

SMALL BUSINESS REGULATORY ENFORCEMENT AND FAIRNESS ACT (SBREFA)

POLICY

The following memorandum from Eric Shaeffer disseminates information regarding small business. Also included is an information sheet which shall be handed out by the inspector at each location where a FIFRA inspection is conducted provided that the facility meets the criteria as explained in the memorandum.

MEMORANDUM

SUBJECT: Final Guidance on Disseminating EPA's SBREFA Information Sheet to Businesses at the Time of an Enforcement Activity

FROM: Eric V. Schaeffer, Director
Office of Regulatory Enforcement

TO: Regional Counsel, Regions I-X
Enforcement Coordinators, Regions I-X
Headquarters and Regional Enforcement Division Directors Headquarters
and Regional SBREFA Contacts OGC SBREFA Contact

This memorandum replaces the December 23, 1998 guidance and is in response to Regional questions on the Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet (attached), which EPA has agreed to disseminate to small businesses

beginning on April 1, 1999. The information sheet itself has also been revised to reflect Regional comments. As mentioned in the December 1998 guidance, EPA agreed that it would notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to SBREFA Section 222 in response to Small Business Administration¹ (SBA) and Congressional requests.²

The information sheet is intended to inform small businesses of their rights to comment to the SBREFA Ombudsman about EPA enforcement activity, as well as provide information on compliance assistance. As you will see from the attached, we tried to draft this language to remind the reader that SBREFA does not eliminate the responsibility to respond to a complaint, information request, or other enforcement activity within the time allowed nor does it create any new rights or defenses under law. The information sheet should be given to a small business at the time EPA has its *initial enforcement contact* with the business, which we have determined may include the following activities:

- Inspection
- ◊ Warning letter
- ◊ Reminder notice or letter
- ◊ Compliance Audit Program or Incentive letter or notice
- ◊ Information collection request
- ◊ Subpoena
- ◊ Show cause letter
- ◊ Administrative search or other warrant
- ◊ Stop sale, use, and removal order (SSURO)
- ◊ Notice of Violation or other notice letter
- ◊ Administrative complaint Administrative order or administrative penalty order.

In general, it should only be necessary to distribute the information sheet once, at the time of the first formal enforcement contact. If appropriate, the information sheet may, in addition to the initial hand-out, be disseminated at later junctures in an enforcement activity at the Region's discretion. The SBA generally defines a small business as 500 employees or less although a business with as many as 1500 employees and up to \$23 million dollars in annual receipts may qualify as a small business depending on the SIC code involved (SBA's small business definitions are codified at 13 C.F.R. 121.201). If there is any question whether a business is small, the information sheet should be given to that business.

¹ SBA's SBREFA Ombudsman is charged with administering § 222 of SBREFA. Section 222, entitled "Oversight of Regulatory Enforcement" contains the SBREFA provision allowing small businesses to comment on agency enforcement activities, which may include audits, on-site inspections, compliance assistance efforts or other enforcement-related communication or contact by an agency.

² SBREFA's legislative history provides that the "SBA shall publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with enforcement agencies to make small business aware of the program at the time of agency enforcement activity ." Joint Statement of Senators Bond and Bumpers, March 29, 1996, Cong. Rec. S3242 (pp. S3242). To carry out this legislative intent, the SBA Ombudsman requested agencies to disseminate information about SBREFA to small businesses. SBA's small business definitions are codified at 13 C.F.R. 121.201.

In response to the questions raised by your offices, we have made changes to this Guidance and to the Information Sheet, as summarized below.

Q: Should the information sheet be given out in criminal investigations or actions?

A: No. The information sheet should not be given out in criminal investigations or actions for several reasons. First, SBREFA is geared towards, and appears only to apply to, civil or administrative actions. Second, the leading role of Assistant United States Attorneys (or DOJ Trial Attorneys) in criminal investigations and prosecutions makes it inappropriate for EPA to unilaterally agree to provide Reg Fair Notice in criminal investigations. Third, no other agency appears to be disseminating the sheet in criminal actions, including EPA's counterparts involved in environmental criminal investigations. Fourth, EPA is generally not able to disclose any information about criminal investigations or actions.

Q: Should the information sheet be given out in CERCLA (or Superfund), RCRA corrective or Oil Pollution Act actions?

A: This guidance does not address activities under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the provisions of the Resource Conservation and Recovery Act ("RCRA") concerning corrective action and remediation of underground storage tanks, and the provisions of the Oil Pollution Act and Clean Water Act section 311 concerning remediation of oil and hazardous substance spills. Guidance will be forthcoming from the Office of Site Remediation Enforcement to clarify the application of the SBREFA information sheet dissemination requirements to enforcement of CERCLA and the other remediation statutes. This guidance will be issued by May 15, 1999.

Q: Should the sheet be handed out after a matter has been referred to the Department of Justice?

A: No. In the unlikely event that the initial enforcement contact with a small business occurs after the matter has been referred, DOJ is responsible for determining whether the SBREFA information sheet will be handed out. As with all matters referred to DOJ, EPA employees should coordinate with DOJ before having any communication with current or potential defendants or with other outside individuals or agencies. As such, the December 23rd guidance suggesting that, a civil judicial action is one of the junctures at which the information sheet should be handed out is corrected to read only "Administrative complaint."

Q: What type of training should we be giving staff?

A: The "training" we anticipated was informal discussion at staff and other meetings sufficient to ensure that the employees that would be handing the sheet out were aware of the requirement and knew who to contact if questions arose (the Regional SBREFA contact or Carolyn Dick at 202-564-4007).

Q: Should we be tracking or counting the number of information sheets handed out?

A: We suggest that you make a note to the file confirming that the information sheet was given to the business and, until further notice, track and count the number of sheets handed out.

Q: Should contractors responsible for inspections (or for any other activity when the sheet should be handed out) be required to hand out the information sheet?

A: Yes, if a contractor, doing the work of the EPA, is the first representative to come in contact with a small business at one of the above-listed junctures, then the contractor should hand the information sheet out to small businesses.

Q: Can the information sheet be revised to include regional-specific information and must those revisions be reviewed by SBREFA staff at Headquarters?

A: This sheet must be distributed verbatim to avoid confusion that could arise from paraphrasing, particularly in light of the concern that we be nationally consistent in informing small businesses of the resources and rights available to them. If a Region would like to add regional-specific information, the Region should draft a cover memorandum including that information and forward it to the Office of Regulatory Enforcement for approval to ensure a nationally consistent and accurate message. Any such memoranda can be sent via the LAN or mail to Carolyn Dick (mail code 2246A).

Please begin disseminating the attached information sheet to small businesses at the time of initial enforcement contact during the activities listed above, on April 1, 1999. Since EPA must inform SBA that the information sheet is being disseminated, I am requesting each Regional Enforcement Coordinator to inform me by April 5, 1999, that their Region has begun implementing this Guidance.

If you have any comments or questions, please call me or have your staff contact Carolyn Dick (telephone 202-564-4007). Thank you for your help in complying with SBA 's request.

Information for Small Businesses

If you are small business as defined by the Small Business Administration (defined at 13 CFR 121.201; in most cases, this means a business with 500 or fewer employees), below is information you may find helpful.

The United States Environmental Protection Agency (EPA) offers small businesses a wide variety of compliance assistance resources and tools designed to assist businesses to comply with federal and State environmental laws. These resources can help businesses understand their obligations, improve compliance and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Websites

EPA offers a great deal of compliance assistance information and materials for small businesses on the following Websites, available through public libraries:

# www.epa.gov	<i>EPA 's Home Page</i>
# www.smallbiz-enviroweb.org	<i>EPA 's Small Business Home Page</i>
# www.smallbiz-enviroweb.org/state.html	<i>List of State Contacts</i>
# www.epa.gov/ttn/sbap	<i>Small Business Assistance Programs</i>
# www.epa.gov/oeca/polguid/index.html	<i>Enforcement Policy and Guidance</i>
# www.epa.gov/oeca/smbusi.html	<i>Small Business Policy</i>
# www.epa.gov/oeca/oc	<i>Compliance Assistance Home Page</i>
# www.epa.gov/oeca/ccsmd/commpull.html	<i>Small Businesses and Commercial Services</i>
# www.epa.gov/oeca/ccsmd/mun.html	<i>Small Communities Policy</i>

Hotlines

EPA sponsors approximately 89 hotlines and clearinghouses that provide free and convenient avenues to obtain assistance with environmental requirements. EPA's Small Business Ombudsman Hotline can provide you with a list of all the hot lines, and assist you with determining which hotline will best meet your needs. Key hotlines that may be of interest to you include:

# EPA's Small Business Ombudsman.....	(800) 368-5888
# RCRA/UST/CERCLA Hotline.....	(800) 424-9346
# Toxics Substances and Asbestos Information.....	(202) 554-1404
# Safe Drinking Water.....	(800) 426-4791
# Stratospheric Ozone/CFC Information.....	(800) 296-1996
# Clean Air Technical Center.....	(919) 541-0800
# Wetlands Hotline.....	(800) 832-7828

Compliance

Assistance Centers EPA has established national compliance assistance centers, in partnership with industry, academic institutions, and other federal and State agencies, that provide on line and fax back assistance services in the following sectors heavily populated with small businesses:

- # Access to All Centers (www.epa.gov/oeca/mfcac.html)
- # Metal Finishing (1-800-AT-NMFRC or <http://www.nmfrc.org>)
- # Printing (1-888-USPNEAC or <http://www.pneac.org>)
- # Automotive (1-888-GRN-LINK or <http://www.ccar-greenlink.org>)
- # Agriculture (1-888-633-2155 or <http://www.epa.gov/oeca/ag>)
- # Printed Wiring Board Manufacturing (<http://www.pwbr.org>)
- # The Chemical Industry (1-800-672-6048 or <http://www.chemalliance.org>)
- # The Transportation Industry (<http://www.transource.org>)
- # The Paints and Coatings Center (<http://www.paintcenter.org>)
- # Local Governments (1-877-TO-LGEAN or <http://www.lgean.org>)

State Agencies Many State agencies have established compliance assistance programs that provide on-site as well as other types of assistance. Please contact your local State environmental agency for more information. EPA's Small Business Ombudsman can provide you with State Agency contacts by calling (800)-368-5888.

Compliance

Incentive Policies EPA's Small Business Policy and Small Communities Policy are intended to promote environmental compliance among small businesses by providing incentives such as penalty waivers and reductions for participation in compliance assistance programs, and encouraging voluntary disclosure and prompt correction of violations. These policies can not be applied to an enforcement action that has already been initiated. Contact Ginger Gotliffe (202-564-2310) for information on the Small Business Policy and Ken Harmon (202-564-2310) for information on the Small Communities Policy.

In order to improve your understanding of and compliance with environmental regulations and avoid the need for future enforcement actions, we encourage you to take advantage of these tools. *However, please note that any decision to seek compliance assistance at this time does not relieve you of your obligation to respond to an EPA request, administrative or civil complaint in a timely manner, does not create any new rights or defenses, and will not affect EPA's decision to pursue this enforcement action.*

The Small Business and Agriculture Regulatory Enforcement Ombudsman and ten Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually rate each agency's responsiveness to small businesses. If you believe that you fall within the Small Business Administration's definition of a small business (based on your SIC designation, number of employees or annual receipts, defined at 13 C.F.R. 121.201) and wish to comment on federal enforcement and compliance activities, call 1-888-REG-FAIR (1-888-734-3247).

However, participation in this program does not relieve you of your obligation to respond to an EPA request, administrative or civil complaint or other enforcement action in a timely manner nor create any new rights or defenses under law. In order to preserve your legal rights, you must comply with all rules governing the administrative enforcement process. The ombudsman and fairness boards do not participate in the resolution of EPA's enforcement action.

Dissemination of this information sheet does not constitute an admission or determination by EPA that your business, organization or governmental jurisdiction is a small entity as defined by the Small Business Regulatory Enforcement and Fairness Act (SBREFA) or related provisions nor does it create any new rights or defenses under law.