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Advocacy: the voice of small business in government

July 8, 2008

BY ELECTRONIC MAIL

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable Susan E. Dudley
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
725 17th Street, N.W.
Washington, D.C. 20503

RE: Docket ID No. EPA-HQ-OAR-2008-0318, Comments on EPA's draft Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions under the Clean Air Act"

Dear Administrator Johnson and Administrator Dudley:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments in response to the draft Advance Notice of Proposed Rulemaking (ANPR) prepared by the U.S. Environmental Protection Agency (EPA) entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act."

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.[1]

[1] 15 U.S.C. § 634a, *et. seq.*

Advocacy has reviewed the draft ANPR, and, based on our initial reading, we have serious concerns with how EPA's regulation of greenhouse gases (GHGs) through the Clean Air Act framework would negatively impact small entities.[2] We believe that the regulatory approaches outlined in the ANPR, taken in part or as a whole, would impose significant adverse economic impacts on small entities throughout the U.S. economy. The draft ANPR acknowledges that using existing Clean Air Act regulatory approaches to control GHGs would subject large numbers of firms to costly and burdensome new requirements.

Expanding the Prevention of Significant Deterioration/New Source Review (PSD/NSR) program to cover carbon dioxide (CO2) emissions, in and of itself, would make many small businesses that have not previously had to deal with the Clean Air Act subject to extensive new clean air requirements. Because relatively small facilities can generate substantial quantities of CO2 and exceed the PSD/NSR regulatory threshold,[3] small entities would be captured by the CO2 PSD/NSR permitting requirement when they are constructed or modified. These small entities would include small businesses operating office buildings, retail establishments, hotels, and other smaller buildings. Buildings owned by small communities and small non-profit organizations like schools, prisons, and private hospitals would also be regulated. It is difficult to overemphasize how potentially disruptive and burdensome such a new regulatory regime would be to small entities. In our view, those costs would likely be imposed on large numbers of small entities with little corresponding environmental benefit in terms of reduced GHG emissions.

I. THE CLEAN AIR ACT REGULATORY FRAMEWORK

The ANPR demonstrates that the Clean Air Act regulatory framework is poorly suited as a mechanism to control GHG emissions. Several key examples illustrate this:

A. Prevention of Significant Deterioration/New Source Review (PSD/NSR). The PSD/NSR program currently requires the owners and operators of major stationary sources of air pollutants[4] to obtain construction permits before they can build or modify their facilities. Issuance of permits to construct or modify these facilities is predicated upon the completion of measures designed to ensure that the facility will not degrade local air quality. Firms seeking PSD/NSR permits must install the most advanced emission controls, meet stringent emission standards, and provide data to show that their

[2] Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

[3] For PSD, the thresholds are 100 tons per year of pollutant for 28 listed industrial source categories, 250 tons per year for other sources. See 40 C.F.R. §§ 51.166(b)(1) and 52.21(b)(1). For nonattainment NSR, the major source threshold is generally 100 tons per year.

[4] A "major stationary source" for PSD meets or exceeds the annual emission thresholds listed in the note 3, *supra*.

emissions will not harm air quality. Currently, obtaining a PSD/NSR permit for a coal-powered source typically requires at least a year of preparation time and costs up to $500,000, not including the cost of purchasing, installing, and maintaining control equipment.

Today, EPA estimates that 200 to 300 of these permits are issued each year by federal, state, and local authorities. Processing PSD/NSR permits represents a major resource commitment for these permitting authorities, as well as for the permit applicant. As EPA has noted, "there have been significant and broad-based concerns about [PSD/NSR] implementation over the years due to the program's complexity and the costs, uncertainty, and construction delays that can sometimes result from the [PSD/NSR] permitting process."[5] This problem would be greatly exacerbated by regulating GHGs under the PSD/NSR program. EPA believes that "if CO2 becomes a regulated NSR pollutant, the number of [PSD/NSR] permits required to be issued each year would increase by more than a factor of 10 (i.e., more than 2,000 – 3,000 permits per year) . . . the additional permits would generally be issued to smaller industrial sources, as well as large office and residential buildings,[6] hotels, large retail establishments, and similar facilities."[7] Not only would many more facilities become subject to PSD/NSR permitting requirements, but smaller firms that have never been subject to Clean Air Act permitting requirements would become regulated for the first time. EPA has likely greatly underestimated the large number of sources that would be required to obtain PSD/NSR permits if GHGs were included in the program. Neither EPA nor state and local permitting authorities have the resources to administer such a large volume of PSD/NSR permit applications; as a result, construction and modification activities would virtually come to a standstill. Any marginal reductions in GHGs achieved would not justify the tremendous costs and regulatory burdens imposed. Even if EPA is correct in its estimate, and the increase in businesses that must obtain PSD/NSR permits is only a tenfold increase, and even if the cost and administrative burdens associated with obtaining a PSD/NSR permit were to be dramatically reduced, a substantial number of small entities can be expected to experience a significant adverse economic impact by having to obtain CO2 PSD/NSR permits.

B. Hazardous Air Pollutant (HAP) Standards. Section 112 of the Clean Air Act requires EPA to regulate air pollutants classified as hazardous under section 112(b).[8] While GHGs are not currently listed as hazardous air pollutants (HAPs), EPA has solicited comments on whether GHGs should be regulated as HAPs. Based on Advocacy's experience with rules designed to regulate HAPs, particularly the area source rules that regulate non-major sources of HAPs,[9] many of which are small entities, the section 112 framework would be a poor mechanism for regulating GHGs. Typically, HAPs are emitted at relatively low volumes and are known to have health effects, which

[5] Draft ANPR (June 17, 2008) at 230.
[6] "Large residential buildings" presumably means homes. According to Office of Advocacy research, 53% of all small businesses are home-based businesses.
[7] Draft ANPR (June 17, 2008) at 225.
[8] 42 U.S.C. § 74129(b).
[9] Area sources are stationary sources of HAPs that emit less than 25 tons per year of any combination of HAPs and less than 10 tons per year of any single HAP. 42 U.S.C. § 112(a)(1),(2).

are generally localized, at low thresholds. HAP emission rules often require very costly technologies to eliminate relatively small amounts of HAP from being emitted to the air. Because the HAPs are recognized as causing serious health effects, HAP regulations often impose control costs that are much higher on a per ton basis than any other type of air pollutant.

By contrast, GHGs (and CO2 in particular) are ubiquitous, are distributed uniformly throughout the atmosphere, and have no demonstrated adverse health effects at ordinary atmospheric concentrations. Using section 112 to control GHGs would not be a reasonable regulatory approach. Imposing high per-ton GHG control costs through a HAP standards-type regime would yield small reductions in GHG at enormous cost to sources, especially small entities.

C. Title V Permit Program. EPA also solicits comments on whether and how GHG requirements could be included in Title V operating permits. Based on the cost, complexity, and administrative burdens associated with obtaining Title V operating permits, Advocacy believes that Title V permits should not be required of sources on the basis of GHG emissions. Currently, federal, state, and local permitting authorities issue Title V operating permits to a limited subset of the stationary sources of air pollution in the United States. Applying for and obtaining a Title V permit is time-consuming and expensive. In the late 1990's, for example, many major stationary sources spent more than $100,000 to obtain initial Title V permits, when the cost of hiring consultants and technical personnel is considered. Again, even if EPA were able to dramatically decrease the cost of applying for and complying with GHG Title V permits, the cost and burden would be an enormous new impact, particularly on small entities.

EPA has taken steps to ensure that Title V permits are principally required for larger stationary sources. EPA initially administratively deferred Title V applicability for non-major sources, and, more recently, EPA has allowed area sources of HAPs to satisfy Title V compliance demonstrations through less burdensome means. EPA understands that administering Title V permits is a resource-intensive process for all parties, and that forcing smaller facilities to comply imposes great burden and cost for little commensurate environmental gain. Requiring small firms that would otherwise not be subject to Title V to obtain Title V permits on the basis of GHG emissions would not be worth the cost to companies or the heavy additional load placed on permitting authorities' resources.

D. National Ambient Air Quality Standards. EPA further solicits comments on whether it should develop a National Ambient Air Quality Standard (NAAQS) for CO2 and other GHGs. In Advocacy's view, EPA should not seek to develop a GHG NAAQS. GHGs are fundamentally different than any of the current NAAQS criteria pollutants. CO2, for example, is distributed broadly through the atmosphere and is ubiquitous, rendering geographic determinations useless in mitigating CO2 levels. The wide and uniform distribution of CO2 would mean that the entire country would either be classified as in attainment or out of attainment. Either way, small entities, in turn, would become subject to rigid new "one-size-fits-all" GHG requirements, regardless of local conditions or their actual emissions of GHGs.

Therefore, rather than merely serving as a useful vehicle to administer a national GHG cap and trade program, establishing a GHG NAAQS would set in motion a number of statutory control measures that would be costly, inefficient, and ineffective. Small entities could have to contend with new barriers to construction and expansion, new restrictions on operating cars and trucks, and the potential for having to retrofit their existing buildings with GHG controls or to purchase equivalent credits. These NAAQS control measures would subject vast numbers of small entities across the country to standardized, inflexible GHG control requirements for the very first time. The full impact of these new burdens on these small entities could be devastating.

E. Mobile Source Requirements. EPA also solicits comments on using the Mobile Source provisions of the Clean Air Act to control GHGs. EPA would impose new regulatory requirements on on-highway motor vehicles, as well as non-road vehicles and equipment. These GHG requirements would be imposed in addition to the renewable fuel standards contained in the Energy Independence and Security Act of 2007 (EISA),[10] which requires 36 billion gallons of renewable fuel to be blended into the nation's gasoline and diesel fuel supply by 2022. To a large degree, the goal of EISA was to address GHGs from mobile sources.

In Advocacy's view, using the mobile source provisions of the Clean Air Act to further impose new GHG requirements are likely to have serious adverse impacts on small entities that rely on vehicles and equipment. On-board GHG control measures such as speed limiters would have a major impact on small entities that operate trucks or other vehicle fleets. Other requirements designed to limit the use of vehicles will similarly impact small businesses that depend on being able to pick up and deliver goods, or to travel to and from their clients. These requirements could be a particular hardship for trucking companies, and the numerous small communities that depend entirely on long-haul trucks for delivery of their food supplies and other goods.

II. DISPROPORTIONATE IMPACTS ON SMALL ENTITIES

Our concerns about the advisability of regulating GHGs under a massive and unwieldy new environmental regulatory scheme that will capture hundreds of thousands of small businesses is motivated by our knowledge of how regulations often unfairly impact small entities.

A. Advocacy's Research. An Advocacy-funded report that details the $1.1 trillion cumulative regulatory burden on enterprise in the United States shows how the smallest businesses bear a 45 percent greater burden than their larger competitors.[11] The annual cost per employee for firms with fewer than 20 employees is $7,747 to comply with all

[10] Pub. L. No. 110-140 (2007).
[11] W. Mark Crain, *The Impact of Federal Regulations on Small Firms*, funded by the U.S. Small Business Administration, Office of Advocacy (2005).

federal regulations.[12] That cost is more, on a per-household basis, than what Americans pay for health insurance. When it comes to compliance with environmental requirements, small firms with fewer than 20 employees spend four times more, on a per-employee basis, than do businesses with more than 500 employees.[13]

B. Any GHG Rule Must Be Subject to a SBAR Panel. The owners of small businesses want to comply with applicable environmental rules. However, the growing thicket of clean air, solid waste, water quality, and other environmental requirements emanating from local, state, federal, and global authorities is daunting. If EPA chooses to go forward with plans to use the Clean Air Act to address climate change, the Office of Advocacy will insist that the views of small entities be considered in the pre-proposal stage as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[14] The direct involvement of small entities has benefited over 30 EPA rulemakings since President Clinton signed SBREFA in 1996. The "Small Business Advocacy Review" (SBAR) panels required by SBREFA provide EPA with on-the-ground, real world, experienced views from small business representatives who are relied upon to provide practical solutions for regulatory challenges faced by EPA. Nine prior SBAR panels have dealt with planned EPA rules issued under the Clean Air Act and, because small entities were involved, the final rules reflect a better understanding of how the regulations would impact small business. Millions of dollars have been saved because poorly designed approaches and unintended consequences are filtered out of proposed regulations with the help of small entities and government officials.[15] These changes are accomplished without compromising valuable protections for human health and the environment.[16]

C. EPA Should Not Ignore the Impact of GHG Regulation on Small Entities. Unfortunately, EPA has ignored small business input when issuing Clean Air Act regulations in the past. In 1997, for example, EPA determined that the revision of the NAAQS for ozone and particulate matter did not "directly regulate" small entities and was, therefore, exempt from the SBAR panel requirement to consider small entity input. In Advocacy's view, any movement forward by EPA to capture small entities in a reinterpretation of the Clean Air Act designed to address climate change will properly constitute direct EPA regulatory action. Even if EPA were to construct a legal argument that claims GHG regulations do not significantly impact a substantial number of small entities,[17] EPA would be better served by carefully considering the impact of GHG regulations on small businesses, small organizations, and small communities.

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[12] *Id.*
[13] *Id.*
[14] 5 U.S.C. § 609.
[15] See the annual reports of the Regulatory Flexibility Act at: http://www.sba.gov/advo/laws/flex/
[16] 5 U.S.C. § 603 (c) explicitly requires that any alternatives to a regulatory proposal that would minimize the impact on small entities must "accomplish the stated objectives of applicable statutes."
[17] Under 5 U.S.C. § 605(b), EPA is not required to convene a SBAR panel if it certifies that the regulation will not have a significant economic impact on a substantial number of small entities.

We look forward to working with you to ensure that the impact on small entities is seriously considered prior to EPA moving ahead on regulating greenhouse gas emissions. Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if we can be of further assistance.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy