



December 21, 2015

VIA REGULATIONS.GOV

The Honorable Gina McCarthy
Administrator
United States Environmental Protection Agency
EPA Docket Center (EPA/DC)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments on EPA’s proposed rule “Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations” (Docket No. EPA–HQ– OAR–2015–0199).

Dear Administrator McCarthy:

The U.S. Small Business Administration’s Office of Advocacy (Advocacy) submits the following comments in response to Environmental Protection Agency’s (EPA’s) October 23, 2015, notice of proposed rulemaking, “Federal Plan Requirements for Greenhouse Gas (GHG) Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations.”¹ Advocacy believes that EPA’s Initial Regulatory Flexibility Analysis (IRFA) and other related analyses do not provide small entities sufficient information to understand the likely economic impacts or evaluate reasonable regulatory alternatives. Advocacy strongly recommends that, for each state that does not submit an acceptable state implementation plan for the Clean Power Plan, EPA re-propose a federal plan and develop a supplemental IRFA for each one.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.² The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996

¹ 80 Fed. Reg. 64,966 (October 23, 2015), Docket No. EPA–HQ– OAR–2015–0199.

² 15 U.S.C. § 634a, *et. seq.*

³ 5 U.S.C. § 601, *et. seq.*

(SBREFA),⁴ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a “significant economic impact on a substantial number of small entities,”⁵ EPA is required by the RFA to conduct a SBREFA Panel to assess the impact of the proposed rule on small entities,⁶ and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule.⁷

Background

EPA published proposed GHG standards for existing fossil-fueled power plants (a.k.a. the Clean Power Plan (CPP)) in June 2014. The CPP is an instruction to states to regulate sources within their borders. Under the Clean Air Act section 111(d), states must develop plans to implement the CPP and submit them to EPA. If a state’s plan is not acceptable, or if a state does not submit a plan, EPA must develop an implementation plan for that state, also called a federal plan. Each state may have a different federal plan. For the purposes of the RFA, EPA through the CPP does not impose direct impacts on small entities unless or until it issues a federal plan.

In January 2015, in response to states’ and stakeholders’ concern about the proposed CPP implementation, EPA Acting Assistant Administrator Janet McCabe committed to develop a rule that would describe a proposed federal plan that could also help states start to think about their own plans. She also announced that EPA would conduct a SBREFA panel for this rulemaking.

EPA provided formal notification to Advocacy and the Office of Management and Budget Office of Information and Regulatory Affairs (OIRA) of its intent to convene a panel on March 27, 2015. Advocacy held a series of conference calls with potential small entity representatives (SERs) in early April to address concerns raised by the regulated community about EPA’s timeline. EPA convened the panel on April 30, 2015.

Advocacy wrote to EPA on May 8, 2015 expressing concern about convening the panel without sufficient information.⁸ Advocacy stated, “Due to this lack of information, any panel conducted under these circumstances is unlikely to succeed at identifying reasonable regulatory alternatives for small businesses.”

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

⁵ See 5 U.S.C. § 609(a), (b).

⁶ Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁷ 5 U.S.C. § 604, as amended by the Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

⁸ See Office of Advocacy Letter from Acting Chief Counsel Claudia Rodgers to EPA Administrator Gina McCarthy, “Comments to EPA on Convening of Panel on Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014,” May 8, 2015.

EPA hosted a briefing for the SERs on May 8, 2015 covering the available information about the FIP rulemaking. The SBREFA panel members held the panel outreach meeting on May 14, 2015. Due to the open-ended nature of the discussion and large number of issues that remained open, the panel held a follow-up meeting conference call on May 19, 2015.

Prior to the SBREFA panel completing the panel report, EPA submitted a proposed rule to OIRA for EO 12866 review on July 2, 2015. During EO 12866 review, OIRA hosted meetings with a number of SERs, as well as with other outside parties, which EPA and Advocacy attended.⁹ The panel signed its report with recommendations to the EPA Administrator on July 31, 2015, OIRA concluded EO 12866 review on August 2, 2015, and EPA signed the proposed rule on August 3, 2015.

Advocacy has continued consultation with small entities since the signing, including by hosting a Small Business Environmental Roundtable on September 11, 2015, at which EPA staff presented and responded to questions.

Advocacy comments

EPA's analysis of the effects of future federal plans is insufficient to inform adequately a consideration of regulatory alternatives that would minimize the impact on small entities while remaining consistent with the Clean Power Plan. As EPA says in its analysis and RFA statement, it has made a number of very strong assumptions in order to analyze the impacts on the economy and on small entities, including that of a uniform federal plan across the contiguous United States. While perhaps necessary for analytical purposes, it makes understanding the likely impacts on small entities very difficult. It is not surprising that there was little consensus among the SERs during panel consultations and the public comment period.

First, small entities themselves are not uniform. Municipalities, cooperatives and privately-owned small entities are very different. In addition to ownership structure, they have different management philosophies, different rate structures and, for practical and historical reasons, different asset mixes. These differences lead to different preferences for the options EPA must consider in developing state-specific plans.

Second, small entities are not uniformly spread throughout the country, a function of different market conditions and state regulatory regimes. There appear to be significant regional difference across the country that may lead EPA to choose different options in different parts of the country. For example, the RIA for the Clean Power Plan projects that a rate-based system will raise electricity rates more than a mass-based system in some parts of the country and less in other parts of the country. Small entities in these regions, while on one hand preferring a broad compliance market, may be better off with a series of regional markets, each with a different structure, that reduce the costs to their consumers.

⁹ OIRA publishes disclosures of meetings with outside parties conducted during EO 12866 review on its website at <http://www.reginfo.gov/public/do/eom12866Search>. OIRA conducted relevant meetings under RIN 2060-AR33 (the Clean Power Plan) and RIN 2060-AS47 (this rulemaking).

Third, the choices that states make in their plans (for those that submit acceptable plans) will have a significant bearing on the desirability of particular options in states subject to a federal plan. If neighboring states choose a rate-based trading system, then EPA is more likely to choose a rate-based system, to allow for tradability and ensure a deeper and broader compliance market.

Given these factors, Advocacy believes that small entities do not have enough information to evaluate the options presented by EPA or aid in the development of additional flexibilities, like alternative allocation mechanisms or the alternative compliance pathway. This is the same concern expressed during the SBREFA panel by Advocacy and the SERs. EPA must make a state-by-state decision about the structure of the federal plan, and this decision must take into account the variety of factors above. Advocacy believes EPA must also take into account the interests of small entities in each state when making these decisions. The SBREFA panel report and the IRFA do not aid in this consideration because of highly generalized nature of the recommendations and analysis.

Because of these large uncertainties, Advocacy strongly recommends that EPA re-propose a separate federal plan for states that must be subject to one and develop a supplemental IRFA for each one. This additional action, later in the process and after neighboring states have made their own decisions, will provide the small entities with the needed information to evaluate the likely impacts of the federal plan and provide useful information about reasonable alternatives.

Conclusion

Advocacy believes that the SBREFA panel report and IRFA for the proposed federal plan do not provide small entities sufficient information to evaluate the impacts of potential federal plans or reasonable regulatory alternatives in their states. Advocacy strongly recommends that, for each state that does not submit an acceptable state implementation plan, EPA re-propose a federal plan and develop a supplemental IRFA to aid small entities in the understanding of issues unique to their business, state and region.

Advocacy looks forward to continuing to work with EPA as implementation of the Clean Power Plan progresses and strives to be a resource to the agency for all small business-related concerns. If my office can be of any further assistance, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or david.rostker@sba.gov.

Sincerely,

/s/

Claudia R. Rodgers
Acting Chief Counsel for Advocacy
Small Business Administration

/s/

David Rostker
Assistant Chief Counsel
Office of Advocacy

Copy to: The Honorable Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget