

US EPA ARCHIVE DOCUMENT

**TESTIMONY OF THOMAS E. KELLY
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BEFORE THE
SUBCOMMITTEE ON GOVERNMENT PROGRAMS AND OVERSIGHT
AND THE SUBCOMMITTEE ON REGULATORY REFORM
AND PAPERWORK REDUCTION
OF THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES**

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INTRODUCTION

Good morning, Mr. Chairman and Ranking Member Poshard, Madam Chairwoman and Ranking Member Jackson, and other Members of the Committees. My name is Tom Kelly and I serve as EPA's Small Business Advocacy Chair under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). SBREFA opens the regulatory process to fuller participation by small businesses, communities, and non-profit organizations. I thank the House Small Business Committee for its leadership on this important legislation, and I appreciate the opportunity to testify on behalf of EPA.

EPA COMMITMENT TO OUTREACH AND ACCOMMODATION

Historically, small entities have often borne a regulatory burden disproportionate to that assigned to their larger competitors. While there are many reasons for this, I think we can all agree that regulatory agencies owe these small entities our full attention in understanding both their contribution to the problem and their ability to contribute to its solution. In my role as Small Business Advocacy Chair, I support EPA's programs in

carrying out our standing policy of outreach and accommodation for small entities in any rule that might affect them: outreach to include them as advisors in regulatory development, and accommodation of their needs and limitations to the extent possible in determining workable, affordable compliance options. The Regulatory Flexibility Act as amended by SBREFA sets up special provisions for that outreach and accommodation in the case of the subset of rules that will impose a significant economic impact on a substantial number of small entities. The Small Business Advocacy Review Panel recruits small entities in a formal process to advise three Federal agencies as they consider together options to minimize the negative impacts certain pre-proposal rules may impose on small entities. The SBREFA Panel process reinforces the clear direction Administrator Browner has given to our Agency, to involve stakeholders extensively in rule development, including small businesses and other small entities.

When I came before you last April I outlined several of EPA 's efforts to ensure the SBREFA Panel process achieves its goals of outreach and accommodation for small entities. My testimony outlined EPA's longstanding commitment to small business, especially through EPA's Small Business Ombudsman. I pointed to EPA's small business compliance and enforcement policies that inspired certain provisions in SBREFA. And I described in broad terms our work to design and implement EPA's first SBREFA Panel, the one we held on Non-Road Diesel Engines. Today I want to expand on our experience with the SBREFA Panel process, since we have now completed five Panels, with another underway. We now have a great deal more insight as to how the process works to the redress the regulatory disadvantage under which many small entities have been operating over the years.

SBREFA ACTIVITIES GEARED TO OUTREACH AND ACCOMMODATION

EPA's main mission is the protection of public health and the environment, and the Agency administers a number of authorizing statutes in support of that mission. The Regulatory Flexibility Act supports the substantive objectives of those governing environmental statutes, and instructs us as to how we are to pursue our mission. For that reason one of EPA's goals is the full integration of SBREFA's requirements into ongoing Agency regulatory procedures. As I told you last year, EPA has developed and issued interim guidance to support our SBREFA implementation activities. Through the past year's experience our guidance has proved itself essentially sound. It has been an invaluable tool for EPA personnel in their preparation for each Panel process, as well as to my own office in the day-to-day management of Panel activities. EPA's SBREFA guidance covers regulatory flexibility screening analysis, small entity identification, and SBREFA Panel procedures. Each rule has presented us with different challenges, and each Panel has therefore been unique, but the guidance has stood as a valuable reference for Agency personnel, as well as for Federal Panel members, about EPA's interpretation and procedures under SBREFA. This clarity of procedure, I believe, has simplified an inherently complex undertaking, and contributed to the success of our early Panels in understanding the potential impact a rule may have on small entities and framing findings and recommendations for the Administrator. While the guidance has served its most important purpose, we view it as a "living" document, and we intend to update it shortly on the basis of our own experience, as well as through feedback from other Panel members, GAO, and the small entities who have advised us.

To inform and educate EPA staff about EPA SBREFA Panel policy and procedures, my staff has developed an Agency SBREFA training package. Using these materials, my staff and I work with EPA national and regional office personnel so that they understand Agency objectives and procedures for SBREFA Panels. In addition, we now include SBREFA management as a lesson topic in the Agency's broader training program for employees new to the rulemaking process. Also, my staff spends considerable time with program office people, providing technical advice prior to and during the convening of an actual Panel, so that they are fully aware of Panel requirements and procedures.

I have brought with me today another tool that we use to manage our work in support of small entities, our recently updated Tracking Report on Rules Affecting Small Entities. While this document helps us plan for the convening of SBREFA Panels, it also contains a section drawn from the Regulatory Agenda that lists all pre-proposal actions that **may** have **any** effect on **any** number of small entities. The point is to encourage regulatory programs to begin outreach with small entities and identify these potential impacts early, even though there may be little reason to predict the rule will ever require a full SBREFA Panel. Through such early outreach to small entities, and with effective data collection, EPA will be better able to inform itself of the likely impacts of an action on small entities, and to plan effectively to minimize or avoid those impacts when possible.

This leads me to the main point of small entity outreach, and of the Panel process itself, the accommodation of small entity needs in the rule to be proposed. EPA, SBA, and OMB have completed five formal Panels to date. The Agency has published

proposed rules in three of these cases, and the other two are nearing publication. In each case, the proposal package reflects the Agency's acceptance of recommendations made by the SBREFA Panel.

For example:

The **Non-road Diesel Engines Rule** Panel report recommended several alternatives that would be less burdensome to affected small entities. Among these were:

- 1) Redressing an inequity of treatment between engines <50 horsepower and >50 horsepower.
- 2) Adjusting the allowance to maintain a small inventory of non-standard engines so that it applies across models of engines.
- 3) Regulatory relief in cases of demonstrated hardship.

The **NPDES Stormwater II Rule** Panel report recommended that EPA solicit additional comments in the proposed rule on potential alternatives to the proposed regulation of construction sites between one and five acres. The report also asked that EPA solicit comment on allowing construction activities to be controlled through existing permits under which municipalities impose Best Management Practices, instead of through national regulation.

The **Industrial Laundries Point Source Category Rule** Panel report recommended that EPA consider several options that would exclude facilities

from regulation based on their size or volume. The Agency's preferred option would already exclude facilities processing less than 1 million pounds of industrial laundry per year, of which 255 thousand pounds or less is heavily soiled. The Panel further recommended that the Agency solicit public comment on several other exclusion thresholds, including a "no regulation" option for the industry that would be based on environmental risk and on economic factors other than the Agency's traditional consideration of firm closures.

EPA discussed all of these recommendations in the preamble to each proposed rule and solicited public comment on them. By taking this step, EPA has ensured that each option injected by the Panel will be eligible for consideration in the final rulemaking, subject to the results of public comment and further technical, economic, and legal analysis.

In addition to these three Panels, EPA and its Federal partners have completed two others, covering Effluent Guidelines for the **Transportation Equipment Cleaning Industry** and the **Centralized Waste Treatment Industry**. We recently convened a sixth panel for **Underground Injection Control Regulations for Class V Injection Wells** and will shortly convene a seventh Panel for the **Groundwater Microbial Protection Rule**.

LESSONS LEARNED

Based on our experience to date, I would like to share with you some of the lessons we are drawing from the Panel process:

First, each rule is different from the last, and each Panel is therefore unique. Still, the common thread that has run through all of them so far is that Panels do achieve their goal of focusing the regulatory process on potential impacts a proposed rule may have on small entities, and of opening the Agency's thinking to options that it might not have fully considered before.

Second, while outreach to all stakeholders in the rulemaking process is important, early outreach to small entities seems especially so. Identifying and consulting small entities early not only improves the overall rulemaking process but greatly aids a future SBREFA panel. Let me point out an example. Beginning in the early stages of the **NPDES Stormwater Phase II Rule**, EPA chartered a large advisory workgroup under the Federal Advisory Committee Act, which included several representatives of small businesses and municipalities. When it came time to convene a Panel for this rule, not only were EPA and the Federal Panel able to identify major small entity issues, EPA and SBA were able to easily identify potentially affected small entity representatives for the actual Panel process. Because of these early outreach efforts the small entity representatives

were already well-informed and able to provide meaningful comments to the Panel.

Third, SBREFA requires that EPA supply the panel with, “*material that the Agency has prepared in connection with this chapter...*” EPA recognizes the importance of supplying current and relevant information concerning the proposed rule to the small entities as well as the Panel members. Such information is the basis not only of informed comment by small entity representatives, but of thoughtful consideration by the Panel as well. Information EPA supplies to Panel members and small entity representatives has included the rule’s statutory requirements, preliminary Reg Flex analyses and other economic data to the extent available, regulatory options currently under consideration, cost estimates, and projections of environmental improvements sought and expected. In many cases, the Agency has gone beyond the requirements of the Statute by offering additional reports and descriptions, at times even producing additional analysis specifically requested by the Panel. For example, in the **Industrial Laundries Point Source Category Rule**, the Panel asked that EPA prepare an extensive data chart that plotted the likely effects attributable to numerous alternatives to the Agency’s preferred option. For each alternative the chart projected the number of facilities that would be excluded from regulation, associated adjustments to the environmental effectiveness of the rule, and other relevant factors. The Agency later published the chart in

connection with its rulemaking proposal and asked for public comment on the options it described. While this is strong evidence of the power of the Panel to put important information on the table, I must note an important constraint. EPA's rules are often prepared under deadline, our resources are finite, and staff assigned to a "SBREFA rule" are usually working simultaneously on other rules under deadline. While the Agency makes a good faith effort to provide all relevant information that is reasonably available, we must apply a rule of reason in determining what information we can produce that has not already been *"prepared in connection with this chapter,"* as the Statute puts it.

Fourth, the Panels we have held so far have occurred very late in the rulemaking process, after EPA's management had selected a primary option. Given the imminence of statutory or judicial deadlines, each Panel has paid most of its attention to framing alternatives to the Agency's primary option. The true value of these initial Panels will emerge in the nature and direction of public comment on the broader set of options laid out by the Agency in the proposal. In particular, the small entities who have advised the Panel will be particularly well-informed to participate vigorously in the public comment period.

Fifth, the SBREFA Panel is a potent but limited tool. It provides a stationary snapshot in the course of a dynamic rulemaking. The materials available to small entity representatives and the Panel are those available at the time the small entities are advising and the Panel is meeting. In many cases important

information becomes available to the Agency only late in the Panel's schedule, or even after its conclusion. As important as the Panel can be in directing EPA's attention to small-entity concerns during a rulemaking, it cannot expect to be the ultimate arbiter of the Agency's position. It is one important influence among many, and it occurs by design before the full record is complete. Nevertheless, both the Panel process and the record it creates greatly fortify the consideration of small-entity concerns in two subsequent reviews. Since OMB's Office of Information and Regulatory Affairs participates in the Panel, its staff becomes especially well-versed in the needs and concerns of small entities, as well as in how the Agency's proposal addresses those concerns. Small entities stand to benefit substantially from OMB's prior knowledge of their issues during its review under Executive Order 12866. Beyond this there is the opportunity I mentioned above for vigorous and informed public comment on the rule once it is proposed. Since the Panel Report will be part of the record on which the public will comment, citizens will have a ready framework within which to judge the Agency's performance in accommodating small entities within the framework of the authorizing statute.

Sixth, the Panel acts as a collective body, not as the creature of any one agency.

All three agencies care about a clean environment, fairness for small entities, and obtaining a good "buy" for the public's regulatory investment, but each approaches these goals from a different perspective. The conjunction of these three views in a search for consensus usually yields a fourth. A signed final

Panel Report, therefore, is not an EPA or SBA or OIRA document, but a Panel report that fully reflects the judgment, findings, recommendations, and occasional disagreements of all three Federal agencies.

MAKING A BETTER PANEL PROCESS

Because I know you are interested in ways to make the Panel process work better, I want to mention several areas in which we are planning improvements.

First, as I mentioned above and in my appearance before you last April, I believe the timing of a Panel during a rulemaking schedule is logically associated with the influence the Panel has on the regulatory outcome. There are trade-offs to be considered in convening a Panel either early or late in the rulemaking process, but our SBREFA guidance suggests the Panel should take place before the time when EPA management must narrow the field by selecting a primary option. While our experience to date has not afforded us this opportunity, we intend to convene two upcoming Panels much earlier in their respective schedules, the **Groundwater Microbial Protection Rule** and the **Effluent Guideline for Metal Manufacturing and Machinery**. This will allow small entities to influence early decisions regarding a specific regulation, thereby making relief for small entities easier to analyze and weigh in the choices presented to EPA management when they select the primary option, and in the proposal later to be presented for public comment.

Second, I also testified last year that I believe the Panel process is best served when small owners and operators themselves serve as small entity representatives. I believe this is what the Congress had in mind when it passed SBREFA, and we have made a strenuous effort to involve real owners and operators of small facilities in advising the Panels. Not surprisingly, we have found it difficult to lure important people with customers to serve and payrolls to meet to participate in a process they know will cost them valuable time. For this reason we have sometimes involved trade representatives in place of actual small business owners to advise the Panel. We have found that these Washington-based trade associations also have much to contribute. Their breadth of knowledge of an entire industry has enhanced the Panels convened to date. EPA believes that a proper balance must be struck between the insights of front line entrepreneurs and the more panoramic views of their trade association counterparts. For this reason we will continue our efforts to recruit small business people as primary advisors, with their trade organizations available in reserve to advise and support or, when necessary, represent them.

Third, EPA needs to improve our coordination, both internally with our program offices and externally with OIRA and the Office of Advocacy, to complete panels in the sixty days provided by the Statute. While I regret that two Panels exceeded this term, I believe sixty days is ample time to conduct this work if we manage it carefully. Since the SBREFA Panel is intended to enhance the regulatory process, and certainly not deflect the rulemaking from its statutory purpose, we must manage Panels to meet both the time limits set by SBREFA and the statutory and judicial deadlines to which our rules are

typically subject. In order to meet the Panel schedule, EPA now holds meetings early in the process with OIRA and the Office of Advocacy to determine the data and information needs foreseen by Panel members and to deliver whatever is available prior to convening. Before the Panel convenes we also provide key documents to small-entity advisors, and hold a meeting with them for orientation and issue identification, to which we also invite Panel members from SBA and OMB. In this way we approach the Panel from a "running start," providing the Panel with good, early information on small entity needs and interests that the Panel then supplements through its own outreach during its sixty-day term.

Conclusion

In summary, let me stress once again EPA's decision to exceed SBREFA's requirements, and to conduct outreach and provide accommodation in any rulemaking that has any impact on any small entity. Since March 1996 EPA has dedicated itself to full compliance with SBREFA. We have professionalized our approach to the legislation, operating under comprehensive EPA guidance that has provided focus and discipline to all our work under the Statute. My office trains Agency personnel on SBREFA Panel procedures, and we have established a tracking mechanism to follow the progress of specific rules of interest to small entities from the earliest stages of their development. EPA has expanded its outreach to small entities, beginning early in the rulemaking process and continuing up to and through the formal Panel process.

We pledge to refine our SBREFA process as we gain experience beyond the five Panels completed to date. I would like to publicly thank GAO for their thoughtful review of our efforts and the helpful comments they have made in their report. We will consider fully their findings in our efforts to improve our Panel policies and procedures. Using the tools available for outreach and accommodation, we will strive to develop the best regulatory options for all affected parties, especially small entities.

Finally, I would like to thank the Committees for their interest and leadership in this legislation, and in reviewing EPA's compliance. With the active participation of SBA's Office of Advocacy and OMB's Office of Information and Regulatory Affairs, we are off to a good start under SBREFA. While EPA's primary responsibility is to protect public health and the environment, we fully believe we can pursue this mission with an eye fully open to the roles small entities must fairly play in its achievement.

Thank you for the opportunity to discuss our SBREFA Panel activities. I will be pleased to answer any questions you may have.