

United States Senate
WASHINGTON, DC 20510

November 13, 2013

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

Dear Administrator McCarthy:

We are writing to express our views regarding the Environmental Protection Agency's (EPA) upcoming Maximum Achievable Control Technology (MACT) rule for brick and structural clay processes, which is scheduled for proposal by February 6, 2014, and finalization by December 18, 2014.¹ This "Brick MACT," if crafted imprudently, 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 (68 Fed. Reg. 26,689) that the brick industry implemented at a total compliance cost of approximately \$100 million. Controls installed to comply with the 2003 MACT rule largely remain in operation. This 2003 MACT, however, was subsequently vacated by a federal court in 2007 due to no fault of the brick industry. As you can appreciate, it is highly 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 appreciate that EPA has amended this proposed consent decree to add an additional six months to the schedule for the proposed rule. 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.

¹ This letter is being sent in coordination with a bipartisan group comprised of 53 members of the U.S. House of Representatives who wrote you with these same concerns in a letter dated November 6, 2013.

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

- 1. Consideration of Work Practice Standards and Accurate Regulatory Burden Estimates.** We urge EPA to use its 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 brick 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 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 costs of the rule 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 manufactures 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.

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 human health and the environment are protected and that this essential industry can continue to thrive, generate jobs in our states, and help our struggling economy rebound.

Sincerely,

Jeff Seamon

John Thune

Roy Johnson

Lamar Alexander

John Boozman

Sayby Chaulkier

John Cornyn

Pat Romney

Mike Johanns

David Vitter

Sam McClellan

Rayburn

Rob Portman

Jim Risch

Jeff Sessions

Ray Bennett

Mike Crapo