



November 28, 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

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

Dear Administrator Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments in response to the Advance Notice of Proposed Rulemaking (ANPR) published by the U.S. Environmental Protection Agency (EPA) on July 30, 2008 entitled “Regulating Greenhouse Gas Emissions under the Clean Air Act,” 73 Fed. Reg. 44,354 (July 30, 2008).

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

Based on our review of the ANPR, we are concerned that EPA’s effort to regulate greenhouse gases (GHGs) through the framework of the Clean Air Act is likely to result in serious and widespread negative impacts on small entities.² The regulatory

¹ 15 U.S.C. § 634a, *et. seq.*

² Under the Regulatory Flexibility Act, 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.

approaches outlined in the GHG ANPR, either individually or in combination, would impose significant adverse economic impacts on small entities throughout the U.S. economy.

Expanding the scope of the Clean Air Act to regulate carbon dioxide (CO₂) emissions and other greenhouse gases could make hundreds of thousands of small entities that have not previously had to deal with the Clean Air Act potentially subject to extensive new clean air requirements. Because relatively small facilities can generate CO₂ and other GHGs at quantities above the Act's applicability thresholds, small facilities would likely have to meet the same kind of permitting and control requirements that major stationary sources now must meet. The compliance burdens associated with these requirements would devastate small entities throughout the economy, including farms, shops, motels, offices, schools, hospitals, and churches.

If EPA ultimately determines that GHGs can and should be regulated under the Clean Air Act, the agency must thoroughly and carefully evaluate how small entities will be affected. At a minimum, EPA should be prepared to convene a separate Small Business Advocacy Review (SBAR) Panel for each primary industry sector likely to be affected (e.g., transportation, agriculture, public institutions, manufacturing, etc.). To avoid creating severe unintended consequences from "one-size-fits-all" GHG regulations, EPA must adequately consider the probable impacts on small entities.

I. BACKGROUND

EPA issued the GHG ANPR in response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*.³ The Court found in *Massachusetts v. EPA* that GHGs are air pollutants under section 302 of the Clean Air Act (CAA),⁴ and that EPA therefore has the authority to regulate GHGs under the CAA. The Court further directed EPA to (1) find that GHGs contribute to climate change, which endangers public health and welfare, or (2) to find that GHGs do not contribute to climate change, or (3) to explain why it cannot or will not make an endangerment finding. The ANPR is, in part, intended to help EPA evaluate the practicability of regulating GHGs under the CAA.

EPA discusses several distinct CAA programs in the ANPR that it believes might provide a basis for regulating GHGs.⁵ These programs include National Ambient Air Quality Standards (NAAQS) for CO₂ and possibly other GHGs, New Source Review/Prevention of Significant Deterioration (NSR/PSD)(preconstruction/pre-modification permits), New Source Performance Standards (NSPS)(emission control requirements for certain industrial categories), section 112 (hazardous air pollutant requirements), Title V (federal operating permits), and Title II (mobile source requirements). The ANPR requests comment on whether these CAA programs would be appropriate mechanisms for addressing climate change.

³ 549 U.S. 497 (2007)

⁴ 42 U.S.C. § 7602.

⁵ 73 Fed. Reg. 44,476-44,520 (stationary sources), 44,432-44476 (mobile sources) (July 30, 2008).

II. ADVOCACY’S CONCERNS WITH REGULATING GHGs UNDER THE CAA

A. GHGs Are Not Like Other “Pollutants” Regulated Under the CAA.

To a large degree, the CAA works by requiring individual stationary sources of air pollution to operate “end of stack” emission control technologies (e.g., baghouses, scrubbers, etc.). By requiring air pollution to be controlled more or less stringently depending on the severity of local pollutant concentrations, air quality is managed on a local or regional basis.

By contrast, GHGs, and CO₂ in particular, are fundamentally different. They exist in the atmosphere at relatively uniform concentrations everywhere. CO₂ is ubiquitous, and is present at a volume that is hundreds of times greater than any other regulated pollutant. Most importantly, GHGs cannot be controlled or eliminated simply by installing a pollution control device onto an emission source. True reductions in GHGs have to be accomplished by (1) reducing fuel and/or energy use, (2) switching from higher-emitting fuel such as coal to lower-emitting fuel such as natural gas, (3) developing more efficient operations, or (3) sequestering carbon. The relatively traditional “command and control” structure of the CAA is poorly suited to accomplish these objectives.

B. Using the CAA to Regulate GHGs Will Create Heavy Burdens for Small Entities.

Even if EPA concludes that the CAA is a good tool for managing GHGs, using any of the CAA programs discussed by EPA in the ANPR is likely to create substantial new burdens for hundreds of thousands of small entities. While some of those burdens would come in the form of new federal permitting requirements and fees to do things that do not require such permits now, other burdens would come from higher fuel costs, restrictions on fuel choices, limits on energy use, the requirement to purchase and install new, more efficient equipment, and, potentially, new regulatory limitations on business operations.

1. New Federal Permitting/Procedural Burdens.

National Ambient Air Quality Standards. If EPA establishes a National Ambient Air Quality Standard for CO₂, the impact on small entities would be substantial. As noted above, GHGs are fundamentally different from any of the current NAAQS criteria pollutants.⁶ The wide and uniform distribution of CO₂ would mean that the entire country would have to be classified either 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.

Depending on the CO₂ concentration that was selected for the actual standard, NAAQS requirements would include a number of statutory control measures that would be costly,

⁶ The criteria pollutants are ozone, carbon monoxide, particulate matter, lead, sulfur dioxide, and nitrogen dioxide.

unwieldy, and inefficient. 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 limit their operations. These NAAQS control measures would subject small entities across the country to standardized, inflexible GHG control requirements for the very first time.

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 pollutants⁷ 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 pay permit fees, install the most advanced emission controls, meet stringent emission standards, and provide data to show that their 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 can cost millions of dollars.

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.”⁸ This problem would be greatly exacerbated by regulating GHGs under the PSD/NSR program. Relatively small facilities emit CO₂ at levels which easily exceed the PSD/NSR regulatory applicability threshold.⁹ Indeed, 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,¹⁰ hotels, large retail establishments, and similar facilities.”¹¹

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

⁷ A “major stationary source” for PSD meets or exceeds the annual emission thresholds listed in note 9, *infra*.

⁸ 73 Fed. Reg. 44,501 (July 30, 2008).

⁹ 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.

¹⁰ “Large residential buildings” presumably means homes. According to Office of Advocacy research, 53% of all small businesses are home-based businesses.

¹¹ 73 Fed. Reg. 44,499 (July 30, 2008). According to a study funded by the U.S. Chamber of Commerce, over one million commercial sources could become subject to PSD if CO₂ were regulated with the current applicability thresholds. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant*, U.S. Chamber of Commerce (September 2008)

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. Clearly, a substantial number of small entities would experience a significant adverse economic impact by having to obtain CO₂ PSD/NSR permits.

Title V Permit Program. The cost, complexity, and administrative burdens associated with obtaining Title V operating permits are high. Currently, federal, state, and local permitting authorities issue Title V operating permits to a relatively limited subset of the stationary sources of air pollution in the United States.¹² 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. Permit applicants must pay an application fee, which is required to be sufficiently high to cover the cost to a state or local permitting authority to administer the Title V program.¹³ If EPA's GHG regulations prompt a dramatic increase in the number of Title V permits, with smaller entities having to obtain these permits for the first time, the average permit fee is likely to increase, further burdening small entities. Even if EPA were able to decrease the cost of applying for and complying with GHG Title V permits significantly, 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 only larger stationary sources. EPA initially administratively deferred Title V applicability for non-major sources, and, more recently, EPA has allowed non-major sources of hazardous air pollutants (HAPs) to demonstrate equivalent compliance 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 alone would be highly burdensome and inefficient.

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).¹⁴ 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,¹⁵ many of which are small entities, the section 112

¹² In 2002, the EPA Inspector General found that up to 18,710 Title V permits may have been issued by permitting authorities, which is only a fraction of the hundreds of thousands of stationary sources in the U.S. See <http://www.epa.gov/air/oaqps/permits/issuestatus.html>.

¹³ 40 C.F.R. § 70.9(a).

¹⁴ 42 U.S.C. § 74129(b).

¹⁵ 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).

framework would be a particularly poor mechanism for regulating GHGs. HAPs are most commonly emitted at low volumes and have demonstrated adverse health effects, which 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 CO₂ has no demonstrated hazardous 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.

2. Other Potential New Burdens from Regulating GHGs Under the CAA

Restrictions on Vehicle Use and Transportation. EPA would impose new GHG regulatory requirements on on-highway motor vehicles, as well as non-road vehicles and equipment. We believe that these requirements would 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. According to Census Bureau statistics from 2005, at least 103,000 small businesses operate trucking companies, with another 14,000 small companies operating other forms of ground transport (taxis, messengers, delivery vehicles, etc.).¹⁶

Operating Restrictions on Combustion Sources. EPA estimates that there are at least 1.3 million boilers now in operation across the U.S.¹⁷ The vast majority of these boilers are medium or small in size, and many of these are owned by small entities. Many of these (more than 50%) are institutional boilers located at schools, churches, nursing homes, courthouses, prisons, etc. Another 45% are commercial boilers located at shopping malls, laundries, apartments, restaurants, hotels, and motels. In addition, some small communities and small businesses operate larger boilers (e.g., municipal boilers). Because boilers and other combustion sources use fuel and directly emit GHGs, they are prime targets for GHG requirements such as PSD. The prospect of hundreds of thousands of small entities having to go through the PSD permitting process is daunting by itself. But many of these boiler owners could also be forced to switch to more costly fuels or restrict their boiler operations. The cost to a small business of fuel switching can

¹⁶ All figures are for 2005 available at: http://www.sba.gov/advo/research/us05_n6.pdf.

¹⁷ Draft Report, *Economic Impact Analysis of NESHAP for Institutional, Commercial, and Industrial Boilers at Area Sources*, RTI International (February 2007). The Department of Energy estimates that a total of 2.2 million boilers are in operation, *Characterization of the U.S. Industrial Commercial Boiler Population*, Energy and Environmental Analysis, Inc. (May 2005)

be significant, particularly if future supply shortages make the cost of the replacement fuel prohibitive. Other types of combustion sources that could come under GHG regulations are process heaters, dryers (such as those used at automobile body shops), kilns and ovens, and forges. Taken together, hundreds of thousands of combustion units owned by small entities could be regulated by EPA for the first time because of the GHG regulations.

Restrictions on Farm Operations. There are estimated to be more than 2 million farms in the U.S.¹⁸ Virtually all of these (more than 90%) farms are small. Many of these farms would be regulated for the first time under GHG rules because of GHG emissions from livestock (methane), from fertilizer applied to fields (nitrous oxide), and because of manure (ammonia). Small dairies provide a good illustration of the impacts of GHG regulations under the CAA. In 2007, the U.S. Department of Agriculture estimated that some 63,470 dairy operations were small businesses. The GHGs emitted by dairy cows and their manure makes many of those operations potential targets for regulation. It is estimated that one dairy cow produces about 4 tons of methane per year, which the greenhouse gas equivalent of 16 tons of CO₂. Thus, even a smaller dairy could be subjected to PSD and/or Title V permitting, as well as other GHG requirements that could threaten their economic survival. These requirements would also include higher energy and fuel costs, and higher costs for operating vehicles and equipment such as trucks and tractors. A similar fate could confront small farms that have other livestock or use substantial amounts of fertilizer.

Restrictions on Small Manufacturers. Small manufacturers would be particularly hard hit by GHG rules. To begin with, there are some industries that are significant CO₂ emitters with numerous small businesses. The most prominent of these industries are cement, lime, aluminum, and foundries (ferrous and nonferrous). As of 2005, there were 95 small cement producers (78% of all cement producers) plus another 5,090 that make cement products and concrete from the cement (98% of these are small businesses), 32 small businesses are lime producers (80% of the total), 392 small businesses produce aluminum (89% of the total), and 1,878 small businesses operate foundries (93.7% of the total).¹⁹ In addition to these small companies, which are likely to be dramatically affected by GHG rules under the CAA, other small manufacturers will be hard hit by increased fuel and energy costs. These costs would manifest themselves as higher shipping costs, higher production costs, and higher heating/cooling costs at production facilities.

III. EPA MUST FULLY CONSIDER THE IMPACTS ON SMALL ENTITIES

A. Regulating GHGs Under the CAA Will Have A Disproportionate Impact on Small Entities.

An Advocacy-funded report shows that the smallest businesses generally have to bear a 45 percent greater burden of regulatory compliance costs than their larger competitors

¹⁸ 2002 *Census of Agriculture*, U.S. Department of Agriculture, National Agricultural Statistics Service.

¹⁹ See note 16, *supra*.

do.²⁰ The annual cost per employee for firms with fewer than 20 employees is \$7,747 to comply with all federal regulations.²¹ When it comes to compliance with environmental requirements, the disproportionate burden is even greater: small firms with fewer than 20 employees spend four times more, on a per-employee basis, than do businesses with more than 500 employees.²² These disproportionate impacts would clearly be exacerbated if EPA concludes that it should regulate GHGs under the CAA. Expanding the scope of the Clean Air Act to regulate CO₂ emissions and other GHGs could make hundreds of thousands of small entities that have not previously had to deal with the Clean Air Act potentially subject to costly and extensive new clean air requirements. In general, small entities are not capable of bearing that massive new burden.

B. Any EPA Rulemaking to Regulate GHGs Under the CAA Must Be Preceded By SBAR Panels.

If EPA chooses to go forward with plans to regulate GHGs under the Clean Air Act, it is clear that EPA's action will have a "significant economic impact upon a substantial number of small entities" (SISNOSE). Even a cursory review of the large numbers of small entities likely to be affected and the magnitude of the probable economic impacts indicates a SISNOSE. Accordingly, the Office of Advocacy will insist that the views of small entities be considered in the pre-proposal stage as required by the Regulatory Flexibility Act,²³ which was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA).²⁴ 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.²⁵ These changes are accomplished without compromising valuable protections for human health and the environment.²⁶

In the case of an EPA determination to regulate GHGs under the Clean Air Act, EPA should be prepared to convene a separate Small Business Advocacy Review (SBAR)

²⁰ W. Mark Crain, *The Impact of Federal Regulations on Small Firms*, funded by the U.S. Small Business Administration, Office of Advocacy (2005).

²¹ *Id.*

²² *Id.*

²³ Pub. L. No. 96-354, 94 Stat. 1164 (1981), as amended by the Small Business Regulatory Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996), codified as amended at 5 U.S.C. §§ 601-612.

²⁴ 5 U.S.C. § 609.

²⁵ See the annual reports of the Regulatory Flexibility Act at: <http://www.sba.gov/advo/laws/flex/>

²⁶ 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."

Panel for each primary industry sector likely to be affected (e.g., transportation, agriculture, public institutions, manufacturing, etc.). Due to the broad scope of the rule, multiple panels would be necessary in order to ensure that each affected small business sector had adequate representation in the panel process. The large number of disparate industry sectors covered requires that the panel process be carved up into more manageable pieces. Advocacy recognizes that conducting multiple panels on a single regulatory action is without precedent. The potential scope and breadth of a GHG rulemaking under the Clean Air Act is similarly unprecedented, however. EPA would be best served, in the longer term, by carefully and thoroughly considering the impact of GHG regulations on small businesses, small organizations, and small communities.

We look forward to working with you to ensure that the impact on small entities is adequately considered prior to EPA moving ahead on regulating greenhouse gas emissions under the Clean Air Act. 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,

/s/

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley
Administrator, Office of Information and Regulatory Affairs