

July 28, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator McCarthy:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for EPA's planned proposed rulemaking entitled "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014." This notice of proposed rulemaking is being developed by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA).

This planned proposed rulemaking will establish a federal plan to implement greenhouse gas Emission Guidelines (EGs) for existing fossil fuel-fired electric generating units (EGUs). The EGs were proposed in June 2014 as the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (79 FR 34830; the Clean Power Plan). This plan is part of the President's Climate Action Plan announced in June of 2013 to reduce carbon emissions from the power sector by 30 percent below 2005 levels. This federal plan serves to: 1) provide a model rule that states can tailor for implementation, and 2) set in place a plan that EPA can implement for states that do not develop an approvable state plan. The final Clean Power Plan EGs, due out this summer, are related to but separate from the proposed federal plan. The final EGs will detail the CO₂ reduction goals for sources by state. The purpose of the proposed federal plan is to lay out mechanisms to achieve reductions in CO₂ emissions from affected EGUs that are not covered by an EPA-approved state plan.

On April 30, 2015, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition to its chairperson, the Panel consists of the Director of the Sector Policies and Programs Division within EPA's Office of Air Quality Planning and Standards, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Chief Counsel for Advocacy of the Small Business Administration (SBA). 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 this process as well as from public comment on the proposed rule. The options the Panel identified for reducing the rule's economic impact on small entities will require further analysis and/or data collection to ensure that the options are practicable, enforceable, protective of public health, environmentally sound and consistent with the CAA.

SUMMARY OF SMALL ENTITY OUTREACH

The EPA has maintained ongoing engagement with stakeholders on the scope of this rulemaking. There has been considerable outreach on the proposed Clean Power Plan to all stakeholders, including 11 listening sessions (one held in each region and one held at headquarters in Washington D.C.); four two-day public hearings and ongoing interaction with states, utilities, labor unions, nongovernmental organizations, consumer groups, industry and the general public.

After the SBAR Panel was convened, the Panel distributed outreach information to the small entity representatives (SERs) on May 1, 2015, for their review and comment and in preparation for three outreach meetings/conference calls. The Panel met with the SERs on May 8, 14 and 19, 2015 to hear their comments on the information distributed to them. The SERs were asked to provide written feedback on ideas under consideration for the proposed rulemaking. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials. See Section 6 of the Panel Report for a complete discussion of SER comments. Their full written comments are also included in Appendix A. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFEA and developed the findings and discussion summarized below.

PANEL FINDINGS AND DISCUSSION

Under section 609(b) of the RFA, the Panel is to report its findings related to these four items:

- 1) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.
- 2) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
- 3) Identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.
- 4) A description of any significant alternatives to the planned proposed rule which would minimize any significant economic impact of the proposed rule on small entities consistent with the stated objectives of the authorizing statute.

The Panel's most significant findings and discussion with respect to each of these items are summarized below. To read the full discussion of the Panel findings and recommendations, see Section 7 of the Panel Report.

A. Number and Types of Entities Affected

Section 3 of the report presents a definition of the small entities to which the proposed rule may apply.

B. Recordkeeping, Reporting, and Other Compliance Requirements

SERs made a general request for reduced recordkeeping and reporting requirements. However, apart from a suggested threshold of units less than 100MW, the SERs did not provide specific recommendations. EPA did not present specific information about the potential reporting, recordkeeping, and compliance requirements beyond the certain key reporting requirements that are already set in Part 75 and do not represent an incremental burden. However, the Panel recommends that EPA take comment on how reporting and recordkeeping requirements could be minimized for small entities to the extent possible under the statute and existing regulations.

Compliance Timelines

Multiple SERs commented that small entities should be provided additional time to comply, citing concerns that the 2030 deadline for achievement of the state goals and the interim goals (as presented in the proposed EGs) would impose unreasonable burdens on small entities if applied on a unit-by-unit basis. EPA notes that changes in the final emissions guidelines, including moving the initial compliance deadline from 2020 to 2022 and adjusting state targets were designed to address these concerns.

Within the context of the federal plan, the Panel recommends an approach to the federal plan that utilizes emissions trading in order to maximize compliance option flexibilities for small units. The Panel also recommends the use of multi-year compliance periods. The Panel recommends that the EPA take

comment on a federal plan that grants, on a case-by-case basis, small entities additional time to come into compliance, and to request additional input from the public as to the design of such flexibility that would be compatible with the emission guidelines and a federal plan that implements a trading system.

SERs recommended longer compliance averaging periods. One SER recommended a five-year averaging period. Another suggested the ability to average over the entire interim period. The Panel recognizes that a greater than one year averaging period would reduce the burden on SERs by reducing the likelihood that a unit would be out of compliance in any one year due to increased utilization. The Panel recommends that EPA propose or take comment on using multi-year compliance periods in either a rate- or mass-based trading program. The Panel recognizes that longer averaging periods for small entities, different from other sources, would make it difficult to include them in a larger trading forum. Having different compliance periods for units in the same market can create complications in administration of the program and in the operation of markets. Allocating allowances and demonstrating compliance on a different timetable could create liquidity challenges. Additionally, because in a number of cases, units are owned by a combination of small entities and non-small entities, implementing this provision could be very challenging. Furthermore, longer averaging times make it more difficult to catch and correct instances of non-compliance, resulting in potentially harsher penalties and enforcement when the problem is identified.

The Panel recognizes that, generally, no entity should rely on borrowing as a long-term compliance strategy. However, the Panel recommends that EPA request comment on limited borrowing of credits or allowances across compliance periods and request comment on what these limitations should be.

The SERs also commented that for those utilities' operating units to be taken out of service prior to 2030, an exemption from emission standards, as well as the associated recordkeeping and reporting requirements, will provide regulatory certainty, a predictable financial environment in which to invest in transmission and renewable capabilities, and an incentive to remove the fossil-fuel fired unit from the fleet rather than repurpose it. Advocacy supports this flexibility and believes that it is consistent with section 111(d) and the goals of the CPP. The EPA noted that any regulatory exemption must be grounded in the statute, supported by analysis, and consistent with the EGs and the emission performance rates.

Advocacy also recommends EPA propose an exemption for small- and medium-sized coal-fired units that are willing to commit to decommissioning within a fixed time period prior to 2030. For those utilities operating units to be taken out of service prior to 2030, an exemption from emission standards, as well as the recordkeeping and reporting requirements associated with credit or allocation tracking and trading, will provide regulatory certainty, a predictable financial environment in which to invest in transmission and renewable capabilities, and an incentive to remove the fossil-fuel burning unit from the fleet rather than repurpose it.

The Panel recommends that EPA take comment on an exemption for small- and medium-sized coal-fired units that are willing to commit to decommissioning within a fixed time period prior to 2030.

Compliance Baseline

Various SERs expressed concern about the selection of baseline in the proposed EGs. They are concerned that a single year baseline wouldn't reflect the natural variability of electrical generation. One SER recommends a baseline of the average of the highest emissions for three years out of five prior to 2012. SERs are also concerned that the wrong baseline will punish sources for early investment or for investments to comply with other environmental mandates that had the result of decreasing energy efficiency and increasing GHG emissions.

The EPA notes as an initial matter that the regulatory alternatives presented to the SERs relied on a unit specific single year baseline for determining compliance for rate, while mass did not rely on a unit specific single baseline for determining compliance. The current regulatory alternatives do not reflect, in part due to the SERs comments, unit specific single year baseline for determining compliance rate. In a rate-based trading program, the subcategorized uniform emission rates for steam electric generation and stationary

combustion turbines would be met by meeting a total tonnage of emissions divided by a total amount of output over a given compliance period. Shortfalls can be made up by acquiring credits. In a mass-based trading program, the compliance obligation is to hold sufficient allowances to cover emissions in a given compliance period. Neither of these approaches require the calculation of unit-specific baselines, and again, the emission performance rates will have already been established in the EGs. The selection of baseline for purposes of establishing the emission performance rates in the EGs could not be changed within the federal plan. Nonetheless, the Panel believes that it may be appropriate in certain calculations relevant to the federal plan to rely on multi-year averaging or data, for instance, in the methodology for allocations in a mass-based trading program.

The Panel recommends that the EPA use multiple years of data, where appropriate, for instance, in determining mass allowance allocations, or potentially in certain aspects of a rate-based trading program, utilization baselines, to the extent permissible under the EGs.

C. Related Federal Rules

Section 2.3 of the report contains a discussion of related federal rules. In addition, SERs raised concerns that other EPA mandates, such as NSR, may impede the ability of SERs to comply with the federal plan. SERs are concerned that NSR will impede changes in dispatch to NGCC units within their portfolio or construction of additional natural gas EGU to support renewable resources. The EPA noted it does not expect this to be a major concern. The Panel recommends that the EPA request comment on this issue to better understand potential scenarios in which NSR could pose a regulatory barrier to small entities taking compliance measures under the federal plan, and whether any steps could be taken to alleviate those concerns in a way that is consistent with judicial precedent. The Panel also recommends that EPA take comment on ideas for how to harmonize or streamline interaction between NSR permitting programs and implementation of the federal plan.

D. Regulatory Flexibility Alternatives

Panel Process

SERs commented on their perceptions of the adequacy of the SBREFA panel process for the section 111(d) federal plan. Under the statute, EPA provides “information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected.” § 609(b)(1). Then SERs are selected, and the Panel collects “advice and recommendations” from each SER. § 609(b)(4). The Panel reviews the SERs’ comments, and “any material the agency has prepared in connection with [the RFA],” and “report[s] on the comments of the [SERs] and its findings as to issues related to” preparation of an IRFA. § 609(b)(5). EPA solicited SERs comments during the course of, and after holding three outreach meetings. The Agency provided information to the SERs on two primary regulatory alternatives for the federal plan – a rate-based trading program and a mass-based trading program. The Agency identified specific areas under both of these alternatives where it was still in the decision making process and open to recommendations. This information forms the basis for consideration of issues and additional regulatory options important to these small entities.

Advocacy shares many of the concerns raised by the SERs (see attached letter from Acting Chief Counsel Claudia Rodgers to EPA Administrator Gina McCarthy). While Advocacy endorses the Panel recommendations, Advocacy agrees that the SERs did not have sufficient information to inform advice and recommendations about specific regulatory alternatives and flexibilities. In Advocacy’s view, this is reflected in Panel recommendations that advise EPA to consider issues raised by the SERs rather than to propose or consider regulatory alternatives. Advocacy regrets that the Panel is not able to make more specific recommendations for flexibilities to minimize the impacts on small entities.

While not all members of the Panel agree with all of these concerns, the concerns of the SERs regarding the Panel process have been noted. Nonetheless, EPA is committed to ensuring that it meets the requirements of the RFA and will, to the maximum extent practicable, fully consider the advice and recommendations of representatives of small entities in the development of the proposed rule . The EPA

intends to continue working on issues regarding small businesses, and consider appropriate flexibilities, throughout this rulemaking process.

Remaining Useful Life

SERs commented that EPA needed to account for remaining useful life of EGUs. Multiple comments addressed challenges that EPA must face in satisfying the statutory mandate that “in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing sources to which such standard applies.” SERs are concerned that EPA will develop EGs under section 111(d) in a manner that either prohibits plans from providing this consideration or only providing for plans to “make these adjustments at the expense of other sources.” AEPCO comments that it has obligations under the Rural Electrification Act to operate under an 80-year mandate. SBA recommends EPA propose allowing for guaranteed amount of run-time for small entities to allow them to recoup investment. EPA believes “remaining useful life” is a concern directed toward plants with short remaining lives, but recognizes that there are concerns about economic viability of some marginal plants.

The Panel recommends that EPA clearly explain how it took into consideration remaining useful life and take comment on other ways of defining the remaining useful life consideration. The Panel also recommends proposing or considering economic incentives for compliance that could avoid early retirement or reduce the financial effects of early retirements. For instance, the EPA could propose continuing allocations for a set number of years to units that retire in order to alleviate the financial effects of the retirement. EPA should request comment on how long such allocations should continue. The EPA should also consider whether there are parallel mechanisms in a rate-based proposal that could provide similar regulatory relief or benefits for small entities, if appropriate.

Design of the Compliance System

The panel requested SER input on a number of aspects of the federal plan design, based on EPA's presentation of federal plan options. SER comments ranged quite broadly. Comments included: 1) differing opinions within SERs on favor of rate- vs mass-based approaches, 2) emphasis on market liquidity in a program, 3) support for types of allocation methodologies (in a mass-based allowance system), 4) encouragement for early action crediting, 5) increased averaging and compliance times to help small entities, and 6) whether and how to consider the effects of credit/allowance banking, borrowing, and shelf-life on market liquidity. In some instances, no general consensus emerged. The Panel notes the following specific areas where it is making a recommendation.

Mass-based or rate-based trading

Various SERs favored one system over the other, and some suggested that each individual small entity should be able to choose the system under which they would comply. However, it is unclear to what extent SERs would favor such choice at the expense of a broader trading pool. The panel, however, notes that the idea of individual companies within a state choosing which system to comply would significantly limit the opportunity for intra- or inter-state trading and would therefore not be consistent with other recommendations. The Panel recommends that EPA take comment on which approach (mass or rate) is preferable. In the interests of maximizing liquidity across all federal plan states, the Panel recommends that EPA should propose to finalize a single approach for all federal plans.

Allocations and credit issuance/early action

SERs expressed a variety of views on the appropriate method of allocating allowances under a mass-based system or credits under a rate-based system. Some preferred allowing states to make these decisions. Some wanted allocations to account for early action and energy efficiency efforts. The Panel agrees that EPA should take comment on the use of allocations to minimize the impact of the federal plan on small entities. The Panel notes that the early incentive pool that is part of the EGs does provide credit for early action, but the SERs did not have an opportunity to respond to this flexibility. The panel recommends that in the federal plan the EPA allow credit for early action and energy efficiency efforts to the extent it is allowed under the guidelines.

Non-generating party participation and market liquidity

SERs generally supported developing a system that would ensure a sufficient supply of credits be available on the open market and available for free trade to ensure that they would not be disadvantaged by large utilities withholding excess credits generated by renewable energy in their portfolio. However, some SERs also expressed the need to be able to generate and use credits internally (particularly those with generation across multiple states) (i.e., a portfolio approach). Some SERs endorsed allowing non-generating parties to create and sell credits or allowances. Other SERs warned that third parties should not be allowed to purchase credits or allowances for the purpose of retiring them without offsetting GHG emissions from electricity generation. The Panel recommends that the EPA ensure a liquid market in compliance instruments, through consideration, request or comment, or proposal of several of options, including: allocation methods or rules that could impact liquidity, mechanisms to place allowances or credits into the market relatively early, requirements for public transparency of information related to allowance or credit issuance, tracking, transfers, and holdings, and whether and to what extent oversight authority exists related to measures to ensure liquid markets. Additionally, the Panel recommends that EPA solicit comment on other approaches to ensure liquidity, including but not limited to the concept of an early incentive pool which would serve to incentivize early reductions and create a market of additional allowances.

Renewable Energy and Energy Efficiency

Generally SERs encouraged EPA to incorporate existing EE efforts into the program in a way that gives credit for the investment and to rely on “deemed” energy savings to earn compliance credits. SERs raised concerns about the accounting of investments in RE and EE efforts in their compliance with GHG emission standards.

SERs also expressed concern that they be able to generate and use credits across state lines. This is particularly important for the investment in renewables, for which the generating potential is highly dependent on geography and is unequally distributed among the states. Thus, the Panel recommends that EPA develop a credit or allowance compliance program that allows for interstate accounting and trading for states under the federal plan. Additionally, the Panel recommends that the program include opportunities for interstate trading between sources in states under the federal plan and states under compatible state plans.

The Panel recommends that EPA consider the treatment of RE and EE in rate-based and mass-based federal plan contexts. EPA should further consider how to implement preferred policy options in a way that incentivizes investment and does not create unintended barriers for small entities. The Panel also recommends that EPA allow crediting of RE across states under the federal plan while soliciting comment for allowing crediting for EE across states under the federal plan.

Reliability

Multiple SERs expressed concerns that implementation of the EGs, either by states or through a federal plan, could have a negative impact on reliability because individual units could have operational obligations that conflict with the emissions requirements. In their comments, both the American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) recommend Dynamic Reliability Safety Valve. EPA noted that the use of a reliability mechanism in the EGs is provisioned on the concern that some forms of state plan may create inflexible requirements that could in some limited circumstances raise a reliability concern. However, EPA believes the design of the federal plan as a flexible trading program alleviates these concerns and therefore a reliability mechanism is not needed.

The Panel recognizes the connection between meeting the GHG reduction goals of the federal plan and maintaining the reliability of the electric grid. The Panel recommends that EPA fully explain in the proposal and take comment on methods to address reliability and EPA should take comment on establishing a reliability safety valve, particularly if small entities can be shown to need regulatory flexibility for reliability critical units beyond the flexibilities already built into the design of the federal plan.

Subcategorization/Applicability/Exemptions

SER comments on applicability reflect concerns related to the combined series of rulemakings affecting GHG emissions from electricity generating units: the NSPS, the EGs and the federal plan. SERs endorse excluding RICE and NGSC units from the combined rulemakings. One SER requests a subcategory that addresses the particular characteristics of lignite coal. Some SERs suggest special provisions for small units or utilities, including a small system exemption. The SBA suggested taking comment on an economic hardship exemption for small entities and that EPA propose a mechanism for additional compliance time when generation and transmission investments necessary for compliance have been delayed by government reviews. However, EPA noted that regulatory exemptions must be grounded in statute and supported by analysis, and EPA believes the design of the federal plan itself should maximize compliance options that are both consistent with the EGs and also should adequately address these concerns.

The Panel notes that EPA must be consistent with the EGs on issues of applicability, which should address the SERs' concerns with regard to inclusion of RICE or NGSC units. The Panel also notes that EPA is proposing a design to the federal plan that utilizes emission trading and thus maximizes compliance options such that individual units can take into account their particular characteristics in designing a compliance strategy. This should further address concerns and make unnecessary the need for further sub-categorization or the use of unit-specific exemptions. Additionally, the Panel recommends that EPA solicit comment on an alternative allocation methodology under the mass-based proposed federal plan that may increase allocations for small businesses, and consider whether there are parallel mechanisms in a rate-based proposal that could provide similar regulatory relief or benefits for small entities, if appropriate.

Sincerely,

/s/

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Enclosure