

Final Report

of the

Small Business Advocacy Review Panel on

EPA's Planned Proposed Rule

Federal Plan Requirements for Greenhouse Gas
Emissions from Electric Utility Generating Units
Constructed on or Before January 8, 2014

July 28, 2015

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1. INTRODUCTION

This report is presented by the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened to review the planned proposed rulemaking on the Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units. Under section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), a Panel is required to be convened prior to publication of the initial regulatory flexibility analysis (IRFA) that an agency may be required to prepare under the RFA. In addition to EPA's Small Business Advocacy Chairperson, the Panel will consist of the Director of the Sector Policies & Programs Division of the EPA Office of Air Quality Planning & Standards, 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.

This report includes the following:

- Background information on the proposed rule being developed;
- Information on the types of small entities that may be subject to the proposed rule;
- Description of small entity outreach; and
- A summary of the comments that have been received to date from these representatives.

Section 609(b) of the RFA directs the Panel to consult with and report on the comments of small entity representatives (SERs) and make findings on issues related to elements of an IRFA under section 603 of the RFA. Those elements of an IRFA are:

- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of projected reporting, record keeping, 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;
- An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; 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. This analysis shall discuss any significant alternatives such as:
 - the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 - the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
 - the use of performance rather than design standards; and
 - an exemption from coverage of the rule, or any part thereof, for such small entities.

Once completed, the Panel Report is provided to the agency issuing the proposed rule and is included in the rulemaking record. The agency is to consider the Panel's findings when completing the draft of the proposed rule. In light of the Panel Report, and where appropriate, the agency is also to consider whether changes are needed to the IRFA for the proposed rule or the decision on whether an IRFA is required.

The Panel's findings and discussion will be based on the information available at the time the final Panel Report is drafted. The U.S. Environmental Protection Agency (EPA) will continue to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process.

Any options identified by the Panel 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 (CAA) and its amendments.

2. BACKGROUND AND DESCRIPTION OF RULEMAKING

2.1. Description of Rulemaking and its Scope

The EPA is planning a notice of proposed rulemaking for 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 EPA sees this federal plan as an interim measure to ensure that congressionally mandated emission standards under authority of section 111 of the CAA are implemented until states assume their role as the preferred implementers of the EGs.

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 carbon dioxide (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. The EPA is considering a range of options and approaches through which affected EGUs would meet a rate-based goal or a mass-based equivalent. The EPA intends to incorporate flexibility to the extent possible into the proposed federal plan so affected units can achieve these reductions in a cost-effective way.

2.2. Overview of Regulatory Options Likely to be Proposed

Through Agency review and stakeholder input, a broad range of program improvements have been suggested. From these, the EPA identified those which could only be addressed through regulation change, and further limited to those which would provide the most protective impact. The following is a listing of regulatory actions currently being considered and evaluated by EPA, and is not final at this time.

- Potential approaches to regulating affected EGUs:
 - Rate-based approach
 - EGUs are assigned an emission rate limit and must either emit below the required limit or acquire credits to offset emissions above the required rate
 - Mass-based approach
 - EGUs must hold allowances (in mass) to cover their mass emissions
- Potential mechanisms for trading, crediting and allocations
 - Affected EGUs will be able to acquire, trade, or sell credits (rate-based programs) or allowances (mass-based programs)
 - Considering whether trading should be allowed between any holder of credits or any EGU with allowances within states subject to the federal plan or any other entity holding credits/allowances
- Potential state role
 - Option to take direct responsibility for implementing certain parts of the plan (e.g., allocating allowances)
 - Implementation of complementary measures as part of states' general energy planning process (e.g., renewable standards, energy efficiency measures)

2.3. Related Federal Rules

On September 20, 2013, EPA proposed carbon pollution standards for new fossil fuel fired EGUs. On June 2, 2014, the EPA, proposed carbon pollution standards for modified and reconstructed fossil fuel fired EGUs, in addition to the Clean Power Plan EGs, to cut carbon pollution from existing fossil fuel fired EGUs. These existing EGUs are, or will be, potentially impacted by several other recently finalized EPA rules. On February 16, 2012, the EPA issued the mercury and air toxics standards (MATS) rule (77 FR 9304) to reduce emissions of toxic air pollutants from new and existing coal- and oil-fired EGUs. On May 19, 2014, the EPA issued a final rule under section 316(b) of the Clean Water Act (33 U.S.C. 1326(b)). This rule establishes new standards to reduce injury and death of fish and other aquatic life caused by cooling water intake structures at existing power plants and manufacturing facilities. On June 18, 2014 (79 FR 34830), the EPA promulgated the stream electric effluent limitation guidelines (SE ELG) rule to strengthen the controls on discharges from certain steam electric power plants. On April 17, 2015 (80 FR 21302), the EPA promulgated the coal combustion residuals (CCR) rule, which establishes technical requirements for CCR landfills and surface impoundments under subtitle D of the Resource Conservation and Recovery Act (RCRA), the nation's primary law for regulating solid waste.

3. APPLICABLE SMALL ENTITY DEFINITIONS

The definition of affected sources according to the proposed EGs is any boiler, integrated gasification combined cycle (IGCC), or combustion turbine (in either simple cycle or combined cycle configuration) that meets all of the following:

- Is capable of combusting at least 250 million Btu per hour;
- For utility boilers and integrated gasification combined cycle (IGCC) units: constructed for the purpose of supplying one-third or more of its potential electric output and more than 219,000 MWh net-electric output to a utility distribution system on an annual basis (from fossil fuel, either alone or in combination with any other fuel);
- For stationary combustion turbines: constructed for the purpose of supplying, and, on a 3-year rolling average basis: (1) supplies one-third or more of its potential electric output and more than 219,000 MWh net-electrical output to a utility distribution system, (2) combusts fossil fuel for more than 10.0 percent of the heat input, and (3) combusts over 90% natural gas on a heat input basis; and
- Commenced construction on or before January 8, 2014 (the date the proposed GHG standards of performance for new EGUs were published in the Federal Register).

Table 1. Examples of Potentially Regulated Entities^a

Category	NAICS Code	Examples of potentially regulated entities
Industry	221112	Fossil fuel electric power generating units
State/Local Government	221112 ^b	Fossil fuel electric power generating units owned by municipalities

^a Includes NAICS categories for source categories that own and operate electric power generating units (includes boilers and stationary combined cycle combustion turbines).

^b State or local government-owned and operated establishments are classified according to the activity in which they are engaged.

4. LIST OF SMALL ENTITY REPRESENTATIVES

The EPA consulted with Advocacy to develop the list of SERs in the table below. The EPA issued a press release inviting self-nominations by affected small entities to serve as potential SERs. The press release directed interested small entities to a web page where they could indicate their interest in serving as a SER. The EPA launched the website January 27, 2015 and accepted self-nominations until February 10, 2015. The EPA sent Advocacy a Formal Notification with the suggested list of potential SERs on March 26, 2015 and Advocacy responded on April 9, 2015.

Name	Affiliation
Rae Cronmiller Environmental Counsel	National Rural Electric Cooperative Association (NRECA)
Leonard F. Hopkins Vice-President of Fuel, Environmental, & Safety	Southern Illinois Power Cooperative
James R. Frauen Vice President of Technical Services and Development	Seminole Electric Cooperative, Inc. Florida
Donna Snyder Sr. Vice President and CFO	Hoosier Energy REC, Inc. Indiana
Joe Eutizi Engineering Manager	San Miguel Electric Cooperative, Inc. Texas
Dear Schramm-Satayathum Manager, Environmental Affairs	Wabash Valley Power Association Indiana
Michelle Freeark Director of Safety & Environmental Services	Arizona's Generation and Transmission Cooperatives
Brent A. Ross Manager, Carbon Programs	Associated Electric Cooperative, Inc. Missouri
Michael Knotts Director of Government Affairs	Tennessee Electric Cooperative Association
Rex Butler Manager, Environmental & Safety	Central Iowa Power Cooperative (CIPCO)
Robert C. Jagusch	Minnesota Municipal Utilities Association (MMUA)
Phillip "Doc" Mueller Senior VP – Government Affairs and Management Services	Illinois Municipal Utilities Association (IMUA) and the Illinois Municipal Electric Agency (IMEA)
Jeff Brediger Director of Utilities	Orrville Utilities Ohio
Scott Tomashefsky Regulatory Affairs Manager	Northern California Power Agency
Colin Hansen Executive Director	Kansas Municipal Utilities
Brandy Dulceak Olson Director, Legal & Regulatory Services	Muscatine Power & Water Iowa
Mason Baker General Counsel	Utah Associated Municipal Power Systems
Wayne Penrod Executive Manager Environmental Policy	Sunflower Electric Power Corporation Kansas
Scott Carver Sr. Vice President & Associate General Counsel	LS Power Development, LLC New Jersey
Megan Berge Baker Botts, LLP and Kent Fletcher, WFEC	Representing Western Farmers Electric Cooperative Oklahoma

Name	Affiliation
Nathan Franklin Government Relations	Dairyland Power Cooperative Wisconsin
Ruth Valle (and Thomas Burke) Environmental Compliance and Policy Manager	Golden Spread Electric Cooperative, Inc
Alex Hofmann Director, Energy & Environmental Services	American Public Power Association

5. SUMMARY OF PRE-PANEL 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.

The Panel conducted three meetings/teleconferences with SERs on May 8th, 14th and 19th 2015. To help SERs prepare for the meetings, EPA sent materials to each of the SERs via email on May 1st 2015. A list of the materials shared with SERs before and during the Panel outreach meeting is contained in Appendix A. EPA presented an overview of the SBREFA process, an explanation of the planned rulemaking, and technical background. EPA asked the SERs to provide written comments by May 28th 2015.

Comments and discussion during the pre-Panel and Panel outreach meetings and written comments submitted by the SERs are summarized in Section 6, and included in their entirety as Appendix B.

The table below summarizes the comments small entities provided during and following the April 2015 outreach meeting with the Panel.

Topic	Comment
Panel Process	<ul style="list-style-type: none"> • The timelines that the Agency conducted this panel in where too compressed • The EPA should provide a draft rule for which SERs to comment on; or additional information that would help SERs assess the potential impact of this rulemaking • Additional meetings with the SERs are needed, prior to proposal
Remaining Useful Life	<ul style="list-style-type: none"> • A mechanism to account for small entities remaining useful life as prescribed in the statute is needed; flexibility needs to be provided • The proposed federal plan must allow for small entities to operate through their remaining useful life

Topic	Comment
Overall Trading Programs and Federal Plan Structure	<ul style="list-style-type: none"> • The EPA must establish a framework that recognizes regulatory limitations on some generators and encourages generators to implement cost effective operational changes to reduce emissions directly from individual sources • The EPA should take into account that there are many owners of generation when developing the federal plan • Maximum flexibility should be allowed when establishing an emission standard • Provisions should be established to ensure that EGUs have broad access to emission reductions outside of the fence line • Credits and allowances should not expire and an entity should be able to collect credits and allowances; borrowing and banking of credits should be allowed throughout the compliance period and through the interim goal
Mass-based Trading	<ul style="list-style-type: none"> • The federal plan should adopt a mass-based trading program that calculates each state cap using a reasonable load growth factor • Flexibilities should be allowed for, including: allowing states to allocate allowances, credit mass reductions through agricultural sequestration, and do not allow allowances to be retired • The EPA should realize that larger utilities can control emission allowance markets and this places small businesses at an economic disadvantage
Rate-based Trading	<ul style="list-style-type: none"> • The EPA should establish a robust interstate emission reduction credit program • The EPA should create credits based on assumptions that reduced operations at a covered facility will bring about re dispatch of generation to lower carbon emitting generators • There should be full credit for early action and innovative efficiency programs • The EPA should allow for an interstate emission rate credit (ERC) program that would enable EGUs to connect with the broader energy system ensuring reasonable access to credits • The EPA should allow credit generation in the pre-2020 period • The EPA should allow for credit of demand side management (DSM) investments

Topic	Comment
Best System of Emission Reduction (BSER)/Energy Efficiency (EE) and Renewable Energy (RE)	<ul style="list-style-type: none"> • The EPA should reduce expectations for building block 4 implementation for small entities • Natural gas simple cycle (NGSC) units have an important role in supporting renewable energy should not be restricted in the federal plan • EPA should not mandate heat rate improvements for NGSC or natural gas combined cycle (NGCC) units in the federal plan • EPA's heat rate improvement assumptions for units 125MWs or smaller should reflect technical limitations and financial realities • The federal plan should cross reference existing programs for energy efficiency and renewable energy • Offsets for energy efficiency should be measured using deemed energy savings • Renewable resources should include hydro-electric, landfill methane, coalbed methane, waste heat, and biomass
Compliance Averaging	<ul style="list-style-type: none"> • Multi-year averaging for compliance over at least a five year period • Compliance period for small entities should be 2035
Record Keeping and Reporting	<ul style="list-style-type: none"> • Reduce reporting obligations for EGUs with a nameplate capacity of less than 100MW
Reliability	<ul style="list-style-type: none"> • The federal plan should address reliability concerns due to short compliance timelines • A reliability safety valve should be included
Treatment of New Units	<ul style="list-style-type: none"> • New units cannot be regulated under the federal plan
Subcategorization/ Applicability/Exemptions	<ul style="list-style-type: none"> • The proposed federal plan should exempt reciprocating internal combustion units (RICE) and simple cycle natural gas turbines • The EPA should create a subcategory for small public and cooperative utilities that are disproportionately affected and a lignite subcategory
Legal Authority	<ul style="list-style-type: none"> • The proposed federal plan violates the Rule Electrification Act and the 80-year federal mandate that the electric cooperative system provide reliable, low-cost electricity to rural America
Compliance Timelines	<ul style="list-style-type: none"> • A longer compliance period should be available for small businesses • Compliance timelines must be shifted and the interim compliance deadline should be eliminated
General Comments	<ul style="list-style-type: none"> • The EPA must ensure that the proposed federal plan does not disproportionately impact electric cooperative members • More clarity is needed around how an allowance program could work • A rate-based trading program should not be adopted

6. SUMMARY OF COMMENTS FROM SMALL ENTITY REPRESENTATIVES¹

6.1. Number and Types of Entities Affected

- EPA identified 223 potentially affected EGUs owned by 74 small entities included in EPA's 2030 projections. Fifty-nine of these potentially affected EGUs are projected to no longer be operating by 2030. Twenty-four small entities are projected to have all of their potentially affected EGUs cease operation in the base case by 2030.

6.2. Potential Reporting, Recordkeeping, and Compliance Requirements

6.2.1 Reduced reporting for SERs

- Simplifying reporting for units smaller than 100 MWs would assist in reducing the compliance costs of small business EGUs with no recognizable impact on the success of the overall program (NRECA, Western Farmers Coop, APPA, and Pre-panel).

6.2.2 Compliance Timelines

- Compliance dates should allow the regulated community more time for careful and responsible planning and to then allow the construction of the needed generation and transmission resources (GSEC).
- Extend the compliance period for small entities (SIPC) to 2035 (Western Farmers Coop and Pre-panel).
- A longer compliance period should be available to SERs since they typically operate smaller numbers of affected EGUs and will be disproportionately hampered by generation shift impacts under building blocks 2 and 3 and efficiency improvement requirements under building block 1 (Sunflower Electric and Pre-panel).
- Compliance timelines must be shifted, and the interim compliance deadline should be eliminated (SMECI, KMU and Pre-panel).
- EPA should extend the timeline for submittal of state plans (KMU).
- Delay or dilute interim goals (IMUA/IMEA and KMU).
- The timeliness are too compressed (Orrville Utilities and Pre-panel).

6.3. Related Federal Rules

6.3.1 New Source Review (NSR) is a Deterrent

- EPA must modify the proposal to ensure that NSR does not serve as a regulatory deterrent to effectuating the development of lower-emitting and more efficient power generation (Orrville Utilities).
- It is unclear how an allowance program could be drafted based on the recent historical emissions (Pre-panel). For instance, one NGCC facility ran at no more than 15% utilization over the course of the past several years, and should this facility need to run more often, this may require re-opening the CAAPP Permit and likely trigger NSR (WVPA).
- EPA should state clearly that any upgrades necessary to implement building block 1 for small entities will not trigger NSR (APPA).

¹ The following commenters made endorsements:

- WVPA is a member of the NRECA and endorses those comments.
- IMUA/IMEA and KMU endorse comments made by the APPA.
- KMU stands behind its more formal November Clean Power Plan comments in regards to the compliance timeline, interim goal and reliability safety valve.

6.4. Regulatory Flexibility Alternatives

6.4.1 Panel Process

- The panel should have had the opportunity to comment on regulatory options presented to it by EPA (NRECA).
- EPA should be more concerned with a correct rule for small businesses rather than an expedient rule (SIPC).
- EPA should share more about the federal plan.
 - EPA should provide a draft rule upon which to comment (SIPC and Pre-panel).
 - EPA has not provided clarity on whether a federal plan will be rate- or mass-based (Hoosier Energy).
 - Prior to the release of the federal plan, an additional meeting must be held by the SBAR Panel to receive comments on any draft federal plan (SMECI and Pre-panel).
 - EPA did not provide usable information or data in a sufficient form that would assist the SERs in assessing the potential impact of this rulemaking and a potential federal plan. Without the necessary information or options, reasonable regulatory alternatives cannot be identified, to the extent that any may exist (SMECI).
 - The presentation was not clear about the unit of measure used to calculate rate-based crediting (WVPA).
 - How will a federal plan normalize the certain impacts, especially for small utilities, of generation switch to zero- or low-emitting sources? (Sunflower Electric).

6.4.2 Remaining Useful Life

- A mechanism to account for small entities remaining useful life as prescribed in the statute is needed (Pre-panel).
- EPA needs to provide flexibility to small businesses and cooperatives as provided in Section 111(d) of the CAA, “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 source to which such standard applies.” (SMECI)
- The issues raised by North American Reliability Corporation (NERC), the Southwest Power Pool, Inc. (SPP) and Electric Reliability Council of Texas (ERCOT) assessments present a significant challenge to 111(d).
- The federal plan must allow for small entity EGUs to operate through their remaining useful lives (Hoosier Energy and APPA).
- EPA must deviate from the EGs to address remaining useful life (Western Farmers Coop).

6.4.3 Overall Trading Programs and Federal Plan Structure

- The federal plan framework should encourage generators to implement cost effective operational changes to reduce emissions directly from the individual source (LS Power and Pre-panel).
- The EPA should take into account that there are many owners of generation when developing the
- EPA should ensure access to emission reductions outside-the-fence in order to avoid shutting the unit down as the only compliance option, since heat rate improvement options may be limited (Orrville Utilities, APPA, and Pre-panel).
- Emissions limits must be achievable within the fence (SMECI).
- Any rule must give electric cooperatives the use of its generation assets, at a reasonable net generation price, over the course of time to pay for such assets and get full utilization from

these investments i.e., its remaining useful life (SIPC and Pre-panel). A compliance option based on an annual “minimum run time” that would prevent stranded costs (APPA).

- EPA should develop a minimum utilization as a backdrop against a mandated shutdown. This could be designed as a minimal level necessary for the unit to supply the electric purchase agreements and contracts previously entered into, as well as ensure reliability (SMECI).

6.4.4 Design of the Compliance System

- An entity (or an EGU) should have the option to choose between a rate- or mass-based compliance (NRECA, SMECI, Sunflower Electric, and APPA).
- Adopt a mass-based trading program that calculates each state cap using a reasonable load growth factor (Western Farmers Coop and Pre-panel).
- A mass-based trading approach is easier conceptually (AEPCO).
- A rate-based trading program should not be adopted (Pre-panel).
- The extreme variation in the proposed state emission guidelines presents an insurmountable hurdle to the successful implementation of a rate-based trading program (Western Farmers Coop).
- EPA has provided little or no information on how a rate-based market might be structured (Hoosier Energy).
- Base allocations on the state specific target for capacity factors of NGCC units (LS Power).
- NGSC units play an important role in supporting renewable energy, and their utilization should not be restricted in EPA’s federal plan (GSEC and Pre-panel).
- Heat rate improvements for NGSC or NGCC units should not be mandated in the federal plan.
- The federal plan should allow business to form for the purpose of creating and selling credits based on the full range of energy system opportunities (LS Power).
- Increases in demand could be met by new, lower or zero emitting generation, it will take time for that generation, and associated infrastructure, to be developed (Western Farmers Coop).
- Small entities should be afforded unique flexibilities (AEPCO)
 - Award credit for generation in the pre-2020 (Western Farmers Coop and Pre-panel).
 - Award credit for “deemed savings” of demand side management (DSM) investments (Western Farmers Coop and Pre-panel).
 - Larger utilities can control emission allowance markets (state or regional), and this places small businesses at an economic disadvantage (SIPC and Pre-panel).

6.4.5 Compliance Averaging

- Maximum flexibility should be allowed when establishing emission standards (Pre-panel).
- While the proposed CPP appears to suggest 3-year compliance averaging, it is unclear how it would function. For small entities, longer averaging times would give them more flexibility for compliance. We suggest 5-year compliance averaging at a minimum for small entities (NRECA, APPA, and Pre-panel).
- Allow small entities to average over the entire interim period (Western Farmers Coop).
 - Baseline emissions
 - Multi-year averaging for determining unit baselines would be especially helpful for a small entity that has just one or several units (SMECI, NRECA and AEPCO). Flexibility in setting a baseline emission should be provided (IMUA/IMEA).

- Baseline for a unit's CO₂ emissions should not be based on a single operational year; in the CPP, this was 2012. Rather, it should be based on an average of the three highest emission years for the past five years (SMECI).
- CO₂ emission impacts due to recently installed environmental controls should be excluded from the emissions limitation burdens (SMECI).

6.4.6 Allocations and Credit Issuance/Early Action

- Allocations
 - Allow states to allocate allowances (Western Farmers Coop).
- Emission Rate Credits
 - The federal plan should allow borrowing and banking of credits throughout the compliance period and through the interim period (NRECA, LS Power, and Pre-panel).
 - Any allowances or credits should only be in addition to those necessary for overall utility industry compliance with state goals (NRECA).
 - Credit should be given to and retained by utilities for coal plant retirements (Hoosier Energy).
 - Credit mass reductions through agricultural sequestration (Western Farmers Coop).
 - Do not allow allowances to be retired or expire (Western Farmers Coop, LS Power, and Pre-panel), and a utility should be able to collect credits/allowances (SMECI).
 - EPA should establish a robust interstate ERC program. Generators should be incentivized to make operational adjustments that reduce generation (LS Power, APPA, and Pre-panel).
 - Credits should incentivize the generation shift to lower carbon emitting generators (LS Power and Pre-panel).
 - Full credit should be granted for early action and innovative efficiency programs (APPA and Pre-panel).
 - The EPA should allow for an interstate ERC program that would enable EGUs to connect with the broader energy system ensuring reasonable access to credits (APPA and Pre-panel).

6.4.7 Renewable Energy and Energy Efficiency

- The federal plan should cross reference existing programs for energy efficiency and renewable energy (AEPCO and Pre-panel).
- Offsets for energy efficiency should be measured using deemed energy savings (Hoosier Energy and Pre-panel).
- The federal plan should broaden renewable resources to include hydro-electric, landfill methane, coalbed methane, waste heat, and biomass (Hoosier Energy and Pre-panel).

6.4.8 Reliability

- The federal plan should address reliability concerns due to the short compliance timeline (GSEC).
- The federal plan must be reviewed by Federal Energy Regulatory Commission (FERC) and NERC value reliable and affordable power and include a "safety valve" (NRECA, SIPC, SMECI, IMUA/IMEA, APPA, and Pre-panel).
- EPA should consider a solution set forth in the comments of the Arizona Utilities Group (AUG), which has recommended a solution that reduces the costs of compliance while lessening the reliability problems and maintaining the bulk of the carbon reductions under the Proposed Rule (AEPCO).

6.4.9 Treatment of New Units

- New units cannot be regulated under the federal plan (Western Farmers Coop, APPA, and Pre-panel).
- A small business entity should have the option of including new units in its compliance plan (NERCA).

6.4.10 Subcategorization/Applicability/Exemptions

- Subcategorization
 - EPA should create a subcategory for small public and cooperative utilities that are disproportionately affected by the Proposed Rule (AEPCO, WVPA, Orrville Utilities, KMU and Pre-panel).
 - The federal plan should recognize small entities' unique characteristics, special challenges, and other considerations when considering Building Block 4 - Energy Efficiency requirements (NERCA).
 - EPA's heat rate improvement assumptions for units 125MWs or smaller should reflect technical limitations and financial realities (NERCA and Pre-panel).
 - EPA should create a subcategory limited to small municipal or cooperative generators with a cutoff point tied to sales of less than 219,000MWh per year to the grid (Orrville Utilities).
 - Expectations should be reduced for building block 4 implementation for small entities, most are not vertically integrated and therefore cannot compel or even incent consumers to undertake such projects (Sunflower Electric and Pre-panel).
 - The federal plan should include a lignite subcategory (SMECI and Pre-panel).
- Applicability
 - Exclude RICE and NGSC units (IMUA/IMEA, KMU, APPA, and Pre-panel).
 - Any federal plan must provide appropriate deference and variance to those targeted EGUs which commenced construction during the Implementation Powerplant and Industrial Fuel Use Act of 1978 (SMECI).
 - Exclude units that are already 6% more efficient than the state fleet average (IMUA/IMEA).
 - EPA should take steps to make certain that the federal plan does not inadvertently penalize load-serving entities (LSEs) that do not own or operate EGUs (KMU).
 - Small entities unable to purchase credits or benefit from reductions achieved through building blocks 1, 2, 3, and 4; these units should be exempt (APPA).

6.4.11 Legal Authority

- The proposed CPP violates the Rural Electrification Act (REA) and the 80-year federal mandate that the electric cooperative system provide reliable, low-cost electricity to rural America (AEPCO and Pre-panel).

6.4.12 General Comments

- EPA should assess how public utility that qualify as small businesses fit into a regulatory scheme that contemplates regulation by both state utility commissions, state environmental agencies, multi-jurisdictional and regional circumstances (Orrville Utilities and APPA).
- Maintaining coal fired units is very capital intensive. Small entities depend on the electric program through the Rural Utilities Service for loans to upgrade pollution controls and maintain the fleet (AEPCO).

7. PANEL FINDINGS AND DISCUSSIONS

7.1. Number and Types of Entities Affected

For a complete description of the small entities to which the proposed rule may apply, see Section 3 of this document.

7.2. Potential Reporting, Recordkeeping, and 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.

7.2.1 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.

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 requirements² 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

² Note that the Panel is not suggesting an exemption from any pre-existing GHG emission reporting requirements.

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.

7.2.2 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.

7.3. Related Federal Rules

See Section 2.3 of this document for 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.

7.4. Regulatory Flexibility Alternatives

7.4.1 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.

7.4.2 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.” AEPSCO 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.

7.4.3 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.

7.4.3.1 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.

7.4.3.2 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.

7.4.3.3 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.

7.4.4 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.

7.4.5 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, and whether there is a need for regulatory flexibility for reliability critical units beyond the flexibilities already built into the design of the federal plan.

7.4.6 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. In EPA's view, this makes it less likely that there is a 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.

APPENDIX A

List of Materials shared with Panel and Small Entity Representatives

[insert file: draft Appendix A.PDF]

APPENDIX B

Written Comments Submitted by Small Entity Representatives

[insert file: draft Appendix B reduced size.PDF]