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

April 27, 2004

Dear Mr. Leavitt:

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 "Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Existing and New Facilities." These regulations are under development by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act, section 316(b). They would control the loss of fish and shellfish to impingement and entrainment by cooling water intake structures.

Pursuant to a consent decree, EPA's rulemaking under section 316(b) was divided into three phases. Phase I (published December 18, 2001) applies to cooling water intake structures at new land-based facilities. Phase II (signed February 16, 2004) applies to existing utility and non-utility electric power producers with design intake flow (DIF) of 50 MGD or greater. Phase III could apply to a range of existing facilities, including electric power producers with design intake flow less than 50 MGD and manufacturing plants, as well as to certain new offshore facilities not included in the Phase I rule. The consent decree requires that EPA propose regulations for Phase III facilities by November 1, 2004, and take final action by June 1, 2006.

On February 27, 2004, EPA's Small Business Advocacy Chairperson (Alexander Cristofaro) 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 Engineering and Analysis Division of the Office of Science and Technology within EPA's Office of Water, 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 that the Panel identified 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, protective of public health, environmentally sound and consistent with the Clean Water Act.

Summary of Small Entity Outreach

EPA has actively involved stakeholders in the development of the proposed rule in order to ensure the quality of information, identify and understand potential implementation and compliance issues, and explore regulatory alternatives. EPA conducted numerous meetings with the electric power industry over the past six years and met twice with manufacturing industry representatives in the past two years, and, in the process, received direct input about the impacts of the proposed rule on the industry.

In the past three years, EPA held three conference calls with small entity representatives from the manufacturing and electric power industries to improve our understanding of cooling water intakes in these industries, and the potential impacts of new requirements from an economic and business perspective. Prior to convening the Panel, EPA held a conference call/meeting on October 1, 2002 and another on January 22, 2004, to receive information from prospective small entity representatives (SERs) about plans for convening the Panel and their early concerns about the planned proposed regulation.

EPA invited six municipal power plant representatives and six representatives from manufacturing industries to serve as potential SERs during the pre-panel outreach process. Ultimately, three municipal power plant representatives and four representatives from manufacturing industries provided comments to the Panel. The full Panel report lists the materials provided to them and summarizes their comments. Their full written comments are also attached. 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 the RFA, the Panel is to consider four regulatory flexibility issues related to the potential impact of the rule on small entities (i.e., small businesses and municipalities):

1. The type and number of small entities to which the rule will apply.

2. Record keeping, reporting and other compliance requirements applicable to small entities.

3. The rule's interaction with other Federal rules.

4. Regulatory alternatives that would minimize the impact on small entities consistent with the stated objectives of the statute authorizing the rule.

The Panel's most significant findings and discussion with respect to each of these issues are summarized below. To read the full discussion of the Panel findings and recommendations, see Section 9 of the Report.

Number and Types of Entities Affected

EPA believes that around 121 electric generating facilities owned by about 73 entities, and about 630 manufacturing facilities owned by nearly 630 entities, may potentially be covered by the forthcoming proposed rule. Of these, an estimated 95 are small entities, as defined by the Small Business Administration. These estimates are based upon an initial, screening survey of 2600 facilities and a subsequent detailed survey of 1412 facilities.

Potential Reporting, Record keeping, and Compliance Requirements

The small entity representatives commented that the costs projected by EPA could impose a significant financial burden on some small businesses, especially in certain industries, like steel and paper, that have experienced recent downturns. There was general agreement among SERs that the projected costs of conducting demonstration studies and verification monitoring were substantial and would likely impose a significant burden, particularly as most small entities would need to hire outside consultants

The Panel shares these concerns and recommends that EPA develop regulatory alternatives that minimize these types of costs. For example, the Phase II rule included a pre-approved technology option that allowed facilities to avoid the demonstration study requirement while still requiring them to conduct verification monitoring and to demonstrate attainment of performance standards. The Panel recommends that EPA include a similar provision in the proposed Phase III rule and explore ways to expand the availability of a pre-approved technology option to low-flow facilities and/or identify other ways to reduce the associated monitoring and study costs. One promising approach, suggested by one SER, would be to eliminate the verification monitoring requirement for low-flow facilities that install and properly operate an approved technology.

Related Federal Rules

The Panel did not identify any federal rules that duplicate, overlap, or conflict with the proposed Phase III rule.

Regulatory Flexibility Alternatives

The small entity representatives suggested a number of regulatory alternatives for reducing the impacts of the rule on small entities that the Panel believes warrant further consideration. These included delayed implementation or flexible timing of implementation, and thresholds for applicability of requirements based upon the design flow of an intake.

The Panel notes that significant implementation flexibility was included in the Phase II rule and recommends that at least the same level of flexibility be provided for Phase III requirements. The Panel also recommends that EPA consider the availability of contractor resources as it develops the implementation schedule for Phase III.

Most SERs recommended an applicability threshold in the range of 20 to 50 million gallons per day (MGD). Under this approach, facilities that fell below the threshold would

continue to be regulated on an individual best professional judgement (BPJ) basis by State and local permitting authorities, but would not be subject to uniform national requirements. These SERs noted the relatively small quantity of water used (nationwide) below various capacity thresholds, the comparatively high cost per gallon of water of controlling impingement and entrainment (I&E) at small-capacity intakes, and either the absence of evidence for adverse impacts or the small numbers of fish impinged at small-capacity intakes. The Panel notes that in some cases, even small intake flows could cause significant adverse environmental impacts. BPJ-based permitting decisions would be able to address such situations on a site-specific basis.

In response to these comments, EPA developed additional information on Phase III facilities within various design intake flow ranges, under the assumption that they were required to comply with Phase II requirements.

Based on that information, the Panel believes that an effective way to substantially reduce potential economic impacts on small businesses would be to set an applicability threshold of 20 MGD. Facilities below 20 MGD represent a small proportion of the total flow associated with the Phase III rulemaking. Setting an applicability threshold at 20 MGD would exclude 43% of potentially in-scope facilities, including 53% of small entities, that collectively account for 11% of the national costs but only 5-6% of flow, which the Panel used as a proxy for expected benefits. To the extent flow is a good proxy for environmental impacts, setting a threshold at this level would not substantially reduce the environmental benefits of the rule. Thus, the Panel recommends that EPA analyze a range of potential thresholds, particularly those between 20 MGD and 50 MGD. Setting a threshold at any of these levels would remove a majority of potentially impacted small entities from the scope of the rule.

Methodological Issues

One municipal electric generator provided comments from its industry trade association, American Public Power Association (APPA), that raised several issues regarding EPA's methodology in analyses prepared for the Panel report. These concerned the number of potentially-affected entities and the down-time required to retrofit an intake. The Panel anticipates that the Phase III rule will incorporate flexible implementation provisions adopted in Phase II, which should be sufficient to address APPA's concerns. Nonetheless, the Panel recommends that EPA seek further information from APPA to identify any necessary modifications to the assumptions used for its cost and economic impact analyses prepared for this report.

The same SER also provided comments and examples to suggest that EPA might have underestimated compliance costs for facilities with a small budget and staff. The Panel recommends that EPA review its assumptions used to develop costs and economic impacts to ensure that these assumptions are appropriate for facilities with smaller budgets and staffs.

(see next page for signature blocks)

Sincerely,

_____

Alexander Cristofaro
Small Business Advocacy Chair
Office of Policy, Economics and Innovation
U.S. Environmental Protection Agency

_____

John D. Graham
Administrator
Office of Information and Regulatory Affairs
U.S. Office of Management and Budget

_____

Thomas M. Sullivan
Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration

_____

Mary T. Smith
Director, Engineering and Analysis Division
Office of Water
U.S. Environmental Protection Agency