

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Subcommittee on Agriculture, Energy and Trade
From: Committee Staff
Re: Hearing: "The President's Climate Action Plan: What Is the Impact on Small Businesses?"
Date: July 15, 2013

On July 18, 2013, at 10:00 a.m., in room 2360 of the Rayburn House Office Building, the Subcommittee on Agriculture, Energy and Trade will meet for a hearing titled, "The President's Climate Action Plan: What Is The Impact on Small Businesses?" The hearing will examine the implications of the President's recently announced Climate Action Plan¹ for small businesses, particularly those that produce and consume electric power. It will also examine what actions the Environmental Protection Agency (EPA) intends to take to ensure its compliance with the Regulatory Flexibility Act (RFA).²

I. The President's Climate Action Plan and the Clean Air Act

On June 25, 2013, the President released his Climate Action Plan. Included in this proposal are provisions directing the EPA to conduct rulemaking under the Clean Air Act³ (CAA) to regulate emissions of greenhouse gases (GHG) from electric utility generation units (EGUs).⁴ Specifically, the President's Climate Action Plan directs EPA to publish a proposed rule to regulate GHG emissions from new or substantially modified EGUs under § 111 of the CAA (New Source Performance Standards or NSPS)⁵ by September 20, 2013, to be followed by a proposed rule on GHG emissions from existing EGUs no later than June 1, 2014.⁶ The plan further directs EPA to finalize the existing sources rule no later than June 1, 2015.⁷

¹ The President's Climate Action Plan (June 2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

² 5 U.S.C. §§ 601-12.

³ 42 U.S.C. §§ 7401-671g.

⁴ Climate Action Plan, *supra* note 1 at 6. The President's Climate Action plan continues a process that began following the United States Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Court found that GHG emissions are an air pollutant, 42 U.S.C. § 7521(a), for the purposes of Title II of the CAA and thus required EPA to explain why it cannot or will not regulate GHG emissions from mobile sources. On December 15, 2009, the agency chose to issue an endangerment finding which is a determination that designated GHG emissions as pollutants that may harm health or welfare and which is the first step in regulating the emission of designated air pollutants. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). While the Supreme Court's decision and the endangerment finding rule specifically addressed GHG emissions from mobile sources under Title II, the issuance of an endangerment finding can act as a trigger which may require EPA to consider emissions limitations from other sources regulated in other parts of the CAA.

⁵ 42 U.S.C. §7411.

⁶ Power Sector Carbon Pollution Standards, Memorandum From Barack Obama, President to Administrator of the Environmental Protection Agency, 78 Fed. Reg. 39,535, 39,536 (July 1, 2013) [hereinafter "President's Memorandum to EPA].

⁷ *Id.*

New Source Performance Standards (NSPS) are emissions limitations⁸ on major new, or substantially modified, stationary sources of air pollution that, in the Administrator's judgment, cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.⁹ NSPS regulations permit the EPA to decide what classes, types and sizes of sources can be regulated,¹⁰ to consider the economic costs and feasibility of the regulations on individual categories of sources,¹¹ and determine what technology has been adequately demonstrated to achieve emission limits goals, again taking into account the economic costs.¹²

A number of organizations representing small businesses have expressed concern about the potential costs of reducing GHG emissions from new EGUs and the effect those costs will have on their members and industries. These adverse consequences may be exacerbated should the agency pursue similar emission limits regulations for existing EGUs.¹³ In addition, small businesses may be concerned that the timelines established in the President's Climate Action Plan will not permit them to examine the potential implications of these limitations on GHG emissions. There also is concern that these tight deadlines will not permit EPA to meet its obligations to small entities under the RFA.

II. EPA's Obligations under the RFA

The RFA requires EPA to assess the economic consequences of its proposed rules on small entities.¹⁴ If the EPA expects that a proposed rule will have a significant economic impact on a substantial number of small entities, the agency then is required to perform an initial regulatory flexibility analysis (IRFA). The key part of the IRFA is EPA's development and consideration of alternatives that are less burdensome on small entities, yet still allow the agency to achieve its regulatory objective.¹⁵ If the agency does not prepare an IRFA, it is required to certify that the rule will not have a significant economic impact on a substantial number of small entities.

When the EPA is ready to issue a proposed rule for which it will have to prepare an IRFA, it is required to conduct a formal procedure prior to publication of the proposed rule in the Federal Register. Essentially, the agency obtains input from small businesses on the potential impact of the rule and alternatives that might abate

⁸ These emissions limitations are referred to as a "standard of performance" which means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emissions reduction (taking into account the cost of achieving such a reduction and any non-air quality, health and environmental impacts). 42 U.S.C. § 7411(a)(1).

⁹ *Id.* at § 7411(b)(1)(a).

¹⁰ *Id.* at § 7411(b)(2).

¹¹ *Id.* at § 7411(h)(2)(B).

¹² *Id.* at § 7411(h)(1). It should also be noted that § 111 of the CAA prohibits EPA from mandating the use of a particular emissions reduction technology. *Id.* at § 7411(b)(5).

¹³ Letter from Various Associations to EPA, Comments, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generation Units 3 (June 25, 2012) [hereinafter "Association's Comments NSPS 2012"] (on file with Committee Staff). The comments were submitted in response to Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources; Electric Utility Generating Units; Proposed Rule, 77 Fed. Reg. 22,392 (April 13, 2012). That proposal has never been finalized.

¹⁴ Under the RFA, small entities include small businesses, small not-for-profit organizations, and small governmental jurisdictions (those with populations of less than 50,000). Small businesses are defined by cross-referencing the statutory definition of small businesses in § 3 of the Small Business Act, 15 U.S.C. § 632, and the Small Business Administration's (SBA) size regulations set forth in Part 121 of Title 13, Code of Federal Regulations. 5 U.S.C. § 601(3).

¹⁵ *Id.* at § 603. The RFA is a procedural statute. Nothing in the Act requires the agency to adopt less burdensome alternatives. See *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 113 (1st Cir. 1997).

its effects. The agency, in consultation with SBA Office of Advocacy, identifies small businesses from the affected industries to serve as small entity representatives (SERs), and provides SERs with any draft of the proposed rule, analysis of the impacts on small businesses, and a description of any significant alternatives. The SERs then provide their assessment of the proposed rule, and its potential impacts on small businesses, to the SBAR panel. The SBAR panel, made up of federal employees,¹⁶ then prepares a report which the agency includes in the notice of proposed rulemaking.¹⁷

SBAR panels allow the EPA to benefit from the insights of small businesses that will be required to comply with the regulations.¹⁸ SBAR panels are most successful in fully fleshing out small business impacts and less burdensome alternatives when EPA provides a complete regulatory proposal to the SERs. An effective panel process allows the SERs to understand and evaluate its potential economic impacts and recommend alternative regulatory options that would minimize any significant economic impact while still allowing the agency to achieve its objective.¹⁹

EPA's compliance with the RFA has been inadequate in recent years.²⁰ Compliance concerns include, but are not limited to: certifying rules when the agency should have prepared an IRFA; insufficiently analyzing of potential impacts and less burdensome alternatives; incorrectly analyzing the number and type of affected entities; and poor preparation of SBAR panel members.²¹ These shortcomings have undermined the ability of small entities to assess the economic consequences of EPA rulemakings which ultimately may lead EPA to promulgate less rational rules.

III. Small Business Concerns with Regulating GHG Emissions for Electric Utility Power Generation Units

EPA had previously issued a proposed rule related to GHG emissions from new EGUs that generated a great deal of opposition from a number of organizations representing small entities. According to small entities, the proposed rule controlled not merely the emissions of GHGs, but the choice of fuel and energy that a project must utilize. In addition, EPA's proposal would have combined two independent and distinct source categories and regulated them under a single standard of performance that cannot be attained by one of the source categories, energy produced at coal-fired facilities.²² Finally, small entities expressed concern regarding the

¹⁶ The SBAR panel consists of an employee from SBA Advocacy, an employee of the Office of Management and Budget's Office of Information and Regulatory Affairs, and an employee of the agency writing the rule. These panels are often denominated as SBREFA panels after the Small Business Regulatory Enforcement Act which amended the RFA and imposed this prepublication requirement on EPA.

¹⁷ The covered agency may respond to the report prior to publication of the proposed rule. The report and agency response must be placed in the public rulemaking record and summarized in the notice of proposed rulemaking.

¹⁸ Letter from Winslow Sargeant, Chief Counsel of Advocacy, SBA Office of Advocacy, to Lisa Jackson, Administrator, EPA, SBAR Panel: Convening Panel on "Greenhouse Gas New Source Performance Standards for Electric Utility Steam Generating Units (June 13, 2011), available at http://www.sba.gov/sites/default/files/files/epa11_0613.pdf.

¹⁹ *Id.* at 3.

²⁰ *Id.* The above comments address only one proposed EPA rule. For a partial list of additional comments critical of EPA compliance with the RFA please contact the Committee or review the SBA Office of Advocacy Regulatory Affairs comment letters to the agency, available at <http://www.sba.gov/advocacy/816>.

²¹ *Id.* at 4.

²² Association's Comments NSPS 2012, *supra* note 13 at 4. The GHG emissions performance standards of 1,000 lbs. of carbon dioxide per megawatt hour is not achievable by coal-fired plants without applying carbon capture and sequestration technology, which, according to these organizations, is costly and not a commercially proven technology. *Id.* at 8.

potential impact of imposing similar regulations on existing sources of GHG emissions, particularly in trade-exposed industries, such as manufacturing.²³

Overall, small businesses believe that the 2012 proposed rule would have made it too expensive to build new EGUs to produce electricity from coal-fired plants. According to the EPA's own analysis of the rule, the cost of producing electricity from a new pulverized coal plant would increase by 80 percent and the cost of producing electricity from a gasification-based coal plant would increase by up to 30 percent.²⁴ The effect of this change would be to discourage the use of coal as an electric power source in favor of fuels that emit fewer GHG emissions. Should EPA impose substantially similar emission limits regulations to existing EGUs, as directed in the President's Memorandum to EPA,²⁵ utilities may be compelled to retire existing coal-fired EGUs in favor of other fuel sources.

According to the United States Energy Information Agency, coal-fired EGUs produced 37 percent of all utility power generated in the United States in 2012.²⁶ A reduction in the demand for coal could be expected to reduce employment at coal-fired EGUs and in the coal mining industry. According to the United States Small Business Administration, approximately 539 firms engaged in coal mining are classified as small businesses.²⁷

In addition, regulations that increase the cost of generating electricity from coal-fired EGUs could result in increased demand for substitute fuels, such as natural gas and even some renewable energy sources.²⁸ Holding all else constant, consumers of electricity could expect their utility rates to rise as the price of substitute fuels to supplant coal-fired EGUs likewise increases due to increased demand for these other sources.²⁹ This in turn could lead to higher costs for utility consumers and reduce the competitiveness of some small businesses that compete in a global economy where other countries, particularly India and China, do not impose GHG emission limitations from coal-fired power facilities.

IV. Conclusion

The regulation of GHG emissions from EGUs is a significant economic concern of small businesses. Imposing GHG emissions limitations on coal-fired power facilities in the absence of cost effective technologies will reduce these facilities ability to compete in the market place. This in turn would reduce employment in facilities that produce power from coal and in coal mining. In addition, increases in electric power costs are also a

²³ *Id.* at 5.

²⁴ 77 Fed. Reg. at 22,415-16.

²⁵ President's Memorandum to EPA, *supra* note 6 at 39,535,

²⁶ <http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3>.

²⁷ United States Small Business Administration, Office of Advocacy, U.S. Static Data, U.S. Data, Statistics of U.S. Businesses, Firm Size Data (2009), available at <http://www.sba.gov/advocacy/849/12162>. (NAICS Codes 22111, 212112).

²⁸ Currently, renewable fuel sources, such as wind and solar, are not cost competitive with natural gas or coal. However, these fuel sources benefit from a number of government policies intended to reduce the cost differential vis-à-vis more traditional fuel sources to consumers. Imposing regulations that increase the cost of producing electricity from coal would likewise narrow this spread and could be viewed as another government preference or subsidy to renewable fuels. However, it could also be argued that increasing the cost of coal-fired power is a means of addressing other externalities associated with burning coal, such as air pollution.

²⁹ It should be noted that coal consumption in the United States has declined in recent years in part due to the low-cost of natural gas and the imposition of new and potential CAA emissions limits on coal-fired utilities. CITIGPS, NORTH AMERICA, THE NEW MIDDLE EAST? 38 (March 20, 2012), available at <https://ir.citi.com/%2FSyMM9ffgOZguStaGpnCw5NhPkvdMbbn02HMA05ZX%2BJHjYVS07GqhxF2wMk%2Bh4tv7D EZ5FymVM%3D>.

concern to small businesses, especially in trade-exposed industries that must compete with foreign nations without similar emissions limitations on their power generation sectors.

For these reasons, the EPA should ensure that the potential cost consequences on small entities of any regulations limiting GHG emissions for EUGs are minimized to the greatest extent possible. Also, the EPA should not prize expediency over thorough analysis in assessing impacts of the regulations on small businesses. The artificial rulemaking deadlines included in the President's memorandum to EPA should be withdrawn to ensure that the agency has adequate time to thoroughly analyze the effects of any regulatory proposals and aid the agency's compliance with all procedural rulemaking requirements, including the RFA.

In addition, the EPA should conduct thorough outreach to small businesses to ensure that its analysis of costs and impacts is accurate and develop less burdensome alternatives. Finally, to best ensure that these potential costs are minimized and that potential regulations are rational, the EPA should conduct SBAR panels, issue an IRFA on each potential rule, and ensure that the small businesses that serve as SERs to the panel are provided with comprehensive, accurate, and timely information on the regulatory proposals so that small businesses have the opportunity to meaningfully participate in the rulemaking process.