

# The Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act: Could a Single Word Doom the New NAAQS?

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*At the heart of EPA's certification of the proposed NAAQS rule was the Agency's interpretation of the word "impact" as used in the RFA. Is the "impact" to be analyzed under the RFA a rule's impact on the small entities that will be subject to the rule's requirements, or the rule's impacts on small entities in general, whether or not they will be subject to the rule?*<sup>1</sup>

It is hard to imagine that the fate of the new National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter might turn on the meaning of a single word. Sifting through the hundreds of pages of Federal Register notices, or the thousands of pages of supporting documentation, it is easy to get lost in the complexity of the numerous scientific and legal issues raised by the ozone and particulate matter NAAQS rules. In one respect, however, the debate over the validity of the new NAAQS rules is remarkably simple. As the Environmental Protection Agency (EPA or the Agency) admits in the preamble to the final ozone NAAQS rule, a question lies at the heart of these rulemakings

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1. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (1997) (to be codified at 40 C.F.R. pt. 50).

of how to interpret the word “impact” as used in the Regulatory Flexibility Act (RFA or Reg Flex).<sup>2</sup>

In order to understand how the meaning of this word could affect the fate of the ozone and particulate matter rules, a little background is necessary on the RFA,<sup>3</sup> the recent amendments made by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>4</sup> and the EPA’s interpretation of the word “impact” as set forth in the preamble to the rules.<sup>5</sup> To the many small businesses and small business trade associations who have petitioned for review of the proposed NAAQS rules, these materials suggest that the agency has misinterpreted the word “impact” and failed to properly implement the RFA. This view is bolstered by the EPA’s own actions in other rulemakings affecting small businesses.<sup>6</sup> If the EPA’s interpretation is wrong, then it has failed to complete a fundamental legal obligation of the rulemaking process, a failure that could doom both rules.

#### I. THE REGULATORY FLEXIBILITY ACT

The RFA was enacted in 1980 out of a concern that “uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands . . . upon small businesses, small organizations and small governmental jurisdictions with limited resources.”<sup>7</sup> In the view of Congress, “the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation.”<sup>8</sup> To address these concerns, the RFA established a series of procedural requirements federal agencies must use to assess the effects of regulations on “small entities.”

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2. Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996). For an early assessment of the RFA, see Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act, Report to the Administrative Conference of the U.S.*, in 1982 DUKE L.J. 213. The statute defines the term “small entity” to mean small municipalities of less than 50,000 people, small nonprofit organizations and “small business concern[s]” as that term is defined by the Small Business Administration. 5 U.S.C. § 601(3-6).

3. See 5 U.S.C. §§ 601-612.

4. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996) (codified as amended in scattered sections of 5 U.S.C.).

5. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,887.

6. See, e.g., *infra* text accompanying notes 80, 81, 87, 89, 90.

7. Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(a)(3), 94 Stat. 1164 (1980), reprinted in 5 U.S.C. § 601 annot. at 551 (1994).

8. Regulatory Flexibility Act § 2(a)(6), 94 Stat. 1165, reprinted in 5 U.S.C. § 601 annot. at 551.

The purpose of these requirements is “to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organization and governmental jurisdictions subject to regulation.”<sup>9</sup>

The structure of the RFA is fairly simple. When a federal agency publishes a notice of proposed rulemaking, the RFA directs the agency to conduct an initial regulatory flexibility analysis (IRFA).<sup>10</sup> The RFA describes the content of an IRFA in two ways. In general, an IRFA “shall describe the impacts of the proposed rule on small entities.”<sup>11</sup> In addition, the RFA sets out a number of specific elements which must be included as part of an IRFA, such as estimates of the number and type of small entities which will be subject to the rule.<sup>12</sup>

When an agency publishes a final rule, it must reassess the impacts of the rule on small entities and publish a final regulatory flexibility analysis (FRFA).<sup>13</sup> The FRFA must contain each of the elements required of the IRFA plus

a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.<sup>14</sup>

The requirement to perform these analyses is not, however, absolute. An agency need not perform either an IRFA or FRFA if “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>15</sup> If an agency decides that a rule meets this test, it must publish a certification to that effect as part of the initial or final rule.<sup>16</sup>

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9. Regulatory Flexibility Act § 2(b), 94 Stat. at 1165, *reprinted in* 5 U.S.C. § 601 annot. at 552.

10. *See* Regulatory Flexibility Act, 5 U.S.C. § 603(a) (Supp. II 1996).

11. *Id.*

12. *See* 5 U.S.C. § 603(b) (1994). The minimum elements of an IRFA are: (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification of relevant duplicative, overlapping or conflicting Federal rules. *Id.*

13. *See id.* § 604(a) (Supp. II 1996).

14. *Id.* § 604(a)(5).

15. *Id.* § 605(b).

16. *See id.*

As originally enacted in 1980, the RFA contained a prohibition on judicial review of agency compliance with its requirements.<sup>17</sup> Perhaps because of this prohibition, the RFA became something of a footnote to administrative law. Yet within the small business community, the lack of judicial review of the RFA became a *cause célèbre*. In June 1995, the White House Conference on Small Business made a series of policy recommendations.<sup>18</sup> One of the most sought after policy changes was to allow judicial review of agency compliance with the RFA.<sup>19</sup>

Within a year of the White House Conference, Congress responded by passing the Small Business and Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>20</sup> The SBREFA partially rewrote the RFA along the lines recommended by the White House Conference. Among other changes, the SBREFA amended the required elements of a FRFA set out in RFA Section 604<sup>21</sup> and required a more detailed explanation of certifications of no impact under RFA Section 605.<sup>22</sup> SBREFA also amended RFA Section 611 to explicitly allow judicial review of federal agency compliance with Sections 604 and 605.<sup>23</sup>

## II. THE NAAQS RULEMAKINGS

Prior to the publication of the proposed NAAQS rulemakings, the EPA appeared to believe that the rules would require regulatory flexibility analyses. In the May 1996 Unified Agenda of Federal Regulatory and Deregulatory Actions, the EPA indicated that it would conduct a regulatory flexibility analysis for both the ozone and particulate matter rules.<sup>24</sup> This position was consistent with the EPA's past practice on RFA certifications, which assessed the impacts of state regulations that would

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17. *Id.* § 611.

18. *See generally* WHITE HOUSE CONFERENCE ON SMALL BUSINESS, FOUNDATION FOR A NEW CENTURY, A REPORT TO CONGRESS AND THE PRESIDENT (1995).

19. *See id.* at 27.

20. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996) (codified as amended in scattered sections of 5 U.S.C.). The SBREFA originated as S. 942, introduced by Senator Christopher Bond (R-MO). After S. 942 passed the Senate unanimously on March 19, 1996, companion legislation was added onto H.R. 3136, the Contract with America Advancement Act, by the Hyde amendment. When H.R. 3136 passed the House of Representatives on March 28, 1996, the SBREFA was Title III of that Act. However, the original Title II of H.R. 3136, dealing with the line item veto, was separately enrolled. As a result, SBREFA became Title II of Public Law 104-121.

21. *Id.* § 241(b) (codified at 5 U.S.C. § 604(a) (Supp. II 1996)).

22. *Id.* § 243 (codified at 5 U.S.C. § 605(b) (Supp. II 1996)).

23. *Id.* § 247 (codified at 5 U.S.C. § 611(a) (Supp. II 1996)).

24. Unified Agenda of Federal Regulatory and Deregulatory Actions, 61 Fed. Reg. 23,679, 23,679-80 (1996).

likely be needed to implement NAAQS rules.<sup>25</sup> As the EPA had stated in the recent NAAQS rule for sulfur oxide:

Additional [State Implementation Plan (SIP)] requirements will be needed only for those areas or sources which are designated as nonattainment for the existing primary standards now or in the future. Given the current air quality and attainment status, however, it is very unlikely that new SIP requirements would be required that would significantly affect a substantial number of small entities.<sup>26</sup>

However, as the publication date for the proposed ozone and particulate matter NAAQS rules approached, Congress and the Small Business Administration's (SBA) Chief Counsel for Advocacy became increasingly concerned that the EPA would not follow through with the earlier decision to conduct a regulatory flexibility analysis. On October 9, 1996, six Senators wrote to EPA Administrator Carol Browner out of concern for the impact of the NAAQS rules on small businesses stating:

We understand that the Agency is currently deliberating over whether SBREFA applies to these regulations. The test of whether a Regulatory Flexibility Analysis must be performed is whether the rule will have a "significant economic impact on a substantial number of small entities." We note that the proper analysis for this test is not limited to small entities that are directly subject to the rule, but all small entities that are impacted by the rule . . . Congress envisioned precisely these types of regulations to be covered by SBREFA.<sup>27</sup>

In addition, the SBA's Chief Counsel for Advocacy, Mr. Jere Glover, wrote to Administrator Browner on November 18, 1996, objecting to any certification of the proposed ozone NAAQS rule. His letter stated:

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25. *See, e.g.*, National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)—Reproposal, 59 Fed. Reg. 58,958, 58,975 (1994). EPA's initial position is also consistent with other rules that, like the NAAQS, apply in the first instance to states, but apply to the private sector through state implementing regulations. *See, e.g.*, Inspection/Maintenance Program Requirements, 57 Fed. Reg. 52,950, 52,986 (1992) (Clean Air Act rulemaking on State inspection and maintenance programs) (codified at 40 C.F.R. pt. 51); Operating Permit Program, 57 Fed. Reg. 32,250, 32,294 (1992) (Clean Air Act rulemaking on State operating permit programs) (codified at 40 C.F.R. pt. 70).

26. National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide): Final Decision, 61 Fed. Reg. 25,566, 25,577 (1996) (to be codified at 40 C.F.R. pt. 50). For other examples of regulatory flexibility analyses of NAAQS rulemakings based on the impacts of state regulations under hypothetical implementation scenarios, see Review of the National Ambient Air Quality Standards for Carbon Monoxide, 50 Fed. Reg. 37,484, 37,499 (1985) and Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634, 24,654 (1987).

27. Letter from Senators Robert Bennett (R-UT), Christopher Bond (R-MO), John H. Chafee (R-RI), Larry E. Craig (R-ID), Dirk Kempthorne (R-ID), Don Nickles (R-OK), Craig Thomas (R-WY), and John W. Warner (R-VA) to Carol Browner, Administrator, EPA (Oct. 9, 1996) (on file with author).

In the draft regulation, EPA avoids preparing a regulatory flexibility analysis by making a certification under the Regulatory Flexibility Act [citation omitted] that the revision of the ozone NAAQS will not have a “significant economic impact on a substantial number of small entities.” Considering the large economic impacts suggested by EPA’s own analysis that will unquestionably fall on tens of thousands, if not hundreds of thousands of small businesses, this would be a startling proposition to the small business community.<sup>28</sup>

Despite these clear indications from Congress and the Chief Counsel for Advocacy that the law required the EPA to conduct a regulatory flexibility analysis, the EPA did not do so when it published the proposed NAAQS rules on December 13, 1996.<sup>29</sup> Instead, Administrator Browner made a certification under Section 605 that both the ozone and particulate matter rules would not have “a significant economic impact on a substantial number of small entities.”<sup>30</sup> In justifying Administrator Browner’s certification, the EPA pointed to the structure of the Clean Air Act (CAA).<sup>31</sup>

The CAA requires the EPA to issue regulations establishing national air quality standards.<sup>32</sup> These standards, or NAAQS, set ambient levels of air pollution that all areas of the country must attempt to meet.<sup>33</sup> This level is to be achieved through the adoption of state implementation plans (SIPs).<sup>34</sup> The CAA requires each state to develop a SIP containing regulations that will result in sufficient reductions in emissions to allow all areas in the state to achieve the NAAQS.<sup>35</sup> If a state fails to have its SIP approved by the EPA, the EPA develops a federal implementation plan containing regulations necessary to achieve the NAAQS.<sup>36</sup>

The NAAQS rules are thus bifurcated rulemakings. The imposition of regulatory controls is divided into a two-step process of first, setting a

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28. Letter from Jere Glover, Chief Counsel for Advocacy, Small Business Administration, to Carol Browner, Administrator, EPA (Nov. 18, 1996) (on file with author).

29. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996); National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,747 (1996) (proposed Dec. 13, 1996).

30. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,747.

31. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,747.

32. See CAA § 109(a), 42 U.S.C. § 7409(a) (1994).

33. See CAA § 110(a), 42 U.S.C. § 7410(a).

34. See *id.*

35. See *id.* § 110(a)(2), § 7410(a)(2).

36. See *id.* § 110(c), § 7410(c).

general standard, followed at a later point by the application of that general standard to particular entities and the approval of each state's SIP. No one can be directly and immediately subject to a NAAQS rule in the sense that no one will ever face fines or penalties for violating a national ambient standard. However, hundreds of thousands of businesses may face new regulation under state SIPs as a direct result of an EPA rule adopting or tightening a NAAQS standard. In the ozone and particulate matter NAAQS rulemakings, the EPA took the position that the term "impact" as used in the RFA only applies to small entities that are subject to a rule.<sup>37</sup> Because of the bifurcated nature of the NAAQS rules, no one is "subject to" the rule. In the EPA's view, there will be zero impact from the NAAQS rules for purposes of the RFA, clearly less than the "significant economic impact on a substantial number of small entities" required for certification.<sup>38</sup>

When the EPA published the final ozone and particulate matter NAAQS rules on July 18, 1997, it did not publish a FRFA or a certification for either the particulate matter rule or the ozone rule.<sup>39</sup> Instead, the EPA pointed to the certifications made at the time of the proposed rulemakings and indicated that despite comments to the contrary, it felt its certifications of the rules were proper.<sup>40</sup>

### III. THE EPA'S INTERPRETATION OF "IMPACT" IN THE RFA

In the preambles to the proposed and final NAAQS rules, the EPA explained its interpretation of the word "impact" as used in Section 605 of the RFA.<sup>41</sup> The EPA first looked at the purposes of the RFA and the statutory requirements for regulatory flexibility analyses.<sup>42</sup> The EPA

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37. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,702-03 (1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,888 (1997) (to be codified at 40 C.F.R. pt. 50).

38. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-03; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

39. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-03; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

40. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,706; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,892. The EPA's position in the NAAQS rules suggests that a certification at the proposal stage may be final agency action regarding the application of the RFA to a particular rule.

41. See National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996); see also National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,747 (1996) (proposed Dec. 13, 1996); 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

42. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

noted that Congress was concerned with one-size-fits-all regulations and that small businesses are at a competitive disadvantage in complying with uniform rules.<sup>43</sup> The EPA interpreted Congress's direction to agencies to "fit regulatory and informational requirements to the scale of [small entities] subject to regulation,"<sup>44</sup> not to refer to all small entities that are affected by a regulation, but only to those small entities that are directly and immediately subject to the regulation.<sup>45</sup>

In examining the text of the RFA, the EPA cited several sections limiting a portion of the RFA assessment to only those entities that will be "subject to" a particular rulemaking.<sup>46</sup> For example, listed among the required elements of regulatory flexibility analyses in subsections 603(b) and 604(a) is a description of "the number of small entities to which the proposed rule will apply" and "an estimate of the classes of small entities which will be subject to the requirement."<sup>47</sup> From this assessment, the EPA concluded that Section 605 should likewise be read to limit the assessment of impacts to impacts on entities subject to the rule.<sup>48</sup>

Next, the EPA examined the limited case law involving the RFA. The EPA cited *Mid-Tex Electric Cooperative, Inc. v. FERC*<sup>49</sup> and *United Distribution Cos. v. FERC*<sup>50</sup> for the proposition that the test for certification under Section 605 should be limited to assessing impacts on small entities that are subject to the requirements of the rule.<sup>51</sup> The EPA

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43. See National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; see also National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,746-47; 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-07; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888-92.

44. Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(b), 94 Stat. 1165 (1980), reprinted in 5 U.S.C. § 601 annot. at 552 (1994).

45. See National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,669; see also National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,746-47; 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-07; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888-92.

46. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

47. Regulatory Flexibility Act, 5 U.S.C. §§ 603(b)(3), (4) (1994); 604(a)(3), (4) (Supp. II 1996).

48. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

49. 773 F.2d 327 (D.C. Cir. 1985).

50. 88 F.3d 1105 (D.C. Cir. 1996).

51. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888; see also *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (holding that FERC correctly determined that it does not need to prepare a regulatory flexibility analysis under the Reg Flex Act where it has proposed a rule that the Agency has determined will not have a significant impact on a substantial number of small entities); *United Distribution Cos. v. FERC*,

appeared to believe that Congress would support its narrow reading of the term “impact,” claiming that “Congress let this interpretation stand when it recently amended the RFA in enacting SBREFA.”<sup>52</sup>

Finally, the EPA noted the bifurcated nature of NAAQS rulemakings, but rejected the possibility of conducting regulatory flexibility analyses at the second phase during which the EPA decides whether to approve each state’s SIP. “EPA’s approval of SIPs for the new or revised NAAQS also will not establish new requirements, but will simply approve requirements that a State is already imposing.”<sup>53</sup> Apparently, the EPA’s position is that any impacts of a NAAQS rule on small entities will occur after the promulgation of the rule, but before the approval of state SIPs. Thus, small entities would never have an opportunity to benefit from a regulatory flexibility analysis of the regulatory burdens they will face as a result of the NAAQS rules.

#### IV. CONGRESSIONAL REACTION

The response from the congressional authors of SBREFA came soon after the EPA published its certification of the rules. On January 7, 1997, both the Chairman and the ranking Democrat of the Senate Small Business Committee wrote Administrator Browner expressing their strong disapproval of the EPA’s reading of the statutory test for RFA certifications.<sup>54</sup> These two Senators had been the principal authors of the Senate version of SBREFA, S. 942, and were chiefly responsible for its unanimous passage in the Senate.

It seems overly legalistic to attempt to separate the direct and indirect compliance consequences of new standards, and these arguments simply are not persuasive in the context of what Congress has required of federal agencies under Reg Flex and SBREFA. EPA surely is aware of the

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88 F.3d 1105, 1170 (D.C. Cir. 1996) (concluding that under the RFA, FERC has no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate).

52. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

53. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,705; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,890; *see also* Approval and Promulgation of Air Quality Implementation Plans; Approval of the Carbon Monoxide Implementation Plan Submitted by the State of Connecticut Pursuant to Sections 186-187 and 211(m) (“A SIP approval does not create any new requirements, but simply approve [sic] requirements that the State is already imposing. Therefore, because the federal SIP-approval process does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected.”).

54. Letter from Senators Christopher S. Bond (R-MO) and Dale Bumpers (D-AR) to Carol Browner, Administrator, EPA (Jan. 7, 1997), *reprinted in* *Nomination of Aida Alvarez to be Administrator of the United States Small Business Administration: Hearing Before the Committee on Small Business, United States Senate*, 105th Cong. 24 (1997).

consequences of these new standards, and the range of possible implementation scenarios to attain the new standards has no doubt been considered at length by EPA and its staff. The fact that some discretion is given to the states, and that economic impact may not be ascertainable with precision or certainty, is appropriate for discussion in the analyses prepared under Reg Flex. EPA's knowledge and experience should provide a basis for reasonable estimates of the likely range of economic impact on small entities. The existence of several possible outcomes clearly does not mean the standards will have no significant economic impact at all, and cannot excuse EPA from its statutory obligations under Reg Flex and SBREFA.

EPA's own Regulatory Impact Analyses (RIAs) accompanying the NAAQS rulemakings provide estimates of the impact on small entities, including small businesses, cities and towns. The particulate matter RIA states that, "At least one or more small establishments in up to 30 or 40 percent of affected industries . . . may experience potentially significant impacts." For ozone, the RIA states that, "At least one or more small establishments in up to 18 percent of affected U.S. industries . . . may experience potentially significant impacts." These statements seem to be at odds with a certification of no impact under section 605. In the context of claiming the benefits expected to accrue from the new standards as justification for their issuance, EPA assumes implementation and compliance will be achieved. EPA cannot simultaneously disclaim these implementation and compliance consequences of the new standards when it comes time to satisfy its statutory obligations under the plain language of Reg Flex to "describe the impact of the proposed rule on small entities."<sup>55</sup>

## V. A BETTER READING OF THE RFA AND SBREFA

How could the EPA have so badly misjudged the intent of the SBREFA's congressional authors on the proper application of the RFA? Is there a better reading of SBREFA and the RFA, one that would be closer to the text and purposes of the statutes? The answer to these questions begins with a closer reading of the text of the RFA, and a reexamination of the case law on which the EPA has relied. Ultimately, the answer brings us back to the EPA. Other EPA program offices have adopted an alternative reading of the RFA that is more in keeping with the spirit of the statute and the views of the SBREFA's congressional authors.

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55. *Id.* At the hearing, Senator Bond summed up the EPA's application of the RFA in the NAAQS rules to bear hunting:

In other words, if you go bear hunting and you aim a gun and you pull a trigger of a gun aimed at a bear and the bullet kills the bear, it is the bullet that kills the bear and the EPA is saying the person who pointed the gun and pulled the trigger has absolutely no responsibility for what the bullet did.

*Id.* at 23.

A better reading of the RFA would start with a closer look at the text of the statute. The test for making a certification under Section 605 is whether or not the rule will have a “significant economic impact on a substantial number of small entities.”<sup>56</sup> At its core, the EPA’s view is that we should read the statute as if Congress had written the phrase “that are subject to the requirements of the rule” at the end of the sentence, thus limiting the analysis required by Section 605.<sup>57</sup> The fundamental question is whether the EPA is justified in reading this restrictive language into the statute.

An examination of the RFA as a whole reveals that the scope of some requirements of the RFA is explicitly limited to small entities that are subject to the rule.<sup>58</sup> Other adjacent sections do not contain this limitation. As the EPA notes, certain elements of IRFAs and FRFAs are limited by Sections 603(b) and 604(a) to small entities that are subject to the rule.<sup>59</sup> For example, agencies issuing a rule are required to describe “the classes of small entities which will be subject to the requirement”<sup>60</sup> and “the number of small entities to which the proposed rule will apply.”<sup>61</sup> However, the EPA neglects to mention that Section 603(a) mandates that an agency’s “analysis shall describe the impact of the proposed rule on small entities.”<sup>62</sup> Section 603(a) appears to create an overarching obligation that an IRFA assess impacts on entities beyond those “subject to” the rule.<sup>63</sup> To be consistent, the EPA’s logic would require us to rewrite the RFA by inserting language of limitation into this section as well as Section 605.

Why go to all this trouble when a less tortured reading is available? The EPA could accept the interpretation that Congress intended Sections 603(a) and 605 to require a broad consideration of impacts, as suggested by the lack of limiting language, while Sections 603(b) and 604(a) are intended to list specific elements of the analyses focused on small entities that are subject to the rule. This reading would also have the virtue of comporting with the principle of statutory construction that, “where Congress includes particular language in one section of a statute but omits

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56. Regulatory Flexibility Act, 5 U.S.C. § 605(b) (Supp. II 1996).

57. See National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,746-47 (1996) (proposed Dec. 13, 1996) (quoting *Mid-Tex Elec. Coop, Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985)); National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996) (quoting *Mid-Tex Elec. Coop*, 773 F.2d at 342).

58. See 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996).

59. See, e.g., 5 U.S.C. §§ 603(b), 604(a) (1994).

60. *Id.* § 603(b)(4) (1994).

61. *Id.* § 603(b)(3), (4) (1994).

62. *Id.* § 603(a) (Supp. II 1996).

63. *Id.*

it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”<sup>64</sup> Far from confirming the EPA’s interpretation of the word “impact,” the structure of the RFA suggests that the analysis required for a certification must encompass impacts on entities beyond those that are directly and immediately subject to the rule.

#### VI. *MID-TEX* AND *UNITED DISTRIBUTION*

The EPA’s reliance on case law is also misplaced. While the *Mid-Tex* and *United Distribution* decisions might appear to support the EPA’s position, a closer reading of the two cases shows that both are consistent with the view that a certification of the NAAQS rules is improper.<sup>65</sup> The key to this conclusion is an understanding of the wide variety of impacts a regulation can trigger, and the precise kind of impacts the petitioners in *Mid-Tex* and *United Distribution* sought to bring within the RFA.

In *Mid-Tex*, the petitioners were wholesale customers of electrical utilities regulated by the Federal Energy Regulatory Commission (FERC).<sup>66</sup> The alleged impacts on these parties consisted of potential increases in the prices they paid for wholesale electricity.<sup>67</sup> Their central claim was that the FERC had sanctioned a new accounting method that would allow regulated electrical utilities to increase their rate bases.<sup>68</sup> This increase, in turn, would result in higher wholesale prices and a “price squeeze” that would impair wholesale customers’ abilities to compete with the utility for retail customers.<sup>69</sup>

In *United Distribution*, a number of public utility commissions (PUCs) claimed that FERC’s Order 636, which mandated the unbundling of natural gas pipeline sales and transportation services and required a change in pipeline rate structures, would have impacts on natural gas local distribution companies (LDCs).<sup>70</sup> The PUCs alleged that because of the FERC’s mandated pipeline rate structure, LDCs would face increased prices when they sought to obtain natural gas from the regulated gas companies.<sup>71</sup>

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64. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

65. *See Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 330 (D.C. Cir. 1985); *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

66. *See Mid-Tex Elec. Coop.*, 773 F.2d at 330.

67. *See id.* at 335.

68. *See id.* at 335-36.

69. *See id.*

70. *See United Distribution Cos.*, 88 F.3d at 1168-70.

71. *See id.* at 1129 n.26.

In both cases, the impacts that these petitioners sought to bring within the RFA did not flow from any new regulatory costs that might be imposed on small entities. The impacts arose from the potential for the regulated utilities' costs to be passed through to their customers in the form of higher prices for electricity or gas. In *Mid-Tex*, the court concluded that the possibility that small entities would face increased electricity costs was an "indirect impact" that need not be considered in an RFA certification. "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."<sup>72</sup>

Like the FERC orders at issue in *Mid-Tex* and *United Distribution*, the NAAQS rulemakings are likely to have a potentially infinite number of effects on small entities as the costs associated with meeting the new standards ripple through the economy. However, in contrast to *Mid-Tex* and *United Distribution*, the NAAQS rules also trigger the imposition of regulatory costs directly on small entities. These impacts are described in some detail in the Regulatory Impact Analyses (RIA) of the NAAQS rules.<sup>73</sup>

A brief description of the RIA demonstrates how the regulatory impacts of the NAAQS rules differ from the economic impacts at issue in *Mid-Tex* and *United Distribution*. Like any assessment of regulations prior to their implementation, the RIA requires the EPA to make an educated guess about the future.<sup>74</sup> In order to conduct the quantitative cost analyses in the RIA, the EPA uses a "hypothetical implementation scenario."<sup>75</sup> For each local nonattainment area, the EPA identifies a set of industry-specific pollution control requirements that would allow the area to reach attainment in the least-cost manner.<sup>76</sup> The hypothetical scenario includes many new regulations applicable to small entities.<sup>77</sup>

While states are not under an obligation to adopt the set of control measures assumed in the RIA, the hypothetical scenario is sufficiently robust for the EPA to make reasonable predictions about the foreseeable

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72. *Mid-Tex Elec. Coop*, 773 F.2d at 343; see also *Motor & Equip. Mfg. Ass'n v. Nichols*, Nos. 96-1392 and 96-1397, 1998 WL 193662, at \*19 (D.C. Cir. Apr. 24, 1998).

73. THE OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA, REGULATORY IMPACT ANALYSES FOR THE PARTICULATE MATTER AND OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS AND PROPOSED REGIONAL HAZE RULE § 11.9 (1997) [hereinafter REGULATORY IMPACT ANALYSES].

74. See *id.* § 11.8.1.

75. See *id.* § 11.8.3.

76. See *id.* app. B.1 at 33.

77. See *id.* § 11.9. For a description of how specific control measures were selected for the ozone and particulate matter hypothetical implementation scenarios, see E.H. PECHAN AND ASSOCIATES, CONTROL MEASURE ANALYSIS FOR OZONE AND PM ALTERNATIVES: METHODOLOGY AND RESULTS 53 (1997) (EPA Contract No. 68-D3-0035).

costs of the rule. Given the technique used to develop the hypothetical scenario, it appears that any state that deviates from the scenario will needlessly increase the overall costs of achieving the new NAAQS. As the RIA suggests, the hypothetical implementation scenario “may be very useful as States design the actual implementation strategies to meet the NAAQS.”<sup>78</sup> Thus, the EPA’s documentation for the NAAQS rules identifies specific regulatory costs that are likely to be imposed on small entities as a direct and foreseeable consequence of the promulgation of the NAAQS rules.

*Mid-Tex* and *United Distribution* may stand for the proposition that the impact on small entities of possibly having to pay increased prices for various goods and services may be so indirect as to properly be excluded from consideration under the RFA. However, the EPA’s certifications in the NAAQS rules would require a significant expansion of the holdings in those cases to exclude the impacts on small entities of complying with new regulations that are likely to be imposed on them as a direct and foreseeable consequence of a rulemaking. Acceptance of this expansion would mean that all bifurcated rulemakings would be exempt from the RFA, a proposition for which there is no suggestion in the statute or legislative history.

## VII. RFA PRACTICE IN OTHER EPA PROGRAM OFFICES

The EPA’s invitation to expand the holdings of *Mid-Tex* and *United Distribution* should also be rejected because it conflicts with the Agency’s own practice of conducting regulatory flexibility analyses in other program offices.<sup>79</sup> As an illustration, consider the analyses prepared by the EPA’s Office of Water when it issues regulations establishing effluent limitations guidelines and pre-treatment standards.<sup>80</sup>

Pre-treatment standards apply to indirect dischargers who release their effluent into public sewer systems where the effluent is subject to further treatment before being discharged.<sup>81</sup> These indirect dischargers are “subject to” the rule in that they can be fined for failing to comply

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78. REGULATORY IMPACT ANALYSES, *supra* note 73, § 11.8.3.

79. *See* *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

80. *See* LYNNE G. TUDOR, EPA, EPA 821-R-93-012, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY (1993); LYNNE G. TUDOR, EPA, EPA 821-R-95-022, ECONOMIC IMPACT ANALYSIS OF PROPOSED EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE METAL PRODUCTS AND MACHINERY INDUSTRY (PHASE I) (1995); LYNNE G. TUDOR, EPA, EPA 821-R-96-017, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY (1996).

81. *See* Clean Water Act, 33 U.S.C. § 1317(b) (1994).

with the standards.<sup>82</sup> On the other hand, effluent limitations guidelines do not directly apply to anyone, but guide permit writers in establishing site-specific limits for direct discharges.<sup>83</sup> Direct dischargers are not “subject to” the rule, in that they can not be fined for violating an effluent limitations guideline.<sup>84</sup> They only become subject to regulation when a state implements the guidelines in site-specific permits.<sup>85</sup>

For example, in the final rule for effluent limitations and standards for the pesticide manufacturing industry, the EPA specifically looked at the impacts of the rule on direct dischargers in determining whether to make an RFA certification.<sup>86</sup> “Under the final effluent limitations, no facility closures are projected for direct dischargers. One direct discharging facility and one zero discharge facility are expected to close product lines. . . . Because two firms do not constitute a ‘substantial number of small entities,’ no regulatory flexibility analysis is required.”<sup>87</sup> However, by the EPA’s logic in the NAAQS rules, these impacts should not even be considered in making an RFA certification because direct dischargers are not immediately “subject to the rule.”<sup>88</sup>

In another example, occurring at almost the same time that the EPA decided to certify the proposed NAAQS rules, the EPA decided to certify the final rule for effluent limitations for the pesticide formulating industry.<sup>89</sup> In making its RFA certification, the EPA assessed the impacts

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82. See *id.* §§ 1317(d) (making operation in violation of standards unlawful), 1319(c), (d), (f), (g) (imposing penalties for violations of § 1317).

83. See *id.* § 1314(b) (directing Administrator to promulgate effluent limitations).

84. See *id.* § 1319(c), (d), (g) (penalty provisions do not include noncompliance with § 1314 as a violation subject to penalties).

85. See *id.* §§ 1342(b) (governing state implementation of National Pollutant Discharge Elimination System permit program), 1319(c), (d), (g) (imposing penalties for violating conditions or limitations of permits issued pursuant to § 1342).

86. See LYNNE G. TUDOR, EPA, EPA 821-R-93-012, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY § 8.2.A (1993); see also Pesticide Chemicals Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 58 Fed. Reg. 50,638, 50,676 (1993); Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Metal Products and Machinery, 60 Fed. Reg. 28,210, 28,250 (1995); LYNNE G. TUDOR, EPA, EPA 821-R-95-022, ECONOMIC IMPACT ANALYSIS OF PROPOSED EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE METAL PRODUCTS AND MACHINERY INDUSTRY (PHASE 1) 10.12 (1995) (separately assessing impacts on direct dischargers as part of the initial regulatory flexibility analysis).

87. LYNNE G. TUDOR, EPA, EPA-R-93-012, ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY 8.2.A (1993).

88. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (1997) (to be codified at 40 C.F.R. pt. 50).

89. See Pesticide Chemicals Category, Formulating, Packaging and Repackaging Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 61 Fed. Reg. 57,518, 57,538-39 (1996); see also LYNNE G. TUDOR, EPA, EPA 821-R-96-017, ECONOMIC

of the rule on two classes of small entities that are clearly not subject to the rule: small publicly owned treatment works that are responsible for implementing the rule, and small communities that may contain facilities adversely affected by the regulation.<sup>90</sup> Here, the EPA adopted an even broader interpretation of “impact,” one that appears to include the reasonably foreseeable impacts of a rule on small entities, regardless of whether they will ever be subject to regulation.

The impacts of rules establishing effluent limitations guidelines on small entities regulated by state-issued direct discharge permits are analogous to the impacts of the NAAQS rules on the small entities that will be regulated under state implementation plans. In both cases, the impacts do not arise from the rule itself, but from regulatory burdens imposed as a direct and foreseeable consequence of the rule. However, the EPA’s Office of Water includes impacts on direct dischargers within its RFA assessments while the Office of Air and Radiation attempts to exclude the impacts of the NAAQS rules on small entities.

The broad interpretation of the word “impact” used by the EPA in rules promulgated under the Clean Water Act does not appear to pose any great difficulty for the Agency’s Office of Water. One wonders why the Agency’s Office of Air and Radiation would go to such great lengths to attempt to justify a contrary and more restrictive interpretation for the NAAQS rules.

#### VIII. CONCLUSION

Any new regulation can have a potentially infinite number of impacts on entities, both large and small, as the costs of implementing the regulation ripple throughout the economy. In deciding whether, under the RFA, to certify that a rule will not significantly impact small entities, an agency must cut off its assessment of impacts at some point. It may apply a rule of reason to distinguish between reasonably anticipated impacts and highly speculative ones. It may distinguish between the regulatory impact of complying with new legal requirements and the economic impact of paying more for goods and services. However, it may not ignore new regulatory burdens that will be imposed on small entities as a direct and foreseeable result of a rule simply because of an intervening

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ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY § 4.2 (1996).

90. See Pesticide Chemicals Category, Formulating, Packaging and Repackaging Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 61 Fed. Reg. 57,518, 57,538-39 (1996); see also LYNNE G. TUDOR, EPA, EPA 821-R-96-017, ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY § 4.2.2 (1996).

step such as a state's issuance of a permit or implementing regulations. The EPA's certification of the NAAQS is at odds with the statute, the case law, and the EPA's own practice in other rulemakings.