ASSESSING THE IMPACT OF GREENHOUSE GAS REGULATIONS ON SMALL BUSINESS

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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ASSESSING THE IMPACT OF GREENHOUSE GAS REGULATIONS ON SMALL BUSINESS

WEDNESDAY, APRIL 6, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:39 p.m., in room 2154, Rayburn House Office Building, Hon. Jim Jordan (chairman of the subcommittee) presiding.

Present: Representatives Jordan, Buerkle, DesJarlais, Kucinich, and Speier.

Also present: Representative Issa.

Staff present: Ali Ahmad, deputy press secretary; Michael R. Bebeau, assistant clerk; Molly Boyl, parliamentarian; Lawrence J. Brady, staff director; Benjamin Stroud Cole, policy advisor and investigative analyst; Adam P. Fromm, director of Member liaison and floor operations; Ryan M. Hambleton and Kristin L. Nelson, professional staff members; Justin LoFranco, press assistant; Mark D. Marin, senior professional staff member; Kristina M. Moore, senior counsel; Laura L. Rush, deputy chief clerk; Walker Hanson, legal intern; Noelle Turbitt, intern; Kevin Corbin, minority staff assistant; Ashley Etienne, minority director of communications; Carla Hultberg, minority chief clerk; Mark Stephenson, minority senior policy advisor/legislative director; and Alex Wolf, minority professional staff member.

Mr. JORDAN. The hearing on Assessing the Impact of EPA Greenhouse Gas Regulations on Small Business will come to order. And I apologize to our witnesses; I was in the Capitol in an important meeting. There are lots of important meetings going on this week. We want to get started because we are going to have to recess for a Republican conference, so let's get rolling.

Today's hearing marks the third occasion for this committee to consider the regulatory burdens facing America's job creators. Thus far we have learned a great deal from the private sector employers in the manufacturing and construction industries about the harm that two Federal regulatory agencies in particular are doing to their businesses. Together, the EPA and the Occupational Safety and Health Administration, with their joint army of more than 20,000 regulators, receive a combined $11 billion in taxpayer dollars to fulfill their statutory responsibility, but it has never been the goal of Federal regulation to stifle economic growth. At least it is not supposed to be.

As was detailed in a report to released by Chairman Issa in February, hundreds of job creators have identified scores of regulations from these two agencies that hinder their ability to expand and offer good paying jobs to millions of out-of-work Americans. Today we will focus our oversight on the Environmental Protection Agency and specifically development, implementation, and the effect of EPA's greenhouse gas regulations on small businesses.

Under the current regime, the EPA has emerged as the chief enforcer of the Administration's agenda for environmental law. On both sides of the aisle, Republicans and Democrats recognize the "glorious mess" of EPA's rulemaking. Whether by hamstringing recovery efforts in the wake of the Gulf oil spill or unilaterally redefining the Agency's authority under the Clean Air Act, the EPA has nurtured the distinct impression among American job creators that this Administration is out of touch with the real world harm that the agenda causes.

Even worse, the committee has reason to believe that in addition to its bureaucratic disregard for struggling industries that were hardest hit by economic downturn, the EPA appears to have broken the law in a rush to issue sweeping new rules for greenhouse gas emissions. Regulated industries, understandably, feel left out of the process and confined to an environment of job killing uncertainty while EPA crafts a whole new regulatory superstructure that touches every area of our national life, all of this despite the presence of numerous promises before and after his election that regulations in this Administration would be crafted with careful consideration of their cumulative effect on small business.

The growth and sustainability of small business are critical to the success of the American economy, which is why this committee will continue to be in place, a place where men and women, entrepreneurs and investors can come for a fair hearing about their concerns. The American people deserve a responsive government that listens to them and works for them. Small business specifically warrant out attentive ear, as they employ more than half of all private sector workers and represent more than 99 percent of all employer firms in the United States.

Yet, these businesses carry an increasingly disproportionate share of the American regulatory burden. One recent study revealed that the annual regulatory cost to small business is nearly $3,000 more per employee than the cost to larger firms. The same study found that compliance with environmental regulations in particular cost small business and small business owners four times more than firms with more than 500 employees.

It is disconcerting, therefore, to learn how far the EPA has fallen short of the present stated goals. By adding to this already intense regulatory burden, the Administration has executed a strategy that destroys jobs, rather than creates them. With prolonged unemployment that we have not seen in decades, the folly of this agenda is not difficult to see.

Today we will hear from those affected by EPA's regulation of greenhouse gases and we will hear from the EPA and Small Business Administration. I want to thank these witnesses for their presence today.

I now turn to my friend and the ranking member, the distinguished gentleman from Ohio, Mr. Kucinich.

[The prepared statement of Hon. Jim Jordan follows:]

Remarks for Chairman Jordan
Wednesday, April 6, 2011
Regulatory Impediments to Job Creation: Assessing the Impact of GHG Regulations on Small Business

Today's hearing marks the third occasion for this Committee to consider the regulatory burdens facing American job creators. Thus far we have learned a great deal from private sector employers in the manufacturing and construction industries about the harm that two federal regulatory agencies in particular are doing to their businesses.

Together, the Environmental Protection Agency and the Occupational Safety and Health Administration – with a joint army of more than 20,000 regulators – receive a combined $11 billion in taxpayer money to fulfill their statutory responsibility. But it has never been the goal of federal regulation to stifle economic growth. At least, it isn't supposed to be.

As was detailed in a report released by Chairman Issa in February, hundreds of job creators have identified scores of regulations from these two agencies that hinder their ability to expand and offer good-paying jobs to millions of out-of-work Americans. Today we will focus our oversight on the EPA, and specifically the development, implementation, and effect of EPA's greenhouse gas regulations on small businesses.

Under the current regime, the EPA has emerged as a chief enforcer of the administration's agenda for environmental radicalization. On both sides of the aisle, Republicans and Democrats recognize the "glorious mess" of EPA's rulemaking. Whether by hamstringing recovery efforts in the wake of the Gulf oil spill, or unilaterally redefining the agency's authority under the Clean Air Act, the EPA has nurtured the distinct impression among American job creators that this Administration is out of touch with the real-world harm that this agenda causes.

Even worse, the Committee has reason to believe that in addition to its bureaucratic disregard for struggling industries that were hardest hit by the economic downturn, the EPA appears to have broken the law in a rush to issue sweeping new rules for greenhouse gas emissions. Regulated industries understandably feel left out of the process and confined to an environment of job-killing uncertainty while EPA crafts a whole new regulatory superstructure that touches every area of our national life.

All of this, despite the President's numerous promises before and after his election that regulations in an Obama administration would be crafted with careful consideration of their cumulative effect on the small businesses.

The growth and sustainability of small businesses are critical to the success of the American economy – which is why this Committee will continue to be a place where men and women, entrepreneurs and investors, can come for a fair hearing of their concerns. The American people deserve a responsive government that listens to them and works for them. Small businesses, specifically, warrant our attentive ear as they employ more than half of all private sector workers and represent more than 99 percent of all employer firms in the United States.

Yet these businesses carry an increasingly disproportionate share of the American regulatory burden. One recent study revealed that the annual regulatory cost to small businesses is nearly $3000 more per employee than the cost to larger firms. That same study found that compliance with environmental regulations, in particular, cost small businesses four times more than firms with more than 500 employees.

It is disconcerting, therefore, to learn how far the EPA has fallen short of the President's stated goals. By adding to this already-intense regulatory burden, the Administration has executed a strategy that destroys jobs rather than creates them. With prolonged unemployment that we have not seen in decades, the folly of this agenda is not difficult to see.

Today, we will hear from those most affected by the EPA's regulation of greenhouse gasses. And we will hear from the EPA and the Small Business Administration. I want to thank these witnesses for their presence today, and I yield to the Ranking Member for his opening statement.

Mr. KUCINICH. Thank you very much, Mr. Chairman. I just wanted you and the witnesses to know I just have to step outside briefly at 2 for a meeting that I had scheduled before this committee hearing was scheduled, but I am pleased to be here with you and with our chairman and the other members of the committee. Thank you for holding this important hearing.

Today we are here to discuss the impact of greenhouse gas regulations on small businesses. America's small businesses are the lifeblood of this country's economy. Competition, innovation, and the entrepreneurial spirit have driven Americans to prosperity, and it is our job in Congress to ensure that we facilitate and promote an environment of economic opportunity. It is also our job to protect the well being of American citizens, with the bottom line of providing the highest quality of life reach in every person.

Based on actual results and future projections, it is clear that the Clean Air Act strikes a balance between economic growth and keeping each and every one of us healthy. By 2020, for every taxpayer dollar invested in the Clean Air Act, there will be an estimated $30 in return in benefits. In the year 2010 alone, the Clean Air Act prevented over 160,000 deaths, over 3 million lost school days, and 13 million days of lost work. These numbers are illustrative of the benefits to both businesses and public health facilitated by the Clean Air Act.

The regulation of greenhouse gases under the Clean Air Act is imperative to protecting public health and welfare. The threat posed by climate change is based on peer-reviewed, accurate, and concrete science. The threat is real, and preventative steps are necessary. The EPA's regulation of greenhouse gases under the Clean Air Act is a measured common sense approach to mitigating climate change that protects not only public health and welfare, but protects businesses as well.

Opponents of greenhouse gas regulation claim that small entities will be overly burdened by costly and unattainable emission standards. However, the EPA's implementation of the tailoring rule is a small business conscious method of protecting public health and this country's employers and employees. The tailoring rule, by setting a greenhouse gas emission threshold, exempts 95 percent of all stationary source of greenhouse gas emissions. Essentially, the tailoring rule lifts a regulatory burden off of small businesses.

In written testimony provided for today's hearing, the Small Business Majority, a representative of U.S. businesses, states that, "Some will claim that a variety of small businesses, everything from bookstores to diners and plumbers, would be impacted by greenhouse gas standards. This simply isn't the case."

Further, as described in the Small Business Majority's testimony, a significant number of small business owners welcome measures to reduce environmental pollution. Now, this sentiment simply cannot be ignored. As I have said at this subcommittee's past two meetings, we can't have a productive discussion about the impact of regulations without considering both cost and benefits. For example, when we talk about the new tailpipe emission standards, we cannot simply discuss a potential increase in the sticker price of a vehicle. The proposed standards for heavy- and medium-duty trucks, despite a marginal increase in sticker price, are projected

to save over $74,000 over the life of the truck and save over 500 million barrels of oil.

You want to talk economic impact? Multiply that roughly with the price of oil bouncing back and forth over $100, and you could have savings that you could measure, do the math, $50 billion. Multiply this times all the trucks on the road and the reduced fuel consumption, and greenhouse gas pollutant emissions can help achieve energy independence while improving our public health.

Mr. Chairman, I look forward to having a well rounded discussion about greenhouse gas emission standards, their costs and their benefits, with today's witnesses. I yield back.

Mr. JORDAN. I thank the gentleman.

Members have 7 days to submit opening statements. Oh, no, no, no, we have an opening statement. I forgot we have the chairman here. The chairman of the full committee the gentleman from California is recognized.

Mr. ISSA. Thank you very much, Mr. Chairman, and I will be brief.

The ranking member wisely said that cost and benefit need to be evaluated, but as we will hear today, and this committee has found in its studies, cost and benefit are not part of the EPA's mandate or consideration. If they were, many of the regulations that they have created would not have been created. Ultimately, they simply say we are only looking at the environment, we are not looking at the cost. If cost effectiveness, least cost to the system, greatest pollution reduction at the least price were part of the mandate, we would all applaud it.

In addition, the EPA has no limits. This committee has discovered that in fact a natural occurring gas that will continue to be produced in huge amounts in other countries is in fact being regulated. Any coal not consumed in this country will be shipped to another country. The most high-polluting coal in the world is burned in China. These and other realities cause us to, A, have more of this gas than we would otherwise have if our goal really was to reduce the gas on a global basis, but, B, and most importantly, when you look at farmers in Iowa who find themselves being fined because dust from corn husks get in the air on their farm, and other kinds of nonsensical things not intended in the EPA's original mandate regulations continue to be produced, you have to wonder why didn't Congress set limits.

Last, but not least, this committee has repeatedly seen and now becomes convinced that the EPA and other environmental organizations are in fact inviting litigation, settling, and using that litigation in order to justify new regulations. This practice of being sued, settling, and then in fact producing new rules is an area that clearly has to stop. Congress exempts itself from civil lawsuits over its policies for a reason. The EPA, on the other hand, and other organizations seem to welcome those because they lead to the same end that they want, but make it faster.

Last, Mr. Chairman, this committee is more and more, through that AmericanJobCreators.com awareness program, we are finding that rules that have not been made, but used under the form of guidance and guidelines and so on, are basically threatened as rules, so eventually they become rules after, in fact, compliance is

reached by a long threat. These and other impediments to job creation are something this committee is dedicated to. Of course, on both sides of the aisle, we want clean air and clean water, but we also want the funds created by a successful economy that pay for that clean air and clean water.

Last weekend I was on a bipartisan CODEL to Egypt. The Nile is very pretty, but there is not enough money to deliver the kind of health standards in Egypt that we have here today. That is a goal that America has to be cognizant of. If we do not have a successful economy, there will not be money for the regulators to have the dream they now mandate without a clear course toward it.

With that, Mr. Chairman, I thank you for this important hearing and yield back.

Mr. JORDAN. I thank the gentleman.

We want to welcome our first panel of witnesses. We have, first, Dr. David Kreutzer, a research fellow in energy economics and climate change at the Heritage Foundation. In his position, he researches how energy and climate change legislation will affect economic activity in the national, local, and at the industry level.

We have Mr. Joe Rajkovacz, the director of regulatory affairs at the Owner-Operator Independent Drivers Association, and has been involved in the trucking industry over 30 years as both an employee driver and owner and operator.

We have Mr. David Doniger. He is the policy director of the Climate Center at the Natural Resources Defense Council. We welcome you to the committee.

And Mr. Keith Holman is deputy executive director at the National Lime Association and represented small businesses on environmental regulatory issues for many years.

It's pursuant to the rules of the committee, all witnesses are sworn in, so if you would just stand and raise your right hands.

[Witnesses sworn.]

Mr. JORDAN. Let the record show that each of the four witnesses answered in the affirmative.

We are going to try to limit everyone's testimony to 5 minutes. We do have a Republican conference that starts in 9 minutes, but they never start on time, so we are going to try to get through all five of you, and then we will probably recess and then try to come back for questions. And I apologize, but we want to at least get your testimony. So let's get started, and we are going to go right down the line. Mr. Rajkovacz.

STATEMENTS OF JOE RAJKOVACZ, DIRECTOR OF REGULATORY AFFAIRS, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION; DAVID KREUTZER, PH.D., RESEARCH FELLOW IN ENERGY ECONOMICS AND CLIMATE CHANGE, THE HERITAGE FOUNDATION; DAVID D. DONIGER, POLICY DIRECTOR, CLIMATE CENTER, NATURAL RESOURCES DEFENSE COUNCIL; AND KEITH HOLMAN, DEPUTY EXECUTIVE DIRECTOR, NATIONAL LIME ASSOCIATION

STATEMENT OF JOE RAJKOVACZ

Mr. RAJKOVACZ. Chairman Jordan, Ranking Member Kucinich, good afternoon and thank you for allowing me to testify on behalf

of small-business truckers concerning EPA's efforts to regulate greenhouse gas emissions.

OOIDA represents the interest of small business trucking professionals and professional drivers. We currently have more than 153,000 members collectively who own and operate approximately 200,000 heavy-duty trucks nationwide. Any regulation adopted affecting the trucking industry has a dramatic effect on small-business truckers.

The main issue as we see it is all about process: how regulations are adopted; whether the process is open, transparent, includes all of the stakeholders; and if the justifications have properly taken into account all the variables necessary to avoid a one-size-fits-all regulatory system that may disproportionately benefit some stakeholders at the expense of others. In this context, EPA's proposed GHG regulations for new heavy-duty trucks can be viewed as having thrown small business concerns under the bus.

Small-business truckers cannot be portrayed as unconcerned about air quality and fuel mileage improvement. Between EPA's stepped up emission standards on diesel engines beginning in 2004 and continuing through 2007 and 2010 model years, today's diesel engines are more than 90 percent cleaner than just a decade ago. On top of that, EPA mandates truckers must use ultra-low sulfur diesel, and in California specialty diesel blends. All of this has come with a significant price increase on new trucks and at the fuel pump.

Additionally, since small-business truckers operate in a hyper-competitive marketplace, managing their No. 1 expense, fuel, is imperative for their survival. Those who don't are quickly culled from the market, as evident by the recent record bankruptcies in the trucking industry.

In spite of all the success in reducing emissions, government agencies still want to regulate further, at a time when small-business truckers are still trying to collect their breath after the worst economic contraction since the Great Depression.

When EPA embarked on this regulatory process, the White House instructed the Agency to work with all stakeholders, with specific direction to partner with the California Air Resources Board in crafting GHG rules. I suppose this was because many think CARB is an environmental trailblazer. However, many of us in the small business community recognize CARB's record as one that does not account for the concerns of small businesses.

Indeed, CARB's history of engagement with small business can be viewed as nothing more than checking off the box. Their supposed leadership on regulating trucking GHG emissions has not been without significant controversy within the trucking community because they have resulted in high cost limited benefits to all but the largest trucking fleets. Yet, they are driving EPA's regulatory process on GHG emissions regulation of trucks.

From the Hien Tran affair to Dr. Enstrom's dismissal at UCLA for questioning CARB's PM mortality studies, CARB cutting by half the original diesel emissions mortality estimates, to the admission I recently received from CARB which shows air regulating transportation refrigeration units on trailers without any studies or scientific foundation, their actions are leaving the small business

community breathlessly questioning the agency's commitment to accuracy and wondering about their disproportionate influence on EPA's rulemaking, especially when EPA is ignoring our small business concerns.

Based on the attention small businesses have received as job creators, the small-business trucking community had hoped for more from EPA. However, we have only seen more of the same: shut out, ignored, and likely forced to live with bad public policy. Owner-operators and small-business truckers operate widely diverse trucking operations. Categorizing all trucking into a one-size-fits-all regulatory regimen will likely lead to those same entities keeping their older equipment longer, reduce new truck sales, and fail to fully realize the stated goals of regulating GHG.

Owner-operators and small-business truckers should not have rules crafted that needlessly drive up their operational costs simply because their business model has been ignored by regulatory agencies when promulgating rules.

I thank you again for this opportunity and I look forward to answering any questions.

[The prepared statement of Mr. Rajkovacz follows:]

Testimony of

JOE RAJKOVACZ
DIRECTOR OF REGULATORY AFFAIRS
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION

Before the

UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

Regarding

REGULATORY IMPEDIMENTS TO JOB CREATION: ASSESSING THE IMPACT OF GHG REGULATIONS ON SMALL BUSINESS

APRIL 6, 2011

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Submitted by

Owner-Operator Independent Drivers Association
1 NW OOIDA Drive
Grain Valley, Missouri 64029
Phone: (816) 229-5791
Fax: (816) 427-4468

Good afternoon Chairman Jordan, Ranking Member Kucinich and distinguished members of the Subcommittee. Thank you for inviting me to testify this afternoon on the subject of Greenhouse Gas (GHG) regulation of the trucking industry. Currently proposed regulations will undoubtedly raise the cost for new heavy-duty trucks purchased by owner-operators and small-businesses – often for little or no environmental benefit. Much more concerning is the fact that less expensive and less intrusive alternatives to reduce GHG emissions of heavy-duty trucks exist, but they are being all but ignored.

My name is Joe Rajkovacz. I have been involved in the trucking industry for over 30 years and currently serve as Director of Regulatory Affairs for the Owner-Operator Independent Drivers Association (OOIDA). Prior to joining the staff at OOIDA in 2006, I was both an employee driver and owner-operator for nearly three decades. For twenty of those years, I owned both my truck and trailer and leased them along with my driving services to a motor carrier. During my driving career, I purchased 4 new heavy-duty trucks, drove in excess of 3.8 million accident-free miles, and like most successful small-business truckers, operated my equipment as efficiently as possible by focusing on achieving the best fuel mileage possible – the key metric when discussing GHG emissions.

OOIDA is the international trade association representing the interests of small business trucking professionals and professional drivers on matters that affect their industry. The Association actively promotes the views of small-business truckers through its interaction with state, provincial and federal regulatory agencies, legislatures, the courts, other trade associations and private entities to advance an equitable business environment and safe working conditions for commercial drivers. OOIDA currently has more than 153,000 members who collectively own and operate approximately 200,000 individual heavy-duty trucks nationwide.

Small-business truckers dominate the trucking industry in the United States. One-truck motor carriers represent roughly half the total number of active motor carriers operating in our country while approximately 90 percent of U.S. motor carriers operate 6 or fewer trucks in their fleets. Considering that roughly 69 percent of freight tonnage in the United States is moved by truck, any regulation adopted affecting the trucking industry has a dramatic effect on the viability of small-business truckers.

Since the focus of this hearing is to examine the cumulative impact of GHG regulation on the small-business community and address the process EPA (along with NHTSA) is using to develop these regulations, I would first like to say that small-business truckers are not against improving our nation's air quality and reducing our dependence on foreign sources of energy by using those resources efficiently. The marketplace in which these small-business truckers operate in is brutally efficient in culling those who are not wise stewards of resources. The entire trucking industry has been paying the significant cost increases associated with EPA emissions regulations on 2007 and 2010 heavy-duty diesel engines. We have been paying the price at the pumps for the new ultra-low sulfur diesel (ULSD). Both of these EPA mandates have come at a high cost but have also dramatically cut diesel related emissions to a level unimaginable just a decade ago. In addition, many small-business truckers have embraced assorted anti-idle technology that can add as much as ten thousand dollars to the cost of a new (or in-use) heavy-duty vehicle. All of this has happened in the back-drop of the worst economy seen in most of

our lifetimes. All of these increased costs have not come with corresponding increases in rates paid to small-business truckers. In a marketplace where costs increase without any corresponding rate increases, the only way to survive is to become even more efficient in how one operates their truck. Many focus on improving their fuel economy.

The EPA's proposed regulation to establish fuel efficiency and GHG standards on new heavy-duty vehicles is flawed for many reasons, and unfortunately will likely not achieve the hoped for emissions results. This rulemaking will actually encourage many to rebuild and operate older equipment and result in reduced new heavy-duty vehicle sales to small-businesses and owner-operators because of unnecessary price increases associated with unappealing compliance options.

A. Current EPA rulemaking is flawed.

Last year, EPA and NHTSA proposed for the first time to establish GHG emissions and fuel efficiency standards for heavy-duty vehicles ("HD vehicles" or "trucks"). The rulemaking grew out of a request from President Obama to begin such a joint rulemaking contained in a May 21, 2010 White House communication titled "Presidential Memorandum Regarding Fuel Efficiency Standards." *See* http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards. The White House directive set forth numerous principles to guide those agencies in crafting the regulatory framework for developing such emissions and fuel efficiency standards for HD vehicles. One of those principles is to "Seek input from **all stakeholders**, while recognizing the continued leadership role of California and other States" (emphasis added).

OOIDA does not believe either agency respected the spirit of the Presidential directive concerning "input from all stakeholders" and, more importantly, that they complied with the various statutory requirements pertaining to adoption of administrative rules and regulations. *See, e.g.* Administrative Procedure Act ("APA"), 5 U.S.C. § 553; Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 603-604. To the point, both agencies could and should have more actively sought input from and considered the impact on HD truck buyers, especially small-business truckers – common end users of vehicles impacted by these proposed regulations – a substantial industry group directly affected by this rulemaking. Instead, EPA and NHTSA focused primarily on truck, engine, and component manufacturers, overlooking the fact that small-business and other truckers make the decision on whether to purchase a particular truck and ultimately pay the associated costs. In our view, this omission deprived EPA and NHTSA of meaningful input, insights and concerns from those substantial groups.

OOIDA would also like to point out that we filed comments last summer to the initial rulemaking initiated by EPA and NHTSA. We cautioned both agencies about numerous initiatives cloaked as environmentally friendly that could have adverse impacts on driver health and public safety. We also noted that a less costly and more productive means for achieving the stated goals existed. Unfortunately, both agencies ignored legitimate small-business concerns when they published their Proposed Rule on November 30, 2010. Additionally, while public hearings were held on the Proposed Rule, these were conducted in advance of its publication in the Federal Register, depriving both agencies of meaningful small-business input.

It is also important to note that this rulemaking cannot be viewed in isolation from other rulemakings and substantive regulatory changes. Small-business trucking has been inundated with no less than a dozen proposed rules (not including new final rules) in the past five months. Responding to all rulemakings effectively has been a challenge and required establishing priorities. When EPA published its proposed rule governing GHG emissions on new heavy-duty vehicles, it was evident that small-business concerns were not considered, a fact made clear when the associated Regulatory Impact Analysis statement claimed that there were no small-businesses affected. As such, our Association efforts were more productively used on other rulemakings where small business concerns were clearly being considered.

B. Proposed rule mandates technological solutions when other- less expensive options exist.

The current proposed rule will effectively be a mandate that truck buyers make choices in their purchasing decisions. Each option comes with a direct cost associated with the selected technology but also the added burden of the mandatory 12% federal excise tax that must be paid on each new heavy-duty vehicle purchased. The existing rulemaking made new vehicle acquisition costs estimates that may be appropriate for large motor carriers, but were not representative for owner-operators and small-business motor carriers. The following are examples of some of the selected options that must be included when purchasing a new heavy-duty vehicle:

- Speed-limiters
- Aerodynamic add-ons
- Wide-based/super single tires
- Automatic engine shutdown
- Anti-idle technology

While each technology separately or in combination can improve heavy-duty efficiency, final results depend upon how the vehicle is utilized by the end user. There are many examples where virtually none of the technologies are useful in achieving estimated goals. Most importantly, the reliance on technological solutions completely ignores the single most effective means of reducing GHG by improving fuel mileage – driver education and training.

The National Academy of Sciences study titled "*Technologies and Approaches to Reducing the Fuel Consumption of Medium-and-Heavy-Duty Vehicles*" postulates that driver training offers potential savings for the trucking industry rivaling the savings available from technology. The opportunities for fuel savings are significant and indicators are that this could be one of the most cost-effective and best ways to reduce fuel consumption.

It is widely known that driving behavior is one of the single most significant contributors to fuel efficiency. In fact a study done by *Dierlein* (2002) stated, "[the] most important fuel economy variable was the driver, who controls the idle time, vehicle speed, brake use, etc. The difference between a 'good" and a 'bad' driver can be up to 35% in fuel efficiency." Ignoring this most significant factor and instead relying on manufactured "add-ons" for heavy-duty vehicles to increase fuel efficiency can substantially increase vehicle acquisition costs for little or no

appreciable benefit – either from a fuel efficiency (or environmental) standpoint or a cost benefit standpoint. These additional costs, combined with unproven results, will lead to owner-operators and small-business truckers keeping their owner equipment in service for longer periods of time.

C. Conclusion.

Owner-operators and small-businesses truckers operate widely diverse trucking operations. Categorizing all trucking into a "one-size-fits-all" regulatory regiment, one which is more suitable to large motor carriers, will likely lead to those same entities keeping their older equipment for a longer period of time, reduce new truck sales, and fail to fully realize the stated goals of regulating GHG. Owner-operators and small-business truckers should not have rules crafted that needlessly drive up their operational costs simply because their business model has been ignored by regulatory agencies when promulgating rules.

Thank you again for this opportunity, and I look forward to answering any questions that you may have.

Mr. JORDAN. We thank you.
Doctor.

STATEMENT OF DAVID KREUTZER, PH.D.

Mr. KREUTZER. My name is David Kreutzer. I am research fellow in energy economics and climate change at the Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Chairman Jordan and Ranking Member Kucinich and distinguished members of the subcommittee, thank you for giving me this opportunity to address the question of the economic impact of carbon dioxide regulation. I would like to make several points regarding this impact. First, forcing cuts in CO_2 emissions reduces access to affordable energy.

The United States gets 85 percent of its energy from fossil fuels, and CO_2 is an unavoidable byproduct of using fossil fuels. Though substitutes exist, they are more expensive and cannot be turned on and off as needed.

In my written testimony there is a chart that compares that cost of coal-fired electricity to wind and solar power after these renewable costs have been adjusted for necessary backup power and for the long transmission distances. We see that wind and solar power are 80 percent to 280 percent more costly than coal. These higher costs will not help consumers and they will not help businesses of any size.

It should be noted that if recent low prices of natural gas continue, gas-fired electricity should have costs comparable to that of coal.

The second point is CO_2 restrictions will have a costly impact on the economy, regardless of the mechanism used to force the cuts. There are no free lunches.

Imagine a misguided policy to dramatically restrict the consumption of dairy products by way of a $3 million per gallon tax on milk. Perhaps one very rich milk lover will buy one gallon of dairy products per year. This will raise $3 million, a minor amount by Washington standards. However, it will devastate the dairy industry, imposing much higher costs than the tax revenue, and it is that higher cost that is the focus of the economic impact. The loss of jobs and income at the farm, at the processing plants, and at the retailers, that is the economic impact of such a policy.

A cap-and-trade program that issues an allowance for a single gallon of milk per year would have the same devastating impacts on the economy and the dairy industry as the $3 million per gallon tax, so they are two equivalent ways of doing the same damage.

In a similar vein, regulations that cut milk consumption to a single gallon, however they are devised, would also have the same devastating impact on the dairy industry and the overall economy.

So it is with CO_2. Whatever policy is used to cut CO_2 also cuts access to affordable fossil fuels and imposes similar economic losses.

At The Heritage Foundation, our analysis of the Waxman-Markey cap-and-trade bill concluded that it would have cut national income by over $9 trillion and cut employment by nearly 2½ million

jobs by 2035. A regulatory regime that targets similar CO_2 cuts will have a similarly large economic impact.

My third point is that regulatory mandates do not create free efficiency. Markets provide efficiency when and where it makes sense. Car advertisements tout their miles per gallon because consumers care about saving money. Appliance manufacturers pay to meet Energy Star standards because consumers care about saving money. But forcing consumers to buy products they wouldn't choose under the guise of saving them money either will not save them money overall or will force them to make costly and inconvenient lifestyle changes. Let me give a personal example to illustrate how mandated energy efficiency standards may not only be counterproductive, but also very annoying.

My old 1993 Maytag dishwasher used to use 9 gallons of hot water and take about an hour and 15 minutes to clean the dishes. Since then, efficiency mandates forced a reduction in hot water use, so the newer model uses 7 gallons of hot water, but takes at least an hour and 50 minutes to clean the dishes. The combined cost of the 2 gallons of water saved in both the purchase, water and sewer rate, plus the heating it up, is less than a dime; and that is in Arlington, where we have pretty high water rates.

Perhaps for some the tradeoff of 35 minutes for 10 cents is worth it. If so, they can buy the dishwasher that takes 2 hours. Or they could have used the 7 gallon cycle that was already available on my 1993 model dishwasher. For my wife and me, the 10 cents isn't worth it, but it is no longer a choice we get to make.

Businesses large and small are constantly making choices over the products and processes that give them the best results for the money they spend. These firms were hoveled when regulations, however well intentioned, forced unwanted choices on them. When these engines of economic growth are hoveled, income and employment suffer as well.

Thank you.

[The prepared statement of Mr. Kreutzer follows:]

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CONGRESSIONAL TESTIMONY

Job Creation and Carbon Dioxide Regulation

Testimony before
Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending
United States House of Representatives

April 6, 2011

David W. Kreutzer, Ph.D.
Research Fellow in Energy Economics and Climate Change
The Heritage Foundation

My name is David Kreutzer. I am Research Fellow in Energy Economics and Climate Change at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Energy and CO_2

Energy is the foundation of modern economies. This is as true now as it has ever been. Over the past 30 years, even as America switched economic emphasis from the production of energy-intensive commodities such as steel to services and high-tech production, our per-capita energy use has been essentially flat, and total energy use has grown along with population. In 2007, this per-capita consumption was the equivalent of nearly 60 barrels of petroleum per year.

The United States gets about 85 percent of its primary energy from fossil fuels, And carbon dioxide is an unavoidable product of fossil-fuel energy use. Cutting CO_2 emissions restricts energy use as well. Substitutes for fossil-fueled energy exist but are typically much more expensive.

Last year, the Center for Data Analysis at The Heritage Foundation compared the costs of wind and solar electricity to the cost of coal-fired electricity.[1] The figure below is taken from that report and shows that wind and solar power would be 80 percent to 280 percent more expensive than coal-fired electricity.

The High Cost of Renewable Energy Systems

Using wind and solar energy systems to provide 100 percent of electricity could double or triple household electric bills.

Average Electricity Bill for a Family of Four, by Exclusive Energy Source

Energy System	Costs Monthly	Costs Annually
Coal	$188.66	$2,263.90
Onshore wind	$339.58	$4,075.02
Offshore wind	$403.65	$4,843.75
Solar thermal	$504.03	$6,048.34
Solar photovoltaic	$717.82	$8,613.85

Sources: Heritage Foundation calculations, and U.S. Energy Information Administration, "2016 Levelized Cost of New Generation Resources from the Annual Energy Outlook 2010," at *http://www.eia.doe.gov/oiaf/aeo/electricity_generation.html* (March 30, 2010).

[1] David Kreutzer *et al.*, "A Renewable Electricity Standard: What It Will Really Cost Americans," Heritage Foundation *Center for Data Analysis Report* No. 10-03, May 5, 2010, at *http://www.heritage.org/Research/Reports/2010/05/A-Renewable-Electricity-Standard-What-It-Will-Really-Cost-Americans*.

Though the costs of some renewables may decline, their ability to substitute for conventional fuels in significant scale is questionable. The Congressional Budget Office's review of the American Clean Energy and Security Act of 2009—the Waxman–Markey cap-and-trade bill—noted: "Energy conservation and most renewable energy sources are projected to play relatively limited roles over the entire period, mainly because most kinds of renewable energy provide power intermittently."[2]

Cutting CO_2

Whether CO_2 is restricted by levying a tax, imposing caps, or by mandating regulations, the associated energy cuts will lead to lost economic activity. The resulting losses in national income will be similar for different approaches even though regulation may not generate government revenues.

Under a regime that taxes CO_2 directly, the transfer of revenue is not the immediate source of economic damage. The damage is a result of the behavioral changes brought about by the tax.

For instance, imagine that a $3 million-per-gallon excise tax on milk would limit consumption to one gallon per year for what we can assume would be one very rich milk lover. The tax revenue in this case would be $3 million per year. Rebating a penny to each of 300 million Americans would make this tax and rebate a revenue-neutral policy. However, the damage to the economy would be many times the $3 million. If milk consumption were forced down to one gallon per year, the dairy industry would be devastated. Milking parlors would be scrapped, herds would be slaughtered, and dairy processors would have to write off the value of their equipment and lay off workers. These would be the sources of the economic damage from our hypothetical tax on milk.

Regulations that would have the effect of reducing milk consumption to one gallon per year would have a similarly devastating impact on the dairy industry and our economy even though they generate no government revenue. In addition, for the same reduction in CO_2 emissions, regulations are likely to be even costlier than a tax or a cap-and-trade regime because such regulation reduces the market flexibility needed to most efficiently achieve the targets.

The Environmental Protection Agency's proposal to "tailor" the Clean Air Act (CAA) exposes the significant administrative costs of the regulatory approach. The EPA estimates that the Clean Air Act would raise the number of entities needing Title V permits from the current level of about 15,000 to 6 million.[3]

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[2] Congressional Budget Office, "The Costs of Reducing Greenhouse-Gas Emissions," November 23, 2009, p. 10, at *http://www.cbo.gov/ftpdocs/104xx/doc10458/11-23-GreenhouseGasEmissions_Brief.pdf* (April 4, 2011).

[3] Robin Bravender, "EPA Issues Final 'Tailoring' Rule for Greenhouse Gas Emissions," *The New York Times*, May 13, 2010, at *http://www.nytimes.com/gwire/2010/05/13/13greenwire-epa-issues-final-tailoring-rule-for-greenhouse-32021.html* (April 4, 2011).

Cost of CO_2 Cuts

When the Center for Data Analysis at The Heritage Foundation analyzed the economic impact of the Waxman–Markey cap-and-trade bill, it found that the legislation, if enacted, would have:

- Cut national income (gross domestic product, or GDP) by a cumulative total of $9.4 trillion between 2012 and 2035 and
- Would have reduced employment by nearly 2.5 million jobs by 2035.[4]

Even when using the Intergovernmental Panel on Climate Change's estimates of the sensitivity of world temperature to CO_2 levels, the reductions in CO_2 wrought by Waxman–Markey would have moderated temperature increases by only thousandths of a degree by 2050 and a few tenths of a degree by 2100.

Another approach to restricting CO_2 emissions would be a renewable energy standard. A typical RES sets standards for minimum fractions of electricity that must be generated from renewable sources and ratchets up this minimum over time.

Last year, the Center for Data Analysis analyzed the economic impact of an RES that increased by 1.5 percentage points per year the fraction of electricity that must come from renewable sources starting in 2012 and going to 2035.[5] According to this analysis, such an RES would:

- Cause employment to track about 1 million jobs lower for the years 2016–2035,
- Reduce national income (GDP) by a cumulative $5.2 trillion from 2012–2035, and
- Add $10,000 to a family of four's share of the national debt by 2035.

EPA Regulation of CO_2

The particular regulations of CO_2 under the Clean Air Act are still being developed by the EPA. However, if the cuts in CO_2 under the CAA are similar in magnitude to those targeted under Waxman–Markey or an RES, we could expect similar impacts on employment, income, and national debt.

Frequently, regulations are presented as efficiency improvements, implying that the regulation will cost little or may even save consumers more on their energy bills than the increased cost of the products. This reasoning implies that consumers are systematically wasting money.

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[4] William Beach *et al.*, "The Economic Impact of Waxman–Markey," Heritage Foundation *WebMemo* No. 2438, May 13, 2009, at *http://www.heritage.org/Research/Reports/2009/05/The-Economic-Impact-of-Waxman-Markey*.

[5] David Kreutzer *et al.*, "A Renewable Electricity Standard."

Consumers already have a wide variety of products and services with different energy efficiencies. They can buy vehicles whose gas mileage varies from under 15 miles per gallon to over 50 miles per gallon. Someone who buys a 10,000-square-foot house could have purchased a 1,000-square-foot house instead. Anybody who has recently purchased an appliance will be familiar with the Energy Star ratings that clearly spell out expected energy costs for competing models and brands.

However, forcing people to buy the most energy-efficient model does not mean that everybody is better off. More efficient models usually cost more, may lack desired features, and can be less reliable. The relative valuation of the different characteristics varies from person to person and situation to situation. A single focus on watt-hours can blind regulators to other important features.

A personal example is a good illustration. My 1993 Maytag dishwasher used about nine gallons of hot water and took about an hour and 15 minutes to run a load. The current model uses seven gallons but takes at least an hour and 50 minutes to run a load. The cost of buying, heating, and disposing of those two gallons is less than 10 cents. Further, the old dishwasher already had a cycle that used seven gallons.

In other words, the efficiency mandates have reduced the options available to consumers and forced a trade-off of 40 minutes of time for less than a dime. In addition, the efficiency rules preclude the possibility of a firm's developing a dishwasher that uses 10 gallons of hot water but takes only 20 minutes for an effective cycle.

Limiting choice does not make life easier or reduce costs for consumers or for businesses. However if CO_2 cuts are imposed, they will reduce access to energy and reduce income and growth.

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Mr. JORDAN. Thank you, Doctor.
Mr. Doniger.

STATEMENT OF DAVID D. DONIGER

Mr. DONIGER. Thank you, Mr. Chairman. The other witnesses that you are hearing today are pursuing, I think, a false story line that demonizes the Environmental Protection Agency and the amount of steps it is taking to reduce carbon pollution.

The EPA is doing just what Congress told the Agency to do when it wrote the Clean Air Act. Congress gave EPA the duty to keep abreast of science and to act when that science shows pollution is endangering our health and welfare. The endangerment finding is backed by solid authority. America's own most authoritative scientific body, the National Academy of Sciences, said this in 2010: Some scientific conclusions or theories have been so thoroughly examined and tested and supported by so many independent observations and results that their likelihood of being subsequently found wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts. This is the case for the conclusion that the earth system is warming and that much of the warming is likely due to human activities.

Congress has never done what you are about to do on the floor today, which is to repeal an expert agency's formal scientific finding of the threat to health and welfare, and politicians don't prosper long when they put themselves in the position of denying modern science. Repealing the scientific endangerment finding would be like repealing the Surgeon General's finding that tobacco smoke causes cancer.

H.R. 910 will harm the health and the pocketbook of millions of Americans. It is bad policy and it is deeply unpopular.

The Clean Air Act's critics get the economics of environmental safeguards completely backward. Over the past 40 years, the American economy has tripled in size, while we have cut some forms of pollution by more than 60 percent. The Clean Air Act doesn't demand the impossible; it requires only pollution controls that are achievable and affordable.

EPA has taken great care to protect American families and American small businesses. In fact, EPA set carbon pollution standards for new cars, SUVs and over-the-road trucks, the kinds of cars that small businesses buy, and diesel and saved billions of dollars for American families and small businesses by cutting their gasoline and diesel fuel bills $3,000 a vehicle, $7,400 a vehicle for the second round of standards if EPA is allowed to set those, and that is with gas prices at $2.61. I would like to have that back again. The figures will be somewhat bigger with today's gas prices.

Lobbyists for some of America's biggest polluters are falsely claiming that the Clean Air Act's carbon requirements will fall on millions of apartments, office buildings, farms, churches. The truth is otherwise. EPA has exempted all small sources of carbon pollution from permit requirements. Instead, directly in line with congressional intent, EPA has focused the permit requirements on the largest, new and expanded sources of carbon pollution, such as power plants, oil refineries, and other big polluters.

EPA has been sued by dozens of trade associations, companies, and right-leaning advocacy groups. But when put to the test of proving their claims, they fail; the courts have found no merit in their claims of harm. This is no surprise because the court challenges, like lobbyists who come up here on the Hill, are seeking not relief for the small-fries, but special favors for big polluters; power plants, oil refineries, and the like. These pollution giants can't complain to the courts about being harmed by EPA's exemption of all the smaller sources. Their attempt to hide behind the skirts of small businesses should fare no better here on the Hill.

Congressmen deny science at their peril. Likewise, they buy into phony story lines about burdens on small businesses at their peril. As I have mentioned, large majorities of the American people support the Clean Air Act and want EPA to do its job to control air pollution. They specifically want EPA to do its job to control carbon air pollution. I have appended the polling data to my testimony. It is food for thought and I welcome questions.

[The prepared statement of Mr. Doniger follows:]

TESTIMONY OF DAVID D. DONIGER
POLICY DIRECTOR, CLIMATE CENTER
NATURAL RESOURCES DEFENSE COUNCIL

HEARING ON ASSESSING THE IMPACT OF EPA GREENHOUSE GAS REGULATIONS ON SMALL BUSINESS BEFORE THE SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

APRIL 6, 2011

Thank you, Chairman Jordan and Ranking Member Kucinich, for the opportunity to testify today. My name is David Doniger, and I am policy director and senior attorney for the Climate Center of the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.2 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I have worked at NRDC since 1978, except during Clinton administration, when I served in the White House and the Environmental Protection Agency. Over the last decade, I represented NRDC in the Supreme Court case *Massachusetts v. EPA* and continue to do represent NRDC in the agency proceedings and court cases on carbon pollution since that ruling.

Mr. Chairman, the witnesses you have heard before me, and many members of this panel, are pursuing a false story-line that demonizes the Environmental Protection Agency and the modest steps it is taking to begin reducing dangerous carbon pollution. Contrary to that false story-line, EPA is doing just what Congress told the agency to do when it wrote the Clean Air Act. Congress gave EPA the duty to keep abreast of developing science, and to act when science shows that pollution endangers our health and welfare. EPA is following the overwhelming weight of climate science, and is requiring only the biggest polluters to use only available, affordable, and cost-effective pollution control measures. EPA is taking great care to protect American families and American small businesses that are the focus of this hearing. In fact, EPA has set carbon pollution standards for new cars, SUVs, and over-the-road

trucks that will *save billions of dollars* for American families and small businesses by cutting their gasoline and diesel fuel bills. And EPA has gone to great lengths *to exempt the millions of American small businesses from any obligations* as it begins to address carbon pollution from only the very largest industrial sources, such power plants and oil refineries.

In pursuing this false story-line, the majority in this House is sharply out of step with the majority of the American people, who in poll after poll – both nationally and in districts like yours – strongly back the actions EPA is taking to protect their health, including the agency's actions on carbon pollution, by margins of well over 60 percent. (Data on this polling is attached to my testimony.) It is not too late for the House to take a deep breath and reconsider the course you are on.

Denying the Science

Mr. Chairman, let me begin with a word on the extreme legislation, H.R. 910, that the House of Representatives is on the verge of adopting this week. With this bill, House members would take the unprecedented step of repealing an expert agency's formal scientific finding of a threat to health and welfare. Congress has never done this before, and you should not start now.

The EPA endangerment finding is backed by solid scientific authority. For example, America's own most authoritative scientific body, the National Academy of Sciences (NAS), concluded in 2010:

> Climate change is occurring, is caused largely by human activities, and poses significant risks for – and in many cases is already affecting – a broad range of human and natural systems. . . . Most of the warming over the last several decades can be attributed to human activities that release carbon dioxide (CO_2) and other heat-trapping greenhouse gases (GHGs) into the atmosphere. The burning of fossil fuels – coal, oil, and natural gas – for energy is the single largest human driver of climate change, but agriculture, forest clearing, and certain industrial activities also make significant contributions.[1]

The NAS report also stated:

[1] National Research Council, *Advancing the Science of Climate Change* 3 (2010), http://books.nap.edu/openbook.php?record_id=12782&page=3.

> Some scientific conclusions or theories have been so thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts. This is the case for the conclusions that the Earth system is warming and that much of this warming is very likely due to human activities.[2]

And here, concisely put, are the conclusions of the U.S. Global Change Research Program (USGCRP), which is mandated by Congress in the Global Change Research Act (15 U.S.C. §§ 2921-2961) to coordinate and integrate climate change federal research:

> Climate changes are underway in the United States and are projected to grow. Climate-related changes are already observed in the United States and its coastal waters. Widespread climate-related impacts are occurring now and are expected to increase. Climate changes are already affecting water, energy, transportation, agriculture, ecosystems, and health. Crop and livestock production will be increasingly challenged. Coastal areas are at increasing risk from sea-level rise and storm surge. Risks to human health will increase. Climate change will interact with many social and environmental stresses. Thresholds will be crossed, leading to large changes in climate and ecosystems. Future climate change and its impacts depend on choices made today. The amount and rate of future climate change depend primarily on current and future human-caused emissions of heat-trapping gases and airborne particles. Responses involve reducing emissions to limit future warming, and adapting to the changes that are unavoidable.[3]

EPA's findings – that industrial emissions of greenhouse gases have contributed to the build-up of carbon dioxide and other greenhouse gases in the atmosphere, that rising concentrations are causing climate change, and that climate change impacts endanger both public health and welfare – rest on the solid foundation of the NAS and USGCRP reports and reports by a host of other national and international scientific bodies. They were reached after two full rounds of public comment in which EPA heard and responded to every possible public concern. This was a model of transparent decision-making and is precisely how our government should operate.

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[2] *Id.* at 21-22.

[3] U.S. Global Change Research Program, *Global Climate Change Impacts in the United States* 12 (2009) http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf.

Politicians do not prosper long when they put themselves in the position of denying modern science. Repealing EPA's scientific determination that carbon pollution causes dangerous climate change would be like repealing the Surgeon General's finding that tobacco smoke causes cancer. H.R. 910 will harm the health and the pocketbook of millions of Americans. It is both bad policy and deeply unpopular. I urge you to step back from this abyss when the bill goes to the floor.

The Clean Air Act: One of America's Best Investments

The Clean Air Acts critics get the economics of environmental safeguards completely backwards. Rather than hurting economic growth, four decades of data show that the Clean Air Act *helps our economy grow* while it *protects the health of millions of Americans*.

Over the past 40 years, the American economy has tripled in size while we've cut some forms of pollution by more than 60 percent. That's because the Clean Air Act does not demand the impossible – it requires only pollution controls that are achievable and affordable. That's just as true when setting carbon pollution standards as it has been for other kinds of pollution.

In an extensively peer-reviewed report,[4] EPA recently documented the following health and environmental benefits just from the Clean Air Act's 1990 amendments:

- In 2010 alone, we gained approximately $1.3 trillion in public health and environmental benefits, for a cost of only $50 billion. The ratio of benefits to costs in 2010 is more than 26 to 1.
- In 2020, we will have a staggering gain of approximately $2 trillion in benefits, at a cost of $65 billion. The ratio of benefits to costs in 2020 will be more than 30 to 1.

I am pretty sure everyone here would like to have returns like these in our own portfolios.

The table below shows EPA's estimates for the associated health benefits in 2010 and 2020, as well as cumulative figures for the decade estimated by NRDC.

[4] EPA, Benefits and Costs of the Clean Air Act, Second Prospective Study – 1990 to 2020 (Mar. 1, 2011), http://www.epa.gov/air/sect812/prospective2.html.

Avoided Health Impacts (PM2.5 & Ozone Only)*	Pollutants	Year 2010	Year 2020	Estimated Cumulative Benefits 2010-2020 (NRDC)**
PM 2.5 Adult Mortality	PM	160,000	230,000	2,145,000
PM 2.5 Infant Mortality	PM	230	280	2,805
Ozone Mortality	Ozone	4,300	7,100	62,700
Chronic Bronchitis	PM	54,000	75,000	709,500
Acute Bronchitis	PM	130,000	180,000	1,705,000
Acute Myocardial Infarction	PM	130,000	200,000	1,815,000
Asthma Exacerbation	PM	1,700,000	2,400,000	22,550,000
Hospital Admissions	PM, Ozone	86,000	135,000	1,215,500
Emergency Room Visits	PM, Ozone	86,000	120,000	1,133,000
Restricted Activity Days	PM, Ozone	84,000,000	110,000,000	1,067,000,000
School Loss Days	Ozone	3,200,000	5,400,000	47,300,000
Lost Work Days	PM	13,000,000	17,000,000	165,000,000

*Chart from Environmental Protection Agency, The Benefits and Costs of the Clean Air Act from 1990 to 2020, Summary Report, March 2011, p. 14.

**To estimate the cumulative life savings and health benefits of the 1990 amendments from 2010 to 2020, NRDC assumeda roughly linear growth rate to interpolate benefit estimates between EPA's estimates for years 2010 and 2020 and then aggregated the annual estimates across the period.

EPA's Carbon Pollution Safeguards Will Help, Not Hurt, America's Small Businesses

So now let's turn to the impacts of EPA's carbon pollution safeguards on small businesses. Contrary to the false story-line that you have heard in letters to Chairman Issa and from other witnesses here today, the fact is that EPA's actions to curb carbon pollution *totally exempt small sources.* And the most important step EPA has taken so far – the landmark clean car standards – will *actually save thousands of dollars* for American families and small businesses.

Let's start with the myth that EPA is coming after every hot dog stand in the nation. This charge has been repeated, ad nauseum, by countless industry lobbyists and it appears over and over in their submissions responding to Chairman Issa's solicitation of alleged regulatory burdens. For example, in its January 11th letter, the Heritage Foundation claimed: "The EPA has acknowledged that the endangerment finding and concomitant regulations will, for the first time, *impose costly requirements*

on millions of businesses and other 'facilities,' including *apartment buildings, office buildings, and even churches. Farmers will also be entangled in costly regulations.*"[5]

There's only one problem. The claims are false. Every one of the Heritage Foundation's charges, italicized above, is just plain wrong. The truth is that EPA has *exempted* all small sources of carbon pollution from permit requirements for new and expanded sources. Instead, directly in line with congressional intent, EPA has focused those permit requirements on only the largest new and expanded sources of carbon pollution, such as power plants, oil refineries, and other big polluters.

Let's be clear about what the Clean Air Act actually requires. When a company wants to build or expand a big plant that will operate for decades, it is only common sense to take reasonable steps to reduce how much dangerous pollution it will put into the air. So for decades, the Clean Air Act has required that someone – either the state's environmental agency or the EPA as a last resort – review what the new or expanded plant can reasonably do to reduce its pollution, and put achievable and affordable emission limits into a construction permit.

Congress adopted this sensible safeguard in the 1977 Clean Air Act amendments, and it applies to each pollutant that is "subject to regulation" under the Act. Starting this year, when EPA's greenhouse gas standards for new cars took effect – and I will say more about those clean car standards in a moment – the construction permit review of available and affordable pollution control measures also applies to the largest sources of carbon pollution, like new power plants, oil refinery expansions, or other large projects. This is the same review that has been undertaken for decades other pollutants.

What does EPA mean by "big" carbon pollution sources? The review of carbon pollution controls that began in January applies only to new sources or expansions that already need a permit because they emit large amounts of other pollutants, and even then only if they will also increase carbon pollution by at least 75,000 tons/year. Later this year, permits will also be required for new or

[5] Letter from James Gattuso & Diane Katz, Heritage Foundation, to Chairman Darrell Issa, p.6 (Jan. 11, 2011) (emphasis added).

expanded sources that *don't* need permits for other pollutants but will increase carbon pollution by at least 100,000 tons/year.

In crafting these thresholds, EPA has taken great pains to be sure that only the largest new and expanded industrial sources will be reviewed. How high are these thresholds? High enough to exempt everyone the Heritage Foundation claims to be concerned about – *"apartment buildings, office buildings, and even churches."* America's farmers are also exempted. Even the largest animal feedlot operation in America has greenhouse gas emissions below these levels. The truth is, small sources simply are not covered.

Yet EPA has been sued by dozens of trade associations, companies, and right-leaning advocacy groups representing the country's biggest polluters. Last year those groups, together with the State of Texas, tried to get a "stay" – like a preliminary injunction – from the U.S. Court of Appeals in Washington. To get a stay, you have to show that you will be irreparably harmed if Clean Air Act safeguards are not blocked. They filed hundreds of pages of briefs and affidavits attempting to prove the claims they have made in their letters to Chairman Issa.

But when put to the test of *proving* those claims, they failed. After sorting through all the papers, the court found no merit in their claims of harm from the requirement to put available and affordable pollution control technology on big new factories. The December 10, 2010, order denying the stays says this:

> Petitioners have not satisfied the stringent standards required for a stay pending court review. ... Specifically, with regard to each of the challenged rules, petitioners have not shown that the harms they allege are certain, rather than speculative, or that the alleged harms will directly result from the actions which the movants seek to enjoin.

This is no surprise, because the court challengers – like the lobbyists who come up here – are seeking not relief for the small fries, but special favors for the biggest polluters – power plants, oil refineries, and the like. These pollution giants cannot complain to the courts about EPA's exempting

smaller sources, because the giants are not harmed by it. Their attempt to hide behind the skirts of small businesses should fare no better here on the Hill.

After all, it's hard to hide an oil refinery behind a donut shop.

Even if some of the witnesses here today admit that small businesses are exempt from EPA's carbon permit review, I expect to hear claims that they still will be affected indirectly because the large sources will have to pass on supposedly crushing costs in electricity and gasoline costs, for example. That is also a false story-line for two reasons.

First, the Clean Air Act does not demand the impossible. It limits pollution controls on the big sources to what is *available* and *affordable.* This is one reason why our economy has tripled in size over the last 40 years while we've reduced many forms of pollution by 60 percent or more.

Second, because the costs of carbon safeguards will be minimal, any costs actually passed along to small businesses will be very small. Let's look first at small *manufacturing* firms, whose energy costs are likely to be much larger than for the average small business. A federal interagency study found in 2009 that for 96 percent of *all* manufacturing firms – firms that employ 93 percent of America's 13 million manufacturing workers – energy costs average *less than 2 percent* of the value of the goods they produce.[6] That means the maximum effect from the carbon pollution safeguards at power plants will be only a small percentage change in an already small percentage of manufacturing costs.

The impacts on *non*-manufacturing small businesses, with lower energy costs to start with, will be even less. And these businesses have opportunities to lower their overall energy bills significantly through smart programs to make energy use more efficient – to cut air conditioning, heating, and lighting costs in buildings, for example.

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[6] The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive Trade-Exposed Industries," p. 2 (Federal Interagency Report, December 2009, available at: http://www.epa.gov/climatechange/economics/pdfs/InteragencyReport_Competitiveness-EmissionLeakage.pdf.

And this brings me to my final example: thanks to EPA's carbon pollution standards for new cars, small businesses will save big-time at the gas pump. Under the landmark Clean Car Agreement brokered by the Obama administration, EPA, acting together with the Department of Transportation (DOT) and California, has set combined carbon pollution and fuel economy standards that will lower gasoline bills for American small businesses and families by *billions of dollars*. The first round of standards, for 2012-2016 model cars, SUVs, vans, and pick-ups, will use so much less gasoline that small business owners will save as much as $3,000 over the life the vehicle. Carbon pollution from new vehicles will be cut by 30 percent by 2016, and over the life of the vehicles the country will save *1.8 billion barrels of oil.*[7]

EPA's clean car standards for 2017-2025 will save small businesses even more – as much as another $7,400 per car, and cut national oil dependence by billions of barrels more.

I should note that these calculations were based on gasoline costs starting at $2.61/gallon! Where can you find that anymore? At today's and tomorrow's higher gas prices, the savings will be even greater.

You've heard complaints here today from a representative of the trucking industry. But EPA's carbon pollution safeguards mean huge savings for them. That's because EPA is also working with DOT and California on the first-ever carbon pollution and fuel economy standards for over-the-road trucks. Those standards, proposed last year, will save the owner of a heavy-duty truck up to *$74,000* over the truck's useful life. The nation will save 500 million barrels of oil over the same period.[8] The money

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[7] EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks (Apr. 2010), http://www.epa.gov/otaq/climate/regulations/420f10014.htm.

[8] EPA and NHTSA Propose First-Ever Program to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium- and Heavy-Duty Vehicles: Regulatory Announcement (Oct. 2010), http://www.epa.gov/otaq/climate/regulations/420f10901.htm#2.

saved on diesel fuel will stay in the pockets of truck and fleet owners, will make them more competitive, and will enable them to pass on savings to every American in lower costs for food and other goods.

To help even more, last Friday President Obama announced a new initiative specifically to help small trucking companies get access to the new cleaner and more fuel efficient trucks at group rates, to match the prices available to larger companies, and to assist them with financing those purchases.[9]

Conclusion

Chairman Jordan, Ranking Member Kucinich, and members of the subcommittee. The Clean Air Act has been a tremendous investment for American public health and for the American economy. Congress wrote the Clean Air Act to safeguard us not only against the pollutants we knew about 40 years ago, but also from the pollution that modern science demonstrates is dangerous. That includes the carbon pollution – the greenhouse gas emissions – that EPA is now beginning to address under the nation's air pollution law. As the Supreme Court's found, Congress gave EPA a job to do, and thankfully EPA is now tackling that long-overdue task.

Congressmen, you deny the science at your peril. Likewise, you buy into phony story-lines about burdens on small business at your peril. As I mentioned at the outset, large majorities of the American people support the Clean Air Act and want EPA to do its job to control air pollution. They specifically want EPA to do its job to safeguard us from *carbon* pollution. I've appended this polling data to my testimony as food for thought, and I welcome your questions.

[9] White House, FACT SHEET: National Clean Fleets Partnership (Apr. 1, 2011), http://www.whitehouse.gov/the-press-office/2011/04/01/fact-sheet-national-clean-fleets-partnership.

February 16, 2011

American Voters Strongly Oppose Congressional Action Against Clean Air Standards

Voters Want EPA, Not Congress, To Set Standards

To: The American Lung Association and Interested Parties
From: Mike Bocian and Andrew Baumann, Greenberg Quinlan Rosner
Jon McHenry and Dan Judy, Ayres, McHenry & Associates

A new bipartisan national survey of likely 2012 voters[1] finds American voters at odds with those in Congress pushing to strip the Environmental Protection Agency of its authority to update air pollution standards, including Carbon Dioxide.

An overwhelming bipartisan majority wants the EPA to set stricter limits on air pollution, with about three-quarters of voters backing tougher standards on Mercury, smog and Carbon Dioxide as well as higher fuel efficiency standards for heavy duty trucks.

More important, voters explicitly reject Congressional efforts to stop the EPA from updating these standards both as a whole and in a debate specific to Carbon Dioxide standards. After a balanced debate on the issue, with language based on that recently used by supporters of Congressional action, a two-to-one majority opposes Congressional action to stop the EPA. This includes a vast majority of independents who, on this issue, look much more like Democrats than Republicans.

Key Findings

1. **Voters overwhelmingly support the EPA updating Clean Air Act standards.** 69 percent of voters think the EPA should update CAA standards with stricter limits on air pollution.

Moreover, on specific elements of the CAA:

- 79 percent support stricter limits on Mercury.
- 77 percent support stricter limits on smog.
- 77 percent support stricter limits on Carbon Dioxide.
- 74 percent support tougher fuel efficiency standards on heavy duty trucks.

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[1] Memo based on a national survey of 1021 likely 2012 voters conducted for the American Lung Association by Greenberg Quinlan Rosner and Ayres, McHenry & Associates, February 7-14, 2011. Margin of error for the full sample is 3.1%. For half samples it is 4.4%.

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2. **Voters overwhelmingly oppose Congressional action that impedes EPA from updating clean air standards.** 68 percent say that Congress should NOT stop the EPA from updating the four standards listed above. When asked specifically about updating standards for Carbon Dioxide, 64 percent say that Congress should NOT stop the EPA.

- After hearing a balanced debate on the issue, with messages based on the actual language used by opponents and supporters of the EPA, strong majorities continue to oppose Congressional action to stop the EPA. 63 percent oppose Congressional action on all four standards while 60 percent oppose Congressional action when the debate centers specifically on Carbon Dioxide. Independents oppose Congressional action by a two-to-one margin in both debates.

3. Voters trust EPA more than Congress to set clean air standards. Even after hearing strong arguments from opponents of the EPA, EPA supporters win every element of this debate. Taken as a whole, the survey clearly indicates that voters strongly trust the EPA to deal with clean air standards more than Congress.

- Congress is significantly less popular than either the EPA or the Clean Air Act.
- Only 18 percent of voters think the EPA is exceeding its legal mandate.
- A bipartisan 69 percent majority believes that EPA scientists, rather than Congress, should set pollution standards. This is despite opposing language arguing that our elected representatives in Congress would do a better job than "unelected bureaucrat at the EPA."
- By a nearly 20-point margin, voters believe that updated EPA standards will boost, rather than harm, job creation.

EPA More Popular Than Congress, Protecting Air Quality More Important Than Cutting Regulations

While this survey confirms that "getting the economy moving and creating jobs" is the most important issue for voters (95 percent rate it as extremely or very important), some in Congress are missing the mark by centering their efforts so heavily on cutting EPA regulations, particularly on stopping the EPA from updating standards under the Clean Air Act. In fact, protecting air quality is seen, by 17 points, as a higher priority than "reducing regulations on businesses." And voters believe that updating clean air standards is more likely to create jobs by leading to innovation rather than cost jobs by restricting businesses by 55 to 36 percent.
Meanwhile, the EPA enjoys relatively high ratings with a net +9 favorability rating (38 percent favorable, 29 percent unfavorable) compared to Congress (-13). The Clean Air Act has even higher net ratings at +17.

Consequently, voters want the EPA, and not Congress, to set pollution standards. An overwhelming 69 percent majority (including sizeable majorities of Democrats, independents and Republicans) agrees that "Scientists at the EPA should set pollution standards, not politicians in Congress" while only 21 percent agree that "our elected representatives in Congress should set pollution standards, not unelected bureaucrats at the EPA."

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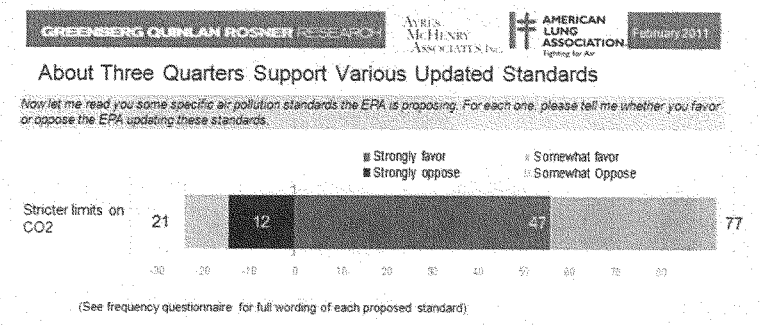
Multiple Polls Show Americans Support EPA and Carbon Limits; Oppose Efforts to Block EPA

Recent polling by Democratic and Republican polling firms demonstrates clear support across party lines for the Environmental Protection Agency and the Clean Air Act.

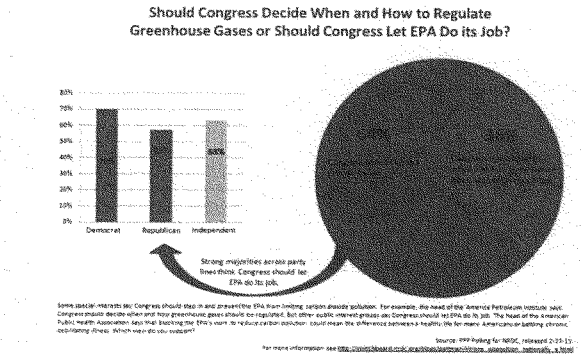
Greenberg Quinlan Rosner and Ayres, McHenry & Associates polling of 1,021 likely 2012 voters conducted for the American Lung Association February 7-14, 2011 with a margin of error for the full sample of 3.1%.

- More than three out of four voters support the EPA setting tougher standards carbon dioxide, including 78% of Independents and 62% of Republicans.



Public Policy Polling (PPP) February 18th-19th national and district-specific polling for the Natural Resources Defense Council:

- 64 percent of Americans -- including 57 percent of Republicans and 63 percent of Independents -- think "Congress should let the EPA do its job" versus "Congress should decide when and how greenhouse gases should be regulated," which was favored by only about a third of Americans (36 percent).

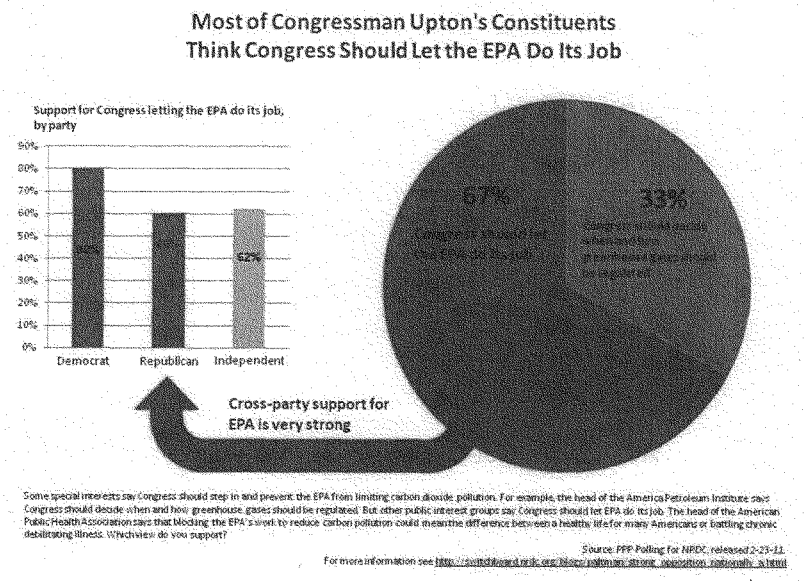


- More than two thirds of Americans (68 percent) -- including 54 percent of Republicans and 59 percent of Independents -- said the EPA should move ahead to "reduce carbon pollution without delay."

Findings for Congressional Districts

PPP polling of 27 congressional districts reveals similar patterns of support for the EPA, the Clean Air Act and limiting carbon pollution. For example, in Chairman Fred Upton's district (MI-6)

- 67 percent of registered voters -- including 60 percent of Republicans -- agreed with the statement that "Congress should let the EPA do its job," as opposed to the minority who believe that "Congress should decide" what actions are taken to curb carbon pollution.



Polling sources:

Greenberg Quinlan Rosner and Ayres, McHenry & Associates polling of 1,021 likely 2012 voters conducted for the American Lung Association February 7-14, 2011 with a margin of error for the full sample of 3.1%. For details: http://www.lungusa.org/healthy-air/outdoor/resources/clean-air-survey.html.

Public Policy Polling national and 19 district survey conducted for NRDC February 18-29 with including the following districts: Joe Walsh, IL-8; Robert Dold, IL-10; and Bobby Schilling, IL-17; Daniel Benishek, MI-1; Mike Rogers, MI-8; Michele Bachmann, MN-6; Chip Cravaack, MN-8; Denny Rehberg (MT-At Large); Speaker John Boehner, OH-8; Patrick Tiberi, OH-12; and Jim Renacci, OH-16; Jason Altmire, PA-4; Jim Gerlach, PA-6; Patrick Meehan, PA-7; Lou Barletta, PA-11; Robert Hurt, VA-5; Scott Rigell, VA-2; Reid Ribble, WI-8; and Sean Duffy, WI-7. For details: http://switchboard.nrdc.org/blogs/paltman/2-23%20Poll%20Table.pdf and all reports: http://bit.ly/fbzBaO.

Public Policy Polling 9-district survey (including Chairman Upton' and districts in of registered voters in 9 districts conducted for NRDC February 4-5. Including following districts: Mary Bono Mack (CA-45); Cory Gardner, (CO-4); Adam Kinzinger, (IL-11); Charlie Bass, (NH-2); Leonard Lance, (NJ-7); Mike Doyle, (PA-14); Charles A. Gonzalez, (TX-20); and Gene Green, (TX-29.) For details including press release and individual polling reports: http://switchboard.nrdc.org/blogs/paltman/voters_in_uptons_and_other_hou.html.

Mr. JORDAN. Thank you, Mr. Doniger.

Unfortunately, Mr. Holman, we are going to have to have you wait, and it is going to be a while, and I do apologize. They just called votes 9 minutes ago. We have 6 minutes left in this vote, so we have to go vote, so we are going to recess. But it may be a while. I am guessing in the 3:15, 3:30, 3:40 range. So with this series of votes going to take a while, I need to stop by the Republican conference, and either myself or—I have not talked to the gentlelady from New York yet—Ms. Buerkle will be back to get things rolling around 3:30. So we are going to stand in recess.

[Recess.]

Ms. BUERKLE [presiding]. Good afternoon. We will resume our hearing. I apologize for the delay for all of you.

Mr. Holman, you are now recognized for your opening speech.

STATEMENT OF KEITH HOLMAN

Mr. HOLMAN. Thank you. Ms. Buerkle, sitting in for Chairman Jordan and members of the subcommittee, good afternoon and thank you for giving me the opportunity to testify today. My name is Keith Holman and I am the deputy director of the National Lime Association.

NLA is the trade association for manufacturers of calcium oxide and calcium hydroxide, commonly known as lime. So just to clear up any misconceptions, we are not the green little citrus fruit and we are not associated with Lyme Disease.

For the lime industry, particularly our smaller companies, EPA's greenhouse gas rules are having a big impact. Lime plants generate CO_2 emissions both from the fuel that they use and from what you could call the roasting process that converts limestone into lime. All lime plants are now subject to greenhouse gas permitting requirements when they are modified. So even though the GHG rules took effect only 3 months ago, we are already seeing a chilling effect on plants to modernize or expand lime plants because of great uncertainty surrounding GHG permitting.

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. These small lime companies face intense competition and they are particularly sensitive to increases in regulatory costs. For this reason, when EPA planned a Clean Air Act rulemaking back in 2002 that would impose stringent new requirements on lime plants, NLA was able to persuade EPA to convene what is known as a small business advocacy review panel under the Regulatory Flexibility Act. 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.

EPA convened the lime panel in January 2002. Seven of the nine 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 in Washington, DC. The companies were able to talk directly to EPA, as well as with representatives of the Office of Advocacy and with the White House Office of Management and Budget.

Because of the panel process, the final rule was tough, but something that our small lime plants could live with. Several improve-

ments to the rule were only made possible because small lime companies were able to meet face-to-face with EPA and provide critical information. Not surprisingly, when EPA announced in 2008 that it planned to regulate GHGs under the Clean Air Act, many industries, including the lime industry, wanted EPA to convene a panel. However, instead of convening a panel, EPA simply chose to have a public outreach meeting, and only after it had proposed three rules under GHG program: the first the endangerment finding, the vehicle tailpipe rule, and the so-called tailoring rule. EPA argued that it was not required to conduct a panel for these rulemakings.

Whether or not EPA could legally choose not to convene a panel, it was clearly wrong not to do so. EPA held the panel meeting in November 2009, well after the 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 dialog with the Agency about the actual design of the rules.

NLA followed up the meeting with written comments to EPA about the design of the tailoring rule. The tailoring rule proposed to defer GHG permitting requirements for plants that had GHG emissions below a certain threshold. Because there is no known way to avoid generating CO_2 when limestone is heated and converted into lime, NLA asked that EPA consider excluding these process-related GHG emissions from counting against the tailoring rules applicability thresholds. EPA's single paragraph response failed to meaningfully respond to EPA's request.

EPA's reliance on the public outreach approach as a substitute for the panel process is wrong for several reasons. In bypassing the panel process, EPA lost its best chance to meet with actual small businesses face-to-face and exchange information with them. The panel process also establishes a context for EPA advocacy and OMB to meet, discuss the issues, and reach consensus on flexible solutions. 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 these GHG rules have been resolved.

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

[The prepared statement of Mr. Holman follows:]

National Lime Association

LIME

The Versatile Chemical

Testimony of
Keith W. Holman
Deputy Executive Director
National Lime Association

U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Date:	April 6, 2011
Time:	1:30 P.M.
Location:	Room 2154 Rayburn House Office Building Washington, D.C.
Topic:	"Regulatory Impediments to Job Creation: Assessing the Impact of GHG Regulations on Small Business"

200 North Glebe Road, Suite 800 ▪ Arlington, Virginia 22203 ▪ (703) 243-5463

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.

Ms. BUERKLE. Thank you, Mr. Holman.

At this time, without objection, I would like to enter into the record testimony from the National Association of Homebuilders, the Farm Bureau Federation, and the Small Business and Entrepreneurship Council. Without objection, so ordered.

At this point, I am going to yield myself 5 minutes and see if some of the other subcommittee members join us.

Mr. Rajkovacz, in your testimony, you mentioned the EPA taking a one-size-fits-all approach, and I wonder if you could expand upon that a little bit.

Mr. RAJKOVACZ. Yes. We fundamentally believe without having included small-business motor carriers, owner-operators in the discussion—and when I say they didn't include it, within their regulatory impact analysis, they specifically stated that the rulemaking would not have a significant economic impact on a substantial number of small entities.

And as we started looking at that, we were aware that they were talking with large motor carrier interest, and this gets to the heart of the problem in terms of looking at the trucking industry. The industry is predominantly dominated by small-business motor carriers. Nearly 96 percent of motor carriers operate registered motor carriers in this country have 20 or fewer trucks that they operate.

And yet, when you go and talk to the largest of the large, who have very homogenous streamlined operational models, they run one truck, one type of trailer, it fails to take into account the multiple dual purpose uses that small businesses actually engage in. We have many members that operate a couple of trailers. They may one day pull a drive-in trailer, for instance, where aerodynamic technologies would be appropriate and work. We don't deny that these technologies will work where appropriate, but the next day they are pulling a flatbed or drop-deck, and in that now that technology is working against them.

Ms. BUERKLE. Thank you.

Mr. Doniger, in your comments earlier, before we adjourned, you made the statement that you hoped that Members of Congress wouldn't fall prey to the phony story lines of small businesses when it comes to EPA burdens placed on them. Could you expand? What were you referring to?

Mr. DONIGER. If I may, I was referring to a phony story line about small businesses that is generally told by others, by lobbyists for larger entities, and the common story line is that EPA's regulations affect apartment houses, hotdog stands, donut shops, small entities; and they don't. There is a specific exemption, as I am explained and I am sure you will hear from EPA, and as Mr. Kucinich explained, that the permit requirements don't apply to 95 percent of the sources in the country, don't apply to the kinds of sources that emit less than 75,000 tons a year of carbon pollution; and, as a result, this story line that millions of tiny sources are being roped into a government bureaucracy is the very opposite of what is true.

Ms. BUERKLE. Thank you. I have about a minute and a half left, and I would like to give each of the other three members of the panel the opportunity to respond to that.

Mr. KREUTZER. Well, if the tailoring rule is followed and allowed, it would provide an exemption for some small emitters of CO_2 for a few years. Even the EPA says that eventually it is going to cover entities requiring, just for Title 5 permits, 6 million new entities will have to be permitted. So the tailoring rule is just putting it off for a few years.

Ms. BUERKLE. Thank you.

Go ahead.

Mr. RAJKOVACZ. As far as affecting small businesses, if EPA's rulemaking goes through in its current form, there are millions, literally millions of trucks that operate interstate commerce in this country. As I stated, most of them are small businesses. That means eventually this rule affects millions of small businesses.

Ms. BUERKLE. Thank you.

Mr. Holman.

Mr. HOLMAN. Yes, I would agree that the tailoring rule is only a partial temporary solution for small businesses, and we don't know what EPA is going to do at the end of the period of deferral, which will end in a few years. We also don't know if EPA is interested in writing other programs that are going to apply to small businesses, so we are in a very comprehensive and wide-reaching regulatory program in the climate arena, and certainly from the standpoint of looking at what the impacts are of that program, EPA has done not a particularly good job.

Ms. BUERKLE. Thank you.

At this time I am pleased to recognize our chairman from Ohio, I yield you 5 minutes.

Mr. JORDAN. I thank the gentlelady. I didn't know if the ranking member was in the room. Well, I will ask a few questions; I think Dennis will be fine, and we will give him, if he wants, a little longer time. We will be happy to do that.

Let me again thank you all for being here, and I apologize, all my notes are at Ann Marie's desk, but let me just do a couple things.

Dr. Kreutzer, talk to me a little bit more about the cap-and-trade bill and what EPA may be doing and how that relates. You mentioned it some in your testimony, but if you can elaborate on that, I would appreciate that. Then I do have a question for Mr. Holman and then a general question, I think.

Mr. KREUTZER. If you cut CO_2 emissions, if you force them to be reduced, you are going to cut fossil fuel use. Fossil fuel is the affordable energy right now. Fifty percent of our electricity comes from coal, 20 percent from natural gas, and in my written testimony I did a cost comparison showing that the renewables are 80 to 280 percent more expensive. That restricts economic activity. It means consumers have less money to spend on other things once they have paid their utility bills; it means producers have higher costs of production.

So if you have consumers with less money and you have to have higher cost products, they are going to buy less of it; you need fewer people to make that, so employment goes down as well. It doesn't matter if it is a tax; it doesn't matter if it is a cap; it doesn't matter if you come up with a complex set of regulations to force the same reduction. You are going to have those costs. With regula-

tions even more costly, because you have the compliance of the administrative costs as well, the 6 million permits that the EPA said they would have to issue for Title 5 permits.

Mr. JORDAN. Thank you.

Mr. Rajkovacz, is that pretty close?

Mr. RAJKOVACZ. Yes.

Mr. JORDAN. Let me ask you this. This came up in a hearing we had in this room a couple weeks ago. We had a Mr. Michaels from OSHA and I asked him this question. In the course of the hearing, I guess I sort of picked up on this and asked him this general question, and I would like your thoughts as to how you see the small business folks that you work with, how they might feel about this.

I asked the gentleman the question, I said, Mr. Michaels, would you agree with me that, in the vast majority of cases, employers care pretty deeply about their employees? They invest time in training them; they are the key to their success, making a profit; they know them, they may live in the same community? There are always exceptions, but I asked him wouldn't you agree that in most situations employers care deeply about the well-being of their employees; and I was struck by the gentleman's response. He said I would like to think so. And it just struck me that sometimes we have this attitude amongst Federal employees, who are supposed to, I understand, regulate business, but also probably educate and help them, and yet they have this attitude that somehow the employer is the bad guy.

Have you picked up on any of that in your dealings with the Federal Government, whether it be EPA, OSHA, or any other agency?

Mr. RAJKOVACZ. Trucking is actually, I would argue, one of the most heavily regulated enterprises in the United States. Others might have a different opinion. I have been dealing with roughly 15 different Federal rulemakings just in the last 4 months; it is somewhat overwhelming for a lot of us in the industry to keep up with it.

It depends. A lot of times you do develop relationships with different people and agencies, and that is a very important thing, working with these folks and developing relationships. But when you don't have a lot of contact with an agency, you are an outsider, and it is really tough to crack that egg.

Mr. JORDAN. Let me ask you another question. This came out in a hearing a few weeks back. In the full committee we had one of the freshmen, Congressman Guinta from New Hampshire, he asked five business owners, he said, if you knew—and most of these guys started their business 25, 30 years ago; all very successful. He said if you knew then what you know now, would you have started, relative to regulation. If you knew back then all the things you would have to deal with, I think he mentioned 15 was the number of different regulators you have to deal with, agencies you have to deal with, if you knew then what you know now, would you have started your business, and every single one of them said they wouldn't have done it, would not have done it. Has that been the experience with some of the folks that you deal with?

Mr. RAJKOVACZ. What I hear from our members is they are basically on regulatory overload. I said 15 rulemakings in the last 4 months, and they are major rulemakings that will change the in-

dustry's productivity. People are generally fed up with what they think is an over-regulated environment. It is oftentimes under the guise of safety, and where that is appropriate, obviously——

Mr. JORDAN. I didn't get to my question, Mr. Holman, but I will have another round and I will get to that one next time. Thank you.

Ms. BUERKLE. Thank you, Mr. Jordan.

I now yield 5 minutes to Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Madam Chair.

Dr. Kreutzer, I read your testimony. I was particularly interested in the chart with the high cost of renewable energy systems, where you chart the monthly and annual costs, and my part in this discussion about regulation has always been that you can assign costs, but if you want to get a clear picture you have to look at costs and benefits simultaneously; otherwise, we are not really understanding the societal impact.

And when I look at coal, in particular, I don't think that anyone could argue that coal, the use of coal and the burning of coal and the after effects on the environment of coal, does have adverse environmental impact. In a way, the sulfur dioxide byproducts can exacerbate pulmonary problems, it is well recognized; asthma, emphysema. The sulfur dioxide, when it travels over many miles, as we know this in the Midwest, that coal burning plants in the Midwest end up with the condensate polluting rivers and lakes in the Northeast, and we have a price of beautification there. You could actually monetize the costs to adverse health and the adverse impact on the environment.

I just wanted to share that thought with you because I think it is really important that when we are in a discussion, the essence of which is what does this cost, and your chart, taken within its own context, you don't make the argument, but when you look at the cost of that technology, there is an expense that is offloaded onto the society. I just wanted to share that with you.

Mr. KREUTZER. I agree. And I don't think anybody here is talking about undoing the Clean Air Act back to 1966. What I am addressing is carbon dioxide regulation. We already have an extraordinary amount—maybe we need more; I am not here to debate that—regulation for sulfur dioxide and other criterion pollutants. If you want to look at the impact of carbon dioxide on a cost-benefit, I think some of the estimates have been exaggerated. But if you take the estimates of the social cost of carbon, add that to the coal cost, that is about 2 cents per kilowatt hour, it is still much cheaper than wind or solar. It changes the number some; it doesn't flip any of them around.

So we want to look at the costs and benefits. What benefit in terms of global warming mitigation do you get from this? Even with a full-blown Waxman-Markey cap-and-trade——

Mr. KUCINICH. Do you think there is such a thing as global warming?

Mr. KREUTZER. Do I think? Yes, the world is warmer. Yes.

Mr. KUCINICH. I just have a few minutes left and I am going to have to go on.

Mr. KREUTZER. OK.

Mr. KUCINICH. But I thank you.

I would just like to submit for the record, Mr. Chairman, a study that shows, in terms of benefits and costs, that the proposed rules that we have been promoting would avoid up to 17,000 premature deaths, 4,500 cases of chronic bronchitis, 1,100 non-fatal heart attacks. These are the benefits of focusing on protecting clean air. So I would just like to put this into the record.

In the minute that I have left, I just want to ask Mr. Doniger, can you explain how the tailoring rule works to prevent harm to small businesses?

Mr. DONIGER. Yes, thank you. As I said in my testimony and in response to Ms. Buerkle, the purpose of the tailoring rule is to focus the permit requirement, the requirement that big new plants and big expanded plants examine whether they have the opportunity to control pollution at an affordable and achievable cost, it limits this requirement to very big sources and it excludes the 95, maybe 97, 99 percent of the so-called 6 million sources that Mr. Kreutzer and others keep saying would be subject to Clean Air Act requirements. It just will not be so.

Mr. KUCINICH. My time has expired, but the Chair has just said that he is going to ask one more question and he has been kind enough to let me ask another question. I have a followup to ask of you, Mr. Doniger.

So I would go back to the Chair. Thank you, Mr. Chairman.

Mr. JORDAN. [Remarks made off microphone.]

Mr. KUCINICH. That would be great, if I could.

Mr. Doniger, we know that these exemptions are expected to be reconsidered by the EPA in 2013. Do you think the EPA is going to keep this exemption for small sources of greenhouse gas emissions?

Mr. DONIGER. Yes, I do. I see no reason why they would take that exemption away.

Mr. KUCINICH. Well, could you clarify just once more, do any of the current greenhouse gas permitting regulations burden small sources of greenhouse gas emissions?

Mr. DONIGER. No, they don't, and the one thing that is in place that actually helps small businesses so far are these standards for vehicles, both light-duty and heavy-duty, that will save thousands of dollars for small businesses to buy cars and trucks.

Mr. KUCINICH. So, bottom line, what is the impact of the current greenhouse gas regulations on small businesses?

Mr. DONIGER. It is probably helpful to small businesses as a whole.

Mr. KUCINICH. Thank you.

Mr. JORDAN [presiding]. Mr. Holman, would you like to maybe pick up where these guys just left off? Let me start with you by asking this. You were a former Assistant Chief Counsel of Energy and Environment at the SBA Office of Advocacy, is that right?

Mr. HOLMAN. That is correct.

Mr. JORDAN. And you authored the comments that SBA submitted to the EPA in 2009 that expressed concern about the EPA's endangerment finding and greenhouse gas tailoring rule, is that right?

Mr. HOLMAN. Yes, the comments in 2008 and 2009.

Mr. JORDAN. Both 2008 and 2009. Good. So in your former capacity can you give us some insight into the discussion that just took place and the impact that this stuff will have on small business?

Mr. HOLMAN. Well, I can——

Mr. JORDAN. It seems to me you are pretty darned uniquely positioned to comment on the conversation we just heard.

Mr. HOLMAN. Well, I guess I appreciate that comment. You know, there was a lot of discussion between the Office of Advocacy and EPA on the tailoring rule and there is no doubt that the tailoring rule is a help to many small businesses because it does delay the permitting requirements that would otherwise be falling on small businesses the way it has fallen on the lime industry even now.

And I can first address what are those impacts that are falling on us and on some other smalls, and that ultimately will fall on all small businesses, potentially, and that is uncertainty because of GHG permitting. So imagine that you are required to comply with GHG permitting and you want to do some sort of modernization or expansion of your plan. What it is going to mean is that you have to go to get a permit to do that expansion, and in that process of getting that permit, it could be that every aspect of your operations will wind up being looked at by EPA or a State under what is known as best available control technology review.

The concern by most of the industrial sources, and even some of the small ones, is that process could wind up requiring you to install non-related things, things that have nothing to do with emissions but have to do with energy efficiency or some other improvement in your plant that would be very expensive. And it has a chilling effect because imagine you go to a bank and you say you want to get financing for a project that I am going to do at my facility. Well, when do you have to put it in? I don't know. What is it going to be? I'm not sure because EPA can't really tell me what it is; we will only know at the end of the process, and even then we might not know because that is subject to being challenged in court and potentially being changed.

So there is a lot of uncertainty just in terms of this process is not cut and dried. Unlike the BACT process that has existed for criteria pollutants for 35 years, we are in a totally new arena here when it comes to greenhouse gases. Nobody knows exactly what is going to be required. So when you say what is the magnitude of this impact on smalls, at the moment we don't really know; it is very open-ended, and that has uncertainty which, as you know, business people hate.

From the standpoint of the Office of Advocacy, we wanted a tailoring rule or something that would at least temporarily soften the blow, which the tailoring rule does that, but not for everybody; certainly not for the lime industry, bricks, small utilities, municipal utilities, rural electric cooperatives, foundries. There are a number of businesses that are not going to be entirely shielded by the tailoring rule.

Mr. JORDAN. So when you put this together and you gave your comments and recommendations to the EPA, and yet you just talked about entities who are, you think, impacted in a negative way, did you think EPA followed your comments? Did they follow

the statutory requirements they were supposed to follow? Did they listen? Talk about that process.

Mr. HOLMAN. Speaking from my own perspective as an individual, my sense was that EPA was in a rush to get this rule completed. We wanted very much to have, as I mentioned in my testimony, we wanted EPA to stop or to slow down, consider what the impacts were going to be on smalls, and try to come up with a way to design the rule so that it would protect them. EPA was not really interested in alternatives, was not really interested in listening to what the smalls had to say other than——

Mr. JORDAN. That is what I want to be clear on. My understanding is the law requires them to give serious consideration, due diligence to your recommendation. Is that accurate?

Mr. HOLMAN. That is correct.

Mr. JORDAN. And do you think that took place? That is the question.

Mr. HOLMAN. We were not satisfied that took place, which is why we wrote four public letters to the EPA saying you must do a panel before you proceed with these rulemakings.

Mr. JORDAN. So in your role as advocate for small business in front of the EPA, they did not follow, in your mind, what the law requires them to follow.

Mr. HOLMAN. It was our belief that EPA did not follow the Regulatory Flexibility Act. They certified the rule and went with what they considered to be a compromise under Section 609(c) of the Regulatory Flexibility Act.

Mr. JORDAN. Had that ever been done before?

Mr. HOLMAN. No, it had never been done before.

Mr. JORDAN. So didn't follow normal practice, took an action never done before on an issue that you told them was going to impact small business owners in a negative way. Is that accurate?

Mr. HOLMAN. We told them at least four times.

Mr. JORDAN. Four times you told them?

Mr. HOLMAN. In public documents.

Mr. JORDAN. OK. Thank you, Mr. Holman, I appreciate that.

We have one more round for Ms. Buerkle.

Ms. BUERKLE. Thank you, Mr. Chairman.

Dr. Kreutzer, you had started to answer a question about global warming and I have a feeling you didn't finish your answer, and I wonder if you could just expand on that.

Mr. KREUTZER. I think I was responding to Congressman Kucinich asking me if I believed in global warming, and I said, yes, we are warming. The question, though, is more than are we having warming and is it caused by human-made emissions. We are looking at a set of regulations, and if we are going to do cost-benefit, we need to look at what is the cost of the regulation compared to how much benefit you get from reduced global warming. That is the problem with CO_2, if there is one.

And climatologists looked at the Waxman-Markey bill, which was more comprehensive than the current EPA regulations. Their estimates were that by 2050, if you use the largest sensitivity of temperature to CO_2, the high end, the maximum change moderation from Waxman-Markey, that is, how much difference would Waxman-Markey make, thousands of a degree in 2050, maybe a few

tenths of a degree in 2100. This will have less impact than that. So we can't compare the cost here to stopping tsunamis; we have to compare the cost here to actually what impact it will have on moderating world temperatures, and it is pretty minimal; in 50 years not even measurable.

Ms. BUERKLE. Thank you. In your testimony you talk about the cost of cap-and-trade.

Mr. KREUTZER. Yes.

Ms. BUERKLE. And the cost to our GDP, as well as a number of employees. Can you comment in general, not specific to that legislation, but what regulations are doing? Our country has had 20-plus months of unemployment hovering at 9 to 10 percent, so we are concerned about that. We want to get government out of the way so businesses can succeed. Can you shed some light on that?

Mr. KREUTZER. We haven't done an estimate on the impact of the most recent regulations. We are working on ones for the projected EPA regulations. But one of the things that happens when you have an environment where you say we might impose this, we might impose this, it makes it very difficult to make investment.

Now, some on the other side would say that is why we need to have the regulations, but that is when you say we know for certain it is going to be really bad. When there is some uncertainty that is really bad, you still don't want to invest; but when it comes to horrible, that is even worse. OK, so, yes, we have a problem where to make investments in power industry, to build the power plants we are going to need for firms that are in energy-intensive industries are reluctant to go forward if they think the regulations are going to be burdensome.

Ms. BUERKLE. And I just want to go back to your previous answer to the first question I asked you. Is there in your opinion, what is the connection between the CO_2 emission and global warming?

Mr. KREUTZER. I am not a scientist; I am an economist, so this is close to a man-on-the-street interview now. There will be some warming from manmade emissions, probably. There are some models that show some offsetting. But the CO_2, by itself, if it doubles, will lead to a degree and a half of warming.

The argument is all about are there feedback loops. The models have lots of them. The data so far, when we look at the last 15 years, we don't have accelerating warming; the 1999 level has been pretty flat. So we don't know for sure what it is. But, more importantly, let's say it is the 4½ degrees C that they are talking about at the high end of the IPCC model. What does any of this regulation do? If all it does is impose costs and make us feel like we are doing something but we are not, then we are getting the warming anyway, and unemployment and lower income. So whether you believe IPCC or not, this is not a solution.

Ms. BUERKLE. Thank you very much.

I yield back.

Mr. JORDAN. I thank the gentlelady.

The gentlewoman from California, do you wish to ask this panel some questions? You are welcome to.

Ms. SPEIER. Thank you, Mr. Chairman.

Maybe California really is on another planet, but we did pass A.B. 32. There was an effort to repeal that; it failed miserably. And Californians recognize that we all have a responsibility to be stewards of this planet. Having said that, small business in California has spoken up very strongly in favor of A.B. 32, which would limit greenhouse gases.

Mr. Chairman, for the record, I would like to submit a letter and document from the Small Business Majority that basically says the following: Our research has continually shown that the Clean Air Act is good for small business. The report we released in October of last year found that the benefits of the law have far outweighed the costs. The Office of Management and Budget predicts that the total economic benefits of the Clean Air Act to be more than four to eight times the cost of the compliance. Our report also found that the law has spurred important technological innovations such as the catalytic converter, and exports of these and other environmental technologies were valued at $30 billion in 2004. These are encouraging numbers and cannot be ignored.

Furthermore—without objection?

Mr. JORDAN. Without objection.

[The information referred to follows:]

April 6, 2011

RE: House passage of H.R. 910

Dear Representative/Senator:

The House of Representatives passage yesterday of H.R. 910 that prevents the Environmental Protection Agency from enforcing the Clean Air Act is an affront to small businesses and only satisfies a narrow ideological agenda, no matter the consequences. This legislation is a distraction from the real challenges small business owners face and presents a threat to the millions of entrepreneurs who benefit from the Clean Air Act. We urge senators to reject any similar legislation if it comes before the chamber.

Our research has continually shown that the Clean Air Act is good for small businesses. A report we released in October of last year found that the benefits of the law have far outweighed the costs. The Office of Management and Budget predicts the total economic benefits of the Clean Air Act to be more than four to eight times the costs of compliance. Our report also found that the law has spurred important technological innovations, such as the catalytic converter, and exports of these and other environmental technologies were valued at $30 billion in 2004. These encouraging numbers cannot be ignored.

Small business owners want opportunities for growth and economic competitiveness, not more political theater. Lawmakers who say they support small business need to work to ensure the Clean Air Act is protected so we can continue seeing the kinds of innovation, job creation and economic growth the law has provided for decades. Now is not the time to turn back 40 years of success under the Clean Air Act. We urge you to let the EPA do its job so small business owners can focus on doing theirs.

Sincerely,

John C. Arensmeyer

John Arensmeyer
Founder & CEO

4000 Bridgeway, Suite 101 • Sausalito, CA 94965 • (866) 597-7431 • www.smallbusinessmajority.org

The New York Times

SNOW FLOWER and the SECRET FAN
WATCH THE TRAILER

May 13, 2010

EPA Issues Final 'Tailoring' Rule for Greenhouse Gas Emissions

By ROBIN BRAVENDER of Greenwire

U.S. EPA today issued its final "tailoring" rule for greenhouse gas emissions, a contentious policy aimed at shielding small polluters from rigid Clean Air Act permitting requirements.

EPA's rule "tailors" permitting programs to limit the number of facilities that would be required to obtain New Source Review and Title V operating permits based on their greenhouse gas emissions. EPA said the threshold would cover power plants, refineries and other large industrial plants while exempting smaller sources like farms, restaurants, schools and other facilities.

Beginning next January, facilities that must already obtain New Source Review permits for other pollutants will be required to include greenhouse gases in their permits if they increase their emissions of the gases by at least 75,000 tons of carbon dioxide equivalent per year.

On July 1, 2011, EPA will extend the requirements to new construction projects that emit at least 100,000 tons of greenhouse gases and existing facilities that increase their emissions by at least 75,000 tons per year, even if they do not exceed thresholds for other pollutants. Sources that emit at least 100,000 tons of greenhouse gases per year will also be required to account for greenhouse gas emissions in their Title V operating permits starting next July.

Between July 1, 2011, and June 30, 2013, EPA estimates about 550 sources will need to obtain operating permits for the first time due to their greenhouse gas emissions. Most of those sources will likely be solid waste landfills and industrial manufacturers, according to EPA. About 900 new facilities and modifications per year will trigger New Source Review permitting requirements based on greenhouse gas emissions.

New and upgraded facilities that are subject to the requirements will be required to install the "best available control technology" to control their greenhouse gas emissions. EPA is preparing to issue guidance for industries about how it will define that standard.

The Clean Air Act's current thresholds for regulating "conventional pollutants" like lead,

sulfur dioxide and nitrogen dioxide are 100 or 250 tons a year. But while those thresholds are appropriate for those pollutants, EPA says, they are not feasible for greenhouse gases, which are emitted in much larger quantities.

Without the tailoring rule, EPA air chief Gina McCarthy said today, about 6 million facilities could need permits when EPA's greenhouse gas standards for automobiles kick in next January, making greenhouse gases officially "subject to regulation" under the Clean Air Act. "We did not want that fact lingering out there for long," she said.

EPA will complete another rulemaking by July 1, 2012, taking comment on phasing in additional sources and whether certain small sources can be permanently excluded from permitting requirements. Such a rulemaking would not require permitting for sources that emit less than 50,000 tons of greenhouse gases annually, EPA said.

No sources that emit less than 50,000 tons per year will be subject to permitting requirements until at least April 30, 2016, according to the rule.

"After extensive study, debate and hundreds of thousands of public comments, EPA has set common-sense thresholds for greenhouse gases that will spark clean technology innovation and protect small businesses and farms," EPA Administrator Lisa Jackson said in a statement.

"There is no denying our responsibility to protect the planet for our children and grandchildren. It's long past time we unleashed our American ingenuity and started building the efficient, prosperous clean energy economy of the future."

EPA said the rule will encompass facilities that are responsible for 70 percent of the greenhouse gases from stationary sources.

Thresholds raised from proposal

EPA's initial thresholds have been increased substantially from the limits laid out in the agency's **proposal (pdf)** last September, which sought to require permits from facilities that release more than 25,000 tons of carbon dioxide equivalent annually (*E&ENews PM*, Sept. 30, 2009).

Under the proposal, EPA estimated that 14,000 large industrial sources would need to obtain greenhouse gas permits, and about 3,000 of those sources would be newly subject to Clean Air Act operating permit requirements.

Jackson signaled earlier this year that EPA was planning to "substantially" raise the thresholds from its proposed rule to exempt more facilities from permitting requirements,

in part because state regulators had argued that the rule would impose significant administrative burdens and could create regulatory backlogs (*E&ENews PM*, March 3).

McCarthy said today agency officials realized the 25,000-ton limit was going to reach sources it did not intend to cover, including large apartment buildings and other commercial sources "that clearly were not appropriate at this point to even consider regulating."

Environmentalists today were quick to offer support for the tailoring rule.

"It's clear that EPA is trying to fine-tune it and make sure that the permit requirements are truly limited to the biggest sources," said Clean Air Watch President Frank O'Donnell. "I think the EPA is trying to act very responsibly, and they're trying to say to the Congress and the public, 'We're not the green monsters you think we are.'"

But despite EPA's decision to raise the thresholds from the proposal, industry representatives maintained their position that the Clean Air Act is an inappropriate vehicle for regulating greenhouse gas emissions and that the rule is based on shaky legal ground.

"The Clean Air Act is not designed to regulate greenhouse gas emissions, and this tailoring rule doesn't fix the problems with the Clean Air Act doing it," said Howard Feldman, director of regulatory and scientific affairs at the American Petroleum Institute.

Feldman and others fear that EPA's rule could be overturned in court because it seeks to alter limits that were laid out plainly by Congress.

McCarthy said today that while she expects challenges to all of EPA's rulemakings, "We think that this phased approach is not only legally correct but it's the best way that we can achieve the intent of Congress when they passed the Clean Air Act."

Click here (pdf) to read the final rule.

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SMALL BUSINESS MAJORITY

Economic Opportunities for Small Business Under AB 32

October 18, 2010

Economic Opportunities for Small Business Under AB 32

In 2006, California enacted the Global Warming Solutions Act, commonly referred to as AB 32. This was a watershed moment for California's environmental future. AB 32 called for an ambitious reduction in California's carbon footprint. By 2020, it requires the state to cut emissions by 30%—down to 1990 levels—and by 2050, emissions will have to be at 80% of those levels. To do this, AB 32 directed the California Air Resources Board (CARB) to outline cost-effective strategies the state can use to meet those requirements. By the start of 2011, the reduction measures set forth in the plan are to be adopted, making California the national leader in the fight to offset the effects of climate change.

While spearheading environmental policy is not new to California, the controversy that accompanies policy change has been heightened by the recession. Opponents of AB 32 claim that setting carbon reduction measures and regulations will weaken an already struggling economy and cost the state jobs, while proponents argue that the legislation presents an opportunity for California to participate in a clean energy revolution that will create jobs and stimulate new investments.

Much of the discussion surrounding AB 32 has focused on complex cost-benefit estimates and whether the legislation will result in job loss or gain for the state overall.[1] This report, however, looks under the hood of these net benefit discussions to examine, specifically, the economic opportunities that AB 32 presents for small businesses in California.[2] The opportunities include:

- Increased demand for energy efficiency goods and services;
- Enhanced consumer awareness of and interest in "green" products and services;
- More resources in the hands of consumers as a result of lower overall spending on energy;
- Increased investment in clean energy production and other technologies.

California's Small Businesses

Small businesses play a vital role in the state's economy; 7.2 million Californians were employed by 718,220 small businesses (companies with 500 employees or fewer) in 2006. Of these firms, 88% had fewer than 20 employees and nearly half (47%) had between 1 and 4 employees.[3] According to analysis by The Brattle Group, 9 industries account for almost 82% of small businesses.[4] Table 1, below, details the number of small firms and their share of small business employment by sector, including descriptions of the types of businesses in each category.

Table 1: Small Business Characteristics

Industry	% of Firms	% of Employees	Example Businesses
Professional, Scientific, and Technical Services	14.4%	9.5%	Lawyers, accountants, architects, consultants, veterinarians
Health Care and Social Assistance	11.2%	10.7%	Childcare, physicians, dentists, home health care, nursing care facilities
Construction	10.6%	11.0%	Building construction, home additions, maintenance, repairs
Retail Trade	10.5%	9.6%	Office supply, computer, plumbing and electrical supply stores
Other Services (except Public Administration)	8.8%	8.5%	Auto repair, social services, dry cleaners
Accommodation and Food Services	7.7%	11.2%	Restaurants, food carts, bars, hotels, RV parks
Wholesale Trade	7.1%	7.5%	Sellers of clothing, building materials, electronics to other businesses
Real Estate and Rental and Leasing	5.8%	< 5%	Costume rental, car rental, video stores, real estate agents
Manufacturing	5.6%	11.1%	Small manufacturers
All Other	18.4%	≈ 17%	Publishers, insurance agents

Source: The Brattle Group

It is also useful to note that small business accounts for a smaller share of overall state employment in energy-intensive sectors. These include: utilities (24%), information (34%), agriculture (38%), mining (39%), non-energy intensive manufacturing (40 %), and energy-intensive manufacturing (43%).[5] Meanwhile, small business accounts for a majority of employment in labor-intensive and service-oriented sectors, such as construction (73%), wholesale trade (70%), retail trade and finance (65%), insurance and real estate (66%).

In summary, the variety of small business establishments in California means that different firms will find different opportunities from AB 32. The remaining sections of this report discuss these economic opportunities in detail.

Opportunities from Increased Investment in Energy Efficiency

AB 32 will stimulate demand for and increase investment in energy-efficient goods and services, thereby creating opportunities for small businesses that provide them.

AB 32 requires that the state significantly reduce its emissions. Small businesses provide many of the goods and services that consumers and businesses will need to achieve improved efficiency, and therefore stand to benefit. Achieving the energy efficiency milestones AB 32 sets will require a significant investment across many sectors of the economy, including zero-net energy systems for new buildings, whole-building retrofits for existing buildings, and increased use of solar roofs and water heating systems. Inside these buildings, new clean-tech appliances will also lead to improved efficiency.

As Zabin and Buffa, two researchers at the UC Berkeley Center for Labor Research and Education, write in their analysis:

> AB 32 will induce billions of dollars in private and public investment in energy efficiency retrofits, new construction, and renewable energy generation, presenting growth opportunities in traditional sectors and in new markets yet to be developed.[6]

SMALL BUSINESS OPPORTUNITY

Selim Sandoval founded *Growing Green Energy*, a renewable energy installation and green workforce development company in Mammoth Lakes that helps other companies increase their energy efficiency.

Read about his company in the addendum.

For example, just one of the energy efficiency measures in AB 32—a requirement that new buildings have zero-net energy systems—will stimulate significant growth in California's solar water heating manufacturing and installation sectors. The state has developed a program—the Solar Hot Water and Efficiency Act of 2007 (SHWEA)—to create a self-sustaining industry by authorizing a 10-year, $250 million incentive program for solar water heaters, with the goal of installing 200,000 of these systems in California by 2017.[7] Incentives like these present opportunities for small businesses to tap new markets.

Another AB 32 focus, whole-building retrofits, presents further opportunities for small businesses. Incentives for whole-building retrofits will stimulate growth of the home performance industry, which provides a comprehensive whole-house approach to identifying and fixing energy efficiency problems. According to Efficiency First, the national trade association for home performance contractors, the industry is primarily composed of small businesses.[8] Home performance contractors mostly come from the ranks of the established home construction, remodeling, weatherization, HVAC, and insulation industries—sectors traditionally dominated by small firms. Furthermore, the Center for American Progress estimates that 90% of contractors in the construction industry, 82% of window manufacturers and installers, 90% of HVAC equipment manufacturers and installers, and 90% of lighting equipment manufacturers and installers nationwide are small businesses.[9] In California, the third largest small business sector is construction—compromising 10.6% of all small businesses.[10] Therefore, as AB 32 spurs building retrofit demands, small businesses in construction and related industries will have more business opportunities.

Similar opportunities will accrue to small businesses that manufacture, distribute, sell, and install other efficiency products, such as solar panels, combined heat and power generation systems[11] and consumer appliances. Small firms that specialize in efficiency design and consulting will also experience opportunities for growth and expansion, from architects to green designers.

Efficiency Investments Create More Jobs

According to several studies, energy efficiency investments also create more jobs than comparable purchases of traditionally-generated energy. Traditional energy purchases, such as electricity or natural gas, don't create a significant number of jobs; the jobs they create include capital-intensive refining, conveyance and electric power generation.[12] On the other hand, energy efficiency-related jobs, such as building renovations and appliance manufacturing, tend to be associated with high-tech manufacturing and high-skilled service professions.[13] That's why an analysis by the American Council for an Energy-Efficient Economy found that efficiency-related jobs employed more than twice as many people per dollar of output when compared with the employment effects of spending on traditional energy production.[14] Another study found that 8 to 11 direct jobs are created per $1 million invested in retrofitting buildings for energy efficiency.[15]

In summary, the increased investment in energy efficiency spurred by AB 32 will be an opportunity for small businesses to meet increased demand for building materials, energy and design consultations, energy-efficient appliances and electronics, and residential and commercial renovations. AB 32 will also increase demand in traditional small business strongholds such as the construction, manufacturing, retail, wholesale trade and professional services sectors.

Opportunities from Going Green

AB 32 will create savings and profit opportunities for "new Main Street" small businesses that successfully "go green" and employ brand differentiation strategies to grow their businesses.

AB 32 doesn't require businesses to "go green," but provides financial incentives for those that do. While AB 32 does not require small businesses to invest in energy efficiency improvements, it can provide opportunities for entrepreneurs that decide to make their businesses more sustainable. First, making investments in more efficient technologies will save businesses money on energy costs. And it will be easier than ever for small businesses to take advantage of these technologies thanks to the substantial resources devoted to helping them make improvements. Second, increased consumer awareness of climate change spawned by the law likely will lead to increased demand for climate-conscious products and services—simultaneously creating opportunities for companies that successfully promote the "greener" aspects of their businesses.

SMALL BUSINESS OPPORTUNITY

San Diego-based printer **Thomas Ackerman**, owner of *Spirit Graphics and Printing, Inc.*, employed a number of sustainable practices to make his business "greener." *Read about his company in the addendum.*

It's Easy Going Green

CARB has focused its AB 32 implementation efforts on helping small businesses invest in better energy efficiency processes and products. It has created information campaigns and resources that present small businesses with numerous no-cost and low-cost ways in which to save money by cutting energy use. For example, small investments such as occupancy light sensors or larger investments in new Energy Star equipment or appliances will lead to reductions in the amount of energy used for lighting, refrigeration, heating and air conditioning, and computers and other equipment—thereby reducing energy purchases. Savings resulting from these investments will directly affect small businesses' bottom lines and can be reinvested to grow their businesses. Additional subsidies will be available for small businesses implementing efficiency measures, lowering the cost of going green.[16,17]

How AB 32 Will Increase Consumer Demand for "Green" Products and Services

As AB 32 implementation proceeds, consumers will likely become more aware of climate change. Heightened consumer awareness will increase demand for "green" products and services. According to a report by researcher Andrea Reyell and her co-authors, firms respond with "increasing environmental proactiveness" based on the extent of media and policy attention "on issues such as climate change, which has heightened public concern and galvanized support for urgent environmental action."[18] A study commissioned by Green Seal and EnviroMedia Social Marketing shows that sustainability is a high priority for consumers—with 82% still buying green products despite the down economy. Valerie Davis, EnviroMedia's CEO said, "There's a real opportunity for authentic green marketing, despite the tough economy. This research proves people want to do what's best for the environment..."[19]

Not only does research support the idea that increased awareness of climate change issues will spur consumer demand for green products, many consumers are in fact willing to pay a premium for products that they consider to be more environmentally friendly. According to a report by the Boston Consulting Group (BCG), "Consumers were willing to pay a higher price for green products deemed to be of higher quality."[20] The report further found that "the continuing expansion of green consciousness around the world presents a huge opportunity for smart companies." According to the survey that formed the basis of the BCG report, "most consumers...consider a store's green credentials when choosing where to shop—a clear opportunity for savvy retailers."

Other Benefits of Brand Differentiation

Successfully "going green" can help small businesses become more competitive in the market, but more important for many small businesses, recruit and retain talented employees. Not only can successful brand differentiation lead to increased sales and customer loyalty, evidence suggests that other aspects of a business can benefit, as well. According to one study, "business owners were motivated not just by the 'push' of legislation and environmental concern but by the 'pull' of potential cost savings, new customers, higher staff retention and good publicity for their firms."[21] Among these factors, it is perhaps the ability to recruit and retain talented employees that has the biggest impact. In an interview about the business case for sustainability, SAP chief sustainability officer Peter Graf said, "sustainability really re-energizes our workforce. We needed something where people say, 'Yeah, I'm proud to work for SAP. We have a huge impact. This is a great opportunity.' People need to come to work for a purpose that's bigger than selling software."[22] What's more, a group of 2009 MBA graduates from Harvard Business School created an ethical pledge that, among other things, "strives to create sustainable economic, social and environmental prosperity worldwide," as a way to enhance the value their businesses create for society over the long term.[23]

In summary, evidence suggests that small businesses have an opportunity to save money through greening their operations, and to grow and improve their businesses through successful "green" rebranding. As the BCG report concludes, "our research proves that green matters to consumers around the world, and green strategies offer companies and retailers a competitive advantage in product differentiation and cost savings."[24] As AB 32 implementation proceeds, we should expect consumer awareness of and demand for green products and services to increase, with corresponding benefits for small businesses.

Opportunities from Reduced Spending on Energy Purchases

AB 32 will benefit small businesses by lowering overall energy costs, which can lead to increased spending on other goods and services.

The energy efficiency investments put in place by AB 32 will result in increased energy efficiency and decreased household energy consumption. This means consumers will spend less money on gasoline, electricity and other forms of energy. In effect, money that consumers were spending on gas and electricity will be available to be used on other goods and services, which will lead to increased demand and production in these sectors. Overall, taking into account the recent economic downturn, CARB conservatively projects that AB 32 will save $2 billion in personal income.[25]

SMALL BUSINESS OPPORTUNITY

Husband and wife team **Kim and Monique Kelso**, owners of *Toot Sweets Bakery & Café* in Stockton, were able to give their bottom line a hefty boost by significantly reducing their energy costs.
Read about their company in the addendum.

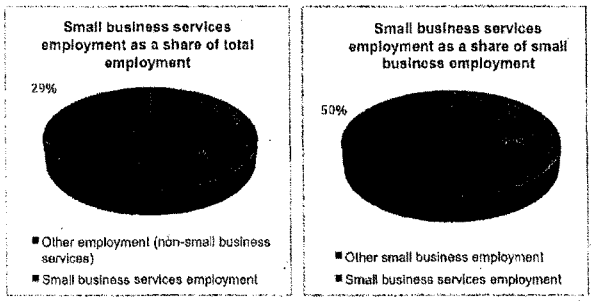
Energy efficiency savings have an additional benefit beyond the amount of money shifted from energy purchases to purchases of other goods and services. Traditional energy production supply chains do not create a significant number of jobs (relying instead on capital equipment), and for California they mainly include capital-intensive refining, conveyance and electric power generation. On the other hand, non-energy consumer spending is concentrated in job-intensive services, such as retail, consumer goods and foodstuffs.[26] As a result, a shift in consumer spending of this nature results in an increase of jobs. U.C. Berkeley economist David Roland-Holst describes this process:

> When consumers shift one dollar of demand from electricity to groceries, for example, one dollar is removed from a relatively simple, capital intensive supply chain dominated by electric power generation and carbon fuel delivery. When the dollar goes to groceries, it animates much more job intensive expenditure chains including retailers, wholesalers, food processors, transport, and farming. Moreover, a larger proportion of these supply chains (and particularly services that are the dominant part of expenditure) resides within the state, capturing more job creation from Californians for California.

This basic economic relationship explains why Roland-Holst found that, in California between 1972 and 2006, energy efficiency measures created about 1.5 million full-time equivalent jobs with a total payroll of $45 billion. It also explains earlier work by the RAND Corporation, which found that energy efficiency improvements between 1977 and 1995 increased per capita Gross State Product (GSP), a measure of economic output, by at least 3%.[27]

CARB analyzed the economic impact of full implementation of AB 32, and found that the small business service sector in particular will see significant benefits. This sector accounts for nearly 30% of the state's total employment, and 50% of all small business jobs (Chart 1).[28] Under AB 32, this sector will see an increase of $4.6 billion in net income by the year 2020, and more than 15,000 new jobs will be added. These benefits are a result of requirements in the law that spur greater energy and fuel efficiency, which will save small businesses money. CARB's analysis also found that as the California economy was projected to experience continued economic growth associated with the implementation of AB 32, small businesses were expected to experience many of the benefits—more jobs, greater productive activity, and rising personal income—associated with that growth.[29] In fact, the financial benefit of the law translates to an extra $1,115 per employee per year (Table 2).[30]

Chart 1: Small Business Service Sector Employment



Source: Table 31: California Employment and Small Business Share by Industrial Sector, *CARB's Updated Economic Analysis of California's Climate Change Scoping Plan Staff Report to the Air Resources Board*, March 24, 2010

Table 2: Small Business Sector Increased Output and Employment Under AB 32

	Baseline	AB 32	No Increase with Implementation of AB 32
Total output in small business service sector	$556.9 billion	$561.5 billion	$4.6 billion
Total employment in small business service sector	4,117,225	4,132,439	15,214
AB 32 increased economic output per small business service sector employee in 2020	$1,115		

Sources: Table 32: E-DRAM Small-Business Employment Changes for Modeling Cases and Table 33: E-DRAM Small-Business Output Changes for Modeling Cases, *CARB's Updated Economic Analysis of California's Climate Change Scoping Plan Staff Report to the Air Resources Board*, March 24, 2010

As CARB's economic modeling shows, AB 32, by reducing consumers' energy bills, will likely redirect spending away from large energy providers and toward small businesses. Whether these businesses are suppliers to other larger businesses, traditional retailers, or "Main Street" service providers, increased consumer spending on non-energy goods and services has the potential to strengthen California's small business sector.

Opportunities from Innovation

AB 32 will spur investment in and development of technological innovation, creating new economic opportunities for small businesses.

The innovative push of AB 32 may be one of its greatest economic benefits to small businesses and the state economy as a whole. Implementing AB 32 requires reductions in carbon emissions that will only be achievable through the development and implementation of new technologies. While the 2020 goals can be met mostly using existing technologies and improved efficiency, the 2050 targets—which aim to cut emissions to 80% of 1990 levels—will, according to CARB, "require California to develop new technologies that dramatically reduce dependence on fossil fuels, and shift into a landscape of new ideas, clean energy, and green technology."[31] These new technologies will present numerous opportunities for small businesses. The innovators of many of these technologies will be small businesses, which will produce direct profits. They will also profit indirectly through the statewide economic growth that follows increased investment and technological innovation.

SMALL BUSINESS OPPORTUNITY

Chris Erickson founded San Francisco-based *Climate Earth*, a company that sells a software service that measures and tracks greenhouse gas emissions and energy use. *Read about his company in the addendum.*

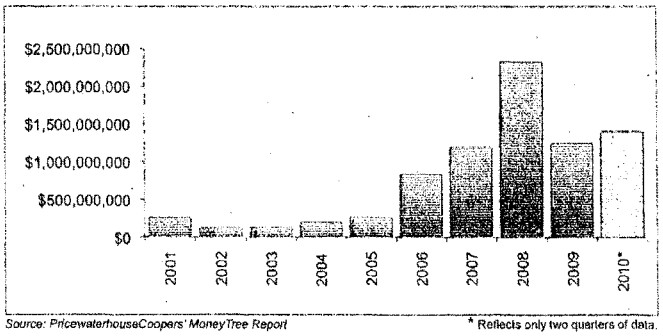
As these new technologies emerge and certain sectors of the economy grow, small businesses will be called upon to supply many of the new products and services. Therefore, they will indirectly benefit from the "trickle-down" effect of innovation. For example, as the clean tech space has grown since 2001, jobs have been created not only in the companies that have been conceived during that time, but also in many ancillary industries (accounting, law, banking, consulting, facilities maintenance, and public relations, to name a few) and even in the public sector.[32]

While CARB forecasts that AB 32 will result in an overall net increase in jobs by 2020, David Roland-Holst projects more significant job growth based on the "trickle-down" nature of innovation. By "including the potential for innovation," Roland-Holst found much more optimistic economic consequences than CARB: Gross State Product (GSP) would jump by about $76 billion, increasing real household incomes by up to $48 billion and creating as many as 400,000 new efficiency and climate action driven jobs.[33]

Innovation can be a significant driver of economic growth, both at the macro-level (states and countries) and at the individual firm level. Since renowned economist Joseph Schumpeter published his definitive work on innovation in 1942, researchers have focused on the causes and benefits of innovation—trying to spur more of it. By all indications, AB 32 has this power. It shapes the market for technological development by providing regulatory guidance, reducing regulatory uncertainty, and creating demand for new products and services.[34,35]

AB 32 has already begun spurring innovation and economic growth. Despite the recession, studies show that AB 32 has resulted in nearly $11.6 billion in investments since 2006. Venture capital, a lead indicator of economic growth in a sector, has been flooding into California since AB 32's passage in 2006. In 2008, CARB measured venture capital investment in the industrial/energy industry as a proxy for green technology investment. According to data supplied by PricewaterhouseCoopers (as shown in Figure 1), venture capital investment has exploded since 2006. Even with the economic downturn, these investments have grown from $262 million in 2005 to $1.4 billion in just the first two quarters of 2010.[35] In the same period, California's share of the nation's total venture capital investment in the industrial/energy industry has risen from 32% in 2005 to 53% in 2009.

Figure 1: Venture Capital Investment in Energy Innovation in California Before and After Passsage of AB 32 in 2006



Source: PricewaterhouseCoopers' MoneyTree Report * Reflects only two quarters of data.

The Cleantech Group, LLC, provides another measure of technology innovation funding. Their clean technology venture capital figures are based on data for a broader range of investments outside of the energy sector, including recycling, waste, agriculture, materials and transportation. In 2010, they reported that California clean technology firms received 60% of total North American venture capital investment in 2008 and 2009, at $3.4 billion and $2.1 billion respectively.[37] Between 2005 and 2009, venture capital investment in clean technology grew 360%. At its peak in 2008, investment was up 623% over 2005.[38] These increased investments fuel innovation and stimulate economic growth. As former U.S. Secretary of State George Shultz noted, since passage of the law, "a whole industry is developing here, and I might say a lot of jobs are connected with it."[39]

How Small Businesses Benefit

Historically, small businesses have been a major source of innovation. According to the U.S. Small Business Administration, small firms are a significant source of innovation and patent activity: They produce more patents per employee than larger businesses; outperform large business patents in growth, citation impact and originality; and tend to specialize in high tech, high-growth industries, such as bio-technology, information technology and semiconductors.[40] Most studies find that small firms can keep up with larger firms in terms of innovation, and show no difference in the quality and significance of the innovation produced.[41] All in all, small businesses are set up well to enter this market demand with new ideas, new products and processes, and compete for venture capital dollars and increased consumer demand.[42]

The process of innovation itself will financially benefit small businesses. Schumpeter's original theory has led to numerous economic studies showing innovation is a source of economic growth. A considerable body of evidence now exists that shows the level of technological innovation contributes significantly to economic performance, particularly at the firm and industry levels.[43] Think, for example, of the new economic activity created by the dot com revolution and the multiplicity of new products and services that resulted: Google was started by two college students, as was Facebook, and countless new eBay entrepreneurs make their fortunes online every day. Then think of all the companies that profit by providing goods and services in these areas. All this firm-level growth then filters throughout the economy as innovators and their customers buy products and services from other businesses, and their employees spend their paychecks on consumer goods.

Clean Technology Production Creates More Jobs

The clean technology sector is spawning tremendous innovation. Clean energy technology will create more jobs than the traditional energy sector, and there is strong evidence that clean energy production can generate more jobs than its fossil fuel-based counterpart.[44,45]

AB 32 can help create significant opportunities for entrepreneurs to introduce new products and services to a growing market, to drive change and spur innovation. Despite the fact that not all small businesses are innovators, the majority of small businesses will benefit from innovation because it stimulates wider economic growth.

Conclusion

AB 32 provides small businesses with numerous economic opportunities for growth and success. Increased investments in energy efficiency products and services will provide new markets for small businesses. Many of these businesses will be in the construction, manufacturing, retail and professional services sectors. More traditional "Main Street" businesses, such as the local dry cleaner and florist shop, can also benefit by going green. Investing in energy efficiency improvements will not only boost their bottom line, but will help them retain qualified employees and attract new customers interested in sustainable products and services. Still another type of small business, the "clean tech" entrepreneur, is set to benefit from increased demand for innovation in clean energy technology. All small businesses stand to benefit as AB 32 creates demand for new products and services that have yet to be designed and whose effects may be more wide-ranging than anticipated.

In the end, the overall economic growth from increased investment and innovation will benefit a wide swath of small businesses across the state. Similarly, almost all small businesses will benefit from decreased consumer spending on traditional energy, and the increased spending on other consumer goods and services. These goods and services are more likely to be produced in California and provide more jobs for Californians than the energy purchases they replace. Almost every small business has something to gain from California's commitment to a more sustainable economy.

Endnotes

1 Although there have been numerous studies on the economic effects of AB 32, the most recent data research to date has been completed by the California Air Resources Board. According to this research, the state can expect to experience a small net increase in employment by 2020 as a result of the implementation of AB 32.

2 It should be noted that when we speak of AB 32 throughout this report, we mean California's climate change policies as set out in California's Global Warming Solutions Act of 2006 (AB 32) and the standards and programs that are adopted by California's administrative agencies, including the California Air Resources Board, to implement the AB 32 Scoping Plan. Thus, we consider, for example, the Renewable Portfolio Standard and the Pavley Light-Duty Vehicle Emissions Standards part of "AB 32."

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Small Business Majority

Small Business Majority is a California-based, national nonprofit, nonpartisan small business advocacy organization founded and run by small business owners and focused on solving the biggest problems facing small businesses today. We speak for the nearly 28 million Americans who are self-employed or own businesses of up to 100 employees. Our organization sponsors scientific research that guides us to understand and advocate on behalf of the interests of small businesses across the country.

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Ms. SPEIER. Furthermore, I am amused because when the Clean Air Act, in 1990, was being considered, Ford Motor Co. claimed that, "We just do not have the technology to comply." And yet look where we are today. Ford Motor Co., Chevrolet, every one of the auto manufacturers are embracing all of the clean air standards and creating electric cars and hybrid cars, and the public is embracing them as well.

So I guess my question to you, Mr. Doniger, is there some level of exaggeration going on here?

Mr. DONIGER. Thank you, Congresswoman. It seems as though, wherever we are in time, the regulations of the past are embraced and the regulations of the future are treated like Armageddon; and then we move on a little bit more in time and those regulations become embraced because, as your examples show, the benefits are proven, the economic costs turn out to be much smaller than were forecasted by lobbyists up here, and life goes on. The economy of the United States has tripled in size since 1970, while we have been able to cut the emissions of most pollutants by 60 percent or more. So we can do these two things at once.

I would just call your attention to a study by three economists. Roger Bezdek is the first name. I would be happy to supply this for the record. And if I may recite just one paragraph of his findings: Contrary to conventional wisdom, environmental protection, economic growth, and jobs creation are complimentary and compatible. Investments in environmental protection create jobs and displace jobs, but the net effect on employment is positive. Second, environmental protection has grown rapidly to become a major sales generating, job creating industry: $300 billion a year and 5 million jobs in 2003.

Most of the 5 million jobs created are standard jobs for accountants, engineers, computer analysts, clerks, factory workers, etc., and the classic environmental job, environmental engineer, ecologist, etc., constitutes only a small portion of the jobs created. Most of the persons employed in the jobs created may not even realize that they owe their livelihood to protecting the environment.

So this is a big business and it is a big contribution to our economy, and our economy grows because we protect our environment.

Ms. SPEIER. Thank you, Mr. Doniger. One final question, and this has probably been addressed already earlier in the hearing, but this is supposed to be focusing in on small business and the impacts on small business. The EPA tailoring rule, which has come forward, would suggest that you have to spew out 75,000 tons a year to be subject to any kind of regulation by EPA. Are most small businesses spewing out 75,000 tons?

Mr. DONIGER. No, they are not. Virtually all of the buildings, the small businesses that own those buildings are untouched by this regulation. Now, several of the people here have suggested, well, that may not be true in the future. Well, if Congress was going to do something that would be constructive and help create the regulatory certainty we need, it would be to lock in the tailoring rule the way it is now and take away any uncertainty about how it develops in the future.

And that uncertainty exists only because there is a limit on how long EPA is allowed to make an exemption under the court doc-

trines that EPA is using to justify these exemptions; and Congress, of course, can make those exemptions permanent. If you lock in the tailoring rule, we will have the certainty, the focus on the big pollution sources, get the technology on them and leave the small-fries alone.

Ms. SPEIER. Thank you. My time has expired.

Mr. JORDAN. I thank the gentlelady.

Mr. Doniger, let me just followup, then, real quick. Which is it? Earlier you said that more regulation has been good, it has added to the economy, it has been growth, and now you are saying they should lock in the tailoring rule to take away any uncertainty and not expand it. I mean, which way is it?

Mr. DONIGER. The way it is, Congressman——

Mr. JORDAN. I mean, your premise to the first question of hers was more regulation is good.

Mr. DONIGER. Not all more regulation, sir.

Mr. JORDAN. Oh, so it isn't all. So some regulation could be bad.

Mr. DONIGER. Of course.

Mr. JORDAN. OK. But that is not what you said. You said regulation is good, it added to the economy, it was wonderful.

Mr. DONIGER. I said the regulation that we—the greenhouse gas safeguards that EPA is putting in place are a net plus——

Mr. JORDAN. I think you said regulations in the past have been embraced as the good stuff, but all the future ones everyone always says they are bad, and you said that is not the case, it is good. So you made this general statement that regulation was good for business, good for the economy, and now you are saying, no, we should limit the tailoring rule, shouldn't expand it, we have to take away any uncertainty out there. I just want to know which way is it.

Mr. DONIGER. I am sure we can work out which of the positive economic growth promoting, health promoting regulations and which are not helpful. I am here to present the case that what is being done now makes perfect common sense, and what EPA has done is to make sure that the small businesses are not burdened by the kinds of regulations that don't make sense.

Mr. JORDAN. Any further questions for the first panel?

[No response.]

Mr. JORDAN. I want to thank you all for joining us today. We do need to move on. And I apologize for the schedule. As I said earlier, it is just one of those weeks around Congress.

We will get ready for our second panel and we will move through that as quickly as we possibly can.

Thank you all.

As soon as we get you situated here, we will start it here. OK, we are pleased to welcome our second panel of witnesses.

We have The Honorable Gina McCarthy, who is the Assistant Administrator at the U.S. Environmental Agency. Welcome, Ms. McCarthy.

And we also have Ms. Claudia Rodgers, who is the Deputy Chief Counsel at the Small Business Administration's Office of Advocacy.

If you were here for the first panel, we have a practice here. Please rise and raise your right hands.

[Witnesses sworn.]

Mr. JORDAN. Let the record show both witnesses answered in the affirmative.

And we will go right down the row here. Ms. Rodgers, you are up first. Go right ahead.

STATEMENTS OF CLAUDIA RODGERS, DEPUTY CHIEF COUNSEL, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION; AND GINA MCCARTHY, ASSISTANT ADMINISTRATOR FOR THE OFFICE OF AIR AND RADIATION, U.S. ENVIRONMENTAL PROTECTION AGENCY

STATEMENT OF CLAUDIA RODGERS

Ms. RODGERS. Mr. Chairman, ranking member, members of the subcommittee, my name is Claudia Rodgers and I am Deputy Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration. I am pleased to have the opportunity to appear before this committee on behalf of Chief Counsel Dr. Winslow Sargeant.

In the interest of time, I will summarize my prepared testimony and ask that my full statement be included in the record. Because Advocacy is an independent body within SBA, my testimony does not necessarily reflect the position of the administration or the SBA.

Congress established the Office of Advocacy to represent the views of small entities before Federal agencies and Congress. The Office of Advocacy is charged with oversight of agency compliance with the Regulatory Flexibility Act. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, EPA must conduct SBREFA panels to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

Advocacy and EPA have a long and productive working relationship. Since SBREFA was signed into law in 1996, EPA has conducted nearly 40 SBREFA panels to assess the impact of proposed rules on small entities and to consider less burdensome alternatives. These panels allow for small business to give direct feedback on the potential cost of the proposed rules and to suggest and develop less burdensome alternatives. Final panel reports must be signed by the Chief Counsel for Advocacy, the Administrator of the Office of Information and Regulatory Affairs, and the Administrator of the EPA. In 15 years of SBREFA panels, Advocacy has found that the panel process is a useful way for small businesses to provide valuable input into the rulemaking process. In short, the panel process works.

SBREFA panels have saved billions of dollars for small businesses due to changes and improvements that were made to proposed rules, while still allowing EPA to achieve their statutory objective. While Advocacy does occasionally have disagreements with EPA on procedure and policy, we are also very proud of the work we have done with EPA to improve regulations and reduce the burdens on small businesses. We currently have five SBREFA panels underway on EPA rules, and we will continue to work with EPA in a constructive way to make sure the RFA and SBREFA are

being followed and the impacts of regulations on small businesses are being taken into account.

With respect to regulation of greenhouse gases, Advocacy disagrees with EPA on whether the impacts on small businesses were properly considered. Advocacy has been clear and consistent in its public comment letters and other communications with EPA about our positions on these issues. We believe EPA should have held SBREFA panels and conducted thorough RFA analysis to explore potential impacts of greenhouse gas regulations on small entities. In 4 years of greenhouse gas regulatory activity, EPA has not evaluated the economic effects that its initial endangerment finding and mobile source emission standards have had on small businesses.

Advocacy does not challenge EPA's authority to implement the Clean Air Act; however, we do believe a more thorough analysis was needed, including SBREFA panels, to fully consider the impacts greenhouse gas regulation would have on small businesses. These concerns were noted in Advocacy's four public comment letters, attached to my testimony.

In 2008, when EPA issued an advanced notice of proposed rulemaking indicating it might regulate greenhouse gases, Advocacy filed public comments asking EPA to hold SBREFA panels on any greenhouse gas regulation to ensure the effects of small entities could be considered.

When EPA issued its endangerment finding in 2009, Advocacy again filed public comments advising EPA to conduct SBREFA panels to explore potential impacts of greenhouse gas regulations on small entities.

In EPA's subsequent proposed regulation of motor vehicle greenhouse gas emissions standards and the proposed tailoring rule, EPA again certified under the RFA that such standards would have no significant impact on a substantial number of small entities. EPA did acknowledge some of the potential burdens on small businesses and established a phased in compliance program with the tailoring rule. This action led to significant cost savings for small businesses and EPA deserves credit for its implementation. However, Advocacy believes EPA should have done a SBREFA panel, which would have better reflected the views of small businesses and improved the rule.

In conclusion, while EPA has expressed its desire to reach out to small entities and has provided temporary relief to small businesses, Advocacy remains concerned that EPA has not fully complied with both the spirit and the requirements of the RFA on the greenhouse gas rules. EPA did conduct public outreach; however, public outreach is not a substitute for the concrete feedback agencies get from small businesses during the panel process.

We look forward to continuing to work with EPA on these and other important regulations. Thank you for the opportunity to address such an important issue for small business. I appreciate your work in the Office of Advocacy and I am happy to answer any questions you may have.

[The prepared statement of Ms. Rodgers follows:]

Advocacy: the voice of small business in government

Testimony of

Claudia R. Rodgers
Deputy Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration

Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending

Committee on Oversight and Government Reform

U.S. House of Representatives

Date:	April 6, 2011
Time:	1:30 PM
Location:	Room 2154 RHOB Rayburn House Office Building Washington, D.C.
Topic:	Regulatory Impediments to Job creation: Assessing the Impact of GHG Regulations on Small Business

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates. For more information about the Office of Advocacy, visit ***http://www.sba.gov/advo****, or call (202) 205-6533.*

Mr. Chairman, Ranking Member, Members of the Subcommittee, my name is Claudia Rodgers and I am Deputy Chief Counsel for the Office of Advocacy at the U. S. Small Business Administration (SBA). I am pleased to have the opportunity to appear before this Committee on behalf of Chief Counsel Dr. Winslow Sargeant on the subject of greenhouse gas (GHG) regulations and their impact on small business.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to represent the views of small entities before federal agencies and Congress. Because Advocacy is an independent body within the SBA, the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.[1] Accordingly, this testimony has not been circulated through the Office of Management and Budget (OMB). The Office of Advocacy is charged with oversight of agency compliance with the Regulatory Flexibility Act (RFA).[2] The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[3] gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[4] the Environmental Protection Agency (EPA) is required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,[5] and to

[1] 15 U.S.C. § 634a, *et. seq.*
[2] 5 U.S.C. § 601, *et. seq.*
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601, et. seq.).
[4] *See* 5 U.S.C. § 609(a), (b).
[5] 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.

consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.[6]

Office of Advocacy's Work with EPA on Behalf of Small Business

The Office of Advocacy and EPA have a long working relationship as a result of the rulemaking process and the requirements of the Regulatory Flexibility Act (RFA). Since SBREFA was signed into law in 1996, EPA has conducted about 40 SBAR Panels to assess the impact of proposed rules on small entities and to consider less burdensome alternatives. These panels allow small businesses to give direct feedback on the potential costs and burdens of the proposed rules and to suggest and develop less burdensome alternatives. Final panel reports must be signed by the Chief Counsel for Advocacy, the Administrator of the Office of Information and Regulatory Affairs (OIRA), and the Administrator of the EPA. In 15 years of SBAR panels, Advocacy has found that the panel process is a useful way for small businesses to provide valuable input into the rulemaking process. In short, the panel process works.

SBAR panels have saved billions of dollars for small businesses due to changes and improvements that were made to proposed rules while allowing EPA to achieve their statutory objective. In anticipation of such panels and throughout the panel process, the Office of Advocacy works extremely closely with EPA to ensure that the process is working as intended and that appropriate costs are being considered. While Advocacy

[6] 5 U.S.C. § 604, *as amended by the* Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

does occasionally have disagreements with EPA on procedure and policy, we are also very proud of the work we have done with the agency to improve regulations and reduce the burdens on small businesses. We currently have five SBAR panels underway on EPA rules, and we will continue to work with EPA in a constructive way to make sure the RFA is being followed and the impacts of regulations on small businesses are being taken into account.

Advocacy's Position on GHG SBAR Panel

However, Advocacy disagrees with EPA on whether the impacts on small businesses are being properly considered in its GHG regulations. Advocacy has been clear and consistent in its public comment letters and other communications with EPA about our positions on these issues (see Appendices). Advocacy believes EPA should have held SBAR panels and conducted thorough RFA analyses to explore potential impacts of GHG regulations on small entities. In four years of regulatory activity, EPA has not evaluated the economic effects that its initial endangerment finding and mobile source emissions standards have had on small businesses. Advocacy does not challenge EPA's authority to implement the Clean Air Act (CAA). However, we do believe a more thorough analysis was needed, including SBAR panels, to fully consider the impacts GHG regulation would have on small businesses.

The Advance Notice of Proposed Rulemaking

In 2008, when EPA issued an Advance Notice of Proposed Rulemaking indicating it might regulate GHG, Advocacy filed public comments in which we identified a number of possible issues with GHG regulation, including the high thresholds for emissions permitting that would be required by the Prevention of Significant Deterioration/New Source Review (PSD/NSR) provisions of the CAA.[7] We also asked EPA to hold SBAR panels on any GHG regulation to ensure that any disproportionate effects on small entities could be considered. Advocacy further suggested that EPA conduct "a separate [SBAR] panel for each primary industry sector likely to be affected (e.g., transportation, agriculture, public institutions, manufacturing, etc.)."[8]

The Proposed Endangerment Finding

When EPA issued its Endangerment Finding in 2009, Advocacy again filed public comments advising EPA to conduct SBAR panels to explore potential impacts of GHG regulation on small entities. We also recommended, should EPA move forward, that it establish regulatory exemptions to small GHG emitters that might mitigate the economic impacts on small entities, an approach similar to what EPA would propose later that year.

The Proposed Motor Vehicle GHG Emission Standards

In September 2009, EPA proposed regulation of motor vehicle GHG emission standards (i.e., fuel economy standards).[9] EPA certified under the RFA that such

[7] 73 Fed. Reg. 44,354, 44,390 (July 30, 2008).
[8] Letter to EPA Administrator Stephen L. Johnson from Acting Chief Counsel for Advocacy Shawne C. McGibbon, November 28, 2008, *available at* http://archive.sba.gov/advo/laws/comments/epa08_1128.pdf
[9] 74 Fed. Reg. 49,454 (September 28, 2009).

standards would have no significant impact on a substantial number of small entities because small automobile manufacturers were excluded from the rule.[10] EPA asserted that it was exercising 609(c) authority under the RFA to reach out to small entities. Such outreach by itself is not legally or functionally equivalent to conducting an SBAR panel. In addition, such outreach does not typically result in the identification of significant regulatory alternatives, which is one of the primary objectives of the panel process. Similarly, consultation between EPA, OMB, and Advocacy does not take the place of the deliberative process that occurs between the agencies as panel members. Finally, and perhaps most importantly, informal consultation and public outreach do not result in a written panel report with formal recommendations to the EPA Administrator.

Advocacy disagreed with EPA's certification and stated that any regulation of GHGs under the CAA would, by operation of law, automatically and immediately trigger the regulation of GHGs from stationary sources under the PSD/NSR program.[11] No additional regulatory action would be needed before permits would be required by law.

EPA's own estimates indicated that the number of facilities that would have to obtain GHG PSD permits because of construction or modifications could increase from about 280 a year to almost 41,000 per year.[12] For Title V operating permits, EPA estimated that "more than six million facilities . . . would become newly subject to Title V requirements because they exceed the 100 ton per year threshold for GHG but did not for previously regulated pollutants."[13] A large number of facilities facing these new GHG permitting requirements are small businesses, along with small communities and small nonprofit associations. Thus, it was clear that the GHG emissions standards rule for light-duty vehicles would directly and

[10] *Id.* at 49,629.
[11] *See* 74 Fed. Reg. 55, 292, 55,294 (October 27, 2009).
[12] *Id.* at 55,301.

immediately trigger regulatory impacts on small entities. And, for this reason, Advocacy believes that EPA should have convened SBAR panels in advance of this rulemaking.

The Proposed Tailoring Rule

Acknowledging the economically significant impact that finalizing the motor vehicle standards would impose on the economy, EPA proposed the Tailoring rule to temporarily raise the PSD/NSR and CAA permitting thresholds for GHG emitters so that smaller sources would not have to apply for permits immediately.[14] Advocacy was pleased that EPA acknowledged some of the potential burdens on small businesses and established a phase-in compliance program. This action led to significant cost savings for small businesses, and EPA deserves credit for its implementation. However, EPA again certified that the rule would have no significant impact on a substantial number of small entities.[15] Here, the certification asserted that the Tailoring rule was strictly regulatory relief, and thus could not trigger a significant impact.

Advocacy filed public comments on the proposed Tailoring rule on December 23, 2009.[16] The comments stated that EPA did not comply with the RFA in the GHG rulemakings. First, the Tailoring rule would not have been necessary if the endangerment finding and motor vehicle GHG standards imposed no significant economic harm on a substantial number of small entities. Second, even if taken as a whole, the proposed Tailoring rule would not have mitigated the full economic impact on small entities because the relief in the proposed Tailoring rule was only temporary and because the

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[13] *Id.* at 55,302.
[14] 74 Fed. Reg. 55, 292 (October 27, 2009).
[15] *Id.* at 55,349.

proposed Tailoring rule did not exempt all small entities. Had EPA thoroughly analyzed the potential reach of the GHG permitting requirements on small entities, it would have learned that a substantial number of small entities (over 1,200) would have remained subject to the GHG permitting requirements.[17]

In our letter, Advocacy again advised EPA that it had not met its obligations under the RFA and that it should revisit its ongoing rulemakings to ensure sufficient time to conduct SBAR panels and adequately consider the impacts of GHG regulations on small entities. Nonetheless, EPA finalized its endangerment finding,[18] and the GHG emission standards for light-duty vehicles,[19] and the Tailoring rule[20] without engaging in SBAR panels or conducting RFA analyses of impacts of GHG regulations on small business.

EPA now has completed a regulatory process which has or will soon subject small businesses to the burden of Clean Air Act permitting, a burden that the Tailoring rule has failed to address for some and has only delayed by a few years for others. Throughout the rulemaking process, our office has informed EPA that it should adequately consider the impacts of this program on small businesses.

Conclusion

While EPA has expressed its desire to comply with the RFA, reach out to small entities and provide temporary relief to some small businesses, Advocacy remains

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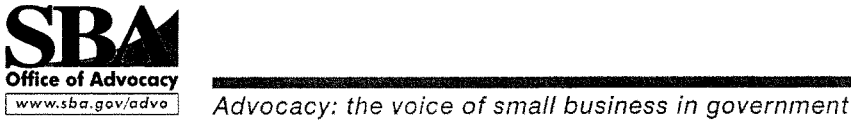
[16] Letter to EPA Administrator Lisa P. Jackson from Acting Chief Counsel for Advocacy Susan M. Walthall, December 23, 2009, *available at* http://www.sba.gov/sites/default/files/reg%201223%20EPA.pdf.
[17] *Id.* at 7.
[18] 74 Fed. Reg. 66,496 (December 15, 2009).
[19] 75 Fed. Reg. 25,324 (May 7, 2010).
[20] 75 Fed. Reg. 31,514 (June 3, 2010).

concerned that EPA did not comply with the RFA by holding SBREFA panels on the three GHG regulations, and therefore did not adequately take into account the potential impact of these regulations on small entities. Advocacy does not challenge EPA's authority to implement the Clean Air Act; to the contrary, we believe EPA has significant authority and discretion in this area. Rather, Advocacy, through the RFA analysis process, has sought a full consideration of the impacts GHG regulation might have on small entities. We look forward to continuing to work with EPA on these and other important regulations.

Thank you for the opportunity to address such an important issue for small business. I appreciate your interest in the work of the Office of Advocacy.

Appendices
A,B,C,D,E



January 19, 2011

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Settlement Agreements for Petroleum Refineries (75 Fed. Reg. 82,390 (December 30, 2010), Docket No. EPA-HQ-OGC-2010-1045) and Electric Utility Generating Units (75 Fed. Reg. 82,392 (December 30, 2010), Docket No. EPA-HQ-OGC-2010-1057)

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the two Environmental Protection Agency's (EPA's) notices of proposed settlement agreement under the Clean Air Act published on December 30, 2010. In these notices, EPA invites public comment on settlement agreements that would require rulemaking under section 111(b) and 111(d) of the Clean Air Act for Petroleum Refineries and for Electric Utility Generating Units (EGUs). Advocacy is concerned that the timelines for rulemaking required by these settlement agreements do not provide sufficient time for EPA to fully comply with the Regulatory Flexibility Act (RFA), including, if necessary, the requirement to conduct a Small Business Advocacy Review (SBAR) in support of notices of proposed rulemaking.[1] Advocacy also would welcome the opportunity to discuss with EPA how they could set aside the time necessary to comply with the RFA in future negotiated settlement agreements or consent decree deadlines.

The Office of Advocacy

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.[2] The RFA,[3] as amended by the Small Business Regulatory Enforcement

[1] 5 U.S.C. § 609(b).
[2] 15 U.S.C. § 634a, *et. seq.*
[3] 5 U.S.C. § 601, *et. seq.*

Fairness Act of 1996 (SBREFA),[4] gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[5] EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities,[6] and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.[7]

Background

On December 23, 2010, EPA announced proposed settlement agreements in litigation, brought by various States and NGOs, seeking regulations of Greenhouse Gas (GHG) emissions from EGUs and petroleum refineries. The settlement agreement would require EPA to propose, for each of these two sectors, New Source Performance Standards for GHG emissions under section 111(b) of the Clean Air Act and emissions guidelines for States under 111(d) of the Clean Air Act. EPA would propose regulations for EGUs by July 26, 2011 and issue final regulations by May 26, 2012. EPA would propose regulations for refineries by December 15, 2011 and finalize regulations by November 15, 2012. EPA published these settlement agreements for 30-day public comment on December 30, 2010.

Advocacy believes that both of these rulemakings would directly impact small entities. EPA has information from prior and current rulemakings, such as the ongoing rulemaking to establish Clean Air Act section 112 National Emissions Standards for Hazardous Air Pollutants (NESHAP) for EGUs and the recent rulemaking implementing the Renewable Fuel Standards under the Energy Independence and Security Act, identifying these small entities.

Advocacy therefore wants to ensure that EPA provides itself sufficient opportunity to comply with the requirements of the RFA. Advocacy has no information at this time that would indicate that EPA could or could not certify that either or both of these rules "will not, if promulgated, have a significant economic impact on a substantial number of small entities," but in the absence of such information, advises EPA to allocate time for a Small Business Advocacy Review Panel, as required by 5 U.S.C. § 609(b) or as permitted by 5 U.S.C. § 609(c). EPA's November 2006 guidance on the Regulatory Flexibility Act states that "the entire Panel process – once begun in earnest with focused small entity outreach, through SBA notifications, preparation for and convening of the Panel, and the

[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).
[5] *See* 5 U.S.C. § 609(a), (b).
[6] 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.
[7] 5 U.S.C. § 604, *as amended by the* Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

completion of the Panel Report – will usually take between four and ten months." Advocacy also believes that the most productive Panels occur after EPA has done preliminary development and analysis of regulatory options before the initial outreach to Advocacy and the Small Entity Representatives. The Panel Report itself is intended to be an input into the Initial Regulatory Flexibility Analysis (IRFA), which should be completed and available for comment with the proposed rule.

Advocacy is therefore concerned that the proposed settlement agreements do not provide sufficient time for a full Panel process and subsequent development of an Initial Regulatory Flexibility Analysis prior to a robust interagency review under Executive Order 12866. Accounting for preliminary consideration and analysis of regulatory options, time for a Panel, at least two months for development of the IRFA and rule, and up to 90 days for EO 12866 interagency review, Advocacy believes that EPA should allow itself significantly more than a year to develop a proposed rule that fully complies with and benefits from the RFA.

Advocacy also hopes to discuss further with EPA a way to ensure that time for RFA compliance is considered by the courts and in negotiations over future settlement agreement and consent decree timelines. Advocacy believes that there have been instances in the recent past in which EPA felt it necessary to compromise its RFA compliance in order to meet these deadlines. Advocacy offers its assistance in planning for RFA compliance in advance of negotiations over rulemaking deadlines.

Conclusion

For the reasons above, Advocacy advises EPA to request more time to complete the rulemakings required by the settlement agreement. Advocacy believes that the seven months provided for the EGU proposed rule and 11 months provided for the refineries proposed rule are not sufficient to allow for full compliance with the procedures required by the RFA, including an SBAR Panel Report and development of IRFA, or to ensure that the Administrator, in exercising her policy discretion, can benefit from the agency's understanding of both rulemakings' economic impact on small entities. Further, Advocacy welcomes a broader discussion with EPA on negotiated deadlines in settlement agreements and consent decrees.

Please do not hesitate to call me or Assistant Chief Counsel David Rostker (david.rostker@sba.gov or (202) 205-6966) if we can be of further assistance.

Sincerely,

/s/

Winslow Sargeant, Ph.D
Chief Counsel for Advocacy

/s/

David Rostker
Assistant Chief Counsel

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Advocacy: the voice of small business in government

December 23, 2009

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55,292 (October 27, 2009), Docket No. EPA-HQ-OAR-2009-0517

Dear Administrator Jackson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments in response to the U.S. Environmental Protection Agency's proposed rulemaking, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("GHG Tailoring Rule"), 74 Fed. Reg. 55,292 (October 27, 2009). EPA has certified that the GHG Tailoring Rule, along with two interrelated rules that will result in the federal regulation of greenhouse gases for the first time,[1] will not have a significant economic impact upon a substantial number of small entities. We disagree.

As discussed below, whether viewed separately or together, it is clear that EPA's Clean Air Act greenhouse gas rules will significantly affect a large number of small entities. EPA was therefore obligated under the Regulatory Flexibility Act to convene a Small Business Advocacy Review Panel (or Panels) prior to proposing these rules.[2] By failing to do so, EPA also lost its best opportunity to learn how its new greenhouse gas rules would actually affect small businesses, small communities and small non-profit associations. These small entities are concerned that EPA has not adequately considered

[1] "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 18,886 (April 24, 2009), and "Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (September 28, 2009).
[2] *See* 5 U.S.C. § 609(b).

regulatory alternatives that could achieve greenhouse gas emission reductions without imposing heavy new compliance burdens on large numbers of small entities.

The Office of Advocacy

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.[3] The Regulatory Flexibility Act (RFA),[4] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[5] gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[6] EPA is specifically required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,[7] and to consider less burdensome alternatives.

Background

EPA began developing a framework to regulate greenhouse gases (GHGs) under the Clean Air Act in the wake of the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*.[8] The Court found in *Massachusetts v. EPA* that GHGs are air pollutants under section 302 of the Clean Air Act,[9] and, consequently, that EPA has the authority to regulate GHGs under the Clean Air Act. On July 30, 2008, EPA published an Advance Notice of Proposed Rulemaking (ANPR) entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act," 73 Fed. Reg. 44,354 (July 30, 2008). EPA discussed several Clean Air Act regulatory programs in the ANPR that could provide a means for regulating GHGs.[10] The ANPR requested comment on whether these Clean Air Act programs would be appropriate mechanisms for addressing climate change, and whether

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[3] 15 U.S.C. § 634a, *et. seq.*
[4] 5 U.S.C. § 601, *et. seq.*
[5] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).
[6] *See* 5 U.S.C. § 609(a), (b).
[7] 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.
[8] 549 U.S. 497 (2007).
[9] 42 U.S.C. § 7602.
[10] 73 Fed. Reg. 44,476-44,520 (stationary sources), 44,432-44476 (mobile sources) (July 30, 2008). These programs include National Ambient Air Quality Standards (NAAQS) for CO_2 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).

EPA should find that GHGs contribute to climate change and endanger public health and welfare. On November 28, 2008, Advocacy submitted comments on the ANPR, recommending that EPA refrain from regulating GHGs under the current Clean Air Act because of the potential impacts on small entities.[11] On April 24, 2009, EPA published its proposed endangerment determination – that six greenhouse gases[12] in the atmosphere may reasonably be anticipated to endanger public health and welfare.[13] With respect to the RFA, the agency stated "[b]ecause this proposed action will not impose any requirements, the Administrator certifies that this proposed action will not have a significant economic impact on a substantial number of small entities."[14] Subsequently, on September 28, 2009, EPA published proposed GHG emissions standards for light-duty vehicles under section 202(a) of the Clean Air Act.[15] For this rule, the agency stated

> EPA has not conducted a Regulatory Flexibility Analysis or a SBREFA SBAR Panel for the proposed rule because we are proposing to certify that the rule would not have a significant economic impact on a substantial number of small entities. EPA is proposing to defer standards for [vehicle] manufacturers meeting SBA's definition of small business as described in 13 CFR 121.201 due to the short lead time to develop this proposed rule, the extremely small emissions contributions of these entities, and the potential need to develop a program that would be structured differently for them (which would require more time). EPA would instead consider appropriate GHG standards for these entities as part of a future regulatory action.[16]

In other words, EPA certified that the GHG emissions standards rule would not have a significant economic impact on small entities because it only regulates larger vehicle manufacturers; small manufacturers are deferred from regulation. Significantly, however, regulating GHGs as pollutants for the first time under ***one part*** of the Clean Air Act means that GHGs are automatically regulated under ***the entire*** Clean Air Act. For stationary sources, therefore, the Clean Air Act would immediately require GHG preconstruction permits and GHG operating permits for businesses or facilities with emissions exceeding 100 or 250 tons per year of carbon dioxide (CO_2). At these statutory applicability thresholds, EPA has estimated that over six million facilities would need to apply for GHG permits once the vehicle emission rule takes effect.[17] EPA acknowledged that small entities are concerned about the potential impact on them of GHG permitting:

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[11] This comment letter is available at http://www.sba.gov/advo/laws/comments/epa08_1128.html.

[12] The six gases are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6).

[13] "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 18,886 (April 24, 2009). Advocacy submitted comments on the proposed endangerment determination on June 23, 2009. The comment letter is available at http://www.sba.gov/advo/laws/comments/epa09_0623.html.

[14] 74 Fed. Reg. 18,909 (April 24, 2009).

[15] "Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (September 28, 2009).

[16] 74 Fed. Reg. 49,629 (September 28, 2009).

[17] 74 Fed. Reg. 55,301, 55,302 (October 27, 2009).

> EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD [preconstruction permitting] requirements that may occur given the various EPA rulemakings currently under consideration concerning greenhouse gas emissions . . . 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, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs.[18]

On October 27, 2009, EPA published the proposed GHG Tailoring Rule, which is designed to temporarily raise GHG permitting applicability thresholds to 25,000 tons per year (tpy) of carbon dioxide equivalent (CO_2e) so that smaller sources would not have to immediately apply for permits.[19] Concerning the RFA, EPA stated that:

> I certify that this rule will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities . . . We believe that this proposed action will relieve the regulatory burden associated with the major PSD [preconstruction permits program] and title V operating permits program for new or modified major sources that emit GHGs, including small businesses. . . . As a result, the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity.[20]

In response to EPA's publication of the three GHG proposals, many small entity representatives have contacted Advocacy and expressed their concerns about EPA's regulation of GHGs through the Clean Air Act's regulatory framework. These small entity representatives have also communicated their frustration that EPA has not convened a Small Business Advocacy Review Panel or Panels on these proposals. On October 13, 2009, and December 11, 2009, Advocacy hosted small business roundtables to obtain additional small business input on this issue, and Advocacy participated in EPA's November 17, 2009 Greenhouse Gas Public Outreach Meeting held in Crystal City, Virginia.

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[18] 74 Fed. Reg. 49,629 (September 28, 2009).
[19] "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55,292 (October 27, 2009). The proposed GHG Tailoring Rule would defer GHG sources below this threshold from PSD and Title V permitting for six years.
[20] 74 Fed. Reg. 55,349 (October 27, 2009).

EPA Improperly Certified Under the RFA That the GHG Rules Will Not Have A Significant Economic Impact On A Substantial Number of Small Entities

As discussed below, whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper. The GHG rules are likely to have a significant economic impact on a large number of small entities. Small businesses, small communities, and small non-profit associations will be affected either immediately or in the near-term. For the following reasons, EPA should have convened one or more Small Business Advocacy Panels to properly consider the small entity impacts of these rules.

Proposed Endangerment Finding

EPA's RFA certification accompanying the proposed GHG endangerment finding is grounded on the narrow, technical argument that the finding, in and of itself, does not actually impose any direct requirements on small entities. Once finalized, however, the GHG finding legally and irrevocably commits the agency to regulating GHGs under the Clean Air Act.[21] Given this entirely new regulatory program, EPA should have recognized the potential economic impact of the endangerment finding and conducted an SBAR Panel.[22] In the months immediately preceding its issuance of the proposed endangerment finding in April 2009, EPA had sufficiently detailed information about (1) the basis for the endangerment finding, (2) the section 202(a) GHG emissions standards for vehicles, and (3) the regulatory consequences that the vehicle rule would trigger for stationary sources. Accordingly, an SBAR Panel at that time would have been useful and timely.

GHG emission standards from Light-Duty Vehicles

EPA's RFA certification accompanying the GHG emission standards rule for light-duty vehicles is based on the argument that because small vehicle manufacturers are not covered by the rule, the rule will have no impact on small entities. This narrow interpretation ignores the fact that the GHG emissions standards rule, when finalized, immediately and automatically triggers the regulation of GHGs from stationary sources, including a panoply of small entities. As EPA explains in the preamble to the Tailoring Rule:

> When the light-duty vehicle is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD [preconstruction permit] program, meaning that from that point forward, prior to constructing any new major source or major modification

[21] EPA published its final endangerment determination on December 15, 2009. 74 Fed. Reg. 66,496 (December 15, 2009).

[22] EPA recognized in the 2008 GHG ANPRM that the regulation of GHGs under the Clean Air Act is unprecedented in its scope and has significant consequences for regulated entities of all sizes and types. *See generally* "Regulating Greenhouse Gas Emissions under the Clean Air Act," 73 Fed. Reg. 44,354 (July 30, 2008).

> that would increase GHGs, a source owner would need to apply for, and a permitting authority would need to issue, a permit under the PSD program that addresses these increases. Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated GHGs, if it did not have a title V permit already, would have 1 year to submit a title V permit application.[23]

Thus, by operation of law, the final vehicle GHG rule will trigger the imposition of PSD and Title V GHG permitting requirements, and on a large scale. EPA estimates that the number of facilities that would have to obtain GHG PSD permits because of construction or modifications could increase from the current level of about 280 each year to almost 41,000 per year.[24] For Title V operating permits, EPA estimates that "more than six million facilities . . . would become newly subject to title V requirements because they exceed the 100 ton per year threshold for GHG but did not for previously regulated pollutants."[25] A large number of facilities facing these new GHG permitting requirements are small businesses, along with small communities and small non-profit associations. Thus, it is clear that the GHG emissions standards rule for light-duty vehicles directly and immediately triggers regulatory impacts for small entities.[26] If this were not true, EPA would not need to finalize the GHG Tailoring Rule prior to finalizing the GHG emission standards rule. Under section 609(b) of the RFA, EPA was therefore required to convene a SBAR Panel before proposing the GHG emission standards rule.

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[23] 74 Fed. Reg. 55,294 (October 27, 2009).
[24] *Id.* at 55,301.
[25] *Id.* at 55,302.
[26] This situation is somewhat analogous to the automatic imposition of rules triggered by the removal (delisting) of the bald eagle from the List of Endangered and Threatened Wildlife under the Endangered Species Act (ESA). In anticipation of the delisting, the U.S. Fish and Wildlife Service (FWS) proposed a definition of "disturb" under the Bald and Golden Eagle Protection Act (BGEPA) to guide post-delisting bald eagle management. 71 Fed. Reg. 8,265 (February 16, 2006). Upon delisting as an endangered species, the bald eagle would immediately fall under the protection of the BGEPA. In considering the potential costs to small entities of delisting, FWS included the costs imposed by the BGEPA-based regulations (71 Fed. Reg. at 8266-67), recognizing that those costs were a direct result of the delisting. Similarly, when the National Institute for Occupational Safety and Health (NIOSH) published a proposed rule establishing Approval Tests and Standards for Closed-Circuit Escape Respirators, 73 Fed. Reg. 75,027 (December 10, 2007), NIOSH included the cost of replacing CCERs in its economic analysis, recognizing that its proposed rule would directly trigger regulatory costs under separate Mine Safety and Health Administration respiratory standards. 73 Fed. Reg. 75,038. While NIOSH's proposed rule on its face would apply only to manufacturers of CCERs, it would also automatically trigger MSHA requirements for mine operators to provide their workers with the most current NIOSH-approved products. Accordingly, some CCERs used in mines would have to be replaced before their normal product life cycle, triggering additional costs to mine operators. *See also Aero. Repair Station Ass'n v. F.A.A.*, 494 F.3d 161 (D.C. Cir. 2007)(Court rejected agency's assertion that small business subcontractors were not directly regulated for RFA purposes by drug and alcohol testing requirements; while the regulation on its face applied only to employer air carriers who operate aircraft, employees of contractors and subcontractors were also subject to the requirements and should have been considered in the RFA analysis).

GHG Tailoring Rule

EPA's RFA certification of the GHG Tailoring Rule is based on the assertion that the rule is deregulatory in nature and that "the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity."[27] Applying the Tailoring Rule's temporary GHG applicability threshold of 25,000 tpy CO_2e, EPA believes, would shield all small entities from GHG compliance costs, at least until the expiration of the tailoring period. In reality, however, several small entities and their representatives have informed Advocacy that their anticipated GHG emissions will exceed the 25,000 tpy CO_2e threshold; accordingly, they will immediately become subject to PSD and Title V permitting requirements for GHGs. Examples of affected small entities, based on conversations with Advocacy, include:

- More than 100 small brick manufacturers;
- 400-500 small foundries;
- 150 small pulp and paper mills;
- Over 100 small coal mines;
- 80 small lime manufacturers;
- 350 small municipal utilities;
- More than 40 small electric cooperatives; and
- At least 16 small petroleum refineries.

Some of these 1,200+ small entities (e.g., brick manufacturers) report that they will be required to obtain Title V permits for the first time solely because of their GHG emissions. EPA estimates the cost of obtaining a first-time Title V permit for industrial facilities at $46,350 per permit, and new PSD permits are estimated to cost $84,530 per permit.[28] These estimates do not include the costs of project delays and potential operational modifications required by permitting authorities. In total, these costs may exceed 3 per cent of annual operating expenditures for some small entities (e.g., electrical distribution cooperatives). Under EPA's RFA Guidance, rules with 3 percent or greater economic impact on more than 1,000 small entities are presumed to be ineligible for certification under the RFA.[29] Had EPA thoroughly analyzed the potential reach of the GHG permitting requirements on small entities, it would have learned that the GHG Tailoring Rule will not benefit a substantial number (over 1,200) of small entities. The fundamental basis for EPA's RFA certification – that the GHG Tailoring Rule will

[27] 74 Fed. Reg. 55,349 (October 27, 2009).
[28] *Id.* at 55,339.
[29] EPA, *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act* (November 2006) at 24.

completely relieve the regulatory burden associated with PSD and Title V permitting for all small entities – is not factually supported. Under section 609(b) of the RFA, EPA was required to convene an SBAR Panel before proposing the GHG Tailoring Rule.

The Combined GHG Rulemaking

While EPA clearly could have convened a SBAR Panel for any of the three individual GHG rules, there is no doubt that the agency was required by the RFA to conduct a Panel for the combined GHG rulemaking. EPA's effort to regulate GHGs under the Clean Air Act is a major regulatory undertaking and is unlike previous EPA programs. This new regulatory program should not have been launched without the benefit of a thorough review of the potential small entity impacts, as required by the RFA.

EPA's GHG Public Outreach Efforts Are Not A Substitute for SBAR Panels

While Advocacy acknowledges that EPA has made a concerted effort to reach out to small entities concerning GHG regulation under the Clean Air Act, public outreach by itself is not legally or functionally equivalent to conducting an SBAR Panel. Such outreach does not typically result in the identification of significant regulatory alternatives, which is one of the primary objectives of the Panel process. Similarly, consultation between EPA, OMB and Advocacy does not take the place of the deliberative process that occurs between Panel members. Finally, and perhaps most importantly, informal consultation and public outreach do not result in a written Panel report with formal recommendations to the EPA Administrator.

When a planned rule or rules will have a significant economic impact on a substantial number of small entities, which Advocacy believes is the case with the three GHG rules, EPA cannot rely on outreach campaigns to satisfy its Panel obligation under the RFA.. Nevertheless, in the GHG emissions standards rule for light-duty vehicles, the agency stated 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, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs."[30] Section 609(c) of the RFA provides that "an agency may in its discretion apply subsection (b) [i.e., section 609(b), the SBAR Panel requirement] to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities."[31] Advocacy interprets section 609(c) to allow (and encourage) an agency that can properly certify a proposed rule to elect to conduct a full SBAR Panel, even though the agency is not required to do so.[32] As such, an agency proceeding under section 609(c) would be

[30] 74 Fed. Reg. 49,629 (September 28, 2009). EPA relied on similar language in the GHG Tailoring Rule, 74 Fed. Reg. 55,349 (October 27, 2009), and in another recent proposed rule concerning the interpretation of the regulatory phrase "subject to regulation" (74 Fed. Reg. 51,535 (October 7, 2009)).
[31] 5 U.S.C. § 609(c).
[32] Under the RFA's current definitions, EPA and the Occupational Safety and Health Administration are the only federal agencies that must conduct SBAR Panels when their planned rules will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. § 609(d).

expected to meet all of the Panel requirements in section 609(b), not something less. Here, where EPA could not properly certify the GHG rules and already had the obligation to conduct a Panel, section 609(c) does not give EPA the legal discretion to do anything less than a full Panel. Otherwise, EPA could choose in any rulemaking to "certify" the rule and use the "discretion" of section 609(c) to conduct informal consultation and outreach. This strained interpretation would effectively vitiate the RFA's Panel requirement.

EPA Had No Legal Basis To Avoid Conducting A Panel

Although there are rare situations where an agency may have a legitimate reason for not conducting the small business impact analysis required by the RFA (which in this case would include a SBAR Panel), none of those situations are present here. Congress has not exempted these rulemakings from the Administrative Procedure Act[33] or the RFA. EPA is not acting under a court-ordered deadline for rulemaking that precludes the time needed to complete the Panel process. Likewise, EPA has not received a Congressional directive to complete these rulemakings by a date that makes compliance with the Panel requirement impossible.[34] EPA has not demonstrated that these rulemakings are eligible for a waiver of the SBAR Panel requirements, as provided in section 609(e) of the RFA.[35] More specifically, EPA has not shown that special circumstances exist that would make a Panel impractical or unnecessary. On the contrary, available evidence suggests that EPA would have greatly benefited from receiving additional advice from small entities before proposing these rules.[36]

Advocacy's Recommendations

Advocacy recommends that EPA adopt the following with respect to GHG regulations under the Clean Air Act.

- EPA should reconsider its Finding on Endangerment for GHGs. EPA published its final endangerment finding for GHGs on December 15, 2009.[37] EPA should

[33] 5 U.S.C. §§ 551-559.
[34] For example, in 2006 the Department of Homeland Security (DHS) published a draft interim final rule, *Chemical Facility Anti-Terrorism Standards*. 71 Fed. Reg. 78,276 (December 28, 2006). The draft interim final rule implemented Section 550 of the Homeland Security Appropriations Act of 2007, which required DHS to promulgate interim final regulations for the security of certain chemical facilities in the United States within six months of its passage.[34] See Pub. L. 109–295, sec. 550. In this instance, DHS did not assess the impact of this proposed rule on small entities or prepare an IRFA because Congress directed it to issue "interim final regulations" within six months. While Congress did not specifically instruct the agency to bypass the proposed rule stage, the short timeframe and "interim final" language arguably gave the agency good cause to bypass the traditional notice and comment rulemaking process and the RFA.
[35] 5 U.S.C. § 609(e).
[36] At a minimum, small entity representatives could have provided EPA with additional regulatory alternatives, and more detailed information about the real-world impacts of the PSD and title V permitting programs.
[37] 74 Fed. Reg. 66,496 (December 15, 2009).

reconsider this finding and/or delay the effective date of the finding in order to allow the agency to conduct an SBAR Panel on endangerment and the other GHG rules.

- EPA should adopt an interpretation of the effective date of the GHG emissions standards rule for light-duty vehicles that gives EPA, the states, and small entities additional time to prepare for the new GHG requirements. Several states and state air permitting authorities have commented that they will have great difficulty implementing GHG requirements at the state level.[38] Specifically, state authorities are concerned that they will not be able to incorporate the GHG Tailoring Rule thresholds for PSD and Title V permits into state law on an expedited basis. Small GHG sources would not be deferred from having to submit permit applications, which will overwhelm the state agencies. Moreover, states are concerned that they lack the resources and the trained personnel to process large volumes of permit applications. To help alleviate this situation, it has been suggested that EPA interpret the regulatory phrase "subject to regulation" in the context of the GHG emissions standards rule for light-duty vehicles so that that GHG emissions are subject to regulation only at such time as Model Year (MY) 2012 vehicles are certified, which would be an additional 15 months.[39] States will need this time to amend their state laws to reflect the applicability and significance thresholds of the GHG Tailoring Rule, and to hire and train additional permitting personnel.

- EPA must conduct an SBAR Panel on the GHG rulemakings. Whether or not EPA interprets the "subject to regulation" phrase as allowing an additional 15 months before the PSD and Title V permitting requirements become applicable, EPA needs to conduct a Panel on the GHG regulatory program, as required by the RFA. The Panel process would give EPA critical information about the impacts of GHG rules on small entities, while allowing the agency to consider alternative ways to achieve its regulatory objectives without injuring small entities. [40] The Panel could also address the issue of how EPA should determine what constitutes Best Available Control Technology for GHGs. The issue of determining BACT is critically important, particularly for the more than 1 million facilities in the U.S. that have boilers and may have to go through the PSD review process.

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[38] *See, e.g.*, Letter from South Carolina Department of Health and Environmental Control to the U.S. EPA (November 24, 2009); Letter from the National Association of Clean Air Agencies to the U.S. EPA (December 7, 2009).

[39] Letter from the National Association of Clean Air Agencies to the U.S. EPA (December 7, 2009) at 4 ("NACAA suggests that when Title II regulations are the trigger for PSD and Title V permitting, it may be permissible for EPA to interpret "subject to regulation" to mean when the regulation "takes effect" under the CAA. In this instance, EPA is proposing that its GHG regulation of light-duty vehicles would "take effect" in MY 2012. Since MY 2012 vehicles would ordinarily be certified in the summer of 2011, this interpretation would likely provide an additional 15 months after the anticipated promulgation of the regulation for states to take critical actions to respond to the initial impacts of the new programs." (*citations omitted*)).

[40] 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."

- EPA should adopt higher tailoring thresholds in the GHG Tailoring Rule. Small businesses have told EPA that the proposed 25,000 tpy CO_2e applicability threshold in the GHG Tailoring Rule is too low.[41] Similarly, there is concern that the applicability threshold for modifications under the PSD program should be higher than the proposed 10,000 to 25,000 tpy CO_2e. EPA should adopt a higher applicability threshold for PSD and Title V (such as 100,000 tpy CO_2e), and it should adopt a significance threshold for PSD purposes of at least 50,000 tpy CO_2e. EPA should also consider longer phase-in periods for these applicability and significance thresholds to apply. EPA needs to explain more clearly how it will apply the GHG significance threshold to routine operational changes and clarify how PSD modifications could be triggered by such operational changes.

- GHG regulations should focus on facilities' actual emissions, not on their potential to emit. The difference between actual and potential emissions at a facility can be substantial. EPA's Greenhouse Gas Reporting Rule[42] requires sources to report their actual annual GHG emissions, not their potential emissions based on a facility's design capacity. To be consistent with the GHG Reporting Rule, facilities should not be required to obtain PSD or Title V permits solely because of potential GHG emissions.[43] This regulatory approach would yield real benefits, and avoid unnecessarily burdening facilities whose actual emissions are only a small fraction of their potential emissions.

Conclusion

Whether viewed separately or together, it is clear that EPA's Clean Air Act greenhouse gas rules will significantly impact a large number of small entities. EPA was therefore obligated under the RFA to convene a Panel (or Panels) prior to proposing these rules. EPA now needs to conduct a Panel to gain informed input and develop well-considered regulatory alternatives as the agency seeks to address one of the most important and challenging environmental issues of this decade.

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[41] *See, e.g.*, Comments of American Public Power Association Regarding Proposed EPA GHG Rules Affecting Small Entities (December 1, 2009) (Association representing small municipal utilities asserts that proposed GHG Tailoring Rule's applicability threshold is too low to benefit over 350 small municipal utilities).

[42] "Mandatory Reporting of Greenhouse Gases" 74 Fed. Reg. 56,260 (October 30, 2009).

[43] Methods exist to allow a source to limits its potential to emit, such as federally enforceable state operating permits. EPA should develop streamlined procedures to allow GHG sources to limit their potential emissions.

Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if you have questions or if we can be of assistance.

Sincerely,

/s/

Susan M. Walthall
Acting Chief Counsel for Advocacy

/s/

Keith W. Holman
Assistant Chief Counsel for
Environmental Policy

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

SBA
Office of Advocacy
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Advocacy: the voice of small business in government

June 23, 2009

BY ELECTRONIC MAIL

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 6102T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Docket ID No. EPA-HQ-OAR-2009-0171, Comments on EPA's "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act"

To Whom It May Concern:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments in response to the proposed rule published by the U.S. Environmental Protection Agency (EPA) on April 24, 2009, entitled "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 Fed. Reg. 18,886 (April 24, 2009).

As discussed below, Advocacy, on behalf of the small entities we represent, is concerned that (1) the current Clean Air Act is neither an effective nor an efficient mechanism for EPA to use to regulate greenhouse gases, (2) regulating carbon dioxide (CO_2) for the first time under the Clean Air Act will be complex and disruptive, and (3) regulating CO_2 and other greenhouse gases (GHGs) under the Clean Air Act will negatively impact small entities, including small businesses and small communities. Accordingly, Advocacy recommends that EPA (1) defer to ongoing efforts by Congress to enact climate change legislation, (2) defer any decision to regulate CO_2 until the agency has gained experience with regulating other GHGs, (3) establish applicability thresholds for GHG regulations that exempt small entities, and (4) conduct Small Business Advocacy Review Panels for sectors of the economy where small entities are heavily affected by GHG regulations.

The Office of Advocacy

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] The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a "significant economic impact on a substantial number of small entities,"[4] federal agencies are required by the RFA to assess the impact of the proposed rule on small entities,[5] and to consider less burdensome alternatives.

Feedback from Small Entities

In response to EPA's publication of its proposed endangerment finding, a number of small entity representatives have contacted Advocacy and expressed their concerns about EPA's regulation of GHGs through the Clean Air Act's regulatory framework. On May 22, 2009, Advocacy hosted a small business roundtable to obtain additional small business input on the proposal, as well as to consider possible alternatives. The following comments and recommendations are reflective of the discussion during the roundtable as well as other conversations with small entity representatives.

Background

EPA proposed the endangerment finding for vehicles under section 202(a) of the Clean Air Act in response to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*.[6] The Court found in *Massachusetts v. EPA* that GHGs are air pollutants under section 302 of the Clean Air Act (CAA),[7] 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) find that GHGs do not contribute to climate change, or (3) explain why it cannot or will not make an endangerment finding. On July 30, 2008, EPA published an Advance Notice of Proposed Rulemaking (ANPR) entitled "Regulating Greenhouse Gas Emissions under the

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[1] 15 U.S.C. § 634a, *et. seq.*
[2] 5 U.S.C. § 601, *et seq.*
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).
[4] *See* 5 U.S.C. § 609(a),(b).
[5] 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.
[6] 549 U.S. 497 (2007).
[7] 42 U.S.C. § 7602.

Clean Air Act,"73 Fed. Reg. 44,354 (July 30, 2008). EPA discussed several Clean Air Act regulatory programs in the ANPR that could provide a basis for regulating GHGs.[8] The ANPR requested comment on whether these CAA programs would be appropriate mechanisms for addressing climate change, and whether EPA should find that GHGs contribute to climate change and endanger public health and welfare. On November 28, 2008, Advocacy submitted comments to EPA concerning the ANPR. *See* Attachment A. Advocacy expressed concern that EPA's effort to regulate GHGs through the CAA framework is likely to result in negative impacts on small entities, since the CAA was not designed to deal with "pollutants" that have the characteristics of GHGs. On April 24, 2009, EPA published its proposed determination that a mix of six greenhouse gases[9] in the atmosphere may reasonably be anticipated to endanger public health and welfare.[10] While the proposed endangerment finding relates only to mobile sources of GHGs (e.g., automobiles and trucks) under section 202(a) of the CAA, if EPA finalizes the endangerment finding, the agency will be able to regulate stationary GHG sources as well. EPA will likely be petitioned to regulate all GHG sources, regardless of their size or their relative contribution to climate change.

A. The Clean Air Act is Not an Effective or Efficient Mechanism to Regulate Greenhouse Gases.

As Advocacy has noted in previous comments, the Clean Air Act is neither designed nor well suited to address global climate change.[11] This is because GHGs (and CO_2 in particular), have characteristics that are markedly different from those of the traditional pollutants regulated under the CAA. They exist throughout the atmosphere in uniform concentrations. CO_2 is nearly as ubiquitous as water vapor, and is present at a volume that is hundreds of times greater than any other regulated pollutant. Unlike sulfur dioxide (SO_2) or carbon monoxide (CO), there is no GHG control device that can simply be put into a vehicle's exhaust system or added onto a piece of equipment.[12] The traditional "command and control" structure of the current CAA is poorly suited to address GHG emissions.

While EPA believes that a market-based "cap and trade" emissions program would allow GHGs to be controlled more effectively and efficiently than a command and control approach, the CAA presently does not give EPA authority to implement such a program.

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[8] 73 Fed. Reg. 44,476-44,520 (stationary sources), 44,432-44476 (mobile sources) (July 30, 2008). These programs include National Ambient Air Quality Standards (NAAQS) for CO_2 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).

[9] The six gases are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6).

[10] 74 Fed. Reg. 18,886 (April 24, 2009).

[11] *See* Advocacy comment letter on draft ANPR (November 28, 2008), available at www.sba.gov/advo/laws/comments/epa08_1128.html.

[12] Reductions in GHG emissions are primarily accomplished through (1) improved energy/fuel efficiency or (2) switching from carbon-intensive fuel such as coal to a lower intensity fuel such as natural gas.

Therefore, it is necessary for Congress to create the authority for a GHG cap and trade program. EPA Administrator Jackson clearly acknowledged that the existing CAA is not the best structure for dealing with climate change when she told Congress "[t]here are costs to the economy of addressing global warming emissions, and that the best way to address them is through a gradual move to a market-based program like cap and trade. There is a difference between [a] cap and trade program[,] which can be authorized by legislation and is being discussed[,] and a regulatory program."[13] Congress is now in the process of considering such cap and trade legislation.

Beyond creating the statutory authority for a cap and trade program, Congress should properly be the architect of a national strategy for climate change. EPA has neither the resources nor the technical experience to design and oversee a national energy plan, national efficiency standards, or other components that could constitute a comprehensive U.S. climate change strategy.[14] Therefore, Congress is the appropriate body to undertake this task.

B. Regulating CO_2 for the First Time Will Be Complex and Potentially Disruptive.

Regulating CO_2 in the U.S. for the first time, particularly through the "command and control" structure of the CAA, is likely to result in confusion and disruption for regulated sources, at least in the near term. Most businesses have not been required to track their CO_2 emissions or to pay to emit CO_2. Small business representatives have expressed concerns that GHG regulations would be an entirely new cost of doing business, requiring time and effort for facilities to understand their obligations and to develop compliance mechanisms. In the short run, GHG regulations would cause disruption as companies try to understand whether they are subject to the new regulatory program. Many of those companies would need to hire attorneys and consultants to advise them on how to comply. This, in turn, adds to the cost of dealing with new regulations.

Moreover, CO_2 regulation under the CAA may also result in unintended consequences, such as exacerbating ozone pollution. By requiring CO_2 reductions in the engines of new

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[13] Comments of EPA Administrator Lisa P. Jackson before the Senate Committee on Environment and Public Works, Hearing on EPA's Budget, May 12, 2009. Administrator Jackson reiterated the need for congressional action two days later on national television. Appearing on *The Daily Show*, she was asked by host Jon Stewart "you feel that you can do that [regulate climate change] without hurting small business? Because that is . . . these companies are hurting and any more onerous regulation . . . and some of that could be an issue . . . ." Administrator Jackson responded that "I do think we need to be sensitive to it . . . I do think Congress is looking at that issue. I do think there are ways within a market-based system to do that. We need legislation to do it the best." Remarks of EPA Administrator Lisa P. Jackson, *The Daily Show with Jon Stewart* (May 14, 2009).

[14] National energy policy and efficiency standards, for example, have been within the regulatory purview of the Department of Energy for decades. Regulations relating to vehicle design (and crashworthiness) have been the responsibility of the Department of Transportation and the National Highway Safety Administration. Other areas potentially affected by GHG regulations overlap with the traditional authority of other agencies (e.g., airplane design and the Federal Aviation Administration, boat design and the Coast Guard).

vehicles, manufacturers may be forced to trade CO_2 reductions against increased emissions of other pollutants (such as oxides of nitrogen (NOx)) from those engines, potentially worsening air quality. Costly CO_2-based requirements in new vehicles and equipment would also create incentives for companies to retain their old, less efficient items longer. We therefore urgeEPA to consider the impact that an entirely new regulatory program for CO_2 is likely to have on the U.S. economy.

C. Regulating GHGs Under the Clean Air Act Will Impact Small Entities.

Expanding the scope of the Clean Air Act to regulate CO_2 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 CO_2 and other GHGs at quantities far above the Act's current applicability thresholds, small facilities could have to meet the same kind of permitting and control requirements that major stationary sources now must meet. Small businesses are particularly concerned about becoming subject to the CAA's construction and operating permit requirements due to their CO_2 emissions. These permitting requirements are complex, time-consuming, and extremely costly.[15] Affected small entities could 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 could also be regulated.

Even if small entities were not required to go through the costly process of applying for and obtaining construction and operating permits, they could still face major new regulatory obstacles to their operations. If, for example, EPA were to develop a National Ambient Air Quality Standard (NAAQS) for CO_2 and other GHGs, small entities could be heavily burdened. The wide and uniform distribution of CO_2 would mean that the entire country would either be classified as "in attainment" or "out of attainment."[16] 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.[17]

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

[15] Obtaining major source construction and operating permits typically requires many months, extensive preparation, and can easily cost applicants from $50,000 to more than $100,000.
[16] *See* 42 U.S.C. § 7407(d).
[17] "[T]he practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation" RFA, Congressional Findings and Declaration of Purpose, section (a)(6).

standardized, inflexible GHG control requirements for the very first time, adding to the overall regulatory burdens they face. [18]

EPA's endangerment finding would likely also result in new regulatory requirements for 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),[19] 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. Small businesses are concerned that regulating GHGs from mobile sources under the Clean Air Act would have serious adverse impacts on small companies that must 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.

Small entities should not be subject to costly and complex GHG regulations if they are not significant contributors to climate change. EPA needs to be aware of the concerns of small entities and ensure that any GHG regulations promulgated under the CAA are carefully tailored to exempt small entities that have insignificant GHG emissions. This is the best way to minimize the potential economic impact on small entities.

D. Advocacy's Recommendations.

Advocacy recommends that EPA consider taking the following steps with respect to GHG regulations under the Clean Air Act. We believe that EPA has the discretion in the wake of the *Massachusetts v. EPA* to defer specific action on regulation where such deferral is appropriate.

- <u>EPA should defer to ongoing congressional efforts to enact climate change legislation</u>. EPA is best served by waiting for Congress to create the statutory authority for a cap and trade or similar program. Congress is the appropriate architect of a national strategy for climate change.

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[18] An Advocacy-funded report that details the $1.1 trillion cumulative regulatory burden on the U.S. economy shows how the smallest businesses bear a 45 percent greater burden than their larger competitors. W. Mark Crain, *The Impact of Federal Regulations on Small Firms*, funded by the U.S. Small Business Administration, Office of Advocacy (2005). The annual cost per employee for firms with fewer than 20 employees is $7,747 to comply with all federal regulations. *Id.* 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 businesses with more than 500 employees.

[19] Pub. L. No. 110-140 (2007).

- EPA should defer any decision to regulate CO_2 until the agency (and regulated entities) gain experience with regulating other GHGs such as methane and nitrous oxide. EPA can choose to move forward and regulate methane, nitrous oxide, HCFCs, PFCs, and sulfur hexafluoride under the CAA. Those gases have greater warming potential than CO_2, and HCFCs and PFCs are already regulated under Title VI of the CAA.[20] By deferring the decision to regulate CO_2, EPA could benefit from designing GHG regulations for the other gases and gaining experience in regulating these gases. This experience would also help EPA to better understand how to address CO_2 emissions.

- EPA should establish applicability thresholds for GHG regulations that exempt small entities. Advocacy recommends that EPA look to its recent Greenhouse Gas Reporting Rule, which proposed a reporting threshold of 25,000 metric tons per year of CO_2 equivalent.[21] Advocacy supported this reporting threshold as a good way to achieve EPA's objective of accounting for GHG emissions without imposing pointless reporting burdens on small business. The same would be true for any GHG regulations promulgated under the CAA. Administrator Jackson seems to be sensitive to this concern, having stated before Congress "[w]ith respect to EPA's regulatory authority, it is true that if the endangerment finding is finalized EPA would have authority to regulate greenhouse gas emissions and what I've said in that regard is that we would be judicious, we would be deliberative, we would follow science, we would follow the law, and I would call your attention to our greenhouse gas registry rule where we particularly didn't look for small businesses to register . . . or have to report emissions."[22]

- EPA should conduct Small Business Advocacy Review Panels pursuant to section 609 of the RFA for each sector of the economy where small entities are heavily affected by GHG regulations. 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. SBAR Panels provide EPA with on-the-ground, real world, experienced views from small business representatives. Poorly designed approaches and unintended consequences are filtered out of proposed regulations with the help of small

[20] If EPA decides to regulate GHGs under the CAA, Title VI, the Protection of Stratospheric Ozone, may provide a useful conceptual framework. Like climate change, stratospheric ozone depletion is a global problem that was addressed through new authorities added to the CAA in Title VI. Titles I and II of the CAA were ill-suited to address the stratospheric ozone problem.
[21] 74 Fed. Reg. 16,448 (April 10, 2009).
[22] Comments of EPA Administrator Lisa P. Jackson before the Senate Committee on Environment and Public Works, Hearing on EPA's Budget, May 12, 2009 (emphasis added).

entities and government officials. These changes are accomplished without compromising valuable protections for human health and the environment.[23]

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,

s/_____

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

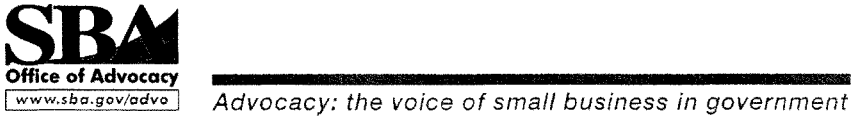
s/_____

Keith W. Holman
Assistant Chief Counsel for
Environmental Policy

Enclosure/Attachment

cc: Kevin Neyland, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

[23] 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."



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 (CO_2) 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 CO_2 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 CO_2 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.

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[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 CO_2 in particular, are fundamentally different. They exist in the atmosphere at relatively uniform concentrations everywhere. CO_2 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 CO_2, 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 CO_2 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 CO_2 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 pollutants[7] 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 CO_2 at levels which easily exceed the PSD/NSR regulatory applicability threshold.[9] Indeed, EPA believes that "if CO_2 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

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[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 Advoocacy 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 CO_2 were regulated with the current applicability thresholds. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO_2 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 CO_2 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 CO_2 in particular) are ubiquitous, are distributed uniformly throughout the atmosphere, and CO_2 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 CommercialBoiler 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 diary 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 CO_2. 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 CO_2 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% are 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 CO_2 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)

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[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

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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.

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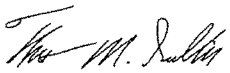
We look forward to working with you to ensure that the impact on small entities is seriously considered prior to EPA moving ahead on regulating greenhouse gas emissions. Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if we can be of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

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy

BILLING CODE 6560-50-C

General Information

What Should I Consider as I Prepare My Comments for EPA?

A. Submitting CBI

Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be confidential business information (CBI). For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. Tips for Preparing Your Comments

When submitting comments, remember to:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and/or data you used that support your views.
- If you estimate potential burden or costs, explain how you arrived at your estimate.
- Provide specific examples to illustrate your concerns.
- Offer alternatives.
- Make sure to submit your comments by the comment period deadline identified.
- To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Outline of This Preamble

I. Introduction
II. Background Information
III. Nature of Climate Change and Greenhouse Gases and Related Issues for Regulation
IV. Clean Air Act Authorities and Programs
V. Endangerment Analysis and Issues
VI. Mobile Source Authorities, Petitions and Potential Regulation
VII. Stationary Source Authorities and Potential Regulation
VIII. Stratospheric Ozone Protection Authorities, Background, and Potential Regulation

I. Introduction

Climate change is a serious global challenge. As detailed in section V of this notice, it is widely recognized that greenhouse gases (GHGs) have a climatic warming effect by trapping heat in the atmosphere that would otherwise escape to space. Current atmospheric concentrations of GHGs are significantly higher than pre-industrial levels as a result of human activities. Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level. Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases. Future projections show that, for most scenarios assuming no additional GHG emission reduction policies, atmospheric concentrations of GHGs are expected to continue climbing for most if not all of the remainder of this century, with associated increases in average temperature. Overall risk to human health, society and the environment increases with increases in both the rate and magnitude of climate change.

Today's notice considers the potential use of the CAA to address climate change. In April 2007, the Supreme Court concluded in *Massachusetts* v. *EPA*, 127 S. Ct. 1438 (2007), that GHGs meet the CAA definition of "air pollutant," and that section 202(a)(1) of the CAA therefore authorizes regulation of GHGs subject to an Agency determination that GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The Court also ruled that in deciding whether to grant or deny a pending rulemaking petition regarding section 202(a)(1), EPA must decide whether new motor vehicle GHG emissions meet that endangerment test, or explain why scientific uncertainty is so profound that it prevents making a reasoned judgment on such a determination. If EPA finds that new motor vehicle GHG emissions meet the endangerment test, section 202(a)(1) of the CAA requires the Agency to set motor vehicle standards applicable to emissions of GHGs.

EPA is also faced with the broader ramifications of any regulation of motor vehicle GHG emissions under the CAA in response to the Supreme Court's decision. Over the past several months, EPA has received seven petitions from states, localities, and environmental groups to set emission standards under Title II of Act for other types of mobile sources, including nonroad vehicles such as construction and farm equipment, ships and aircraft. The Agency has also received public comments seeking the addition of GHGs to the pollutants covered by the new source performance standard (NSPS) for several industrial sectors under section 111 of the CAA. In addition, legal challenges have been brought seeking controls for GHG emissions in

Mr. JORDAN. Thank you, Ms. Rodgers.
Ms. McCarthy.

STATEMENT OF GINA MCCARTHY

Ms. MCCARTHY. Chairman Jordan, Ranking Member Kucinich, and members of the subcommittee, I want to thank you for inviting me here today, and I am honored to be sitting here with Ms. Rodgers.

I hear repeatedly from members that small business constituents are very concerned about EPA updating its Clean Air Act programs to address greenhouse gases. But when I listen to the concerns, I am most struck by the fact that what they think we are doing bears little or no relationship to what we are actually doing. I appreciate today's opportunity to try to set that record straight.

The Agency is taking a common sense approach to meet our Clean Air Act obligations to reduce carbon pollution. Our focus now is not on small sources at all, but on the largest polluters. Perhaps the most repeated misinformation about greenhouse gas regulation and small businesses relates to greenhouse gas air permits. Contrary to the most commonly heard claims, small sources are not currently covered by the permitting program. EPA adopted regulations last year that exempt small sources for at least the next 5 years, and we cannot include them absent a future rulemaking with public comment that would do so.

I know some of your constituents are concerned about what has been called a cow tax. Well, let me reassure you that the Agency has no intention or desire to impose taxes on cows, pigs, chickens, or any other livestock. And while we routinely hear concerns that our greenhouse gas standards will cause incredible increases in gas prices and electricity rates, none of these estimates are actually based on the analysis of our programs. Instead, they are based on studies, and many of them are severely flawed, of economy-wide cap-and-trade programs that bear absolutely no relationship to EPA's actions.

In sharp contrast to these concerns, the only greenhouse gas standard EPA has issued under its existing Clean Air Act authority will save small businesses money. The average American purchasing a new passenger vehicle that meets our greenhouse gas standards would net savings of $3,000. Our proposed standards for medium- and heavy-duty vehicles would net operators of semitrucks savings of up to $74,000 over the truck's useful life.

Misconceptions about the effects of EPA programs are unfortunately no surprise. Over the last 40 years, similar unsupported claims have been made nearly every time EPA has taken significant steps to protect the American public. In the 1970's we were told that by using the Clean Air Act to phase in catalytic converters for new cars and trucks, that entire industries might collapse. Instead, the requirement gave birth to a global market for catalytic converters and enthroned American manufacturers at the pinnacle of that market.

In the 1980's, people claimed that the proposed Clean Air Act amendments would cause a quiet death for businesses across the country, but instead the U.S. economy actually grew by 64 percent,

even as the implementation of Clean Air Act amendments cut acid rain pollution in half.

In the 1990's, when we took steps to phaseout chemicals that deplete the ozone layer, a refrigeration industry representative testified that we would see shutdowns of refrigeration equipment in supermarkets and air conditioners in large office buildings, hotels, and hospitals. None of that happened. Instead, the phase-out happened 5 years faster and cost 30 percent less.

EPA is using the same Clean Air Act tools that we have been using for these past 40 years to protect public health to now address the public health threat that is posed by carbon pollution. These Clean Air Act tools have proven their worth over and over in these years to improve public health. In fact, Clean Air Act programs adopted since 1990 are expected to provide $2 trillion in benefits in 2020 alone, over $30 in benefits for every dollar spent. Just last year these programs are estimated to have reduced premature mortality equivalent to saving over 160,000 lives and to have enhanced productivity by preventing 13 million lost work days.

I will close with a statement by the Small Business Majority and the Main Street Alliance: Any step to delay or limit EPA's ability to regulate greenhouse gases and other pollution has negative implications for many businesses, whether they are large or small. It would hamper the growth of the clean energy sector of the economy, a sector that a majority of small business owners view as essential to their ability to compete.

Thank you, Mr. Chairman, and I look forward to your questions.

[The prepared statement of Ms. McCarthy follows:]

Opening Statement of Regina McCarthy
Assistant Administrator for Air and Radiation
U.S. Environmental Protection Agency

Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending
Committee on Oversight and Government Reform
U.S. House of Representatives

Hearing on the Impact on Small Businesses of Addressing Greenhouse Gas Pollution

April 6, 2011

Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee, thank you for inviting me to testify about the impact on small businesses of the Environmental Protection Agency's steps to address greenhouse gas pollution.

I hear repeatedly from Members that their small business constituents are very concerned about EPA's regulation of greenhouse gases. When I listen to their concerns, I am struck by the fact that what they think we are doing often bears little or no relationship to what we actually are doing. I appreciate today's opportunity to set the record straight.

The Agency is taking a common-sense, phased approach to meet our obligations under the Clean Air Act to reduce carbon pollution. Our focus now is not on small sources at all, but solely on the largest polluters and, for the most part, on the sectors that are responsible for the largest share of our greenhouse gas emissions.

Perhaps the most-repeated misinformation about greenhouse gas regulation and small businesses relates to greenhouse gas air permits. Contrary to the most commonly heard claims, small sources are not now covered by the permitting program. In fact, EPA adopted regulations last year that will ensure that, for at least the next five years, small sources would not be subject to greenhouse gas permitting requirements. By phasing in the Act's greenhouse gas permitting requirements, and by exempting for at least the first five years those sources that emit less than 50,000 tons per year, the Tailoring Rule exempted most of the small businesses that otherwise would have been automatically covered by the program. Absent further rulemaking, greenhouse gas emissions will trigger the obligation to get a preconstruction permit only for new construction of, or a major modification at, large facilities with the potential to emit more than 100,000 tons of greenhouse gases a year – the equivalent of burning the amount of coal it would take to fill almost 500 railroad cars. Although some small businesses say they are worried that the exemption will be overturned in court, we believe that the Agency has legal authority to issue the Tailoring Rule and that it rests on sound and well-established legal doctrines.

I also understand that some of your constituents are concerned about what has been called a "cow tax". This is nothing but an urban legend migrated to the countryside. I want to assure you that the Agency has no intention or desire to impose taxes on cows, pigs, chickens or any other livestock.

Small businesses also express concerns about indirect costs of greenhouse gas standards. In sharp contrast to this concern, the only greenhouse gas standard EPA has issued under its existing Clean Air Act authority will result in savings for small businesses and other consumers. Last year, EPA acted under the Clean Air Act to issue greenhouse gas emissions standards for cars and light trucks of model years 2012 through 2016. By ensuring that new vehicles are more fuel efficient, the EPA standards will save American drivers money at the pump while reducing America's oil consumption by 1.8 billion barrels. We estimate that the average American purchasing one of these vehicles will have a net savings of $3,000 over the lifetime of the car or light truck.

Last fall, EPA proposed to issue greenhouse gas emissions standards under the Clean Air Act for medium and heavy-duty trucks for model years 2014 through 2018. These standards, in particular, would save American businesses money on fuel expenses, and would reduce national oil consumption by 500 million barrels. We estimate that an operator of a semi truck could pay for the technology upgrades in under a year, and have net savings up to $74,000 over the truck's useful life. Those savings are especially important to small businesses, because fuel costs hit them even harder than they hit large firms.

United Auto Workers President Bob King summed up the overall picture well when he said, "This is a pretty simple equation: new technologies required by such standards bring additional content on each vehicle, and that requires more engineers, more managers, and more construction and production workers. Meanwhile, we achieve greater oil independence for our nation and a cleaner, healthier environment for ourselves and our children." [1]

We also routinely hear concerns about incredible estimated increases in gas prices and electricity rates as a result of Clean Air Act greenhouse gas standards. None of the estimates that we have seen are based on analysis of our programs. They are all based on studies, many of them severely flawed, of various economy-wide cap-and-trade programs that bear no relationship to the standards we have adopted or have under consideration. Our current greenhouse gas programs (greenhouse gas motor vehicle standards and PSD permitting) focus on making cars, power plants, refineries and industrial facilities more efficient; increased energy efficiency should help reduce costs for all Americans, including American small businesses.

In 2008, Congress ordered EPA to establish a nationwide system for reporting greenhouse gas emissions. When the Agency established that system, we made a point of exempting, from <u>all</u> of the reporting requirements, any facility that annually emits less than 25,000 metric tons of greenhouse gases. That is the amount of carbon dioxide released from burning the coal it would take to fill more than 130 railroad cars. EPA worked to minimize the number of small businesses covered by the program and to keep reporting costs low for those small businesses that are covered. This rule does not impose any limitations on greenhouse gas emissions. Instead, it will simply provide better information to the public on the levels of greenhouse gases emitted from the nation's largest sources.

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[1] http://www.bluegreenalliance.org/press_room/press_releases?id=0135

Finally, EPA has announced a schedule for using notice-and-comment rulemaking to establish greenhouse gas performance standards for fossil fuel-fired power plants and oil refineries. Together, those sectors are responsible for nearly 70 percent of the nation's greenhouse gas pollution from the industrial sector. Again, our focus is on the largest emitters, not small sources. EPA will comply with all applicable requirements of the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act.

EPA has announced that it will conduct a SBREFA panel for the greenhouse gas NSPS for fossil fuel-fired power plants. Although the Regulatory Flexibility Act only requires EPA to solicit input from small entity representatives during the Panel Process, the Agency intends to send them informational material on the rule and potential options, provide them with a background briefing, and hold two outreach meetings. In fact, the first outreach meeting on this standard is scheduled for Wednesday, April 6.

What I just described is the reality for small businesses where EPA's steps to address greenhouse gas pollution are concerned, steps that are in keeping with EPA's common-sense approach to implementing the Clean Air Act. It is no surprise that what we are hearing reflects misinformation about our greenhouse gas actions. As Administrator Jackson said when celebrating the 40 years of the Clean Air Act, "Today's forecasts of economic doom are nearly identical – almost word for word – to the doomsday predictions of the last 40 years. This "broken-record" continues despite the fact that history has proven the doomsayers wrong again and again."[2]

In the 1970s, it was stated that by using the Clean Air Act to phase in catalytic converters for new cars and trucks, "entire industries might collapse."[3] Instead, the requirement gave birth to a global market for catalytic converters and enthroned American manufacturers at the pinnacle of that market. The catalytic converter and the unleaded gasoline required to maintain have, of course, resulted in massive reductions in pollution from automobiles, and have provided correspondingly large public health benefits.

In the 1980s, people claimed that the proposed Clean Air Act Amendments would cause "a quiet death for businesses across the country."[4] Instead, the US economy grew by 64 percent even as the implementation of Clean Air Act Amendments cut Acid Rain pollution in half.

Yet again, in the 1990s, we were told that using the Clean Air Act to phase out the chemicals depleting the Ozone Layer would create "severe economic and social disruption."[5] People were worried that phasing out the use of CFCs in aerosol cans would mean they would have to give up their hairspray or deodorant. A refrigeration industry representative testified that

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[2] http://yosemite.epa.gov/opa/admpress.nsf/12a744ff56dbff8585257590004750b6/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument

[3] *World News Digest*, Facts On File News Services, May 19, 1971, quoting the Chamber of Commerce.

[4] Alexandra Allen, "Blow Away the Foul-Air Lobby," *The New York Times*, June 11, 1988, page 31.

[5] http://energycommerce.house.gov/Press_111/20090616/dc_industryjobs.pdf.

"We will see shutdowns of refrigeration equipment in supermarkets . . . . We will see shutdowns of chiller machines, which cool our large office buildings, our hotels, and hospitals."[6] In reality, the phase out was accomplished without such disruptions. New technology cut costs while improving productivity and quality. The phase-out happened five years faster and cost 30 percent less than predicted. According to an international team of scientists, "Substantial recovery from the depletion of global and polar ozone caused by ozone-depleting substances is expected in the later decades of this century. The recovery follows on the success of the Montreal Protocol in reducing the global production and consumption of ozone-depleting substances."[7]

EPA is using the same Clean Air Act tools that we have been using for the last 40 years to protect public health to now address greenhouse gas emissions. These Clean Air Act tools have proven their worth over the years in improved public health, economic and job growth, and technological innovation. In 2020, Clean Air Act programs adopted since 1990 will provide $2 trillion in benefits – over thirty dollars in benefits for every dollar spent.[8] In just the last year, these programs are estimated to have reduced premature mortality risks equivalent to saving over 160,000 lives; spared Americans more than 100,000 hospital visits; prevented millions of cases of respiratory problems, including bronchitis and asthma; enhanced productivity by preventing 13 million lost workdays; and kept kids healthy and in school, avoiding 3.2 million lost school days due to respiratory illness and other diseases caused or exacerbated by air pollution.[9]

I will close with a statement by the Small Business Majority and the Main Street Alliance. They write that any step to "delay or limit [EPA's] ability to regulate greenhouse gas emissions and other pollution ... has negative implications for many businesses, large and small, that have enacted new practices to reduce their carbon footprint as part of their new business models. It would also hamper the growth of the clean energy sector of the economy – a sector that a majority of small business owners view as essential to their ability to compete."[10]

Thank you, Mr. Chairman. I look forward to your questions.

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[6] http://www.epa.gov/ocirpage/hearings/testimony/106_1999_2000/101499rp.htm

[7] http://ozone.unep.org/Assessment_Panels/SAP/Scientific_Assessment_2010/SAP-2010-FAQs-update.pdf. Fahey, D.W., and M.I. Hegglin, *Twenty Questions and Answers About the Ozone Layer: 2010 Update*, Scientific Assessment of Ozone Depletion: 2010, 72 pp., World Meteorological Organization, Geneva, Switzerland, 2011.

[8] USEPA (2011). *The Benefits and Costs of the Clean Air Act from 1990 to 2020*. Final Report. Prepared by the USEPA Office of Air and Radiation. February 2011. Table 7-5.

[9] Id. Table 5-5.

[10] http://www.smallbusinessmajority.org/energy/index_national_economic.php.

Mr. JORDAN. Thank you both for your testimony and your time.

I am going to let the ranking member go because he has to run to another meeting, and then we will finish up.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Ms. McCarthy, in a hearing about the impacts of greenhouse gas regulations, I think it is important to discuss the reason why these regulations exist. In his written testimony, Mr. Doniger cited the National Academy of Sciences, which concluded, "Climate change is occurring. It is caused largely by human activities and poses significant risks for, and in many cases already affecting, a broad range of human and natural systems." The National Academy of Sciences continued to explain that the scientific basis for reaching this conclusion has "been so thoroughly examined and tested and supported by so many independent observations and results that the likelihood of them subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts."

Now, Ms. McCarthy, as you know, the National Academy of Sciences is far from the only organization that has reached legitimate compelling scientific conclusions that illustrate the real danger caused by climate change. Entities, including the World Health Organization, International Monetary Fund, and the U.S. Global Change Research Program, a program mandated by Congress to integrate climate change, Federal research, all definitively identified climate change a real danger.

Ms. McCarthy, do you agree that the science that provides the impetus for greenhouse gas regulation is indisputable? And if you do, why?

Ms. MCCARTHY. I do, Mr. Kucinich, and that is because the best available peer-reviewed science that we have found indicates that greenhouse gas emissions threaten the health and welfare of the American people. That is what the Administrator said in making her endangerment finding. It is backed not just by EPA research, but by the full breadth of all of the agencies in the Federal Government who address these types of issues, including the National Academy of Sciences, including NASA, including NOAA. All of the agencies that we rely on to provide the best science to this country and internationally have told us that the simple fact is that greenhouse gases are endangering public health and the environment, and it is time to take action now to reduce those pollutants.

Mr. KUCINICH. Well, did the EPA allow for comments from private industry, including small businesses on the greenhouse gas endangerment finding?

Ms. MCCARTHY. We did. It went through a rulemaking process. It was one of the most thorough of the agencies. We had more than 350,000 comments, which we addressed individually. We had 11 volumes of response to comment on this rule. We believe we did the most thorough job that the Agency could and that the science is indisputable.

Mr. KUCINICH. So what do you say, then, to the small businesses who are continuing to express concern that EPA is not paying attention to them and EPA is endangering their businesses? What do you say to them?

Ms. MCCARTHY. I would tell them that the EPA understands that our obligation under the Clean Air Act is to regulate greenhouse gases and that they pose a substantial public health problem. I would tell them that we are taking reasonable common sense steps to address greenhouse gases under the Clean Air Act in the way that Congress intended, in a way that protects the interest of the small businesses, in a way that will continue to allow the economy to grow, to continue to allow jobs to happen. We are doing the same thing to regulate greenhouse gases as we have successfully done with other pollutants under the Clean Air Act, and we will look at the economic impacts. We have done that; we will continue to do that. We will act deliberately and smart and use a common sense approach.

Mr. KUCINICH. You heard the testimony of the witnesses in the previous panel, did you not?

Ms. MCCARTHY. I did.

Mr. KUCINICH. I think we have to be concerned about small business communicating their difficulties, and I know Mr. Doniger's testimony is that most of the small businesses, that the rules would not necessarily apply to them. But I think for those to whom they do apply, they are looking for some words from you that would indicate that you are trying to do everything you can to make sure people can stay in business, at the same time trying to protect the environment. Is that a fair characterization?

Ms. MCCARTHY. That is correct.

Mr. KUCINICH. OK.

I want to thank the chairman for indulging me with this opportunity to go first. Thank you. Yield back.

Mr. JORDAN. You bet. I appreciate the gentleman. Thank you.

Ms. Rodgers, the SBREFA Act has been around for about 15 years, is that right?

Ms. RODGERS. Since 1980, 30 years.

Mr. JORDAN. Thirty years. OK.

Ms. RODGERS. I'm sorry, the RFA is 30 years; SBREFA has been 1996.

Mr. JORDAN. 1996. About 15 years. That is what I have. And how many SBREFA panels have you been involved with with the EPA in that timeframe?

Ms. RODGERS. The Office of Advocacy has been involved with nearly 40, I think we are up to about 38 now.

Mr. JORDAN. And I think in your testimony isn't it true you said you had like five underway right now?

Ms. RODGERS. Yes, five currently.

Mr. JORDAN. OK. And you believe these have been positive?

Ms. RODGERS. Yes. Overall, actually EPA is one of the better actors in terms of compliance with the RFA in general. When we were developing a training program back in 2002, we had to go to agencies to find out those who do it best to help us develop the program, and we went to EPA.

Mr. JORDAN. So you have a good relationship, good track record with EPA in all these except the one that is at issue today, is that right?

Ms. RODGERS. Yes, we are concerned about the greenhouse gas regulations.

Mr. JORDAN. So the normal process was not done with the greenhouse gas issue and its effect on small business. All the other times have been fine, when you recommended, when you went through it, except for this one particular one.

Ms. RODGERS. We felt that the Office of Advocacy, yes, felt that, taken as a whole or separately, the greenhouse gas regulations clearly had a significant economic impact on the a substantial number of small entities and, therefore, a SBREFA panel should have been held.

Mr. JORDAN. And is this a notable exception or is this the only exception to when you suggested you move in this way and go through the process that the law spells out? Is this a notable exception, is this one of a few that has been done this way or is this the only one that has been done this way?

Ms. RODGERS. It is one of a few. However, certainly over the years, over 15 years and 40 panels, we are bound to have disagreements over their certifications on some rules. But it is really one of the very few.

Mr. JORDAN. OK, so when Ms. McCarthy answered the ranking member's questions about there was a process that was undertaken with small business owners, it wasn't the normal process.

Ms. RODGERS. Correct.

Mr. JORDAN. OK.

Ms. McCarthy, why?

Ms. MCCARTHY. Mr. Jordan, I would just disagree with the characterization that it wasn't a normal process. I would emphasize that EPA certainly follows both the letter and the spirit of the RFA as it has been amended by SBREFA——

Mr. JORDAN. Just hang on 1 second. Ms. Rodgers just testified that it has been a great relationship, you have worked things out——

Ms. MCCARTHY. It has.

Mr. JORDAN [continuing]. The process has been followed almost all the time. And yet here we have a pretty important rule.

Ms. MCCARTHY. We do.

Mr. JORDAN. Clean Air Act, greenhouse gas, pretty important stuff that they think is going to have a real impact on small business. It would seem to me you would want to follow the standard procedure and go through what has been the custom and the practice. So why not in this situation?

Ms. MCCARTHY. We did follow the appropriate procedure. I thin where we disagree is that the tailoring rule, which seems to be the issue at hand, is a burden reduction rule.

Mr. JORDAN. This is important. You keep saying you followed the normal procedure, but Ms. Rodgers says out of the ordinary; the gentleman before, I assume you saw where Mr. Holman talked and said out of the ordinary, not the normal process.

Ms. MCCARTHY. There are a variety of ways to comply with the law. EPA generally goes above and beyond, and we always meet both the letter and the spirit of the law. In this instance we made a decision that we did not need to convene a panel because the tailoring rule was a deregulation rule. In fact, it reduced the burden for 6 million small businesses to have to deal with greenhouse gas permitting, and in that instance we did not convene a panel.

Now, we did get comment from SBA indicating that they thought we should. I believe the disagreement is one that we have had in the past before. In particular——

Mr. JORDAN. You believe or do you know?

Ms. MCCARTHY. Oh, I do know, yes.

Mr. JORDAN. OK.

Ms. MCCARTHY. Let me explain when that happened. And that had to do with the ozone and fine particles standards that we issued in 1997. At that point in time, SBA also indicated to us that we should convene a panel. We indicated that rule was not subject to a panel requirement. That was actually taken to court. The D.C. Circuit said that SBA's interpretation of the RFA doesn't carry any more weight than EPA's, and they disagreed with SBA and found that our interpretation of the RFS was persuasive. We actually won that case, and we have never ever lost a case.

Mr. JORDAN. OK.

Ms. Rodgers, did you suggest a panel be convened for the tailoring rule and the endangerment finding and the light duty truck rule?

Ms. RODGERS. Yes, we did, Congressman.

Mr. JORDAN. So all three.

And, Ms. McCarthy, you declined to do it for each of those?

Ms. MCCARTHY. Well, we explained each of those rules, and I can go through them if you would like, but we still believe we took the appropriate action under the law.

Mr. JORDAN. Because you talked about the tailoring rule; I didn't hear you talk about the other two. So three times.

Ms. MCCARTHY. I can talk about the endangerment finding.

Mr. JORDAN. Endangerment finding, OK.

Ms. MCCARTHY. EPA looks at cost and looks at getting SBREFA panels——

Mr. JORDAN. Well, let's cut to the chase here. Why not on something this important, something of this magnitude, why not do the standard practice? Why go through this? To cite this decision and that and here is why, why not just do what the advocacy group that is in the law and follow the process that is designed to be followed?

Ms. MCCARTHY. We did follow the process that is designed to be followed. What I would indicate to you is that——

Mr. JORDAN. Well, again, we have the advocates for small business, both of them saying you didn't.

Ms. MCCARTHY. I would disagree, respectfully.

Mr. JORDAN. OK.

I will yield to the Chair of the full committee, the gentleman from California. Excuse me.

Mr. ISSA. You should take Ms. Speier.

Mr. JORDAN. I apologize, Mr. Chairman, I am going to insult you twice in 30 seconds.

Mr. ISSA. Ladies first, please.

Mr. JORDAN. I didn't see the gentlelady walk in from California. California is going to get covered nonetheless, one way or the other.

Ms. SPEIER. Thank you, Mr. Chairman, and thank you, Mr. Chairman. I would have yielded, but I have constituents who are

waiting in the wings to talk with me, so I would like to take my opportunity now.

Ms. Rodgers, Chairman Issa circulated a Dear Colleague letter to House members yesterday, I believe, that cites a September 2010 report issued by the SBA Office of Advocacy, authored by Crain and Crain. The report estimated the annual cost of regulation was more than $1.75 trillion. That is kind of a staggering figure.

And yet in February of this year Professor Sid Shapiro and Ruth Ruttenberg released a critique of the Crain and Crain study, called Setting the Record Straight. The Shapiro-Ruttenberg report found that the Crain and Crain report had "severe flaws." One of these flaws in the study was that they looked at costs of regulation without looking at the benefits.

I think you can make the case if you look at the cost of running Congress, it is staggering. But some would argue that there is some benefit associated with running Congress. In any case Ms. Rodgers, unless you all want to retire or resign at this point in time.

In any case, Ms. Rodgers, did the SBA Office of Advocacy contract with Nicole Crain and Mark Crain, and they did they ask the authors to evaluate the benefits of regulation or only the costs?

Ms. RODGERS. Thank you, Congresswoman. We did not ask them to evaluate the benefits as well, and the reason is this: This is the fourth in a series of studies we have done on the same issue, which is the cost of regulations and the impact of those regulations on small businesses. The purpose of the study is not to show regulations are bad and not to show that all regulations are over-burdensome for small business. The purpose was to show that small businesses feel the effect of regulations differently than large businesses.

And the reason that was done for the cost, and not the benefits, because the costs were what affect small businesses most and it is what the Regulatory Flexibility Act requires our office to oversee, which asks agencies to review the cost of their——

Ms. SPEIER. All right. How much did that study cost?

Ms. RODGERS. Oh, I don't know that answer. I will have to get back to you.

Ms. SPEIER. Would you please provide that to the committee?

Ms. RODGERS. I would be happy to, yes.

Ms. SPEIER. Another flaw in the study identified by Shapiro and Ruttenberg was that the SBA's Office of Advocacy never had access to the underlying data used in the report; a little astonishing to me. If you can't look at the underlying data, then garbage in, garbage out is the way I look at things.

Ms. Rodgers, does your office have the data used in the Crain and Crain study? If so, would you please make that data available to us?

Ms. RODGERS. I will check and see if our office has the data and make it available to you. I do know, I am told that it is available through Crain and Crain on their Web site or through their Web site, that they have made it available. When we contract out studies, our office is not required to ask for that data and make it publicly available——

Ms. SPEIER. Well, let me suggest to you that from a public perspective, if you are using taxpayer funds, we deserve to have the underlying data so we can in fact determine whether or not it is accurate.

Ms. McCarthy, if EPA funded a study, would the Agency expect to have access to the underlying data?

Ms. MCCARTHY. The Agency would not only have access to it, the public would.

Ms. SPEIER. All right. I think that makes sense.

In addition, Shapiro and Ruttenberg, one of the peer reviewers, Richard Williams, from the Mercatus Center, raised concerns that the report's regulatory quality index may not measure what the authors say it measures; and even if it does, it may overstate the cost of regulation when used in conjunction with other measures.

Ms. Rodgers, what, if anything, was done to address this concern that was raised during the peer review process?

Ms. RODGERS. We did have the document, the study peer reviewed, and it came back with actually excellent reviews during the peer review process. This is, as I mentioned, one in four studies. Crain has been involved, the author has been involved in many of our studies previously which have not had—and used the exact same methodology—have not had complaints before then. We have done it in 1995, 2001, 2005, and 2010. So it is basically the same methodology, a new version of the same study with an updated cost on how these costs are affecting small businesses.

Ms. SPEIER. Ms. McCarthy, do you have any concerns with the peer review process used to evaluate the Crain and Crain study?

Ms. MCCARTHY. I do, and I am glad you asked that. As far as I know, the study was reviewed by two individuals. The sum total of one of the individual's comments was, "I looked it over and it's terrific. Nothing to add. Congrats." If this is the quality of the peer review of that study, then I would suggest to you it is a study that EPA could certainly not put its weight behind.

EPA is required to do peer review analysis of its studies; it is required to have our studies have analytic consistency, rigor, real peer review, transparency. The last report that EPA went out and contracted for and worked through was peer reviewed by 34 economists and technical individuals. We had a thorough public comment process. What I have here holding is a double-sided copy of just their last comments that they submitted to us during the peer review process.

Two individuals does not make a substantive peer review process, when we have repeatedly asked for the underlying data and have not been provided it by Crain and Crain or by the SBA.

Ms. SPEIER. Thank you.

Mr. Chairman, I know my time has expired, but I would just like to suggest to all of us that taxpayer funds should be spent on studies that really give us good data, and certainly the data should be available to us and to the taxpayers of this country. So I would hope that as we look at ways of making sure that government operates effectively, that we require that moving forward. Thank you.

Mr. JORDAN. I thank the lady. She makes a good suggestion.

Following up on that, Ms. McCarthy, in the closing of your testimony you say, I will close with a statement by the Small Business

Majority, and you quote the ability to regulate greenhouse gases should not be limited. Do you know how many members, what the membership is in the Small Business Majority? Do you know that number?

Ms. MCCARTHY. I am sorry, I do not.

Mr. JORDAN. Well, according to a New York Times story July 8, 2009, Small Business Majority has no membership. Its founder, Mr. John Arensmeyer, says it can no longer objectively represent small business if it had membership. So while the gentlelady from California's point is good, the close of your testimony cites a group, at least according to the New York Times, that has no membership and yet portrays itself as an organization representing small business. So I think both points are well taken and you should make sure in your testimony to quote from a source that actually might reflect something of the interest of small business.

With that, I would yield to the chairman of the full committee.

Mr. ISSA. Thank you, Mr. Chairman. And I am sorry that my colleague from California left. Let me just make something clear for the record.

Ms. Rodgers, Ms. McCarthy, you are both working for departments headed by President Obama, political appointees, right?

Ms. RODGERS. Yes.

Mr. ISSA. So when she sort of implies that one side of your two positions must be good and the other is ill-conceived and doesn't care about the same things that we all saw President Obama elected for, at least, Ms. Rodgers, I suspect you object to some idea that you don't care to get it right or that somehow your mandate is different in some way. Wouldn't that be true?

Ms. RODGERS. Yes, Congressman, I would absolutely object. Small businesses care about clean air and care about the environment, so we want to make that point as well.

Mr. ISSA. Let me ask you both a question. Isn't it true you could both be right, that Ms. McCarthy, with a mandate to essentially have the cleanest possible air and water, can in fact, in good conscience, make every effort to be as pure as possible? We used to say driven snow, but I have seen what it looks like when it melts, so I won't go there.

And isn't it possible, Ms. Rodgers, that you, when you go out and you get a study that shows $1.75 trillion, that you are not saying that you can save all of it and still have the level of clean air and clean water the American people expect? Couldn't you both be right?

Ms. RODGERS. I would absolutely agree.

Mr. ISSA. Now, Ms. McCarthy, wouldn't you agree that somewhere in $1.75 trillion, if that is an accurate number, that some of that should be reviewed and reconsidered to see if in fact changes could save much of that burden and free up those dollars for other uses, even if they are uses to help clean the environment; that not every regulation has accomplished what you wanted it to in a sound science way? Wouldn't you agree?

Ms. MCCARTHY. We are in the process now of complying with the President's Executive order and doing a review of our regulations.

Mr. ISSA. But I actually was looking at the conclusion. Wouldn't you conclude that there has to be something there that you could

re-look at that would help get burden off the backs of small business, and maybe even not small business; that, in fact, on a tradeoff of cost-benefit is not the best regulation out there?

Ms. MCCARTHY. Mr. Issa, I would suggest to you that we continually look at those issues and we are working with the——

Mr. ISSA. OK, then maybe you can explain something to me. In Boiler MACT you have a standard that can't be adhered to, and you have gone to the courts asking them to give you relief, and they have said we can't relieve you from your stupidity; go to Congress. Now, isn't that slightly vulgar, but pretty much the exact truth; that you have something that does not exist, you have created a rule that cannot presently be done, you have gone to the courts trying to get temporary relief in hopes that some day it will be able to be complied with, rather than saying what is it that exists that can be complied with? Wouldn't that be a fair characterization?

Ms. MCCARTHY. I don't believe so, no.

Mr. ISSA. OK, what part of it was inaccurate? Tell me in specificity?

Ms. MCCARTHY. The specific issue is the Boiler MACT rule went through a public process——

Mr. ISSA. No, I am looking at the outcome. Is the science attainable today according to——

Ms. MCCARTHY. Yes.

Mr. ISSA. It is? Then why did you ask the court for relief?

Ms. MCCARTHY. Because we believed that it deserved reconsideration because some of the legal underpinnings during the public comment process, because of comments we heard from industry, many of them small businesses, we made substantial changes from proposal to final which warranted additional legal underpinnings through a public comment process.

Mr. ISSA. So why——

Ms. MCCARTHY. We will do that.

Mr. ISSA. Why wouldn't you just pull the rule?

Ms. MCCARTHY. There was no need to do that and we were under a court order to deliver a final rule within a given point in time, which we did.

Mr. ISSA. So now we have something for which you have asked the court for relief and they can't give you relief.

Ms. MCCARTHY. No. What we intend to do is reconsider the rule in due time. We will respond appropriately; it will be legally sound. And it is already scientifically credible.

Mr. ISSA. But not currently available.

Ms. MCCARTHY. Oh, it is actually a final rule.

Mr. ISSA. No, no. I am talking about the actual technology.

Ms. MCCARTHY. Oh, no, I am sorry. I believe that the requirements in the rule are achievable.

Mr. ISSA. Well, thank you, I appreciate your having that opinion under oath. The mandate for these impacts, last year—and it has probably been brought up, but I will just bring it up again. Last year I sent the Administrator, Administrator Jackson, a letter requesting EPA suspend finalization of its greenhouse gas proposals until after the Agency complied with the Office of Advocacy demand.

You sent me back a response on February 4th, informing me that the Agency's decision was to move forward. At that time, you indicated that your outreach under 609(c) fully satisfied EPA's obligation to assess the impact and actions on small business. Do you still stand behind that?

Ms. MCCARTHY. Yes.

Mr. ISSA. Ms. Rodgers, do you think that they have really lived up to the spirit of that?

Ms. RODGERS. Unfortunately, no, we don't. Section 609(c) of the RFA does allow an agency to reach out to small businesses, but we don't feel that this relieves them of their duty to hold a SBREFA panel. And as I said in my testimony, outreach to small business is not the same thing as a SBREFA panel.

And the advantages of a panel that you don't get from outreach are at the pre-proposal stage you have the three member panel, our office, EPA, and the Office of Information and Regulatory Affairs at the White House; and at the end of the process you end with a panel report that has the recommendations from actual small businesses on various alternatives that get put into the document.

Mr. ISSA. I had another question to this round, if I can, since I think we have a little time here.

Section 317 of the Clean Air Act requires EPA to complete an economic impact assessment for any regulations propagated under Section 202 of the act, which applies to the car rule. Did EPA conduct a Section 317 economic impact assessment before any of its greenhouse gas rulings were made?

Ms. MCCARTHY. It did conduct a regulatory impact assessment associated with the light duty vehicle rule.

Mr. ISSA. If so, did the analysis assess the following, which are required by statute: the cost of compliance?

Ms. MCCARTHY. Yes.

Mr. ISSA. The potential inflationary or recessionary effects?

Ms. MCCARTHY. I believe so.

Mr. ISSA. The effects on competition with respect to small business?

Ms. MCCARTHY. The rule exempted small business, Mr. Issa, so we probably did not need to go into much detail there.

Mr. ISSA. Do you intend on always exempting small business?

Ms. MCCARTHY. No. When it is appropriate we do.

Mr. ISSA. No, no. Do you expect that this rule will never change; that in some future time you wouldn't do it?

Ms. MCCARTHY. If the rule changes, we will have to go through a rulemaking process——

Mr. ISSA. So you carved out small business in order to essentially keep yourself from having to do that assessment or that assessment simply wasn't necessary and that was never part of the consideration?

Ms. MCCARTHY. That was obviously part of the regulatory impact assessment, was to look at all costs. What I am explaining to you is that we did not——

Mr. ISSA. The reason I asked the question is you don't exempt anybody without a reason. Obviously we don't want clean air and clean water only for big companies; we want clean air and clean

water. So in your decision to exempt small business, wouldn't you need a cost reason to do so?

Ms. MCCARTHY. Actually, we did provide a thorough assessment of why it was appropriate to exempt. Cost was part of the consideration; lead time was part of the consideration. Because you are asking significant improvements in cars, and many of the smaller manufacturers would not be able to produce and comply with the rules in the same way that large industries or large manufacturers were able to do that.

Mr. ISSA. OK. The next test was the effects on consumer cost. Did you take that into consideration?

Ms. MCCARTHY. Yes, we did.

Mr. ISSA. The effects on energy use, did you take that into effect?

Ms. MCCARTHY. Yes, we did.

Mr. ISSA. To the extent that EPA has conducted any economic impact analysis, I respectfully request that you provide that to the committee. Are you prepared to do that?

Ms. MCCARTHY. Oh, we certainly will.

Mr. ISSA. OK. I would very much appreciate it. That, in our opinion, has been requested previously and is long overdue.

I am getting head shaking. Christina, am I wrong? We have requested that?

[Remarks made off microphone.]

Mr. ISSA. OK, I think if you look through the series of letters, you will find that was certainly something we had expectation of getting; we haven't gotten. But I appreciate your willingness to give it to us today and yield back.

Thank you, Chairman.

Ms. MCCARTHY. It is part of the rulemaking. That is public information and is in the docket.

Mr. JORDAN. I thank the Chair.

Ms. MCCARTHY. And it is on the Web site.

Mr. JORDAN. I just have one other question and will be happy to yield back if the chairman has anything additional.

In your testimony, Ms. Rodgers, you indicated that the panels work.

Ms. RODGERS. Yes.

Mr. JORDAN. The panels work and you feel like you have a good relationship with Ms. McCarthy and anyone and everyone else that you work with there. It is a process that makes sense and that has been effective.

Ms. McCarthy, would you agree with Ms. Rodgers' testimony, what she said in her testimony, that these panels work and that it is a good process?

Ms. MCCARTHY. Our relationship works very well. I would submit to you that we both are extremely concerned that EPA get appropriate information and feedback on small businesses and impacts to small businesses relative to those that we are regulating through a rule, yes.

Mr. JORDAN. But to the specific question, the SBREFA panels work? The process works.

Ms. MCCARTHY. It has worked very well, yes.

Mr. JORDAN. OK. Now, so I come back to what I asked you earlier. A rule of this magnitude, in light of the debate that took place

in the U.S. Congress dealing with cap-and-trade, this issue that has been front and center for the American people, a process that you both indicate works, why didn't you follow it for something, again, of this magnitude, of this importance, with the debate the way it is, with the concerns expressed by small business owners in front of this committee today? Look, I understand hindsight is 20/20 and all that, but if you had it to do over again would you have convened a panel and went through the normal process?

Ms. MCCARTHY. Let me explain to you, if I——

Mr. JORDAN. Can you answer that question? If you had it to do over again?

Ms. MCCARTHY. No, I would not. I would do it exactly the same way.

Mr. JORDAN. OK.

Ms. MCCARTHY. And that is because these panels are designed to address issues relative to a rulemaking that sets a standard or establishes a requirement on a business sector, a small business entity. They are asked specific questions like what is the reporting and recordkeeping and compliance; what are the Federal rules that might duplicate it; what alternatives do you have to the proposed rule? We did not enjoin a panel because the rules that you are talking about did not immediately or directly regulate small business.

Mr. JORDAN. Wait a minute.

Ms. MCCARTHY. So there was no way in which we could apply this rule——

Mr. JORDAN. You just said you had a great relationship. Ms. Rodgers is an intelligent lady. The folks who work for her are intelligent people. They suggested that you do it. So you may not have thought it was absolutely necessary, but why not do it, again, when they are saying this makes sense to do and business owners were saying it makes sense to do? We have heard testimony of the concerns they have. Why not just do it? Why not be safe rather than sorry?

Ms. MCCARTHY. On the tailoring rule we did a voluntary program where we had an outreach with 23 SERs. We had a panel; we got their input. What we are not agreeing to is that this rule, and there was a requirement for panels to be developed when we have a rule like the endangerment finding that isn't directly regulating small businesses like the tailoring rule——

Mr. JORDAN. Ms. Rodgers——

Ms. MCCARTHY [continuing]. That is de-regulating small businesses. It doesn't mean we don't appreciate the input of small business, and we try to get that input into the process.

Mr. JORDAN. Ms. Rodgers, you understood, when you suggested the panel, that the EPA could in fact take the route that they took? You understood that? You didn't think it would happen because it was out of the norm.

Ms. RODGERS. Exactly.

Mr. JORDAN. Yet you still said this was important to have this panel. Give me why you were so focused and why you have expressed comments after the fact why it was important to have that panel.

Ms. RODGERS. I would be happy to. One of the reasons the endangerment finding, no, did not directly regulate small busi-

nesses; however, it did set the greenhouse gas regulations in motion. The foreseeable impacts of this rule on small businesses certainly were there. The next rule to come about was the vehicle emissions rule, of course. They were regulating large automobile manufacturers.

However, just by beginning that process and starting to regulate greenhouse gases under the Clean Air Act on one part of the Clean Air Act automatically triggered the greenhouse gas regulation or regulating greenhouse gases under the entire Clean Air Act, thereby subjecting small businesses to permitting requirements under the Clean Air Act.

Mr. JORDAN. So you could foresee what was coming. Why couldn't they?

Ms. RODGERS. I can't answer that question, but what I can say is by not——

Mr. JORDAN. And it was clear. Your team who suggested this, was there any disagreement? Was it unanimous, we need to move with this panel?

Ms. RODGERS. It was unanimous.

Mr. JORDAN. So it was strong. You had to do this.

Ms. RODGERS. Yes.

Mr. JORDAN. You could foresee what was coming.

Ms. RODGERS. Yes, we could.

Mr. JORDAN. And you have proved right, based on the testimony we got from the first panel.

Ms. RODGERS. We think we have, yes.

Mr. JORDAN. Yes. And yet they just couldn't see it.

Ms. RODGERS. Unfortunately, no.

Mr. JORDAN. OK.

I see we have no further questions for the panel. I want to thank you both for attending. Again, I want to apologize for the schedule. We look forward to visiting again.

We are adjourned.

[Whereupon, at 5:05 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 2 2011

OFFICE OF
AIR AND RADIATION

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Thank you for your letter of May 2, 2011, following up on my testimony before the House Oversight and Government Reform Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending regarding the impact of the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations on small business. I have provided responses to your enumerated questions in the enclosed document. In addition, I am including documents responsive to your request on the enclosed CD.

As I stated in my testimony before the Subcommittee, the EPA is taking a common sense, phased approach to meeting our obligations under the Clean Air Act to address carbon pollution. The Agency is keenly aware of the concerns of small businesses in regard to greenhouse gas standards, and has taken numerous steps to eliminate or minimize the impacts of such standards on small businesses. The EPA has a long history under the Clean Air Act of protecting human health and the environment while supporting strong economic growth. The Agency is applying the same tools that we have been using for the last 40 years to protect public health to now address greenhouse gas emissions. Those tools have proven their worth over the years in improved public health, economic and job growth, and technological innovation.

The EPA undertakes extensive economic analysis of the costs and benefits of its Clean Air Act standards, including the greenhouse gas standards addressed by your letter. As indicated in the enclosed responses, the Agency has fully complied with its obligations to analyze its greenhouse gas standards under section 317 of the Clean Air Act. Section 321 of the Clean Air Act authorizes the EPA to investigate specific allegations that actions under the Act have resulted or will result in job losses. The EPA has not received any request under section 321 to investigate any such alleged impacts of those standards. Finally, our analyses of the cumulative benefits and costs of Clean Air Act programs have consistently shown large benefits that greatly exceed, by factors of 30 or more, the costs of implementing the Act.

Again, thank you for your letter and for your interest in this important subject. I look forward to continuing to work with you. If you have any questions regarding the subject of this response, please contact me or your staff may call Tom Dickerson in the EPA's Office of Congressional and Intergovernmental Relations at (202) 564-3638.

Sincerely,

Gina McCarthy
Assistant Administrator

Enclosures

cc: The Honorable Elijah E. Cummings
Ranking Member

Responses to Questions and Requests

1. **A full and complete explanation as to whether a section 317 analysis has been completed for the Car Rule, Tailoring Rule, and Endangerment Finding and submission of any of these analyses.**

The EPA was not required to do a section 317 analysis of the Endangerment Finding because that finding is not an action listed in section 317(a), and thus was not an action to which section 317 applies.

The EPA met its obligations under section 317 for both the Car Rule and the Tailoring Rule. The economic analyses completed by the EPA to support the Car Rule and the Tailoring Rule fully satisfy the requirements of section 317, including both the procedural requirements in section 317(b) and the substantive requirements for the analysis in section 317(c).

The text and legislative history of section 317 make clear that Congress intended this provision to be applied pragmatically. Section 317(d) states that "[t]he assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under [the Clean Air Act]." See also 123 Cong. Rec. 26850 (Aug. 4, 1977) (Senate consideration of the Conference Report) ("Consequently, the Administrator may make reasonable judgments about which analyses must be done to comply with this section and the depth of analysis required.").

An overview of how each of the substantive requirements of section 317(c) was satisfied for both the Car Rule and the Tailoring Rule follows. For each of the two rules, this explanation is organized on the basis of the five paragraphs of section 317(c).

Car Rule:

"(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;"

The rulemaking fully assesses the costs of the model year (MY) 2012-2016 standards, and these assessments are fully described in the preamble and Regulatory Impact Analysis (RIA). The EPA's cost assessment included a full range of costs, including costs for individual automobile manufacturers, industry average per-vehicle compliance costs, industry average technology outlays, and consumer savings due to saving money on fuel costs. See Preamble Section III.H.2 Costs Associated with the Vehicle Program (75 Fed. Reg. 25,513) (May 7, 2010) and Section III.H.4 Reduction in Fuel Consumption and Its Impacts (75 Fed. Reg. 25,516); RIA Chapter 6: Vehicle Program Costs Including Fuel Consumption Impacts. The EPA also explained in detail how the effective dates for the standards provided sufficient lead time for compliance, and how the choice of standard stringency was tied to the industry's vehicle redesign cycles to assure the most cost effective means of compliance. 75 Fed. Reg. 25,467-68. Similar analyses were part of the record for the proposed rule.

In addition, the EPA assessed the impacts and costs of both more and less stringent standards. Specifically, the EPA assessed standards that would reduce CO2 emissions at a rate of 4% per

year and 6% per year. The EPA's basis for rejecting these alternative standards is discussed at 75 Fed. Reg. 25,465-68, and the assessment is fully presented in the RIA, Chapter 4.

"(2) the potential inflationary or recessionary effects of the standard or regulation;"

The EPA's assessment in the MY2012-2016 final rule analysis does not indicate that there will be any inflationary or recessionary effects of the standards. The light-duty greenhouse gas program results in a net savings to consumers, as the fuel savings due to improved fuel efficiency over the lifetime of a vehicle far outweigh the initial up front increased vehicle costs. The EPA estimates that the average cost increase for a model year 2016 vehicle due to the national program will be approximately $950. Consumers would save more than $3,000 over the lifetime of a model year 2016 vehicle (that is, the $4,000 saved on fuel more than offsets the increased cost of the vehicle). See 75 Fed. Reg. 25,516-20.[1]

This issue is also discussed further in section (4) below.

"(3) the effects on competition of the standard or regulation with respect to small business;"

The EPA exempted from the greenhouse gas emissions standards small entities meeting the Small Business Administration (SBA) size criteria of a small business as described in 13 C.F.R. 121.201. This exemption is described in the Final Rule preamble at 75 Fed. Reg. 25,424 and 75 Fed. Reg. 25,440, and in Chapter 9 of the Final Regulatory Impact Analysis. The Car Rule thus has no direct impact on small businesses.

"(4) the effects of the standard or regulation on consumer costs;"

As noted above, the EPA estimates that the average cost increase for a model year 2016 vehicle due to the national program will be approximately $950. U.S. consumers who pay for their vehicle in cash will save enough in lower fuel costs over the first three years, on average, to offset these higher vehicle costs. Consumers using an average 5-year, 60-month loan would see immediate savings due to their vehicle's lower fuel consumption in the form of reduced annual costs of $130-$180 a year throughout the duration of the loan (that is, the fuel savings will out-weigh the increase in loan payments by $130-$180 per year). Whether a consumer takes out a loan or pays for their vehicle in cash, consumers would save more than $3,000 over the lifetime of a model year 2016 vehicle (that is, the $4,000 saved on fuel more than offsets the increased cost of the vehicle). To calculate these fuel savings, fuel prices (including taxes) were estimated to range from $2.61/gallon in 2012, to $3.60/gallon in 2030, to $4.49/gallon in 2050, based on Department of Energy projections.

"(5) the effects of the standard or regulation on energy use."

[1] See also H.1 - Conceptual Framework for Evaluating Consumer Impacts (75 FR 25510); H.2 – Costs Associated with the Vehicle Program (75 FR 25513); H.4 – Reduction in Fuel Consumption and Its Impacts (75 FR 25516); H.5 – Impact on U.S. Vehicle Sales and Payback Period (75 FR 25517); RIA Chapter 6: Vehicle costs and consumer fuel savings estimates. RIA Chapter 8 Section 8.1 includes Consumer Vehicle Choice Modeling (p. 8-4), Consumer Payback Period and Lifetime Savings on New Vehicle Purchases (p. 8-13). Section 8.3 includes analysis/discussion of other consumer related impacts including; (1) Reduced Refueling Time (p. 8-18), (2) Value of Additional Driving (p. 8-19), (3) Noise, Congestion and Accidents (p. 8-19).

The EPA fully assessed the impacts of the MY2012-2016 standards on energy use. Over the lifetime of the vehicles sold during MY 2012-2016, the standards are projected to save 1.8 billion barrels of oil. The light-duty vehicles subject to this national program account for about 40 percent of all U.S. oil consumption. The EPA also assessed the impacts of these standards on energy security.[2]

Tailoring Rule:

"(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on: (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;"

As explained in the RIA for the rule, the Tailoring Rule provides regulatory relief for over 6 million small greenhouse gas-emitting Title V sources and tens of thousands small greenhouse gas-emitting new or modifying PSD sources.[3] The benefits of the rule are the avoided Title V and PSD permitting and associated regulatory requirements. These benefits will accrue to smaller sources of greenhouse gases and state and local permitting authorities that are granted regulatory relief.[4] The costs of the rule are the foregone greenhouse gas emission reductions that would otherwise occur absent the regulatory relief mandated by the rule.[5] In developing the rule, the EPA considered alternative levels of regulatory relief as well as differing effective dates of the phase-in period prior to establishing the phased-in threshold approach.[6]

There are no emission control requirements or associated costs imposed by the Tailoring Rule because it is a regulatory relief rule. The rulemaking assesses the costs of the rule in terms of foregone emission reductions at alternative regulatory thresholds and the associated benefits of the rule (i.e. avoided permitting costs) at alternative threshold levels both more and less stringent than the final rule levels. See the RIA for "The Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" in the docket to the final rule for more details.

"(2) the potential inflationary or recessionary effects of the standard or regulation;"

Since the Tailoring Rule provides regulatory relief, it has neither inflationary nor recessionary effects on the economy.[7]

"(3) the effects on competition of the standard or regulation with respect to small business;"

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[2] See also Preamble Section H.4 - Reduction in Fuel Consumption and Its Impacts (75 FR 25516); Preamble Section III.H.8 - Energy Security Impacts (75 Fed. Reg. 25,531); RIA Chapter 6 Section 6.3 provides Fuel Consumption Impacts analysis (p. 6-14); RIA Chapter 8 Section 8.2 includes Energy Security Impacts (p. 8-16).

[3] See the Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule available in the docket for the rulemaking or at http://www.epa.gov/ttn/ecas/regdata/RIAs/riatailoring.pdf

[4] Final Tailoring Rule RIA Chapter 3

[5] Final Tailoring Rule RIA Chapter 4

[6] Final Tailoring Rule RIA Chapter 2 and Final Rule Preamble Sections IV.B. and V.B.

[7] Final Tailoring Rule RIA Chapter 7, Section 7.1

As explained in the RIA for the rule, the Tailoring Rule provides regulatory relief and therefore has no adverse effects on competition in the economy or on small businesses. The EPA considered the impact of the Tailoring Rule on small entities (small businesses, governments and non-profit organizations) as required by the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). For informational purposes, the RIA for the final rule includes the SBA definition of small entities by industry categories for stationary sources of greenhouse gases and potential regulatory relief from Title V and NSR permitting programs for small sources of greenhouse gases. Since the Tailoring Rule does not impose regulatory requirements, but rather lessens the regulatory burden of the Clean Air Act requirements on smaller sources of greenhouse gases, no economic costs are imposed upon small sources of greenhouse gases as a result of the rule. Rather the final Tailoring Rule provides regulatory relief for small sources. These avoided costs or benefits accrue because small sources of greenhouse gases are not required to obtain a Title V permit, and new or modifying small sources of greenhouse gases are not required to meet PSD requirements. Some of the small sources benefitting from this action are small entities, and as a result, these entities will benefit from the regulatory relief finalized by the Tailoring Rule.[8]

"(4) the effects of the standard or regulation on consumer costs;"

The effects of the Tailoring Rule on consumer costs were considered in the RIA for the rule. The Tailoring Rule is deregulatory in nature and as such has no adverse impacts on consumer costs.

"(5) the effects of the standard or regulation on energy use."

As required by Executive Order 13211, the EPA assessed the impact of the rule on energy supply and use. The EPA concluded that the Tailoring Rule would not create any new requirements for sources.[9]

2. **If the aforementioned analyses have not been completed, I request EPA immediately initiate the analysis and provide it to the Committee.**

As explained above, the analyses have been completed for the actions for which they were required.

3. **My understanding is a section 317 analysis may not be substituted by other analyses. If you have a different view, please provide a legal explanation that justifies your view.**

There is no language in section 317 indicating that any specific labeling of the analysis is required to satisfy the section's requirements. The EPA may satisfy its duties under section 317 by means of documents such as Regulatory Impact Analyses or preambles, provided that these documents address the substantive and procedural requirements set forth in the provision, subject to the flexibility provided by section 317(d). As explained above, the EPA has done so fully with regard to the rulemakings at issue here.

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[8] Final Tailoring Rule RIA Chapters 6 and 7 and Final Rule Preamble Sections VII.C. and VIII.C.

[9] Final Tailoring Rule RIA Chapter 7, Section 7.8 and Final Rule Preamble Sections VII.G. and VIII.H.

4. **A section 321(a) analysis on the individual and cumulative impact of the GHG regulations on potential job losses.**

The EPA has provided detailed regulatory impact analyses for each of its major greenhouse gas regulations that provide extensive information about the economic impact of those rules. Consistent with relevant Executive Orders, EPA estimates the benefits and costs of all of its economically significant rules. EPA's regulatory impact analyses often contain hundreds of pages of detailed work which draws heavily on peer-reviewed literature. Labor, a key factor of production, is intrinsically incorporated into EPA's economic analyses. The economic impacts of the Car Rule, as analyzed in the Regulatory Impact Analysis for that rule, are discussed in the responses to questions 1 and 5. As explained elsewhere in this response, the Endangerment Finding has no economic impact independent of any impacts of the Car Rule, and the Tailoring Rule operates to reduce any potential economic impacts from stationary source preconstruction permitting requirements under the Clean Air Act.

Section 321 of the Clean Air Act authorizes the Administrator of the EPA to investigate, report and make recommendations regarding employer or employee concerns that requirements under the Clean Air Act will adversely affect employment. Section 321(a) provides for "continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this Act and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." Sections 321(b) and (c) authorize, in general, an employee to petition for an investigation of alleged loss of employment due to Clean Air Act requirements, and establish procedures for such an investigation. Finally, section 321(d) provides that the evaluations or investigations authorized in section 321 do not authorize or require the EPA or the States to modify any Clean Air Act requirement.

Section 321 was added in the 1977 amendments to the Clean Air Act. Both the House and Senate Committee Reports for the 1977 amendments describe the purpose of section 321 as addressing situations where employers make allegations that environmental regulations will jeopardize employment, possibly in order to stimulate union or other public opposition to environmental regulations. The section was intended to create a mechanism to investigate and resolve those allegations. In addition, the section was designed to provide individual employees whose jobs were threatened or lost allegedly due to environmental regulations with a mechanism to have EPA investigate those allegations. The legislative history makes clear that Congress intended to provide a mechanism to respond to specific allegations in particular cases:

> "In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognizes the need to determine the truth of these allegations. For this reason, the committee agreed to section 304 of the bill [which became section 321 of the Act], which establishes a mechanism for determining the accuracy of any such allegation." H.R. Rep. 95-294, at 317; *see also* S. Rep. 95-127, at 1474-76.

The committee reports do not describe the provision as applying broadly to all regulations or implementation plans under the Clean Air Act.

In keeping with congressional intent, the EPA has not interpreted section 321 to require the Agency to conduct employment investigations in taking regulatory actions. Conducting such investigations as part of rulemakings would have limited utility since section 321(d) expressly prohibits the EPA

(or the States, in case of applicable implementation plans) from "modifying or withdrawing any requirement imposed or proposed to be imposed under the Act" on the basis of such investigations. As noted above, section 321 was instead intended to protect employees in individual companies by providing a mechanism for the EPA to investigate allegations – typically made by employers – that specific requirements, including enforcement actions, as applied to those individual companies, would result in lay-offs. The EPA has not received any request for any such investigation with regard to its GHG regulations.

5. **An analysis of the cumulative impact of all the EPA's GHG regulations on all sectors of the economy and small business.**

The EPA has finalized three significant regulations to control greenhouse gas emissions (the Renewable Fuel Standard, the Tailoring Rule, and the Car Rule), and has proposed one other significant regulation (medium- and heavy-duty vehicle standards). The EPA's practice with significant greenhouse gas rules, as it is for all significant rules, is to conduct a regulatory impact analysis of each rule pursuant to Executive Order 12866 and any applicable statutory or other requirements. When the EPA conducts a regulatory impact analysis, the Agency's normal practice is to include in the base case previously finalized rules that impose regulatory obligations on sources. Thus, for example, when the EPA analyzes the effect on gasoline costs of a new rule, the effect of prior rules on gasoline costs is already accounted for.

The Energy Independence and Security Act of 2007 established lifecycle greenhouse gas emission requirements for biofuels to qualify for the Renewable Fuel Standard (RFS). The EPA issued a final rule (RFS2) implementing that and other changes mandated by the 2007 law (Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program: Final Rule, 75 Fed. Reg. 14,669 (March 26, 2010)). As part of that rulemaking, the EPA conducted a regulatory impact analysis, which can be found at http://www.epa.gov/otaq/renewablefuels/420r10006.pdf. This analysis estimated that, when fully implemented in 2022, the RFS would save $11.8 billion in gasoline and diesel costs, reduce oil imports by $41.5 billion and increase farm income by $13 billion. Other estimated economic impacts are included in the regulatory impact analysis. The EPA also conducted a Regulatory Flexibility Analysis for the RFS2, which can be accessed at http://epa.gov/otaq/renewablefuels/420r10006.pdf and is summarized in the preamble to the RFS2 (see 75 Fed. Reg. at 14,858-862). As detailed in the preamble to the final rule, the EPA took a number of steps to minimize the impact of the RFS2 on small refiners.

In April 2010, the EPA and NHTSA finalized a joint rule to establish a national program consisting of new standards to increase the efficiency of, and reduce the greenhouse gas emissions from, model year 2012 through 2016 light-duty vehicles. Light-duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,323 (May 7, 2010). As part of that rulemaking, the EPA conducted a regulatory impact analysis to fully assess the costs of these standards. See Preamble Section III.H.2 Costs Associated with the Vehicle Program (75 Fed. Reg. 25,513) (May 7, 2010) and Section III.H.4 Reduction in Fuel Consumption and Its Impacts (75 Fed. Reg. 25,516); RIA Chapter 6: Vehicle Program Costs Including Fuel Consumption Impacts, which can be found at http://www.epa.gov/otaq/climate/regulations/420r10009.pdf. Among other things, the analysis estimated that, over the lifetime of the covered vehicles, these standards would save 1.8 billion barrels of oil and would save consumers more than $3000 per vehicle. The EPA did not analyze the effect on small businesses because small businesses are exempt from these standards.

In November 2010, the EPA and NHTSA proposed joint rules to establish a Heavy-Duty National Program consisting of new standards to increase the fuel efficiency of, and reduce the greenhouse gas emissions from, model year 2014 through 2018 medium- and heavy-duty engines and vehicles. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Proposed Rules, 75 Fed. Reg. 74,15274152 (November, 2010). As part of that rulemaking, the EPA is conducting a regulatory impact analysis to fully assess the costs of these proposed standards. The draft proposed RIA can be accessed at http://www.epa.gov/otaq/climate/regulations/420d10901.pdf. See Preamble Section VIII "What are the agencies' estimated cost, economic, and other impacts of the proposed program?" (75 Fed. Reg. 74,302)74302) (Nov. 30, 2010) and RIA Chapter 9: "Economic and Social Impacts." The EPA accounted for RFS2 impacts in the baseline emission inventories for this program. Among other things, the analysis estimated that, over the lifetime of the covered vehicles, these proposed standards would save 500 million barrels of oil and would provide benefits to private interests of $35 billion in fuel savings. The EPA did not analyze the effect on small businesses because EPA proposed not to cover small businesses as part of this rulemaking.

In 2010, the EPA finalized the Tailoring Rule, which provides regulatory relief for over six million small greenhouse gas-emitting Title V sources and tens of thousands small greenhouse gas-emitting new or modifying PSD sources. (Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514 (June 3, 210). The EPA conducted a regulatory impact analysis, which is available at http://www.epa.gov/ttn/ecas/regdata/RIAs/riatailoring.pdf. In calculating the benefits of the Tailoring Rule, the EPA analyzed the avoided regulatory burden by sources given regulatory relief by the Rule. The avoided burden focused on the avoided costs for those given regulatory relief of going through the permitting process, but not of any control requirements that would have resulted from the permitting process. The EPA lacked the data necessary to estimate the costs of the avoided control requirements.

The EPA cannot analyze the economic impacts of policies when it is unclear what regulatory obligation would be imposed and on whom. Quite simply, if one does not know what a source will be required to do, one cannot analyze how much it will cost. The greenhouse gas PSD permitting obligations are not sufficiently detailed to be analyzed because the actual regulatory obligation is set through a case-by-case determination by the permitting authority (which is usually a local or state agency) and because the obligation only arises when a new source is built or an existing source increases its emissions significantly and undertakes a major modification. When local permitting authorities make the case-by-case determination through which they set greenhouse gas permit requirements for affected sources, the permitting authorities are required under federal law to take cost into account.

The EPA did not conduct a regulatory impact analysis of the Endangerment Finding because it was a scientific finding and did not itself impose regulatory obligations on private entities.

The EPA has conducted three analyses of the cumulative benefits and costs of regulations promulgated under the Clean Air Act. The first report, "The Benefits and Costs of the Clean Air Act, 1970 to 1990," (October 15, 1997) estimated that the mean estimate of the benefits in 1990 of implementing the Clean Air Act (to the extent they could be monetized) exceeded the costs by approximately 40 to 1. The second report, "The Benefits and Costs of the Clean Air Act, 1990 to 2010" (November 15, 1999), and third report, "The Benefits and Costs of the Clean Air Act from

1990 to 2010" (March, 2011), both analyzed the benefits and costs of implementing Clean Air Act programs since the passage of the 1990 Clean Air Act Amendments. The third report is an updated version of the second analysis; the benefits and costs it analyzed are in addition to the benefits and costs estimated in the first report. The central benefits estimates (to the extent that benefits can be monetized) in the third report exceeds the costs by 30 to 1. All three reports were multi-year efforts (six years each for the first two reports, five years for the third report) and were subjected to extensive peer review, including review by the EPA's independent Science Advisory Board Council on Clean Air Act Compliance Analysis.

6. **All documents and communications referring or relating to any analysis EPA conducted on GHG regulations that were sent to the Office of Information and Regulatory Affairs (OIRA).**

The enclosed CD provides EPA analyses of the light-duty vehicle and medium- and heavy-duty vehicle GHG rules, the RFS2 and the Tailoring Rule that were sent to OIRA in connection with these rulemakings.