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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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LOCAL GOVERNMENT  
ADVISORY COMMITTEE

Ms. Carol M. Browner  
Administrator  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, DC 20460

Dear Ms. Browner:

On behalf of the Local Government Advisory Committee (LGAC) and the Small Community Advisory Subcommittee (SCAS), it is with great pleasure that we forward to you the Committee's recommendations concerning the Agency's implementation of the small community-related provisions of the Unfunded Mandates Reform Act (UMRA) and the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Recognizing the importance of UMRA and SBREFA in the context of regulatory development, as well as the significance of the opportunity to advise the Agency on how it implements them, the working group responsible for developing these recommendations took its charge very seriously. Working with Agency and Congressional staff through a process which was collaborative and thoughtful, the working group examined EPA's current policies, procedures and practices concerning implementation of these statutes and, where appropriate, identified opportunities to strengthen its partnership with local governments, particularly small communities, through improved **rulemaking** practices.

The goal of the working group was to **find** a way that the requirements of SBREFA and UMRA could be used to strengthen while streamlining the environmental regulatory process rather than making it more cumbersome. To do this, the working group first studied the seven rules (proposed or final between June 1996 and December 1998) that conducted SBREFA-mandated consultation with local governments and small communities. The next step was a day-long review of the relevant internal policy and guidance documents guided by the Small Business Advocacy Chair (SBAC) and his **staff**. Working group members also talked with the U.S. Senate Small Business Committee counsel. With this knowledge base, the working group then met with program office regulation managers, including those managers of such high profile rules as Stormwater Phase II, for what most participants say was a very candid conversation about the practical difficulties of meaningful consultation. Once the initial recommendations were developed, the working group again engaged the SBAC in a dialog about feasibility and, on two separate occasions, the Regulatory Steering Committee also provided valuable comments on

early drafts of the recommendations that are reflected in the final version. In short, through this iterative, fact-based approach, the workgroup was able to ensure that its recommendations would reflect a practical balance of consultation ideals and operational realities.

Of critical importance were the group's findings that:

**Consultation with small communities:**

- Should occur for any rule where any significant impact on any number of small communities is anticipated
- Requires flexibility and should occur at various "checkpoints" throughout the rule development process, beginning with regulatory "screening" and continuing through workgroup closure
- Should be commensurate with the level of anticipated impacts on small communities
- Should include careful consideration of "indirect impacts" when such data are made available from Agency or external sources

**A Small Government Agency Plan**

- Should be prepared for rules where any impact on any number of small communities is anticipated
- Would address how the Agency will notify, consult with and provide compliance assistance to small local governments
- Should be a "living" document, subject to revision reflecting small community input
- Should, as a result of the Regulatory Steering Committee's vigilance, function as an integral part of the rule making process.

**Program Office "Core Groups"**

- Should be developed and managed by every Agency program which regularly promulgates regulations
- Would be comprised of small community representatives sufficiently knowledgeable to provide **meaningful** input on several rules
- Should be supported by a separate travel budget account of \$500K per annum
- Would greatly enhance program offices' capacity for small community consultation.

**Outreach Network Database**

- Would function as a "**pool**" of small community representatives that would **support/augment** the consultative efforts of program office "**core groups**"
- Would be established in and managed by the Office of Policy and Reinvention's ORMI

- Would build on the work of the Small Community Outreach Project for the Environment (SCOPE) and the Local Government Environmental Assistance Network (LGEAN).

**Income Test**

- Should be compared, when data are available, to "revenue test" data.

**Evaluation**

- Should be conducted by an independent group 24 months after recommendations are adopted by EPA.

Members of the working group stand ready to meet with you or your staff in order to answer questions or provide further clarification for any of these recommendations.

As evidenced by its unanimous support of the SCAS workgroup's findings, the LGAC understands the unique problems and needs facing the smallest of local governments. It should be noted, however, that the LGAC wishes to underscore the potential for broader applicability of these principles when dealing with local governments of all sizes. With that, and in the same collaborative spirit through which these recommendations were developed, the Committee respectfully requests a formal Agency response to this document within six months of receipt.

Again, thank you for supporting the work of the Committee, and for providing this opportunity to work together on these important matters.

Regards,



Bill Anderson  
Chair  
Local Government Advisory Committee



Anne Morton  
Chair  
Small Community Advisory Subcommittee

Enclosure

**The U.S. Environmental Protection Agency's Implementation of the  
Small Community-Related Provisions of the Unfunded Mandates Reform Act  
and the Regulatory Flexibility Act as amended by the Small Business  
Regulatory Enforcement Fairness Act**

**Findings and Recommendations**

**of the**

**Small Community Advisory Subcommittee**

**of the Local Government Advisory Committee**

**September 9, 1999**

## Introduction

- One of the key recommendations of the Small Town Task Force (STTF) was that there be early and meaningful involvement by small communities in the regulatory development process.
- \* Based on the Small Community Advisory Subcommittee's (SCAS) analysis of the Small Community Activities Inventory Update (SCAIU), SCAS determined that the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, as implemented by EPA, represented a good beginning effort to implement the STTF recommendations.
- The SBREFA working group was established by SCAS in November 1998 to investigate ways to increase the early involvement of small communities in the rule development process.
- SCAS directed the working group to 1) investigate those rules identified in the SCAIU that have gone through the SBREFA process, 2) review SBREFA, Unfunded Mandates Reform Act (UMRA) and other regulatory process guidance and 3) interview regulation managers and others.
- The purpose of the working group is to evaluate the Agency's implementation of SBREFA, UMRA and other relevant legislation as they affect small communities and make recommendations for improvement.

## Findings

- EPA has made progress in involving small community stakeholders in the rulemaking process.
- SCAS found that of the 14 rules (7 w/ small government small entity representatives (SERs)) where small business advocacy review (SBAR) panels were convened since the adoption of SBREFA, Radon in Drinking Water, Long Term 1 Enhanced Surface Water Treatment, Filter Backwash Recycling and Ground Water rules provide excellent examples of consultation with small governments.
- Although the SCAS found that EPA's implementation of SBREFA can be an effective process, it does not meet the needs identified in the STTF recommendations which suggest that consultation with small communities should occur early in the regulatory process. SCAS recognizes the difficult balance regarding the timing of small community involvement: too early and there is not enough information available to make educated recommendations; too late and the regulatory course is difficult to change.
- The working group found that while the roles of Office of Management and Budget (OMB), Small Business Administration (SBA) and national associations representing local government and small business are important, there is too much emphasis on gathering the opinions of those institutions about small communities. EPA should increase direct involvement of small communities in the regulatory process.
- The current recommended quantitative criterion for evaluating the economic impact of a

rule on small governments is the annualized compliance costs as a percentage of annual government revenues ("revenue test"). EPA guidance to rule writers, however, suggests using the "income test" (annualized compliance cost to households per capita as a percentage of median household per capita income) where data are available.

- While timely involvement of small communities in the regulatory process will require some additional preparation and early outreach, such involvement will likely reduce costs later in the process and produce rules that small communities can more reliably implement.
- EPA has not adequately implemented the requirements of section 203 of the Unfunded Mandates Reform Act, which requires that a Small Government Agency Plan (SGAP) be **drafted**. EPA currently uses "generic" or "boilerplate" language to describe its small government outreach, consultation and compliance assistance efforts related to a specific rule.
- Agency rules are divided into three "tiers" with most rules identified as Tier **3** rules. Tier **3** rules are managed within individual program offices. The SCAS found that better oversight of Tier **3** rules is needed to ensure adequate SGAPs.

## **Recommendations:**

### **Any/Any Policy & Indirect Impacts**

- EPA should reaffirm its commitment to the policy requiring small community consultation for any rule where any impact on any number of small communities is anticipated.
- SCAS understands that EPA policy and legal analyses hold that the Regulatory Flexibility Act, as amended by SBREFA, requires only the use of direct cost data when determining whether significant, substantial or unique impacts on small communities are likely to occur. SCAS believes, however, that once the potential for significant, substantial or unique impacts on small communities becomes apparent, EPA should -- when possible -- employ data reflecting indirect impacts when developing such regulations.
- Indirect impact data made available to EPA from non-Agency sources should be carefully considered during impact analyses.

### **Early Involvement**

- Consultation with small communities should begin as part of the screening process described in the Revised Interim Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act. March 29, 1999.
- The screening process should be completed at or before tiering decisions are made.
- The outreach activities conducted for the screening analysis should be informal, exploratory and commensurate with the level of anticipated impact on small communities.

- Consultation with small communities requires flexibility and should occur at different times during the regulatory process for different rules. Events around which consultation may be appropriate include: 1) development of **and/or** major changes to the analytic blueprint; 2) **development/acceptance** of side agreements with other program offices; 3) the development of contract resources plans; 4) major briefings for senior management; 5) elevation and resolution of critical issues; 6) development of compliance guides; 7) analysis of public comments; and 8) workgroup closure.

### **Income Test**

- The "income test" should be used, where data are available, as a comparison to the results of the "revenue test" to ensure that a rule does not result in any significant or unique economic impacts on small communities.

### **Small Government Agency Plan**

- EPA should establish a policy requiring that a Small Government Agency Plan (SGAP) be prepared for rules where any impact on any number of small communities is anticipated.
- Rules for which anticipated impacts on small communities are neither significant nor unique – as defined in Agency guidance for UMRA implementation -- should be developed with the use of the Agency's existing generic **SGAP/checklist**. Rules with potential impacts which are either significant or unique, however, should be developed with the use of a comprehensive, **rule-specific SGAP**.
- The SGAP should **address** the way EPA will: 1) identify and **notify** affected small

governments about the rule; 2) consult with affected small governments; and 3) provide compliance assistance to small governments when the rule is adopted.

- The initial SGAP should be made available for public comment (see Outreach Network Database recommendation) after the "tiering" decision has been made. It should be updated and revised as needed to reflect small government input and to ensure real stakeholder involvement without becoming a rigid process.
- The Regulatory Steering Committee should ensure that SGAPs function as an integral part of the rule making process, especially for Tier 3 rules for which there are potentially significant, substantial or unique impacts.

### **Program Office Level "Core" Groups**

- Building on the ground breaking and innovative work of the Office of Groundwater and Drinking Water, each EPA program office regularly promulgating regulations should establish a core group of small community representatives.
- The core group should not be a committee established under Federal Advisory Committee Act (FACA). Instead, it should be a group of advisors sufficiently knowledgeable to provide meaningful individual input on several rules.
- Program offices should widely publicize the establishment of the core group.
- The core group should be balanced and some provision should be made for the regular replacement of members.
- Program Offices are responsible for core group orientation about the specific issues associated with regulatory development, organizational mission, background on relevant

environmental issues and program organization.

- The SGAP for each rule should state how these small community experts will be consulted and, if necessary, assisted by support from other knowledgeable advisors during the rule making process.

## **Travel Funding**

- EPA should seek whatever authority is required to establish a separate budget account exclusively to fund travel by small community representatives to participate on program office core groups for developing regulations.
- \$500,000 annually

## **Outreach Network Database**

- Building on the work of the Small Community Outreach Project for the Environment (SCOPE), the Local Government Environmental Assistance Network (LGEAN) and other pilot projects for increasing the involvement of small communities, the Office of Regulatory Management and Information should establish and maintain an outreach network database of small community representatives (2-5 persons from each State) which could be available to program offices for consultation on specific rules.
- The outreach network database would function as a pool of small community representatives that program offices could select from when forming core groups for individual rules or a series of related rules. Program offices would use the outreach

network database or find their own small community representatives.

## **Evaluation**

- The implementation of these recommendations shall be evaluated by a credible and independent outside group and the results of the evaluation presented to the SCAS 24 months after these recommendations are adopted by EPA.
- The evaluation shall address 1) were the recommendations implemented; 2) did the recommendations (and which ones) increase small community involvement 3) how did small community involvement affect the substance of the rule; 4) did the effort meet the requirements of UMRA 203.

## **Conclusions**

- SCAS recognizes that not all conflicts will be resolved through the consultation process and the Agency should make this clear to those who participate.
- While the subcommittee is mindful of the definitions for small communities in existing legislation and in current agency practice, nevertheless, we recommend that special attention be paid to the small and very small communities (under 2,500 population).
- The SCAS should establish working groups to work with EPA on: 1) evaluating the effects of the "income test" versus the "revenue test" on small communities; 2) establishing program office core groups and outreach networks; and 3) the implementation of the remaining recommendations.

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