

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 "Federal Implementation Plans for Regional Reductions of Nitrogen Oxides" (the "NO_x FIP"). The problem being addressed in this rulemaking is the windborne transport of ozone smog and one of its precursor chemicals -- nitrogen oxides, or "NO_x" -- from NO_x-producing sources in 22 eastern States and the District of Columbia. To reduce this transported pollution, EPA will soon promulgate the OTAG SIP Call, which will require the States to revise their State Implementation Plans (SIPs) to achieve the NO_x emission reductions necessary to address the transport problem. The NO_x FIP being reviewed by this panel is a Federal "backstop" rule to assure that the necessary reductions are achieved by Federal action in the event that the States do not address the problem adequately through SIPs. The FIP proposal is planned for release at essentially the same time that the OTAG SIP Call will be promulgated.

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 all NO_x-emitting stationary sources in 22 eastern States and the District of Columbia, with sources being found in many major industrial categories including electric power plants, factories, and industrial boilers. Potentially, more than 5000 business entities were candidates for regulation under this rule, with over 1200 of these being 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 five source categories: electric generating units, industrial boilers, gas turbines, stationary internal combustion engines, and cement manufacturing facilities. Of these, only about 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 panel outreach meeting were primarily focused on potential impacts on small entities in the aforementioned five source categories currently being considered for regulation. The cement industry representatives were primarily concerned that there may be no cost-effective control technology for their industry that can achieve the amounts of reductions EPA would require. Similar concerns were voiced by representatives of industrial boilers, who pointed out that most of those owned by small entities were old and would experience very high control costs. Both of these sets of 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 FIP to the various categories of NOx-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 FIP. 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. Comments from the cement industry asserted that a CEM requirement for trading sources would prevent them from taking advantage of trading. 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 NOx 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 NOx mass emissions, and therefore intends to allow non-CEMs alternatives for units that have emissions of less than 50 tons per year of NOx. This cutoff will provide relief for industries with industrial 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 the FIP and 126 rules. 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 categories: electric generating units, larger industrial boilers, gas turbines, internal combustion engines, and cement manufacturing facilities.

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 option explored was to propose exempting cement kilns as a source category if it could be shown that EPA's assumed 30% reduction of NO_x emissions is not feasible, and that the achievable reductions were such that it would not be cost-effective to require controls on these sources. The panel recommends that EPA solicit comment on rational bases on which small-entity-owned cement kilns could be exempted if further analysis shows this to be appropriate. Examples of the kinds of factors that might be considered rational bases for exemption are disproportionate ability to bear costs and administrative burdens, and contributing only a de minimis amount of emissions.

The second option considered by the panel was to retain applicability to cement kilns, but to grant relief if, after installing available controls, they proved to be unable to achieve the mandated 30% reduction in NO_x emissions. The model concept considered was that of an Alternative Emission Limit (AEL) similar to the one used in the Acid Rain NO_x Reduction program, whereby a source can apply for and receive a less stringent reduction requirement if it can be shown that this lesser reduction is the most that can be achieved at that particular unit. To implement this concept, the panel recommends that EPA solicit comment on whether small-entity-owned cement kilns unable to achieve the mandated reduction should be given the opportunity to apply for an AEL to be set at a level demonstrated to be achievable at the unit in question. EPA should also solicit comment on the appropriateness and workability of this option, and should solicit information to support it.

The next 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 NO_x emission tonnage limit (e.g., 25 tons during the ozone season) and thereby obtain an exemption from FIP 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 NO_x 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 NO_x 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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