

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

**Memorandum**

To: Members, House Small Business Subcommittee on Agriculture, Energy and Trade  
From: Small Business Committee Staff  
Date: September 19, 2011  
Re: Hearing: "Are Excessive Energy Regulations and Policies Limiting Energy Independence, Killing Jobs and Increasing Prices for Consumers?"

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**Introduction**

On Monday, September 19, 2011 at 10:00 am MDT, the Subcommittee on Agriculture, Energy and Trade will conduct a field hearing titled: *Are Excessive Energy Regulations and Policies Limiting Energy Independence, Killing Jobs and Increasing Prices for Consumers?* The hearing will take place in the City Hall Auditorium, 250 North 5<sup>th</sup> Street, Grand Junction, CO.

This hearing will examine federal regulations and policies affecting the energy industry and their impact on small businesses, jobs and consumer prices. Specifically, the hearing will examine Environmental Protection Agency (EPA) rules on greenhouse gas emissions, the coal combustion residuals (CCR) proposed rule,<sup>1</sup> the proposed rule to limit mercury and other air toxics from coal-burning electricity generators,<sup>2</sup> and the potential for regulation of hydraulic fracturing in the natural gas industry. Additionally, the hearing will focus on the permitting and leasing process of the Department of the Interior for natural gas and oil exploration and production on federal lands, as well as the permitting and leasing procedures for wind turbines. Representatives from both the EPA and the Department of Interior's Bureau of Land Management will testify.

**Issues**

**I. EPA Greenhouse Gas Regulations from Stationary Sources**

Small businesses have expressed great concern about the potential for increased energy costs and the potential to become regulated entities as a result of the EPA's proposed regulations on the emissions of greenhouse gases (GHG). On average, small businesses face a 30 percent price differential for

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<sup>1</sup> 75 Fed. Reg. 35,127.

<sup>2</sup> 76 Fed. Reg. 38,590.

electricity and a 20 percent price difference for natural gas compared to larger businesses.<sup>3</sup> Some estimate the EPA GHG regulation could increase the cost of gasoline by 50 percent, electricity by 50 percent and natural gas by 75% over the next twenty years.<sup>4</sup> In addition, the rules could result in a number of small businesses becoming subject to emissions regulations,<sup>5</sup> which may subject them to significant costs associated with permitting and compliance.

On December 15, 2009, EPA issued an endangerment finding<sup>6</sup> under the Clean Air Act after, which the agency needed to determine the appropriate means of regulating (GHG) emissions (i.e., under Title I, ambient air quality standards; Title II, mobile sources; or Title V, stationary sources). The primary policy tools the agency chose are: prevention of significant deterioration / new source review permits, which require any facility emitting more than 100 tons of GHG per year to undergo preconstruction review and permitting and incorporate best available control technology; and Title V permits, which require all new and existing facilities emitting more than 100 tons of a regulated pollutant to obtain permits.

These emissions limit thresholds, when applied to a GHG, are extremely low compared with emissions for other regulated pollutants. They could result in a substantial number of facilities, including more 20,000 manufacturing facilities and 1,000,000 commercial buildings, having to obtain emissions permits, which would impose new and potentially costly compliance burdens on these businesses.<sup>7</sup>

## **II. EPA Coal Combustion Residue Regulation**

A number of small businesses that produce coal or rely upon coal-fired power as an energy source have expressed concerns regarding the EPA's potential new regulations on the management and disposal of Coal Combustion Residues (CCR).<sup>8</sup> CCR is material that remains after coal is burned in coal-fired power plants. A tremendous amount of the material is generated each year—industry

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<sup>3</sup> ANDY BOLLMAN, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, CHARACTERIZATION AND ANALYSIS OF SMALL BUSINESS ENERGY COSTS (2008), available at <http://archive.sba.gov/advo/research/rs322tot.pdf>.

<sup>4</sup> AFFORDABLE POWER ALLIANCE, POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (2010), available at <http://www.affordablepoweralliance.org/LinkClick.aspx?fileticket=GBqH57mHH5w%3D&tabid=40>.

<sup>5</sup> 74 Fed. Reg. 55,303.

<sup>6</sup> 74 Fed. Reg. 66,516.

<sup>7</sup> *Id.* at 55,303.

<sup>8</sup> Coal combustion residue may also be referred to as coal ash or coal combustion waste.

estimates that as much as 135 million tons<sup>9</sup> were generated in 2009, making it one of the largest waste streams generated in the United States. For decades, companies have sold non-hazardous CCR for beneficial uses, such as an ingredient in cement and concrete. The beneficial use of non-hazardous CCR helps energy producing facilities manage their costs and waste.

The EPA has authority to identify and regulate solid and hazardous wastes under the Resource Conservation and Recovery Act<sup>10</sup> (RCRA). The RCRA classifies waste into categories. Those classified under Subtitle C of the RCRA are materials deemed to be hazardous wastes that require specific disposal and storage methods in addition to federal permits for disposal. Those classified under Subtitle D of the RCRA are solid wastes deemed not to be hazardous and are primarily regulated by state environmental enforcement entities under nationally established guidelines.

On December 22, 2008, the breach of a containment pond at a Tennessee Valley Authority power plant resulted in a massive release of CCR into the environment. As a result of this incident, EPA has proposed two regulatory options<sup>11</sup> regarding waste management. Option one would have the agency regulate all CCR as hazardous waste under Subtitle C of the RCRA. The second option would establish specific criteria applicable to CCR disposal in ponds and landfills under Subtitle D.

Small businesses are concerned about the impact of these proposals on energy prices due to the increases in costs to coal utilities in managing their waste. A study<sup>12</sup> by Veritas Economic Consulting estimated that regulating CCRs under Subtitle C could increase coal-fired power plant compliance costs by up to \$110 billion over twenty years,<sup>13</sup> while regulating CCR under Subtitle D could increase these costs by up to \$35 billion; costs that could be passed down to customers in the form of higher utility rates. Another small business concern is the impact on the economy and jobs. Direct job losses among coal producers are estimated at up to 7,900 fewer jobs (Subtitle C) or up to 3,400 fewer jobs (Subtitle D). Job losses at coal-fired utilities are estimated at up to 7,600 (Subtitle C) or up to 2,800 (Subtitle D). The overall impact on jobs could be even greater. The study estimated regulation under Subtitle C could potentially reduce employment by 316,000 jobs (Subtitle C)<sup>14</sup> or 65,000 jobs (Subtitle

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<sup>9</sup>AMERICAN COAL ASH ASSOCIATION, CORRECTED 2009 COAL COMBUSTION PRODUCT PRODUCTION USE AND SURVEY iii, *available at*

[http://acaaffiniscap.com/associations/8003/files/2009\\_CCP\\_Production\\_Use\\_Survey\\_Corrected\\_020811.pdf](http://acaaffiniscap.com/associations/8003/files/2009_CCP_Production_Use_Survey_Corrected_020811.pdf).

<sup>10</sup> Pub. L. No. 94-580, 90 Stat. 2793 (1976), codified at 42 U.S.C. § 6901 et seq. RCRA was enacted as an amendment to the existing Solid Waste Disposal Act.

<sup>11</sup> 75 Fed. Reg. 35,128.

<sup>12</sup> AN ECON. ASSESSMENT OF NET EMPLOYMENT IMPACTS FROM REGULATING COAL COMBUSTION RESIDUES, VERITAS ECONOMIC CONSULTING (2011), *available at* <http://www.recyclingfirst.org/pdfs/101.pdf>.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 1.

D). These job losses would be especially pronounced in the Mountain states<sup>15</sup> where employment could decline by 54,000 jobs (Subtitle C) or 11,700 jobs (Subtitle D).<sup>16</sup>

### III. EPA Utility MACT Emissions Regulations

Another regulation with the potential to increase energy costs for small businesses is the EPA's proposed Utility Maximum Achievable Control Technology (MACT) rule<sup>17</sup> requiring coal-fired power plants to achieve 91% reductions in emissions of mercury, a hazardous air pollutant. In addition, the agency included hydrogen chloride and hydrogen fluoride emission reductions into the rule, which will substantially raise costs on coal-fired power producers, costs that could be passed down to customers.

While this rule is supposed to address public health hazards associated with these emissions, many in the energy industry have questioned EPA's findings regarding the health benefits of the proposed rule.<sup>18</sup> According to an analysis by the Gradient Corporation,<sup>19</sup> the rule would have a negligible impact on mercury exposure, as most U.S. exposures are attributable to foreign sources. The report estimated that the incidence of cancer caused by Hazardous Air Pollutants (HAPs) would be reduced by 1/10000<sup>th</sup> of a percent (33% to 33.0001%).<sup>20</sup>

The effect of the regulation on small businesses could be higher energy costs. The Utility MACT is projected to be the most expensive rule affecting coal-fired power plants in the EPA's history. According to the agency's own figures, MACT compliance will cost the coal-powered industry more than \$10 billion a year.<sup>21</sup> A separate study by National Economic Research Associates found that the Utility MACT Rule, when combined with the Clean Air Transport Rule,<sup>22</sup> will increase coal power industry costs by \$17.8 billion a year, resulting in an 11.5 percent increase in average utility costs and a net loss of 1.4 million jobs by the year 2020.<sup>23</sup>

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<sup>15</sup> Montana, Idaho, Wyoming, Nevada, Arizona, New Mexico, Utah, and Colorado.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> 76 Fed. Reg. 38,590.

<sup>18</sup> SCOTT SEAGAL PROPOSED EPA REGULATION OF THE POWER SECTOR: HIGH COSTS TO CONSUMERS WITH LITTLE REAL BENEFIT, INSIDE ALEC (2011), available at [http://www.alec.org/AM/pdf/insidealec/ia\\_julaug2011.pdf](http://www.alec.org/AM/pdf/insidealec/ia_julaug2011.pdf).

<sup>19</sup> MEMORANDUM TO PAUL BAILEY AND VICKY SULLIVAN OF THE AMERICAN COALITION FOR CLEAN COAL ENERGY FROM THOMAS LEWANDOWSKI, PH.D., GRADIENT CORPORATION, REVIEW OF PROPOSED EPA HAPS RULE (2011) (on file with Committee staff).

<sup>20</sup> *Id.* at 7.

<sup>21</sup> ENVIRONMENTAL PROTECTION AGENCY, FACT SHEET: PROPOSED MERCURY AND AIR TOXICS STANDARDS, available at <http://www.epa.gov/airquality/powerplanttoxics/pdfs/proposalfactsheet.pdf>.

<sup>22</sup> 76 Fed. Reg. 48,208.

<sup>23</sup> NATIONAL ECONOMIC RESEARCH ASSOCIATION, ECONOMIC IMPACTS OF EPA'S PROPOSED TRANSPORT RULE AND UTILITY MACT RULE (2011), available at <http://appanet.cms-plus.com/files/PDFs/ModelingresultsJune2011FINAL.pdf>.

#### **IV. Potential Federal Regulations on Hydraulic Fracturing**

Approximately 65% of natural gas and 45% of oil are produced by independent petroleum companies.<sup>24</sup> The majority of these companies qualify as small businesses.<sup>25</sup> While no new proposed federal regulations on the process of hydraulic fracturing are in the process of consideration, legislation has been introduced in the U.S. House of Representatives to further regulate the practice.<sup>26</sup> Small businesses that produce natural gas through hydraulic fracturing claim policymakers and the public have been receiving biased and inaccurate information on the practice and its impact on the environment.

Advances in technology, such as horizontal drilling and hydraulic fracturing, have made it possible to extract gas deposits from shale rock formations and coal methane beds, greatly increasing the size of recoverable domestic natural gas reserves. Horizontal drilling makes it possible to drill deeper into shale gas and oil bearing rock formations, while hydraulic fracturing is the process of injecting into production wells large volumes of water, sand, and other specialized chemicals that help create cracks in the rock formation facilitating the release of gas trapped in the rock.<sup>27</sup>

While the process of hydraulic fracturing has been used in oil wells for decades,<sup>28</sup> it has only recently been widely adopted in the production of natural gas from shale. This is leading some to raise concerns about the impact of hydraulic fracturing on the environment and local drinking water. While hydraulic fracturing in shale rock has not been linked to specific cases of drinking water contamination, the EPA is currently undertaking a comprehensive study of the relationship, if any, between hydraulic fracturing and drinking water.<sup>29</sup>

#### **V. Oil and Gas Leasing on Federal Lands**

In recent years, it has become more difficult and costly for oil and gas companies to produce energy from public lands. This is partly the result of federal agency actions that have made it more difficult to obtain drilling permits on federal lands, and partly due to ongoing federal policies that have restricted new lands for lease. Small businesses in the oil and gas sector have expressed concern that

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<sup>24</sup>IHS GLOBAL INSIGHT, THE ECONOMIC CONTRIBUTIONS OF ONSHORE INDEPENDENT OIL AND NAT. GAS PRODUCERS IN THE U.S. ECONOMY 1 (2011), available at <http://www.ipaa.org/news/docs/IHSFinalReport.pdf>.

<sup>25</sup> INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, PROFILE OF INDEPENDENT PRODUCERS 2 (2009), available at <http://www.ipaa.org/reports/faq/docs/2008ProfileOfIndependentProducers.pdf>.

<sup>26</sup> H.R. 1084, 112<sup>th</sup> Congress (2011).

<sup>27</sup> SHALE EXTRACTION PROCESS, ENERGYFROMSHALE.ORG, available at <http://www.energyfromshale.org/shale-extraction-process>.

<sup>28</sup> *Id.*

<sup>29</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, QUESTIONS AND ANSWERS ABOUT EPA'S HYDRAULIC FRACTURING STUDY, available at <http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/faqs.cfm>.

these actions are increasing costs in producing energy from existing leases, as well as limiting future opportunities to maintain a viable business.

The Bureau of Land Management (BLM) is the primary federal agency responsible for managing private energy production activities on federal lands. In many cases, companies that propose drilling on federal lands have been required to meet new or expanded BLM requirements that did not exist at the time the lease was made. These requirements, in addition to an agency backlog in processing drilling applications, can increase the time it takes to get a permit from 18 months to 5 years.<sup>30</sup> State legal challenges to permit applications can add additional time to the process.<sup>31</sup> The BLM has also deferred opening up new areas for leasing while it conducts new Resource Management Plans for these parcels.<sup>32</sup> Additionally, some stakeholders complain the agency is also imposing new standards without providing for public comment and input as required by the National Environmental Policy Act and the planning provisions of the Federal Land Policy Management Act.<sup>33</sup> As a result of these policies, the western United States has experienced a significant decline in leasing activity.

## **VI. Regulatory Impediments to Renewable Energy Production**

Small businesses play a significant role in the renewable energy sector, helping build, maintain, produce and distribute renewable energy to residential and commercial customers. In addition, policymakers from both political parties have identified renewable energy as a component to a comprehensive energy policy.

Small renewable energy firms, and the small subsidiaries of larger entities, can face uncertainties and impediments caused by federal regulatory and tax policies. These include access to federal lands for development projects, shifting regulatory requirements for projects on federal lands, and the temporary nature of tax policies intended to encourage renewable energy production.

Approximately 97.9% of potential wind and solar production (per megawatt produced) is under development on private lands, versus 2.1% on public lands.<sup>34</sup> Many wind power businesses have identified the U.S. Fish and Wildlife Service's (USFWS) guidelines regarding the establishment of wind energy projects on federal lands<sup>35</sup> as a major impediment to the adoption of wind-based power.

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<sup>30</sup> BUREAU OF LAND MANAGEMENT, OIL AND GAS DEVELOPMENT PROCESS, *available at* [http://www.blm.gov/wo/st/en/info/newsroom/Energy\\_Facts\\_07/development.html](http://www.blm.gov/wo/st/en/info/newsroom/Energy_Facts_07/development.html).

<sup>31</sup> POSITION PAPER, WESTERN ENERGY ALLIANCE, LEASING 2 (2011), *available at* [http://westernenergyalliance.org/wp-content/uploads/2011/08/dashboard\\_leasing.pdf](http://westernenergyalliance.org/wp-content/uploads/2011/08/dashboard_leasing.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> AMERICAN WIND ENERGY ASSOCIATION, 2010 U.S. WIND ENERGY ANNUAL MARKET REPORT, *available at* [http://www.awea.org/learnabout/industry\\_stats/index.cfm](http://www.awea.org/learnabout/industry_stats/index.cfm).

<sup>35</sup> UNITED STATES FISH AND WILDLIFE SERVICE, DRAFT LAND-BASED WIND ENERGY GUIDELINES (2011), *available at* [http://www.blm.gov/wo/st/en/info/newsroom/Energy\\_Facts\\_07/development.html](http://www.blm.gov/wo/st/en/info/newsroom/Energy_Facts_07/development.html).

Some in the industry believe these guidelines are unworkable and based on dubious findings.<sup>36</sup> They are advocating the agency return to siting guidelines reached by stakeholder consensus as part of an agency advisory committee in 2010.<sup>37</sup>

Shifting environmental regulations and guidance are also an area of concern, especially when regulation and guidance have been issued after a project has been permitted and investments made in its development. For example, the USFWS guidance related to the protection of eagle populations<sup>38</sup> has injected new uncertainty over wind projects under development on federal, and increased the potential for similar state regulation on private lands.

Additionally, small renewable energy firms are concerned that tax policies intended to encourage renewable energy projects and production, particularly the Renewable Energy Production Tax Credit, are temporary and must be regularly renewed by Congress. These firms believe that the temporary nature of this tax policy discourages investment in renewable energy projects.<sup>39</sup>

### **Conclusion**

Through aggressive rulemaking and other regulatory initiatives, small industry firms believe that EPA and the BLM have neglected to take into account significant impacts that their policies will have on small businesses. This hearing will provide an opportunity to hear from agency officials and small businesses about important regulations affecting energy independence, jobs and consumer energy prices.

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<sup>36</sup> *American Wind Energy Initiative: Identifying Roadblocks to Wind and Solar Energy on Public Lands and Waters, Part II – The Wind and Solar Perspective*, the House Comm. on Nat. Resources, 112<sup>th</sup> Cong. (2011) (testimony of Roby Roberts), available at <http://naturalresources.house.gov/UploadedFiles/RobertsTestimony06.1.11.pdf>.

<sup>37</sup> U.S. FISH AND WILDLIFE SERVICE, WIND TURBINE GUIDELINES ADVISORY COMMITTEE RECOMMENDATIONS, available at [http://www.fws.gov/habitatconservation/windpower/wind\\_turbine\\_advisory\\_committee.html](http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html).

<sup>38</sup> U.S. FISH AND WILDLIFE SERVICE, DRAFT EAGLE CONSERVATION PLAN GUIDANCE (2011), available at [http://www.fws.gov/windenergy/docs/ECP\\_draft\\_guidance\\_2\\_10\\_final\\_clean\\_omb.pdf](http://www.fws.gov/windenergy/docs/ECP_draft_guidance_2_10_final_clean_omb.pdf).

<sup>39</sup> *Id.*