

Congress of the United States
Washington, DC 20515

November 6, 2013

The Honorable Gina McCarthy
EPA Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington DC 20460

RE: Brick MACT

Dear Administrator McCarthy -

We are writing to express our concern regarding the Environmental Protection Agency's (EPA) proposed Maximum Achievable Control Technology (MACT) rule for brick and structural clay processes. This "brick MACT" could jeopardize the economic viability of brick manufacturers and distributors in our states and imperil hundreds of thousands of jobs nationwide. We urge you to exercise the discretion provided by Congress in the Clean Air Act (CAA) to minimize regulatory burdens on the brick industry that do not provide commensurate environmental benefit. We urge EPA to fully consider how such measures would affect public health and the economic vitality of brick manufacturers, distributors, and communities that rely on them for their livelihood.

The brick industry is in a unique situation. In 2003, EPA issued a Brick MACT that the brick industry implemented at a total compliance cost upward of \$100 million. Controls installed to comply with the 2003 MACT rule largely remain in operation. This 2003 MACT, however, was vacated in 2007 due to no fault of the brick industry. It is problematic when an industry is subject to two consecutive rounds of technology-based MACT rules, particularly after compliance was attained with the first technology-based MACT. Moreover, we are concerned that the lower emission levels attained from controls installed to comply with the 2003 vacated rule may be used as the baseline for the second MACT and may result in an even more stringent rule than would have been imposed absent the first MACT. This "MACT on MACT" situation could require the costly removal and replacement of still-viable air pollution control devices without producing actual environmental or human health benefits.

On December 7, 2012, EPA published a proposed schedule for a new Brick MACT pursuant to efforts to negotiate a consent decree with the complainant in the case vacating the 2003 Brick MACT. We understand that EPA has amended this proposed consent decree to add an additional six months to the schedule for the proposed rule. We commend EPA for this decision. This newly proposed schedule envisions a final rule issuance late December of 2014. We urge EPA to continue to review the schedule and identify if and when additional changes to the final schedule should be made.

We respectfully request that EPA use this time to take the steps necessary to promulgate a rule which protects public health and the environment, but does not impose unwarranted burdens on significant portions of the brick industry. We believe such an approach would include the following:

- 1. Consideration of Work Practice Standards and Accurate Burden Estimates.** We urge EPA to use the authority in the CAA to consider work practice standards, wherever reasonable, including for the relatively small amount of metal HAP emissions, including mercury. This review should include an assessment of whether work practice standards are warranted for all pollutants not covered by a health-based standard. EPA is currently considering very expensive controls for the minimal amounts of mercury that the industry emits. The brick industry is on the list for MACT development because of acid gasses, not metal emissions, and to absorb crippling control costs to receive minor reductions in the amount of mercury and metals the industry emits may not be justified or even required to meet the requirements of the Clean Air Act. In addition, since EPA's estimated annual compliance costs are significant (running well over \$150,000,000 per year) and the rule will impact a substantial number of small businesses, thoughtful consideration of the additional reviews required to comply with the Regulatory Flexibility Act (RFA) are critical. EPA must then develop a thorough Initial Regulatory Flexibility Analysis that assesses the impacts on small businesses and examines less burdensome alternatives. EPA must also provide accurate estimates of the cost and a reasonable determination of the technical feasibility of control devices to meet the standard as an essential part of an initial RFA. We believe work practice standards could both protect the environment and eliminate unwarranted burdens.
- 2. Health-based standard.** CAA Section 112(d)(4) allows for consideration of health-based thresholds when establishing MACT standards for a category. While this action is discretionary under the CAA, the unique MACT on MACT situation discussed above, as well as the limited quantity of emissions generated by brick manufacture – especially as compared to other regulated industries subject to recent MACTs -- justify full consideration of the health-based approach for standards set pursuant to this rule. If EPA chooses not to pursue a health-based approach to this regulation, we ask that EPA explain fully why this approach is not reasonable for this industry.
- 3. Establish reasonable subcategories.** The CAA provides ample authority for EPA to use its discretion to establish subcategories when evaluating MACT for an industry. We urge EPA to use this discretion to minimize unnecessary "MACT on MACT" impacts for this industry, including the removal of viable air pollution control devices installed in good faith to comply with the 2003 MACT. At a minimum, EPA should maintain the same subcategories as in the 2003 rule. However, EPA should fully explore all potential subcategorization options.

4. **Non-major sources.** As EPA calculates the "MACT floor" for a category of major sources, we urge EPA to follow a literal reading of the CAA, which requires that EPA include only sources within the category when determining the MACT floor for existing sources. At present, we understand that EPA staff has indicated their intention of including sources from outside the category in the floor determination. By CAA definition, the floor determination for existing sources in a source category that includes only major sources should only include major sources. This would exclude all area sources, including "synthetic area sources." Congress made no provision in the CAA for EPA to create a third classification of sources because the definition of "area source" includes all facilities that do not meet the definition of "major source," including "synthetic area" sources. EPA is incorrectly treating this subset of area sources differently from other area sources.

Thank you for considering the incorporation of these environmentally-responsible and cost-conscious approaches as EPA develops the proposed Brick MACT rule. A reasonable standard will ensure that health and environment are protected and that this essential industry can continue to thrive, generate jobs in our states, and help our struggling economy rebound.

Sincerely,

Bill Johnson

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