



*Advocacy: the voice of small business in government*

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 regulatory alternatives that could achieve greenhouse gas emission reductions without imposing heavy new compliance burdens on large numbers of small entities. [\(3\)](#)

**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. [\(3\)](#) The Regulatory

Flexibility Act (RFA),[\(4\)](#) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[\(5\)](#) 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,”[\(6\)](#) EPA is specifically required by the RFA to conduct a Small Business Advocacy Review (SBAR) Panel to assess the impact of the proposed rule on small entities,[\(7\)](#) and to consider less burdensome alternatives.

## 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 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<sub>2</sub>).<sup>17</sup> 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.<sup>(17)</sup> EPA acknowledged that small entities are concerned about the potential impact on them of GHG permitting:

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.<sup>(18)</sup>

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<sub>2</sub>e) so that smaller sources would not have to immediately apply for permits.<sup>(19)</sup> 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.<sup>20</sup> 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.<sup>(20)</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.

### **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.<sup>23</sup> The GHG rules are likely to have a significant economic impact on a large number of small entities.<sup>24</sup> 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 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.<sup>(26)</sup> 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.

### ***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.<sup>(27)</sup> Applying the Tailoring Rule's temporary GHG applicability threshold of 25,000 tpy CO<sub>2</sub>e, 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<sub>2</sub>e 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.<sup>(28)</sup> 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.<sup>(29)</sup> 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 is that the GHG Tailoring Rule will 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 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.

- EPA should reconsider its Finding on Endangerment for GHGs. EPA published its final endangerment finding for GHGs on December 15, 2009.[\(37\)](#) EPA should 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. A A
- 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.
- EPA should adopt higher tailoring thresholds in the GHG Tailoring Rule. Small businesses have told EPA that the proposed 25,000 tpy CO<sub>2</sub>e applicability threshold in

the GHG Tailoring Rule is too low.<sup>(41)</sup> 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<sub>2</sub>e. EPA should adopt a higher applicability threshold for PSD and Title V (such as 100,000 tpy CO<sub>2</sub>e), and it should adopt a significance threshold for PSD purposes of at least 50,000 tpy CO<sub>2</sub>e. 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<sup>(42)</sup> 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.<sup>(43)</sup> 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.

Please do not hesitate to call me or Assistant Chief Counsel Keith Holman ([keith.holman@sba.gov](mailto:keith.holman@sba.gov) or (202) 205-6936) if you have questions or if we can be of assistance.

Sincerely,

Susan M. Walthall

Acting Chief Counsel for Advocacy

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

## ENDNOTES

1. ~~See~~ 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 ~~See~~ 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).
3. ~~See~~ 15 U.S.C. § 634a, *et. seq.*
4. ~~See~~ 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. ~~See~~ 549 U.S. 497 (2007).
9. ~~See~~ 42 U.S.C. § 7602.
10. ~~See~~ 73 Fed. Reg. 44,476-44,520 (stationary sources), 44,432-44,476 (mobile sources) (July 30, 2008). These programs include National Ambient Air Quality Standards (NAAQS) for CO<sub>2</sub> 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).

11. This comment letter is available at [http://www.sba.gov/advo/laws/comments/epa08\\_1128.html](http://www.sba.gov/advo/laws/comments/epa08_1128.html).
12. The six gases are carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>).
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](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).
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).
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).
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).<sup>27</sup> In anticipation of the delisting, the U.S. Fish and Wildlife Service (FWS) proposed a definition of “disturbance” under the Bald and Golden Eagle Protection Act (BGEPA) to guide post-delisting bald eagle management.<sup>28</sup> 71 Fed. Reg. 8,265 (February 16, 2006).<sup>29</sup> Upon delisting as an endangered species, the bald eagle would immediately fall under the protection of the BGEPA.<sup>30</sup> 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.<sup>31</sup> 73 Fed. Reg. 75,038.<sup>32</sup> 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.<sup>33</sup> 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).

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.

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).

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).<sup>35</sup> 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. See Pub. L. 109<sup>th</sup> 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).

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.”

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 limit 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.