

Issued in Washington, DC on March 12, 1997.

Dan W. Reicher,

*Chief of Staff, Department of Energy.*

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## Office of General Counsel

### Unfunded Mandates Reform Act; Intergovernmental Consultation

**AGENCY:** Office of the General Counsel, Department of Energy.

**ACTION:** Notice of final statement of policy.

**SUMMARY:** The Department of Energy (DOE) today publishes a final statement of policy on intergovernmental consultation under the Unfunded Mandates Reform Act of 1995. The policy reflects the guidelines and instructions that the Director of the Office of Management and Budget (OMB) provided to each agency to develop, with input from State, local, and tribal officials, an intergovernmental consultation process with regard to significant intergovernmental mandates contained in a notice of proposed rulemaking.

**EFFECTIVE DATE:** This policy is effective March 18, 1997.

**FOR FURTHER INFORMATION CONTACT:** Steve Duarte, Office of the Assistant General Counsel for Regulatory Law, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585, (202) 586-9507.

**SUPPLEMENTARY INFORMATION:** Section 203 of the Unfunded Mandates Reform Act of 1995 (the Act), 2 U.S.C. 1533, requires that, prior to establishing regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals. Section 204(a) of the Act requires each agency to develop, to the extent permitted by law, an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments in the development of a regulatory proposal containing a proposed "significant intergovernmental mandate" that is not a requirement specifically set forth in law. 2 U.S.C. 1531, 1534(a).

A "significant intergovernmental mandate" under the Act is any provision in a Federal agency regulation that: (1) Would impose an enforceable

duty upon State, local, or tribal governments (except as a condition of Federal assistance); and (2) may result in the expenditure by State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. See 2 U.S.C. 658(5)(A)(i), 1532(a). The Act defines "small government" to mean any small governmental jurisdiction defined in the Regulatory Flexibility Act, 5 U.S.C. 601(5), and any tribal government. 2 U.S.C. 658(11).

In January 1996, DOE published a notice of a proposed policy to implement this portion of the Act and the OMB guidelines and instructions published on September 29, 1995 (60 FR 50651) that deal with the intergovernmental consultation process. DOE sought public comment on the proposed policy in order to give State, local and tribal officials, as well as members of the public, an opportunity to comment on the policy before it was finalized. DOE received comments from one commenter. The DOE reviewed the comments and has determined to finalize the proposed policy with the modifications as described below.

The commenter suggested that indirect notification to local elected officials (or their designees) through the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors may not provide notification to those local elected officials who are not members of these national organizations. The commenter suggested that DOE also notify the State Municipal Leagues. DOE has decided to implement this suggestion in the following manner. DOE understands that a number of the State Municipal Leagues are members of, and are represented by, one or another of the named national organizations. DOE will notify directly the State Municipal Leagues that are not otherwise represented by one of the named national organizations.

The commenter suggested that, in determining if an unfunded mandate triggers the \$100 million threshold, the DOE should not discount future costs to present value. After consulting with OMB, DOE has accepted this suggestion.

The commenter also suggested that DOE open the consultation process whenever a DOE rule would create an unfunded mandate, without regard for the cost of the mandate. DOE has not accepted this suggestion because the Act provides otherwise, and in any event, issues about a proposed mandate could be presented during the comment period provided in the notice of proposed rulemaking. The Act assigns to the agency the obligation to assess the

effects of Federal regulatory actions on State, local and tribal governments. 2 U.S.C. 1531. The Act requires that the agency permit State, local, and tribal governments to provide input in the development of regulatory proposals when the regulatory proposals contain significant Federal intergovernmental mandates. 2 U.S.C. 1534. If the agency finds that the unfunded mandate does not rise to the level of a "significant intergovernmental mandate" under the Act, then the consultation process is not required. However, such a finding would not preclude a State, local, or tribal government from commenting in a public hearing or in a meeting with agency officials on a proposed intergovernmental mandate that is below the threshold of a "significant intergovernmental mandate."

Finally, the commenter suggested that DOE create a review process whereby local government officials can petition to have DOE's threshold determination reviewed by a "neutral party." DOE has not accepted this suggestion because the Act specifically provides for judicial review. 2 U.S.C. 1571.

In accordance with section 801 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 801, DOE will report to Congress the promulgation of this Statement of Policy prior to its effective date.

Issued in Washington, DC, on March 11, 1997.

Mary Anne Sullivan,  
*Acting General Counsel.*

On the basis of the foregoing, DOE adopts the following Statement of Policy:

Statement of Policy on the Process for Intergovernmental Consultation Under the Unfunded Mandates Reform Act of 1995

#### *I. Purpose*

This Statement of Policy implements sections 203 and 204 of the Unfunded Mandates Reform Act of 1995 (Act), 2 U.S.C. 1533, 1534, consistent with the guidelines and instructions of the Director of the Office of Management and Budget (OMB).

#### *II. Applicability*

This Statement of Policy applies to the development of any regulation (other than a regulation for a financial assistance program) containing a significant intergovernmental mandate under the Act. A significant intergovernmental mandate is a mandate that: (1) Would impose an enforceable duty upon State, local, or tribal governments (except as a condition of Federal assistance); and (2)

may result in the expenditure by State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. DOE officials may apply this Statement of Policy selectively if there is an exigent need for immediate agency action that would warrant waiver of prior notice and opportunity for public comment under the Administrative Procedure Act, 5 U.S.C. 553.

### *III. Intergovernmental Consultation*

When to begin. As early as possible in the development of a notice of proposed rulemaking (for other than a financial assistance program) that involves an enforceable duty on State, local, or tribal governments, the responsible Secretarial Officer, with the concurrence of the Assistant Secretary for Policy and the General Counsel, should estimate whether the aggregate compliance expenditures will be in the amount of \$100 million or more in any one year. In making such an estimate, the Secretarial Officer ordinarily should adjust the \$100 million figure in years after 1995 using the Gross Domestic Product deflator as contained in the Annual Report of the Council of Economic Advisors which is part of the Economic Report of the President.

Content of notice. Upon determining that a proposed regulatory mandate on State, local, or tribal governments may be a significant intergovernmental mandate, the Secretarial Officer responsible for the rulemaking should provide adequate notice to pertinent State, local and tribal officials: (1) Describing the nature and authority for the rulemaking; (2) explaining DOE's estimate of the resulting increase in their governmental expenditure level; (3) inviting them to participate in the development of the notice of proposed rulemaking by participating in meetings with DOE or by presenting their views in writing on the likely effects of the regulatory requirement or legally available policy alternatives that DOE should take into account. If DOE publishes an advance notice of proposed rulemaking, then these issues may be addressed in that advance notice.

How to notify State and tribal officials. With respect to State and tribal governments, actual notice should be given by letter, using a mailing list maintained by the DOE Office of Intergovernmental and External Affairs that includes elected chief executives (or their designees), chief financial officers (or their designees), the National Governors Association, and the National Congress of American Indians. The

Secretarial Officer also should provide notice in the Federal Register.

How to notify local officials. With respect to local governments, the Secretarial Officer should provide notice through the Federal Register and by letter to the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, and any State Municipal League not represented by a national association. If a significant intergovernmental mandate might affect local governments in a limited area of the United States, then the Secretarial Officer, in consultation with the Office of Intergovernmental and External Affairs, should give actual notice by letter to appropriate local officials if practicable.

Exemption from the Federal Advisory Committee Act. Secretarial Officers are encouraged to meet with State, local, and tribal elected officials (or their designees) to exchange views, information, and advice concerning the implementation of intergovernmental responsibilities or administration. Section 204(b) of the Act, 2 U.S.C. 1534(b), exempts from the Federal Advisory Committee Act (5 U.S.C. App.) meetings for this purpose that do not include other members of the public.

Small government consultation plan. If the proposed regulatory requirements might significantly or uniquely affect small governments, then the Secretarial Officer should summarize in the Supplementary Information section of the notice of proposed rulemaking its plan for intergovernmental consultation under section 203 of the Act. Unless impracticable, the plan should provide for actual notice by letter to potentially affected small governments.

Documenting compliance. The Supplementary Information section of any notice of proposed and final rulemaking involving a significant intergovernmental mandate upon State, local, or Indian tribal governments should describe DOE's determinations and compliance activities under the Act. The Supplementary Information section of the notice of proposed rulemaking should describe the estimated impact of an intergovernmental mandate, the assumptions underlying its calculation, and the resulting determination of whether the rulemaking involves a significant intergovernmental mandate. It should discuss, as appropriate, cost and benefit estimates and any reasonable suggestions received during pre-notice intergovernmental consultations. Any substantive pre-notice written communications should be described in the Supplementary Information and made available for

inspection in the public rulemaking file in the DOE Freedom of Information Reading Room.

Reporting. Pursuant to the OMB guidelines and instructions, the Office of General Counsel, with the cooperation of the Secretarial Officers, will prepare the annual report to OMB on compliance with the intergovernmental consultation requirements of the Act (initially due on January 15, 1996, and annually on January 15 thereafter).

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## **Federal Energy Regulatory Commission**

[Docket No. TM97-10-23-000]

### **Eastern Shore Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff**

March 12, 1997.

Take notice that on March 7, 1997, Eastern Shore Natural Gas Company (ESNG) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, certain revised tariff sheet in the above captioned docket, with a proposed effective date of April 1, 1997.

ESNG states that the purpose of this instant filing is to "track" Transcontinental Gas Pipe Line Corporation's (Transco) revised fuel retention percentages for injecting gas into storages (see Transco's Seventh Revised Sheet No. 29) proposed to be effective April 1, 1997.

ESNG states that copies of the filing have been served upon its jurisdictional customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, in accordance with Rule 211 and Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the