

FINAL REPORT

of the

SBREFA Small Business Advocacy Review Panel

on EPA's Planned Proposed Rule for

**RESPONDING TO PETITIONS UNDER
SECTION 126 OF THE CLEAN AIR ACT**

August 21, 1998

TABLE OF CONTENTS

1. INTRODUCTION.....1

2. BACKGROUND.....2

3. OVERVIEW OF PROPOSAL UNDER CONSIDERATION.....4

4. APPLICABLE SMALL ENTITY DEFINITIONS.....4

5. INDUSTRIES THAT MAY BE SUBJECT TO THE PROPOSED REGULATION5

6. SUMMARY OF SMALL ENTITY OUTREACH.....5

7. SMALL ENTITY REPRESENTATIVES.....6

8. SUMMARY OF INPUT FROM SMALL ENTITY REPRESENTATIVES.....8

9. PANEL FINDINGS AND DISCUSSION.....9

9.1 Major Topics of Panel Discussion.....9

9.2 The Types and Number of Small Entities to Which the Proposed Rule Would Apply.....9

9.3 Projected Reporting, Record Keeping, and Other Compliance Requirements of the Proposed Rule.....10

9.4 Other Relevant Federal rules Which May Duplicate, Overlap, or Conflict with the Proposed Rule.....10

9.5 Regulatory Alternatives.....11

ATTACHMENT A: SUMMARIES OF SMALL ENTITY OUTREACH MEETINGS

ATTACHMENT B: SMALL ENTITY WRITTEN COMMENTS

ATTACHMENT C: DOCUMENTS DISTRIBUTED TO SMALL ENTITY REPRESENTATIVES

Report of the Small Business Advocacy Review Panel on Proposed Rulemaking Responding to Petitions Under Section 126 of the Clean Air Act

1. INTRODUCTION

This report is presented by the Small Business Advocacy Review Panel convened for the proposed rulemaking responding to petitions under Section 126 of the Clean Air Act that the Environmental Protection Agency (EPA) is currently developing. On June 23, 1998, 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 of 1996 (SBREFA). Section 609(b) requires convening a review panel prior to publication of the initial regulatory flexibility analysis that an agency may be required to prepare under the RFA. In addition to its chairperson, the Panel consists of the Director of the Office of Air Quality Planning and Standards within the Office of Air and Radiation, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel for Advocacy of the Small Business Administration.

This report provides background information on the proposed rule being developed and the types of small entities that would be subject to the proposed rule, describes efforts to obtain the advice and recommendations of representatives of those small entities, summarizes the comments that have been received to date from those representatives, and presents the findings and recommendations of the Panel. The complete written comments of the small entity representatives are attached to this report.

Section 609(b) of the RFA directs the review panel to report on the comments of small entity representatives and make findings as to issues related to identified elements of an initial regulatory flexibility analysis (IRFA) under section 603 of the RFA. Those elements of an IRFA are:

- C A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- C A description of projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;
- C An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and
- C 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.

Once completed, the Panel report is provided to the agency issuing the proposed rule and included in the rulemaking record. In light of the Panel report, the agency is to make changes to the draft proposed

rule, the IRFA for the proposed rule, or the decision on whether an IRFA is required, where appropriate.

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 the remainder of the rule development process. The Panel makes its report at a preliminary stage of rule development and its report should be considered in that light. At the same time, the report provides the Panel and the Agency with an opportunity to identify and explore potential ways of shaping the proposed rule to minimize the burden of the rule on small entities while achieving the rule's statutory purposes. Any options the Panel identifies for reducing the rule's regulatory impact on small entities may require further analysis and/or data collection to ensure that the options are practicable, enforceable, environmentally sound and consistent with the statute authorizing the proposed rule.

2. BACKGROUND

The problem being addressed in this rulemaking is the windborne movement of ozone smog and one of its precursor chemicals -- nitrogen oxides, or "NOx" -- from NOx-producing sources. This movement -- called "transport" -- can cover very long distances; for example, sources in the midwestern U.S. have been found to contribute significantly to smog on the east coast. The NOx is produced primarily by combustion, and comes from such sources as automobiles, powerplants, and other industrial facilities such as industrial boilers, cement manufacturing plants, internal combustion engines, and gas turbines. As the NOx is transported downwind, it combines with other chemicals and contributes to the formation of ozone smog in cities throughout the eastern United States.

In August 1997, eight northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont) submitted individual petitions to EPA under section 126 of the Clean Air Act. Each petition requests that EPA make a finding that certain NOx-producing stationary sources in upwind States contribute significantly to ozone nonattainment problems in the petitioning State. If EPA grants the requested findings, EPA must establish Federal emission control requirements for the affected sources in these jurisdictions. Sources would have to comply with the emissions limits within three years from the finding.

It is important to note that these sources may also be affected by two related rulemakings also in development at this time. The first of these is the EPA rulemaking action requiring certain States to address the problem of regional ozone transport that EPA proposed on November 7, 1997 ("Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 62 FR 60318, often referred to as the "OTAG SIP Call"). In this rulemaking, EPA made a proposed finding that emissions from 23 jurisdictions --22 eastern States and the District of Columbia -- significantly contribute to nonattainment

problems in downwind States, and proposed that these States and DC must revise their State implementation plans to include provisions that will reduce State-wide NO_x emissions to a specified level. The 23 jurisdictions are Alabama, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

The second related rulemaking is a Federal Implementation Plan (FIP) to be proposed in the fall of 1998 as a “backstop” to the aforementioned OTAG SIP Call. This FIP, entitled “Federal Implementation Plans to Reduce the Regional Transport of Ozone,” will be modeled closely on the aforementioned SIP Call, covering the same 23 jurisdictions, and would be the vehicle for taking Federal action to achieve the required emission reductions if the States fail to do so in response to the SIP Call. Both the SIP Call and the FIP affect the same sources that would be affected by the 126 rulemaking, and would require very similar emission reductions from those sources. EPA is therefore taking great care to coordinate the three rulemakings.

In order to facilitate the coordination of these three rulemakings, EPA has worked to coordinate their schedules. On December 17, 1997, EPA signed a memorandum of agreement (MOA) with the eight petitioning States concerning the schedule for EPA action on the petitions. The petitioning States brought a lawsuit against EPA to formalize the schedule, and the petitioning States and EPA submitted to the court a proposed Consent Decree that incorporates the schedule in the MOA. EPA received public comment on this Consent Decree and its recommended schedule. According to this recommended schedule, EPA will have additional time beyond the statutory deadline for analyzing the technical merits of the petitions and carrying out the rulemaking process. It is designed to ensure that EPA will take timely action on the petitions while recognizing that EPA is simultaneously examining ozone transport through a State-based process. Under the recommended schedule, EPA must: publish an advanced notice of proposed rulemaking in the Federal Register by April 30, 1998; publish a notice of proposed rulemaking in the Federal Register by September 30, 1998; and take final action by April 30, 1999. In accord with the aforementioned MOA, EPA intends to propose the 126 rulemaking, entitled “Findings of Significant Contribution and Rulemaking on Section 126 Petitions from Eight Northeastern States For Purposes of Reducing Interstate Ozone Transport,” by September 30, 1998.

It should also be noted that the FIP rulemaking proposal is being reviewed by a SBREFA panel which is being advised by the same set of Small Entity Representatives as the panel discussed in this report. The two panels are on the same schedule, and cover much the same ground. It is therefore expected that the recommendations to mitigate small-entity impacts contained in this report will be very similar to, if not identical with, those in the FIP panel report.

3. OVERVIEW OF PROPOSAL UNDER CONSIDERATION

In this rulemaking, EPA will grant the requested findings or deny the petitions, in whole or in part, unless EPA chooses an alternative schedule. The alternative schedule would allow the States affected by the OTAG SIP Call an opportunity to respond to that rule with a State implementation plan addressing transport before EPA would make a final finding on the section 126 petitions. Under this approach, the findings would be deferred pending certain actions by the States and EPA regarding the OTAG SIP Call SIPs. If EPA does not propose approval of a State's SIP by November 30, 1999, the section 126 finding would be deemed granted for sources in that State. In addition, if EPA proposes approval of the State's SIP by November 30, 1999, but does not issue a final approval of the SIP by May 1, 2000, the section 126 finding would be deemed granted for sources in that State as of May 1, 2000. If EPA finally approves the SIP by May 1, 2000, then EPA will take any further actions, if necessary, to complete its action regarding the section 126 petitions by that same date. EPA has the authority to revise or amend the control requirements promulgated under section 126 in light of the controls that might be required under a SIP or FIP for the OTAG SIP Call.

If EPA grants the requested findings for a given State, EPA would establish Federal NO_x emission control requirements for the affected sources in that State. Sources would have to comply with the emissions limits within three years from the finding. A section 126 rulemaking would be promulgated for the sources in that State, and would involve setting specific NO_x emission limits for sources found by EPA to contribute significantly to ozone nonattainment problems in downwind petitioning States. EPA is now assessing and analyzing the role small entities might play in the NO_x transport problem, and intends to minimize potential regulatory impacts on small entities to the extent possible, utilizing input from the Panel. As stated above, because the section 126 petition process overlaps considerably with the OTAG SIP Call and FIP rulemakings, EPA intends to coordinate the three actions as much as possible.

4. APPLICABLE SMALL ENTITY DEFINITIONS

To define small entities, EPA used the Small Business Administration (SBA) industry-specific criteria published in 13 CFR section 121. SBA size standards have been established for each type of economic activity under the Standard Industrial Classification (SIC) System. These criteria are usually expressed in terms of number of employees or dollar volume of sales.

To determine the affected small entities, EPA developed a list of SIC codes containing industries that might be subject to the proposed rule; these are essentially any industrial categories that emit NO_x. This list of SIC codes is given in Section 5 below.

5. INDUSTRIES THAT MAY BE SUBJECT TO THE PROPOSED REGULATION

Due to their NO_x-emitting properties, the following industries have the potential to be affected

by the Section 126 rulemaking:

SIC Codes in Division D: Manufacturing

2611 -- Pulp mills

2819 -- Industrial Inorganic Materials

2821 -- Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers

2869 -- Industrial Organic Chemicals

3312 -- Steel Works, Blast Furnaces, and Rolling Mills

3511 -- Steam, Gas, and Hydraulic Turbines

3519 -- Internal Combustion Engines

3585 -- Air-Conditioning and Warm-Air Heating Equipment and Commercial and Industrial Refrigeration Equipment

SIC Codes in Division E: Transportation, Communications, Electric, Gas, and Sanitary Services

SIC Major Group 49: Electric, Gas, and Sanitary Services, including:

4911 -- Electric Utilities

4922 -- Natural Gas Transmission

4931 -- Electric and other Gas Services

4961 -- Steam and Air Conditioning Supply

As described below, a number of these industries are under consideration for exemptions from rule applicability due to a number of factors, including amount of emissions, number of facilities, and availability of cost-effective control technology.

6. SUMMARY OF SMALL ENTITY OUTREACH

In developing this proposal, EPA has sought and obtained input from small businesses, small governmental jurisdictions, and small organizations. EPA and SBA agreed on a set of representatives of these three categories of small entities. The list of these representatives is given in Section 7 below.

Outreach Conducted Prior to Convening this Panel

Initial outreach was conducted by means of a meeting with the small-entity representatives in Washington, D.C. on April 14, 1998. The purpose of this meeting was to familiarize the small-entity representatives with the substance of the rulemaking and the kinds of sources being considered for regulation, and to solicit comment on these topics. A summary of that meeting is attached. Subsequent to the meeting, the representatives submitted follow-up comments in writing, copies of which are attached.

Outreach Conducted During the Panel Process

The primary outreach by the panel was accomplished by a meeting with the small-entity representatives in Washington, D.C. on August 4, 1998. The purpose of this meeting was to present the results of EPA's analysis on small-entity impacts, and to solicit comment on this analysis and on suggestions for impact mitigation. A summary of that meeting is attached. Subsequent to the meeting, the representatives submitted follow-up comments in writing, copies of which are attached.

A summary of the comments received at the August 4 meeting and the written comments submitted following that meeting is presented in Section 8 below. These comments apply to both the 126 proposal under review in this report and the FIP proposal which is under review by another SBREFA panel running concurrently with this one. In the invitation letter to the SERs dated July 27, 1998, it was made clear that any regulatory controls imposed by the 126 rulemaking would also be imposed by the FIP rulemaking, and that any panel findings and recommendations would apply to both the FIP and 126 proposals. The SER comments summarized in Section 8, therefore, apply to the 126 proposal as well as to the FIP proposal.

7. SMALL ENTITY REPRESENTATIVES

EPA, in consultation with the Small Business Administration, invited the following 36 small entity representatives (SERs) to participate in its outreach efforts on this proposal. Those representatives who attended the August 4 meeting or who submitted written comments after that meeting are marked with an asterisk (*).

William Greco
American Foundrymen's Society

David Woodbury
American Wire Producers Association

Jim McLarney
American Hospital Association

Robert Ruddock
Associated Industries of Massachusetts*

Randy Meyer
American Municipal Power-Ohio*

Robert Bessette
Council of Industrial Boiler Owners*

Tom Carter
American Portland Cement Alliance*

Warren Stickle
Chemical Producers and Distributors
Association

Bill Wemhoff
American Public Power Association*

Nelson Cooney
Brick Institute of America

Allen Schaeffer
American Trucking Association

Carter Keithley

Hearth Products Association

Raj G. Rao
Indiana Municipal Power Agency

Matthew Hare
Michigan Manufacturers Association

James J. Houston
Industrial Heating Equipment Association

Jay J. Vroom
National Agricultural Chemicals Association

Theresa Larson
National Association of Manufacturers

Jennifer Tolbert
National Association of Public Hospitals &
Health Systems

John Satagaj
National Business Legislative Council

Tom Sullivan
National Federation of Independent Business*

Susan Fry
National Food Processors

Eric Males
National Lime Association*

Richard Margosian
National Particleboard Association

John Paul Galles
National Small Business United

Tracey Steiner
National Rural Electric Cooperative
Association

Bruce Craig
Natural Gas Supply Association*

Megan Medley
Nonferrous Founders Society

Thomas E. Cole
Rubber Manufacturers Association

Randy Meyer
Ohio Municipal Electric Association*

Maureen Healey
Society of the Plastics Industry

Julie Scofield
Smaller Business Association of New England

Clifton Shannon
SMC Business Councils*

Victor N.Tucci, M.D.
Three Rivers Health & Safety, Inc. and Small
Business United*

Karen Price
West Virginia Manufacturers' Association

Michael H. Levin
West Virginia Chamber of Commerce*

Tobia G. Mercurio
Capitol Cement Corporation*

8. SUMMARY OF INPUT FROM SMALL ENTITY REPRESENTATIVES

SER comments were received by the Panel both verbally at the August 4 meeting and in writing subsequent to that meeting. Attachment A includes a summary of the August 4 meeting, and Attachment B contains all the written comments received. The following is a summary of all the comments on the Section 126 Petitions, both verbal and written.

One of the associations presented arguments supporting the view that SBREFA authorizes EPA to exempt small entities on the basis of de minimis emissions impact, in a way analogous to other categorical exemptions being considered, such as source-size cutoffs and de minimis exemptions. Another commenter urged EPA to exempt the remainder of the non-EGU small entities on the basis of these kinds of factors. Failing this, the commenter suggested exempting any small entities with emissions under some limit higher than the ones already being considered.

Comments regarding impacts on industrial boilers were received from one association. Many of these comments appeared to be aimed at distinguishing industrial boilers (of any size) from utility boilers, and are thus tangential to the assessment of impacts on boilers owned and operated by small entities. The thrust of these comments was that EPA's industrial-boiler assumptions regarding cost and the benefits of trading are based on utility experience and analyses, and therefore do not translate very well to industrial boilers, which are normally much smaller. Presumably these factors would apply even more strongly to smaller industrial boilers. The association commented that the costs of continuous emission monitors (CEMs) for industrial boilers would be so high they would prevent the boilers from participating in trading. This association also commented that any industrial boilers were old, implying very high control costs, and that they are not base-loaded as utility units are, implying a high cost-per-ton of control.

Comments on electric generating units (EGUs) were received from two public power companies and one public power association. The company and one association concurred with EPA's choice of 25 MW as the lower-size applicability cutoff. One association commented that EPA's cost-lowering assumptions for trading were too optimistic, and that EPA should make it easier for small units to opt-in to the trading program. One association commented that small utilities should get trading credit for significant NO_x reductions already accomplished. The association and one company claimed that several affected units in their area show high costs (above 3% of revenue) and that these were probably peaking units, which inherently run only for brief times and are thus very inefficient to control.

Finally, one association voiced the concern that the States may still target small entities, and that EPA should issue guidance addressing this problem.

9. PANEL FINDINGS AND DISCUSSION

9.1 Major Topics of Panel Discussion

The primary topic of panel discussion was applicability of the rule to the various categories of NO_x-emitting sources, the costs the rule would impose, and the possibility of further reducing rule applicability. Secondary topics were emissions monitoring and other potentially duplicative Federal rules. These discussions are summarized below. Panel findings are presented in section 9.5 below.

9.2 The Types and Number of Small Entities to Which the Proposed Rule Would Apply

The 126 rulemaking is potentially applicable to all NO_x-emitting entities named in one or more of the Section 126 petitions. Since this is a subset of the entities covered by the FIP proposal, any impacts from the 126 rule will be a subset of the FIP impacts, and the FIP proposal represents the worst case that could result if all eight 126 petitions were granted. Therefore, EPA has applied its limited time and resources to developing estimates of impact based on the FIP proposal, with the knowledge that it represents the worst case in terms of impact on small entities.

EPA estimates that the total number of NO_x-emitting entities named in the 126 petitions is somewhat less than the number affected by the FIP proposal -- namely, about 5200, of which about 1200 are small entities. Based primarily on considerations of overall cost-effectiveness and administrative efficiency, EPA is considering reducing this applicability based on several factors including input from this panel. Specifically, EPA is now considering exempting a number of source categories from being subject to this regulation based on factors such as low relative emissions and lack of an identified NO_x control technology. Additional categories of sources are being considered for exemption as being cost-ineffective, with EPA considering an average cost-effectiveness of \$2000 per ton of NO_x removed as the upper average cost limit.

If EPA follows through with this reduced-applicability approach, the 126 rulemaking will apply only to the following types of sources: electric generating units (EGUs), industrial boilers, and combustion turbines. The stringency levels of control EPA currently intends to propose for these types of sources is as follows: for EGUs, an emission rate of .15 pounds of NO_x per million BTU; for industrial boilers and combustion turbines, an emission reduction of 60%. At these stringency levels, the estimated number of small entities that would be affected is as follows:

Electric Generating Units -- 114 small entities

Industrial Boilers and/or Combustion Turbines -- 35 small entities

EPA has further estimated that, of these affected small entities, the following would experience costs equal or greater to 1% of their revenues:

Electric Generating Units -- 32 small entities

Industrial Boilers and Combustion Turbines -- 8 small entities

Of these, EPA estimates that about 18 small entities with electric generating units and 4 small entities with industrial boilers or turbines would see costs greater than 3% of revenues.

Focusing the rule on these categories would constitute **a reduction of over 85% in the number of small entities affected by the rule: out of 1200 potentially-affected small entities, over 1000 would be exempted, with only 149 small entities remaining.** The panel received written comments from three small-entity representatives strongly endorsing these exemptions. In section 9.5 below, the panel likewise recommends that they be adopted in the rule proposal.

9.3 Projected Reporting, Record Keeping, and Other Compliance Requirements of the Proposed Rule

In this area, panel discussion was centered on the requirement for continuous emissions monitors (CEMs) for sources other than electric generators. The panel received both written and oral comments to the effect that CEMs would be prohibitively costly for many industrial boilers, representing a significant part of the cost of the rule. EPA believes that it is necessary for all sources in the trading program to be subject to accurate and consistent monitoring requirements designed to demonstrate compliance with a mass emission limitation, and therefore intends to require all large units to monitor NOx mass emissions using CEMS (including units opting-in to the trading program). However, EPA does believe that it is appropriate to provide lower cost monitoring options for units with low NOx mass emissions, and therefore intends to allow non-CEMs alternatives for units that have emissions of less than 50 tons per year of NOx. This cutoff will provide relief for boilers large enough to be covered by the rule, but that run for a smaller number of hours each year, including any such boilers owned by small entities.

9.4 Other Relevant Federal rules Which May Duplicate, Overlap, or Conflict with the Proposed Rule

Discussion in this area centered on the role of State regulation via SIPs versus the role of the Federal government under the FIP and 126 rules. The American Public Power Association submitted written comments expressing worry that regardless of the decisions made about the FIP proposal, many States would nonetheless target small businesses when they prepare their SIPs. The same argument would apply to the 126 rule. The commenter recommended that EPA write guidance to address this problem. As outlined in Section 9.5, the panel is recommending that EPA produce such guidance.

9.5 Regulatory Alternatives

The Panel agreed with the general approach EPA is now considering to define the scope of the rule. **The Panel recommends that the categorical exemptions outlined in Section 9.2 be included in the proposal, and further recommends that the applicability of EPA's proposed**

rule be limited to the categories shown in that section.

The Panel notes that EPA's cost estimates in Section 9.2 show that even with this narrowed scope, the rule is still projected to impact 40 small entities at a level greater than or equal to 1% of revenues, and over 20 entities at 3% or greater. Moreover, commenters have questioned the assumptions behind EPA's estimates, as outlined in Section 8 above. Further refinement of these assumptions and analyses could raise or lower the impact estimates. Given this uncertainty, the panel considered it appropriate to explore options for further reducing the impact of the rule.

Several commenters have suggested that EPA exempt all small entities from this rulemaking. Although EPA does not feel that a blanket, across-the-board exemption could be supported, in the spirit of SBREFA EPA has indicated it is receptive to proposals for further exemptions, up to and including exempting all small entities if that could be shown to be appropriate. Therefore, the panel **recommends that EPA solicit comment on additional types of small-entity exemptions and the rational bases on which such exemptions could be made, such as disproportionate ability to bear costs and administrative burden.**

The panel recommends that EPA encourage non-trading sources to opt-in to the emissions trading program. Allowing these sources to opt-in to the trading program provides an incentive to develop alternative cost-effective control options that will allow sources to improve overall emissions reduction cost savings.

Some commenters have suggested that control costs for industrial boilers are likely to be higher than EPA has estimated, and that a ceiling should be set on the cost per ton that these boilers should be required to pay. The panel considered this, but also recognized that EPA expects to factor CEM cost into the overall control cost considered when setting the level of stringency of the rule. EPA believes the effect of this will be to require somewhat less emission reduction than if CEM cost had not been considered for this source category. In addition, owners of those industrial boilers with high emissions reduction costs may choose to purchase emissions credits in the trading program rather than control emissions to the required level.

In furtherance of SBREFA's goal of reducing small-entity impacts, in addition to the aforementioned general recommendations, the panel has proposed a number of specific ideas for exempting or reducing burden on particular categories of small entities. Many of these ideas were generated from comments made by small entity advisors to this panel. The first area the panel explored was electric generating units (EGUs). EPA's analysis shows that slightly more than 30 EGUs may experience costs above 1% of revenues, and that 18 of these might exceed 3%. From comments made by small utilities, the panel suspects that many of these high-cost-to-revenue situations may involve peaking units, which run only a small percentage of the time and thus may be inefficient to control. To address this problem, the panel **recommends that EPA solicit comment on whether to allow electric generating units to obtain a federally enforceable NOX emission tonnage limit**

(e.g., 25 tons during the ozone season) and thereby obtain an exemption from FIP applicability. EPA should also solicit comment on the necessity for and appropriateness of such an option.

Individual panel members conceived of other potential ways to mitigate impact on small entities, such as raising the size cutoff for small entities and/or lessening the required percentage reduction in NOX emissions required from small entities. (SBA recommends requiring only a 40% reduction instead of 60%, and notes that the impacts of 40% reductions submitted to the Panel by the program office included large firms as well. SBA encourages the agency to conduct analyses to determine the impact of 40% reduction being applied solely to small firms and 60% solely to large firms, and the resulting effect on control levels for sources regulated in the 126 rule.) The panel members are split on this issue: some oppose considering such options, but others **recommend that (1) EPA solicit comment on whether requirements should be reduced on small-entity-owned industrial boilers by some combination of raising the size cutoff and/or lessening the required reduction; (2) that EPA solicit comment on which, if any, of these options is preferable, the necessity and appropriateness of any such option, and the appropriate level (e.g., 40% reduction instead of 60%); and (3) that EPA solicit information to support any comments submitted.**

Finally, the panel notes that several commenters have expressed concern that regardless of the sensitivity to small-entity concerns EPA shows in the FIP and/or 126 rulemakings, the States may nevertheless see fit to target small entities in their SIPs. To help address this problem, the panel **recommends that, subsequent to the FIP and 126 proposals, EPA issue guidance that conveys to the States the kinds of options and alternatives EPA has considered in addressing small-entity concerns, explains the rationale behind these kinds of options, and recommends that the States consider adopting similar alternatives in their SIPs.**