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December 20, 2023

Administrator Michael S. Regan  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

*Submitted to the Federal eRulemaking Portal, [www.regulations.gov](http://www.regulations.gov)*

**Re: Supplemental Notice of Proposed Rulemaking for 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. 80,682 (November 20, 2023)**

Dear Administrator Regan,

The National Rural Electric Cooperative Association (NRECA) respectfully submits these comments in response to the U.S. Environmental Protection Agency's (EPA) supplemental notice of proposed rulemaking (Supplemental Notice) related to its May 23, 2023 proposed New Source Performance Standards (NSPS) and emission guidelines for greenhouse gas emissions from new and existing fossil fuel-fired electric generating units (Proposed Rules).<sup>1</sup> NRECA filed comments on the Proposed Rules August 8<sup>2</sup> and filed supplemental comments providing new information pertaining to carbon dioxide (CO<sub>2</sub>) pipelines on November 13.<sup>3</sup>

NRECA is the national trade association representing 900 not-for-profit electric cooperatives that deliver power to 42 million people and serve 92 percent of the nation's persistent poverty counties. NRECA members include 63 generation and transmission (G&T) cooperatives and 832 distribution cooperatives. As not-for-profit, consumer-owned utilities, electric cooperatives are deeply concerned about maintaining affordable and reliable electric service for our members. Importantly, all but two of NRECA's 900 member cooperatives are "small entities" under the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-12, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

NRECA appreciates the opportunity to comment on the Supplemental Notice and that EPA has acknowledged, as NRECA stated in its August 8 comments, that the RFA requires alternatives discussed during the Small Business Advocacy Review (SBAR) Panel process to be made available for public comment.

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<sup>1</sup> Supplemental Notice of Proposed Rulemaking for 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. 80,682 (November 20, 2023).

<sup>2</sup> Comments submitted by National Rural Electric Cooperative Association (NRECA). August 8, 2023. Available at: <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0770>. (August 8 comments).

<sup>3</sup> Supplemental comments submitted by National Rural Electric Cooperative Association (NRECA). November 13, 2023. Available at: <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-8119>. (Supplemental comments).

## **Executive Summary**

NRECA maintains that the Proposed Rules exceed EPA's statutory authority and would jeopardize affordable and reliable electricity by mandating nascent, inadequately demonstrated technologies and unachievable emissions limits on an unworkable timeframe.

EPA asks for comment on potential subcategories that might mitigate impacts on cooperatives and other small entities, based on feedback received during the SBAR Panel. Rather than developing a specific proposal based on public comment during the initial comment period or during the SBAR Panel, EPA seeks ideas about potential alternatives from the public. A neatly comprised subcategory of cooperatives is not possible.

Further, EPA has only solicited comments on subcategories for the portion of the rule covering new units and not the portion applying to existing units. But the existing source guidelines themselves will have devastating economic and reliability impacts. Attempting to make subcategories for new source standards, but not existing source guidelines makes no logical or legal sense.

EPA also seeks input on mechanisms that may preserve grid reliability – again without offering any specific proposal it would consider. EPA received numerous comments about grid reliability from which it could have developed a specific proposal. In addition, EPA still has not assessed reliability impacts – either for the Proposed Rules or the entire suite of rules EPA is working on that target fossil fuel generation. Until that occurs and the full scope of the impacts are known, any discussion of reliability mechanisms is frivolous.

Finally, EPA's Initial Regulatory Flexibility Analysis (IRFA) continues to underestimate the costs of the Proposed Rules to small entities despite EPA receiving specific information during the initial comment period on ways in which it underestimated costs. The IRFA's underlying small entity screening analysis also contains an obvious error that calls into question the quality of that analysis.

## **Introduction**

The Supplemental Notice solicits comment on (1) the potential creation of additional subcategories of fossil fuel-fired electric generating units (for the purposes of setting New Source Performance Standards) that EPA identified in its Initial Regulatory Flexibility Analysis after the Small Business Advocacy Review Panel, (2) whether to include mechanisms to address the reliability issues that NRECA, electric cooperatives, Congress, and several others raised before, during, and after the comment period, and (3) the IRFA for the portion of the rule covering new units.

NRECA addresses each of these topics below. At the outset, NRECA reiterates that the Proposed Rules exceed EPA's statutory authority and would jeopardize affordable and reliable electricity by mandating nascent, inadequately demonstrated technologies and unachievable emissions limits on an unworkable timeframe. Indeed, the landscape for the Proposed Rules has only gotten worse since issuance. As NRECA notified EPA in its November 13 supplemental comments, since the initial comment period closed, the developer of the Midwest Carbon Express pipeline has delayed its CO<sub>2</sub> pipeline project due to permitting challenges and the developer of the Heartland Greenway CO<sub>2</sub> pipeline project has canceled that project due to "the unpredictable nature of the regulatory processes involved." As NRECA pointed out in both its August 8 and November 13 comments, EPA's proposal relies on technology and infrastructure that simply has not been demonstrated and does not and will not exist, if at all, until long after the compliance period.

Nothing in the Supplemental Notice addresses the underlying challenges that will make compliance with the Proposed Rules unattainable. In fact, the questions on which EPA seeks public input highlight these challenges.

Further, EPA has not offered specific proposals on any of the areas in which it seeks comment and instead puts the burden on the public to come up with ideas while offering no guidance from the Agency on what type of solutions it might actually incorporate into a final rule. EPA received more than 1.3 million comments on its Proposed Rules from which it could have drawn possible solutions and proposed them to the public. EPA has also given the public a mere 30 days to provide such solutions despite requests from NRECA and others to extend the comment period.<sup>4</sup>

### **Comments on Subcategorization**

In the Supplemental Notice, EPA seeks comment on “potential exclusions or subcategories that may address the concerns of small entities” and “whether ‘rural electric cooperatives and small utility distribution systems (serving 50,000 customers or less) can expect to have access to hydrogen or (carbon capture and storage) infrastructure, and if a subcategory for these units is appropriate.’” EPA’s request for comments is in response to comments supplied by NRECA, several individual cooperatives, and others during the SBAR Panel meeting held in August and apply only to the NSPS portion of the Proposed Rules. Unfortunately, however, EPA has failed to offer any specific information on what compliance requirements, exclusions, or alternatives, it would create for any additional subcategories. This leaves stakeholders without the ability to analyze and comment on realistic alternatives and deprives them the ability to meaningfully comment on any actual proposal from the Agency in the absence of further supplemental notices.<sup>5</sup> That being said, for the reasons stated below, NRECA does not see how subcategorization would provide meaningful relief from the harms presented by the unlawful Proposed Rules.

As a preliminary matter, additional NSPS subcategorization for cooperatives, or small entities generally, would not mitigate the economic and reliability impacts from the Proposed Rules. While the NSPS undoubtedly would be disastrous for cooperatives, the NSPS represents merely a portion of the impacts that would result if the Proposed Rules are promulgated. The proposed emission guidelines for existing natural gas and coal units, which are not being considered in this section of the Supplemental Notice, will have devastating economic and reliability impacts on cooperatives. The impossible and unlawful emission guidelines will force the premature retirement of large, often baseload, existing units for which replacement generation options will not exist because of the unlawful and impossible NSPS requirements. This is particularly harmful to cooperatives. As explained in NRECA’s August 8 comments, by their not-for-profit nature any costs imposed on cooperatives must be passed along to end-of-the-line customers, which often include some of the poorest and most disadvantaged people in the United States. Accordingly, cooperatives are acutely mindful of how they manage their systems to keep electricity costs affordable for these vulnerable communities. Absent providing relief from the emission guidelines and/or completely overhauling the NSPS proposal, consideration of NSPS subcategories is frivolous.

Meanwhile, attempting to subcategorize new sources, but not existing sources makes no logical or legal sense. Before EPA may establish standards for existing sources, it must first set standards for new sources

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<sup>4</sup> Extension request submitted by National Rural Electric Cooperative Association (NRECA). November 22, 2023. Available at: <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-8118>. EPA notified NRECA on December 19 that it did not intend to extend the deadline.

<sup>5</sup> See, e.g., *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (A final rule fails the logical outgrowth test and thus violates notice requirements where “interested parties would have to ‘divine the [agency’s] unspoken thoughts,’ because the final rule was surprisingly distant from the proposed rule.”).

and “may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards,” i.e., create subcategories.<sup>6</sup> EPA may, in turn, establish existing source guidelines for sources “to which a standard would apply if such existing source were a new source.”<sup>7</sup> Any theoretical subcategories therefore should apply to both existing and new sources.

Nevertheless, NRECA cannot envision a subcategorization for cooperatives that would provide meaningful relief as long as EPA insists on basing its best system of emission reduction (BSER) for the NSPS (and the broader Proposed Rules) on the inadequately demonstrated technologies of carbon capture and storage (CCS) and co-firing of clean hydrogen at levels never before seen, demonstrated, scaled, or achievable.<sup>8</sup> A subcategory for cooperatives would not address any of the legal, technological, or physical flaws in the proposed NSPS (see August 8 comments). Crucially, it would not resolve any of the reliability concerns created by the Proposed Rules.

G&Ts provide wholesale electricity to their distribution cooperative and other rural utility members, and many also have some sales to non-members through bilateral and organized markets. Likewise, distribution cooperatives do not obtain all their power from G&Ts. NRECA estimates that cooperative generation accounts for about 40 percent of the power that cooperatives sell at retail. So, unless EPA were to exclude G&Ts regardless of unit capacity or retail power sales *and* exempt all sources of retail power distributed by cooperatives, the subcategory would provide no relief.

In addition, EPA appears to have mischaracterized the feedback it received from cooperatives that participated in the SBAR Panel process because the Supplemental Notice asserts that cooperatives believe the proposed requirements of the NSPS would not be “commercially available or viable in very rural areas.”<sup>9</sup> The vast majority of cooperatives do not expect to have access to CCS or clean hydrogen co-firing. These technologies will be more difficult for cooperatives to develop than some other utilities because of their often-remote location and because cooperatives have fewer resources at their disposal. However, it should not be lost on EPA that the nascent technologies that the Agency has proposed as BSER, coupled with the immense pipeline networks and other infrastructure build out that would be necessary to support those technologies make it virtually impossible to comply *anywhere* in the country (see August 8 Comments). Moreover, NRECA cautions EPA that cooperatives do not serve exclusively rural areas, making any subcategory contingent on geographic area unsuitable.<sup>10</sup>

As a final point on subcategorization, NRECA maintains that EPA’s threshold for the low load subcategory (units operating at an annual capacity factor of less than 20 percent) is arbitrary and inappropriately low. In its August 8 comments, NRECA cited data from the Energy Information Administration showing that the trend for such “peaking” units is that they continue to run at increasing capacity factors year over year, and for the first time in 2022 the average capacity factor of simple cycle units was above 20 percent.<sup>11</sup> These rising capacity factors indicate utilities are increasingly using peaking units to ensure reliability.

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<sup>6</sup> 42 U.S.C. § 7411(b)(2).

<sup>7</sup> *Id.* § 7410(d)(1)

<sup>8</sup> NRECA provided more than 250 pages of comments and technical information in its August 8 comments, the majority of which explain in detail why these proposed BSERs do not meet the requirements of Section 111 of the Clean Air Act.

<sup>9</sup> 88 Fed. Reg. 80,683.

<sup>10</sup> Furthermore, standards of performance must be adequately demonstrated and achievable for the source category regardless of geography. *See* 42 U.S.C. § 7411(a)(1).

<sup>11</sup> *See* NRECA August 8 Comments at 24.

## Comments on Reliability Mechanisms

Without question, the Proposed Rules – both alone and in conjunction with EPA’s broader “power sector strategy” aimed at driving the retirement of baseload fossil fuel by using “all of tools in our toolbox”<sup>12</sup> – will threaten electric reliability. It should come as no surprise to EPA that NRECA maintains its position from its August 8 comments that the only way to ensure grid reliability is to withdraw the Proposed Rules in their entirety.

In the Supplemental Notice, EPA appears to recognize the substantial feedback it received from NRECA, cooperatives, and several other stakeholders – including Congress<sup>13</sup> – that the Proposed Rules will jeopardize reliability by soliciting input on “whether the Agency should include a specific mechanism or mechanisms to address grid reliability needs that may arise during implementation of its final rules.”<sup>14</sup> However, as EPA did with regard to subcategorization, the Agency offers no specific proposal for the public to comment on, instead providing broad conceptual areas in which it seeks comment.

Since the close of the first comment period, EPA officials have downplayed concerns about the grid impacts of the proposed rules with assurances that “flexibility is actually inherent in the state planning process that Section 111(d) of the Clean Air Act authorized. States are the ones who have the authority to examine their remaining useful life of the unit, and develop source specific considerations, which may result in less stringent standards of performance or long compliance schedules.”<sup>15</sup> Unfortunately, such statements do not align with a much more restrictive view of “remaining useful life and other factors” expressed in the Proposed Rules, as NRECA explained in its August 8 comments,<sup>16</sup> and in the recently finalized Section 111(d) implementing regulations.<sup>17</sup>

Further, the simple fact that EPA is soliciting input on reliability mechanisms after the initial public comment period has closed underscores the Agency’s failure to assess the Proposed Rules’ impact on grid reliability. Indeed, EPA *still* has not appropriately assessed reliability impacts from the Proposed Rules despite receiving substantive comments on the topic during the initial comment period and through the Federal Energy Regulatory Commission’s (FERC) 2023 Annual Reliability Technical Conference (FERC Conference), during which Principal Deputy Assistant Administrator for the Office of Air and Radiation Joseph Goffman committed to making the FERC Conference record part of EPA’s rulemaking record.<sup>18</sup> EPA has admitted grid reliability is a valid consideration while addressing it in the Proposed Rules.<sup>19</sup> In doing so the Agency also cites a memorandum of understanding between it and the Department of Energy,<sup>20</sup> which both recognizes the need for monitoring and analyzing “electric sector resource adequacy and operational reliability.”<sup>21</sup> And the memorandum also describes the need to work with FERC and the North American

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<sup>12</sup> See <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/01/icymi-president-biden-pushes-forward-on-tackling-climate-crisis-despite-supreme-courts-attempt-to-take-country-backwards/>.

<sup>13</sup> See letter from Sens. Barrasso and Capito to FERC. June 30, 2023. Available at: <https://www.energy.senate.gov/services/files/63B78DEB-1D9D-4D0B-AB44-454335BF1470>.

<sup>14</sup> 88 Fed. Reg. 80,684.

<sup>15</sup> See FERC Annual Reliability Conference Transcript at 162:4-11. Available at: <https://ferc.gov/media/transcript-docket-no-ad23-9-000>.

<sup>16</sup> See NRECA August 8 Comments at 25.

<sup>17</sup> Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 88 Fed. Reg. 80,480 (November 17, 2023).

<sup>18</sup> See FERC Annual Reliability Conference Transcript at 185:13-17.

<sup>19</sup> 88 Fed. Reg. at 33,415-16.

<sup>20</sup> *Id.* at 33,415.

<sup>21</sup> Memorandum of Understanding on Interagency Communication and Consultation on Electric Reliability. March 8, 2023/ Available at <https://www.epa.gov/system/files/documents/2023-03/DOE-EPA%20Electric%20Reliability%20MOU.pdf>.

Electric Reliability Corporation (NERC).<sup>22</sup> As NRECA detailed in its August 8 comments, EPA only analyzed resource adequacy, which is not the same thing as electric reliability – a point the Agency conceded in its *Resource Adequacy Analysis Technical Support Document*.<sup>23</sup>

Accordingly, any discussion of possible reliability mechanisms is frivolous until EPA conducts a proper reliability analysis. This assessment should be performed in conjunction with experts at FERC and NERC, and – as NRECA stated in its August 8 comments – EPA should continue to work with balancing authorities to understand their concerns.<sup>24</sup> It should also include a complete assessment of the reliability impacts from the many regulations EPA has issued in rapid succession and intends to finalize in the coming year as part of its power sector strategy. An analysis focused solely on the Proposed Rules would fail to capture the serious reliability threats likely from the cumulative impacts of those rules. Given the Agency’s array of contemporaneous final, near final, and forthcoming regulations affecting electric generation, it would be arbitrary and capricious for EPA to treat the Proposed Rules as if they were in a vacuum. Once EPA conducts an adequate reliability assessment, it must give stakeholders an opportunity to comment on that assessment prior to any final rule. Simply put, until a full reliability assessment is performed neither EPA nor the public can assess what, if any, reliability relief such mechanisms would provide.

It is apparent from EPA’s discussion of reliability mechanisms that the Agency fails to recognize that electric reliability is a result of long-term planning, not just the capability to respond to real time, acute events with EPA’s blessing. EPA seeks input on what kinds of circumstances or conditions should be accounted for by a reliability mechanism, including instances of extreme weather, unexpected generator outages, transmission outages, supply chain or construction delays, or permitting delays. Cooperatives, and other utilities, must plan at least a decade in advance for any new resources. This long-range planning is complicated by backlogged generator interconnection queues, permitting and siting challenges for transmission and distribution systems and large-scale renewable projects, and development of new infrastructure and technology. New technology, unproven at commercial scale, like CCS and clean hydrogen co-firing will require additional infrastructure outside of the power plant and consumes additional electric energy that must be planned for as well. Further, these expensive technologies will require additional time for cooperatives to secure outside funding in the form of loans or grants, often from government sources.

As a result of long-term planning needs, electric utilities cannot bring on or adjust their generation mix and transmission and distribution systems to address the real-time acute reliability events that EPA believes are the only reliability challenge. Indeed, NRECA detailed the long-term planning challenges presented by the Proposed Rules in its August 8 comments.<sup>25</sup>

The Proposed Rules, with their reliance on inadequately demonstrated technologies and an unworkable timeframe, present a major long-term planning challenge for the electric sector. Based on EPA’s goal of finalizing this rulemaking in April 2024, affected utilities would have to work with their state to develop a state plan for how their existing units will comply that could be finalized by the middle of 2026. That requires making legally binding choices regarding their generation portfolios based entirely on unfounded *projections* about the viability of CCS and clean hydrogen co-firing, the future availability of renewables, and the future of energy storage in the next decade. EPA’s insistence on technologies that have not been adequately demonstrated and are not achievable essentially requires “generation shifting” by eliminating the ability to continue to rely on existing or new fossil resources. And EPA’s broader power sector strategy adds further ambiguity about what assets may be available to fill generation requirements.

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<sup>22</sup> *Id.*

<sup>23</sup> See NRECA August 8 Comments at 20.

<sup>24</sup> *Id.* at 5, 28-29.

<sup>25</sup> *Id.* at 4-6, 21-22, and 26-32.



Notably, EPA’s power sector strategy has been flagged as a variable driving increased bulk power system (BPS) reliability risk by NERC, the not-for-profit international regulatory authority whose mission is to assure the effective and efficient reduction of risks to the reliability and security of the grid. Its recent *2023 ERO Reliability Risk Priorities Report* included energy policy as a risk to reliability for the first time. The report found that the “implementation of policy decisions can significantly affect the reliability and resilience” of the BPS, including policies regarding decarbonization.<sup>26</sup> It also recommended that policymakers should consider the reliability impacts of their options.<sup>27</sup> In addition, the report found that timelines for implementation “can be a reliability risk factor.”<sup>28</sup>

That report was followed last week by NERC’s *2023 Long-Term Reliability Assessment*, which found that all or parts of 19 states in the Midcontinent Independent System Operator and SERC-Central territories are at high risk of rolling blackouts during normal peak conditions.<sup>29</sup> Most of the rest of the country faces similar risk when demand for electricity spikes during exceedingly hot or cold temperatures.<sup>30</sup> NERC also warned regulators and policymakers to “consider effects on the electric grid in their rules and policies and design provisions that safeguard grid reliability.”<sup>31</sup> With regard to the Proposed Rules, the report noted that they would accelerate the retirement of both existing coal and natural gas generation and that these retirements “have the potential to exacerbate energy, capacity, or [essential reliability service] issues.”<sup>32</sup> Accordingly, EPA should carefully study both NERC reports as it considers the Proposed Rules’ impacts on reliability.

In addition, and as explained throughout NRECA’s August 8 comments, demand for electricity will only increase as the economy becomes more and more dependent on electrification in the coming decades. The unsustainable trend of pairing increased demand with the elimination of always available baseload generation from the grid, the delays in constructing and connecting replacement generation, and the barriers to providing affordable replacement resources is a crisis in the making. This challenge cannot be addressed through any short-term reliability mechanism that EPA may or may not be contemplating. It can only be averted through proper long-term resource planning, and EPA should recognize that it is making a serious situation increasingly dire by issuing regulatory actions without even analyzing their impact on reliability and cooperatives’ ability to keep the lights on.

Cooperatives are not alone in calling on EPA to assess the comprehensive reliability impacts of the Proposed Rules. The cohesive and consistent message apparent in the comment record for the Proposed Rules, from Members of Congress, the FERC Conference, and recent reliability reports is clear: EPA must fully assess the reliability impacts of the Proposed Rules and its entire power sector strategy before proceeding with these actions.

### **Comments on the Initial Regulatory Flexibility Analysis**

Under the RFA, as amended by SBREFA, EPA must assess the impacts of rules on small businesses, small not-for-profit organizations, and small governmental jurisdictions (collectively, small entities). If EPA

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<sup>26</sup> North American Electric Reliability Corporation. *2023 ERO Reliability Risk Priorities Report*. August 2023. p. 20. Available at: [https://www.nerc.com/comm/RISC/Related%20Files%20DL/RISC\\_ERO\\_Priorities\\_Report\\_2023\\_Board\\_Approved\\_Aug\\_17\\_2023.pdf](https://www.nerc.com/comm/RISC/Related%20Files%20DL/RISC_ERO_Priorities_Report_2023_Board_Approved_Aug_17_2023.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 21.

<sup>29</sup> North American Electric Reliability Corporation. *2023 Long-Term Reliability Assessment*. December 2023. p. 7. Available at: [https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC\\_LTRA\\_2023.pdf](https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf).

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 32.

determines that a proposed rule will have a “significant economic impact on a substantial number of small entities,” it must convene an SBAR Panel<sup>33</sup> *before* the rule is proposed and prepare an IRFA.<sup>34</sup> If EPA determines that a proposed rule will not have a significant economic impact on a substantial number of small entities, the EPA Administrator may certify to such a conclusion and need not prepare an IRFA.<sup>35</sup> The certification statement must include a “factual basis for the certification.”<sup>36</sup>

EPA arbitrarily included such a certification statement in the preamble of the Proposed Rules, after initially indicating that it would hold an SBAR Panel and receiving information from small entity representatives, including relevant information on some of the issues on which EPA is now requesting comment were raised.<sup>37</sup> In July, EPA – without amending this certification – decided during the public comment period for the Proposed Rules that some of the alternatives on which it sought comment may in fact trigger the need for an IRFA. Accordingly, the Agency held an SBAR Panel meeting on August 10. EPA has now prepared an IRFA.

At the outset, NRECA maintains its position from its August 8 comments that the Proposed Rules themselves – not just the consideration of alternatives that may make the Proposed Rules more stringent upon finalization – necessitated EPA’s compliance with the SBAR Panel and IRFA provisions of the RFA.<sup>38</sup> As such, the IRFA on which EPA seeks comment – which the Agency contends is actually only an IRFA-if-necessary – is occurring too late in the process to achieve Congress’s intent behind the RFA, which is to consider regulatory flexibilities *before* a rule is proposed.

In addition to the procedural missteps of EPA’s IRFA process, the IRFA itself is insufficient in other ways. Foremost, the IRFA is premised on the notion that some of the more stringent alternatives on which EPA sought comment in the Proposed Rules may be of such economic impact that the NSPS will have a significant economic impact on a substantial number of small entities. The IRFA, however, only analyzes the NSPS as proposed – it offers no analysis of any of the more stringent alternatives that EPA thinks might actually trigger the need for an IRFA. Therefore, NRECA views this IRFA as a spurious effort to merely “check the box” with regard to the Agency’s compliance with the RFA.

The spurious nature of the IRFA is evident in the fact that EPA’s IRFA screening analysis contains an error that needs to be corrected and casts doubt on its quality. This screening analysis lists PowerSouth Energy Cooperative’s Lowman Energy Center twice on the spreadsheet tab titled “Capacity Weighted Ownership.”<sup>39</sup> This results in EPA double counting the capacity of PowerSouth in the tab titled “Final.” The obvious nature of this error raises questions about the diligence of EPA’s analysis.

Further, EPA did not deviate meaningfully from the original impacts estimated in its Regulatory Impact Analysis (RIA) despite receiving specific comments from NRECA, cooperatives, and other stakeholders on areas where the Agency underestimated the impacts of the proposed NSPS and the Proposed Rules more

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<sup>33</sup> 5 U.S.C. § 609(b). The panel is comprised of a representative from the EPA, a representative of the Office of Advocacy of the U.S. Small Business Administration, and a representative from the Office of Information and Regulatory Affairs at the Office of Management and Budget. *Id.* at § 609(b). The panel provides SERs with a draft of the proposed rule as well as any analysis of small entity impacts and regulatory alternatives and collects advice and recommendations from the SERs. The panel must report on the SERs’ comments and its findings. The report is made part of the rulemaking record.

<sup>34</sup> 5 U.S.C. § 603.

<sup>35</sup> *Id.* at § 605(b).

<sup>36</sup> *Id.*

<sup>37</sup> See NRECA August 8 Comments at 36.

<sup>38</sup> *Id.* at 35-37.

<sup>39</sup> See spreadsheet “NGCC SISNOSE Screen” attached to the IRFA. Available at: <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-8109>.



broadly. The RIA estimated only one cooperative would be impacted by the proposed NSPS in 2035 at a total net compliance cost of \$2 million. The corresponding analysis in the IRFA increased the number of expected cooperatives affected to three (and perhaps only two since PowerSouth is counted twice) at a net compliance cost of \$10.2 million. This revision continues to underestimate the number of cooperatives affected and the net compliance costs. These mistakes in the analysis undermine its credibility.

The continued underestimation of small entity impact is confounding since EPA received substantive comments on the issue during both the initial comment period for the Proposed Rules and in the comment period following the SBAR Panel meeting. For example, NRECA provided comments subsequent to the SBAR Panel meeting indicating that there were more cooperatives likely to build new natural gas units subject to the NSPS, including 10 combined cycle units and 16 new combustion turbines over the next 5-7 years. Yet EPA seemingly ignored this information when preparing the IRFA.

Similarly, EPA continues to rely on inaccurate cost assumptions in calculating net compliance costs. For example, the Agency again uses the unrealistic assumption that the cost of delivered clean hydrogen in 2035 would be \$.50/kilogram (kg), despite comments submitted by the Electric Power Research Institute that demonstrated this figure was underestimated and explained in detail the flaws regarding EPA's hydrogen cost assumptions.<sup>40</sup> In fact, a recent estimate developed by the EFI Foundation estimates that the cost of delivered clean hydrogen to the Carolinas in 2035, even if possible, would be \$8/kg – 16 times higher than EPA's estimate.<sup>41</sup> The report helps to account for the difference by pointing out that EPA did not fully account for infrastructure like pipelines and storage.

The same report highlights EPA's underestimated costs for CCS. EPA projects costs for new natural gas units at \$85/metric ton, while the EFI Foundation estimates costs at \$110/metric ton.<sup>42</sup> The difference in the values is accounted for by EPA estimating what costs would be for an established technology, while the EFI Foundation's estimate assumes first-of-a-kind costs commensurate with the realities of this emerging technology. Given that no natural gas units operate CCS currently, the EFI Foundation's estimate is without question more appropriate. Additional considerations and corrections that must be addressed by EPA, and which likely result in higher natural gas CCS costs estimates, are detailed in an August 2023 analysis by Dr. William Morris and Mr. John Weeda and discussed in NRECA's August 8 comments.<sup>43</sup> These include issues related to EPA cost models and baseline assumptions; cost estimates for CO2 transportation, storage, and monitoring; and financial modeling of the Internal Revenue Code Section 45Q tax credit.

The utility of EPA's IRFA, or lack thereof, is made plain by the Agency's description of the caveats and limitations of its analysis, many of which deal with core elements of the NSPS and the Proposed Rules in their entirety, and thus will have significant impacts on compliance costs. These include future electricity demand, natural gas supply and demand, longer-term planning by utilities regarding fossil generation retirements and renewables development, uncertainty over the Inflation Reduction Act's implementation, and hydrogen production. Based on EPA's underestimates for both CCS and clean hydrogen co-firing, the cost projections in EPA's RIA – which were used to develop the cost projections in the IRFA – likely represent a best-case scenario in terms of minimizing possible costs than what can realistically be expected given the uncertainties the Agency has identified.

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<sup>40</sup> Comments submitted by the Electric Power Research Institute. August 8, 2023. pp. 71-75. Available at: <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0674>.

<sup>41</sup> EFI Foundation. *How Much, How Fast? Infrastructure Requirements of EPA's Proposed Power Plant Rules*. October 2023. pp. 37-39. Available at: <https://efifoundation.org/wp-content/uploads/sites/3/2023/10/EPA-H2-Infrastructure-1.pdf>.

<sup>42</sup> *Id.* at 35-37.

<sup>43</sup> See *Analysis of Post Combustion CO<sub>2</sub> Capture, Transport and Storage Costs in the EPA's Proposed Power Plant Greenhouse Gas Emissions Rule* attached to NRECA's August 8 comments.

EPA's IRFA only attempts to analyze impacts of the NSPS, not the Proposed Rules in their entirety (thus omitting the highly relevant impacts from the emission guidelines for existing units). While this is consistent with EPA's longstanding position that since states implement the emission guidelines covering existing units an IRFA is not necessary, in this particular instance the Agency would have benefitted from assessing the impact of the emission guidelines on small entities. Including this portion of the Proposed Rules in the analysis, and allowing public comment on that analysis, would likely help EPA get more accurate information on the amount of new natural gas units that will need to be built to replace generation retired as a result of the emission guidelines. NRECA expects this analysis would reveal that actual new natural gas unit builds will be more numerous and much costlier than what EPA projects.

## **Conclusion**

NRECA appreciates EPA making the recommendations of the SBAR Panel available for public comment. As long as the Proposed Rules remain based on the inadequately demonstrated technologies of CCS and clean hydrogen co-firing, however, the EPA's proposal is unlawful and unworkable.

The Supplemental Notice's lack of specific proposals, or even indications about what type of suggestions EPA may incorporate into a final rule, render it ineffective at addressing either small entity or grid reliability impacts. EPA has a substantial record of more than 1.3 million comments from which it could have developed proposed modifications – instead it placed that burden on the public and provided just 30 days for those ideas to be submitted.

Finally, EPA's IRFA is insufficient and appears to serve only to “check the box” with regard to the Agency's RFA compliance obligations rather than adequately assess small entity impacts. EPA ignored input from a variety of stakeholders earlier in the rulemaking process that provided more realistic projections of the number of new units that would be subject to the NSPS and of the Proposed Rules' costs. In addition, the IRFA contains an obvious error that will need to be addressed, which casts doubt on the analysis's quality.

Thank you for consideration of these comments. Should you have any questions, please contact Dan Bosch, regulatory affairs director, at [dan.bosch@nreca.coop](mailto:dan.bosch@nreca.coop) or 571-531-2493.

Sincerely,



Jim Matheson  
CEO, NRECA