly.

William Wemhoff asked about the effect of the new NAAQS and regional haze rules. Lydia Wegman and Tom Helms explained that the analysis of the new NAAQS assumed the implementation of the regional transport reductions. The NO_x SIP call is based on both the old and new ozone standards, but there are still a great many questions about particulate matter (PM). Tobia Mercurio was confused about the regulatory obligations under the new NAAQS for States outside the NO_x SIP Call. Lydia Wegman explained that there are separate obligations. The States' SIP obligations will be based on the attainment area designations which will be made in 2000.

Tobia Mercurio asked if States would be allowed to achieve all of their reductions from utilities. Tom Helms stated there are no provisions that would restrict a State from doing this, but realistically such as approach would probably not be enough to achieve the budget. He also stated that assumptions of reasonably available controls were made to develop the NO_x budgets.

Eric Malès asked two additional questions. He asked if the trading rules were to be included in the supplemental proposal to the NO_x SIP call to which Tom Helms responded affirmatively. Mr. Malès also asked if the analysis of control technologies in the impact analysis were industry specific. Larry Sorrels responded that the impacts were considered at the source category level which is roughly the same as the industry level.

§126 Petitions

Tobia Mercurio asked about the relationship between stack height and the §126 petition. He asked if a source has a short stack and their emissions could not possibly carry over into the petitioning States, why would these sources have to be controlled. Lydia Wegman and Tom Helms explained that it would depend on whether such a source was named in the petition. If a source is named in the petition, EPA needs to consider whether those sources are responsible for significant contribution. There are two other considerations; first, the petition may not be granted, and, second, just because a

source is named in the petition does not mean that it will be included. The first judgement on §126 is whether or not there is a significant contribution of the named sources to the petitioning States.

William Wemhoff continued this discussion by asking what constitutes a significant contribution. Lydia Wegman and Tom Helms explained that within the NO_x SIP call, significant contribution is defined based on a weight-of-evidence approach. Three factors are considered: (1) air quality modeling, (2) air quality data, and (3) total tons of emission coming out of an area. One of the issues being raised for discussion in the advance notice of the proposed rulemaking is whether it is appropriate to use the same test in evaluating §126 petitions, where groups of States are cited by an individual State.

Robert Bessett asked what ozone concentrations (2 or 3 ppb) were considered a significant contribution. Lydia Wegman and Tom Helms stated that a quantitative level was not used, but rather a range of ppb level between 2 ppb up to 25 ppb. Also considered were other impacts and, in some cases, areas were aggregated.

William Wemhoff asked about the relationship between sources controlled under the NO_x SIP call and those controlled under the §126 petition. Lydia Wegman explained that under the SIP call, it is up to the States to choose which sources to control. The States could choose not to control a source named in the §126 petition. The EPA would like to see the NO_x SIP call played out, because it allows the States flexibility to develop the controls they feel are necessary to meet the budgets. In the §126 petitions, the EPA has these named sources and they have to look at significant contribution to make judgements on the petition. It is possible that under the §126 petition, they might cover sources that a State chooses not to regulate and vice versa.

Federal Implementation Plan (FIP)

Robert Rio asked if it is known at this time that any State won't be submitting their SIP. The response was that no State has said publicly that they will not submit a SIP. Mr. Rio continued by asking if any breaks would be given on the SIP, specifically for downwind states such as Massachusetts. The entire panel responded by stating the EPA's objective: the reduction of ozone and the mitigation of transport. If a State does not submit a SIP, the EPA must initiate the FIP. The preferred course is for the States to take their responsibility to submit their SIP and not for the EPA to issue the FIP.

Tom Carter asked if the FIP would follow the same structure as the SIP, as is specified in the NO_x SIP call. Tom Helms and Lydia Wegman responded affirmatively and added that the EPA would look at the cost effectiveness of reasonable controls, in the same way the NO_x budgets were developed.

David Wojick asked if the FIP would target specific sources. The panel responded by hypothesizing that the FIP would cover categories of sources to achieve the reductions called for in the budget, similar to the approach used in the development of the NO_x budget, and not by targeting individual sources. In previous FIPs, it has been done both ways: specifying individual sources and specifying general categories of sources. The FIP to be proposed in September is rather generic and the final FIP may or may not be specific.

Robert Rio asked if the comments made on the NO_x SIP call would be incorporated into the FIP. Tom Helms and Lydia Wegman responded that all good ideas are useful and anything that informs the final SIP will inform the proposed FIP.

Identification of Small Entities and the Relationship Between Small Entities and Emission Sources

In the presentation made concerning the NO_x SIP call, the categorization of source sizes agreed to under the OTAG process are: small sources emit less than 1 ton NO_x/day, medium sources emit between 1 and 2 tons NO_x/day, and large sources emit greater than 2 tons NO_x/day. This same framework is being used for the cost analysis for the §126 petition. William Wemhoff asked if the 1 ton/day amount was an average. Larry Sorrels and Tom Helms explained that the source criteria are daily emission rates averaged over the ozone season which is a five month period.

Michael Levin and Robert Bessett expressed strong concerns about classifying sources as small, medium and large by using emission rate cut-offs. Mr. Levin stated that the real issue is that you can't use cut-offs because a significant number of sources are small entities under SBREFA, but emit NO_x at levels greater than 1 ton/day. Mr. Bessett stated that small businesses may consist of large complexes. He gave an example of a greenhouse in southern Virginia that has a greater than 250 million BTU boiler and that would be classified as a large source boiler, even though the greenhouse is categorized as a small business or entity under SBREFA.

Mr. Levin suggested looking at this issue from another point of view: start the analysis by exempting all entities defined as small under SBREFA, rather than by setting cut-offs. This approach would provide the best way to look at the impacts on small entities and decide if the NO_x reductions are significantly effected. He further suggested considering a trading program that would allow some people to be opted in.

Tobia Mercurio asked about provisions to adjust the NO_x budgets based on the impact to small business. He specifically cited the impacts on the cement industry. Lydia Wegman stated that issues raised in the public comments from the notices will be examined. Some adjustments have already been made and more are expected. The panel expressed their interest in receiving any information on the link between the emissions source information to the business entity. They would also like any ideas about how to exempt small businesses.

Cost and Availability of Control Technology

Tobia Mercurio had several questions and comments concerning the cost and feasibility of the control technologies being proposed to meet the reductions being required under the NO_x SIP call. He asked if the impact analysis included situations where technology doesn't exist to achieve the 70% reduction or situations where the cost is \$10,000 to \$20,000 instead of the estimated \$1,000 to \$2,000. Larry Sorrels responded that such situations may not be included in the impact analysis because of a lack of data. There may be individual sources where the costs are higher, but the goal is to keep the cost industry-wide within the \$2,000 limit.

Mr. Mercurio also asked about the 3% of sales criteria and whether that would be considered. Tom Helms and Tom Kelly described the definition of "significant impact" and "substantial number" as given in the preliminary guidance. If the economic impact is greater than 1% of sales then further analysis is done. If the impact is greater than 3% of sales, then it is considered a significant impact. A substantial number is greater than 20% of the firms (or 100 firms). But there are no absolute triggers. The triggers can initiate a SBREFA panel, but a panel can be convened even without the triggers.

Gary Gess also questioned the cost and feasibility of control by specifically citing the cement industry. For the cement industry, there are three control technologies listed. To use all three, the installation costs alone would be approximately \$50 million and this could be off by a factor of 4 of 5. Cement plants are very often small businesses, but operate large plants. He asked if adjustment to the budget would be made based on a control technology not being feasible. Mr. Levin added that, as an example, the smallest kiln that can be used to produce Portland cement commercially is a large emission source. The same thing holds true for greenhouses and, perhaps, the lime industry.

Considerations of Small Entities by the States when Regulating Controls to Achieve the NO_x Budget

William Wemhoff was specifically concerned about States using the potential to emit rather than the actual emissions to determine which sources to control in order to achieve the NO_x budget (OTAG used actual emissions in their analyses). This is a problem for facilities such as small electric generators that have low emissions, but have a high potential to emit. The States need guidance from the EPA on setting controls so they don't paint with a broad brush. Tom Helms and Larry Sorrels explained that everything for the NO_x SIP call was done on actual emissions based on data from States' inventories over the 5-month ozone season and not on a facility's potential to emit. Lydia Wegman stated that the potential to emit is used in permits and doesn't necessarily represent the actual emissions. Mr. Wemhoff continued by stating that it is his experience that States look at potential to emit when classifying sources as major sources. Mr. Levin added that historically States have used the potential to emit to select categories for controls and if there are no specific directions given to the States, there is a danger that many small entities will be included.

Mr. Wemhoff is also concerned that with these large number of sources, States may be tempted to control broad categories, because it is easy to do this. If this approach is used, many small businesses will be impacted.

Tobia Mercurio asked if the EPA was taking the position of not requiring the SBREFA process. Tom Kelly explained the basic distinction between the States and the EPA on this issue. The EPA has no discretionary obligation under the Clean Air Act (CAA) to try to minimize the impacts on small businesses, although; EPA is not prohibited from establishing size cut-offs for regulatory and administrative purposes. The States have discretion to say who must do what through their direct regulation of sources. EPA is legally barred from telling the States that they must treat small businesses differently. EPA does have discretion to consider source size irrespective of entity (small or large business) size. To assist somewhat, the EPA issued guidance (mitigation of adverse economic impacts due to NAAQS implementation) to the States based on input from small businesses. Mr. Mercurio was interested in receiving a copy of this guidance.

Competitive Equity

Tobia Mercurio had several concerns about the consideration of competitive equity in the analysis of impacts on small businesses. He was specifically concerned about States with large entities petitioning a State where small entities are located. This could result in the large entity driving the small entity out of business. Larry Sorrels said that this is a consideration, but was a difficult question to answer in the time remaining and with the information currently available. Mr. Mercurio asked Mr. Sorrels if he would be interested in such information and Mr. Sorrels responded affirmatively.

During the discussion on the obligations of States outside the NO_x SIP call, Mr. Mercurio stated a concern about a competitor's location in terms of competitive equity. Tom Helms responded with a Texas example. Texas is currently doing a SIP for the 1-hour standard. For the new non-attainment areas (being designated in 2000), States will have to submit a SIP in 2003. Therefore, States have 6 years to implement controls. Lydia Wegman continued the discussion by stating that the NO_x SIP call addresses regional transport for both the 1-hour and the 8-hour standards, but the NO_x SIP call does not address NAAQS compliance. Sources in the regions under the NO_x SIP call may have been getting an advantage since the SIP call should have been made years ago. Thus, competitive advantage can cut both ways.

Indirect Impacts on Small Businesses

Tobia Mercurio raised the issue of direct versus indirect impact on small businesses. His example focused on the cost of electricity for a cement plant which can account for 10% of their operating costs. If utilities raise their rates due to controls imposed under a SIP or FIP, the small business would be affected. William Wemhoff expressed a similar concern about many small public power companies which buy a great deal of their power. The generating companies will pass on the

costs of controls and, therefore, costs will increase indirectly for the small power companies. Damon Dozier responded that small businesses also have been included in past SBREFA proceedings even when indirect effects are the issue. He encouraged the attendees to notify the Small Business Administration about these indirect effects. Larry Sorrels responded that although such indirect costs have been included in the impact analysis for utilities, it would be difficult to measure the indirect impacts on other individual industries.

Robert Bessett expressed concern about a different type of indirect impact. Many small businesses are local entities and they supply bigger facilities. Due to increased control costs at these bigger facilities, there is the possibility of dislocation of these larger facilities outside of the U.S. This could jeopardize the survival of the small business. Tom Kelly expressed the difficulty with this type of indirect impact, because regulatory flexibility applies directly to the regulated industries.

Michael Levin was concerned about the effects of EPA actions, such as the NO_x SIP call, resulting in rules imposed by the States, such as the SIPs.

Participation of Small Businesses Outside of a Full SBREFA Panel

William Wemhoff asked if there was going to be a SBREFA panel and how that decision was going to be made. Tom Kelly and Lydia Wegman responded by stating the need for some basic information, such as to screen the sources identified in the §126 petitions. At this time, the number of small entities that are in jeopardy is unknown. Within EPA, there is a commitment to full involvement. They will listen carefully and look at the facts.

Michael Levin expressed a concern about the difficulty for small business to participate in Washington and to respond to the kinds of requests being made at this meeting. If the EPA doesn't receive the kind of robust data being asked for at this meeting, can the EPA perform their impact analysis in an overly simplified way? Or is there a higher obligation (under SBREFA and CAA) to consider small business even with the limited data currently available? Or will EPA take the other position and use the OTAG definition of small sources, even when they know that they will be sweeping up lots of small business.

Tom Kelly questioned the premise that because they are small, these businesses have little to say. Experience with the six SBREFA panels convened thus far show that these small entities can provide an astonishing amount of information. Mr. Levin continued by agreeing that when a full SBREFA panel is convened small businesses do participate. His concern lay in the sort of situations like this meeting when data is being requested outside of a SBREFA panel. Under these circumstances, you are dealing with small entities or trade associations and they have other things to do and can't respond. Mr. Levin asked what course EPA will take when these small businesses don't respond and what will be done when the data gaps really need to be addressed in order to deal with these statutes. Tom Helms and Lydia Wegman responded that they are trying to get data from every

possible source. And, that from the policy standpoint, EPA generally comes down on the side of minimizing the impacts on small businesses. It is not a cost effective approach to go after 90% of the sources that contribute only 10% of the total emissions.

Trading Programs

David Wojick asked if the FIP would be used to establish a trading program. Lydia Wegman explained that establishing a trading program (a voluntary measure) is outside their legal authority and that the EPA issues a FIP only if a State fails to submit a SIP. Mr. Wojick continued by asking if a trading program was a requirement under a FIP. Ms. Wegman stated that their requirement is to achieve the budget by the most efficient and expedient means. A trading program is not required for a SIP, but would be a method-of-choice used to achieve the NO_x budget if a FIP is issued. The EPA cannot dictate procedure to the States; only upon a State's failure to submit a SIP can the EPA intervene.

Tobia Mercurio asked why industrial furnaces and kilns were left out of the trading program. Tom Helms explained that they are proposing a model trading program and will solicit comments for the usual 45 day comment period. The best model of a trading program is the Acid Rain Program and they are working from that program. Tom Carter stated that trading programs do not include many sources; only sources with continuous emission monitors (CEMs) can be included. Lydia Wegman agreed that CEMs are needed for trading and suggested that additional details on trading programs be obtained from the Acid Rain Division.

Actions Taken on Issues and Comments

Tobia Mercurio requested a copy of the guidance issued to States, by EPA, regarding minimizing the impacts on small business.

Available on the web at < <http://tnwww.rtpnc.epa.gov/implement> >

Tobia Mercurio offered to provide Mr. Sorrels with information on the consideration of competitive equality in the analysis of impacts on small businesses. Specifically regarding States with large entities petitioning a State where small entities are located and the potential result of the large entity driving the small entity out of business.

Tom Kelly asked for additional information or comments about the issues raised at the meeting be provided to Tom Helms in 30 days or by May 15, 1998. For information concerning utilities, the person to provide information to or to determine what information is needed is Peter Tsirigotis, Acid Rain Division, 202-546-9133.

Small entities should expect to hear EPA's decision on convening a SBREFA panel in 45 to 60 days.

**TABLE 1. ATTENDEES FOR THE SMALL BUSINESS REGULATORY
ENFORCEMENT FAIRNESS ACT OUTREACH MEETING
FOR §126 PETITIONS AND FEDERAL IMPLEMENTATION PLANS FOR THE
NO_x STATE IMPLEMENTATION PLAN**

**U.S. EPA Ariel Rios Building
6th Floor, Conference Room 6226
Washington, D.C.**

Tuesday, April 14, 1998

EPA Panel:

Name	Office	Telephone No.	Fax No.
Tom Kelly (Co-chairperson)	Director, EPA Office of Regulatory Management and Information	202-260-4001	202-260-0513
Lydia Wegman (Co-chairperson)	Deputy Director, EPA Office of Air Quality Planning and Standards	919-541-5506	919-541-2464
Tom Helms	EPA/OAQPS/AQSSD/Ozone Policy and Strategies Group	919-541-5527	919-541-0804
Larry Sorrels	EPA/OAQPS/AQSSD/Innovative Strategies and Economics Group	919-541-5041	919-541-0804

Attendees:

Name	Organization	Telephone No.	Fax No.
Bob Bessett	Council of Industrial Boiler Owners	703-250-9042	703-239-9042
Mark Burtschi**	National Association of Manufacturers	202-637-3176	202-637-3182
Tom Carter**	American Portland Cement Alliance	202-408-9494	202-408-0877
Kevin Culligan*	EPA/ARP	202-564-7172	
Melanie Dean*	EPA/ARD	202-564-9189	202-565-2139
Damon Dozier	SBA Advocacy	205-6936	205-6928
Sarah Dunham*	EPA/ARD	202-564-9087	
David D'Onofrio*	National Small Business United	202-293-8830	202-876-8543

Name	Organization	Telephone No.	Fax No.
Tom Eagles*	EPA/OAR/OPAR	202-260-5585	202-260-9766
Gary Gess	Capitol Cement Corp	304-267-8466	304-267-2617
William Greco*	American Foundrymen's Association	202-898-1444	202-898-0188
Bill Hamilton	EPA/OAQPS/AQSSD	919-541-5498	919-541-0804
Heidi King	EPA/OMB/OIRA	202-395-7318	
Ronna Landy**	Bracewell & Patterson	202-828-5852	202-223-1225
Theresa Larson**	National Association of Manufacturers	202-367-3175	202-637-3182
M. H. Levin*	Megorric Woods	202-857-1706	202-828-2976
Eric Malès*	National Lime Association	703-908-0772	703-243-5489
Megan Medley*	Non-Ferrous Founders' Society	202-842-3203	202-842-0439
Tobia G. Mercurio	Capitol Cement	540-722-9269	540-722-9276
Stuart Miles-McLean	EPA/OPPE/SBA	260-8518	260-8518
Dori Price*	EPA/OAR/OPAR	202-564-9067	202-565-2141
Mary Beth Reilly*	National Federation of Independent Business	202-554-9000	202-484-1566
Robert Rio	Associated Industries of Massachusetts	617-262-1180	617-536-6785
David Sanders	EPA/OAQPS/AQSSD	919-541-3356	919-541-0804
Kelly Smith**	National Federation of Independent Business	202-314-2035	202-484-1566
Tracey Steiner	National Rural Electric Cooperative Association	703-907-5578	703-907-5517
Bill Wemhoff	American Public Power Association	202-467-2943	202-467-2990
David Wojick**	Electricity Daily	540-858-3503	540-858-3503

* attended morning session only

** attended afternoon session only