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From: Mike Murray
To: jason.waanders@sol.doi.gov; Doug Wetmore; russ_wilson@nps.gov; AJ North; mike.stevens@sol.doi.gov
Subject: Fw: indirect effects info from the SBA guide
Date: 06/09/2011 07:44 AM

FYI

I touched bases with Sandy Hamilton regarding the IRFA. She emailed me the following information and reminded me of the reasons that we originally decided not to do an RFA analysis (which I can summarize briefly during our call).

Mike Murray
Superintendent
Cape Hatteras NS/ Wright Brothers NMem/ Ft. Raleigh NHS
(w) 252-473-2111, ext. 148
(c) 252-216-5520
fax 252-473-2595

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----- Forwarded by Mike Murray/CAHA/NPS on 06/09/2011 09:41 AM -----

Sandra Hamilton
<shamilton52@hotmail.com>

To <mike_murray@nps.gov>
cc

06/08/2011 03:51 PM

Subject indirect effects info from the SBA guide

Hi Mike

Here's the section that we looked at earlier in discussing this with the SOL. The SBA guide is online at <http://archive.sba.gov/advo/laws/rfaguide.pdf>

starting on p. 69:

Direct versus indirect impact on small entities

Must the agency consider the indirect effects of the proposed regulation? It was first held in *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission* (FERC) that a regulatory flexibility analysis is required when an agency determines that the rule will have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.¹⁷⁴ In that case, FERC proposed a rule that allowed electric utilities to include in their rate bases amounts equal to 50 percent of their investments in construction work in progress. In response to an argument that FERC "should have considered the impact of the proposed rule on wholesale and retail customers of the jurisdictional entities subject to rate regulation by the Commission," FERC stated that "the RFA does not require

the Commission to consider the effect of this rule, a federal rate standard, on nonjurisdictional entities whose rates are not subject to the rule.”¹⁷⁵

The court agreed, reasoning that “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.”¹⁷⁶ The court concluded that “an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.”¹⁷⁷

¹⁷¹ See generally, *National Truck Equip. Ass’n v. NHTSA*, 919 F.2d 1148 (6th Cir. 1990); *Northwest*

Mining Ass’n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998).

¹⁷² *Northwest Mining Ass’n*, 5 F. Supp. 2d 9.

¹⁷³ *Id.* at 13.

¹⁷⁴ *Mid-Tex Elec. Coop v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

¹⁷⁵ *Id.* at 341.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 343.

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In viewing this decision, the same court later held in *United Distribution Companies v. FERC*¹⁷⁸ that an agency is under no obligation to conduct a small entity impact analysis of effects on entities it does not regulate. Because in this case FERC had no jurisdiction to regulate the local distribution of natural gas, it could not be required to conduct a regulatory flexibility analysis for those entities engaged in the local distribution of the

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gas.

Although *Mid-Tex* occurred prior to the passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, post-SBREFA courts have upheld its reasoning. For example, in *Motor and Equipment Manufacturers Ass’n v. Nichols*,¹⁸⁰ the court found that because the deemed-to-comply rule did not subject any aftermarket businesses to regulation, EPA was not required to conduct a regulatory flexibility analysis as to small aftermarket businesses. It was only obliged to consider the impact of the rule on small automobile manufacturers subject to the rule, and it met that obligation. A number of other cases have held similarly.¹⁸¹

Likewise in *American Trucking Associations v. EPA*,¹⁸² EPA established a primary national ambient air quality standard (NAAQS) for ozone and particulate matter. At the time of the rulemaking, EPA certified the rule pursuant to 5 USC § 605(b). The basis of the certification was that EPA had concluded that small entities were not subject to the rule because the NAAQS only regulated small entities indirectly through the state implementation plans.¹⁸³ Although the court remanded the rule to the agency for non-RFA reasons, the court found that EPA had complied with the requirements of the RFA.

Similarly, in *Michigan v. EPA*,¹⁸⁴ EPA certified that its revised NAAQS would not have a significant economic impact within the meaning of the RFA. According to the EPA, the NAAQS itself imposed no regulations upon small entities. Instead, several states regulate small entities through the state implementation plans they are required by the Clean Air Act to develop. Because the NAAQS regulated small entities only indirectly—that is, insofar as it affected the planning decisions of the states—the EPA concluded that small entities were not “subject to the proposed regulation.” The court agreed, stating that states have broad discretion in determining the manner in which they will achieve compliance with the NAAQS. In conclusion, the court stated that “a State may, if it chooses, avoid imposing upon

small entities any of the burdens of complying with a revised NAAQS.”¹⁸⁵

178 *United Dist. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

179 *Id.*

180 *Motor and Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449,467 (D.C. Cir. 1998).

181 See *American Trucking Ass’ns. v. EPA*, 175 F.3d at 1044; *Michigan v. EPA*, 213 F.3d 663, 689 (D.C.

Cir. 2000); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 868 (D.C. Cir. 2001).

182 *American Trucking*, 175 F.3d at 1027.

183 *Id.*

184 *Michigan v. EPA*, 213 F.3d at 689. 185 *Id.*

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The court in *Cement Kiln Recycling Coalition v. EPA*¹⁸⁶ further bolstered the notion that indirect impacts should be disregarded by noting that the RFA is not intended to apply to every entity that may be targeted by the proposed regulation. The fact that the rule will have economic impacts in many sectors of the economy does not change this. The court reasoned that “requiring an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.”¹⁸⁷

An entity can otherwise experience indirect impacts through its dealings with the entity that experiences direct impacts, such as through increased after-market prices or newly required modifications to necessary equipment. Some courts have stated that this impact would likewise not require a regulatory flexibility analysis.¹⁸⁸

Sandy