

United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP

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April 5, 2023

Hon. Michael S. Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Regan:

As the Ranking Member of the U.S. Senate Committee on Small Business and Entrepreneurship, I write you concerning the Environmental Protection Agency's (EPA) proposed regulation titled "National Emissions Standards for Hazardous Air Pollutants for Lime Manufacturing Plants" (Lime Rule).¹ I am concerned that this rulemaking will have a significant economic impact on a substantial number of small entities. Yet, once again, the EPA avoided having to consider the interests of small businesses and the immense burdens these regulations place on them by improperly certifying the proposed rule.

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA is generally required to perform an initial regulatory flexibility analysis (IRFA) on small business impacts whenever it publishes a proposed rule in the *Federal Register*.² The law also requires covered agencies³ to convene a Small Business Advocacy Review (SBAR) panel for most proposed rules.⁴ Instead of following these requirements, the EPA improperly certified their new Lime Rule would *not* have a significant economic impact on a substantial number of small entities.⁵ The agency made this determination based on a cursory analysis in the docket.⁶ The EPA found that "because the total costs associated with the proposed amendments are expected to be less than one percent of annual sales revenue per owner in the lime manufacturing source

¹ *National Emissions Standards for Hazardous Air Pollutants for Lime Manufacturing Plants*, 88 Fed. Reg. 805 (January 5, 2023), <https://www.federalregister.gov/documents/2023/01/05/2022-27994/national-emission-standards-for-hazardous-air-pollutants-lime-manufacturing-plants-amendments>.

² 5 U.S.C. § 603(a) ("Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule...the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.").

³ EPA is listed in the statute as the very first "covered agency." 5 U.S.C. § 609(d)(1).

⁴ 5 U.S.C. § 609(b)(3) (stating covered agencies, including the EPA, must "convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel....").

⁵ 88 Fed. Reg. 819 (Jan. 5, 2023); Under 5 U.S.C. § 605(b), the IRFA requirement and panel requirements are waived if the Administrator makes a finding that the proposed rule would not have a significant economic impact on a substantial number of small entities.

⁶ See Memorandum: *Economic Impact and Small Business Screening Assessments for Proposed Amendments to the National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Facilities*. November 3, 2022. EPA Docket Item EPA-HQ-OAR-2017-0015-0108.

category, there are, therefore, no significant economic impacts from these proposed amendments on the three affected facilities that are owned by small entities.”⁷

The RFA requires the agency to provide a factual basis in the record for any certification of no significant impact;⁸ however, in its screening assessment, the EPA made no attempt to calculate the specific costs that will be incurred by the small business lime manufacturers. Instead, the agency simply apportioned the average industry compliance cost to each small business. This approach assumes that the costs small businesses may be able to absorb are the same—and proportional—to the costs that large businesses may be able to absorb. It also fails to account for the wide variability in costs between plants required to comply with the proposed rule’s emissions standards. Not only are these irrational assumptions, but miscalculations such as these are precisely why Congress passed the RFA in the first place.

The EPA’s cost estimates were based on costs incurred by other industries but did not properly account for operational and emission differences between the lime industry and the other industries, reducing the estimated compliance cost estimates. Small businesses in the lime industry have explained that this rule will have a significant economic impact on a substantial number of small entities, and this impact will exceed one percent (1%) of their annual sales revenue, and in some cases will be several times that amount.

The SBA Office of Advocacy (Advocacy) reiterated this point and made it clear in a letter to the EPA that “this proposed rule will impose millions of dollars in costs on an industry that does not appear to pose an appreciable public health risk,” and that the “EPA has erroneously certified the rule will not have a significant economic effect on a substantial number of small businesses.”⁹

When the EPA issued a similar rule in 2004 that addressed only a single pollutant, the agency conducted an IRFA and convened a small business review panel—actions the agency recognized at the time served to make the regulation stronger.¹⁰ Specifically, in 2004 the EPA stated “[t]he efforts to minimize small business impacts have *materially improved* today’s final rule.”¹¹ By contrast, the new proposed rule, which regulates four additional pollutants to extremely low levels (in some cases approaching detection limits), did not rely on an agency prepared IRFA, nor did it conduct a small business review panel.

Indeed, the EPA exemplified this issue by claiming that the then-proposed “Waters of the United States” (WOTUS) rule would not have a significant economic impact on a substantial number of small entities despite SBA Office of Advocacy and other stakeholders making it clear that it would.¹² Recent

⁷ 88 Fed. Reg. at 816.

⁸ 5 U.S.C. § 605(b).

⁹ U.S. Small Business Administration Office of Advocacy, Comment Letter on National Emissions Standards for Hazardous Air Pollutants for Lime Manufacturing Plants (Feb. 16, 2023), <https://cdn.advocacy.sba.gov/wp-content/uploads/2023/02/16112102/Comment-Letter-Lime-NESHAP-508c.pdf>.

¹⁰ National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants, 69 Fed. Reg. 412 (Jan. 5, 2004) (codified at 40 C.F.R. § 63), <https://www.govinfo.gov/content/pkg/FR-2004-01-05/html/03-23057.htm>.

¹¹ *Id.*

¹² U.S. Small Business Administration Office of Advocacy, Comment Letter on EPA and Army’s proposed rule defining “the waters of the United States” under the Clean Water Act (Feb. 7, 2022), https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf?utm_medium=email&utm_source=govdelivery.

data obtained by the SBC shows the Biden administration's WOTUS rule could negatively impact an estimated 4,358,875 small businesses across three industries reliant on permits: Agriculture, Construction, and Manufacturing.¹³ In Iowa alone, 99.3% of employers in the construction industry are small businesses and 88.8% of employers in the manufacturing industry are small businesses.¹⁴

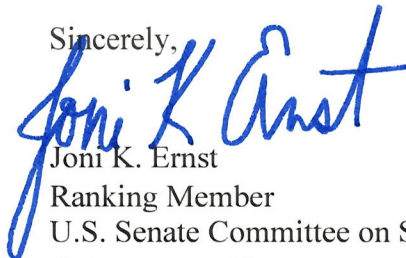
The proposed rule and EPA's pattern of behavior is simply unacceptable. The Biden administration's failure to properly comply with the RFA is harmful to small businesses and in direct contradiction of a congressional mandate. As the EPA has acknowledged, rules are materially improved when IRFA and SBAR panels are properly conducted. Further, as made clear in my recent letter to the EPA's Office of Information and Regulatory Affairs, following the requirements of the RFA in good faith will go a long way towards achieving the administration's stated goal of broadening public engagement in the regulatory process by ensuring small businesses have a genuine voice in the regulatory process.¹⁵

Accordingly, I urge the EPA, working together with the SBA Office of Advocacy, to follow the requirements of the RFA and do the following:

- (1) Withdraw the certification and the proposed rule and repurpose it only after EPA completes its obligations under the Regulatory Flexibility Act;
- (2) Perform an Initial Regulatory Flexibility Analysis that properly analyzes the costs on small businesses in the lime industry; and
- (3) Convene a small business review panel to hear concerns from small businesses and develop regulatory alternatives for consideration that are less burdensome.

Please respond no later than April 14, 2023.

Sincerely,



Joni K. Ernst

Ranking Member

U.S. Senate Committee on Small Business &
Entrepreneurship

Cc: Joseph Goffman, Principal Deputy Administrator, Office of Air and Radiation
Major Clark, Acting Chief Counsel, SBA Office of Advocacy
Charles Maresca, Director of Interagency Affairs
David Rostker, Assistant Chief Counsel for Environment and Regulatory Reform

¹³ U.S. Senate Comm. on Small Bus. and Entrep., *The Economic Impact of WOTUS Rule on Small Businesses* (last visited Mar. 21, 2023), <https://www.sbc.senate.gov/public/index.cfm?p=wotus-rule> (citing U.S. Small Bus. Admin. Office of Advocacy, *2022 Small Business Profiles for the States, Territories, and Nation* (Aug. 31, 2022), <https://advocacy.sba.gov/2022/08/31/2022-small-business-profiles-for-the-states-territories-and-nation/>).

¹⁴ *Id.*

¹⁵ Letter from Sen. Joni K. Ernst, Ranking Member, Senate Committee on Small Bus. and Entrep. to Mr. Richard Revesz, Administrator, Office of Information and Regulatory Affairs (Mar. 21, 2023) (on file with Committee).