



February 13, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (Docket ID EPA-HQ-OAR-2021-0317)

Dear Administrator Regan:

On December 6, 2022, the Environmental Protection Agency (EPA) published a supplemental proposed rule titled “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the supplemental proposed rule.

Advocacy believes EPA has further opportunities to reconsider the likely burden on small businesses. As Advocacy said in our comment letter on the associated proposed rule, this rule will have a significant and disproportionate effect on a substantial number of small entities. EPA should consider additional flexibilities that can minimize these impacts while accomplishing the goal of reducing methane emissions from oil and natural gas production. Based on feedback from small oil and gas producers, Advocacy recommends changes to the proposal related to monitoring, pneumatics controllers and pumps, and the super-emitter response program.

¹ 87 Fed. Reg. 74702 (December 6, 2022).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

B. The Proposed Rule

On November 15, 2021, EPA published a proposed rule that would revise and update the New Source Performance Standards (NSPS) for Oil and Gas production under Clean Air Act (CAA) section 111(b) and Emissions Guidelines (EG) for existing Oil and Natural Gas production sources under CAA section 111(d). This proposed rule would directly regulate methane emissions from new and modified sources (NSPS) and establish standards for state regulation of methane emissions from existing sources (EG). Existing sources include some sources subject to EPA regulation under the 2012 NSPS (Subpart OOOO) and the 2016 NSPS (Subpart OOOOa) for this industry and some sources never before subject to EPA regulations. EPA convened a SBREFA panel for this rule in July 2021 and published an Initial Regulatory Flexibility Analysis with the proposed rule.

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 Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

On January 31, 2022, Advocacy submitted the attached public comments on the proposed rule.⁷ Advocacy commented on EPA’s compliance with the RFA, the disproportionate impact the proposed rule would have on small businesses and suggested additional flexibilities that EPA should consider in this supplemental proposed rule.

On December 6, 2022, EPA published a supplemental proposed rule to provide missing details in the proposed rule and propose further restrictions on methane emissions. This supplemental proposal expanded on the concept of third-party monitoring for “super-emitter” events. It also includes proposed implementing regulations and the consideration of “Remaining Useful Life and Other Factors” (RULOF) in the state plans required under section 111(d).

II. Advocacy’s Small Business Concerns

Advocacy continues to have significant concerns with the impact this rule would have on small businesses in the oil and gas production sector. We recognize the work that EPA did between the proposed rule and supplemental proposal to improve its compliance with the RFA. However, Advocacy re-states its concerns in sections III and IV of its January 31, 2022, comment letter.

A. EPA’s proposals put small businesses at a significant disadvantage.

Advocacy reiterates the concern raised in our previous letter: EPA’s analytical support for this rulemaking inherently disadvantages small businesses. Calculations of cost-effectiveness rely on averages of costs across the whole industry, reflecting economies of scale for equipment and human resources that are not available to many small businesses. Compliance timelines assume priority access to equipment and materials that are not available to small businesses. In addition, annualization over the full lifetime of equipment assumes longer-term financing that is often not available to small businesses.

As we said in our comment letter on the proposed rule, Advocacy recommends that EPA consider and present explicitly the impacts of its rule on all small businesses, including those that are operating existing sites. EPA should consider how the disadvantages described above affect the cost-effectiveness of its proposal. This analysis should consider a range of different size categories.

B. EPA should consider additional flexibilities for small businesses.

1. EPA should consider a compliance option that requires more frequent Audio, Visual, and Olfactory Inspections in lieu of Optical Gas Imaging Inspections.

EPA’s supplemental proposal eliminates the requirement that Optical Gas Imaging (OGI) contractors comply with the proposed Appendix K. While that does reduce costs of OGI overall, small entities remain concerned about the cost of this requirement and their ability to procure the services of OGI contractors, particularly within the timeframes that EPA’s proposal would require. Although EPA’s analysis is that OGI is cheaper than Audio, Visual, and Olfactory (AVO) inspection, the small businesses with whom Advocacy has consulted insist that AVO inspections are generally preferred. They can be done more frequently and without specialized

⁷ Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0924.

equipment, more people can be trained to perform them properly, and they are well-suited to detect the leaks most likely to occur at small sites.

One set of small entities suggested that their staff is present at their well-sites significantly more frequently than the frequency of AVO inspections that would be required by the supplemental proposal. EPA, however, appeared to develop this proposal from the assumption that small sites are visited infrequently. While this may be true for many sites, it serves to highlight the challenge of one-size-fits-all rulemakings across an industry that has wildly different characteristics across regions of the United States. EPA should consider a schedule of compliance alternatives based on more frequent AVO inspections and less frequent OGI or, in some cases, none.

EPA should also consider whether there can be a further subcategorization of well sites with major equipment such that some sites might have bimonthly AVO and semiannual OGI. Advocacy also suggests that EPA clarify that sites can change between subcategories, and thus change monitoring requirements, as equipment is installed and removed from the site.

2. EPA should allow existing facilities to maintain natural gas pneumatic controllers and pumps where electric service is not readily available.

Advocacy's position on EPA's proposal to require controllers and pumps that require electricity to operate is unchanged from the proposed rule. EPA relies on work by Carbon Limits and does not give due consideration to the concerns of small entities raised to Advocacy and in the public comments that these requirements are technically infeasible in some parts of the country. This is particularly problematic because the Carbon Limits 2021 update to its 2016 report relies on interviews with three suppliers and two unidentified oil and gas producers.⁸ Suppliers are not unbiased providers of information about the products and services they sell, especially when they are not required to guarantee a standard of performance. The oil and gas producers who have successfully dispatched electronic pneumatic devices at their new and existing sites may be accurately representing their situation, but two companies cannot represent the whole of diversity in the industry, let alone the range of sizes of companies in the industry. Neither EPA nor Carbon Limits address the concern that EPA is mandating the replacement of approximately 1.7 million controllers in the transition period.

Advocacy reiterates its previous comment:

Because controllers are crucial to oil and natural gas production operations, EPA should provide flexibilities in this requirement for those circumstances in which small entities cannot obtain and/or retrofit zero-emitting controllers. EPA should phase in any requirement for existing sources. After the phase-in period, EPA should allow states to

⁸ See Carbon Limits, *Zero emission technologies for pneumatic controllers in the USA: Updated applicability and cost effectiveness*, November 2021, available at Regulations.gov Document ID EPA-HQ-OAR-2021-0317-1530.

grant extensions to small entities that can show a good faith effort to procure non-emitting controllers at a reasonable price.

In this supplemental proposal, EPA includes a way for state plans to provide some relief for existing sources, through consideration of RULOF in setting emissions standards less stringent than EPA's emission guidelines. EPA provides an example of a state using the RULOF provisions for pneumatic controllers.⁹ However, this flexibility is limited. It requires the state regulatory authority to make findings for a specific facility or class of facilities and identify the facilities in the state plan submitted to EPA. This is much earlier in the process than many small businesses will be ready to engage with their state regulators. It also does not give the state and small businesses flexibility to phase in requirements based on market conditions. EPA should include these flexibilities directly in the emission guidelines.

3. EPA must design the proposed Super-Emitter Response Program to respect small businesses operating in good faith.

Small businesses have raised significant concerns about the proposed Super-Emitter Response Program. These operators want to ensure that the program's emphasis is on the response to these third-party reports, sent in good faith and to which they can respond in good faith, not on enforcement for methane emissions that are otherwise permitted. Further, these small oil and gas producers are concerned that third-party reporters could be motivated to impose bureaucratic costs unrelated to emissions or to their permit requirements to permanently reduce fossil fuel extraction in this country.

To address these concerns, EPA should design this program to make clear that EPA is not delegating enforcement authority and that the role of the third-party notifier is limited to the narrow specifications of this program. Towards that goal, Advocacy recommends the following specific provisions.

- Make a clear prohibition on trespassing on oil and gas production sites, with withdrawal of approval to third-party notifiers for repeated violations. Operators need assurances that third parties will not interpret their participation in this limited program as an invitation to engage in further investigation or conduct their own inspections.
- Require third-party notifiers to submit reports of super-emitter events to the relevant regulatory authority, not directly to the operator. There is no uniform reliable means to determine ownership of a site remotely, and operators should not be required to engage in costly regulatory compliance based on a third-party's self-certification.
- Emphasize that reports of super-emitter events are not evidence of a violation of the Clean Air Act permit or the regulations.
- Provide a safe harbor against enforcement for methane emissions reported and resolved in response to a report of a super-emitter event.

⁹ 87 Fed. Reg. at 74,820.

- Withdraw approval after three erroneous reports, whether to the same operator or not.

III. Conclusion

EPA's proposed NSPS and EG for methane emissions from the oil and natural gas sector will have significant and disproportionate impacts on small businesses. EPA should provide additional flexibilities for small businesses to reduce the likely burden. Based on feedback from small oil and gas producers, Advocacy recommends changes to the proposal related to monitoring, pneumatics controllers and pumps, and the super-emitter response program.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker at (202) 205-6966 or by email at david.rostker@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Dave Rostker
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Richard L. Revesz Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Attachment



January 31, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

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Dear Administrator Regan:

On November 15, 2021, the Environmental Protection Agency (EPA) published a proposed rule titled “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review.”¹ The Office of Advocacy (Advocacy) is concerned that EPA has not fully considered the impact that this proposed rule will have on small businesses. In the supplemental proposal EPA intends to issue for this rulemaking, it should ensure that it has analyzed the costs of every provision of its proposal, recognize that small entities often face disproportionate costs for similar regulatory requirements, and consider a broader range of regulatory flexibilities to reduce the cost to small businesses.

I. Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily

¹ 86 Fed. Reg. 63110 (November 15, 2021).

reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

B. The Proposed Rule

On November 15, 2021, EPA published a proposed rule that would revise and update the New Source Performance Standards (NSPS) for Oil and Gas production under Clean Air Act (CAA) section 111(b) and Emissions Guidelines (EG) for existing Oil and Natural Gas production sources under CAA section 111(d). This proposed rule would directly regulate methane emissions from new and modified sources (NSPS) and establish standards for state regulation of methane emissions from existing sources (EG). Existing sources includes some sources subject to EPA regulation under the 2012 NSPS (Subpart OOOO) and the 2016 NSPS (Subpart OOOOa) for this industry and some sources never before subject to EPA regulations. EPA also proposed a new Appendix K, which establishes requirements for Optical Gas Imaging (OGI) to detect methane leaks. Notably, the *Federal Register* notice of proposed rulemaking included only a preamble describing a proposed rule but did not include rule text for either the NSPS or the EG. EPA also did not prepare submissions to OMB under the Paperwork Reduction Act for the NSPS, EG or Appendix K.

Under section 111(b), EPA establishes performance standards based on the "best system of emission reduction . . . adequately demonstrated" (BSER), considering, among other factors, cost. The BSER can be a design, a use of a piece of equipment, or a work practice. In most cases,

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 Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ 16 U.S.C. § 528 et seq.

EPA will not require the BSER itself but rather establish a numerical standard based on the BSER. However, EPA may establish a work practice or operational standard where it is not feasible to measure emissions, such as in the case of fugitive emissions in this rulemaking.

As part of its justification for identification of a particular BSER, EPA calculates its cost-effectiveness. EPA compares this cost-effectiveness against past EPA rulemakings to demonstrate that a BSER is reasonable. EPA also considers estimated annual costs compared to the industry's estimated annual capital expenditures and estimated annual revenues. The details of these calculations are in the multi-part Technical Support Document (TSD) and supporting spreadsheets.

C. RFA Compliance

Under 5 U.S.C. 603, EPA is required to prepare an Initial Regulatory Flexibility Analysis (IRFA) when publishing a proposed rule. The IRFA must describe the direct impact of the proposed rule on small entities, i.e., those impacts on small entities that are subject to the requirements of the rule.⁷ This includes “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.”⁸ “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.”⁹

In addition, as a “covered agency” under 5 U.S.C. 609, EPA is required to convene a SBREFA panel (or “SBAR panel”) of Advocacy, the Office of Information and Regulatory Affairs (OIRA), and EPA to consult with small entities on the potential impacts of the proposed rule, including projected reporting, recordkeeping and other compliance requirements and regulatory alternatives. The panel writes a report for the EPA Administrator summarizing the consultation and making recommendations for the proposed rule.

In advance of the proposed rule, EPA convened a SBREFA panel to consult with small entity representatives (SERs). EPA limited the scope of the panel to the NSPS, since the EG regulates states rather than sources and thus the impacts of the EG would not be within the scope of an IRFA. Nonetheless, many of the small entities consulted also owned and/or operated existing sources. EPA also did not include proposed Appendix K in the scope of the panel. EPA presented to the SERs some preliminary information about some of the expected costs of BSER alternatives but did not provide cost effectiveness information. As a result, the SERs did not have an opportunity to provide feedback on the technical details and assumption underlying EPA's

⁷ See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

⁸ 5 U.S.C. §603(b)(4).

⁹ §603(c).

initial cost effectiveness calculations. The panel concluded its deliberations and issued its recommendations to EPA in September 2021,¹⁰ *after* EPA had already submitted the proposed rule to the Office of Management and Budget on September 13, 2021.¹¹

II. EPA's compliance with the Regulatory Flexibility Act is insufficient.

The RFA requires EPA to consider the potential impact of its proposed rules on small entities. However, EPA has not considered the economic impact of proposed Appendix K, nor does EPA include any consideration of the burdens due to the proposed NSPS. The IRFA accompanying this rule lacks a sufficient discussion of regulatory alternatives that would minimize the impacts on small businesses. In the supplemental proposal that is to follow this rule, EPA needs to reevaluate the total economic impacts on small entities and prepare a new IRFA.

A. EPA did not consider the economic impact of proposed Appendix K.

As part of this notice of proposed rulemaking, EPA proposes a new Appendix K, which would establish standards for the use of OGI to comply with leak detection monitoring requirements across a wide range of industrial sectors. These new standards would impose new training and quarterly audit requirement for new and experienced OGI operators and new recordkeeping requirements on facilities and camera operators.

In discussions with Advocacy, small businesses have expressed significant concerns about the extra burden Appendix K would place on their operations. Training requirements for new operators would significantly reduce the capacity of the industry, dedicating a senior OGI operator for 100 site surveys for each new operator. Senior OGI operators would be required to participate in in-person classroom training annually. Quarterly audit requirements would also take senior OGI operators out of the field. These requirements do not seem to mirror existing business practice. In fact, one small businessman states that these requirements would be impossible for a sole proprietor, since they would require him to hire a competitor (if one is available) to conduct his quarterly audit. Appendix K also requires perfection in training and audits, an unreasonably high bar for any technology, let alone one based on human perceptions. Appendix K could significantly raise the direct costs of OGI operations and reduce the availability of OGI operators.

Despite this significant change to the requirements for OGI, EPA does not address the costs of Appendix K, either in the effect on OGI contractors or on BSER calculations. Appendix K was not within the scope of the SBREFA panel and is not referenced in the IRFA or anywhere else in the RIA. EPA has not submitted an information collection request detailing the burdens of the proposed Appendix K to the OMB under the Paperwork Reduction Act. Updates to the costs of

¹⁰ *Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Emission Standards for New, Reconstructed, and Modified Sources in the Oil and Natural Gas Sector*, September 2021 (Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0074).

¹¹ See <https://www.reginfo.gov/public/do/eoDetails?rrid=195811> (last visited January 25, 2022).

OGI described in the TSD were limited to updating labor costs and database costs from previous NSPS rulemakings.¹² One significant indication that the OGI costs used in this rulemaking do not reflect the proposed Appendix K is in the comparison of OGI to the existing Method 21, an accepted but more laborious method of leak detection. EPA projects a monitoring rate of 750 components per hour.¹³ However, EPA also proposes in Appendix K that “a component should be imaged from at least two different angles, and the operator must dwell on each angle for a minimum of 5 seconds before changing the angle, distance, or focus and dwelling again.”¹⁴ This would be a maximum of 360 components an hour, excluding the need for breaks, which would also be mandated by the proposed Appendix K. Based solely on this factor, the cost of OGI would at least double over current practice.

EPA’s compliance with the RFA is incomplete because it has not considered the impact of the proposed Appendix K on small entities, either through the direct impact on OGI operators and contracts or through the additional costs adopting Appendix K would impose on oil and natural gas facilities subject to the proposed NSPS.

B. The IRFA does not describe burdens due to the proposed NSPS.

EPA includes the IRFA for this proposed rule as section 4.3 of the Regulatory Impact Analysis.¹⁵ EPA’s description of the projected reporting, recordkeeping, and other compliance requirements describes generally the requirements of the proposed rule (excluding Appendix K, as discussed above). However, in the quantification of the burden, EPA provides only the burden of Subpart OOOOa, not the proposed new NSPS. In addition, EPA provides an average only across the next three years, which is not an accurate description of the burden of the requirement for purposes of an IRFA, particularly when a requirement is phased in.

C. The IRFA does not satisfy the RFA with respect to significant regulatory alternatives.

As has been recent practice, EPA incorporates the SBREFA panel report into the IRFA to satisfy the requirement that the IRFA “contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize

¹² See Background Technical Support Document for the Proposed New Source Performance Standards (NSPS) and Emissions Guidelines (EG), October 2021 (Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0166) (hereinafter, “TSD”), pp. 12-17.

¹³ *Id.*, Table 10-13.

¹⁴ Proposed Appendix K, (Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0075), paragraph 9.4

¹⁵ Regulatory Impact Analysis for the Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, October 2021 (Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0173) (hereinafter “RIA”).

any significant economic impact of the proposed rule on small entities.”¹⁶ However, because the SBREFA panel report does not reflect the issued proposed rule, Advocacy believes that repeating the panel recommendations without change is insufficient to satisfy this requirement.

As EPA develops a proposed rule and its supporting materials, it is required to identify significant regulatory alternatives for the IRFA. This obligation does not end with the conclusion of the SBREFA panel, particularly when there are significant changes during and after the SBREFA panel consultations. For example, for this rule, EPA developed new regulatory alternatives for monitoring requirements, liquids unloading, and pneumatic controllers that became EPA’s preferred alternative. These preferred alternatives and regulatory alternatives that could reduce the impact on small entities are not reflected in the IRFA. EPA does discuss some regulatory alternatives in the *Federal Register* notice, but not in the IRFA and not in response to the panel’s recommendations.

The IRFA is also insufficient because, as discussed above, it excludes discussion of the burdens and alternatives due to proposed Appendix K. The panel’s report cannot stand in for consideration of alternatives where the panel had no information from EPA, no input from small entities, and no deliberations on key parts of the proposal.

Advocacy also believes that it is insufficient to adopt *verbatim* the alternatives section of the panel’s report as the description of alternatives required in the IRFA. The SBREFA panel makes a series of recommendations *to* EPA for EPA to consider incorporating in the proposed rule. A re-statement of recommendations, particularly where panel members disagree, is not the same as an analysis and reasoned consideration of these alternatives.

EPA is correct to incorporate new information into its proposal and analysis as it is developed, and Advocacy does not expect a proposed rule or analysis to be in its final form during the conduct of a SBREFA panel. However, such a change should also be accompanied by changes in the IRFA, to reflect the availability and consideration of different regulatory alternatives. EPA must issue a revised IRFA to include alternatives reflective of the proposed rule and supplemental proposed rule “which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”

D. EPA must prepare a revised IRFA to reflect the entirety of the proposed rule and supplemental proposal.

EPA has committed to publishing a supplemental proposal for this rulemaking because it recognizes that the record to support this rule is incomplete. EPA has issued a proposed rule without providing rule text for the proposed NSPS OOOOb and proposed EG OOOOc. Nor did EPA prepare an information collection request for the requirements of the proposed NSPS, EG or Appendix K, as would be required under 44 U.S.C. 3507(d)(1) for a proposed rule. In

¹⁶ 5 U.S.C. §603(c).

addition, as discussed above, Advocacy believes that there are significant gaps in EPA's RFA compliance.

However, EPA also intends to include additional sources for regulation in the supplemental proposal. Advocacy supports the use of supplemental proposed rules to remedy gaps in the record, but in this case, EPA's supplemental proposal will serve more as a proposed rule than a simple supplemental. As such, Advocacy recommends that, in addition to a revised RIA, EPA prepare a revised IRFA to reflect the entirety of the eventual proposed NSPS OOOOb. Advocacy also recommends that EPA explicitly re-open all elements of the proposed NSPS OOOOb and EG OOOOc for public comment with the supplemental proposal.

III. EPA's proposed rule puts small businesses at a significant disadvantage.

A. BSER calculations disadvantage small businesses.

For most sources in the TSD, EPA evaluates whether a design, a use of a piece of equipment, or a work practice is the BSER by calculating a cost-effectiveness, i.e., average annual cost of compliance against the average annual reduction in methane and VOCs. The use of a single average annual number to represent entire sectors of the industry puts small businesses at a significant disadvantage compared to large businesses.

First, the use of industry averages put small businesses at a disadvantage. Generally, for similar sets of regulatory requirements, small businesses face a greater cost of compliance. For example, when a new regulation requires additional human resources, identifying, hiring, and retaining employees becomes a major concern for small entities, especially in the current tight labor environment. According to the US Census Small Business Pulse Survey, the number one concern of surveyed small businesses since March of 2021 has been to identify and hire new employees.¹⁷

In addition, small businesses frequently lack the benefits packages larger businesses have the size and scale to offer which may lead to higher search costs. For example, while 92 percent of businesses with more than 500 employees offer retirement plans, 73 percent of businesses with 50 to 99 employees, and 53 percent of businesses with less than 50 employees offer retirement plans.¹⁸ Paid leave, quality of healthcare, and other benefits packages are also more generous at larger businesses, leaving smaller businesses at a disadvantage when hiring compliance staff.

Similarly, small businesses have expressed concern that when new regulations require the purchase and installation of new equipment, they are last in line with suppliers. They also believe

¹⁷ U.S. Census Bureau, Small Business Pulse Survey, [Small Business Pulse Survey Data \(census.gov\)](https://www.census.gov/data/tables/2022/smbbiz/pulse-survey.html) (last visited Jan. 26, 2022).

¹⁸ Dep't of Labor, Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2021 [Employee Benefits in the United States, March 2021 \(bls.gov\)](https://www.bls.gov/news.release/ncsa3.pdf)

that they pay more per unit because they are generally purchasing fewer identical items and require more customization per installation.

Second, annual averaging puts small businesses at a disadvantage. EPA's cost effectiveness calculations annualize costs over the full lifetime of the installed equipment. For example, for electronic controller systems powered by solar panels, EPA annualizes over the full anticipated lifetime of the equipment of 15 years. However, small businesses generally cannot finance capital equipment over these time horizons. EPA further distorts the financial outlook for small businesses by presenting cost savings from regulatory requirements as a simple subtraction from these annualized costs, giving the impression that the financial burden on small businesses is more reasonable.

Advocacy believes that these two factors have led EPA to overestimate the cost-effectiveness of the measures proposed as BSER and underestimate the significant impact this rule will have on small businesses. These impacts extend beyond the impacts on small businesses EPA considered under the RFA. The impacts are likely more severe for small businesses that own and operate existing sources not previously subject to EPA regulation, particularly for those requirements that will require retrofitting equipment.

B. The analysis of small business impacts is not a complete picture of the harm to small businesses.

EPA's analysis shows that there will be a significant economic impact on a substantial number of small entities just due to NSPS OOOOa and the proposed NSPS OOOOb. However, the analysis lacks transparency to uncover how it impacts various sizes of entities. In the RIA, EPA breaks down both processing and production entities into "small" and "not small" categories.¹⁹ However, previous Advocacy research has highlighted the need to have analyses examine whether smaller, more vulnerable entities are disproportionately impacted by a regulation.²⁰ In the affected NAICS codes for this rule, there is a wide range of businesses both in terms of range of revenue and range of employees. For example, while the size standard for the crude petroleum extraction industry (NAICS 211120) is 1,250 employees, 70 percent of firms in this industry have 5 employees or fewer. Those with 5 employees or fewer have an average revenue of \$769,000 in an industry with extremely high fixed costs. Due to this vulnerability, Advocacy

¹⁹ RIA, Table 4-14, "Summary Statistics for Revenues of Potentially Affected Entities."

²⁰ See Michael J. McManus, Office of Advocacy, U.S. Small Business Admin., *Examining Small Business Impacts in the Regulator Development Process: The Drawbacks of Averaging* (2018). "Costs fall on different sized business differently for every regulatory scenario. The smallest businesses may experience the smallest regulatory costs, yet experience the largest burden due to their size. Depending on the regulation, larger small businesses may be the ones faced with the highest burden, with the smallest businesses spared. Without performing regulatory analysis on finer-grained size groups, these consequences are hidden from view."

recommends comparing the cost of the regulation not by the average of an entire NAICS code, but rather by different size categories within each NAICS code.²¹

Small businesses also face a greater burden proportionally to comply with reporting and recordkeeping costs. For example, EPA estimates the annual reporting and recordkeeping burden of OOOOa compliance to be 87 hours per respondent.²² Using the above example of the crude petroleum extraction industry, for a firm of five employees, this would mean that no less than 0.84 percent of the business's total hours in a year would be devoted to regulatory compliance for just this component. However, for a business with 500 employees, they would presumably have 1,040,000 labor hours per year (500 employees working 2,080 hours a year) at their disposal, meaning the percent of total hours they would have to use to comply with this regulation would be 0.008 percent. Therefore, smaller businesses would have to spend a greater percentage of their time and labor costs complying than larger businesses.

Advocacy also recommends that EPA present an analysis of the economic impacts this rule would have on small businesses that own or operate existing sources and would be subject to state regulation under the EG OOOOc. These small businesses are at an even greater disadvantage, since they must meet requirements similar to new businesses but with greater sunk costs. Sources that are not subject to OOOO and OOOOa generally have much lower production than new sources, so there would be less revenue per unit across which to spread regulatory costs. EPA should consider the risk that these businesses will leave the industry and whether there is a risk that wells will be abandoned as a result.

IV. EPA should consider additional flexibilities for small businesses

EPA's proposal for new sources and existing sources is expansive. As discussed above, it will have significant direct and indirect economic effects on almost every small business in this industry, and Advocacy believes that these economic impacts have been underestimated. EPA should therefore consider a broader range of flexibilities for small businesses.

A. EPA should propose additional thresholds for reduced monitoring frequency.

As discussed above, Advocacy believes that EPA's proposal for fugitive emissions monitoring is flawed. EPA based its BSER calculations on industry cost estimates for OGI that did not account for the burden of Appendix K. The small entities with whom the SBREFA panel consulted also expressed concern that EPA's cost estimates for OGI were overly optimistic. These small entities sought assurances that they would be able to continue using Method 21 for monitoring, even as EPA insisted that Method 21 was significantly more expensive.

²¹ See SBA Office of Advocacy, *How to Comply with the Regulatory Flexibility Act*, Updated August 2017 (available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>.) pp. 36.

²² RIA, pp. 4-54

Because EPA's proposal and co-proposal for monitoring are highly dependent on an overly optimistic projection of the cost of OGI, EPA should reconsider its monitoring requirements for sources with low total site-level baseline methane emissions. EPA should consider requiring only annual monitoring for the small sources.

B. EPA should rewrite Appendix K to reduce the burden on small OGI operators.

As discussed above, EPA has not considered the significant burden Appendix K will have on small OGI operators. The current draft of Appendix K would practically preclude sole proprietors or businesses with a small number of employees because of the numerous requirements that require two people to do the job of one during initial training and quarterly auditing. Proposed operational requirements will significantly increase the time and burden of OGI site visits. Annual in-classroom refresher classes which are focused on reviewing basic operational materials are an unnecessary expense for experienced operators. Further, the requirement for perfection in leak detection to complete training and during the quarterly audit will significantly reduce the availability of OGI operators.

EPA's consultation on Appendix K appear to have been limited to representatives from the American Petroleum Institute, which generally represents large businesses with a range of sources and facilities and significant financial resources, and camera manufacturers, who would not bear the costs of the proposed Appendix K.²³ Small businesses were not consulted.

Advocacy recommends that EPA reexamine the requirements of Appendix K after a direct consultation with OGI operators in the field and a better understanding of current best practices. EPA should consider fewer prescriptive requirements for the conduct and documentation of inspections, with a stronger focus on the purpose of OGI, i.e., the communication of the results of leak detection to facilitate repairs. EPA should provide for human error in the completion of training and in audits. EPA should reconsider the audit requirement and how it will work in practice for businesses with few employees.

Advocacy also recommends that EPA reconsider the requirement for an annual classroom refresher training. It is unclear on what basis EPA believes that annual retraining "that must cover all the salient points necessary to operate the camera" is necessary in addition to quarterly audits. EPA has rarely, if ever, required annual classes that review the basics in such a manner. Further, for senior OGI camera operators who spend 100 site surveys teaching each new OGI operator, such a requirement is unnecessary and wasteful. If EPA wants to encourage continuing education to foster an exchange of best practices and lessons learned, it could look to the continuing education credit systems used by any number of other professional accreditations.

²³ See Memorandum to Docket ID EPA-HQ-OAR-2021-0317 from Gerri G. Garwood, P.E., EPA. Subject: Summary of Meetings Related to the Development of Appendix K. October 20, 2021, (Regulations.gov Document ID EPA-HQ-OAR-2021-0317-0078).

C. Leak detection technologies used by enforcement authorities and other third-parties should meet the same standards as required for regulatory compliance.

EPA requests comment on “a program for finding large emission events that consists of a requirement that, if emissions are detected above a defined threshold by a community, a Federal or State agency, or any other third party, the owner or operator would be required to investigate the event, do a root cause analysis, and take appropriate action to mitigate the emissions, and maintain records and report on such events.” Small businesses have expressed significant concern that these third parties will be held to a less stringent standard for operation of the technology and interpretation of the results. They fear that giving third parties the ability to trigger such actions without quality checks and minimum competency standards will lead to a cycle of unnecessary and duplicative monitoring and remediation exercises. Advocacy agrees that any third-party use of a monitoring technology that can trigger regulatory action should meet the same standards to which the regulated entities are held, including EPA’s proposed Appendix K.

D. EPA should propose a phase-in for zero-emitting pneumatic controllers and a hardship extension for small entities.

EPA proposes that all pneumatic controllers be zero-emitting and that the most feasible zero-emission options will be solar-powered controllers. EPA’s analysis of the cost-effectiveness of solar-powered controllers assumes the technical feasibility of this requirement everywhere in the United States outside Alaska.

Small entities with whom the SBREFA panel consulted did not consider that EPA could impose a requirement based on the installation of solar panels and batteries. However, EPA notes that in consideration of a similar rule in Colorado, industry commenters raised issues such as battery storage capacity issues, weather-related issues, and mechanical issues related to vibration.²⁴ These issues are not addressed in the preamble or TSD. The primary literature review EPA cites on zero-emitting controllers, a report from 2016, cites snow as a challenge to solar panel and battery lifetime,²⁵ but this listing of challenges is based only on interviews with eight “both small and large oil and gas companies,” so it is unlikely to be a comprehensive or representative list of concerns.

EPA overstates the support that other regulatory regimes provide for this proposal. EPA cites to California, Colorado, New Mexico, and the Canadian provinces of Alberta and British Columbia as evidence that its proposal is reasonable and that there are no technical barriers.²⁶ However, as the description of these regulatory regimes notes, none of these regimes require universal retrofit of existing sources. California allows some continuous bleed natural gas-driven pneumatic

²⁴ 86 *Fed. Reg.* at 63207.

²⁵ Carbon Limits, Zero Emission Technologies for Pneumatic Controllers in the USA. Applicability and Cost Effectiveness, August 1, 2016, pp. 15.

²⁶ 86 *Fed. Reg.* at 63206.

controllers to remain, Colorado has a small operators exemption, New Mexico's proposed rule does not require zero-emitting controllers if there is no electrical power, Alberta only requires zero-emitting for a subset of existing controllers, and British Columbia's rule only requires new sources to be non-emitting. No other regulatory regime applies to all new sources and all existing sources.²⁷

EPA's cost estimates are taken directly from the 2016 White Paper.²⁸ EPA did not update the cost numbers for non-emitting electronic controllers, solar panels, or batteries. While the cost of solar panels and batteries, if properly specified for their environment, is likely to drop over the next decade, the same is not assured for electronic controllers. EPA would be requiring the replacement of over 1.7M controllers over a few short years.²⁹ It is unclear that the industry will be able to procure that many that quickly. Advocacy is concerned that small businesses will have the hardest time procuring non-emitting controllers and will have to pay more for those it can procure.

Because controllers are crucial to oil and natural gas production operations, EPA should provide flexibilities in this requirement for those circumstances in which small entities cannot obtain and/or retrofit zero-emitting controllers. EPA should phase in any requirement for existing sources. After the phase-in period, EPA should allow states to grant extensions to small entities that can show a good faith effort to procure non-emitting controllers at a reasonable price.

E. EPA should propose that liquids unloading operations are clearly within the best professional judgment of the operator.

EPA is proposing new requirements for liquids unloading, a routine process of removing liquids from a gas well that have accumulated over time and are impeding or halting production. EPA would establish a standard of zero-emissions from liquids unloading operations. However, EPA recognizes that there are situations in which such a standard is technically infeasible or not safe. In those cases, EPA proposes the owner or operator write and follow Best Management Practices (BMP) to minimize emissions.

During consultations with the SBREFA panel, small businesses expressed significant concern about the possible regulation of liquids unloading operations. They said that these operations are very site-specific. EPA agrees: "Although the unloading method employed by an owner or operator can itself be a method that mitigates/eliminates venting of emissions from a liquids unloading event, dictating a particular method to meet a particular well's unloading needs is a production engineering decision."³⁰

²⁷ TSD, pp. 8-6,7

²⁸ See Carbon Limits, Zero Emission Technologies for Pneumatic Controllers in the USA. Applicability and Cost Effectiveness. August 1, 2016, Table 3, and TSD, pp. 8-24.

²⁹ TSD, pp. 8-2

³⁰ TSD, pp. 11-1.

EPA's proposal to require the owner or operator to develop and follow their own BMP is reasonable, but small entities are generally concerned that their professional judgment in the development and following of the BMP will be subject to second-guessing by enforcement authorities and third parties through citizen suits. When EPA drafts implementing rule text, it should clearly give deference to the BMP developed for that operation reflecting production engineering decisions. EPA should provide enforcement assurance that following a written BMP is sufficient to comply with the NSPS, and that methane emissions from a liquids unloading operation cannot be used in of itself to show a violation of the NSPS.

F. EPA should provide an exemption from OOOO and OOOOa for any source subject to state regulation under the proposed 111(d) Emission Guidelines.

Small entities have expressed significant confusion and concern about how sources that were new, modified, or reconstructed between August 23, 2011, and November 15, 2021, will be regulated. These sources are subject to direct EPA regulation under prior NSPS, subparts OOOO or OOOOa, both of which remain in effect. However, with this proposal, these same sources would be covered by the proposed EG OOOOc, to be regulated under state law. This situation has the potential to create duplicative regulatory requirements, multiple enforcement authorities, and significant unnecessary costs for small businesses. Although this is a feature of the structure of the Clean Air Act, EPA should do what it can to streamline regulatory communications and compliance.

Advocacy recommends that EPA propose that states can obtain an explicit exemption for existing sources from the prior NSPS subparts. Under this exemption, states would incorporate the performance standards of OOOO and OOOOa for these sources into their performance standards under the EG. Such an exemption would reduce the number of different regulatory provisions to which they are subject and clearly identify the regulatory authority for their sources.

V. Conclusion

Advocacy appreciates the efforts EPA has made in this proposed rule to identify and address small business concerns. However, this proposed rule will have significant and disproportionate economic impacts on a substantial number of small entities across the industry. Advocacy believes that EPA's cost estimates overstate the cost effectiveness of some provisions in its proposal and understate the impact on small businesses, particular businesses at the smaller end of the range of small businesses.

Advocacy recommends EPA reevaluate the impacts on small businesses when it publishes the supplemental proposal and consider additional flexibilities that can minimize the impacts on small entities while accomplishing the goal of reducing methane emissions from oil and natural gas production.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker at (202) 285-6860 or by email at david.rostker@sba.gov.

Sincerely,

/s/

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Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Dave Rostker
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Copy to: Sharon Block, Associate Administrator
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Office of Management and Budget