

August 21, 1998

Ms. Carol Browner  
Administrator  
United States Environmental Protection Agency  
401 M Street S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel convened for EPA's rulemaking entitled "Rulemaking Responding to Petitions Under Section 126 of the Clean Air Act." The problem being addressed in this rulemaking is the windborne transport of ozone smog and one of its precursor chemicals -- nitrogen oxides, or "NOx" -- to downwind States from NOx-producing sources in one or more upwind States. This rulemaking is related to both the OTAG SIP Call rulemaking and its companion rule, the NOx Federal Implementation Plan (NOx FIP), both of which are aimed at addressing largely the same problem, either by State action or by Federal action if necessary. The rule addressed by this Panel report is the result of a provision of the Clean Air Act that allows downwind States to petition EPA for relief from pollution being transported from upwind States. Eight northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont) have submitted such petitions.

On June 23, 1998, EPA's Small Business Advocacy Chairperson (Thomas E. Kelly) convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In addition to its chairperson, the Panel consists of the Director of the Office of Air Quality Planning and Standards within the Office of Air and Radiation, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel for Advocacy of the Small Business Administration.

It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comment on the proposed rule. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the Clean Air Act.

Stakeholder Meetings and Small Entity Outreach

The rule being considered could potentially affect as many as 5000 business entities with sources of NO<sub>x</sub> in the eastern half of the United States. Such sources are found in many major industrial categories including electric power plants, factories, and industrial boilers. Of these 5,000 potential business entities, over 1200 are small entities. Based primarily on considerations of cost effectiveness and administrative efficiency, and with input from this Panel, EPA has been working to target the regulation to those sources with the most favorable cost-effectiveness in achieving reductions. This strategy assures that the required reductions will be achieved at the lowest possible overall cost, and also reduces the number of small entities regulated. With the Panel's strong concurrence, EPA now plans to propose a rule that will regulate only the following three source categories: electric generating units, industrial boilers, and gas turbines. Of these, fewer than 150 are owned by small entities. The panel is also recommending additional options to further reduce the number of small entities regulated.

In developing this proposal, EPA has sought and obtained input from small businesses, small governmental jurisdictions, and small organizations from all the potentially affected source categories. EPA and SBA agreed on a set of representatives of these three categories of small entities. Initial outreach was conducted by means of a meeting with the small-entity representatives in Washington, D.C. on April 14, 1998. The purpose of this meeting was to familiarize the small-entity representatives with the substance of the rulemaking and the kinds of sources being considered for regulation, and to solicit comment on these topics. A summary of that meeting is attached to the panel report. Subsequent to the meeting, the representatives submitted followup comments in writing. The primary outreach by the panel was accomplished by a meeting with the small-entity representatives in Washington, D.C. on August 4, 1998. The purpose of this meeting was to present the results of EPA's analysis on small-entity impacts, and to solicit comment on this analysis and on suggestions for impact mitigation. Subsequent to the meeting, the representatives submitted followup comments in writing.

The comments from the small-entity advisors during the August 4 meeting were primarily focused on potential impacts on small entities in the aforementioned three source categories currently being considered for regulation. Representatives of industrial boilers pointed out that most of those owned by small entities were old and would experience very high control costs. These representatives were concerned about the cost of continuous emission monitors (CEMs), which the rule would require for most of the regulated sources. The representatives of small electric generating units were also concerned with high costs, especially for those units ("peaking units") that run for only brief periods to supply power at times of peak demand.

### Panel Findings and Discussion

Under the RFA, the Panel is to consider four regulatory flexibility issues related to the potential impact of the rule on small entities: (1) the type and number of small entities to which the proposed rule will apply; (2) reporting, record keeping, and other compliance requirements of the proposed rule applicable to small entities; (3) the rule's interaction with other Federal rules; and (4) regulatory

alternatives that would minimize the impact on small entities consistent with the stated objectives of the statute authorizing the rule. The panel's most significant findings and discussion with respect to each of these issues are summarized below.

### Major Topics of Panel Discussion

The primary topic of panel discussion was the applicability of the rule to the various categories of NO<sub>x</sub>-emitting sources, the costs the rule would impose, and the possibility of further reducing rule applicability. Secondary topics included emissions monitoring and other potentially duplicative Federal rules.

### Types and Number of Potentially Affected Small Entities

As mentioned previously, EPA currently estimates that about 150 small entities would be affected by the rule. This would constitute a reduction of over 85% in the number of small entities potentially affected by the rule. The panel received written comments from three small-entity representatives strongly endorsing these exemptions, and the panel recommends that they be adopted in the rule proposal.

### Reporting, Record Keeping, and Other Compliance Requirements

In this area, panel discussion was centered on the requirement for CEMs for sources other than electric generators. The panel received both written and oral comments to the effect that CEMs would be prohibitively costly for many industrial boilers, representing a significant part of the cost of the rule. EPA believes that it is necessary for all sources in the trading program to be subject to accurate and consistent monitoring requirements designed to demonstrate compliance with a mass emission limitation, and therefore intends to require all large units to monitor NO<sub>x</sub> mass emissions using CEMS (including units opting-in to the trading program). However, EPA does believe that it is appropriate to provide lower cost monitoring options for units with low NO<sub>x</sub> mass emissions, and therefore intends to allow non-CEMs alternatives for units that have emissions of less than 50 tons per year of NO<sub>x</sub>. This cutoff will provide relief for boilers large enough to be covered by the rule, but that run for a smaller number of hours each year, including any such boilers owned by small entities.

EPA is currently considering whether to require CEMs for both trading and non-trading sources in this rule. OMB and SBA share the commenters' concern for the potentially high cost of CEM requirements. For this reason, both OMB and SBA recommend that EPA exercise great caution in requiring CEMs on those sources not participating in the trading program. OMB and SBA recommend that EPA solicit comment on alternative monitoring options for non-trading sources, such as parametric monitoring or monitoring as currently required by the New Source Performance Standards (NSPS) program (40 CFR Part 60).

## Interaction with Other Federal Rules

Discussion in this area centered on the role of State regulation via SIPs versus the role of the Federal government under this rule, as well as under the related FIP mentioned earlier in this report. Several commenters expressed worry that regardless of the decisions made about this Federal rule, many States would nonetheless target small businesses when they prepare their SIPs. Both commenters recommended that EPA write guidance to address this problem. As discussed below, the panel is recommending that EPA produce such guidance.

## Regulatory Alternatives

The Panel agreed with the general approach EPA is now considering to define the scope of the rule, and recommends that the applicability of EPA's proposed rule be limited to the aforementioned three categories: electric generating units, industrial boilers, and gas turbines.

The Panel notes that the rule is still projected to impact over 40 small entities at a level greater than or equal to 1% of revenues, and over 20 entities at 3% or greater. Moreover, commenters have questioned the assumptions behind EPA's estimates, as outlined in Section 8 above. Further refinement of these assumptions and analyses could raise or lower the impact estimates. Given this uncertainty, the panel considered it appropriate to explore options for further reducing the impact of the rule.

Several commenters have suggested that EPA exempt all small entities from this rulemaking. Although EPA does not feel that a blanket, across-the-board exemption could be supported, in the spirit of SBREFA EPA has indicated it is receptive to proposals for further exemptions, up to and including exempting all small entities if that could be shown to be appropriate. Therefore, the panel recommends that EPA solicit comment on additional types of small-entity exemptions and the rational bases on which such exemptions could be made, such as disproportionate ability to bear costs and administrative burden.

The panel recommends that EPA encourage non-trading sources to opt-in to the emissions trading program. Allowing these sources to opt-in to the trading program provides an incentive to develop alternative cost-effective control options that will allow sources to improve overall emissions reduction cost savings.

In furtherance of SBREFA's goal of reducing small-entity impacts, in addition to the aforementioned general recommendations, the panel has proposed a number of specific ideas for exempting or reducing burden on particular categories of small entities. The first area considered by the panel was electric generating units (EGUs). From comments made by small utilities, the panel suspects that many of these high-cost-to-revenue situations may involve peaking units, which run only a small percentage of the time and thus may be inefficient to control. To address this problem, the panel recommends that EPA solicit comment on whether to allow electric generating units to obtain a

federally enforceable NOx emission tonnage limit (e.g., 25 tons during the ozone season) and thereby obtain an exemption from Rule applicability. EPA should also solicit comment on the necessity for and appropriateness of such an option.

Individual panel members conceived of other potential ways to mitigate impact on small entities, such as raising the size cutoff for small entities and/or lessening the required percentage reduction in NOx emissions required from small entities. (SBA recommends requiring only a 40% reduction instead of 60%, and notes that the impacts of 40% reductions submitted to the Panel by the program office included large firms as well. SBA encourages the agency to conduct analyses to determine the impact of 40% reduction being applied solely to small firms and 60% solely to large firms, and this effect on NOx budgets proposed in the OTAG SIP Call.) The panel members are split on this issue: some oppose considering such options, but others recommend that (1) EPA solicit comment on whether requirements should be reduced on small-entity-owned industrial boilers by some combination of raising the size cutoff and/or lessening the required reduction; (2) that EPA solicit comment on which, if any, of these options is preferable, the necessity and appropriateness of any such option, and the appropriate level (e.g., 40% reduction instead of 60%); and (3) that EPA solicit information to support any comments submitted.

Finally, the panel notes that several commenters have expressed concern that regardless of the sensitivity to small-entity concerns EPA shows in the FIP and/or 126 rulemakings, the States may nevertheless see fit to target small entities in their SIPs. To help address this problem, the panel recommends that, subsequent to the FIP and 126 proposals, EPA issue guidance that conveys to the States the kinds of options and alternatives EPA has considered in addressing small-entity concerns, explains the rationale behind these kinds of options, and recommends that the States consider adopting similar alternatives in their SIPs.

Sincerely,

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Thomas E. Kelly, Chair  
Small Business Advocacy  
Environmental Protection Agency

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Don Arbuckle, Acting Administrator  
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