



May 8, 2015

BY ELECTRONIC MAIL

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency

RE: SBAR Panel – Convening of Panel on “Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014.”

Dear Administrator McCarthy:

On April 30, 2015, EPA convened a Small Business Advocacy Review (SBAR) panel on its upcoming rulemaking, “Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014.” The Office of Advocacy (Advocacy) believes that EPA has not prepared sufficient materials to convene this panel. EPA has not provided the other panel members with information on the potential impacts of this rule and has not provided Small Entity Representatives (SERs) with the necessary information upon which to discuss alternatives and provide recommendations to EPA, as required by the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Due to this lack of information, any panel conducted under these circumstances is unlikely to succeed at identifying reasonable regulatory alternatives for small businesses.

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.¹ The RFA,² as amended by SBREFA,³ 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,”⁴ EPA is required by the RFA to conduct a SBREFA Panel to assess the impact of the proposed rule on small entities,⁵ and to consider less burdensome alternatives. Moreover, federal agencies

¹ 15 U.S.C. § 634a, *et. seq.*

² 5 U.S.C. § 601, *et. seq.*

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

⁴ *See* 5 U.S.C. § 609(a), (b).

⁵ 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

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.⁶

Background

Since the passage of SBREFA in 1996, EPA has been a "covered agency" under section 609 of the RFA. In that time, EPA, OMB, and SBA have jointly conducted almost 50 panels. EPA has also published valuable guidance to its program offices on compliance with the RFA, including the conduct of SBREFA panels.⁷

SBREFA panels give Small Entity Representatives an opportunity to understand a covered agency's upcoming proposed rule and provide meaningful recommendations to aid in the agency's compliance with the RFA. The process starts with the covered agency notifying Advocacy with "information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected[.]"⁸ Upon convening of the panel, the RFA states that "the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c)[.]"⁹ Advocacy believes that these requirements, read together and in the context of activity to be conducted prior to proposed rulemaking, require the agency to provide sufficient information to the SERs so that they can understand the likely form of the upcoming rulemaking, evaluate its

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.

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

⁷ *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act*, OPEI Regulatory Development Series, U.S. EPA, November 2006.

⁸ § 609(b)(1).

⁹ § 609(b)(4). Section 603(b), paragraphs (3), (4), and (5) read:

- "(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- "(4) 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;
- "(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."

Section 603(c) reads:

- "(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as –
- "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- "(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- "(3) the use of performance rather than design standards; and
- "(4) an exemption from coverage of the rule, or any part thereof, for such small entities."

potential economic impacts, and recommend alternative regulatory options that would minimize any significant economic impact while preserving the agency's regulatory objectives. Advocacy also believes that the statute clearly intends that the agency provide deliberative information as part of this process.

SBREFA Panel

On January 7, 2015, Assistant Administrator Janet McCabe announced EPA's intent to propose a Federal Implementation Plan to implement the Clean Power Plan and provide interested states with a model for compliance. At that time, Assistant Administrator McCabe also announced the intent to convene a panel on this rulemaking. Advocacy received formal notification of EPA's intent to convene this panel on March 26, and EPA convened the panel on April 30.

Materials provided to the SERs on May 1 do not describe potential regulatory alternatives under development or economic impacts. The description of the proposed rule is a discussion of broad outlines of policies and factors EPA may be considering, in the context of complying with final Emission Guidelines, which EPA has not released and to which the SERs have no access. Thus, the outreach materials present little information with which the SERs could evaluate the potential impact on their individual generating units or facilities. This greatly limits their ability to propose potential regulatory flexibilities or discuss the costs and benefits of particular regulatory alternatives on their small businesses.

For this reason, Advocacy believes that EPA should not be convening this panel without a clearer set of available regulatory alternatives and potential impacts available for discussion by the panel members and the SERs.

I look forward to working with you to make sure the voice of small business is heard and considered. When done well, the SBREFA panel process is an important channel for that voice, and it works to the benefit of all stakeholders. If you have any questions, feel free to contact me or Assistant Chief Counsel David Rostker at david.rostker@sba.gov.

Sincerely,

/s/

Claudia R. Rodgers
Acting Chief Counsel for Advocacy

cc: Small Entity Representatives participating in the SBREFA Panel on "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014."

Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget