The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for EPA's planned proposed rulemaking entitled "National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coal- and Oil-fired Electric Utility Steam Generating Units (RIN 2060-AP52)." This notice of proposed rulemaking is being developed by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA) section 112(d).

BACKGROUND AND REGULATORY HISTORY

In December 2000, EPA made a finding that it was appropriate and necessary to regulate coal- and oil-fired electric utility steam generating units (EGUs) under CAA section 112 and listed EGUs pursuant to CAA section 112(c). On March 29, 2005 (70 FR 15994), EPA published a final rule (Section 112(n) Revision Rule) that removed EGUs from the list of sources for which regulation under CAA section 112 was required. That rule was published in conjunction with a rule requiring reductions in emissions of mercury from electric utility steam generating units pursuant to section 111 of the CAA (Clean Air Mercury Rule (CAMR), May 18, 2005, 70 FR 28606). The Section 112(n) Revision Rule was vacated on February 8, 2008, by the U.S. Court of Appeals for the District of Columbia Circuit. As a result of that vacatur, CAMR was also vacated and EGUs remain on the list of sources that must be regulated under CAA section 112.

In the December 2000 regulatory determination, EPA made a finding that it was appropriate and necessary to regulate EGUs under CAA section 112. The February 2008 vacatur of the Section 112(n) Revision Rule reverted the status to that of the December 2000 regulatory determination. CAA section 112(n)(1)(A) and the 2000 determination do not differentiate between EGUs located at major versus area sources of hazardous air pollutants (HAP). Thus, the NESHAP for EGUs will regulate units at both major and area sources.

DESCRIPTION OF THE RULE AND ITS SCOPE

The "electric utility steam generating unit" source category includes those units that combust coal or oil for the purpose of generating electricity for sale and distribution through the national electric grid to the public. CAA section 112(a)(8) defines an "electric utility steam generating unit" as:

> any fossil fuel-fired combustion unit of more than 25 megawatts electric (MWe) that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 MWe output to any utility power distribution system for sale is also considered an electric utility steam generating unit.

The source category includes investor-owned units as well as units owned by the Federal government, municipalities, and cooperatives, among others. These units provide electricity for commercial, industrial, and residential uses. Coal-fired generating units typically supply "base-load" electricity, which means these units operate continuously throughout the day and meet the part of electricity demand that is relatively constant. Oil-fired generating units typically supply "peak" power, when there is increased demand for electricity. Coal- and oil-fired EGUs have the potential to emit many HAP.

Coal-fired electric utility steam generating units include electric utility steam generating units that burn coal, coal refuse, or a synthetic gas derived from coal either exclusively, in any combination together, or in any combination with other supplemental fuels. Examples of supplemental fuels include petroleum coke and tire-derived fuels. Oil-fired EGUs include units that burn liquid oil or solid oil-derived fuel (i.e., petroleum coke). The NESHAP will establish standards for HAP emissions from both coal- and oil-fired EGUs and will apply to any existing, new, or reconstructed units located at major or area sources of HAP. Although all HAP are pollutants of interest, those of particular concern are hydrogen fluoride (HF), hydrogen chloride (HCl), dioxins/furans, and HAP metals, including antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium.

In developing the vacated CAMR, EPA identified a total of 81 potentially affected small entities with coal-fired EGUs and determined that CAMR would not have a significant impact on a substantial number of those small entities. That determination was based on the fact that the final rule would not establish requirements applicable to small entities, other than new sources. At that time, EPA projected no new construction of coal-fired utility units. Additionally, CAMR did not establish requirements applicable to existing small entities because the final rule made allowances available to each State; the States were then to distribute their allowances to the EGUs within their State according to their individual situations. Based on current information, we have identified approximately 525 facilities with 1,350 individual coal- or oil-fired units. We estimate that 80 companies that own coal- or oil-fired EGUs are small entities.

PANEL BACKGROUND

On October 27, 2010, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition to its chairperson, the Panel consists of the Director of the Sector Polices and Programs Division within the EPA Office of Air and Radiation, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Chief Counsel for Advocacy of the Small Business Administration (SBA). It is important to note that the Panel's findings and discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during this process, as well as from public comment on the proposed rule. The options the Panel identified for reducing the rule's economic impact on small entities will require further analysis and/or data collection to ensure that the options are practicable, enforceable, protective of public health, environmentally sound and consistent with the Clean Air Act (CAA).

SUMMARY OF SMALL ENTITY OUTREACH

Before beginning the formal SBREFA process, EPA engaged in outreach with entities that would potentially be affected by the upcoming rulemaking to provide an opportunity for discussion of their questions and concerns regarding the upcoming rulemaking. The outreach consisted of meeting with some organizations that represent and include small entities, including the American Public Power Association (APPA), Edison Electric Institute (EEI), the Utilities Air Regulatory Group (UARG), and the Coal Utilization Research Council (CURC).

After the SBAR Panel was convened, the Panel distributed information to the small entity representatives (SERs) on November 17, 2010, for their review and comment and in preparation for the outreach meeting. On December 2, 2010, the Panel met with the SERs to hear their comments on the information distributed in these mailings. The SERs were asked to provide written feedback on ideas under consideration for the proposed rulemaking by December 16, 2010. The Panel received written comments from the SERs in response to the discussions at the outreach meeting and the outreach materials. See Section 8 of the Panel Report for a complete discussion of SER comments. Their full written comments are also included in the Panel Report. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFA and developed the findings and discussion summarized below.

PANEL FINDINGS AND DISCUSSION

Under section 609(b) of the RFA, the Panel is to report its findings related to these four items:

1) A description of and, where feasible, a n estimate of the number of small entities to which the proposed rule will apply.

2) 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.

3) Identification, to the extent practicable, of all relevant federal rules which ma y duplicate, overlap or conflict with the proposed rule.

4) A description of any significant altern atives to the planned proposed rule which would minimize any significant economic impact of the proposed rule on small entities consistent with the stated objectives of the authorizing statute.

The Panel's most significant findings and discussion with respect to each of these items are summarized below. In some instances, the Panel has joint recommendations. In other instances, EPA, OMB, and SBA have different recommendations. To read the full discussion of the Panel findings and recommendations, see Section 9 of the Panel Report.

A. Number and Types of Entities Affected

The estimated number of small entities that will be potentially subject to the Utility NESHAP includes 66 small State/local governments and 14 small non-government entities. These numbers reflect additions and deletions to the initial list of potentially impacted small entities as suggested by SERs as appropriate. For an estimate of the type and number of small entities to which the proposed rule will apply, see Section 5 of the Panel Report. The list of potentially affected small entities includes electricity generators. SERs believe that this list should also include distribution cooperatives that own electricity generation and transmission (G&T) cooperatives and that qualify as small entities. SERs stated that the Utility NESHAP will have a direct impact on all electric cooperatives generating and/or distributing coal-based power given the closely interwoven nature of the G&T cooperatives and the distribution cooperatives. The Panel acknowledges that small entity distribution cooperatives that own generation processes would be impacted in some way by the Utility NESHAP because generation processes will be regulated by the standards, but the extent to which small entity distribution cooperatives would be impacted is unclear without more detailed information on these entities.

B. Recordkeeping, Reporting, and Other Compliance Requirements

In general, SERs recommended that recordkeeping, reporting, and monitoring requirements should be minimized and simplified to the maximum extent possible.

EPA recommendations: EPA panel members recommend that the Agency consider proposing alternative monitoring approaches (e.g., parameter monitoring in lieu of requiring the use of mercury continuous emissions monitoring systems (CEMS), sorbent traps, periodic stack testing, etc.) and consider requiring particulate matter (PM) CEMS only for the largest EGUs or allow use of PM CEMS as an alternative to conducting opacity monitoring and periodic emissions testing. With respect to SERs' suggestion that if PM CEMS are required by the Utility NESHAP, opacity monitoring requirements of other Federal regulations should no longer apply, EPA panel members recommend that the Agency consider the available alternatives and options to the current opacity provisions.

OMB recommendations: OMB recommends that alternative monitoring approaches (e.g., parameter monitoring in lieu of requiring the use of mercury CEMS, sorbent traps, periodic stack testing) be proposed for small entities and that EPA propose PM CEMS only for the largest EGUs or propose allowing use of PM CEMS as an alternative to conducting opacity monitoring and periodic emissions testing.

SBA recommendations: SBA agrees that EPA should consider relevant factors identified by the SERs in developing this rulemaking, but it does not believe that the Panel has sufficient information to make recommendations beyond EPA's existing obligations under the RFA or Paperwork Reduction Act. SBA agrees that these are flexibilities worthy of consideration, and perhaps proposal, but without information necessary to evaluate specific regulatory alternatives or the impacts of those decisions on particular small entities or small entities in general, SBA believes that the Panel can make no recommendations as to what specific regulatory options would "accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."

C. Related Federal Rules

SERs asked that EPA consider the impact of competing regulatory requirements and technologies when developing the Utility NESHAP. EPA is currently working on revisions to the PM, SO_2, and NO_X emissions limit in subpart Da. Sources subject to the NSPS would also be subject to the Utility NESHAP because those rules regulate sources of HAP whereas the NSPS does not.

In June 2010, EPA issued a final rule that establishes thresholds for GHG emissions that define when permits under the New Source Review PSD and title V Operating Permit programs are required for new and existing industrial facilities (the Tailoring Rule). Beginning in January 2011, large industrial sources, including power plants, became subject to permitting requirements for their GHG emissions.

On December 23, 2010, EPA announced a settlement agreement under which it would issue rules that will address GHG emissions from fossil fuel-fired power plants.

The rules would establish NSPS for new and modified EGUs and emission guidelines for existing EGUs. Under the agreement, EPA commits to issuing proposed regulations by July 26, 2011 and final regulations by May 26, 2012.

In August 2010, EPA proposed a rule that would require 31 states and the District of Columbia (D.C.) to significantly improve air quality by reducing power plant emissions that contribute to ozone and fine particle pollution in other states (the Transport Rule). Specifically, the proposal would require reductions in SO_2 and NO_X emissions that cross state lines. The Transport Rule is expected to be finalized in July 2011. To the extent that EGUs are located in the final set of states or D.C., they would be subject to the Transport Rule. SERs expressed concern regarding what the impact of controlling SO_2 and NO_X emissions as a result of complying with the Transport Rule will do to the level of CO emissions.

Based on the findings from EPA's multi-year study of the Steam Electric Power Generating industry, EPA plans to revise the current effluent guidelines that apply to steam electric power plants. Revised effluent guidelines will be proposed in July 2012 and finalized in January 2014.

As required by section 316(b) of the Clean Water Act (CWA), EPA established best technology available standards to minimize adverse environmental impacts from cooling water intake structures. In developing these standards, EPA divided its effort into three rulemaking phases. Phase I standards, for new EGU plants using cooling water, were finalized in June 2003. Phases II and III standards, which address existing EGU plants that use cooling water, were promulgated in July 2004 and June 2006, respectively. Both regulations were challenged. Several provisions of the Phase II rule were remanded and EPA suspended most of the rule in response to the remand. EPA requested, and was granted, a partial remand of the Phase III rule. EPA signed a settlement agreement that requires regulations for Phase II and III facilities to be proposed by March 14, 2011, and promulgated by July 27, 2012.

In June 2010, EPA proposed national rules for the management of coal ash, which are residues from the combustion of coal in power plants that are captured by pollution control technologies, like scrubbers. EGUs will be subject to these coal ash specific regulations when they are issued.

SBA recommendations: SBA agrees that EPA should consider relevant factors identified by the SERs in development of this rulemaking, including the extent to which other recently proposed or finalized regulatory obligations imposed by EPA will impact small entities or make compliance with this rulemaking more difficult. SBA also agrees that EPA should always avoid duplication of requirements across programs. However, SBA does not believe that the Panel has information necessary make recommendations beyond a restatement of EPA's existing obligations or to evaluate specific regulatory decisions and the impacts of those decisions on particular small entities or small entities in general. Therefore, SBA believes that the Panel can make no recommendations as to what specific

regulatory options would "accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."

Panel recommendations: Although the requirements of section 112 of the CAA direct EPA to establish NESHAP for both major and area sources of HAP and prescribe the processes by which the standards are developed, the Panel recommends that the Agency consider the various flexibilities within its discretion in developing the proposed standards. The Panel recommends that the Agency investigate other potential surrogate pollutants for organic HAP in lieu of CO, given the NO_X-CO relationship (i.e., when NO_X emissions are reduced, CO emissions may increase). In developing the NESHAP for EGUs, the Panel recommends that the Agency avoid duplicating requirements to the fullest extent possible in order to minimize unnecessary costs.

D. Regulatory Flexibility Alternatives

1. MACT Floors and Variability

SERs raised four issues with respect to determining MACT floors and assessing variability: (1) pollutant-by-pollutant ranking approach, (2) pollutants to be regulated, (3) floor determination methodology for existing units, and (4) assessment of emissions variability, including periods of startup and shutdown, and fuel, performance, and load variability. A description of each of these issues along with the Panel recommendations is presented in succession below.

SERs stated that the end result of determining a MACT floor for each HAP or HAP surrogate (a pollutant-by-pollutant approach) for each subcategory of sources is a set of MACT floors that do not represent the emission levels achieved by an actual, best-performing EGU. SERs believe that this methodology for setting MACT floors is inconsistent with the requirements of CAA section 112(d)(3). It was suggested that MACT floors should be established using a facility-wide approach.

EPA recommendation: Consistent with EPA's legal interpretation, EPA panel members recommend that the Agency use the pollutant-by-pollutant approach for determining MACT standards for each HAP or HAP surrogate, while taking into account potential direct conflicts between pollution control technologies.

There are concerns with respect to the suggestion that MACT floors should be established using a facility-wide approach. Determining floors based on a facility-wide approach would lead to least common denominator floors – that is floors reflecting mediocre or no control, rather than performance which, for existing sources, is the average of what the best performing sources have achieved. For example, if the best performing 12 percent of facilities for HAP metals did not control organics as well as a different 12 percent of facilities, the floor for organics and metals would end up not reflecting best performance. This fact pattern has come up in every rule where EPA investigated a facility-wide approach. See, e.g. 75 FR at 54999 (Sept. 10, 2010). Thus, utilizing the single-facility theory proffered by the stakeholders would result in EPA

setting the standards at levels that would, for some pollutants, actually be based on emissions limitations achieved by the *worst*-performing unit, rather than the *best*-performing unit, as required by the statute. Moreover, a single-facility approach would require EPA to make value judgments as to which pollutant reductions are most critical in working to identify the single facility that reduces emissions of HAP on an overall best-performing basis.

OMB and SBA recommendation: OMB and SBA recommend that in the proposed rule, EPA seek comment on reasonable alternative approaches to setting the MACT floor, which account for achievement in practice for control of all HAP.

SERs stated their belief that the Utility NESHAP should be limited to mercury control only. They explained that EPA has not determined that emissions of other HAP in the quantities emitted are detrimental to human health or the environment. SERs continue to support EPA's 2004 legal analysis that stated EPA believed it only had authority to set MACT standards for mercury under CAA section 112(d).

EPA recommendation: As to the comment that EPA should only regulate mercury from coal-fired EGUs and nickel from oil-fired EGUs consistent with the reasoning in the proposed NESHAP for these sources that was published on January 30, 2004, EPA panel members note that the Agency never finalized that proposed interpretation, and the Agency has determined that it must establish CAA section 112(d) standards for all HAP emitted from major source EGUs consistent with the statute and case law from the Court of Appeals for the D.C. Circuit. For these reasons, EPA rejects the proposed interpretation set forth in the 2004 proposed rule.

OMB and SBA recommendation: OMB and SBA recommend that in the proposed rule, EPA seek comment on the specific elements of the 2004 legal analysis and how subsequent court decisions affect that 2004 legal analysis.

Panel Recommendation: The Panel recommends that the analysis of impacts be able to distinguish the marginal costs and benefits of each required control technology, in order for the public to distinguish the impacts of regulating mercury from the impacts of regulating other HAPs. It should be noted that EPA cannot, at this point, estimate monetized benefits for HAP reductions other than Hg.

In addition, by focusing on one HAP at a time, SERs believe that the antagonistic effects a given HAP limit will have on other regulated pollutants are missed. Because production of CO during the combustion process is inversely related to NO_X production, it may be difficult to meet a CO limit if NO_X reductions also are required.

Panel Recommendation: The Panel recommends that the Agency investigate other potential surrogate pollutants for organic HAP (e.g., PAH, formaldehyde). The SERs' example of how a pollutant-by-pollutant approach could result in technical infeasibility

with respect to CO and NO_X may argue against using CO as the surrogate pollutant for organic HAP.

SERs commented that the MACT floor for existing units should be determined using the entire inventory of EGUs and not using only the units for which EPA has test data.

EPA recommendation: The CAA requires the MACT floor for existing sources be based on the best performing sources. Thus, EPA must be able to show that the best performing units are in fact used to establish the MACT floor. To use the entire inventory of EGUs as the basis for determining the average of the best performing twelve percent of units, EPA must be confident that the EGUs for which data are available are the best performers. EPA panel members recommend that the Agency establish the MACT floors using all the available ICR data that was received to the maximum extent possible consistent with the CAA requirements.

OMB and SBA recommendations: OMB and SBA recommend that EPA establish MACT standards that minimize the burden on small entities. OMB and SBA also recommend that EPA consider, and present for comment, MACT floors based on the best performing 12 percent, rather than the best 12 percent of the data EPA collected. If EPA proposed the latter, OMB and SBA recommend that they clearly explain why the subset of sources for which they have data is representative of the entire set of sources.

SERs asked that EPA consider establishing percent reduction limits as an alternative to complying with an emissions limit as a means of providing small entities flexibility in complying with the NESHAP in addition to providing a means of potentially accounting for variability. SERs expressed concern that periods of startup and shutdown could present problems with meeting emission limits and suggested that the emissions limits be based on a longer averaging time rather than basing limits on 3-run averages. SERs stated that the three-day stack sampling required by EPA's ICR provides a snapshot of a unit's HAP emissions and is not indicative or representative of the unit's emissions over longer periods of time. SERs pointed out that a critical question is how EPA plans to modify the stack emissions reported during the ICR to account for fuel, performance, and load variability. One SER suggested that use of a longer-term rolling average (i.e., a 12-month minimum rolling average) is necessary in order to account for varying levels of mercury in fuel. Additionally, one SER indicated that a *de minimis* exemption is a regulatory option/small entity flexibility that EPA should consider.

EPA recommendations: EPA is limited in its ability to establish percent reduction limits as an alternative to complying with an emissions limit. Even assuming that EPA can establish percent reduction standards under CAA section 112, to establish such standards, emissions data for the inlet to the EGU and for the stack are necessary. At this time, EPA does not have such data. EPA panel members recommend that the Agency consider the inclusion of percent reduction standards given the legal constraints and the lack of data necessary to establish such standards. Regarding the SERs' concerns with meeting

emissions limits during periods of startup and shutdown, EPA panel members recommend that the Agency base the proposed emission limits on reasonable averaging times where appropriate. In determining reasonable averaging times, EPA panel members recommend that in addition to considering performance during periods of startup and shutdown, the Agency also consider fuel and load variability. In addition, EPA panel members recommend that the Agency use all data gathered through the ICR for EGUs that comprise the MACT floor, to the maximum extent possible consistent with the CAA requirements and as appropriate, in order to account for fuel, performance, and load variability. With regard to one SER's request that a *de minimis* exemption be considered, EPA must establish standards for all HAP emitted from major sources consistent with CAA section 112(d) and case law from the U.S. Court of Appeals for the D.C. Circuit.

Panel recommendations: The Panel recommends that EPA propose provisions for emissions averaging between units at a facility and long averaging times to address startup, shutdown, and fuel variability for the proposed emissions limit and, further, that the Agency solicit comment on an appropriate averaging time. The Panel recommends that EPA consider fuel variability when deriving the emissions standards. The Panel recommends that the Agency evaluate whether establishing work practice requirements during periods of startup and shutdown would be consistent with CAA section 112(h) and investigate whether there are technical bases for establishing separate standards (e.g., work practices or subcategorization) for EGUs below a certain size and what that size threshold is.

2. Subcategorization

In general, SERs encouraged the broad use of subcategories. SERs commented that EPA should consider subcategorizing EGUs based on fuel type, boiler type, duty cycle, and size. Some SERs requested that EPA consider establishing a subcategory for combined heat and power (CHP) units that meet the definition of EGU (i.e., generate enough electricity). SERs explained that the duty cycles for some coal-fired EGUs are not primarily base-load, as in the past, but may alternate between operating as base-load units and peaking units. Similar comments were not made with regard to consideration of base-load oil-fired EGUs and peaking oil-fired EGUs as separate subcategories.

EPA recommendations: EPA recognizes subcategorization may be necessary and we will consider whether subcategorization is reasonable in light of the data and other information obtained in response to the ICR to the utility industry and the information from the SERs. SERs recommended that EPA consider adopting the following subcategories for EGUs:

- Fuel type
  - ► North Dakota lignite
  - ► Gulf Coast lignite
  - ► Bituminous coal

    - ► Sub-bituminous coal
    - ► Blended bituminous/sub-bituminous coal
    - ► Powder River Basin coal
    - ► Illinois Basin coal
- Boiler design
    - ► Units designed to burn coal
    - ► Units designed to burn oil
    - ► IGCC units
    - ► CHP units
    - ► Units designed to burn multiple fuels
- Unit type
    - ► Fluidized bed
    - ► Pulverized coal
    - ► Wall-fired
    - ► Tangentially-fired
- Duty cycle
    - ► Base-load oil-fired units
    - ► Peaking oil-fired units
    - ► Base-load coal-fired units
    - ► Coal-fired units that alternate operating as base-load and peaking
- Boiler class
    - ► Small entity non-profit providers

EPA and OMB recommendations: EPA panel members and OMB acknowledge that it may not be practicable to adopt all of the proposed subcategories, as there may be substantial overlap between the groups. EPA panel members and OMB recommend that EPA consider these subcategories and adopt a set of standards that is consistent with the CAA and which effectively reduces burden on small entities.

SBA recommendations: SBA agrees that EPA should consider various subcategorization options in developing this rulemaking, but it does not believe that the Panel has sufficient information to recommend a particular subcategorization option that would minimize the significant economic impact of the proposed rule on small entities. While a large number of subcategories may serve to establish standards that minimize the economic impacts on some particular small entities, it could also disadvantage small entities that would otherwise be among the best performing 12 percent of a larger subcategory.

3. Area Source Standards

SERs suggested that EPA establish separate emission standards for EGUs located at area sources of HAP and that the standards be based on generally available control technology (GACT) as allowed under section 112(d)(5) of the CAA. Specifically, SERs recommended that EPA establish management practice standards for natural area source EGUs as well as synthetic area source EGUs.

EPA recommendations: EPA panel members recommend that the Agency consider a regulatory approach for EGUs at area sources of HAP based on GACT. Further, EPA panel members recommend that the Agency consider establishing management practices for area source EGUs.

OMB recommendations: OMB recommends that EPA propose a regulatory approach for EGUs at area sources of HAP based on GACT and propose management practices for area source EGUs.

SBA recommendations: SBA agrees that EPA should consider the use of its authority to establish area sources standards for natural and synthetic area sources to the maximum extent permitted by statute, but does not believe that the Panel has sufficient information to recommend a particular regulatory option that would minimize the significant economic impact of the proposed rule on small entities.

4. Work Practice Standards

SERs recommended that EPA establish work practice standards for major source EGUs. A work practice standard, instead of MACT emission limits, may be proposed if it can be justified under section 112(h) of the CAA that it is not feasible to prescribe or enforce an emission standard (i.e., the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations). Specifically, SERs believe it is not feasible to prescribe or enforce an emission standard for control of a HAP emitted at or below the detection limit of the method that was used to collect and analyze HAP emissions. A number of HAP, including a large percentage of the dioxin/furan and non-dioxin organics measurements, are emitted at or below detection limits.

EPA and OMB recommendation: EPA panel members and OMB recommend that the Agency evaluate the availability of work practice standards, in particular with regards to HAP that are emitted at or below the detection limit.

SBA recommendation: SBA recommends that EPA propose work practices standards to the maximum extent permitted by statute. However, the Panel does not have sufficient information to specify which work practices standards can be proposed.

5. Health Based Emission Limits

SERs commented that health based emission limits (HBELs) should be used to the maximum extent possible when facts support their use. Specifically, SERs encouraged EPA to use its CAA section 112(d)(4) authority to set a HBEL for HCl based on its reference concentration for the entire EGU source category.

EPA recommendation: EPA panel members recommend that the Administrator consider her discretionary authority to propose a HBEL for acid gas HAP emissions as a regulatory flexibility option.

OMB and SBA recommendations: OMB and SBA recommend that in the proposed rule, EPA co-propose and seek comment on an HBEL for HAPs to the maximum extent permitted by statute, including, but not limited to, the acid gas HAP. OMB and SBA recommend that in the proposal EPA explain their method for deriving these limits, along with sample calculations.

6. Potential Adverse Economic Impacts

SERs commented on a number of concerns they have with respect to small entities' ability to comply with the potential requirements of the Utility NESHAP. SERs inquired as to EPA's authority to (1) move the effective date of the standards, (2) determine when implementation begins, (3) allow a phase-in of compliance, and (4) streamline the process for petitioning for a fourth year for purposes of complying with the standards. SERs asked that EPA consider the implications of EGU reliability versus compliance with the Utility NESHAP when establishing the rule's requirements. SERs expressed concern that, depending on the type and stringency of requirements, the regulations could be so expensive that they cause extensive plant retirements and job losses.

SBA recommendation: SBA recommends that EPA propose a streamlined process for granting a fourth year, including aiding small entities in gathering the information necessary to support such a petition, and recommends that EPA develop, in consultation with the Department of Defense and small entities affected by this rule, to develop the information necessary to support a recommendation under section 112(i)(4) of the CAA for consideration by the President.

Panel recommendations: The Panel recommends that the Agency weigh the potential burden of compliance requirements and consider various options for all regulated entities, especially small entities. With respect to dates, EPA does not have the authority to move the effective date of the standards (see CAA section 112(d)(10)), to initially provide more than three years for compliance (see CAA section112(i)), or to allow a phase-in of compliance. The Panel recommends that the Agency investigate the potential for streamlining the process for petitioning for a fourth year for purposes of compliance with the standards and consider the need to invoke the national security exemption under section 112(i)(4) of the CAA. Additionally, the Panel recommends that EPA seek comment in the proposed rule on the potential adverse economic impacts of the rule for small entities and recommendations for mitigating or eliminating these adverse economic impacts on small entities.

7. Concerns with the Small Business Advocacy Review Process

SERs stated that they do not believe they were provided the opportunity for effective participation in the Federal regulatory process as required by SBREFA. SERs indicated that they were not provided descriptions of significant alternatives to the proposed rule, differing compliance or reporting requirements or timetables that take into account the resources available to small entities. SERs further indicated that there was no pre-meeting to go over information on the rule, there was only one outreach meeting, and SERs were only provided 14 days to prepare written comments. SERs had various suggestions including that EPA schedule additional panel meetings once the Agency has progressed further in its rulemaking preparation, that EPA consider starting over with the SBREFA process, and that EPA request an extension to allow time to (1) adequately analyze lessons learned in the Boiler MACT rule development process, (2) thoroughly analyze the emissions data, (3) continue to meet with utility industry representatives, and (4) consider the range of possible emission control options that would allow for implementation to take place such that the integrity of the Grid, the national economy, and national security will be protected.

EPA recommendation: EPA appreciates the SERs' concerns, but believes it has fulfilled its statutory obligations under SBREFA and has afforded SERs sufficient opportunity to suggest regulatory alternatives, and thus, makes no recommendations to address these concerns. The time constraints of the small business advocacy review process with respect to the Utility NESHAP were explained at the beginning of the process. That is, due to the regulatory schedule there could only be one SER outreach meeting. The nature of the information to be provided was also outlined to the SERs at the start of the process. EPA panel members believe they provided sufficient information to allow SERs to make suggestions concerning regulatory alternatives (e.g., regarding subcategories, HAP and HAP surrogates, monitoring requirements, control technologies potentially required to meet standards, CAA authorities to establish health-based emission limits and work practice standards) as part of the small business advocacy review process, and the SERs have in fact made many productive suggestions EPA will seriously consider as part of the rulemaking process.

OMB recommendation: Although OMB understands the time constraints imposed on this rulemaking process, we recommend that once EPA has drafted a set of emissions limits for EGUs, they convene another meeting with the SERs to gather insight on the feasibility and achievability of those limits for small entities. To the extent feasible, we recommend this meeting take place before the proposal is issued.

SBA recommendations: SBA agrees with the concerns raised by the SERs in their comments about the adequacy of the information provided to the Panel and the SERs and about the schedule for the Panel. SBA believes that more time is necessary for EPA to develop regulatory options and to share them with the SERs, so that the SERs could provide a more informed comment and better inform the Panel's recommendations.

SBA recommends that EPA request an extension of the regulatory deadlines imposed by the consent decree. The extension should provide enough time for EPA to:

- Analyze fully the results of the ICR and other data necessary to understand the emissions characteristics of the regulated entities;
- Develop a robust range of specific regulatory options;
- Consult with the SERs and provide an additional opportunity for the SERs to provide input on the regulatory options; and
- Allow for the full interagency review required by Executive Order 12866.

Sincerely,

Alexander Cristofaro
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Enclosure

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