



December 19, 2023

VIA ELECTRONIC SUBMISSION

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

Re: New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, Docket ID EPA-HQOAR-2023-0072.

Dear Administrator Regan:

On November 20, 2023, the Environmental Protection Agency (EPA) published a supplemental notice of proposed rulemaking entitled “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the supplemental proposal.

Advocacy is concerned that the EPA has not addressed Advocacy’s comments on the proposed rule. In addition, the analysis developed in support of the supplemental proposal does not provide an accurate description of the impacts of the proposed rule. Advocacy also shares the concerns raised by small entities that the EPA’s proposal would increase risks to the reliability of the electrical grid and jeopardize their ability to serve their customers. Advocacy recommends that the EPA provide greater flexibilities for small entities to build new sources and operate existing sources that will be necessary to ensure reliable delivery of electricity to their customers.

¹ 88 Fed. Reg. 33240 (May 23, 2023).

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) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. 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.⁴ Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ 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.¹⁰

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."¹¹

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. The Supplemental Proposed Rule

On May 23, 2023, the EPA proposed a new source performance standard for greenhouse (GHG) emissions from new fossil fuel power plants and emission guidelines for existing fossil fuel power plants.¹² The EPA proposed standards that would require carbon capture and sequestration (CCS) or co-firing natural gas with low-GHG hydrogen for a significant subset of new and existing power plants.

Advocacy submitted a public comment letter on this proposal on August 8, 2023.¹³ In response, Advocacy expressed concern that the EPA's standards put small entities at a significant disadvantage, that it set standards based on unreasonable assumptions and expectations about the availability of CCS and green hydrogen, and that the EPA lacked a factual basis for certifying the rule would not have a significant economic impact on a substantial number of small entities.

After publication of the proposed rule, the EPA convened a SBREFA panel. "While EPA certified no [significant economic impact on a substantial number of small entities] for the proposed rule, the EPA solicited comment on several more stringent policy options that may impact small businesses."¹⁴ The EPA convened the panel in anticipation of the possibility that these more stringent policy options could be adopted in the final rule. The panel consulted with small entities after the close of the proposed rule comment period and completed the panel report.

On November 23, 2023, the EPA published the supplemental notice of proposed rulemaking¹⁵ and released an initial regulatory flexibility analysis (IRFA).¹⁶ EPA requested comment on small business flexibilities and reliability concerns but did not include any changes to the May proposal.

¹² New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33240 (May 23, 2023).

¹³ U.S. Small Bus. Admin, Off. of Advocacy, Comment Letter on New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule (Aug. 8, 2023), <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0518>.

¹⁴ PANEL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PROPOSED RULE NEW SOURCE PERFORMANCE STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS 5 (Oct. 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-8108>.

¹⁵ 88 Fed. Reg. 33240 (May 23, 2023).

¹⁶ ENV'T PROT. AGENCY, INITIAL REGULATORY FLEXIBILITY ANALYSIS: PROPOSED NEW SOURCE PERFORMANCE STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; AND REPEAL OF THE AFFORDABLE CLEAN ENERGY RULE (Oct. 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-8109> [hereinafter *IRFA*].

II. Advocacy’s Small Business Concerns

Advocacy reiterates the concerns raised in its comment letter on the proposed rule. The EPA has not addressed these concerns in this supplemental notice or IRFA. Advocacy has the following concerns about the adequacy of the IRFA and about the EPA’s analysis of grid reliability in support of the proposed rule.

A. The IRFA does not provide small entities an accurate description of the impacts of the proposed rule.

The EPA’s IRFA is nearly unchanged to section 5.3 of the Regulatory Impact Analysis published with the proposed rule in May.¹⁷ EPA summarized the changes: “Additionally, based on feedback received from the Panel, EPA updated the analysis to include information from the latest SBA guidelines and corrected data errors in the earlier screening methodology, the net impact of which results in inclusion of additional small entities within the updated screening analysis.”¹⁸ The EPA has not otherwise updated its analysis of impacts on small entities in response to public comments on the proposed rule or to SER comments during the panel consultations. The EPA included a section on caveats and limitations in the IRFA to describe some of the qualitative uncertainties in its analysis, but the section describes these uncertainties in broad terms.¹⁹

In the absence of EPA’s response to public comments on the proposed rule, the IRFA can only repeat the assertion that the proposed rule would not have a significant economic impact on a substantial number of small entities. Advocacy stated in its previous comment letter that the EPA lacked a factual basis for this assertion in the form of a certification. The EPA’s analysis remains an inaccurate portrayal of the impacts on small entities. (1) The assumptions about the cost and technical feasibility of CCS and low-GHG hydrogen co-firing are unreasonable. (2) Small entities lack resources and ratepayer support to engage in experimentation with next-generation technologies like CCS or to relocate operations to minimize costs of sequestration or hydrogen transportation. (3) The EPA has not recognized the need for small entities to make additional investments in new sources due to restrictions the agency would place on existing power plants under this proposal and others, such as the Effluent Limitation Guidelines under the Clean Water Act that EPA recently proposed.²⁰ Small entities have been presented with no additional information upon which to comment.

The EPA’s description of the caveats and limitations demonstrate problematic aspects of the analysis supporting the proposed rule. For example, the EPA recognizes that many of the parameters of its analysis would be significantly affected by this proposed rule and other EPA rulemakings. Natural gas assumptions do not include the proposal to regulate methane emissions

¹⁷ ENV’T PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED NEW SOURCE PERFORMANCE STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; AND REPEAL OF THE AFFORDABLE CLEAN ENERGY RULE (May 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-0007>.

¹⁸ IRFA, *supra* note 16, at 6-7.

¹⁹ *Id.* at 11-13.

²⁰ Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18824 (Mar. 29, 2023).

from oil and gas production. Announced closures of coal-fired power plants in response to EPA regulations and other pressures are not included in the baseline. The significant electricity needed to generate the hydrogen projected to be required by this rule is not included in the analysis. The EPA received significant comments on these and other issues, and the agency recognizes that these are problems with the analysis. Unfortunately, the response to these comments is that changes to the analysis “could result in a different estimate of compliance costs and therefore a finding of no [significant impacts on a substantial number of small entities] for this action.”²¹

Additionally, the EPA convened a SBREFA panel and published an IRFA because of the possibility that it might impose significantly greater impacts in the final rule. “The EPA is also soliciting comment on the impacts of the regulatory alternatives described in the proposed NSPS notice and, if they were to be adopted, appropriate regulatory flexibilities.”²² However, neither this IRFA nor the RIA for the proposed rule address the likely impacts of these more stringent policy options. With no additional information from the EPA, small entities can reiterate their previous comments and further supplement the record. The EPA has missed an opportunity to move the dialogue forward by correcting its record, providing a more realistic description of the impacts on small entities, and engaging the public in its consideration of the consequences of its proposed rule.

B. Small entities remain concerned that the EPA has not taken reliability concerns seriously.

[T]he EPA is soliciting comment on measures to mitigate reliability concerns raised by small businesses, which were similar to concerns raised by some commenters on the proposed rules. Because mechanisms to address reliability concerns are relevant to many entities in the electricity sector, we are more broadly soliciting comment on reliability issues.²³

Small entities are both the generators of electricity and suppliers of electricity for their customers. Reliability is crucial to their businesses and vital to the health of the communities they serve. Small entities raised significant concerns during the public comment period on the proposed rule and during the SBREFA panel about the effect that the proposed rule would have on reliability of the electric grid. These concerns have been supported by multiple other expert sources.²⁴ The EPA has analyzed resource adequacy on the grid and has asserted that the proposed rule would not have a significant impact on reliability. However, the analyses provide questionable support of this assurance.

EPA uses the Integrated Planning Model (IPM) to model generation resources on the grid in response to policy changes. This model is the basis of EPA’s projection of what the electrical grid will look like in the future, considering the impacts the Inflation Reduction Act (IRA) or

²¹ *Id.* at 12

²² 88 Fed. Reg. at 80,683.

²³ *Id.*

²⁴ *See., e.g.*, N. Am. Elec. Reliability Corp. (NERC), *2023 Long-Term Reliability Assessment* (Dec. 2023), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf.

Infrastructure Investment and Jobs Act (IIJA), with and without the proposed rule. However, the IPM only addresses resource adequacy.

IPM addresses reliable delivery of generation resources between the 78 IPM regions, based on current and planned transmission capacity, by setting limits to the ability to transfer power between regions using the bulk power transmission system, as well as the ability to endogenously expand these links based on relative economics. Within each model region, IPM assumes that adequate within-region transmission capacity exists or will be built to deliver any resources located in, or transferred to, the region.²⁵

This is an uncertain assumption about which small entities have raised significant questions. First, it is well recognized that permitting for transmission capacity is one of the significant policy and practical challenges to the grid.²⁶ Second, supplies of needed equipment have been in short supply.²⁷ Further, the EPA has not incorporated significant generation changes that will likely result from other EPA rules, such as changes to the price and availability of natural gas due to the recently announced final rule regulating methane emissions from oil and gas production²⁸ or the effluent limitation guidelines. This is not an issue of short-term emergency needs on the grid due to natural disasters or other extraordinary situations. Before considering the impacts of the proposed rule, the EPA's baseline does not reflect a grid that can support the generation shift and remain reliable.

If reliability is to be ensured, then the generation shifts the EPA envisions in the baseline will likely be delayed, absent major shifts in the policy and economic landscape. A final rule that nonetheless implements these changes would impose costs significantly higher than the EPA projects and would not be consistent with a grid that delivers electricity reliably. Short-term emergency measures would quickly become quasi-permanent measures, relying heavily on the availability of many underutilized sources.

The challenge for small entities is that they want to provide the power they supply to their customers to ensure a reliable and cost-effective supply. The proposed rule incentivizes investment in gas-fired power plants that will avoid the burdensome requirements for CCS or

²⁵ ENV'T PROT. AGENCY, RESOURCE ADEQUACY ANALYSIS, TECHNICAL SUPPORT DOCUMENT, NEW SOURCE PERFORMANCE STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS; AND REPEAL OF THE AFFORDABLE CLEAN ENERGY RULE PROPOSAL 3-4 (April 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-0034>.

²⁶ "Siting and permitting challenges continue to inflict delays in transmission expansion planning. Regional transmission planning processes are adapting to manage energy transition, but impediments to transmission development remain." NERC, *supra* note 24, at 35.

²⁷ See, e.g., Am. Pub. Power Ass'n (APPA), *APPA Survey of Members Shows Distribution Transformer Production Not Meeting Demand* (Oct. 12, 2022), <https://www.publicpower.org/periodical/article/appa-survey-members-shows-distribution-transformer-production-not-meeting-demand>.

²⁸ Env't Prot. Agency, *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review* (Dec. 2023), https://www.epa.gov/system/files/documents/2023-12/eo12866_oil-and-gas-nsp-eg-climate-review-2060-av16-final-rule-20231130.pdf.

hydrogen-cofiring, particularly in the short- and medium-term (i.e., before these technologies are widely adopted and available without delays). However, it will be a significant challenge to gain regulatory approval or financing for assets that are designed to be underutilized.

The EPA's analysis does not seriously consider concerns that small entities would not be able to replace capacity that must be retired, whether for regulatory or economic reasons. Even if IPM projection for resource adequacy show enough power available on the grid in its entirety, small entities may be unable to serve their customers from the open market without the adequate within-region transmission capacity that IPM simply assumes will exist.

With respect to the existing emergency measures to provide additional electricity in extraordinary circumstances, it is unlikely small entities will be able to make these investments that can take advantage of these short-term emergency measures. The ability to assure their customers of a reliable electricity supply would be taken out of their hands entirely.

For these reasons, small entities need the ability to continue operating existing sources when investments in new sources are delayed either by inability to obtain necessary permits for the source or transmission required for reliability or by supply chain challenges. These existing sources should be allowed to operate, even if not otherwise in compliance with other EPA regulations, such as the effluent limitation guidelines.

Given the significant concern that investment in transmission will not keep pace with reliability needs, the EPA should also consider the need to develop new sources of electricity on sites with existing transmission resources. Advocacy commented on the proposed rule that the EPA assumed minimal transportation costs for carbon dioxide and hydrogen as a basis for its determination of best system of emissions reduction. This assumption can make the reuse of existing transmission resources unreasonably expensive, if even feasible. In the interest of maintaining reliability of the grid, the EPA should provide more flexible standards for new sources co-located with existing transmission resources that is not reliant on construction of additional infrastructure.

III. Conclusion

The EPA published a supplemental proposal and supporting analysis that does not address the significant concerns expressed by Advocacy in its public comments or by small entities in their public comments or in SBREFA panel consultations. As a result, the analysis developed in support of the supplemental proposal does not provide an accurate description of the impacts of the proposed rule. Advocacy also shares the concerns raised by small entities that EPA's proposal would reduce reliability of the electrical grid. Advocacy recommends that the EPA provide greater flexibilities for small entities to build new sources and operate existing sources that will be necessary to ensure reliable delivery of electricity to their customers.

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: The Honorable Richard L. Revesz, Administrator
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