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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

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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

[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

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Advocacy: the voice of small business in government

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

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

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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

[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.

[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.

- <u>EPA should reconsider its Finding on Endangerment for GHGs</u>. 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.

[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

Office of Advocacy
www.sba.gov/advo

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

[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

[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.

[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."

Office of Advocacy
www.sba.gov/advo

Advocacy: the voice of small business in government

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.

[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

[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.

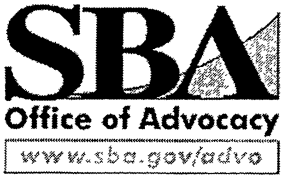
We look forward to working with you to ensure that the impact on small entities is adequately considered prior to EPA moving ahead on regulating greenhouse gas emissions under the Clean Air Act. Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) 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



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

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[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

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[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

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

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

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

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

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

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

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

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

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

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

Claudia Rayford Rodgers, Esq.

As Deputy Chief Counsel in the Office of Advocacy at the U.S. Small Business Administration, (SBA), Ms. Rodgers coordinates and manages the daily operations and statutory responsibilities of the office, including setting goals and standards for achieving Advocacy's mission of encouraging policies that support the development and growth of small business. She also continues to oversee Advocacy's RFA training program. Ms. Rodgers has been with the Office of Advocacy for more than 14 years.

Over the past 18 years, Ms. Rodgers government service has included the Small Business Administration, the Domestic Policy Council at the White House and the Economic Development Administration at the U.S. Department of Commerce.