June 12, 2002

The Honorable Christine T. Whitman
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dear Administrator Whitman:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or the Panel) convened for the planned effluent guidelines regulation of the Aquatic Animal Production Industry that the Environmental Protection Agency (EPA or the Agency) is currently developing.

On January 22, 2002, 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). In addition to the Chair, the Panel was composed of the Director of the Office of Science and Technology's Engineering and Analysis Division of EPA, 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.

The Report includes a discussion of the options under consideration for the proposed regulation under development, a description of the Panel's outreach to small entity representatives, summary of small entity comments received by the Panel, and the Panel's findings and discussion.

Executive Summary

This section summarizes the Report of the Panel. 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 as well as from public comment on the proposed rule. 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, protective of public health, environmentally sound and consistent with the Clean Water Act.

SMALL ENTITY OUTREACH

The Panel met with small entity representatives (SERs) to discuss the potential effluent guidelines and, in addition to the oral comments from SERs, the Panel solicited written input. In the months preceding the Panel process, EPA conducted outreach with small entities that will potentially be affected by this regulation. On January 25, 2002, the SBAR Panel sent some initial information for the SERs to review and provide comment. On February 6, 2002 the SBAR Panel distributed additional information to the SERs for their review. On February 12 and 13, the Panel met with SERs to hear their comments on the information distributed in these mailings. The Panel also received written comments from the SERs in response to the discussions at this meeting and the outreach materials. The Panel asked SERs to evaluate how they would be affected and to provide advice and recommendations regarding early ideas to provide flexibility. See Section 8 of the Panel Report for a complete discussion of SER comments.

PANEL FINDINGS AND DISCUSSION

Under the RFA, the Panel considered four regulatory flexibility issues related to the potential impact of the rule on small entities:

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 applicable statute (Clean Water Act).

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

1. Number of Small Entities

For a complete description and estimate of the small entities to which the proposed rule will likely apply, see Sections 4 and 5 of the Report. Several SERs provided information on the estimates of the number of affected small entities, which are based on the 1998 Census of Aquaculture. The Panel recommended that EPA incorporate this information, as appropriate, and seek additional data on the number of potentially affected facilities.

2. Potential Reporting, Record Keeping, and Compliance Requirements

A. Requirements applicable to all systems

The Panel was persuaded by the SER comments and recommended that the proposed guidelines not include any requirements related to animal health maintenance or feed management. The only exception was for net pens, for which EPA is still exploring feed management requirements. The Panel also agreed that EPA should consider providing guidance on appropriate health and feed management practices. On mortality removal, the Panel recommended against any requirements for pond systems, due to the SER comments. For other systems, the Panel questioned whether national effluent guidelines would enhance environmental protection and recommended that EPA carefully consider such requirements before proposing them. Also, the Panel did not find the HACCP a good model on which to base the planning and documentation requirements. EPA should keep these requirements to a minimum and account for the level of expertise and labor constraints at affected facilities.

B. Requirements applicable to ponds, flow-through, and recirculating systems

The Panel recommended, based on SER comments, that limitations based on the use of settling basins not be included in the proposed guidelines at pond-based systems that utilize slow, controlled drainage techniques. For other systems, the Panel recommended that any requirements related to solids removal be flexible enough to accommodate facilities where settling basins are not a viable option. Similarly, the Panel was persuaded that numeric sediment limits were not appropriate for ponds systems, but for other systems, the Panel recommended that EPA provide alternative requirements, such as BMPS, in lieu of numeric limitations. Finally, the Panel recommended that any monitoring requirements included in the effluent guidelines be kept to a minimum and limited to information that is useful to the operator.

C. Requirements applicable to flow-through and recirculating systems

The Panel was persuaded by SER comments on groundwater protection, disinfection, and land application of manure and recommended that EPA not include any requirements in these areas. The Panel was also concerned about the economic achievability of limitations based on chemical precipitation and recommended that EPA not include any such requirement. The Panel also discussed microfiltration and recommended that any requirements related to solids removal be flexible enough to accommodate facilities where this technology is not economically achievable.

D. Requirements applicable to flow-through systems only

SERs raised compelling concerns about implementing quiescent zones in existing earthen raceways and thus the Panel recommended that EPA re-evaluate the need for and practicability of such a requirement. The Panel also recommended that any requirements related to solids removal be flexible

enough to accommodate facilities where quiescent zones are not a viable option.

E. Requirements applicable to ponds only

Based on SER comments, the Panel recommended against any requirements regarding use of rip rap, frequency of draining, or elimination of deep-water overflows for any pond. The Panel recognized, however, that requirements on the rate of pond draining may be necessary for those ponds which must be drained rapidly for harvest. Similarly, the Panel recommended against any requirements based on constructed wetlands except possibly for rapidly draining ponds. The Panel also recommended that any requirements for vegetated ditches or bank stabilization (other than rip rap) be flexible enough to accommodate facilities where these technologies are not a viable option. Finally, the Panel recommended that EPA not completely eliminate the practice of water exchange and that before limiting the practice for rapidly draining ponds, EPA should consider whether national effluent guidelines would significantly enhance environmental protection, and avoid requirements which would not.

3. Other Regulations that May Duplicate, Overlap, or Conflict with the Proposed Rule

Several SERs identified State or other Federal agency regulations which may overlap, duplicate or conflict with this proposed rule. The Panel thus recommended that EPA investigate the extent to which adequate regulations are already in place, and recommends that EPA explore options to provide regulatory flexibility to reduce conflicting requirements in states with strong existing programs. The Panel recognizes that such an option would have to be structured in a way that is consistent with Clean Water Act requirements.

4. Significant Alternatives to the Proposed Rule

A. Small Facility Exclusion

Based on the data provided by EPA, the Panel was concerned that for most small facilities the regulatory options presented to the SERs would not be economically achievable. For those facilities that do not exceed the NPDES permit applicability thresholds, the Panel strongly recommended that EPA not lower these thresholds or otherwise change the definition of a point source for this industry. For those that do exceed the NPDES thresholds the Panel recommended that EPA consider a higher production threshold for the effluent guidelines. The Panel encouraged EPA to consider a threshold that would ensure that the regulations were economically achievable for those facilities that remained within scope. Smaller facilities that are still large enough to be considered point sources would continue to be

regulated according to the Best Professional Judgement of permit writers.

B. Production System/Sector Specific Comments

Ponds. The Panel agreed that mollusk, crawfish, and sportfish including walleye facilities did not pose any significant risk to water quality or have technologies available that were economically achievable to control their minimal discharges, and thus recommended excluding them from the scope of the proposed guidelines. For other large pond systems, except for perhaps those which rapidly drain for harvest, the Panel recommended that EPA not adopt any requirements related to sediment discharge, erosion, nutrients, or feed management, as the measures considered are either impractical, not economically achievable, or would result in minimal pollutant reductions. EPA is still exploring requirements for drugs, chemicals, aquatic pathogens and exotic species, but based on information developed to date, the Panel believed it unlikely that the measures which have so far been identified would be effective in addressing these concerns. The Panel thus recommended that EPA continue its research, but that it carefully evaluate any potential measures to ensure that they are both effective and economically achievable before including them in proposed guidelines. The Panel recommended that unless EPA identifies such measures, all ponds should be excluded from coverage under the proposed guidelines.

Flow Through and Recirculating Systems. Because of their diversity and/or the preliminary cost information, the Panel recommended that EPA carefully consider economic achievability and technical feasibility before proposing any regulation for these types of systems. If no feasible and economically achievable technologies are identified, EPA should exclude them from the scope of the proposed guidelines. In particular, the Panel was concerned about Alaska Salmon facilities and recommended that EPA carefully consider not proposing effluent limitations for them.

Net Pens. SERs identified practical limitations and raised concerns about the cost effectiveness of the measures under consideration, and so the Panel recommended that EPA consider these concerns before including them in proposed national effluent guidelines.

Other Systems. The Panel recommended that EPA exclude aquaria and baitfish from the scope of proposed guidelines, unless new information prompted EPA to reconsider. For ornamentals, the Panel recommended against inclusion unless drug or chemical use or the release of non-native species is found to pose a significant environmental risk and EPA identifies effective economically achievable technologies to address them. As for alligator systems, the Panel was concerned about the survival of the species and thus recommended that EPA analyze the impacts on wild species and consider such effects in its selection of options.

C. Pollutants of Concern

Pathogens. The Panel questioned whether national effluent guidelines would provide any additional environmental protection relative to existing practice. The Panel thus recommended that EPA address pathogen concerns through guidance rather than through effluent guidelines requirements, unless subsequent analysis identifies control strategies that can be effectively implemented through national effluent guidelines and that would be economically achievable for affected facilities.

Drugs and Chemicals. The Panel found that drug and chemical use is in most cases already adequately regulated, and was unable to identify any particular technology or BMP that would be broadly applicable or effective in addressing concerns related to discharge of drugs or chemicals. Thus, the Panel recommended that unless subsequent analysis identifies control strategies that can be effectively implemented through national effluent guidelines and that would be economically achievable for the affected facilities, EPA address concerns regarding the discharge of drugs and chemicals through guidance rather than through effluent guidelines requirements.

Metals. SERs provided information that traditional methods of metals removal would not be cost-effective for aquatic animal production facilities given their very low baseline metals concentrations. The Panel thus recommended that EPA not include limitations on metals in the proposed effluent guidelines.

Non-Native Species. The Panel found that national effluent guidelines are not the best way to deal with non-native species, and recommended that EPA defer to the States or to other Federal agencies that have the authority to prohibit or control the importation of exotic species. For those species not prohibited that still have a potential to populate the local environment or to carry diseases that may pose a threat to native aquatic species, the Panel recommended that EPA work with these agencies to develop and implement appropriate protection and controls and provide guidance to States.

D. New Facilities

The Panel found it unlikely that compliance costs would be significantly lower for new facilities than for existing facilities. Therefore, the Panel recommended that the New Source Performance Standards not be any more stringent than existing source requirements.

(see next page for signature blocks)

Sincerely,

Thomas E. Kelly
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
Office of Advocacy
U.S. Small Business Administration

Sheila E. Frace
Director, Engineering and Analysis Division
Office of Water
U.S. Environmental Protection Agency

Enclosure