

WebMemo



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Small Business Impact of the EPA Endangerment Finding

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While Congress continues to debate the merits of climate change legislation, the Environmental Protection Agency (EPA) has been steadily moving forward with a process to regulate greenhouse gases (GHGs) under the ill-suited framework of the Clean Air Act (CAA).

On January 14, the first major step of that process—a final rule concluding that GHGs endanger public health and welfare—took effect, and with it the obligation to move forward with what could easily become the most expensive and intrusive set of regulations in history. The implementation of these rules will have a significant impact on the economy and small businesses, even if the “tailoring rule”—a legally dubious attempt by EPA to rein in the costs—survives the expected legal challenges. Congress can and should stop this regulatory overreach.

The Clean Air Act. The CAA is very specific: Once the EPA determines that carbon dioxide (CO₂) emitted from fossil fuel use as well as other greenhouse gases endanger human health, those gases must be treated as regulated pollutants under the statute. The first target is automobiles, but after that almost any energy-using business could be fair game.

The result would be a regulatory dragnet that captures even the smallest entities. The CAA would include any stationary source that has the potential to emit 250 tons or more of any pollutant. According to a study by Mark and Portia Mills produced for the U.S. Chamber of Commerce:

At least one million mid-sized to large commercial buildings emit enough CO₂ per year to become EPA regulated stationary sources. The threshold would be reached, for example, by one-fifth of all food services, one-third of those in health care, half of those in the lodging industry, even 10 percent of buildings used for religious worship.¹

An Uncertain Future. In October 2009, the EPA proposed to raise the emissions threshold from 250 tons to 25,000 tons as a means to provide “regulatory relief for smaller GHG emission sources and for permitting authorities.”² The EPA estimates these new regulations, absent the tailoring rule, would cost small entities more than \$55 billion.³ However, the regulatory relief appears temporary as the small entities are merely “sources not covered during first phase.”⁴ What happens in the second phase, a mere six years away, remains to be seen.⁵ The EPA also refers to other means under the CAA to restrict small businesses and that “the tailoring proposal does not restrict our ability to explore these opportunities during the first phase.”⁶

Further, the tailoring rule itself is subject to some legal uncertainty because of the clarity in

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which the act specifies the 250-ton threshold, seeming to leave little room for the EPA to raise the threshold to 25,000 tons arbitrarily. While that issue appears likely to play out in court, many smaller emitters are left with a lot of uncertainty as to whether they will actually be temporarily protected under the tailoring rule. If not, the EPA estimates nearly 6 million new sources could fall into this regulatory web,⁷ including 1,354,760 commercial buildings,⁸ which is significantly higher than the Mills study for the U.S. Chamber of Commerce estimated in its analysis.

Cost of Regulation on Small Business. Any entity that reaches the emissions threshold (whether it ultimately be 250 or 25,000 tons) would be required to obtain a permit through its state agency to construct a new building or make modifications to its existing structure. According to the EPA, 282 such permits were issued in 2007 at cost of \$125,120 to the applicant and a burden of 866 hours for each application.⁹ Assuming there are only 40,000 new applicants per year, the compliance cost would surpass \$5 billion and would require 17,320 full-time employees.

Aside from the compliance costs, there are the actual economic costs the regulations will impose.

In 2008, The Heritage Foundation completed an economic analysis of the EPA's plan to regulate CO₂ absent the tailoring rule. Between 2010 and 2029, the regulations would cause \$7 trillion in lost economic activity and a loss of nearly 3 million manufacturing jobs by 2029.¹⁰

One additional, though less discussed, threat to small businesses is the potential impact the regulations would have on single-family homes. According to the EPA, 3,925,000 single-family homes would be subject to regulation absent the tailoring rule. Could a small business owner who operates out of the basement be snagged by these regulations? Another 610,340 multi-family homes would also be subjected to regulation if the tailoring rule expires or is defeated in court.¹¹

Impact on Small Business and the SBA Office of Advocacy. Under the Regulatory Flexibility Act, the EPA is required to convene a Small Business Advocacy Review (SBAR) Panel to assess the impact the regulations would have on small businesses. However, the EPA did not convene the panel because, in their view, the tailoring rule would limit the impact on small businesses. In a letter to EPA Administrator Lisa Jackson, the Small Business Administration

1. Portia M. E. Mills and Mark P. Mills, "A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant," U.S. Chamber of Commerce, September 2008, p. 3, at <http://www.uschamber.com/NR/rdonlyres/expe4zbwrndnhcbhe4nbifhdmY5usudezdrp2axsnmhr4wspatvnhqtur47fu24zmzqczw276hawcye36lh7qxjiti2c/092408ertREPORTAREgulatoryBurdenSeptember2008.pdf> (January 19, 2010).
2. U.S. Environmental Protection Agency, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," October, 27, 2009, p. 55339, at <http://fdsys.gpo.gov/fdsys/pkg/FR-2009-10-27/pdf/E9-24163.pdf> (January 19, 2010).
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*, p. 55337. "These avoided costs or benefits accrue because small sources of GHGs are not required to obtain a title V permit and new or modifying small sources of GHGs are not required to meet PSD requirements for a period of 6 years."
6. *Ibid.*, p. 55325.
7. *Ibid.*, p. 55338.
8. *Ibid.*
9. Carrie Wheeler, "Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review," U.S. Environmental Protection Agency, no date, pp. 16–20, at <http://www.uschamber.com/assets/env/supportingreport.pdf> (January 20, 2010).
10. David Kreutzer and Karen Campbell, "CO₂-Emission Cuts: The Economic Costs of the EPA's ANPR Regulations," Heritage Foundation *Center for Data Analysis Report* No. 08-10, October 29, 2008, pp. 1, 8, at <http://www.heritage.org/Research/EnergyandEnvironment/cda08-10.cfm>.
11. EPA, "Prevention of Significant Deterioration," p. 55338.

(SBA) Office of Advocacy strongly disagreed with the EPA's assessment:

Once finalized, however, the GHG finding legally and irrevocably commits the agency to regulating GHGs under the Clean Air Act. Given this entirely new regulatory program, EPA should have recognized the potential economic impact of the endangerment finding and conducted an SBAR panel.¹²

According to the Office of Advocacy, despite the tailoring rule, over 1,200 small entities—including small brick manufacturers, small foundries, and small pulp and paper mills¹³—would be subject to regulation. That alone should prompt a formal review.

These concerns are not new. Early in the process, the SBA Office of Advocacy expressed in a letter to then-EPA Administrator Stephen Johnson “any GHG rule must be subject to a SBAR panel.” They also detailed research by the Office of Advocacy on the regulatory burden on small businesses:

[Research] shows how the smallest businesses bear a 45 percent greater burden than their larger competitors. The annual cost per employee for firms with fewer than 20 employees is \$7,747 to comply with all regulations.... 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.¹⁴

While the EPA has taken steps to hold small businesses harmless, their attempt is based on shaky legal ground. Clearly, more time is needed to analyze the impact of the regulations on small businesses with the understanding that targeted carve

outs or tailoring rules cannot prevent all the economic harm that could arise from the regulations.

Potential Congressional Action. Some have used the impending regulatory threat to call for the passage of cap-and-trade legislation. Substituting one highly problematic tool for regulating carbon emissions for another is poor policymaking. In any event, Administrator Jackson is on record as saying “this is not an either/or moment. This is a both/and moment.”¹⁵

Clearly, the EPA intends to regulate even if cap and trade becomes law. It is important to remember that Congress created the CAA and has the power to alter it, thus preventing these regulations from moving forward. Several options are on the table:

- Congress could amend the CAA so that greenhouse gases like CO₂, water vapor, etc., cannot be regulated under the act. Congresswoman Marsha Blackburn (R-TN) has introduced bipartisan legislation that takes that approach. Congressman Earl Pomeroy (D-ND) also recently introduced a similar piece of legislation.
- A Resolution of Disapproval, as outlined by the Congressional Review Act, would repeal the regulation and make similar regulations difficult in the future. Senator Lisa Murkowski (R-AK) and Congressman Jerry Moran (R-KS) have introduced those resolutions.
- Congress could prohibit funding that expands on the October 2009 prohibition on regulating livestock emission in 2010. Senators Murkowski and John Thune (R-SD) offered a similar amendment last fall, though it did not receive a vote.

Crackdown on Small Business. Given the tremendous costs of the EPA's proposed crackdown on

12. Susan M. Walthall and Keith W. Holman, letter to EPA Administrator Lisa P. Jackson, Small Business Administration, December 23, 2009, p. 5.

13. *Ibid.*, p. 7.

14. Thomas M. Sullivan, letter to EPA Administrator Stephen Johnson, Small Business Administration, July, 8, 2008, pp. 5–6, at <http://www.uschamber.com/NR/rdonlyres/ews52uzc7sh7u75ygwbydmu4jnddkqimtlptavoujofl5uzcwgbtwff4jp7orw5e7zc7evmcy25nv3aqoxuemk32vb/SBALettertoEPAJuly2008.pdf> (January 19, 2010).

15. Foxnews.com, “Administration Warns of ‘Command-and-Control’ Regulation over Emissions,” December 9, 2009, at <http://www.foxnews.com/politics/2009/12/09/administration-warns-command-control-regulation-emissions> (January 19, 2010).

small business, any of these measures to stop or at least slow down this ill-advised agenda is worthy of congressional consideration. Congress can take action against this overreach by the EPA; not doing so would be a dereliction of duty.

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