



May 30, 2023

VIA ELECTRONIC SUBMISSION

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

Re: Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Docket ID EPA-HQ-OW-2009-0819, 88 *Fed. Reg.* 18824 (March 29, 2023)

Dear Administrator Regan:

On March 29, 2023, the Environmental Protection Agency (EPA) published a proposed rule titled “Supplemental Effluent Limitations Guidelines (ELG) and Standards for the Steam Electric Power Generating Point Source Category.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy believes EPA’s reconsideration of the 2020 ELG rule for this industry imposes a disproportionate burden on small entities. EPA has proposed setting standards in a way that systematically favors large businesses. EPA would require small entities to strand recent investments before the end of their useful life while still paying for them. EPA’s certification under Section 605 of the Regulatory Flexibility Act lacks a factual basis. Advocacy recommends EPA engage in consultation with the small entities that will continue in operation after 2028 and extend the compliance period in the final rule to 2040.

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

¹ 88 *Fed. Reg.* 18824 (March 29, 2023).

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 2015 and 2020 rules

In November 2015, EPA published the Steam Electric Power ELG, which imposed new technology-based standards to control wastewater from power plants that use fossil fuels and nuclear power plants.⁷ The Utility Water Act Group (UWAG) submitted a petition for reconsideration of the rule in March 2017,⁸ and Advocacy filed comments in support of the UWAG petition and raised additional concerns about the consideration of small business impacts.⁹ A few days later, the EPA Administrator announced his decision to reconsider the rule, and it never took effect.

In November 2019, EPA published a proposed reconsideration of the 2015 rule.¹⁰ EPA proposed standards based on a different set of technologies. For discharges of wastewater from flue gas desulfurization (FGD) (a Clean Air Act requirement), EPA proposed to require chemical

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.*

⁷ 80 *Fed. Reg.* 67838 (November 3, 2015).

⁸ *Petition for Reconsideration of EPA's Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, (March 25, 2017), available at regulations.gov, Document ID EPA-HQ-OW-20009-0819-6478.

⁹ *SBA Petition for Reconsideration of EPA's Steam Electric ELGs – DCN SE06611*, (April 5, 2017) available at regulations.gov, Document ID EPA-HQ-OW-2009-0819-6481.

¹⁰ 84 *Fed. Reg.* 64620 (November 22, 2019).

precipitation (CP) and low hydraulic residence time biological reduction (LRTR). EPA also proposed to allow coal-fired units retiring by 2028 to avoid installing new wastewater treatment.

In January 2020, Advocacy commented on the proposed rule.¹¹ Advocacy stated that EPA's record did not demonstrate that the proposed technologies were cost-effective for small entities, particularly given market forces and recent environmental regulations that had raised the cost of operation and reduced utilization rates. Advocacy also was concerned that EPA had relied heavily on pilot studies and lacked statistical analyses of normal operating conditions to support its decision. Advocacy wrote:

EPA may be overstating the cost-effectiveness of [LRTR]. EPA should reconsider whether it has the necessary data to establish effluent limits based on this technology operating in real world conditions.

In October 2020, EPA finalized the reconsideration rule, including the requirement for LRTR and the reduced compliance requirements for coal-fired power plants retiring by 2028.¹² EPA required most steam electric facilities to comply with the revised requirements "as soon as possible" after October 2021, but no later than December 31, 2025, as determined by their Clean Water Act permitting authority during the regular review of the facility's National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act.

In July 2021, EPA announced that it would engage in a new rulemaking to make the ELG more stringent. In the announcement, EPA also confirmed that until a new rule is promulgated, the 2015 and 2020 regulations would continue to be implemented and enforced.

C. This proposed Supplemental ELG

On March 29, 2023, EPA published this proposed rule that would require significant new wastewater treatment investments for facilities that intend to continue operating past 2028. For FGD wastewater, EPA proposed to set a standard based on chemical precipitation with membrane filtration. EPA further proposed standards for combustion residual leachate (CRL) from landfills and coal ash impoundments, based on the similarity of CRL to FGD wastewater. EPA proposed to require compliance "as soon as possible" after promulgation of a final rule, but no later than December 31, 2029.

In its analysis and justification for the rule, EPA assumes full compliance with the 2020 rule, including the installation of CP and LRTR for FGD wastewater. EPA also acknowledges that once facilities install membrane filtration, they will stop operating the LRTR portion of the

¹¹ *Comment submitted by Major L. Clark, III, Acting Chief Counsel and David Rostker, Assistant Chief Counsel, Office of Advocacy, U. S. Small Business Administration, (January 21, 2020), available at regulations.gov, Document ID EPA-HQ-OW-2009-0819-8310.*

¹² 85 *Fed. Reg.* 64650 (October 13, 2020).

system but continue operating the CP portion as pretreatment.¹³ For this reason, EPA proposed an “early adopter” subcategory. For facilities that were already complying with the 2020 rule FGD requirements as of the day of this proposal, no additional investment would be required for FGD wastewater if they committed to ceasing operations by 2032. However, it appears that no small entities would be eligible for this provision.¹⁴

II. Advocacy’s Small Business Concerns

Advocacy believes that the proposed rule is unfair to small entities that want to continue providing their ratepayers and owners with electricity using the assets they current own and operate, including coal-fired power plants. EPA should allow small entities to continue to operate through its useful life the equipment in which they have invested or will soon invest to comply with the 2020 rule. To require these investments be made and then become immediately obsolete is a waste and diverts needed resources from the investment that the power sector needs to meet the President’s GHG reduction targets for 2030.

A. This proposed rule favors large businesses over small entities.

1. EPA no longer considers cost-effectiveness in setting ELGs.

Advocacy wrote in its 2017 petition for reconsideration of the 2015 rule:

EPA historically has measured the environmental benefits of ELG rules in terms of the quantities and relative toxicities of the pollutants to be removed, known as toxic-weighted pound equivalents (TWPEs). The TWPE metric is used to measure the benefits of pollutant removals to the public. The agency has used this metric over several decades in determining whether the rule is achieving cost-effective pollutant reductions. ELGs typically cost less than \$100/TWPE [in dollars inflation-adjusted back to 1981]. Rules well in excess of this benchmark were determined to be not cost-effective and not Best Available Technology (BAT).¹⁵ [Footnotes omitted]

EPA’s current interpretation of BAT does not include cost-effectiveness. EPA instead focused on two primary factors: economic achievability and technological availability.¹⁶ In this proposed

¹³ *Technical Development Document for Proposed Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* (February 2022), available at regulations.gov Document ID EPA-HQ-OW-2009-0819-9950, [hereinafter *TDD*], section 5.1.

¹⁴ See 88 *Fed. Reg.* at 18859, Table VII-1. Plant James H Miller Jr, is erroneously listed as operated a small entity in some places in EPA’s RFA screening analysis (*Analysis of Compliance Costs and Economic Impacts [DCN SE11215]* – Attachment 4, regulations.gov Document ID EPA-HQ-OW-2009-0819-9754), but Alabama Power has over 6,000 employees (See [By the Numbers \(alabamapower.com\)](https://www.alabamapower.com), last accessed May 25, 2023).

¹⁵ *SBA Petition for Reconsideration of EPA’s Steam Electric ELGs* at 6-7.

¹⁶ 88 *Fed. Reg.* at 18829.

rule, EPA rejects “less stringent technologies,” including those required in the 2020 rule, solely on the basis that they are less stringent.¹⁷

2. The way EPA sets the ELG favors large businesses.

Both factors that EPA favors in setting BAT - economic achievability and technology availability - disadvantage small entities.

For economic achievability, EPA asks whether the industry as a whole can afford facility-level investments.¹⁸ This inquiry inherently favors large businesses because large businesses can generally invest more in their operations than small entities can.

Generally, for similar sets of regulatory requirements, small businesses face a greater cost of compliance. Small entities believe that they pay more per unit for control equipment because they are generally purchasing fewer identical items and require more customization per installation. Operations and maintenance are also more expensive for small entities. 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 U.S. Census Bureau Small Business Pulse Survey, the top concern of surveyed small businesses in April 2022, the latest available data, is to identify and hire new employees.¹⁹

In addition, small businesses frequently lack the benefits packages larger businesses can offer which may lead to higher search costs. For example, while 92 percent of businesses with more than 500 employees offer retirement plans, only 73 percent of businesses with 50 to 99 employees, and only 53 percent of businesses with less than 50 employees offer retirement plans.²⁰ 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.

For the electric power sector in particular, industry-wide evaluations create an environment in which large multi-state conglomerates thrive, and smaller entities, defined by geographic locality and customer base, have limited options for investment in renewable generation. The industry as a whole may be able to replace lost generation, but small entities cannot and must either purchase power or purchase shares in a larger business’ facility. Many small entities have resisted these options because they believe they are more expensive for their ratepayers.

¹⁷ 88 *Fed. Reg.* at 18843-44.

¹⁸ “Under the CWA, BAT limitations must be economically achievable. Courts have interpreted that requirement as a test of whether the regulations can be “reasonably borne” by the industry as a whole.” *Id.* at 18841.

¹⁹ U.S. Census Bureau, Small Business Pulse Survey, [Small Business Pulse Survey Data \(census.gov\)](#) (last visited May 26, 2023).

²⁰ 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 \(bls.gov\)](#)

For technological availability, EPA similarly approaches the industry as a homogenous whole, ignoring the significant difference between access, expertise, and resources to customize new technologies to existing facilities. EPA does state that the standards “may reflect a higher level of performance than is currently being achieved,” but a justification based on pilot projects and projects in foreign countries makes it clear that small businesses will have a harder time and need longer to comply than larger competitors with more substantial resources. While EPA recognizes that setting a standard in this way will likely cause facility closures and job losses, those impacts are not evenly distributed.

B. This rulemaking would require small entities to strand assets they must install now and for which they will be paying for many years.

EPA has proposed to require CP plus membrane filtration to treat FGD wastewater. This requirement would incorporate the CP requirement of the 2020 rule and replace the LRTR systems required by the 2020 rule. However, EPA announced prior to this rulemaking and in this proposed rule that it intended to leave in place and enforce the 2020 rule until this rule is promulgated and becomes effective. This requires facilities to install and have operating CP+LRTR for FGD no later than December 31, 2025, even as EPA contemplates requiring the LRTR to be replaced no later than December 31, 2029.

As a practical matter, no business can plan based on a promise of future EPA rulemaking, especially given the frequency of litigation and resultant judicial stays. Small entities are planning and spending significant resources now. Facilities must continue to renew NPDES permits to continue operating, and under the 2020 rule, this will include CP+LRTR, even if EPA finalizes this rule before December 31, 2025. In the best case, these small entities will get six years use of a system EPA projected and costed as having a 20-year lifetime. Small entities have invested or will invest millions of dollars in these systems, and they will be paying for this stranded investment for years after they are no longer in operation.

EPA recognizes some of this problem, and proposed an “early adopter” subcategory, but the eligibility is so limited that it excludes all small entities and ignores the fact that small entities generally need longer to install new equipment and thus were least likely to have their CP+LRTR systems fully operational by now. Further, the entities excluded from the “early adopter” subcategory will face greater harm because they will get even less use of the mandated LRTR system.

Forcing electricity generators to strand assets for which they remain in debt is poor public policy, particularly if the Federal government is relying on these same generators to invest in a transition to renewable generations and in transmission infrastructure. EPA has left only one avenue available to these small entities to avoid this economic waste and unnecessary burden on their ratepayers, and that is to commit to closing their facilities by 2028. This only furthers the perception that the purpose of the rule is to force these plants to close, regardless of the requirements of the Clean Water Act.

Because EPA has chosen to continue implementation and enforcement of the 2020 rule even as it plans for equipment installed under the 2020 rule to be stranded, EPA should extend the compliance date for any facility with demonstrable progress towards installation of a CP+LRTR, including financing, contracts, or revised NPDES permit, such that the facility can use the CP+LRTR system for most of its useful life. Advocacy recommends “no later than” December 31, 2040.

D. EPA has not fully complied with the Regulatory Flexibility Act.

In the 2020 ELG rule, EPA provided a clear pathway for coal fired EGUs to reduce compliance costs by committing to cease operations by 2028. EPA has proposed no changes to this subcategory, and EPA’s economic analysis and justification for the rule assumes that the rule would impose no costs on these businesses. However, EPA includes these facilities in its counts of affected businesses.

EPA’s guidance on RFA analysis states “If a small entity will have obligations imposed on them directly by the rule, then the small entity is subject to the requirements of the rule, and it should be included in the RFA screening analysis.”²¹ Advocacy believes that this requires EPA to count only those small entities for whom compliance requirements would change. If counted properly, the correct number of facilities owned and/or operated by small entities would be significantly smaller.²²

Under § 605(b) of the RFA, an agency may avoid the requirements of an initial and final regulatory flexibility analysis, including a discussion of significant, burden-reducing alternatives, if the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. With a sizable reduction in the estimate of the number of small entities affected by this rulemaking, the number of small entities that would likely experience a significant economic impact becomes more substantial. For this reason, Advocacy believes that this rule’s RFA certification is not well-supported.

Advocacy recommends EPA engage with the small entities that intended to continue operating their coal-fired power plants after 2028 to discuss EPA’s estimates of compliance costs and the issues highlighted in this letter, including Advocacy’s recommendation for an extended compliance period to allow for the useful life of new CP+LRTR systems.

²¹ *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act*, OPEI Regulatory Development Series, November 2006.

²² EPA acknowledges in the RIA that it has used an outdated SBA Size Standard for its analysis and will be correcting that in the final rule. (*See* RIA, Footnote 62.) The National Rural Electric Cooperative Association has also identified errors in EPA’s screening analysis, including the incorrect identification of cooperatives as investor-owned or as large businesses and out-of-date facility ownership information.

III. Conclusion

Advocacy believes EPA's reconsideration of the 2020 ELG rule for this industry imposes a disproportionate burden on small entities. EPA has proposed setting standards in a way that systematically favors large businesses. EPA would require small entities to strand recent investments before the end of their useful life while still paying for them. EPA's certification under Section 605 of the Regulatory Flexibility Act lacks a factual basis. Advocacy recommends EPA engage in consultation with the small entities that will continue in operation after 2028 and extend the compliance period in the final rule to 2040.

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