

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6315

**Memorandum**

TO: Members, House Small Business Subcommittee on Investigations, Oversight and Regulations  
FROM: Chairman Mike Coffman  
DATE: May 10, 2011  
RE: Hearing: "Green Isn't Always Gold: Are EPA Regulations Stifling Small Businesses?"

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At 10:00 AM on May 12, 2011, in room 2360 of the Rayburn Building, the House Small Business Subcommittee on Investigations, Oversight & Regulations will hold a hearing entitled, "**Green Isn't Always Gold: Are EPA Regulations Stifling Small Businesses?**" The purpose of this hearing is to examine Environmental Protection Agency regulations that negatively affect small business, most specifically those related to the Clean Air Act and the Resources Conservation and Recovery Act.

Witnesses:

**Glenn Johnston** – Vice President of Regulatory Affairs, Gevo, Inc., Englewood, CO

**John Ward** – Chairman, Citizens for Recycling First, Broomfield, CO

**Bradford Muller** – Vice President of Marketing & Corporate Communications, Charlotte Pipe and Foundry Company, Charlotte, NC

**BACKGROUND**

Generally, government regulations have a significant negative effect on small businesses. According to a 2010 report released by the Office of Chief Counsel for Advocacy at the Small Business Administration, small businesses bear a large monetary burden as a result of federal regulations. It indicated, "[a]s of 2008, small businesses face an annual regulatory cost of \$10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms

(defined as firms with 500 or more employees).”<sup>1</sup> Additionally, compliance with environmental regulations costs small businesses 364 percent more than large firms.<sup>2</sup> This hearing will explore certain regulations promulgated or proposed by the Environmental Protection Agency (EPA), most specifically under the Clean Air Act and the Resources Conservation and Recovery Act. These statutes are significant because they have resulted in some of the broadest and most far-reaching regulatory policies that affect U.S. businesses.

## **ENVIRONMENTAL PROTECTION AGENCY**

The Environmental Protection Agency (EPA) is tasked with protecting human health and the environment in the United States. Several new regulations have been proposed or finalized in areas under the Agency’s authority, based upon Administrator Lisa P. Jackson’s “Seven Priorities for the Future,”<sup>3</sup> among them:

- Taking Action on Climate Change – including developing new regulations on greenhouse gas emissions;
- Improving Air Quality – seeking to reduce sulfur dioxide, nitrogen oxide, and mercury from the air as well as increasing air quality standards for particulate matter, sulfur dioxide and nitrogen dioxide (a naturally occurring gas);
- Protecting American Waters – initiating measures on post-construction runoff and on water quality affected by surface mining; and
- Expanding the Conversation on Environmentalism and Working for Environmental Justice – ‘safeguarding’ through enforcement actions by using environmental justice principles in all EPA decisions.

Through what appears to be a rigorous environmental agenda, the EPA is currently in the process of developing and finalizing roughly 30 significant regulations, especially relating to the Clean Air Act. A matter of serious concern is that the EPA’s aggressive rulemaking does not take into account the Regulatory Flexibility Act (RFA)<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>5</sup> Under the RFA, the EPA must review its proposed and final rules to ensure that while accomplishing its statutory mandate, the ability of small entities (the RFA covers small businesses, small not-for-profit institutions, and small governmental jurisdictions)<sup>6</sup> to invent, produce, and compete is not inhibited. It accomplishes this goal by forcing federal agencies to examine the economic impact of their regulations on small

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<sup>1</sup> Nicole V. Crain and W. Mark Crain, “The Impact of Regulatory Costs on Small Firms,” U.S. Small Business Administration, September 2010.

<sup>2</sup> Ibid.

<sup>3</sup> “Seven Priorities for EPA’s Future,” from the U.S. Environmental Protection Agency website. Available at <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/>.

<sup>4</sup> 5 U.S.C. §§ 601-12. For more information, see “Regulatory Flexibility Act,” available at <http://archive.sba.gov/advo/laws/regflex.html>.

<sup>5</sup> Pub. L. No. 104-121.

<sup>6</sup> This memorandum will use the terms “small business” and “small entities” interchangeably given the focus of the hearing is the impact of EPA regulations on small businesses.

businesses, and if those impacts are significant on a substantial number of small entities, examine alternatives that will accomplish EPA's objectives while reducing adverse economic consequences on small businesses. SBREFA also requires EPA to obtain input from small businesses prior to publication of a proposed rule in the Federal Register, for rules that will have a significant economic impact on a substantial number of small businesses.

In particular, the Subcommittee's focus is on EPA regulations concerning greenhouse gases, fuel additives, and coal combustion residuals (CCRs). Regulations being promulgated by EPA will have significant unintended adverse consequences on small businesses, including their ability to create jobs.

## **THE CLEAN AIR ACT**

In 1970, Congress enacted the Clean Air Act "to protect and enhance the quality of Nation's air resources."<sup>7</sup> The Act regulates both stationary and mobile sources of air pollution through a complex interrelated series of actions by both the Environmental Protection Agency and states.<sup>8</sup> Before discussing regulation of greenhouse gases it will be necessary to briefly explain the regulatory scheme laid out in the Clean Air Act.<sup>9</sup>

### *A. Title I*

Title I provides the basic framework for the regulation of air pollutants in the United States. It requires the Environmental Protection Agency (EPA) to establish ambient air quality standards for pollutants that the agency determines to endanger the public health or welfare.<sup>10</sup> The states are then required to develop implementation plans (called SIPs) that regulate activities within the state with expectation that such regulation will enable the areas within the state (called air quality control regions) to meet the ambient air quality standards. SIPs must be approved by EPA and the agency is authorized to sanction states that fail to develop adequate SIPs and, in certain cases of noncompliant states, to promulgate a satisfactory SIP.<sup>11</sup> Additional stringent requirements are imposed by EPA through SIPs for areas that have not been able to meet the ambient air quality standards (called non-attainment areas). Additional regulations are imposed on areas that are considered pristine (such as areas around national parks) or are already in attainment of air quality standards in order to prevent significant deterioration (usually referred to by the acronym PSD) of air quality in those regions.<sup>12</sup>

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<sup>7</sup> 42 U.S.C. § 7401(b)(1).

<sup>8</sup> K. BRICKEY, ENVIRONMENTAL CRIME 146 (2008).

<sup>9</sup> The Clean Air Act and its 1990 amendments created 11 separate titles. For purposes of this memorandum only Titles I-V are relevant to the regulation of greenhouse gases.

<sup>10</sup> In the 1990 amendments to the Clean Air Act, Congress specified additional regulatory efforts under Title I aimed at six pollutants: ozone, carbon monoxide, small particulate matter, sulfur dioxide, nitrogen oxide, and lead. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887 (D.C. Cir. 2006). As will be seen later in this memorandum, the 1990 amendments did not prevent EPA from finding that other pollutants should be regulated to protect public health.

<sup>11</sup> 42 U.S.C. § 7410.

<sup>12</sup> *Ibid.* at §§ 7470-92.

### *B. Title II*

Title II of the Clean Air Act regulates mobile sources of pollution. EPA is required to promulgate emission standards for various pollutants emanating from the exhaust of small diesel engines (lawnmowers, snowmobiles, motorcycles, jet skis), cars, trucks, construction equipment, buses, and airplanes but only if the pollutants are reasonably anticipated to endanger public health or welfare.<sup>13</sup> Additional standards are imposed on constituents of fuels, including the use of specialized fuel blends during times of high-pollution that will reduce air pollution emissions.<sup>14</sup> It is the regulation of emissions from mobile sources under Title II which has created the current regulatory conundrum.

### *C. Title III*

Title III of the Clean Air Act establishes the regulatory framework for the control of hazardous air pollutants also known as air toxics. Rather than allowing the Administrator to designate these air pollutants, the Act specifies 189 such pollutants and requires the Administrator to impose technological controls that limit the emission of such pollutants. Complicating matters is the statutory requirement that the emission limitations provide an ample margin of safety. Title III also imposes various controls and disclosure requirements on the accidental release of toxic chemicals and air toxics.<sup>15</sup>

### *D. Title IV*

Title IV of the Clean Air Act regulates pollutants associated with overly acidic rain created from power plant emissions of nitrogen oxide and sulfur dioxide. Title IV is a prescriptive regulatory program in which specific limits are imposed on each of 111 identified power plants located in 22 states. The regulatory scheme also provides for pollution allowances at these facilities and enables such facilities to trade the allowances.<sup>16</sup>

### *E. Title V*

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<sup>13</sup> 42 U.S.C. § 7521(a)(1).

<sup>14</sup> 1 F. GRAD, ENVIRONMENTAL LAW § 2.03[2][b] (2006).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* The program of tradable allowances worked sufficiently that the emissions of pollutants that cause acid rain were reduced by margins exceeding the statutory mandate. *See* Malaczynski & Duane, "Reducing Greenhouse Gas From Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act," 36 *ECOLOGY L.Q.* 71, 91 & n.111 (2009). It was the success of this cap and trade program that created the impetus for a cap and trade program to address greenhouse gases. *See* H.R. REP. NO. 111-137, pt. 1, at 319 (2009); *see also in passim*, *Climate Change – Lessons Learned from Existing Cap-and-Trade Programs: Hearing before the Subcommittee on Energy and Air Quality of the House Comm. on Energy and Commerce*, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007).

Since the 1970s, the Clean Air Act required a limited number of major polluters to obtain permits before the construction of stationary sources that would emit significant amounts of air pollutants.<sup>17</sup> Under the 1990 amendments, all facilities that exceeded certain air emission limits had to obtain permits, whether the facility already existed or was a new facility. EPA established emission limitations; states issued permits if the facility was in compliance with the limits imposed by EPA.<sup>18</sup> For new sources, this process was called New Source Review and EPA's efforts to determine what constituted a new source for facilities undergoing modification has created significant controversy.<sup>19</sup> Despite this controversy, stationary sources must obtain permits under Title V if they are going to emit pollutants in excess of limits developed by EPA.<sup>20</sup>

## Greenhouse Gas Emissions

EPA's proposed greenhouse gas (GHG) rules for the energy and utility industries are anticipated to impose costs of "\$11 billion per year in 2016 to American households, who will eventually pay the higher costs of producing electricity."<sup>21</sup> By further decreasing acceptable emission levels, not only will small and rural utility companies be forced to re-tool their operations at a significant expense, but in turn, any additional energy production costs will be passed down to small businesses and other consumers.

EPA found that regulation of emission limitations on mobile sources would primarily affect the manufacturing industry, focusing on large businesses rather than taking into account impacts on smaller manufacturers. EPA noted that the endangerment finding<sup>22</sup> itself does not impose any regulatory requirements and therefore will have no impact on small entities.<sup>23</sup> As a result, the

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<sup>17</sup> Waxman, "An Overview of the Clean Air Act Amendments of 1990," 21 ENVTL. L. 1721, 1805 (1991).

<sup>18</sup> Waxman, "An Overview of the Clean Air Act Amendments of 1990," 21 ENVTL. L. 1721, 1806-07 (1991). EPA was authorized to establish a permitting program if the state failed to do so. *Id.*

<sup>19</sup> See *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006), *cert. denied sub. nom.*, *Utility Air Regulatory Group v. New York*, 550 U.S. 928 (2007).

<sup>20</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas: Proposed Tailoring Rule, 74 Fed. Reg. 55,291, 55,297 (2009).

<sup>21</sup> Diana Furchtgott-Roth, "More Obama Energy Moves that will Cripple the Economy," from the Washington Examiner website. Available at <http://washingtonexaminer.com/opinion/columnists/2011/03/more-obama-energy-moves-will-cripple-economy#ixzz1GxdVPtUI>.

<sup>22</sup> The endangerment finding released from the Environmental Protection Agency on December 7, 2009, indicated that carbon dioxide and other greenhouse gas emissions pose a danger to public health and welfare. This statement, while not a regulatory rule in and of itself, set the stage for EPA increased regulation of greenhouse gases.

<sup>23</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. at 66,545. EPA's finding with respect to the fact that the regulation itself imposes no obligations but may lead to serious onerous adverse consequences on small businesses raises a longstanding problem in the Regulatory Flexibility Act with so-called bifurcated rulemaking. A detailed discussion of that issue is beyond the scope of this memorandum but can be found in OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT 28-30 (April 1987).

agency certified that the endangerment finding would not have a significant economic impact on a substantial number of small entities.<sup>24</sup>

With respect to the tailoring rule, EPA found that the minimum emission level of 25,000 tons per year will exclude almost all small entities (only about 1,400 would be captured by the proposal) and therefore would not affect a substantial number of small entities.<sup>25</sup> The proposed thresholds would “tailor” the permit programs to limit which facilities would be required to obtain NSR and title V permits and would cover nearly 70 percent of the national GHG emissions that come from stationary sources, including those from the nation’s largest emitters—including power plants, refineries, and cement production facilities.

EPA’s finding of no significant impact on the proposed tailoring rule may dramatically underestimate the adverse consequences on small entities for the proposed tailoring rule. It remains unclear whether EPA has the authority under the Clean Air Act to limit the permitting requirements only to facilities with emissions in excess of 25,000 tons per year. Under the Clean Air Act, regulation and permitting is required for stationary sources exceeding either 250 or 100 tons of emissions per year. Irrespective of which number is selected, EPA admits that millions of small businesses that own stationary sources would fall within the parameters of the permitting process under Title V including 20,000 manufacturing firms and over 1,000,000 commercial buildings.<sup>26</sup>

EPA has an additional obligation under the Regulatory Flexibility Act. For rules that it finds will have a significant economic impact on a substantial number of small entities, the agency is required to obtain the input of small business representatives (typically trade associations) prior to the issuance of a proposed rule.<sup>27</sup> These are colloquially known as small business panels and the information obtained by EPA is required to be incorporated into the notice of proposed rulemaking. Given EPA’s determinations in the two rulemakings, EPA did not establish this panel in an effort to obtain small business input. However, EPA’s failure in this regard is not subject to direct judicial review.<sup>28</sup>

Overall, one might conclude that EPA is trying to avoid its obligations under the Regulatory Flexibility Act. Nothing in that Act would prevent the EPA from regulating greenhouse gases under the Clean Air Act. Rather, EPA is attempting to avoid dealing with the significant potential adverse consequences these rules will have on small businesses. This is particularly

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<sup>24</sup> Ibid.

<sup>25</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas: Proposed Tailoring Rule, 74 Fed. Reg. at 55,301, 55, 302, and 55,349. This represents an increase from the current 280 stationary sources operated by small entities that currently must obtain permits under Title V.

<sup>26</sup> Ibid. at 55,302-03.

<sup>27</sup> 5 U.S.C. § 609(b).

<sup>28</sup> However, it remains an open question whether EPA’s failure to follow a statutorily-mandated procedure undermines the rationality of the rulemaking process pursuant to 5 U.S.C. § 706(2) of the Administrative Procedure Act. A detailed analysis of this issue requires parsing the Supreme Court’s decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) which is beyond the scope of this memorandum.

troubling given the fact that the economic impacts come at a time when the country is depending on small businesses to create jobs that will help the nation recover from the recession.

## **Fuel Additives**

EPA is responsible for ensuring that transportation fuel sold in the U.S. contains a minimum volume of renewable fuel under the Renewable Fuel Standard program.<sup>29</sup> In July of 2003, EPA promulgated regulations on fuels and fuel additives to comply with the Clean Air Act to reduce air pollution as a result of mobile emissions.<sup>30</sup> The regulations allow for the special regulatory treatment (preventing federal emissions violations) for commercial gasoline that contains at least 9% ethanol<sup>31</sup> per volume.<sup>32</sup> At the request of Growth Energy,<sup>33</sup> EPA granted a waiver from emissions violations for a blend of gasoline with 15% ethanol (E15) for model year 2007 cars, medium-duty passenger vehicles and light-duty trucks in October of 2010.<sup>34</sup> This was subsequently followed by waivers for E15 for use in model year 2001 and newer light-duty motor vehicles.<sup>35</sup>

Due to the fact that ethanol is specifically outlined in the Code of Federal Regulations as the requisite fuel additive to receive exemptions under the Clean Air Act rather than other biofuels, small businesses creating other viable renewable sources of fuel may be hindered from participating in the clean fuel market, despite a sizeable number of EPA registered gasoline additives.<sup>36</sup> Many other biofuels were already at a disadvantage due to the Volumetric Ethanol Tax Credit (VEETC) that was passed as a result of the American Jobs Creation Act of 2004.<sup>37</sup> This tax credit allows an ethanol blender that is registered with the Internal Revenue Service (IRS) eligibility for \$0.45 per gallon of pure ethanol<sup>38</sup> blended with gasoline.

Isobutanol is one example of enumerable biofuels that are at a market disadvantage in the fuel additives industry. It is a naturally occurring four carbon biofuel that has the capabilities of

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<sup>29</sup> The RFS program was created under the Energy Policy Act of 2005, Pub. L. No. 109-58

<sup>30</sup> See 40 C.F.R. Part 80.

<sup>31</sup> Ethanol is a biofuel comprised of ethyl alcohol, typically from corn or sugar cane. It is a renewable source of energy since it is generated through photosynthesis, a chemical process involving sunlight, which cannot feasibly be depleted. Commercial gasoline is not to exceed 10% ethanol by volume of gasoline.

<sup>32</sup> 40 C.F.R. Part 80

<sup>33</sup> Growth Energy is an organization comprised primarily of ethanol producers.

<sup>34</sup> "Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator," 76.Fed.Reg.17.

<sup>35</sup> Ibid.

<sup>36</sup> For a complete list of Registered Gasoline Additives, see the U.S. Environmental Protection Agency website. Available at <http://www.epa.gov/oms/regs/fuels/additive/web-gas.htm>.

<sup>37</sup> Pub. L. No. 108-357.

<sup>38</sup> That is a minimum of 190 proof. VEETC must first be taken as a credit against the blender's fuel tax liability; any excess may be claimed as direct payment from the IRS. This tax credit is set to expire on December 31, 2011 unless Congress passes an extension. Originally a tax exemption in 1978, it became a credit in 2005.

being chemically equivalent to petroleum-based products, and could be added to a variety of fuels without modifying existing equipment or production processes.<sup>39</sup>

## **RESOURCES CONSERVATION AND RECOVERY ACT**

The Resource Conservation and Recovery Act of 1976 (RCRA),<sup>40</sup> provides EPA the authority to address waste management activities. RCRA creates a ‘cradle-to-grave’ management system for hazardous waste to ensure proper treatment, storage, and disposal. The law includes:

- **Standards for Generators of Hazardous Waste**<sup>41</sup> - establishes the responsibilities of hazardous waste generators, including obtaining an identification number, preparing a manifest, ensuring proper packaging and labeling, meeting standards for waste accumulation units, and recordkeeping and reporting requirements.
- **Land Disposal Restrictions**<sup>42</sup> - establishes treatment standards for materials before placement in a RCRA land disposal unit (landfill, land treatment unit, waste pile, or surface impoundment). Wastes subject to the land disposal restrictions include solvents, electroplating wastes, heavy metals, and acids.
- **Tanks and Containers**<sup>43</sup> – RCRA regulations require testing to determine the concentration of the waste to satisfy tank and container emissions standards.

### **Coal Combustion Residuals**

In its regulatory agenda, EPA has proposed the designation of coal byproducts as hazardous materials under the Clean Air Act despite previous EPA studies to the contrary. This will negatively harm several small businesses engaged in the recycling of these byproducts, as well as place an additional burden on the utility industry, which could increase energy costs to consumers. The potential for harm to consumers and small businesses does not stop there. By placing a stranglehold on coal ash, EPA would be increasing the costs of several forms of building materials, and will effectively increase pollutants in the production of concrete.

Coal-fired power plants generate approximately 131 million tons of Coal Combustion Residuals (CCR – also known as coal ash), which are remnants from the burning of coal. Of that, roughly 56 million tons are beneficially reused (in various building materials and other commercial uses),

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<sup>39</sup> “Isobutanol,” from the Gevo website. Available at <http://www.gevo.com/our-business/isobutanol/>.

<sup>40</sup> Pub. L. No. 95-609.

<sup>41</sup> See 40 C.F.R. Part 262 – Standards Applicable to Generators of Hazardous Waste, from the U.S. Government Printing Office website. Available at [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/40cfr262\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/40cfr262_03.html).

<sup>42</sup> See 40 C.F.R. Part 268 – Land Disposal Restrictions, from the U.S. Government Printing Office website. Available at [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/40cfr268\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/40cfr268_03.html).

<sup>43</sup> See 40 C.F.R. Part 264 – Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities and 40 C.F.R. Part 265 – Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, from the U.S. Government Printing Office website. Available at [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/40cfr264\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/40cfr264_03.html) and [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/40cfr265\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/40cfr265_03.html).

with the remainder disposed as waste. There are four major types of coal ash, generally named for the consistency or placement of the coal residue, including fly ash, boiler ash, boiler slag, and flue gas desulfurization material. These various forms of coal ash can be recycled and used in several applications, such as:

- A raw material in concrete products and grout
- Feed stock in the production of cement
- Fill material for structural applications and embankments
- Ingredient in waste stabilization and/or solidification
- Ingredient in soil modification and/or stabilization
- Component of flowable fill
- Component in road bases, sub-bases and pavement
- Mineral filler in asphalt<sup>44</sup>

The recycling of CCRs in commercial application not only prevents roughly 44% of these coal byproducts from being discarded as waste in landfills and other receptacles, it also saves energy and water resources and reduces emissions as compared to the creation of concrete without the addition of fly ash:

**Energy Savings and Life Cycle Impacts of One Ton of Fly Ash in Concrete**

**Metric Measurement Amount**

Energy Savings in dollars.....	\$129.10
Water savings.....	376.3 liters or 99.4 gallons
Avoided total CO <sub>2</sub> equivalent green house gases.....	718,000 grams or apx. 0.80 tons (ave.)
per ton of portland cement	
Avoided gasoline consumption.....	310 liters or 82 gallons
Avoided oil consumption.....	1.7 barrels or 53.5 gallons

SOURCE: American Coal Ash Association

Given that CCRs have many beneficial uses, they have been granted a large-volume waste exclusion from requirements under RCRA (known as the Bevill exemption). This determination was solidified in Regulatory Determinations issued in 1993<sup>45</sup> and 2000.<sup>46</sup> Despite the fact that coal ash has been widely and safely used as an energy efficient and clean building material (in fact, it was used in the construction of EPA headquarters), EPA is currently in the process of

<sup>44</sup> "Fly Ash," from the U.S. Environmental Protection Agency website. Available at <http://www.epa.gov/osw/conserves/rrr/imr/ccps/flyash.htm>.

<sup>45</sup> "Final Regulatory Determination on Four Large-Volume Wastes from the Combustion of Coal by Electric Utility Power Plants," 58.Fed.Reg.151. (August 9, 1993).

<sup>46</sup> In its 2000 decision, EPA found that "[w]ith the exception of minefilling, ... national regulation... is not warranted for any of the other beneficial uses of coal combustion wastes." See "Regulatory Determination on Wastes from the Combustion of Fossil Fuels; Final Rule," from the U.S. Environmental Protection Agency website. Available at <http://www.epa.gov/fedrgstr/EPA-WASTE/2000/May/Day-22/f11138.htm>.

proposing a rule to place coal ash on the hazardous materials list<sup>47</sup> - a plan that is estimated to increase the costs of handling coal ash from \$300,000 a year to \$25 million.<sup>48</sup> EPA did not analyze beneficial usages of utility waste nor the economic impact on small businesses in its proposal.<sup>49</sup>

To the extent that it costs generators of CCRs to handle the material, those costs potentially will be passed on to recyclers in the form of higher costs for CCRs. Unlike electric utilities that face inelastic demand curves and thus can raise rates without affecting demand or revenue,<sup>50</sup> manufacturers that utilize CCRs in their production processes will face competition from other suppliers that do not use CCRs. Recyclers then will be left with three unpalatable options: 1) continue to use CCRs and pass on the increased production costs to customers;<sup>51</sup> 2) reduce their prices to meet those of lower-cost suppliers thereby reducing their profits; or 3) abandon use of CCRs. A rational producer faced with the first two options ultimately will select the third option in an effort to ensure that its competitive position in the marketplace is not damaged.<sup>52</sup> Although the Agency's Bevill Amendment finding would not be modified, the designation of CCRs as hazardous could lead to increased liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund).<sup>53</sup>

Superfund imposes monetary liability for costs associated with cleanup of sites contaminated with hazardous waste. Those liable under Superfund are known as potentially responsible parties or PRPs.<sup>54</sup> Currently, recyclers of CCRs need not concern themselves about any potential liability under Superfund because they are not considered hazardous wastes. It is unclear whether any CCRs accidentally disposed of at their facility or otherwise not incorporated into an existing product<sup>55</sup> would subject these facility owners to liability. Absent an EPA clarification of this issue, rational business owners would avoid even the remote possibility of becoming a PRP by simply abandoning the use of CCRs and substituting alternatives in the production processes.

EPA's failure to assess indirect impacts on small recyclers is not just problematic to the bottom line of these businesses (whether in the marketplace or the result of increased Superfund

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<sup>47</sup> "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities," 75.Fed.Reg.118 (June 21, 2010).

<sup>48</sup> Representative David McKinley, "Coal Ash Bill a Winner for American Economy," from the U.S. House of Representatives Committee on Energy and Commerce website. Available at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8500&IID=1>.

<sup>49</sup> 75.Fed.Reg.118 (June 21, 2010).

<sup>50</sup> When a producer faces an inelastic demand curve, it can raise prices without fearing that demand for its product will decrease. J. HIRSHLEIFER, A. GLAZER & D. HIRSHLEIFER, PRICE THEORY AND ITS APPLICATIONS 135-36 (2005).

<sup>51</sup> In a competitive market, higher cost producers will lose revenue as customers abandon them for lower-cost suppliers. *Ibid.* at 29. Ultimately, the suppliers of higher cost products will be driven out of business. *Id.*

<sup>52</sup> *Ibid.*

<sup>53</sup> 42 U.S.C. § 9658

<sup>54</sup> *Robins, Catellus Development Corp. v. United States: A "Solid" Approach to CERCLA "Arranger" Liability or a "Waste" of Natural Resources?*, 47 HASTINGS L.J. 189, 194 (1995).

<sup>55</sup> Liability under CERCLA is avoided if a hazardous substance is incorporated into a usable product. *Ibid.* at 196 & nn. 48-56.

liability). More significantly, it impedes one of the goals that Congress wanted to achieve in the enactment of RCRA. As already noted, the primary purpose of RCRA is to ensure that “hazardous waste is to be reduced or eliminated as expeditiously as possible.”<sup>56</sup> One way to reduce or eliminate it is to recycle the waste. However, if producers must abandon the use of the recycled material in order to stay competitive, the amount of hazardous waste will not be reduced or eliminated. Instead, it will sit in ever-growing piles subject to significant regulation.

## **CONCLUSION**

Through its aggressive regulatory rulemaking process, it appears that EPA has neglected to take into account the significant impacts on small businesses, side-stepping its legal obligations under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. By promulgating more stringent rules on matters such as greenhouse gas emissions despite demonstrable declines in gas emissions and designating coal ash as a hazardous substance (although it does not meet the threshold for hazardous toxicity, as well as other significant proposals), small businesses may be forced out of business, leading to job losses in a recovering economy.

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<sup>56</sup> 42 U.S.C. § 6902