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

AUG 1 2000

THE ADMINISTRATOR

Ms. Teree Caldwell-Johnson
Chair
Local Government Advisory Committee
111 Court Avenue, Room 390
Des Moines, IA 50309

Dear Ms. Caldwell-Johnson:

. **Thank** you for your letter of November 5, 1999, through which the Local Government Advisory Committee (LGAC) submitted its recommendations regarding the Agency's implementation of the small community-related provisions of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), and ~~the Unfunded Mandates Reform Act (UMRA).~~

Let me begin by acknowledging the effort put forth by the Committee in developing these recommendations. The development of a product such as this – a product that effectively balances ideals with operational practicability – is no easy task. As evidenced by the **Committee's** efforts to consult with a broad base of policy experts, it is clear that the LGAC, and especially its Small Community Advisory Subcommittee, took this responsibility very seriously. I want to assure you that **EPA's** implementation of the **RFA/SBREFA** and **UMRA** – aided through the application of many of these recommendations – will be equally conscientious.

Small Community Consultation

Over the past several years, EPA has worked to increase opportunities for direct, interactive consultation with States and local governments on policy and regulatory issues. Part of this effort is reflected in **EPA's** vigorous implementation of both the **RFA/SBREFA** and **UMRA**, an effort that has strengthened the intergovernmental partnership that is so essential to environmental protection across the nation.

Most recently, with the issuance of Executive Order 13132, "Federalism," the Agency has begun to develop internal policies and procedures to ensure that its regulatory consultation processes, as required by the various mandates, are consistent with each other, **meaningful**, timely, and responsive to States and local governments. To this end, EPA, consistent with its

administrative capacity and statutory authority, will develop and maintain a coordinated, coherent consultation process that is responsive to the requirements of UMRA, RFA/SBREFA and Executive Order **13132**.

With regard to small governments, EPA's policy is to: (1) assess each rule's impact, (2) engage small communities in a dialogue ~~regarding~~ the rule, and (3) to the extent possible, minimize the rule's impact. The rigor and scope of these efforts will depend on how substantial the impact is on small governments. If the impact is negligible, EPA may do little more than provide a statement in the preamble of a rule. Where substantial impacts are anticipated, however, the rule must be a product of extensive outreach to and consultation with small governments. With this in mind, let me first address the major findings of the Committee.

Committee Findings

I appreciate the Committee's recognition of the Agency's efforts to improve consultation with small governments, ~~as~~ well ~~as~~ its identification of several EPA **rules** that could serve as models of effective outreach and consultation to small communities. Indeed, EPA's implementation of the small business advocacy review (SBAR) provisions of the RFA/SBREFA has demonstrated the value of a formal process to capture small government perspectives during rule development.

~~The Committee's insights into the complex issue of when during the process to initiate~~ consultation are well taken. EPA understands the importance of stakeholders' efforts to inform the process well before pivotal regulatory decisions are made, and we will continue to make every effort to consult with small governments as early as possible during the development of alternatives. Further, I acknowledge the Committee's views about the respective roles of the Office of Management and Budget (OMB), the SBA and the various national associations representing local governments. I, too, believe that direct consultation with small communities is an essential part of regulatory consultation.

While I agree that there is reason to believe that early investment in outreach and consultation will result in rules that can be more reliably implemented by small communities, I must disagree with the Committee's sentiments concerning the Agency's implementation of the UMRA. That having been said, however, please know that EPA is working continuously to improve its regulatory development process. Thus, efforts to strengthen the Agency's implementation of UMRA certainly will continue to be a priority. With these thoughts in mind, I would like to address the major themes raised in the Committee's **recommendations**.

Consultation Policy for Small Communities

Threshold for Consultation

Per the Committee's request, I want to reaffirm the Agency's steadfast commitment to constructive, **meaningful** consultation with small communities for regulatory actions that are anticipated to have **any** impact on **any** number of small governments, commensurate with the extent of the regulations' anticipated impacts. The scope and depth of such consultation will be consistent **with current Agency policy as** expressed in its *Draft Unfunded Mandates Guidance* (Regulatory Management Division, 8/11/95) and its *Revised Interim Guidance for Rulewriters: RFA/SBREFA* (Regulatory Management Division 3/29/99).

Types of Impacts Considered

When determining whether **significant** impacts on a **substantial** number of small entities are likely to result **from** forthcoming regulatory actions, the Agency will continue its practice of employing **direct** cost data during this initial phase of impact analysis. As the Committee notes ~~in its recommendations, the RFA/SBREFA requires analysis of a rule's impact on small entities~~ that will be subject to the requirements of a rule. Therefore, using [direct] costs for both the screening and subsequent regulatory flexibility analyses is consistent with the requirements of the **RFA/SBREFA**.

The requirements under Executive Order 12866 (the Order) and UMRA, however, are different than those of the **RFA/SBREFA**. Under the Order, the Agency must determine if a regulation is a significant action, which is defined, in part, as likely to result in "an annual effect on the economy of \$100 million or more or adversely **affect** in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal **governments** or communities." Similarly, UMRA Section 203 requires us to determine whether a regulation "might significantly or uniquely affect small governments." Since "affect" is a broad term that can include both direct and indirect impacts, the Agency will consider, when possible, such impacts in its overall economic analyses conducted for rulemaking. Any indirect impact data that are made available to EPA **from** non-Agency sources is considered carefully during these impact analyses.

With regard to the use of quantitative criteria for determining the economic impacts of rules under development, EPA is currently in the process of reviewing its guidance for complying with the **RFA/SBREFA** and UMRA. During this process, the Agency **carefully** will consider the Committee's recommendation to use the **income test**, where data are available, in addition to the **revenue test**. We also will consult with the Committee as these documents are being developed.

Timely Involvement: Initiating and Sustaining Consultation

EPA understands that consultation with its local government partners is absolutely essential to the regulatory development process **and** to successful environmental **and** public health protection. Effective consultation requires **thoughtful, careful** planning and must be timely and attentive to the special needs and circumstances **facing** small governments. To that end, we agree with the **Committee's** recommendations that consultation with small communities requires flexibility and should occur at different times during the regulatory process for different rules. The **RFA/SBREFA** screening process, however, generally can not be completed before a tiering decision is made, but generally some level of consultation should occur during the tiering process. Additionally, the Committee's references to specific times at which consultation **might** occur during the rule development process are particularly helpful.

Tools for Consultation

Small Government Agency Plan

EPA has long had a tradition of consultation with stakeholders, including small governments. Given this, the **potential** benefits of using the **UMRA-prescribed Small Government Agency Plans (SGAPs)** are readily apparent to us. **Thus**, I agree with the Committee that EPA should finalize and adopt a policy regarding the use of **SGAPs**, and I commit to do so. As you may know, EPA currently operates under draft guidance for ~~implementation of UMRA, including Section 203, which requires an SGAP be developed and~~ implemented under certain circumstances. We currently are revising that guidance. In addition, the introduction of Executive Order 13132 has caused EPA to examine our guidance on the implementation of **RFA/SBREFA** relative to consultation with States and local governments. Our goal is to ensure we have a consistent, seamless consultation process that is integrated fully with our regulatory development practices. To that end, and in response to the Committee's recommendations, EPA will complete the review of the draft guidance and consult with the Committee **regarding** any proposed changes.

Program Office Core Groups and Outreach Network

Meaningful consultation depends upon several things: potential stakeholders' awareness of and interest in specific regulatory actions, their commitment to fair and effective representation of their perspectives, and their ability to participate in the process. As you are well aware, resource constraints facing small governments, both in terms of personnel time and availability as well as fiscal resources, challenge small government officials' ability to participate fully in Federal regulatory processes. Fully appreciating these and other concerns facing small entities, EPA has developed, piloted and implemented several outreach activities in **an** effort to improve its to consultation with small governments.

Consistent with the Committee's recommendation, EPA continues to improve its approach to small government consultation by ensuring that regulatory program offices are able

to engage small entity representatives in **meaningful** dialogue during rule development. For example, EPA has currently under development a centrally-managed process for outreach to small governments that will help provide EPA program offices access to qualified, knowledgeable small government officials. These officials, in turn, will have the ability to effectively inform the process for developing the entire range of regulations affecting small governments.

Implementation and Evaluation

These recommendations demonstrate the **Committee's** recognition of opportunities to effect positive change. Likewise, I am certain the Committee also recognizes that improving consultation under the RFA/SBREFA and UMRA, supported by parallel efforts under Executive Order 13132, must be a prudent, deliberate process. With this in **mind**, as well as the understanding that this effort marks an important milestone in the continuing process to strengthen the working partnership between EPA and small governments, I would greatly appreciate evaluative feedback, whether formal or informal, on the Agency's implementation of these recommendations.

Thank you again for your efforts in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read "Carol M. Browner", written over a horizontal line.

Carol M. Browner