

October 11, 2023

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

Dear Administrator Regan:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for the rulemaking on the New Source Performance Standards (NSPS) for Greenhouse Gas (GHG) Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units (EGUs). This rule is being developed by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA).

In 2015, the EPA promulgated an NSPS to limit emissions of GHGs, manifested as carbon dioxide (CO<sub>2</sub>), from newly constructed, modified, and reconstructed fossil fuel-fired electric utility steam generating units, i.e., utility boilers and integrated gasification combined cycle (IGCC) EGUs, and newly constructed and reconstructed stationary combustion turbine EGUs. In 2023, EPA proposed revised new source performance standards for GHG emissions from new fossil fuel-fired stationary combustion turbine EGUs and from fossil fuel-fired steam generating units that undertake a large modification.

On July 27, 2023, 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 and Radiation, 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 rule, and additional information may be developed or obtained during this process. 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**

This Panel has not followed the normal course of events typical of an EPA Panel. Based on the information available to EPA at the time of the Notice of Proposed Rulemaking (NPRM) for this action ([88 FR 33240](#)), EPA certified the proposed rule as not having a significant economic impact on a substantial number of small entities (No SISNOSE). However, EPA solicited comment on a number of more stringent policy options that may increase the impact on small businesses, and EPA received public comments raising concerns about the certification of No SISNOSE. Therefore, EPA convened a Panel. EPA will publish an Initial Regulatory Flexibility Analysis for public comment prior to issuing a final rule.

Prior to publishing the NPRM, EPA conducted outreach with small entities that will potentially be affected by these regulations. In December 2022, EPA invited SBA, OMB, and potentially affected small entity representatives (SERs) to a meeting and solicited comments from them on preliminary

information sent to them. EPA shared the small entities' written comments with the Panel as part of the Panel convening document.

After the SBAR Panel was convened, the Panel distributed additional information to the SERs for their review in preparation for the Panel outreach meeting. On August 10, 2023, the Panel met with the SERs to hear their comments on the information distributed to them. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials. See Sections 6 and 8 of the Panel Report for a complete discussion of SER comments. Their full written comments are also included in Appendix B. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFA 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 the following 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 9 of the Panel Report.

### **A. Number and Types of Entities Affected**

As described in Section 3 of the Panel Report, EPA estimates in the proposed rule that approximately 10% of potentially affected new capacity may be owned by small entities and estimates that this total will be approximately ten small entities. SERs commented that EPA should update the SBA size standards used in its analysis, and provided specific data corrections EPA should make in its underlying unit-level data.

The Panel recommends that EPA consider the unique circumstances faced by small rural cooperatives and municipalities. These small entities may face significant challenges in planning, investment, and financing. An impact that may not be significant for a for-profit company, whether privately owned or public, could have a more significant economic impact. Where the information is available, EPA should consider small entities' debt as a factor in determining whether costs to rural cooperatives as a percentage of revenue are significant.

The Panel recommends EPA review its database of electricity generators and validate the size of the operators against the current SBA size standards for for-profit businesses and the standards in the RFA

for nonprofit businesses (see 5 USC 601(4)). The Panel further recommends EPA make appropriate data corrections and reevaluate the screening analysis.

## **B. Related Federal Rules**

EGUs are subject to multiple EPA Clean Air Act regulations, including NSPS under section 111 and National Emission Standards for Hazardous Air Pollutants (NESHAP) under section 112. EGUs are also the subject of regulation due to National Ambient Air Quality Standards (NAAQS), including the rules addressing transport of pollutants between states. EGUs are also subject to Effluent Limitation Guidelines under the Clean Water Act. Coal-fired power plants are subject to regulation of coal combustion residuals under the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act. Small entities have made multiple investments to come into compliance with these requirements over the past decade. One SER noted that they were incurring debt through 2050 to finance these compliance efforts.

SERs note that EPA's determination of best system of emission reduction (BSER) relies heavily on the development and accessibility of infrastructure that is subject to multiple federal authorities. If facilities must be sited based on availability for geologic carbon sequestration, additional natural gas pipelines and transmission lines will be necessary. If facilities are placed based on the availability of natural gas and transmissions lines, then additional carbon pipelines or hydrogen pipelines will be necessary. These investments will be subject to permitting review by the Federal Energy Regulatory Commission (FERC), which includes environmental reviews under the National Environmental Policy Act (NEPA), and safety regulation by the Pipeline and Hazardous Materials Safety Administration (PHMSA). To the extent that highway vehicles are used in the transport of hydrogen, these activities are subject to regulation by the Federal Motor Carrier Safety Administration (FMCSA). In the Western United States, significant pipeline investment will also likely involve permits by federal land management agencies. Carbon sequestration is subject to EPA regulation under the Clean Water Act and is subject to the Underground Injection Control Program. EPA has published multiple guidance documents specific to carbon sequestration.

The Panel recommends EPA continue consulting with the Department of Energy (DOE), FERC, and PHMSA staff to ensure there are no overlapping or contradictory requirements on these sources.

## **C. Regulatory Flexibility Alternatives**

The Panel has reviewed the information provided by EPA to the SERs and the SERs' oral and written comments from the pre-Panel and Panel outreach. In response to this consultation, the Panel identifies the following significant alternatives for consideration which accomplish the stated objectives of the Clean Air Act, and which minimize any significant economic impact of the proposed rule on small entities.

### Subcategorization

SERs stated EPA should consider the hardships on economically disadvantaged communities and small entities. Increased energy costs, transmission upgrade costs, and infrastructure encroachment are concrete effects on the disproportionately impacted communities that should be further evaluated.

Additionally, SERs stated hydrogen and carbon capture and storage (CCS) are not BSER because they are not commercially available and viable in very rural areas.

The Panel recommends EPA consider and request comment on potential exclusions or subcategories for small entities that would be based on the class, type, or size of the source and be consistent with the Clean Air Act.

The Panel understands that current technology for CCS and clean hydrogen generation can require significant water resources, and CCS requires geologic sequestration. Small entity generating units located far from either one of these resources are likely to incur higher costs and at higher rates of uncertainty due to the need for infrastructure investment. The Panel recommends that EPA consider such costs, and other factors including distance from storage, regional renewable energy resource potential, fuel costs, and capital costs for new additions and retrofits, to small entities in its final rule analysis.

The Panel recommends EPA solicit comment on whether rural electric cooperatives and small utility distribution systems (serving 50,000 customers or less) can expect to have access to hydrogen and CCS infrastructure, and if a subcategory for these units is appropriate.

#### Reliability

SERs stated EPA's proposed rule will have significant reliability impacts, including that areas with transmission system limitations and energy market constraints risk power interruption if replacement generation cannot be put in place before retirements. SERs recommended that regional transmission organizations (RTOs) be involved to evaluate safety and reliability concerns.

SERs expressed concern that EPA's proposal relies on the continued development of technologies not currently in wide use and large-scale investments in new infrastructure and pushes these technologies significantly faster than the infrastructure will be ready and sooner than they can justify investment to their stakeholders and ratepayers. This is of particular concern for small entities that are retiring generation in response to other regulatory mandates and need to replace that generation to continue serving their customers.

The Panel recommends EPA solicit comment on a mechanism for reliability relief. Such a mechanism should be easily implementable and straightforward to address electric reliability concerns. The Panel also recommends EPA solicit comments on other mechanisms in the event RTO, independent system operators (ISO) or other relevant authorities identify reliability issues; comment solicitation should also include phase-in considerations for small entities, implementation flexibilities for certain circumstances that may be outside the control of affected sources, and lessons learned from past reliability mechanisms in light of the proposed rule.

#### Analysis

SERs took issue with aspects of EPA's screening analysis, including relying on historical build patterns to project future investments, and recommending that this record be further strengthened by including

additional planned builds by small entities. In addition, SERs commented that EPA should consider the impacts of the proposed requirements on existing sources, in addition to new sources, when evaluating the impacts on small entities, in particular accounting for the need for replacement capacity as a result of existing source requirements and the potential for requiring additional power purchases.

The Panel recognizes that many SERs have identified analytical concerns, and makes the following recommendations for EPA's analysis of small entities impacts in its final rule:

- EPA should consider economic projections of the price of hydrogen as an input in its analysis of small entities impacts and consider sensitivity analyses that address the uncertainty in this future market. EPA should consider comments on availability and cost assumptions for hydrogen. EPA should incorporate this information as relevant within the modeling for the final rule.
- EPA's analysis should consider access to natural resources, including regionalized renewable energy resource potential, fuel costs, and capital costs for both fossil fuel and renewable energy technologies, in the development of estimates of small entities impacts.
- EPA should consider the supporting infrastructure and the logistics of on-site storage of carbon or hydrogen in its analysis of small entities impacts.
- EPA's modeling should capture a representation of the distance from source to sink for carbon storage and sequestration, and include these costs in the compliance cost estimates for the final rule.
- EPA should consider the effects of the final rule on communities that small entities serve, and whether there would be disproportionate effects across different demographic groups on the basis of race, ethnicity, poverty status, employment status, health insurance status, age, sex, educational attainment, and degree of linguistic isolation.

#### **D. Advocacy Recommendations**

##### *Number and Types of Entities Affected*

Advocacy recommends EPA include SER-provided information about intended future investments in generating capacity by small entities. EPA should consider that these investments may be driven by retirement decisions and thus not necessarily based on historical patterns of investment, particularly for those small entities that must close coal-fired power plants. EPA should also consider whether the requirements proposed under 111(d) for existing sources may lead small entities to retire existing generation capacity and seek to replace it with new generation, further raising the number of impacted small entities above the baseline investment and making the historical data a less useful indicator of future investment.

##### *Subcategorization*

Advocacy recommends EPA additionally take comment on an exclusion from CCS or hydrogen co-firing for smaller power plants associated with renewable energy investments and the appropriate mechanisms to identify and maintain such an association.

Advocacy recommends EPA propose alternative thresholds between low, intermediate, and base load, in response to SER concerns that the threshold for low load does not provide sufficient flexibility and could hinder operation of more efficient peaking units in circumstances that do not rise to a “system emergency.”

Sincerely,

**WILLIAM  
NICKERSON**

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**William Nickerson**  
Small Business Advocacy Chair  
Office of Policy  
U.S. Environmental Protection Agency


**MAJOR CLARK**

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**Dominic J. Mancini**  
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**Penny Lassiter**  
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Enclosure