National Lime Association

LIME

The Versatile Chemical

Testimony of
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Chairman Jordan and Members of the Subcommittee, good afternoon and thank you for giving me the opportunity to appear before you today. My name is Keith Holman and I am the Deputy Executive Director of the National Lime Association. The National Lime Association (NLA) is the trade association for manufacturers of calcium oxide and calcium hydroxide, collectively referred to as "lime."[1] NLA's members produce more than 98% of the commercial lime made in the U.S.

The Subcommittee has requested NLA's views on the impact of greenhouse gas (GHG) regulations on small businesses. For the lime industry, particularly our smaller companies, the impact of EPA's GHG rules is significant. Lime plants generate CO_2 emissions, both from the fuel they combust and from the calcination process that turns limestone into lime. Accordingly, lime plants are now subject to rigorous GHG permitting requirements when they are modified. While the GHG rules took effect only three months ago, we already see a chilling effect on lime companies' plans to modernize or expand their plants because of the great uncertainty surrounding GHG permitting. This in turn makes it less likely that lime companies will create new jobs.

We find it particularly troublesome that many small businesses repeatedly asked EPA to convene a Small Business Advocacy Review (SBAR) Panel under the Regulatory Flexibility Act[2] during development of the GHG rules, and EPA refused to do so. Based on the lime industry's 2002 experience going through an SBAR Panel, we can attest to the critical value of the Panel process. Put simply, we believe a Panel is often the **only** way to get EPA to listen to small businesses in our industry and end up with a rule that takes their needs into account. Unfortunately, in the case of the GHG rules, that didn't happen.

The U.S. Lime Industry

The U.S. lime industry is comprised of some 20 companies operating about 50 commercial lime plants. Nearly half of NLA's members are small businesses, as defined by the Small Business Administration.[3] These small lime companies generally have geographically

[1] Lime is used in the production of many vital products, including steel, paper, glass, copper, aluminum, and sugar. It is also used extensively in construction, roadbuilding, and pollution control (wastewater treatment and flue gas desulfurization).
[2] 5 U.S.C. §§ 601-612.
[3] *See* 13 C.F.R. § 121.201.

limited markets – within a few hundred miles of their plants – because lime is restricted by transportation costs.[4] Faced with other, often larger, competitors in their markets, small lime companies face intense competition. These small companies are particularly sensitive to new regulatory costs, such as an EPA requirement to install control equipment upgrades.[5] For this reason, when EPA was preparing in early 2002 to begin a Clean Air Act rulemaking that would impose stringent new air quality requirements on all U.S. lime plants, NLA persuaded EPA to convene an SBAR Panel prior to starting the notice and comment rulemaking process. NLA wanted EPA to have the opportunity to meet with small lime companies, understand their needs, and design the rule with those needs in mind. The Panel process proved to be a very effective way to accomplish those objectives.

The 2002 Lime MACT Panel

The Lime MACT[6] Panel convened on January 22, 2002. Seven of the nine small lime companies potentially affected by the rule participated in the Panel process. These small lime companies met with EPA twice, including a face-to-face meeting on February 19, 2002. The companies were given a detailed description of the planned MACT rule, as well as EPA's estimates of the economic impact of the rule on the lime industry. The companies were also given the opportunity to make oral comments on the rule, and to prepare more detailed written comments on the rule. The Panel members – representatives from EPA, the Office of Advocacy, and the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget – were present to hear the lime companies' concerns and review their written comments.

Based on the companies' oral and written comments, the Panel members (EPA, Advocacy, and OIRA) prepared a Panel Report to the EPA Administrator, which was completed on March 25, 2002. The 2002 Lime MACT Panel Report is enclosed as an attachment to this testimony. Significantly, EPA responded to these comments with several Panel recommendations to the EPA Administrator or, alternatively, provided detailed explanations of

[4] At a distance of five hundred miles or more, transportation costs can exceed the value of the product.
[5] Research funded by the Office of Advocacy at the U.S. Small Business Administration suggests that small manufacturing firms must spend four and a half times more per employee for environmental compliance than their larger competitors do. *See* W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (September 2005).
[6] Under the Clean Air Act, Maximum Achievable Control Technology (MACT) standards are established to control hazardous air pollutants from new and existing industrial sources.

why a recommended change to the rule could not be made. EPA followed the Panel's recommendations.

Because of the Panel process, the final Lime MACT standard was tough but something that the lime industry could live with. Several improvements to the rule were only made possible because small lime companies were able to meet face-to-face with EPA and provide information that was critical to the agency's decisionmaking process. For example, the pre-proposal version of the Lime MACT would have required that baghouse-equipped kilns monitor opacity with bag leak detectors (BLDs). Small lime companies explained to the Panel the difficulties and drawbacks of using BLDs, and suggested that EPA also allow the use of Continuous Opacity Monitors (COMs) because the agency had previously determined that COMs constitute enhanced monitoring. Furthermore, for several of these companies, COMS are required under Federal and state law, and cannot be legally removed. The companies described the substantial resources their plants had already invested to install COMs and to train their personnel to use them. The Panel agreed with the small lime companies and recommended that EPA allow COMs as well as BLDs. In sum, the SBAR Panel was immensely helpful in helping EPA understand and address the concerns of small lime companies.

EPA's 2009 GHG Rulemaking Process

When EPA announced in early 2009 that it planned to regulate GHGs under the Clean Air Act, numerous industries, including the lime industry, wanted EPA to convene an SBAR Panel. The lime industry knew that it would be significantly affected by GHG regulations. EPA subsequently proposed an "Endangerment Finding" for mobile source GHGs on April 24,[7] and GHG tailpipe standards for light-duty vehicles on September 28.[8] EPA also proposed the so-called GHG "tailoring rule" on October 27.[9] Rather than convene a Panel before proposing any of these rules, EPA chose to host a "public outreach meeting." EPA argued that it was not required to conduct a Panel for these rulemakings, asserting that "EPA is using the discretion afforded to it under section 609(c) of the RFA to consult with OMB and SBA, with input from outreach to small entities."[10]

[7] 74 Fed. Reg. 18.886 (April 24, 2009).
[8] 74 Fed. Reg. 49,454 (September 28, 2009).
[9] 74 Fed. Reg. 55,292 (October 27, 2009).
[10] 74 Fed. Reg. 49,629 (September 28, 2009).

Regardless of whether EPA actually had such discretion not to convene an SBAR Panel, EPA was clearly wrong not to do so. EPA held the public meeting on November 17, 2009, **after** all three GHG rules had been proposed. The meeting was in reality little more than EPA giving attendees a broad brush overview of the proposed rules. NLA and the other trade associations that were present had virtually no opportunity to have a dialogue with the agency about the actual design of the rules. It was also evident from this meeting that the EPA staff had only a basic understanding of the rules and who they would affect, and could not answer many questions about the relationships between the GHG rules and other Clean Air Act regulations.

Pursuant to the outreach meeting, NLA submitted written comments to EPA about the design of the "tailoring rule." While the tailoring rule proposed certain CO_2 thresholds below which GHG requirements would be deferred, CO_2 emissions from lime plants exceeded the proposed applicability threshold. A substantial portion of those CO_2 emissions are generated when limestone is calcined in lime kilns. Because there is no known way to avoid generating CO_2 when limestone is calcined and converted to lime, NLA asked that EPA consider excluding calcination process-related GHG emissions from counting against the GHG applicability thresholds.[11] EPA's single paragraph response bundled NLA's request with comments by other groups, but failed to meaningfully respond to any of them, other than to note that the agency would not respond to exclusion requests until some later time. NLA's comment letter, along with the relevant excerpt from EPA's response, is enclosed as an attachment to this testimony. While the process-emissions question was and is a major issue confronting EPA in the implementation of its GHG regulations, NLA has not been able to obtain any meaningful response from EPA, even after Congressional staff received assurances from EPA that the issue would be addressed.

EPA's "Public Outreach" Was Not Equivalent to the Panel Process

From the lime industry's perspective, EPA's reliance on the "public outreach" approach as a substitute for the SBAR Panel process is unsatisfactory, for several reasons. First of all, preparing for the Panel process motivates EPA to understand how the planned rule will work, who it will affect, and what the regulatory burdens will be. In the case of the GHG rules, EPA

[11] Similarly, EPA received exclusion requests from other industries where the process of making the product itself generates GHGs, such as yeast manufacturing.

did not clearly understand who would be affected or what the burdens will be. For example, EPA thought that small lime plants and many other small businesses would be deferred from GHG permitting requirements by the tailoring rule, even though this was not true. EPA also had trouble understanding the complexities of integrating the GHG rules into the existing Clean Air Act regulatory framework. As a result, EPA staff at the public outreach meeting were unable to answer many of the questions posed by small business representatives.

Second, in bypassing the Panel process, EPA lost the valuable opportunity to meet actual small businesses face-to-face and exchange information with them. The exchange of ideas and information that can occur within the Panel process is quite different from simply receiving a presentation by an agency about a rule that has already been proposed. Perhaps the greatest value of the Panel process is that it takes place **before** the agency proposes its rule, when there is still a chance to shape the design of the rule. Such face-to-face discussions are most useful when they take place early on in the process, before the figurative rulemaking "cement" starts to harden.

Third, although EPA argued that it "consulted" with SBA and OIRA, there is no evidence that EPA engaged in the degree of interagency discussion that typically occurs when Panel members meet to discuss the recommendations of Small Entity Representatives. The Panel process establishes a context for the three Panel members to meet, discuss the issues raised by small business, and reach consensus on flexible solutions for those issues. The presence and engagement of the three Panel members (EPA, Advocacy, and OIRA) ensures that EPA is held accountable to adequately consider the Panel Report's recommendations. In the absence of a formal Panel Report for the GHG rules, however, EPA was free to ignore the concerns of small businesses. And, by and large, it did.

Fourth, perhaps the most significant aspect of the Panel process is that EPA is required to consider alternatives to its planned rule that would achieve the objectives of the rule without harming small businesses. In the Lime MACT Panel, for example, EPA was able to find an appropriate alternative to the bag leak detection requirement that worked for small lime plants. In developing its GHG rules, EPA never seemed interested in considering alternatives.

For all of these reasons, EPA was wrong to avoid conducting an SBAR Panel. The "public outreach" approach taken by EPA does not – and cannot – take the place of a Panel.

Many of the implementation difficulties now facing EPA, the States, and industry might have been avoided if EPA had taken the time to listen to small business before writing its GHG rules. Now the lime industry as a whole is reluctant to expand or modernize its plants until the permitting uncertainties caused by the GHG rules have been resolved. The same can be said of many other industries, sacrificing an untold number of new jobs that would have been created.

Thank you for the opportunity to testify today. I would be happy to answer any questions that you may have.