COLUMBUS BRICK COMPANY
MANUFACTURERS OF BRICK SINCE 1890

# U.S. House of Representatives
# Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law
# Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013"
# June 5, 2013 10:00 am
# 2141 Rayburn House Office Building

Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, my name is Allen Puckett III and I am the President of Columbus Brick Co, a small business in Columbus, Mississippi. I am a member of the fourth generation of Pucketts to own and operate Columbus Brick Co. Our fifth generation also works in the company. Our family has been making fired clay bricks in Mississippi since 1890 and we distribute our bricks to more than 15 states. The Columbus Brick company was founded by W.S. Lindamood and my great-grandfather, W. N. Puckett. They were helping build a women's college but discovered there was not enough brick for the project, so they started Columbus Brick Company.

Like the rest of our industry, Columbus Brick has been negatively affected by the slumping economy and housing market in particular. In 2005, we employed 90 people; we currently have only 75. We have resisted layoffs and used early retirements and attrition to reduce our workforce. The production of brick has decreased at the plant by forty million brick per year. This represents about a 30 percent drop, which is actually less than the average for our industry.

We believe that most of our success is due to the loyalty and commitment of our employees. They have made us what we are. We are committed to our employees and strive to create a desirable work environment and culture at our company. We cover over 80% percent of employee health insurance premiums including their family, offer a fully funded profit sharing retirement plan, and a 401k match program. We also have a nurse practitioner come onsite twice a month to have a free clinic for all our employees. We believe that our commitment and support of our employees gives the company a long term stable workforce. Fifty-seven percent of our employees have

worked with us for over 10 years and we even have one who has been with us for 50 years, which is not uncommon. Our employee families have also worked for us for generations. Currently, we have several 2nd, 3rd, and even 4th generation employees. We are a good corporate citizen and support many social causes. I am here today as a small business owner. I do not profess to be an expert on the Clean Air Act or on this bill that you are considering today. We are an industry of mostly small companies and we look to our trade association and industry task forces for that kind of information. I do, however, know how to run a business and what I have seen happening in the past several years makes me extremely concerned about my ability to keep our business viable in the future. I believe that this bill and a few other changes in how the EPA creates rules would help keep Columbus Brick, and the brick industry, alive in the United States.

I am here today on behalf of my industry, our company and the families we employ. Over the past 10 years our industry has been directly impacted by **two** sue-and-settle cases involving air toxics standards being developed by the US Environmental Protection Agency. Our first experience with sue and settle was a rule that was vacated after we spent considerable money for compliance with that rule. We are understandably concerned about this second round of sue-and-settle rulemaking we now face. If EPA continues down the path that it has presented to us, our company and many other companies like ours will be forced to significantly downsize or close. This would mean the loss of jobs in our small community. Since Columbus Mississippi already has more than twice the national unemployment rate, further job loss, particularly with no environmental benefit, is unacceptable.

The rules I am referring to are national emission standards for hazardous air pollutants, or NESHAPs, developed by the EPA under Section 112 of the 1990 Clean Air Act. These rules are based on the level of control defined as the maximum achievable control technology, or MACT, so they are commonly referred to as MACT standards. The EPA was required to develop MACT standards for about 175 categories of sources at various intervals between 1990 and 2000. The CAA included a requirement, referred to as the MACT Hammer, which would make states and industries develop the standards themselves if EPA failed to accomplish their requirements. Throughout the 90's and into the early 2000's, environmental groups such as the Sierra Club used the court system to force EPA to meet these deadlines, as well. It is my understanding that virtually all original MACT standards were completed under either a sue and settle court order or a threat of an impending court order. I also understand that most of those rules were later subject to litigation by the same environmental groups who forced a short schedule, this time

complaining that EPA did not develop the rule properly. I believe there is an obvious correlation between these two facts.

Our first rule was no different. Due to its low risk relative to other source categories, our rule was in the last "bin" for regulation, with our rule due in November of 2000. Our small industry worked with EPA from the very beginning, providing data they requested and remaining abreast of the issues. As the deadline approached, we heard about the lawsuit and the settlement discussions and were concerned, but assured by EPA that they had sufficient time to complete our rule. However, with only seven months between the proposed rule being published in the *Federal Register* and the final rule signature date, we were concerned that EPA did not have adequate time to fully consider what we believed to be significant concerns about the proposed rule.

This shortened schedule was forced by a "sue and settle" arrangement between the EPA and the Sierra Club. We believe we were harmed in many ways by that first sue and settle deal:

1. EPA did not hold a small business panel we believe was required by the Small Business Regulatory Enforcement Fairness Act, or SBREFA. Since the majority of companies in our industry are small businesses and many were projected to be severely impacted by the rule, we believe a small business panel should have been convened.
2. The Brick MACT was the first proposed rule to mention the possibility of a health-based approach for a MACT, a discretionary approach allowed under the CAA that is both protective of the environment and has the potential to provide more operating flexibility to industry. However, the day after the public hearing and just a month after proposal, industry met with EPA to discuss the data they would need to pursue this option. We were told by the EPA that they had no plans to pursue this option due to time constraints. We believe a review of the data then could have saved us the problems we have faced since that time.
3. EPA did not have sufficient time to craft a defensible rule, as evidenced by what happened next. A bad rule hurts everyone.

The Brick and Structural Clay Products MACT was vacated by the courts as deficient in 2007. Unfortunately, the environmental groups seemed to have control of the timing of that, as well. The reconsideration process and then the litigation lasted until almost a full year after our industry had come into full compliance with the rule. Our actions included increasing the number of controlled sources in our industry by more than 400 percent. We believe the vacatur was a direct result of insufficient time to adequately support the

rulemaking process in the written preamble and insufficient time for critical review by both the upper levels of the EPA and the Office of Management and Budget.

Again, industry asked for more time, pointing out the obvious time crunch. Again, the EPA claimed that the schedule was "out of their control." We asked for an extension of the compliance date, but that too was largely denied.

We recognize that environmental groups like the Sierra Club have a role to play in the process. However, so should the affected industry and the regulating agency. In this case, the control of the rule development was turned over to a third party with EPA agreeing to an unreasonable schedule. That same third party then sued EPA because the rule was technically deficient. I believe, in most cases including this one, that same third party is then paid back for the costs they incur to fight a bad rule that was created due to a shortened schedule they encouraged and that EPA did not defend. However, throughout the long reconsideration and litigation, no concern was shown for the millions of dollars that my industry was spending in good faith to comply with a rule that would later be vacated. Now those controls are being used as justification for increasing the stringency on the new MACT, potentially by orders of magnitude.

Recently, EPA has restarted the MACT development process for our industry. They have required us to conduct expensive stack tests on the controls that were installed because of the now-vacated first Brick MACT. They have changed their approach to establishing MACT limits to more stringent methods that would not even be possible with some of those earlier, higher risk categories. After completing larger priorities like the Boiler and Utility MACTs, focus has returned to our small industry. Our rulemaking is haunted by the ghost of the now-vacated "Brick MACT", as EPA has frequently admitted. EPA has once again entered into a "sue and settle" consent decree with the Sierra Club for our rulemaking schedule. We asked to be included in the discussions of the timing in the settlement, but were again excluded from the negotiations until a draft settlement agreement was published in the *Federal Register*. I don't think anyone could possibly fault our industry for being extremely concerned.

1. Over the past 10 years, we have spent over 100 million dollars installing controls to comply with that first MACT and continuing to operate those controls in most cases. EPA estimates that this new MACT could potentially cost close to TWICE that amount each and every year.
2. Columbus Brick spent $750,000 to install a control device on our large kiln to comply with the first Brick MACT. Each year we incur ongoing

operational costs because the operation of this control device is still a requirement of our air operating permit.

3. Before the last rule, our industry had roughly only 20 controlled kilns of over 300 total kilns. Now we have over 100 out of about 250 kilns. Those newly controlled kilns were all installed because of a rule that is no longer on the books. Most of those controls remain in operation.
4. EPA is using the presence of those new controls and new interpretations of the CAA to create a nearly impossible standard for our industry. Our situation is now the "MACT-on-MACT" scenario. We are concerned that EPA does not know how to deal with this scenario which is further exacerbated by a mandated schedule.

The EPA should be focused on fulfilling the requirements of the CAA and not have their priorities dictated to them from a third party. The EPA should be interpreting the statutes as provided by Congress, not basing decisions on "what would Sierra Club say." Even now, as we have discussions with EPA, they mention that they have to consider the "litigants'" position as well. ***There are no litigants to this rulemaking. Not yet.*** There are only litigants to a lawsuit to establish the schedule for this rulemaking. There is a huge difference between the two. But, in a real sense, I think that EPA does see the environmental groups as the litigants to the actual rulemaking and it impacts every decision they make.

The CAA clearly gives EPA flexibility to do things differently than they have done on previous rules. They can fully follow the CAA, protect the environment AND give our industry a chance to exist and maybe even thrive once again. Consideration of flexible alternatives takes time. We are concerned because consideration of these discretionary actions tends to go away as the time crunch increases.

If EPA uses the same approach they have followed on recent rules as a default to lower litigation potential, Columbus Brick may cease to exist after 125 years of operation. Based on EPA's numbers I have seen for my company, I expect at a minimum to have to permanently shutter two of our three kilns. Given these numbers, even if someone gave me fully paid-off control devices, we would have a difficult time paying to operate the controls and remain in business. That will mean a permanent job loss for at least 45 to 50 families in our small community.

Unfortunately, my story is not unique in our industry. Most of the companies that would be affected by this rule are small businesses who face similar fates. Our larger companies in our industry will not fare much better. They, too, operate plants in small towns and will face the potential of closing those plants. Even large plants will be severely stressed since EPA is taking an approach that appears to require development of new technologies and investment in technologies that have never been demonstrated as effective.

If this burden resulted in some great benefit to the environment, it might be worth it. However, EPA has the data in house that demonstrates that there IS NO great benefit to the environment- that our industry's operations are already well within safe levels in many, many cases. If there were no other options available under the CAA, it might be unavoidable. However, EPA has the authority under the CAA to avoid disastrous impacts that provide no benefit. EPA needs to take the time to develop the rule correctly. They need to avoid sue and settle agreements that remove that time.

We want to be able to make our case for sufficient time to assess the data while EPA is having discussions with the litigants, not after they have made their agreements. We are, most definitely, "interested parties" to these discussions.

We actually have a great deal of faith in the EPA to do the right thing, if they are allowed to do so. To look at the data and the requirements of the CAA and come to a decision that meets the requirements of the CAA, protects human health and the environment, and still allows our industry to continue to operate.

We are not asking for this rule to go away. We are asking that the practice of establishing unreasonable deadlines, without input from the impacted industry, go away. We are asking for the opportunity to be an integral part of a rulemaking that could make or break our industry. We are asking that the time be taken to ensure that public health and welfare is maintained, but also allow the brick industry to continue to exist. You can ensure that decisions are made that allow my company to continue and our employees to remain gainfully employed. I would hate to see Columbus Brick go out of business because a rule EPA was forced to be developed too quickly, especially a rule that benefits no one.

Thank you.