

## ENVIRONMENTAL PROTECTION AGENCY

### Environmental Program Grants for Tribes

#### 40 CFR Parts 31 and 35

[FRL-6929-5]

RIN 2030-AA56

### Environmental Program Grants for Tribes

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises and updates requirements in several Environmental Protection Agency (EPA) regulations governing grants to Indian Tribes and Intertribal Consortia. It creates a new Tribal-specific subpart which contains only the provisions for environmental program grants that apply to Tribes; simplifies, clarifies, and streamlines current provisions for environmental program grants to Tribes; and addresses the Performance Partnership Grant (PPG) program for Tribes. The rule includes results-oriented approaches to planning and managing environmental programs. The PPG program fosters EPA's continuing efforts to improve partnerships with its Tribal recipients by increasing flexibility in using environmental program funding. The regulation reflects efforts by EPA and its Tribal partners to increase administrative and programmatic flexibility for Tribes while moving toward improved environmental protection. (A regulation governing environmental program grants to State, interstate, and local government agencies published in the *Federal Register* of January 9, 2001.)

**DATES:** This regulation is effective February 15, 2001. This regulation applies to new grants awarded after February 15, 2001.

**ADDRESSES:** Although this regulation is final, comments may be submitted to the person identified in the section below at any time.

**FOR FURTHER INFORMATION CONTACT:** Michelle McClendon, Grants Policy, Information, and Training Branch (3903R), United States Environmental Protection Agency, 1200 Pennsylvania Ave., Washington, D.C. 20460, Telephone: 202-564-5357, McClendon.Michelle@epa.gov.

#### SUPPLEMENTARY INFORMATION:

##### I. Regulated Entities

Entities eligible to receive the environmental grants listed in 40 CFR

35.501 are regulated by this rule. Regulated categories and entities include:

Category	Regulated Entities
Government .....	Federally recognized Indian Tribal Governments Intertribal Consortia
Other Entities .....	

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the definitions of Tribe and Intertribal Consortium in § 35.502 and in the program-specific rules found following § 35.540 of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

##### II. Comments and Record

The record of this final rule includes copies of the proposed and final rule, comments received on the rule, EPA's responses to those comments, and other relevant documents that support the rule. It is available for inspection from 9 am to 4 pm (Eastern Time), Monday through Friday, excluding legal holidays, at the Water Docket, U.S. EPA Headquarters, 401 M Street, SW; East Tower Basement; Washington, DC 20460. For access to docket materials, please call (202) 260-3027 to schedule an appointment.

##### III. Background

EPA proposed a rule for environmental program grants for Indian Tribes on July 23, 1999 (64 FR 40084). EPA received 16 letters of comment on the proposed rule. A summary of the comments and EPA's response are included in this preamble. The preamble also summarizes a few changes to the rule EPA determined necessary to clarify various provisions. This publication makes the rule final.

The United States Government has a unique legal relationship with Tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. EPA recognized the uniqueness of Tribal governments by issuing and reaffirming its 1984 policy on the "Administration of Environmental Programs on Indian Reservations." Specifically, EPA recognizes the

existence of the trust responsibility in Principle Number 5 of its Indian Policy, which states that the Agency will assure that Tribal concerns and interests will be considered when Agency actions may affect Tribal environments. Additionally, in 1994, the President of the United States issued a presidential memorandum for the heads of Executive Departments and Agencies reaffirming the government-to-government relationships with Native American Tribal Governments. Most recently, on May 14, 1998, the President issued Executive Order 13084, "Consultation and Coordination With Tribal Governments." The Executive Order addresses consultation and collaboration with Indian Tribal governments in developing regulatory policies on federal matters affecting their communities, reducing the imposition of unfunded mandates on Indian Tribal governments, and streamlining the application process and increasing the availability of statutory or regulatory waivers for Indian Tribal governments. Consistent with these principles, this regulation provides an easy-to-use Tribal-specific subpart to optimize the administration of Tribal assistance programs through increased flexibility and to remove procedural impediments to effective environmental programs for Indian Tribes.

In various program specific regulations in this subpart, we have used terms such as "treatment as a State" or "treatment in a manner similar to a State." We have used those terms because they are in many of the statutes authorizing grants to Tribes. EPA recognizes that Tribes are sovereign nations with a unique legal status and a relationship to the federal government that is significantly different than that of States. EPA believes that Congress did not intend to alter this relationship when it authorized treatment of Tribes "as States;" rather, the purpose was to reflect an intent that, insofar as possible, Tribes should assume a role in implementing the environmental statutes in Indian country comparable to the role States play outside of Indian country.

Generally, the administration of financial assistance to Tribes is the same as the administration of financial assistance to States. However, there are provisions in some assistance programs unique to Indian Tribes. For example, Indian Tribes currently compete with each other for limited financial resources in many of the Tribal environmental grant programs listed under § 35.501(a) of the rule. Thus, the stability of annual grant funding for

State, interstate, and local environmental program grants (see 40 CFR part 35, subpart A) is not shared by Tribes. Indian Tribes do not currently receive and cannot rely on continuity of funding from year to year. This uncertainty in financial assistance makes long-term environmental planning difficult. Therefore, the administration of these programs by EPA requires a different approach compared to the approach used when administering an environmental program for State, interstate, or local government agencies.

EPA and many Indian Tribal governments have forged partnerships on a government-to-government basis. An important mechanism to further support these relationships was established when EPA requested and received authorization for a PPG program for Indian Tribes and Intertribal Consortia. (Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Pub. L. 105-65, 111 Stat. 1344, 1373 (1997)). PPGs allow eligible Tribes and Intertribal Consortia to combine environmental program grants into a single grant in order to improve environmental performance, increase programmatic flexibility, achieve administrative savings, and strengthen the partnerships between Indian Tribes and EPA. Environmental program grants that may be included in PPGs are listed in 40 CFR 35.501(a) and funded under EPA's State and Tribal Assistance Grant (STAG) appropriation account.

This regulation will be codified in 40 CFR part 35, subpart B, as "Environmental Program Grants for Tribes." Subpart B incorporates administrative provisions for grants formerly included in 40 CFR part 35, subparts A and Q. This regulation supplements EPA's regulation, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," contained in 40 CFR part 31, which will apply to grants awarded under this regulation (including grants to Intertribal Consortia as defined in § 35.502, regardless of whether the Consortia are organized as nonprofit corporations under State or Tribal law). We have used the terms "Tribe" and "Intertribal Consortium" to refer to the entities eligible to receive grants throughout this subpart. Those terms are defined in § 35.502 for environmental programs that do not include their own

program-specific definitions. When the definition of either term is different in a specific program provision in §§ 35.540 through 35.718 of the rule, the specific definition will govern.

#### IV. Requirements for All Environmental Program Grants

Sections 35.500 through 35.518 apply to all environmental program grants covered by 40 CFR part 35, subpart B, including PPGs. This rule contains changes to foster Tribal-EPA partnerships, improve accountability for environmental and program performance, and streamline administrative requirements. Some of the rule's key features are discussed below.

*Tribal-EPA partnerships.* To foster joint planning and priority setting, the rule explicitly requires consideration of Tribal priorities along with national and regional guidance in negotiating all grant work plans. All Tribes are provided flexibility through the work plan negotiation process, and, in particular, through their ability to organize work plan components in whatever way fits the Tribe best. However, EPA must be able to link the grant work plans to EPA's Government Performance and Results Act Goal and Objective architecture. Where appropriate, the grant work plan will reflect both EPA and Tribal roles and responsibilities in carrying out work plan commitments and there will be a negotiated process for jointly evaluating performance. Tribes applying for PPGs will have still greater flexibility as described in the PPG discussion below. The EPA Regional Administrator must consult with the National Program Manager before agreeing to a PPG work plan that deviates significantly from national program guidance.

*Core performance measures.* Core performance measures for Tribal programs are still evolving and may be different from those negotiated by EPA National Program Managers (NPM) with the States. When EPA has negotiated these measures with the Tribes, they will be included in national program guidance and incorporated, as appropriate, into Tribal/EPA Environmental Agreements and grant work plans as the basis for reporting requirements. Until the Tribal core performance measures are further developed, the regions should use significant work plan goals, objectives or commitments for measuring performance, as appropriate.

*Accountability.* The rule includes results-oriented approaches to planning and managing environmental programs. Definitions and other aspects of the rule

are compatible with GPRA and reflect efforts to establish goals and objectives as well as environmental and program performance measures at both the national and Tribal levels. The rule recognizes the need for a mix of outcome (results) and output (activity) measures for management purposes. The rule encourages Tribes and Intertribal Consortia to organize their work plans around goals and objectives to reflect the new GPRA requirements.

*Administrative changes.* Under the rule, Tribes can negotiate funding periods of more than one year with EPA, thereby improving stability in the programs. EPA recommends, however, that funding periods not exceed five years because it is difficult to account for funds and maintain records for longer periods. The funding period of a General Assistance Program (GAP) grant cannot exceed four years. (The term "funding period" used in this preamble and 40 CFR 31.23 has the same meaning as the term "budget period" on EPA's grant and cooperative agreement and amendment forms.)

The rule streamlines some requirements and eliminates other requirements associated with post-award changes to grant work plan commitments and budgets. It replaces the requirements regarding changes found in 40 CFR 31.30. Prior written approval from EPA is still required for significant changes in a recipient's work plan commitments. Written, but not prior, approval is required for work that will result in a need for increases in grant amounts and extensions of the funding period. However, recipients beginning such work without prior, written approval do so at their own financial risk. EPA approval is no longer required for other changes in the work plan, budget, key persons, or to carry out portions of the work through subgrants or contracts unless the Regional Administrator determines, on a case-by-case basis, that circumstances warrant imposing additional approval requirements on a particular recipient.

*Pre-award costs.* Pre-award costs may be reimbursed under the grants without prior approval so long as they are incurred within the funding period, identified in the approved grant application, and would have been allowable if incurred after the award.

*Intertribal Consortia.* Under this rule, EPA will treat a group of Tribes that applies for a grant (called an Intertribal Consortium in the rule) in the same manner as a single Tribe. Thus, in the absence of clear Congressional intent to the contrary, if a Tribe is eligible for a particular grant, EPA will also treat a group of individually eligible Tribes as

eligible for the grant. EPA believes this approach is a practical, reasonable and prudent way to help interested Tribes strengthen environmental protection when limited funding is available to support Tribal environmental programs. Tribes that form Consortia may be able to use their limited resources more efficiently and address environmental issues more effectively than they could if each Tribe separately developed and maintained separate environmental programs. Accordingly, Intertribal Consortia as defined in § 35.502, will be eligible to receive grants under the programs listed in § 35.501.

For all grants except GAP grants, all members of an Intertribal Consortium must be eligible to receive the grant and must authorize the Consortium to apply for and receive the grant. This means, for example, that for a Consortium to be eligible for a Clean Water Act section 106 grant, each member of the Consortium must establish that it is a federally recognized Tribe and that it has met the requirement for treatment in a manner similar to a State, because that is required for individual Tribes seeking section 106 grants. If a grant authority does not require Tribes to establish eligibility for treatment in a manner similar to a State to receive a grant, then the authorizing members of a Consortium need not satisfy that prerequisite.

For GAP grants, an Intertribal Consortium will be eligible if (1) a majority of the Consortium's members meet the eligibility requirements for the grant; (2) all members that meet the eligibility requirements authorize the Consortium to apply for and receive the grant; and (3) only the members that meet the eligibility requirements will benefit directly from the grant project and the Consortium agrees to a grant condition to that effect. This means that a Consortium may receive a GAP grant even if the Consortium includes Tribal governments that are not recognized as eligible for the special services provided by the United States to Indians because of their status as Indians so long as the Consortium meets the three requirements specified above. EPA decided to impose somewhat less restrictive requirements on Intertribal Consortia seeking GAP grants because the Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. 4368b (IEGAPA), explicitly authorizes GAP grants to an "Intertribal Consortium," which it defines as "a partnership of two or more Indian Tribal governments authorized by the governing bodies of those Tribes to apply for and receive assistance pursuant to this section." This

definition may reasonably be interpreted to include a Consortium comprised of a majority of federally recognized Tribes and a few non-recognized Tribal governments. Such a Consortium would be a partnership of federally recognized Tribes, although it would not be a partnership consisting exclusively of federally recognized Tribes. In effect, the recipient of the GAP grant to such an Intertribal Consortium would be a subset of the original Consortium consisting only of those individually eligible Tribes. The Agency is adopting this approach to meet those very rare circumstances where awarding a GAP grant to such a Consortium would be consistent with the intent of the IEGAPA.

EPA believes this approach for making environmental program grants available to Intertribal Consortia is consistent with President Clinton's Executive Order 13084, which encourages agencies to adopt "flexible policy approaches" and to respect the principle of Indian self-government and sovereignty.

*Preferences for Indians, Indian organizations, and Indian-owned economic enterprises.* Section 450e(b) of the Indian Education, Assistance, and Self Determination Act, January 4, 1975 (25 U.S.C. 450 *et seq.*), provides:

Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452), or any other Act authorizing federal contracts with or grants to Indian organizations or for the benefit of Indians shall require to the extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) (25 U.S.C. 1452).

EPA determined that these preference requirements of the Indian Self-Determination Act apply to the award of grants, contracts, subcontracts and subgrants under the grant programs covered by this subpart. In the proposed regulation, EPA asked for comments on implementing this provision, but received none. Since issuing the proposed rule, EPA has determined that the preference requirements of the Indian Self-Determination Act should apply to all grants awarded to Tribes by EPA because they are awarded to Tribes

pursuant to statutes authorizing grants to Indian organizations, which includes Tribes and Intertribal Consortia, or for the benefit of Indians. Therefore, the regulations governing the award of all EPA grants to Tribes at 40 CFR part 31 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) are amended in this rule to reflect the preference requirements of the Indian Self-Determination Act and no comparable provision is included in the final rule for 40 CFR part 35, subpart B. EPA is adding to 40 CFR part 31 a new § 31.38 which provides:

Any contract, subcontract, or subgrant awarded under an EPA grant by an Indian Tribe or Indian Intertribal Consortium that meets the definition and eligibility requirements at 40 CFR part 35, subpart B shall require to the extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians, as defined in the Indian Self-Determination Act (25 U.S.C. § 405b); and

(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) (25 U.S.C. 1452).

In addition, the requirements for procurement under grants are amended to include a cross reference to the new preference provision at 40 CFR 31.38. Specifically, 40 CFR 31.36(b)(1) is amended to provide:

Procurement Standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurement actions conform to applicable federal law, the standards identified in this section, and, if applicable, 40 CFR 31.38.

#### V. Performance Partnership Grants

Sections 35.530 through 35.538 contain the requirements that apply only to PPGs to Tribes or Intertribal Consortia. In a PPG, the recipient can combine funds from two or more environmental program grants into a single grant under streamlined administrative requirements. Before a Tribe or Intertribal Consortium can include funds from an EPA environmental program in a PPG, it must meet the requirements for that program with a few specified exceptions. For example, if a program

requires treatment in a manner similar to a State, the Tribe or Tribal members of a Consortium must satisfy that requirement in order to include that program's funds in a PPG. The exceptions are requirements that restrict how a specific environmental program grant can be used after award. These requirements are not appropriate to be carried over to PPGs because after funds are awarded in a PPG, they may be used for cross-media activities or strategies and do not need to be accounted for in accordance with their original program sources. However, the source of the funds is considered by the Regional Administrator in negotiating a work plan with the applicant. See §§ 35.507(a) and 35.535. Key features of the PPG rule are discussed below.

*Funds and activities eligible for inclusion in a PPG.* Funds for any environmental program grant listed in § 35.501 may be included in a PPG if the funds for that grant were appropriated in the same specific appropriation as the funds for PPGs. EPA will announce any changes in its appropriation acts that affect the list of programs in § 35.501.

Unlike the rule governing PPGs to States, § 35.535 of this rule allows Tribes and Intertribal Consortia to use PPG funds for any environmental activity that is eligible under the environmental programs listed in § 35.501 (except EPA delegated, EPA approved, or EPA authorized activities, which still require delegation, approval or authorization), regardless of whether a Tribe applied for or was selected for funding for that particular activity, provided that the Regional Administrator consults with the appropriate NPMs. The NPM may expressly waive or modify the consultation requirement in national program guidance. For example, if EPA found that a Tribe was not eligible for a Clean Air Act section 105 grant, but the Tribe wanted to perform air program monitoring or inspections, the Tribe could pay for those activities with PPG funds, provided that: (1) The Regional Administrator consulted with the appropriate NPMs, including those NPMs for the sources of the PPG funds (unless waived in national program guidance) and (2) the activity was included in the approved PPG work plan. The Tribe would perform these air activities using Tribal authority. To implement an EPA delegated, approved, or authorized program under a PPG, a Tribe would need the delegations, approvals, or authorizations as required under § 35.535(a). Given the wide variety of environmental activities eligible under GAP (see §§ 35.540–35.548), this will allow Tribes, as

determined by the Regional Administrator, to use funds from other programs that are put into a PPG for the same wide variety of activities that are eligible for funding under GAP. Furthermore, this will allow Tribes to use GAP funds included in a PPG, to carry out activities that are eligible for funding under any of the other grant programs covered by this subpart as long as the Tribe has any EPA delegation, approval, or authorization required under § 35.535(a).

Within the framework of EPA oversight established by §§ 35.507, 35.514(a), 35.535 and national program guidance, EPA is providing Tribes with flexibility to use PPG funds for a broad variety of activities. EPA believes this approach is appropriate because Tribes need to address a broad range of environmental issues, but do not have the same access to diverse funding sources as States and, generally, Tribes must compete annually for their funds while States do not. EPA believes this approach will help achieve a key purpose of the PPG program: to provide Tribes and Intertribal Consortia with the flexibility to direct resources where they are most needed to address environmental and public health priorities. EPA will retain sufficient programmatic control because § 35.535(b) requires the Regional Administrator to consult with the appropriate NPMs before agreeing to work plans that differ significantly from National Program Guidance. For example, if a Tribe or Intertribal Consortium was selected for funding in a competition based on its proposed work plan for that grant and the Tribe or Consortium proposed a PPG work plan that would significantly modify those proposed work plan activities, then the Regional Administrator would have to consult with the NPM associated with the funding source before approving the work plan (unless waived in national program guidance). Accordingly, the Regional Administrator will be responsible for ensuring that the Tribes and Intertribal Consortia meet the basic requirements of programs which provide funds for the PPG before the Tribes use funds for other important activities.

EPA intends to evaluate the flexibility provided under the rule regarding the activities eligible for funding under a PPG. After the third year of implementing the program, but before the end of the fifth year, the Agency will evaluate the environmental benefits of this flexibility as compared to the costs, which may include reduced accountability for funds and outcomes. Based on that evaluation, the Agency

will determine whether to continue to allow Tribes to use PPG funds to perform activities under programs for which they are not eligible to receive a grant. If the Agency determines that a change in the regulation is appropriate, it will revise the regulations appropriately.

*Administrative flexibility.* A primary advantage of PPGs is the administrative flexibility provided to all PPG recipients. A PPG requires only a single application, work plan, and budget. Once funds are awarded in a PPG, the Tribe or Intertribal Consortium can direct the funds as needed to achieve work plan commitments and does not need to account for funds in accordance with their original program sources. However, EPA must be able to link the grant work plans to EPA's GPRA goal and objective architecture. These features also make it possible for Tribes to negotiate a work plan that includes cross-media or innovative strategies for addressing environmental problems.

*Cost share.* The PPG cost share is the sum of the cost shares required for all individual program grants included in the PPG in accordance with 40 CFR 35.536(b) and (c) for each individual program grant included in the PPG. EPA will not require Tribes and Intertribal Consortia to provide a PPG cost share for funds from programs which do not require cost shares, such as GAP. (Cost sharing requirements for individual programs are found under §§ 35.540 through 35.718.) For funds from programs with a cost share requirement of five percent or less under the provisions of §§ 35.540 through 35.718, the PPG cost share will be the same as the cost share for the individual programs, as identified in §§ 35.540 through 35.718. For funds from programs with a required cost share greater than five percent, EPA will require Tribes to provide a cost share of five percent; however, after the first two years, the Regional Administrator will determine through an objective assessment whether the Tribe or the members of an Intertribal Consortium meet socio-economic indicators that demonstrate the ability of the Tribe or the Intertribal Consortium to provide a cost share greater than five percent. If the Regional Administrator determines that the Tribe or members of the Intertribal Consortium meet such indicators, then the Regional Administrator will increase the required cost share up to a maximum of 10 percent. If the Regional Administrator determines that the Tribe or the members of the Intertribal Consortium do not meet such indicators, then the cost share will remain at five percent.

(The required cost share for the Tribal Water Pollution Control Grant Program (Clean Water Act, section 106) is five percent; therefore, it is not one of the grant programs under which the cost share could be raised to 10 percent through the Regional Administrator assessment and determination process.)

Further, the Regional Administrator may waive the required PPG cost share at the request of the Tribe or Intertribal Consortium if the Regional Administrator determines, based on an objective assessment of socio-economic indicators, that fulfilling the cost share requirement would impose undue hardship on the Tribe or members of the Intertribal Consortium. EPA received several comments on the cost sharing provisions of the proposed rule. The comments are discussed in Section VII of this preamble.

In the preamble to the proposed rule, EPA invited suggestions for the socio-economic indicators for approval of the lower cost share and waiver of cost share, as well as suggestions for how the cost share for Intertribal Consortia should be calculated. EPA did not receive any recommendations for the socio-economic indicators.

#### **VI. Indian Environmental General Assistance Program and Performance Partnership Grants**

An important and unique environmental program available only to Tribes and Intertribal Consortia is the Indian Environmental General Assistance Program (GAP) (40 CFR 35.540 *et seq.*) This program was created to assist Indian Tribes in developing the capacity to manage their own environmental protection programs. GAP offers the opportunity for Tribes to develop integrated environmental programs, to develop capacity to manage specific programs that can be delegated by EPA, and to plan, develop, and establish a core program for environmental protection. It also provides the opportunity for Tribes to define and develop administrative and legal infrastructures, and to undertake additional activities to plan, develop, and establish environmental programs within a simplified administrative framework.

GAP funds can be used more flexibly than categorical environmental program funds. EPA recognizes the Tribes' need for flexibility in using limited resources available for protecting Tribal environments, but believes that this need for flexibility must be balanced with the Agency's goals of establishing a strong Tribal environmental presence in Indian country and of diversifying financial resources available to Tribes

for the administration of comprehensive environmental programs. GAP funds are primarily available for and critical to the development of sustainable, integrated Tribal environmental programs. The long-term goal of developing and maintaining an adequate level of funding for Tribal environmental programs will be best served not by increasing the number of activities that are funded by GAP, but rather by expanding and diversifying the use of various categorical environmental programs funds, in addition to the use of GAP funds.

When Congress authorized the PPG program, it allowed GAP funds to be included in such a grant. However, to balance competing interests in the use of GAP funds, EPA encourages Tribes and Intertribal Consortia to continue to use GAP funds, at least in the first instance, for the development of Tribal capacity to manage environmental programs and not to use these funds for media-specific environmental activities. EPA believes that the overriding value of GAP lies in its ability to assist Tribes in the development of their environmental program capacity. This original and primary purpose of GAP has not been fully realized since some Tribes have not yet developed an environmental program capacity. Including a GAP grant in a PPG should not result in a reduction of EPA media-specific environmental program assistance available to Indian Tribes and Tribal Consortia.

#### **VII. Response to Comments**

EPA received 16 letters commenting on the proposed rule. In general, the comments supported the rule as written but suggested several changes. Specifically:

1. Three commenters addressed EPA's intention to include regulations for the Hazardous Waste and Underground Storage Tank programs in the final rule. One commenter asked that the programs be added to the rule immediately while two asked that the provisions for these programs be made available for public comment first.

EPA decided to include the Hazardous Waste and Underground Storage Tank Grant Programs in the final rule to provide Tribes with an expedited opportunity to include funds from these programs in a PPG and to allow Tribes to use PPGs for activities eligible for funding under these grant programs even if they do not include funds from these programs in a PPG (consistent with the limitations at § 35.535). EPA believes that giving Tribes the option, as soon as possible, of including Hazardous Waste and

Underground Storage Tanks grants in a PPG provides Tribes with greater flexibility in building a partnership for environmental protection than not including the programs in subpart B at this time. Furthermore, as part of its regulation review process EPA provided copies of the draft final rule to many Tribal representatives including those who serve on the EPA Tribal Operations Committee (TOC), the National Tribal Environmental Council (NTEC) and the Tribal Association of Solid Waste and Emergency Response (TASWER). Finally, as noted above, comments on this rule, although final, may be submitted to the person identified above in the **FOR FURTHER INFORMATION** section above. Although EPA does not anticipate doing so, EPA could amend this rule in response to comments without having to go through a subsequent notice and comment rule making. This is because rules regarding the award and administration of grants are explicitly exempt from the notice and comment requirements of the Administrative Procedure Act APA (5 U.S.C. 553(a)(1)).

2. One commenter noted that Section VII of the Preamble included a reference to "State" work plans and it should refer to Tribal work plans.

EPA apologizes for any confusion this mistake may have caused. EPA will substitute the words Tribe, or Tribal for State in this paragraph.

3. Two commenters suggested the term "Tribal/EPA Environmental Agreement" (TEA) should not be defined in the rule because TEAs are not intended to bind Tribes to any particular substantive requirements. The commenters stated that the definition would tend to increase rather than streamline requirements.

EPA agrees that the decision whether to negotiate a TEA is discretionary. Nevertheless, EPA believes it is appropriate to include the definition since a TEA may be used as a work plan under § 35.507(c). EPA is today revising the definition of Tribal/EPA Environmental Agreement that was included in the proposed rule to be more consistent with Administrator Browner's 1994 Action Memorandum for the EPA Indian Program and the American Indian Environmental Office's template and guidance on TEAs which views these as dynamic rather than static documents. To the extent a TEA is used as the basis for a PPG work plan, the version used would be binding for the purposes of the agreement. For an explanation of EPA's work with Tribes to develop TEAs, please see Administrator Browner's July 12, 1994, Tribal Operations Action Memorandum

and American Indian Environmental Office Director's July 1995 TEA Template. Both of these documents are available at: <http://www.epa.gov/indian>, or contact Bob Smith at EPA's American Indian Environmental Office at (202) 260-8202.

Including an appropriate definition for a TEA in the regulation does not impose any requirement for a Tribe to have a TEA, or add new requirements for the content of a TEA. Further, there is no requirement that a TEA be developed. The intention of § 35.507(c) is to provide added flexibility for EPA and a Tribe to agree to use a TEA or a portion of the TEA as the work plan or part of the work plan for an environmental program grant: (1) If they choose to do so; and (2) if the portion of the TEA that is to serve as the grant work plan clearly identifies and distinguishes work plan activities from other portions of the TEA and meets the work plan requirements in § 35.507(b). EPA reasoned that, in some cases, the development of a work plan could actually be made easier if parts of it had already been formulated when the Tribe developed its TEA.

4. Three commenters expressed concern about § 35.504 which will allow Intertribal Consortia to receive grants under all of the grant programs covered by this rule. The commenters maintain that EPA should not award grants to Consortia because it might jeopardize the autonomy of Tribes, conflict with an individual Tribe's proposals, or result in the duplication of activities or performance of activities that are not supported by all members of the Intertribal Consortium.

EPA understands these concerns and has modified the final rule to ensure that such consequences do not result from the award of grants to Intertribal Consortia. Section 35.502 defines Intertribal Consortium as "a partnership between two or more Tribes that is authorized by the governing bodies of those Tribes to apply for and receive assistance under one or more of the programs listed in § 35.501," and § 35.504(a) provides that "an Intertribal Consortium is eligible to receive a grant under the authorities listed in § 35.501 only if the Consortium demonstrates that all members of the Consortium \* \* \* authorize the Consortium to apply for and receive assistance." The definition of Intertribal Consortium in the proposed rule also provided that "[a] Consortium must have adequate documentation of the existence of the partnership and the authorization to apply for and receive assistance." Thus, an Intertribal Consortium must be able to provide some documentary proof that

a Tribe has authorized it to apply for and receive a specific grant on the Tribe's behalf.

To clarify the eligibility and documentation requirements, EPA made a number of changes in the final rule. First, EPA moved the documentation requirements from the definition of Intertribal Consortium to the section on eligibility requirements. In addition, EPA clarified that the documentation must show that all members of the Consortium (or all eligible members of the Consortium in the case of a GAP grant) authorize the Consortium to apply for and receive the grant for which the Intertribal Consortium has applied. The final rule also makes it clear that Intertribal Consortia must both "have" this documentation and submit it to EPA in order to be eligible for a grant award as a Consortium. The documentation of the member Tribes' authorization of the Consortium should specify the period of time for which the authorization is effective without further action by the authorizing Tribe and whether the authorization applies to particular grants or all grants for which the Consortium may apply. Members of a Consortium may impose other requirements on their Consortium to ensure that the Consortium cannot act on their behalf without their authorization. EPA believes that these provisions, as modified in the final rule, will ensure that grants to Consortia do not jeopardize the autonomy of a Tribe, conflict with a Tribe's own proposals, or involve activities not supported by all Tribes that are members of the Consortia. In addition, EPA's review of work plans will further reduce the possibility that Tribes and Intertribal Consortia carry out duplicative activities.

5. Three comments concerned the provisions related to changes in assistance agreements after award. One stated EPA should reduce the number of small changes required, especially in the GAP program with respect to the grant budget.

EPA believes this regulation will eliminate the need for frequent budget revisions for such small changes as unanticipated fluctuations in travel, lodging, or office equipment prices. Those changes will not have to be reported or require prior approval unless the Regional Administrator determines otherwise in specific cases. Section 35.514(c) states that recipients do not need to obtain approval for changes in budgets unless the Regional Administrator determines additional approval requirements should be imposed on a specific recipient for a specified period of time. Amendments

to environmental program grant amounts and extensions of the budget period still, however, require approval from the Regional Administrator under § 35.514(b).

Two commenters suggested that EPA define "significant" as used in § 35.514(a) and explain the circumstances under which the Regional Administrator might determine that additional approval requirements should be imposed in § 35.514(c).

Section 35.514 requires recipients to obtain the Regional Administrator's prior written approval before making significant changes to the grant work plan or budget after the work plan has been negotiated. Under the Uniform Administrative Regulations for Grant and Cooperative Agreements to State and Local Governments (40 CFR part 31), Tribes and Intertribal Consortia would also be required to get EPA's prior written approval for "any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval)" (40 CFR 31.30(d)(1)). EPA believes that for the continuing environmental program grants covered by this rule, prior written approval for changes should be necessary only for significant changes, and that the grantee, with assistance from the EPA project officer, if necessary, is in the best position to distinguish significant from insignificant changes in the context of its particular work plan. Further, defining the term would reduce management discretion and flexibility which we believe are essential to the regulation. Accordingly, EPA has decided not to define "significant". If there is any question as to whether a post-award change in the work plan is significant, the grantee is encouraged to consult with the EPA project officer either during work plan negotiations or before making the change.

These commenters also asked EPA to explain the circumstances under which the Regional Administrator might determine that additional approval requirements should be imposed in § 35.514(c).

Section 35.514(c) provides that no approval is required for changes other than those changes described in § 35.514(a) and (b), unless the Regional Administrator determines that approval requirements should be imposed on a specific recipient for a specific period of time. Thus, § 35.514(c) eliminates requirements for that category of changes, but gives the Regional Administrator the authority to impose them on a case-by-case basis. There are a variety of circumstances which could lead EPA to impose such requirements.

For example, the Regional Administrator might determine that additional approval requirements should be imposed when it is determined the additional requirements are necessary to ensure proper management of EPA grants because the recipient has had a history of poor performance and corrective actions directed by audits.

6. Two comments asked that EPA define "cumulative effectiveness" and "sufficient progress" as used in § 35.515.

Section 35.515 describes the process developed by the Regional Administrator and the Tribe or Intertribal Consortium for jointly evaluating a recipient's performance under the grant in accordance with § 35.515(a). Paragraph (b) of § 35.515 provides, in pertinent part, that "the evaluation process must provide for \* \* \* a discussion of the cumulative effectiveness of the work performed under all work plan components". Paragraph (c) states that "if the joint evaluation reveals that the recipient has not made sufficient progress under the work plan, the Regional Administrator and the recipient will negotiate a resolution that addresses the issues". The phrase "cumulative effectiveness" in the context of § 35.515(b) refers to how effectively the recipient carried out the work under all of the work plan components, taken together. The phrase "sufficient progress" in the context of § 35.515(c) is a jointly agreed upon assessment of accomplishments as measured against the work plan commitments.

EPA believes that a regulatory definition of these terms would significantly restrict the flexibility afforded both Regional Administrators and applicants under § 35.515, particularly since the regulation contemplates a jointly developed process for jointly evaluating and reporting progress and accomplishments under the work plan.

7. Two commenters state the Administrator should not be able to use a guidance document to delete a program from coverage under a PPG.

Section 35.533 provides that the Administrator may in guidance or in regulation describe subsequent additions, deletions, or changes to the list of environmental programs eligible for inclusion in PPGs. EPA grant guidance may include rules (as "rule" is defined by the Administrative Procedure Act, which explicitly exempts grant related rules from notice and comment rule making requirements). There may be changes in the list of environmental programs

eligible for inclusion in a PPG as a result of EPA's annual appropriation act and Tribes will need to know about those changes as soon as possible since they will take effect at the start of the fiscal year. Thus, EPA believes it is important to be able to inform grantees of such changes quickly in a guidance document rather than in a rule. Any changes in the list of environmental programs will be published in the **Federal Register**.

8. One commenter supported the cost sharing requirements included in the proposed regulation while several stated that EPA should reduce the cost share required under PPGs to zero (see § 35.536).

The formula will reduce the cost share from current levels for Tribes that move grants with matches greater than five percent into a PPG. EPA carefully considered the question of further reductions in the cost share for Tribal recipients and concluded that some investment by recipients is generally appropriate to expand the ability of EPA and its partners to protect public health and the environment from pollution. Section 35.536(d) also authorizes the Regional Administrator to waive the cost share requirement at any time upon request by the Tribe or Intertribal Consortium, if the Regional Administrator determines the cost share would impose undue hardship. EPA notes that PPGs and many of the Agency's grant programs allow for recipients to meet the cost share requirements with in-kind services (see 40 CFR 31.24).

9. One commenter expressed concern that PPGs do not work well for Tribes because Tribal grants are not awarded at the same time in a fiscal year, causing the Tribes and EPA to continually update the PPG. The commenter also expressed concern that certain grants are not eligible for the PPG, including solid waste and emergency response grants.

Finally, the commenter stated that: "It seems as though there is a[n] undercurrent of mistrust by Regional program offices, because of the newness of PPG's to Tribes, that fuels the conception that Tribes are not capable of this type of grant management." The commenter expressed concern that EPA is scrutinizing the grants management practices of Tribes more than those of States.

The concern raised by the commenter about the timing of grant awards is valid. EPA hopes that the opportunity to streamline administrative procedures in a PPG will provide an incentive for closer alignment of funding cycles in the Agency's grant programs.

Under the legislation authorizing the PPG program (Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Pub. L. 105-65, 111 Stat. 1344, 1373 (1997)), EPA has made as many environmental program grants as possible eligible for inclusion in a PPG. With this final rule, funds from all 17 environmental program grants available to Tribes in the Agency's earmark for multi-media or single media pollution prevention, control and abatement and related activities, which are in the "State and Tribal Assistance Grant" (STAG) appropriation account, may be included in PPGs. Only funds included in that particular earmark within the STAG account are available for inclusion in PPGs because the statutory authority to award a PPG is limited to those funds. Funds from other EPA appropriations, such as those for Superfund emergency response grants are not included in the earmark. The programs that are funded under this regulation are those listed in § 35.501. EPA does not currently have a grant program for continuing solid waste programs. Under this rule, however, Tribes may use GAP funds to develop and implement solid waste programs (see § 35.545).

EPA has traditionally received funding for its grant programs on a media-specific basis and reported to Congress on program accomplishments similarly. The concerns raised by the commenter regarding "additional scrutiny" and "an undercurrent of mistrust" may reflect the challenge (and growing pains) associated with adopting a new approach that allows funds appropriated by Congress on a media-specific basis to be merged into a PPG. The fact that, due to funding limitations, many EPA programs award grants to Tribes on a competitive basis, rather than through an allotment process, may compound the difficulty of moving from individual Tribal grants to PPGs.

EPA believes its requirements for State and Tribal grants administration are similar under subparts A and B. However, EPA has recognized that there are unique features to Tribal grant programs which make implementation of a PPG more challenging. For example, in addition to the competition for funds described above, an individual Tribe will generally have access to fewer EPA grants on an annual basis than EPA's State partners. Therefore, EPA has provided the opportunity for more flexibility in the use of Tribal grants



funds. In particular, EPA is allowing Tribes and the Regional Administrator to develop a PPG work plan that may include activities that are eligible for funding under any of the PPG-eligible grant programs (within certain limitations), even if funds from certain grant programs were not included in the PPG. In contrast, EPA is requiring States to receive funding from a grant program in order to use PPG funds for activities under that program.

10. One commenter opposed award of GAP grants to Intertribal Consortia because GAP grants are "awarded to build capacity to administer environmental programs on Indian lands by providing general assistance to plan, develop and establish the capability to implement environmental programs in Indian Country." The commenter stated that such capacity building should be undertaken by individual Tribes, not by Consortia.

EPA disagrees. Because we have defined an Intertribal Consortium as a partnership between two or more Tribes (defined in this rule generally as Indian Tribal governments), GAP grants to Intertribal Consortia will assist those Tribes that are members of the Consortium to build capacity to administer environmental programs. Furthermore, the Indian Environmental General Assistance Program Act (42 U.S.C. 4368b) explicitly authorizes EPA to award grants to Intertribal Consortia. EPA prefers not to restrict the eligible recipients of GAP grants further than the statutory authority for GAP grants. Therefore, EPA has not changed the final rule in response to this comment.

11. Two commenters asked for clarification of what constituted "otherwise available funds" which would prevent funding under the Clean Air Act section 105 referenced in § 35.576(d). Section 35.576(d) provides that "[t]he Regional Administrator will not award section 105 funds unless the applicant provides assurance that the grant will not supplant non-federal funds that would otherwise be available for maintaining the section 105 program."

EPA intended § 35.576(d) to refer only to Tribes and Intertribal Consortia that are eligible for financial assistance under § 35.573(b) (for Tribes that have not established eligibility for treatment in a manner similar to a State) and it is a corollary to the maintenance of effort requirement applicable to such Tribes. It does not apply to Tribes that are eligible for a section 105 grant under § 35.573(a) (for Tribes that have established treatment as a State). Non-federal funds that would otherwise be available "for maintaining the section 105 program"

would include Tribal funds in an amount equal to that which the Tribe expended on the Air 105 program in the previous year. To clarify that this section applies only to Tribes that establish eligibility under § 35.573(b), EPA added the phrase "For Tribes and Intertribal Consortia that are eligible for financial assistance under § 35.573(b) of this subpart" to the beginning of this paragraph. We also changed the numbering of the section as follows: Section 35.576(b) became § 35.576(a)(1); § 35.576(c) became § 35.576(a)(2) and § 35.576(d) became § 35.576(b).

12. Two commenters requested that the limit on administrative costs in the Nonpoint Source Program (§ 35.638(c)) be clarified. They asked, does the 10 percent limit apply to Tribal general administrative costs or to general and administrative costs associated with the program? If the former, they ask that a phrase, "unless the applicant has an indirect cost rate agreement," be added at the end of the sentence containing the limitation. If the latter, they express concern that this limitation is so severe as to result in an inability of the Tribes to administer the program at all.

EPA does not have the discretion to remove the limitation at § 35.638(c) from the award of grants under section 319 of the Clean Water Act because it is required by law. This limitation is a restatement of the statutory limitation established by section 319(h)(12) which provides that "administrative costs \* \* \* charged against activities and programs carried out with a grant under this subsection shall not exceed 10 percent of the amount of the grant in such year, except that the costs of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs shall not be subject to this limitation." It applies to grants awarded under section 319 to both States and Tribes. The limitation does not apply to Tribal general administrative costs because general administrative costs that are not associated with a grant program cannot be charged to a grant. Only administrative costs, including allowable indirect costs, that are reasonable and necessary to carry out a grant program or project can be charged to that particular grant. However, it should be noted that section 319(h)(12) specifically exempts the costs of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs. The experience of States, Territories, and Tribes that have received section 319 grants is that this

limitation, defined as it is in the statute, has not posed any significant obstacle to the use of section 319 funds.

13. Two comments strongly supported the increase in funding to be available to Tribes and Intertribal Consortia for drinking water programs (§ 35.673). The commenters agreed with the recent focus on achieving safe and clean drinking water throughout Indian Country and appreciate the recognition of capacity-building needs in respect to Tribal water systems. One commenter asked that the increase of up to seven percent in the Public Water System Supervision (PWSS) program Tribal reserve under § 35.673 be restated to provide for a fixed amount of seven percent. Two other comments strongly opposed the increase. They fear that increasing the Tribal reserve will cause a decrease in PWSS grants available to primacy States. In addition, they argue there should not be an increase in the Tribal reserve since State programs are currently underfunded.

EPA understands the concerns about the increase in the PWSS Tribal Reserve. However, we specifically asked Congress for additional PWSS funds to help Tribes build their capabilities in the PWSS program and to help Tribes meet new requirements that are needed to obtain Drinking Water Infrastructure Tribal Set-Aside grants. These new requirements, such as operator certification and capacity development, are necessary to successfully run a PWSS program as well as to obtain grants. Since Fiscal Year 1998 EPA has received an additional \$3,780,500 in the PWSS Program for these purposes. For the past two years, EPA has deviated from the three percent regulatory limit on the amount of PWSS funds reserved for Tribes. We are increasing the regulatory limit on PWSS funds reserved for Tribes because Tribes need these funds to comply with new requirements imposed by the Safe Drinking Water Act Amendments of 1996.

Tribes do not have the same opportunity as States have to use a portion of their infrastructure funding to meet these new requirements. Thus far, States have set-aside more than \$91 million from their Drinking Water State Revolving Fund capitalization grants for activities supporting drinking water programs (including PWSS, capacity development and operator certification programs) and are expected to set-aside more funds for these purposes in the future. The only additional funds that have been made available for Tribes is the \$3,780,500 million that has been added to the PWSS grants.



The increase in the funds reserved for Tribes is not intended to take funds away from States, but rather to continue to fund the Indian programs at the current level without the need to deviate from the regulations. EPA may not necessarily reserve seven percent of the annual appropriation for PWSS grants; the regulation only provides that "up to" seven percent of the PWSS funds shall be reserved for Tribes. This provides EPA flexibility to adjust the amount of the Tribal reserve upward or downward. Thus, for example, if Congress reduces the appropriation for PWSS grants in the future, then EPA may decide to reduce the Tribal reserve to balance it with the need for funding for the States. EPA will work with stakeholders, including States and Tribes, in establishing an equitable allocation.

14. Two commenters asked that the Agency make the regulation effective for Fiscal Years 2000 and 2001 and not retroactively.

EPA agrees. The regulation will apply to new grants awarded 30 days after the regulation is published. EPA will not apply this rule to grants that have already been awarded. A Tribe may, however, close out an existing grant and carry over funding to a new grant awarded under this subpart after the regulation is published.

15. One commenter expressed concern that the definition of "Indian country" in subpart B may limit the use of certain grant funds that could otherwise be available to address pollution threats to Usual and Accustomed Areas (areas where certain treaty-reserved fishing rights are exercised) and in ceded lands.

To avoid the appearance of unnecessarily limiting its grant authorities, EPA has reviewed the regulations and removed use of the term "Indian country" in four provisions: § 35.516 (Direct Implementation); § 35.540 (Purpose of the Indian Environmental General Assistance Program); § 35.545(b) (Eligible Activities); and § 35.570 (Air Pollution Control Grants). The change to § 35.516 makes this provision consistent with parallel language in the State rule. The changes to §§ 35.540 and 35.545(b) are consistent with the Indian Environmental General Assistance Program Act 42 U.S.C. 4368b. The change to § 35.570 is consistent with Clean Air Act provisions governing use of these grant funds.

16. One commenter stated that the boundaries of many Tribes are constantly being defined and redefined, and wanted to know whether the PPG

is sufficiently flexible to accommodate these changes.

To the extent a Tribe or Intertribal Consortium must identify particular land areas in order to be eligible for a grant (either a single media grant or a PPG), and it wants to perform work in an area not identified in the original application, the Tribe or Intertribal Consortium will need to demonstrate that it continues to meet the requirements for receiving grant.

#### VIII. Other Changes in the Proposed Rule

EPA made a several changes to the proposed rule to clarify certain provisions even though the provisions were not the subject of comments.

1. There is no substantive difference between the definition of Tribe in the GAP provisions of the proposed rule (§ 35.542) and the definition of Tribe at 35.502 which applies to subpart B generally ("Definition of terms"). Section 35.542 of the proposed rule defined "Tribe" as "[a]ny Indian Tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*)), which is recognized as eligible for the special services provided by the United States to Indians because of their status as Indians." 64 FR 40084, 40097 (1999). This definition was in turn based on the definition of "Indian Tribal government" in the Indian Environmental General Assistance Program Act (IEGAPA), which authorizes GAP grants. 42 U.S.C. § 4368b(c)(1).

The definition of Tribe in § 35.502 of the proposed and final rules provided that "Except as otherwise defined in statute or this subpart, Indian Tribal Government (Tribe) means: any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, which is recognized as eligible by the United States Department of the Interior for the special services provided by the United States to Indians because of their status as Indians."

The inclusion of Alaska Native regional or village corporations in the definition of Indian Tribal government in IEGAPA and the proposed rule has created some confusion because regional and village corporations are not governments, and they are not recognized as eligible for the special services provided by the United States to Indians because of their status as Indians. Since Alaska Native regional and village corporations are not

federally recognized governments, they are not eligible for GAP grants.

In the proposed rule, the only difference between the definitions of Tribe in §§ 35.542 and 35.502 was the inclusion of Alaska native regional and village corporations in § 35.542. However, as discussed above, there is no substantive difference between the definitions because no Alaska native regional and village corporation is in fact eligible for a GAP grant as a "Tribe". As there is no need for a GAP-specific definition of Tribe, we have omitted the definition of Tribe for GAP grants at § 35.542, and the general definition at § 35.502 will apply instead.

Although Alaska Native regional and village corporations are not eligible for GAP grants, an Alaska Tribe receiving a GAP grant may award a subcontract or subgrant to a village or regional corporation (just as they could to any other organization), in accordance with EPA's regulations governing subcontracts and subgrants.

2. The regulation uses the term "Regional Administrator" throughout. However, grants subject to these provisions may also be approved and awarded by officials in EPA Headquarters from time to time. Accordingly, the final rule has been modified by adding § 35.501(c) to clarify that this subpart applies and the phrase "Regional Administrator" means "Assistant Administrator in the case of grants awarded from EPA headquarters."

3. We revised § 35.576 to make it clear that while applications for Section 105 Air Pollution Grants must indicate recipients will meet the Maintenance of Effort (MOE) provision of the program (§§ 35.576(a)), recipients' actual expenditures must actually meet the MOE level. We have added section § 35.576(a)(2) to make clear the Regional Administrator must take action to recover the grant funds, if expenditures do not meet the required level.

4. We revised § 35.708(h) to make clear that Indoor Radon program grant funds under section 306 of TSCA may be used to cover the costs of Tribal and Intertribal Consortium proficiency rating programs, but not a federal one.

5. After publishing the proposed rule, EPA reevaluated the eligibility requirements for Intertribal Consortia seeking GAP grants (section 35.504). That provision is intended to allow a GAP grant to a Consortium that includes a majority of recognized and a minority of non-recognized Tribes (it was not intended to allow a GAP grant to a Consortium that includes non-Tribal organizations and businesses). While EPA reaffirms its determination to award GAP grants to Intertribal

Consortia made up of a majority of federally recognized Tribes and a minority of non-federally recognized Tribes, EPA has modified the eligibility requirements for Intertribal Consortia seeking GAP grants in order to further ensure that only those members of an Intertribal Consortium that are federally recognized Tribes directly benefit from the grant.

6. The Clean Air Act prohibits the use of revenue collected under a Title V operating permit program to meet the cost share requirements of an air pollution program under section 105 of the Clean Air Act. We added a new paragraph (c) to § 35.575 to make this clear.

### IX. Implementing GPRA

EPA has developed an integrated approach to implement GPRA, the Chief Financial Officers Act (CFOA), and the Federal Financial Management Improvement Act of 1996 (FFMIA). These laws provide EPA with a framework to demonstrate to Congress and the taxpayers the costs to the federal government of EPA's program accomplishments or outcomes. Tribes and Intertribal Consortia, by virtue of authorized or delegated program authorities and as recipients of EPA grant funds, play an integral part in achieving those goals and objectives. Thus EPA's reports of Agency resources associated with results-based outcomes will incorporate—at the GPRA goal, objective, and subobjective level—expenditures incurred in the form of payments to the Tribes under grants and cooperative agreements. In order to comply with the Paperwork Reduction Act and the federal government's general grant regulations, EPA also has a responsibility to minimize additional administrative reporting requirements and costs borne by the Tribes. In addition, under current regulations EPA generally may not impose accounting requirements on Tribes beyond those currently required by 40 CFR part 31.

EPA, therefore, will use the budget information that Tribes and Intertribal Consortia provide in grant applications as a basis for linking the Agency's actual expenditures with EPA's results-based accomplishments or outcomes. EPA will be able to rely on Tribal budget information sufficiently to determine the costs of EPA's results-based outcomes according to the requirements of this rule:

(1) Tribes and Intertribal Consortia provide the program budget information required as part of the application (see § 35.507(b)(2)(ii));

(2) EPA and the recipients explicitly define work plan goals, objectives,

outcomes, and outputs, as well as the program flexibility contained in the work plan (see § 35.507(b)(2)(i)); and

(3) Recipients report back on work plan accomplishments (see § 35.515).

The rule will ensure these three requirements are met. Additionally, in accordance with § 35.514(a), recipients may make significant changes to the work plan commitments only after obtaining the Regional Administrator's prior written approval. The regional office, in consultation with the recipient, will document these revisions including budgeted amounts associated with the revisions. If necessary, the EPA funding office will make adjustments to original budget linking work plan components to EPA's goal and objective architecture. Once these requirements are met, they provide a reasonable basis for associating the costs of its grants with the Agency's results-based outcomes.

EPA in consultation with recipients, is responsible for cross-walking the Tribal budget information (grant application and work plan data) into the GPRA goal, objective, and subobjective architecture. If a grant is subsequently amended to reflect significant adjustments to work plan commitments, the region will consult with the Tribal government to develop an estimate of the budget associated with the revision so that it can be reflected in regional office GPRA reporting. Cross-walk information is developed by EPA during the work plan/PPA negotiations process with the Tribe or Intertribal Consortium.

### X. Program Specific Provisions

Requirements applicable to each environmental grant program, such as the requirements regarding eligibility and cost share, are located in 40 CFR 35.540 through 35.718.

*Programs not specifically available to Tribes.* Sections 28 and 306 of the Toxic Substances Control Act (TSCA) and section 6605 of the Pollution Prevention Act (PPA) provide explicit authority for grants to States, but are silent regarding grants to Tribes. This rule reflects EPA's determination that those statutes may be interpreted to also authorize grants to Tribes for radon abatement (TSCA section 306) and toxic substances compliance monitoring programs (TSCA sections 28), and reaffirms EPA's determination that Tribes are eligible for Pollution Prevention Grants under section 6605 of the PPA (see, e.g., 56 FR 11553 (1991)).

Previously, EPA determined that it has the authority to approve Tribal lead-based paint abatement certification and training programs and make grants to Tribes under section 404(g) of TSCA for

the development and implementation of such programs even though TSCA makes no mention of Tribes. 61 FR 45778, 45805–808 (1996). The Agency reasoned that its interpretation of TSCA is governed by the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and that because Congress has not explicitly stated its intent in adopting the statutory provision, the Agency could adopt an interpretation which in its expert judgment is reasonable in light of the goals and purposes of the statute. EPA opined further that since TSCA did not define a role for Tribes, there was an ambiguity in Congressional intent and therefore, the Agency's interpretation of TSCA to allow Tribes to apply for program authorization was permissible under *Chevron*. EPA reasoned further that this interpretation is consistent with Supreme Court precedent holding that limitations on Tribal sovereignty must be "unmistakably clear," *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985), and that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 268 (1992). Finally, EPA noted that allowing Tribes to apply for program authorization is consistent with the general principles of federal Indian law "encouraging Tribal independence," *Ramah Navaho Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1985), and the Agency's Indian policy which states that environmental programs in Indian country will be implemented to the maximum extent possible by Tribal governments. In light of these principles, EPA reasoned that Tribes are also eligible for grants to develop and implement lead-based paint certification and training programs under section 404(g) of TSCA.

Consistent with the reasoning that warranted EPA's determination with respect to Tribal lead program approval and grant authority, EPA interprets sections 28 and 306 of TSCA and section 6605 of PPA to authorize grants to Tribes as well as States, even though there is no program approval or authorization associated with the grant programs for radon abatement, toxics substance compliance monitoring, or pollution prevention incentives. While Congress did not expressly provide a role for Tribes in either TSCA or PPA, both statutes were clearly intended to have comprehensive, nationwide coverage—including the provisions regarding financial assistance for these programs. EPA does not believe that

Congress intended the Agency to provide grants exclusively to States and thereby leave Tribal lands without the benefit of grant assistance for these programs, since the problems and goals they address—toxic substances, radon abatement and pollution prevention—are relevant throughout the nation in both State and Tribal areas. Therefore, EPA has determined that it is appropriate to provide grants to Tribes for Radon Abatement programs under section 306 of TSCA, Toxic Substances Compliance Monitoring programs under section 28 of TSCA, and Pollution Prevention Grant programs under section 6605 of PPA.

In order to be eligible for a grant under TSCA section 28, TSCA section 306, or PPA section 6605, a Tribe or each member of an Intertribal Consortium must establish eligibility for treatment in a manner similar to a State by demonstrating that it:

- (1) Is recognized by the Secretary of the Interior;
- (2) Has an existing government exercising substantial governmental duties and powers;
- (3) Has adequate authority to carry out the grant activities; and,
- (4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

If the Administrator has previously determined that a Tribe has met the prerequisites in paragraphs (1) and (2) for another EPA program, the Tribe need provide only that information unique to the particular program required by paragraphs (3) and (4).

*Public water system supervision Tribal reserve.* Until now, EPA's regulation (40 CFR 35.115(g)) has provided that EPA annually reserve up to three percent of each year's Public Water System Supervision (PWSS) funds for use on Indian lands. The Agency is increasing the limit to allow a reserve of up to seven percent. This increase will provide needed funds for the Tribal PWSS program without affecting States' current funding. (See also the response to comments on this issue.)

The Tribal reserve is used for two purposes: to allow EPA to directly implement the PWSS program on Tribal lands; and to assist Tribes with developing PWSS primacy programs. The three percent ceiling, established in 1988, was EPA's estimate of the amount that would be needed to achieve both of these purposes. Over the past 10 years, we have realized that three percent is not adequate to achieve both purposes. To date, only a small number of Tribes have taken steps toward PWSS primacy.

We believe that there are more Tribes which may be interested in the program but have not yet voiced that interest because they do not have the capacity to develop an adequate program. We also believe more Tribes would take interest in the program if sufficient funds were available.

In addition, the current Tribal reserve is insufficient to cover basic direct implementation needs. Tribal systems have a high number of monitoring/reporting and maximum contaminant level violations. These same systems will need to abide by upcoming drinking water regulations and will be asked to partake in several new initiatives outlined in the revised SDWA, including source water protection, capacity development, and operator certification. Although Tribes are not required to apply for PWSS primacy, we believe that EPA, as the primary enforcement authority of non-primacy Tribal systems, should address these initiatives on Tribal lands. Additional Tribal funding can help EPA and Tribes respond to Tribal safe drinking water needs.

EPA requested Congress to provide for funding in excess of the amount necessary for the traditional three percent reserve in Fiscal Year 1998 and succeeding years to assist Tribes in developing capacity and maintaining their own PWSS programs, and to provide additional support to the Tribal PWSS Direct Implementation program. In Fiscal Years 1998, 1999, and 2000, EPA received an additional \$3,780,500 for these purposes. In order to use those funds for Tribes, EPA needed to deviate from the regulation at 40 CFR 35.115(g), which limits EPA's Tribal PWSS reserve to three percent. Instead of continuing to deviate from the regulations, EPA is raising the ceiling of the annual Tribal reserve to up to seven percent. With the additional \$3.78 million PWSS program appropriation, EPA was able to raise the funding ceiling for Tribes to 6.91 percent, the amount available to Tribes in Fiscal Year 2000, without reducing current State funding levels.

*Safe Drinking Water Act and Alaska Native Villages.* EPA is including a new interpretation of the definition of "Indian Tribe" in 42 U.S.C. 300f(14) that would include eligible Alaska Native Villages (ANVs) for purposes of PWSS and Underground Water Source Protection (also known as underground injection control (UIC)) grants under 42 U.S.C. 300j-2(a) and (b). It will also allow ANVs to be considered for primacy for the PWSS and UIC programs under 42 U.S.C. 300g-2, 300h-1 and 300h-4. Under this approach, a federally recognized Tribe

in Alaska could seek to demonstrate that it is eligible for treatment in the same manner as a State according to the criteria established by Congress in 42 U.S.C. 300j-11 and in EPA's regulations at 40 CFR 142.72 and 145.52.

In 1988, EPA announced its interpretation that the term "Indian Tribe" in 42 U.S.C. 300f(14) does not include ANVs. 53 FR 37396, 37407. This interpretation was based on the Agency's interpretation of the legislative history of the Act. At the time, EPA reasoned that Congress would have explicitly mentioned ANVs if it intended to include ANVs in the definition of Indian Tribes. Since then, EPA has reconsidered that interpretation and now believes it is more consistent with Congressional intent and federal Indian law and policy to interpret the term "Indian Tribe" in 42 U.S.C. 300f(14) to include Indian Tribes located in Alaska (*i.e.*, ANVs) that otherwise meet the SDWA's definition of Indian Tribe.

Under the SDWA, the term "Indian Tribe" means "any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area." 42 U.S.C. 300f(14). In 1993, the Department of the Interior (DOI) clarified that the Alaska Native entities listed on DOI's list of federally recognized Tribes have the same governmental status as other federally acknowledged Indian Tribes by virtue of their status as Indian Tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged Tribes; have the right, subject to general principles of federal Indian law, to exercise the same inherent and delegated authorities available to other Tribes; and are subject to the same limitations imposed by law on other Tribes. 58 FR 54364, 54366 (1993).

Thus, because DOI has clarified that federally-recognized Tribes in Alaska have the same status as other federally-recognized Tribes, EPA believes that ANVs that otherwise meet the SDWA's definition of Indian Tribe should not be excluded from seeking PWSS and UIC program primacy or related program grants. This interpretation is consistent with the plain language of the SDWA's definition of "Indian Tribe" and EPA's policy that Indian Tribes are the appropriate entities to set environmental standards and manage their environments where they have the authority and capability to do so. See EPA's 1984 Indian Policy. It is also consistent with Supreme Court precedent holding that any statutory

limitations on Tribal sovereignty must be stated explicitly, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985), and that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 268 (1992).

While this change in interpretation would include ANVs that otherwise meet the SDWA's definition of Indian Tribe within the context of the PWSS and UIC programs, any ANV wishing to seek primacy, or a primacy development grant, for either the PWSS or UIC programs would still need to demonstrate that it meets the relevant statutory and regulatory eligibility criteria, including the jurisdictional requirements contained in 42 U.S.C. 300j-11, 40 CFR 142.72 and 145.52, 40 CFR 35.676 and 35.686 of this subpart. Furthermore, upon the request of an Alaska Tribe in an application for grant or primacy eligibility, EPA will evaluate whether the Alaska Tribe meets the criteria for program primacy or a related program grant. The State of Alaska currently has primacy for PWSS and UIC (Class II wells) for all areas in Alaska except Indian country. EPA is not amending the extent of the State's primacy through this notice.

In the 1996 amendments to the Safe Drinking Water Act, Congress added a sentence to the definition of Indian Tribe explicitly noting that the term "Indian Tribe" for purposes of the State Revolving Fund (SRF) program includes "any Native village." 42 U.S.C. 300f(14). EPA believes that, through this change, Congress only intended to ensure that all Native villages may receive SRF grants. EPA believes that this provision was not intended to mean that federally-recognized Tribes carrying out substantial governmental duties and powers in Alaska are excluded from the definition of Indian Tribe for purposes other than SRF.

*Regulations for programs to manage hazardous waste and underground storage tanks.* After the EPA workgroup reached closure on the proposed rule, Congress authorized the Agency to award grants to Tribes "for the development and implementation of programs to manage hazardous waste, and underground storage tanks." Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. 105-276, 112 Stat. 2461, 2499 (1998). EPA has included regulations for these programs in the final rule.

## XI. Conclusion

This Tribal-specific subpart reflects EPA's regulatory and budgetary efforts to improve the continuity and stability of financial assistance for Tribal environmental programs. Recipients will benefit from the streamlined and simplified requirements of the regulation. In addition, it will provide Tribes and Intertribal Consortia choosing to participate in the PPG program with the flexibility to better use funds to address their environmental priorities.

### Regulatory Flexibility Act

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which notice and comment rule making is required under the Administrative Procedure Act (APA) or any other statute. Grant award and administration matters, such as this rule, are explicitly exempt from the notice and comment requirements of the APA (5 U.S.C. 553(a)(1)) and are not required to undergo notice and comment rule making under any other statute.

### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, 2 U.S.C. 1501 *et seq.*, 109 Stat. 48 (1995), establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. This regulation contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The UMRA excludes from the definitions of "federal intergovernmental mandate" and "federal private sector mandates" duties that arise from conditions of federal assistance.

### National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), requires EPA to use voluntary consensus standards in its

regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. Where available and potentially applicable voluntary consensus standards are not used, the Act requires EPA to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

This rule does not involve any technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

### Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045 applies to any rule that is determined to be: (1) "Economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children; and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

### Executive Order 12866

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) a significant regulatory action is subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have 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;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is a "significant regulatory action" under the terms of Executive Order 12866 because the Performance Partnership Grant authority is a new type of grant authority and therefore raises novel policy issues. As such, this action was submitted to the Office of Management and Budget (OMB) for review. Changes made in response to OMB suggestions and recommendations will be documented in the public record.

#### **Paperwork Reduction Act**

In keeping with the requirements of the Paperwork Reduction Act (PRA), as amended, 44 U.S.C. 3501 *et seq.*, the information collection requirements contained in this rule have been approved by OMB under information collection request number 0938.06 (OMB Control Number 2030-0020) and Quality Assurance Specifications and Requirements information request number 0866.05 (OMB Control Number 2080-0033). This rule does not contain any collection of information requirements beyond those already approved. Since this action imposes no new or additional information collection, reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, no information request has been or will be submitted to the Office of Management and Budget for review.

#### **Executive Order 13132—Federalism**

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that

imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule does not apply to States or local governments; it applies only to Tribes and Intertribal Consortia. Executive Order 13132 does not apply to Tribes and Intertribal Consortia. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

#### **Executive Order 13084**

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule may significantly or uniquely affect the communities of Indian Tribal governments, but it will

not impose substantial direct compliance costs on such communities. This rule governs financial assistance to Tribes. Any costs associated with this regulation will be incurred by a Tribe as a result of its discretionary decision to seek financial assistance. Accordingly, the requirements of Executive order 13084 do not apply.

#### **Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective thirty days after publication in the **Federal Register**.

#### **List of Subjects**

##### *40 CFR Part 31*

Environmental protection, Administrative practice and procedure, Grant programs, Indians, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements.

##### *40 CFR Part 35*

Environmental protection, Air pollution control, Coastal zone, Grant programs-environmental protection, Grant programs-Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: December 28, 2000.

**Carol M. Browner,**  
*Administrator.*

For the reasons set forth in this preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

#### **PART 31—[AMENDED]**

1. EPA is amending 40 CFR part 31 by revising 40 CFR 31.36(b)(1) and adding a new 40 CFR 31.38 to read as follows:

**§ 31.36 Procurement.**

\* \* \* \* \*

(b) *Procurement Standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable federal law, the standards identified in this section, and if applicable, § 31.38.

\* \* \* \* \*

**§ 31.38 Indian Self Determination Act.**

Any contract, subcontract, or subgrant awarded under an EPA grant by an Indian Tribe or Indian Intertribal Consortium shall require to the extent feasible:

(a) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians as defined in the Indian Self Determination Act (25 U.S.C. 450b); and

(b) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 U.S.C. 1452].

**PART 35—[AMENDED]**

2. EPA is removing 40 CFR part 35, subpart Q.

3. EPA is adding a new 40 CFR part 35, subpart B to read as follows.

**Subpart B—Environmental Program Grants for Tribes****General—All Grants**

Sec.

- 35.500 Purpose of the subpart.
- 35.501 Environmental programs covered by the subpart.
- 35.502 Definitions of terms.
- 35.503 Deviation from this subpart.
- 35.504 Eligibility of an Intertribal Consortium.
- Preparing an Application
- 35.505 Components of a complete application.
- 35.506 Time frame for submitting an application.
- 35.507 Work plans.
- 35.508 Funding period.
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- EPA Action on Application
- 35.510 Time frame for EPA action.
- 35.511 Criteria for approving an application.
- 35.512 Factors considered in determining award amount.
- 35.513 Reimbursement for pre-award costs.
- Post-award Requirements
- 35.514 Amendments and other changes.
- 35.515 Evaluation of performance.

- 35.516 Direct implementation.
- 35.517 Unused funds.
- 35.518 Unexpended balances.
- Performance Partnership Grants
- 35.530 Purpose of Performance Partnership Grants.
- 35.532 Requirements summary.
- 35.533 Programs eligible for inclusion.
- 35.534 Eligible recipients.
- 35.535 Activities eligible for funding.
- 35.536 Cost share requirements.
- 35.537 Application requirements.
- 35.538 Project period.
- Indian Environmental General Assistance Program (GAP)
- 35.540 Purpose.
- 35.542 Definitions.
- 35.543 Eligible recipients.
- 35.545 Eligible activities.
- 35.548 Award limitation.
- Air Pollution Control (Section 105)
- 35.570 Purpose.
- 35.572 Definitions.
- 35.573 Eligible Tribe.
- 35.575 Maximum federal share.
- 35.576 Maintenance of effort.
- 35.578 Award limitation.
- Water Pollution Control (Sections 106 and 518)
- 35.580 Purpose.
- 35.582 Definitions.
- 35.583 Eligible recipients.
- 35.585 Maximum federal share.
- 35.588 Award limitations.
- Water Quality Cooperative Agreements (Section 104(b)(3))
- 35.600 Purpose.
- 35.603 Competitive process.
- 35.604 Maximum federal share.
- Wetlands Development Grant Program (Section 104(b)(3))
- 35.610 Purpose.
- 35.613 Competitive process.
- 35.615 Maximum federal share.
- Nonpoint Source Management Grants (Sections 319(h) and 518(f))
- 35.630 Purpose.
- 35.632 Definition.
- 35.633 Eligibility requirements.
- 35.635 Maximum federal share.
- 35.636 Maintenance of effort.
- 35.638 Award limitations.
- Pesticide Cooperative Enforcement (Section 23 (a)(1))
- 35.640 Purpose.
- 35.641 Eligible recipients.
- 35.642 Maximum federal share.
- 35.645 Basis for allotment.
- Pesticide Applicator Certification and Training (Section 23(a)(2))
- 35.646 Purpose.
- 35.649 Maximum federal share.
- Pesticide Program Implementation (Section 23(a)(1))
- 35.650 Purpose.
- 35.653 Eligible recipients.
- 35.655 Basis for allotment.
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- Pollution Prevention Grants (Section 6605)
- 35.660 Purpose.
- 35.661 Competitive process.
- 35.662 Definitions.

- 35.663 Eligible recipients.
- 35.668 Award limitations.
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- Public Water System Supervision (Sections 1443(a) and 1451)
- 35.670 Purpose.
- 35.672 Definition.
- 35.673 Annual amount reserved by EPA.
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- 35.676 Eligible recipients.
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- Underground Water Source Protection (Section 1443(b))
- 35.680 Purpose.
- 35.682 Definition.
- 35.683 Annual amount reserved by EPA.
- 35.685 Maximum federal share.
- 35.686 Eligible recipients.
- 35.688 Award limitations.
- Lead-Based Paint Program (Section 404(g))
- 35.690 Purpose.
- 35.691 Funding coordination.
- 35.693 Eligible recipients.
- Indoor Radon Grants (Section 306)
- 35.700 Purpose.
- 35.702 Basis for allotment.
- 35.703 Eligible recipients.
- 35.705 Maximum federal share.
- 35.708 Award limitations.
- Toxic Substances Compliance Monitoring (Section 28)
- 35.710 Purpose.
- 35.712 Competitive process.
- 35.713 Eligible recipients.
- 35.715 Maximum federal share.
- 35.718 Award limitation.
- Hazardous Waste Management Program Grants (P.L. 105–276)
- 35.720 Purpose.
- 35.723 Competitive process.
- 35.725 Maximum federal share.
- Underground Storage Tanks Program Grants (P.L. 105–276)
- 35.730 Purpose.
- 35.731 Eligible recipients.
- 35.732 Basis for allotment.
- 35.735 Maximum federal share.

**Subpart B—Environmental Program Grants for Tribes**

**Authority:** 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104–134, 110 Stat. 1321, 1321–299 (1996); Pub. L. 105–65, 111 Stat. 1344, 1373 (1997); Pub. L. 105–276, 112 Stat. 2461, 2499 (1988).

**General—All Grants****§ 35.500 Purpose of the subpart.**

This subpart establishes administrative requirements for all grants awarded to Indian Tribes and Intertribal Consortia for the environmental programs listed in § 35.501. This subpart supplements requirements in EPA's general grant regulations found at 40 CFR part 31. Sections 35.500–518 contain administrative requirements that apply

to all environmental program grants included in this subpart. Sections 35.530 through 35.718 contain requirements that apply to specified environmental program grants. Many of these environmental programs also have programmatic and technical requirements that are published elsewhere in the Code of Federal Regulations.

**§ 35.501 Environmental programs covered by the subpart.**

(a) The requirements in this subpart apply to all grants awarded for the following programs:

(1) Performance Partnership Grants (1996 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134; 110 Stat. 1321, 1321-299 (1996) and Departments of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act of 1998, Pub. L. 105-65; 111 Stat. 1344, 1373 (1997)).

(2) The Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. 4368b.

(3) Clean Air Act. Air pollution control (section 105).

(4) Clean Water Act.

(i) Water pollution control (section 106 and 518).

(ii) Water quality cooperative agreements (section 104(b)(3)).

(iii) Wetlands development grant program (section 104(b)(3)).

(iv) Nonpoint source management (section 319(h)).

(5) Federal Insecticide, Fungicide, and Rodenticide Act.

(i) Pesticide cooperative enforcement (section 23(a)(1)).

(ii) Pesticide applicator certification and training (section 23(a)(2)).

(iii) Pesticide program implementation (section 23(a)(1)).

(6) Pollution Prevention Act of 1990. Pollution prevention grants for Tribes (section 6605).

(7) Safe Drinking Water Act.

(i) Public water system supervision (section 1443(a)).

(ii) Underground water source protection (section 1443(b)).

(8) Toxic Substances Control Act.

(i) Lead-based paint program (section 404(g)).

(ii) Indoor radon grants (section 306).

(iii) Toxic substances compliance monitoring (section 28).

(9) Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Pub. L. 105-276; 112 Stat. 2461, 2499; 42 U.S.C. 6908a).

(i) Hazardous Waste Management Program Grants (Pub. L. 105-276; 112 Stat. 2461, 2499; 42 U.S.C. 6908a).

(ii) Underground Storage Tanks Program Grants (Pub. L. 105-276; 112 Stat. 2461, 2499; 42 U.S.C. 6908a).

(b) Unless otherwise prohibited by statute or regulation, the requirements in § 35.500 through § 35.518 of this subpart also apply to grants to Indian Tribes and Intertribal Consortia under environmental programs established after this subpart becomes effective, if specified in Agency guidance for such programs.

(c) In the event a grant is awarded from EPA headquarters for one of the programs listed in paragraph (a) of this section, this subpart shall apply and the term "Regional Administrator" shall mean "Assistant Administrator".

**§ 35.502 Definitions of terms.**

Terms are defined as follows when they are used in this regulation:

*Consolidated grant.* A single grant made to a recipient consolidating funds from more than one environmental grant program. After the award is made, recipients must account for grant funds in accordance with the funds' original environmental program sources. Consolidated grants are not Performance Partnership Grants.

*Environmental program.* A program for which EPA awards grants under the authorities listed in § 35.501. The grants are subject to the requirements of this subpart.

*Federal Indian reservation.* All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

*Funding period.* The period of time specified in the grant agreement during which the recipient may expend or obligate funds for the purposes set forth in the agreement.

*Intertribal Consortium or Consortia.* A partnership between two or more Tribes that is authorized by the governing bodies of those Tribes to apply for and receive assistance under one or more of the programs listed in § 35.501.

*National program guidance.* Guidance issued by EPA's National Program Managers for establishing and maintaining effective environmental programs. This guidance establishes national goals, objectives, and priorities as well as other information to be used in monitoring progress. The guidance may also set out specific environmental strategies, core performance measures, criteria for evaluating programs, and

other elements of program implementation.

*Outcome.* The environmental result, effect, or consequence that will occur from carrying out an environmental program or activity that is related to an environmental or programmatic goal or objective. Outcomes must be quantitative, and they may not necessarily be achievable during a grant funding period. See "output."

*Output.* An environmental activity or effort and associated work products related to an environmental goal or objective that will be produced or provided over a period of time or by a specified date. Outputs may be quantitative or qualitative but must be measurable during a grant funding period. See "outcome."

*Performance Partnership Grant.* A single grant combining funds from more than one environmental program. A Performance Partnership Grant may provide for administrative savings or programmatic flexibility to direct grant resources where they are most needed to address public health and environmental priorities (see also § 35.530). Each Performance Partnership Grant has a single, integrated budget and recipients do not need to account for grant funds in accordance with the funds' original environmental program sources.

*Planning target.* The amount of funds that the Regional Administrator suggests a grant applicant consider in developing its application, including the work plan, for an environmental program.

*Regional supplemental guidance.* Guidance to environmental program grant applicants prepared by the Regional Administrator, based on the national program guidance and specific regional and applicant circumstances, for use in preparing a grant application.

*Tribal Environmental Agreement (TEA).* A dynamic, strategic planning document negotiated by the Regional Administrator and an appropriate Tribal official. A Tribal Environmental Agreement may include: Long-term and short-term environmental goals, objectives, and desired outcomes based on Tribal priorities and available funding. A Tribal Environmental Agreement can be a very general or specific document that contains budgets, performance measures, outputs and outcomes that could be used as part or all of a Performance Partnership Grant work plan, if it meets the requirements of section 35.507(b).

*Tribe.* Except as otherwise defined in statute or this subpart, Indian Tribal Government (Tribe) means: Any Indian Tribe, band, nation, or other organized group or community, including any



Alaska Native village, which is recognized as eligible by the United States Department of the Interior for the special services provided by the United States to Indians because of their status as Indians.

**Work plan.** The document which identifies how and when the applicant will use funds from environmental program grants and is the basis for management and evaluation of performance under the grant agreement to produce specific outputs and outcomes (see 35.507). The work plan must be consistent with applicable federal statutes; regulations; circulars; executive orders; and EPA delegations, approvals, or authorizations.

**Work plan commitments.** The outputs and outcomes associated with each work plan component, as established in the grant agreement.

**Work plan component.** A negotiated set or group of work plan commitments established in the grant agreement. A work plan may have one or more work plan components.

#### **§ 35.503 Deviation from this subpart.**

EPA will consider and may approve requests for an official deviation from non-statutory provisions of this regulation in accordance with 40 CFR 31.6.

#### **§ 35.504 Eligibility of an Intertribal Consortium.**

(a) An Intertribal Consortium is eligible to receive grants under the authorities listed in § 35.501 only if the Consortium demonstrates that all members of the Consortium meet the eligibility requirements for the grant and authorize the Consortium to apply for and receive assistance in accordance with paragraph (c) of this section, except as provided in paragraph (b) of this section.

(b) An Intertribal Consortium is eligible to receive a grant under the Indian Environmental General Assistance Program Act, in accordance with § 35.540, if the Consortium demonstrates that:

(1) A majority of its members meets the eligibility requirements for the grant;

(2) All members that meet the eligibility requirements authorize the Consortium to apply for and receive assistance; and

(3) It has adequate accounting controls to ensure that only members that meet the eligibility requirements will benefit directly from the grant project and will receive and manage grant funds, and the Consortium agrees to a grant condition to that effect.

(c) An Intertribal Consortium must submit to EPA adequate documentation of:

(1) The existence of the partnership between Indian Tribal governments, and

(2) Authorization of the Consortium by all its members (or in the case of the General Assistance Program, all members that meet the eligibility requirements for a General Assistance Program grant) to apply for and receive the grant(s) for which the Consortium has applied.

#### **Preparing an Application**

##### **§ 35.505 Components of a complete application.**

A complete application for an environmental program grant must:

(a) Meet the requirements in 40 CFR part 31, subpart B;

(b) Include a proposed work plan (§ 35.507 of this subpart); and

(c) Specify the environmental program and the amount of funds requested.

##### **§ 35.506 Time frame for submitting an application.**

An applicant should submit a complete application to EPA at least 60 days before the beginning of the proposed funding period.

##### **§ 35.507 Work plans.**

(a) *Bases for negotiating work plans.* The work plan is negotiated between the applicant and the Regional Administrator and reflects consideration of national, regional, and Tribal environmental and programmatic needs and priorities.

(1) *Negotiation considerations.* In negotiating the work plan, the Regional Administrator and applicant will consider such factors as national program guidance; any regional supplemental guidance; goals, objectives, and priorities proposed by the applicant; other jointly identified needs or priorities; and the planning target.

(2) *National program guidance.* If an applicant proposes a work plan that differs significantly from the goals and objectives, priorities, or performance measures in the national program guidance associated with the proposed work plan activities, the Regional Administrator must consult with the appropriate National Program Manager before agreeing to the work plan.

(3) *Use of existing guidance.* An applicant should base the grant application on the national program guidance in place at the time the application is being prepared.

(b) *Work plan requirements.* (1) The work plan is the basis for the management and evaluation of performance under the grant agreement.

(2) An approvable work plan must specify:

(i) The work plan components to be funded under the grant;

(ii) The estimated work years and estimated funding amounts for each work plan component;

(iii) The work plan commitments for each work plan component, and a time frame for their accomplishment;

(iv) A performance evaluation process and reporting schedule in accordance with § 35.515 of this subpart; and

(v) The roles and responsibilities of the recipient and EPA in carrying out the work plan commitments.

(3) The work plan must be consistent with applicable federal statutes; regulations; circulars; executive orders; and delegations, approvals, or authorizations.

(c) *Tribal Environmental Agreement as work plan.* An applicant may use a Tribal Environmental Agreement or a portion of the Tribal Environmental Agreement as the work plan or part of the work plan for an environmental program grant if the portion of the Tribal Environmental Agreement that is to serve as the grant work plan:

(1) Is clearly identified as the grant work plan and distinguished from other portions of the Tribal Environmental Agreement; and

(2) Meets the requirements in § 35.507(b).

##### **§ 35.508 Funding period.**

The Regional Administrator and applicant may negotiate the length of the funding period for environmental program grants, subject to limitations in appropriations and authorizing statutes.

##### **§ 35.509 Consolidated grants.**

Any applicant eligible to receive funds from more than one environmental program may submit an application for a consolidated grant. For consolidated grants, an applicant prepares a single budget and work plan covering all of the environmental programs included in the application. The consolidated budget must identify each environmental program to be included, the amount of each program's funds, and the extent to which each program's funds support each work plan component. Recipients of consolidated grants must account for grant funds in accordance with the funds' environmental program sources; funds included in a consolidated grant from a particular environmental program may be used only for that program.

#### **EPA Action on Application**

##### **§ 35.510 Time frame for EPA action.**

The Regional Administrator will review a complete application and either approve, conditionally approve,

or disapprove it within 60 days of receipt. The Regional Administrator will award grants for approved or conditionally approved applications if funds are available.

**§ 35.511 Criteria for approving an application.**

(a) After evaluating other applications as appropriate, the Regional Administrator may approve an application upon determining that:

(1) The application meets the requirements of this subpart and 40 CFR part 31;

(2) The application meets the requirements of all applicable federal statutes; regulations; circulars; executive orders; and EPA delegations, approvals, or authorizations;

(3) The proposed work plan complies with the requirements of § 35.507 of this subpart; and

(4) The achievement of the proposed work plan is feasible, considering such factors as the applicant's existing circumstances, past performance, program authority, organization, resources, and procedures.

(b) If the Regional Administrator finds the application does not satisfy the criteria in paragraph (a) of this section, the Regional Administrator may either:

(1) Conditionally approve the application if only minor changes are required, with grant conditions necessary to ensure compliance with the criteria, or

(2) Disapprove the application in writing.

**§ 35.512 Factors considered in determining award amount.**

(a) After approving an application under § 35.511, the Regional Administrator will consider such factors as the amount of funds available for award to Indian Tribes and Intertribal Consortia, the extent to which the proposed work plan is consistent with EPA guidance and mutually agreed upon priorities, and the anticipated cost of the work plan relative to the proposed work plan components to determine the amount of funds to be awarded.

(b) If the Regional Administrator finds that the requested level of funding is not justified, the Regional Administrator will attempt to negotiate a resolution of the issues with the applicant before determining the award amount.

**§ 35.513 Reimbursement for pre-award costs.**

(a) Notwithstanding the requirements of 40 CFR 31.23(a) (Period of availability of funds), and OMB cost principles, EPA may reimburse recipients for pre-award costs incurred from the beginning

of the funding period established in the grant agreement if such costs would have been allowable if incurred after the award. Such costs must be specifically identified in the grant application EPA approves.

(b) The applicant incurs pre-award costs at its own risk. EPA is under no obligation to reimburse such costs unless they are included in an approved grant application.

**Post-Award Requirements**

**§ 35.514 Amendments and other changes.**

The provisions of 40 CFR 31.30 do not apply to environmental program grants awarded under this subpart. The following provisions govern amendments and other changes to grant work plans and budgets after the work plan is negotiated and a grant awarded.

(a) *Changes requiring prior approval.* The recipient needs the Regional Administrator's prior written approval to make significant post-award changes to work plan commitments. EPA, in consultation with the recipient, will document approval of these changes including budgeted amounts associated with the revisions.

(b) *Changes requiring approval.* Recipients must request, in writing, grant amendments for changes requiring increases in environmental program grant amounts and extensions of the funding period. Recipients may begin implementing a change before the amendment has been approved by EPA, but do so at their own risk. If EPA approves the change, EPA will issue a grant amendment. EPA will notify the recipient in writing if the change is disapproved.

(c) *Changes not requiring approval.* Other than those situations described in paragraphs (a) and (b) of this section, recipients do not need to obtain approval for changes, including changes in grant work plans, budgets, or other parts of grant agreements, unless the Regional Administrator determines approval requirements should be imposed on a specific recipient for a specified period of time.

(d) *Office of Management and Budget (OMB) cost principles.* The Regional Administrator may waive, in writing, approval requirements for specific recipients and costs contained in OMB cost principles.

(e) *Changes in consolidated grants.* Recipients of consolidated grants under § 35.509 may not transfer funds among environmental programs.

(f) *Subgrants.* Subgrantees must request required approvals in writing from the recipient and the recipient shall approve or disapprove the request

in writing. A recipient will not approve any work plan or budget revision which is inconsistent with the purpose or terms and conditions of the federal grant to the recipient. If the revision requested by the subgrantee would result in a significant change to the recipient's approved grant which requires EPA approval, the recipient will obtain EPA's approval before approving the subgrantee's request.

**§ 35.515 Evaluation of performance.**

(a) *Joint evaluation process.* The applicant and the Regional Administrator will develop a process for jointly evaluating and reporting progress and accomplishments under the work plan (see section 35.507(b)(2)(iv)). A description of the evaluation process and reporting schedule must be included in the work plan. The schedule must require the recipient to report at least annually and must satisfy the requirements for progress reporting under 40 CFR 31.40(b).

(b) *Elements of the evaluation process.* The evaluation process must provide for:

(1) A discussion of accomplishments as measured against work plan commitments;

(2) A discussion of the cumulative effectiveness of the work performed under all work plan components;

(3) A discussion of existing and potential problem areas; and

(4) Suggestions for improvement, including, where feasible, schedules for making improvements.

(c) *Resolution of issues.* If the joint evaluation reveals that the recipient has not made sufficient progress under the work plan, the Regional Administrator and the recipient will negotiate a resolution that addresses the issues. If the issues cannot be resolved through negotiation, the Regional Administrator may take appropriate measures under 40 CFR 31.43. The recipient may request review of the Regional Administrator's decision under the dispute processes in 40 CFR 31.70.

(d) *Evaluation reports.* The Regional Administrator will ensure that the required evaluations are performed according to the negotiated schedule and that copies of evaluation reports are placed in the official files and provided to the recipient.

**§ 35.516 Direct implementation.**

If funds for an environmental program remain after Tribal and Intertribal Consortia environmental program grants for that program have been awarded or because no grants were awarded, the Regional Administrator may, subject to any limitations contained in

appropriation acts, use all or part of the funds to support a federal program required by law in the absence of an acceptable Tribal program.

**§ 35.517 Unused funds.**

If funds for an environmental program remain after Tribal and Intertribal Consortia grants for that program have been awarded or because no grants were awarded, and the Regional Administrator does not use the funds under § 35.516 of this subpart, the Regional Administrator may award the funds to any eligible Indian Tribe or Intertribal Consortium in the region (including a Tribe or Intertribal Consortium that has already received funds) for the same environmental program or for a Performance Partnership Grant, subject to any limitations in appropriation acts.

**§ 35.518 Unexpended balances.**

Subject to any relevant provisions of law, if a recipient's final Financial Status Report shows unexpended balances, the Regional Administrator will deobligate the unexpended balances and make them available, either to the same recipient or other Tribes or Intertribal Consortia in the region, for environmental program grants.

**Performance Partnership Grants**

**§ 35.530 Purpose of Performance Partnership Grants.**

(a) *Purpose of section.* Sections 35.530 through 35.538 govern Performance Partnership Grants to Tribes and Intertribal Consortia authorized in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104-134; 110 Stat. 1321, 1321-299 (1996)) and Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998 (Pub. L. 105-65; 111 Stat. 1344, 1373 (1997)).

(b) *Purpose of program.* Performance Partnership Grants enable Tribes and Intertribal Consortia to combine funds from more than one environmental program grant into a single grant with a single budget. Recipients do not need to account for Performance Partnership Grant funds in accordance with the funds' original environmental program sources; they need only account for total Performance Partnership Grant expenditures. Subject to the requirements of this subpart, the Performance Partnership Grant program is designed to:

(1) Strengthen partnerships between EPA and Tribes and Intertribal Consortia through joint planning and

priority setting and better deployment of resources;

(2) Provide Tribes and Intertribal Consortia with flexibility to direct resources where they are most needed to address environmental and public health priorities;

(3) Link program activities more effectively with environmental and public health goals and program outcomes;

(4) Foster development and implementation of innovative approaches, such as pollution prevention, ecosystem management, and community-based environmental protection strategies; and

(5) Provide savings by streamlining administrative requirements.

**§ 35.532 Requirements summary.**

(a) Applicants and recipients of Performance Partnership Grants must meet:

(1) The requirements in §§ 35.500 to 35.518 of this subpart which apply to all environmental program grants, including Performance Partnership Grants; and

(2) The requirements in §§ 35.530 to 35.538 of this subpart which apply only to Performance Partnership Grants.

(b) In order to include funds from an environmental program grant listed in § 35.501(a) of this subpart in a Performance Partnership Grant, applicants must meet the requirements for award of each environmental program from which funds are included in the Performance Partnership Grant, except the requirements at §§ 35.548(c), 35.638(b) and (c), 35.691, and 35.708 (c), (d), (e), and (g). These requirements can be found in this regulation beginning at § 35.540. If the applicant is an Intertribal Consortium, each Tribe that is a member of the Consortium must meet the requirements.

(3) Apply for the environmental program grant.

(4) Obtain the Regional Administrator's approval of the application for that grant.

(c) If funds from an environmental program are not included in a Performance Partnership Grant, an applicant is not required to meet the eligibility requirements for that environmental program grant in order to carry out activities eligible under that program as provided in § 35.535.

**§ 35.533 Programs eligible for inclusion.**

(a) *Eligible programs.* Except as provided in paragraph (b) of this section, the environmental program grants eligible for inclusion in a Performance Partnership Grant are listed in § 35.501(a)(2) through (9) of this subpart.

(b) *Changes in eligible programs.* The Administrator may, in guidance or regulation, describe subsequent additions, deletions, or changes to the list of environmental programs eligible for inclusion in Performance Partnership Grants.

**§ 35.534 Eligible recipients.**

(a) A Tribe or Intertribal Consortium is eligible for a Performance Partnership Grant if the Tribe or each member of the Intertribal Consortium is eligible for, and the Tribe or Intertribal Consortium receives funding from, more than one of the environmental program grants listed in § 35.501(a) in accordance with the requirements for those environmental programs.

(b) For grants to Tribes, a Tribal agency must be designated by a Tribal government or other authorized Tribal process to receive grants under each of the environmental programs to be combined in the Performance Partnership Grant.

**§ 35.535 Activities eligible for funding.**

(a) *Delegated, approved, or authorized activities.* A Tribe or Intertribal Consortium may use Performance Partnership Grant funds to carry out EPA-delegated, EPA-approved, or EPA-authorized activities, such as permitting and primary enforcement responsibility only if the Tribe or each member of the Intertribal Consortium receives from the Regional Administrator the delegations, approvals, or authorizations to conduct such activities.

(b) *Other program activities.* Except for the limitation in paragraph (a) of this section, a Tribe or Intertribal Consortium may use Performance Partnership Grant funds for any activity that is eligible under the environmental programs listed in § 35.501(a) of this subpart, as determined by the Regional Administrator. If an applicant proposes a Performance Partnership Grant work plan that differs significantly from any of the proposed work plans approved for funding that the applicant now proposes to move into a Performance Partnership Grant, the Regional Administrator must consult with the appropriate National Program Managers before agreeing to the Performance Partnership Grant work plan. National Program Managers may expressly waive or modify this requirement for consultation in national program guidance. National Program Managers also may define in national program guidance "significant" differences from a work plan submitted with a Tribe's or a Consortium's application for funds.

**§ 35.536 Cost share requirements.**

(a) The Performance Partnership Grant cost share shall be the sum of the amounts required for each environmental program grant included in the Performance Partnership Grant, as determined in accordance with paragraphs (b) and (c) of this section, unless waived under paragraph (d) of this section.

(b) For each environmental program grant included in the Performance Partnership Grant that has a cost share of five percent or less under the provisions of §§ 35.540 through 35.718, the required cost share shall be that identified in §§ 35.540 through 35.718 of this subpart.

(c) For each environmental program grant included in the Performance Partnership Grant that has a cost share of greater than five percent under the provisions of §§ 35.540 through 35.718 of this subpart, the required cost share shall be five percent of the allowable cost of the work plan budget for that program. However, after the first two years in which a Tribe or Intertribal Consortium receives a Performance Partnership Grant, the Regional Administrator must determine through objective assessment whether the Tribe or the members of an Intertribal Consortium meet socio-economic indicators that demonstrate the ability of the Tribe or the Intertribal Consortium to provide a cost share greater than five percent. If the Regional Administrator determines that the Tribe or the members of Intertribal Consortium meets such indicators, then the Regional Administrator shall increase the required cost share up to a maximum of 10 percent of the allowable cost of the work plan budget for each program with a cost share greater than five percent.

(d) The Regional Administrator may waive the cost share required under this section upon request of the Tribe or Intertribal Consortium, if, based on an objective assessment of socio-economic indicators, the Regional Administrator determines that meeting the cost share would impose undue hardship.

**§ 35.537 Application requirements.**

An application for a Performance Partnership Grant must contain:

(a) A list of the environmental programs and the amount of funds from each program to be combined in the Performance Partnership Grant;

(b) A consolidated budget;

(c) A consolidated work plan that addresses each program being combined in the grant and which meets the requirements of § 35.507.

**§ 35.538 Project period.**

If the projected completion date for a work plan commitment funded under an environmental program grant that is added to a Performance Partnership Grant extends beyond the end of the project period for the Performance Partnership Grant, the Regional Administrator and the recipient will agree in writing as to how and when the work plan commitment will be completed.

**Indian Environmental General Assistance Program (GAP)****§ 35.540 Purpose.**

(a) *Purpose of section.* Sections 35.540 through 35.547 govern grants to Tribes and Intertribal Consortia under the Indian Environmental General Assistance Program Act of 1992 (42 U.S.C. 4368b.)

(b) *Purpose of program.* Indian Environmental General Assistance Program grants are awarded to build capacity to administer environmental programs for Tribes by providing general assistance to plan, develop, and establish environmental protection programs for Tribes.

**§ 35.543 Eligible recipients.**

The following entities are eligible to receive grants under this program:

(a) Tribes and

(b) Intertribal Consortia as provided in § 35.504.

**§ 35.545 Eligible activities.**

Tribes and Intertribal Consortia may use General Assistance Program funds for planning, developing, and establishing environmental protection programs and to develop and implement solid and hazardous waste programs for Tribes.

**§ 35.548 Award limitations.**

(a) Each grant awarded under the General Assistance Program shall be not less than \$75,000. This limitation does not apply to additional funds that may become available for award to the same Tribe or Intertribal Consortium.

(b) The Regional Administrator shall not award a grant to a single Tribe or Intertribal Consortium of more than 10 percent of the total annual funds appropriated under the Act.

(c) The project period of a General Assistance Program award may not exceed four years.

(d) No award under this program shall result in reduction of total EPA grants for environmental programs to the recipient.

**Air Pollution Control (Section 105)****§ 35.570 Purpose.**

(a) *Purpose of section.* Sections 35.570 through 35.578 govern air pollution control grants to Tribes (as defined in section 302(r) of the Clean Air Act (CAA)) authorized under sections 105 and 301(d) of the Act and Intertribal Consortia.

(b) *Purpose of program.* Air pollution control grants are awarded to develop and administer programs that prevent and control air pollution or implement national air quality standards for air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction.

(c) *Associated program regulations.* Refer to 40 CFR parts 49, 50, 51, 52, 58, 60, 61, 62, and 81 for associated program regulations.

**§ 35.572 Definitions.**

In addition to the definitions in § 35.502, the following definitions apply to the Clean Air Act's section 105 grant program:

*Nonrecurrent expenditures* are those expenditures which are shown by the recipient to be of a nonrepetitive, unusual, or singular nature such as would not reasonably be expected to recur in the foreseeable future. Costs categorized as nonrecurrent must be approved in the grant agreement or an amendment thereto.

*Recurrent expenditures* are those expenses associated with the activities of a continuing environmental program. All expenditures are considered recurrent unless justified by the applicant as nonrecurrent and approved as such in the grant award or an amendment thereto.

**§ 35.573 Eligible tribe.**

(a) A Tribe is eligible to receive section 105 financial assistance under §§ 35.570 through 35.578 if it has demonstrated eligibility to be treated as a State under 40 CFR 49.6. An Intertribal Consortium consisting of Tribes that have demonstrated eligibility to be treated as States under 40 CFR 49.6 is also eligible for financial assistance.

(b) Tribes that have not made a demonstration under 40 CFR 49.6 and Intertribal Consortia consisting of Tribes that have not demonstrated eligibility to be treated as States under 40 CFR 49.6 are eligible for financial assistance under sections 105 and 302(b)(5) of the Clean Air Act.

**§ 35.575 Maximum federal share.**

(a) For Tribes and Intertribal Consortia eligible under § 35.573(a), the

Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 95 percent of the approved costs of maintaining that program. After two years from the date of each Tribe's or Intertribal Consortium's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent if the Regional Administrator determines that the Tribe or each member of the Intertribal Consortium meets certain economic indicators that would provide an objective assessment of the Tribe's or each of the Intertribal Consortiums member's ability to increase its share. For a Tribe or Intertribal Consortium eligible under § 35.573(a), the Regional Administrator may increase the maximum federal share if the Tribe or Intertribal Consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe or within the member Tribes of the Intertribal Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship.

(b) For Tribes and Intertribal Consortia eligible under § 35.573(b), the Regional Administrator may provide financial assistance in an amount up to 60 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 60 percent of the approved costs of maintaining that program.

(c) Revenue collected under a Tribal Title V operating permit program may not be used to meet the cost share requirements of this section.

#### **§ 35.576 Maintenance of effort.**

(a) For Tribes and Intertribal Consortia that are eligible for financial assistance under § 35.573(b) of this subpart, the Tribe or each of the Intertribal Consortium's members must expend annually, for recurrent Section 105 program expenditures, an amount of non-federal funds at least equal to such expenditures during the preceding fiscal year.

(1) In order to award grants in a timely manner each fiscal year, the Regional Administrator shall compare a Tribe's or each of the Intertribal Consortium's member's proposed expenditure level, as detailed in the grant application, to its expenditure level in the second preceding fiscal year. When expenditure data for the preceding fiscal year is complete, the Regional Administrator shall use this

information to determine the Tribe's or Intertribal Consortium's compliance with its maintenance of effort requirement.

(2) If expenditure data for the preceding fiscal year shows that a Tribe or Intertribal Consortium did not meet the requirements of paragraph (a) of this section, the Regional Administrator will take action to recover the grant funds for that year.

(3) The Regional Administrator may grant an exception to § 35.576(a) if, after notice and opportunity for a public hearing, the Regional Administrator determines that a reduction in expenditures is attributable to a non-selective reduction of all the Tribe's or each of the Intertribal Consortium's member's programs.

(b) For Tribes and Intertribal Consortia that are eligible under § 35.573(b), the Regional Administrator will not award Section 105 funds unless the applicant provides assurance that the grant will not supplant non-federal funds that would otherwise be available for maintaining the Section 105 program.

#### **§ 35.578 Award limitation.**

The Regional Administrator will not disapprove an application for, or terminate or annul an award of, financial assistance under § 35.573 without prior notice and opportunity for a public hearing within the appropriate jurisdiction or, where more than one area is affected, within one of the affected areas within the jurisdiction

#### **Water Pollution Control (Sections 106 and 518)**

#### **§ 35.580 Purpose.**

(a) *Purpose of section.* Sections 35.580 through 35.588 govern water pollution control grants to eligible Tribes and Intertribal Consortia (as defined in § 35.502) authorized under sections 106 and 518 of the Clean Water Act.

(b) *Purpose of program.* Water pollution control grants are awarded to assist Tribes and Intertribal Consortia in administering programs for the prevention, reduction, and elimination of water pollution, including programs for the development and implementation of ground-water protection strategies.

(c) *Associated program requirements.* Program requirements for water quality planning and management activities are provided in 40 CFR part 130.

#### **§ 35.582 Definitions.**

*Federal Indian reservation.* All land within the limits of any Indian reservation under the jurisdiction of the United States Government,

notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

*Tribe.* Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior, exercising governmental authority over a federal Indian reservation.

#### **§ 35.583 Eligible recipients.**

A Tribe, including an Intertribal Consortium, is eligible to receive a section 106 grant if EPA determines that the Indian Tribe or each member of the Intertribal Consortium meets the requirements for treatment in a manner similar to a State under section 518(e) of the Clean Water Act (see 40 CFR 130.6(d)).

#### **§ 35.585 Maximum federal share.**

(a) The Regional Administrator may provide up to 95 percent of the approved work plan costs for Tribes or Intertribal Consortia establishing a section 106 program. Work plan costs include costs of planning, developing, establishing, improving or maintaining a water pollution control program.

(b) The Regional Administrator may increase the maximum federal share if the Tribe or Intertribal Consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe or within each Tribe that is a member of an Intertribal Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship.

#### **§ 35.588 Award limitations.**

(a) The Regional Administrator will only award section 106 funds to a Tribe or Intertribal Consortium if:

(1) All monitoring and analysis activities performed by the Tribe or Intertribal Consortium meets the applicable quality assurance and quality control requirements in 40 CFR 31.45.

(2) The Tribe or each member of the Intertribal Consortium has emergency power authority comparable to that in section 504 of the Clean Water Act and adequate contingency plans to implement such authority.

(3) EPA has not assumed enforcement as defined in section 309(a)(2) of the Clean Water Act in the Tribe's or any Intertribal Consortium member's jurisdiction.

(4) The Tribe or Intertribal Consortium agrees to include a discussion of how the work performed under section 106 addressed water quality problems on Tribal lands in the annual report required under § 35.515(d).

(5) After an initial award of section 106 funds, the Tribe or Intertribal Consortium shows satisfactory progress in meeting its negotiated work plan commitments.

(b) A Tribe or Intertribal Consortium is eligible to receive a section 106 grant or section 106 grant funds even if the Tribe or each of the members of an Intertribal Consortium does not meet the requirements of section 106(e)(1) and 106(f)(1) of the Clean Water Act.

#### **Water Quality Cooperative Agreements (Section 104(b)(3))**

##### **§ 35.600 Purpose.**

(a) *Purpose of section.* Sections 35.600 through 35.604 govern Water Quality Cooperative Agreements to Tribes and Intertribal Consortia authorized under section 104(b)(3) of the Clean Water Act. These sections do not govern Water Quality Cooperative Agreements under section 104(b)(3) to organizations that do not meet the definitions of Tribe or Intertribal Consortium in § 35.502; such cooperative agreements generally are subject to the uniform administrative requirements for grants at 40 CFR part 30.

(b) *Purpose of program.* EPA awards Water Quality Cooperative Agreements for investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution. EPA issues guidance each year advising EPA regions and headquarters regarding appropriate priorities for funding for this program. This guidance may include such focus areas as National Pollutant Discharge Elimination System watershed permitting, urban wet weather programs, or innovative pretreatment programs and biosolids projects.

##### **§ 35.603 Competitive process.**

EPA will award water quality cooperative agreement funds through a competitive process in accordance with national program guidance. After the competitive process is complete, the recipient can, at its discretion, accept the award as a separate cooperative agreement or add the funds to a Performance Partnership Grant. If the recipient chooses to add the funds to a Performance Partnership Grant, the water quality work plan commitments must be included in the Performance Partnership Grant work plan.

##### **§ 35.604 Maximum federal share.**

The Regional Administrator may provide up to 100 percent of approved work plan costs.

#### **Wetlands Development Grant Program (Section 104(b)(3))**

##### **§ 35.610 Purpose.**

(a) *Purpose of section.* Sections 35.610 through 35.615 govern wetlands development grants to Tribes and Intertribal Consortia under section 104(b)(3) of the Clean Water Act. These sections do not govern wetlands development grants under section 104(b)(3) to organizations that do not meet the definitions of Tribe or Intertribal Consortium in § 35.502; such grants generally are subject to the uniform administrative requirements for grants at 40 CFR part 30.

(b) *Purpose of program.* EPA awards wetlands development grants to assist in the development of new, or the refinement of existing, wetlands protection and management programs.

##### **§ 35.613 Competitive process.**

Wetlands development grants are awarded on a competitive basis. EPA annually establishes a deadline for receipt of grant applications. EPA reviews applications and decides which grant projects to fund based on criteria established by EPA. After the competitive process is complete, the recipient can, at its discretion, accept the award as a wetlands development program grant or add the funds to a Performance Partnership Grant. If the recipient chooses to add the funds to a Performance Partnership Grant, the wetlands development program work plan commitments must be included in the Performance Partnership Grant work plan.

##### **§ 35.615 Maximum federal share.**

EPA may provide up to 75 percent of the approved work plan costs for the development or refinement of a wetlands protection and management program.

#### **Nonpoint Source Management Grants (Sections 319(h) and 518(f))**

##### **§ 35.630 Purpose.**

(a) *Purpose of section.* Sections 35.630 through 35.638 govern nonpoint source management grants to eligible Tribes and Intertribal Consortia under sections 319(h) and 518(f) of the Clean Water Act.

(b) *Purpose of program.* Nonpoint source management grants may be awarded for the implementation of EPA-approved nonpoint source management programs, including ground-water quality protection activities that will advance the approved nonpoint source management program.

##### **§ 35.632 Definition.**

*Tribe.* Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

##### **§ 35.633 Eligibility requirements.**

A Tribe or Intertribal Consortium is eligible to receive a Nonpoint Source Management grant if EPA has determined that the Tribe or each member of the Intertribal Consortium meets the requirements for treatment in a manner similar to a State under section 518(e) of the Clean Water Act (see 40 CFR 130.6(d)).

##### **§ 35.635 Maximum federal share.**

(a) The Regional Administrator may provide up to 60 percent of the approved work plan costs in any fiscal year. The non-federal share of costs must be provided from non-federal sources.

(b) The Regional Administrator may increase the maximum federal share if the Tribe or Intertribal Consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe or within each Tribe that is a member of the Intertribal Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship. In no case shall the federal share be greater than 90 percent.

##### **§ 35.636 Maintenance of effort.**

To receive funds under section 319 in any fiscal year, a Tribe or each member of an Intertribal Consortium must agree that the Tribe or each member of the Intertribal Consortium will maintain its aggregate expenditures from all other sources for programs for controlling nonpoint source pollution and improving the quality of the Tribe's or the Intertribal Consortium's members' waters at or above the average level of such expenditures in Fiscal Years 1985 and 1986.

##### **§ 35.638 Award limitations.**

(a) *Available funds.* EPA may use no more than the amount authorized under the Clean Water Act section 319 and 518(f) for making grants to Tribes or Intertribal Consortia.

(b) *Financial assistance to persons.* Tribes or Intertribal Consortia may use funds for financial assistance to persons only to the extent that such assistance is related to the cost of demonstration projects.

(c) *Administrative costs.* Administrative costs in the form of salaries, overhead, or indirect costs for

services provided and charged against activities and programs carried out with these funds shall not exceed 10 percent of the funds the Tribe or Intertribal Consortium receives in any fiscal year. The cost of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs are not subject to this limitation.

(d) The Regional Administrator will not award section 319(h) funds to any Tribe or Intertribal Consortium unless:

(1) *Approved assessment report.* EPA has approved the Tribe's or each member of the Intertribal Consortium's Assessment Report on nonpoint sources, prepared in accordance with section 319(a) of the Act;

(2) *Approved Tribe or Intertribal Consortium management program.* EPA has approved the Tribe's or each member of the Intertribal Consortium's management program for nonpoint sources, prepared in accordance with section 319(b) of the Act;

(3) *Progress on reducing pollutant loadings.* The Regional Administrator determines, for a Tribe or Intertribal Consortium that received a section 319 funds in the preceding fiscal year, that the Tribe or each member of the Intertribal Consortium made satisfactory progress in meeting its schedule for achieving implementation of best management practices to reduce pollutant loadings from categories of nonpoint sources, or particular nonpoint sources, designated in the Tribe's or each Consortium member's management program. The Tribe or each member of the Intertribal Consortium must develop this schedule in accordance with section 319(b)(2) of the Act;

(4) *Activity and output descriptions.* The work plan briefly describes each significant category of nonpoint source activity and the work plan commitments to be produced for each category; and

(5) *Significant watershed projects.* For watershed projects whose costs exceed \$50,000, the work plan contains:

(i) A brief synopsis of the watershed implementation plan outlining the problems to be addressed;

(ii) The project's goals and objectives; and

(iii) The performance measures and environmental indicators that will be used to evaluate the results of the project.

#### **Pesticide Cooperative Enforcement (Section 23(a)(1))**

##### **§ 35.640 Purpose.**

(a) *Purpose of section.* Sections 35.640 through 35.645 govern cooperative

agreements to Tribes and Intertribal Consortia authorized under section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act for pesticide enforcement.

(b) *Purpose of program.* Cooperative agreements are awarded to assist Tribes and Intertribal Consortia in implementing pesticide enforcement programs.

(c) *Associated program regulations.* Refer to 19 CFR part 12 and 40 CFR parts 150 through 189 for associated regulations.

##### **§ 35.641 Eligible recipients.**

Eligible recipients of pesticide enforcement cooperative agreements are Tribes and Intertribal Consortia.

##### **§ 35.642 Maximum federal share.**

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

##### **§ 35.645 Basis for allotment.**

The Administrator allots pesticide enforcement cooperative agreement funds to each regional office. Regional offices award funds to Tribes and Intertribal Consortia based on their programmatic needs and applicable EPA guidance.

#### **Pesticide Applicator Certification and Training (Section 23(a)(2))**

##### **§ 35.646 Purpose.**

(a) *Purpose of section.* Sections 35.646 through 35.649 govern pesticide applicator certification and training grants to Tribes and Intertribal Consortia under section 23(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act.

(b) *Purpose of program.* Pesticide applicator certification and training grants are awarded to train and certify restricted use pesticide applicators.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 162, 170, and 171.

##### **§ 35.649 Maximum federal share.**

The Regional Administrator may provide up to 50 percent of the approved work plan costs.

#### **Pesticide Program Implementation (Section 23(a)(1))**

##### **§ 35.650 Purpose.**

(a) *Purpose of section.* Sections 35.650 through 35.659 govern Pesticide Program Implementation cooperative agreements to Tribes and Intertribal Consortia under section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act.

(b) *Purpose of program.* Cooperative agreements are awarded to assist Tribes and Intertribal Consortia to develop and implement pesticide programs, including programs that protect workers, ground water, and endangered species from pesticide risks and other pesticide management programs designated by the Administrator.

(c) *Program regulations.* Refer to 40 CFR parts 150 through 189 and 19 CFR part 12 for associated regulations.

##### **§ 35.653 Eligible recipients.**

Eligible recipients of pesticide program implementation cooperative agreements are Tribes and Intertribal Consortia.

##### **§ 35.655 Basis for allotment.**

The Administrator allots pesticide program implementation cooperative agreement funds to each Regional Office. Regional Offices award funds to Tribes and Intertribal Consortia based on their programmatic needs and applicable EPA guidance.

##### **§ 35.659 Maximum federal share.**

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

#### **Pollution Prevention Grants (Section 6605)**

##### **§ 35.660 Purpose.**

(a) *Purpose of section.* Sections 35.660 through 35.669 govern grants to Tribes and Intertribal Consortia under section 6605 of the Pollution Prevention Act.

(b) *Purpose of program.* Pollution Prevention Grants are awarded to promote the use of source reduction techniques by businesses.

##### **§ 35.661 Competitive process.**

EPA Regions award Pollution Prevention Grant funds to Tribes and Intertribal Consortia through a competitive process in accordance with EPA guidance. When evaluating a Tribe's or Intertribal Consortium's application, EPA must consider, among other criteria, whether the proposed program would:

(a) Make specific technical assistance available to businesses seeking information about source reduction opportunities, including funding for experts to provide onsite technical advice to businesses seeking assistance in the development of source reduction plans;

(b) Target assistance to businesses for whom lack of information is an impediment to source reduction; and

(c) Provide training in source reduction techniques. Such training may be provided through local



engineering schools or other appropriate means.

#### **§ 35.662 Definitions.**

The following definition applies to the Pollution Prevention Grant program and to §§ 35.660 through 35.669:

(a) Pollution prevention/source reduction is any practice that:

(1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal;

(2) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants; or

(3) Reduces or eliminates the creation of pollutants through:

(i) Increased efficiency in the use of raw materials, energy, water, or other resources; or

(ii) Protection of national resources by conservation.

(b) Pollution prevention/source reduction does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

#### **§ 35.663 Eligible recipients.**

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for a Pollution Prevention Grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of the Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the Pollution Prevention Grants program required by paragraphs (b)(3) and (4) of this section.

#### **§ 35.668 Award limitation.**

If the Pollution Prevention Grant funds are included in a Performance Partnership Grant, the Pollution Prevention work plan commitments must be included in the Performance Partnership Grant work plan.

#### **§ 35.669 Maximum federal share.**

The federal share for Pollution Prevention Grants will not exceed 50 percent of the allowable Tribe and Intertribal Consortium Pollution Prevention project cost.

#### **Public Water System Supervision (Section 1443(a) and Section 1451)**

#### **§ 35.670 Purpose.**

(a) *Purpose of section.* Sections 35.670 through 35.678 govern public water system supervision grants to Tribes and Intertribal Consortia authorized under sections 1443(a) and 1451 of the Safe Drinking Water Act.

(b) *Purpose of program.* Public water system supervision grants are awarded to carry out public water system supervision programs including implementation and enforcement of the requirements of the Act that apply to public water systems.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 141, 142, and 143.

#### **§ 35.672 Definition.**

*Tribe.* Any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area.

#### **§ 35.673 Annual amount reserved by EPA.**

Each year, EPA shall reserve up to seven percent of the public water system supervision funds for grants to Tribes and Intertribal Consortia under section 1443(a).

#### **§ 35.675 Maximum federal share.**

(a) The Regional Administrator may provide up to 75 percent of the approved work plan costs.

(b) The Regional Administrator may increase the maximum federal share if the Tribe or Intertribal Consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe or Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship, except that the federal share shall not be greater than 90 percent.

#### **§ 35.676 Eligible recipients.**

A Tribe or Intertribal Consortium is eligible to apply for a public water system supervision grant if the Tribe or each member of the Intertribal Consortium meets the following criteria:

(a) The Tribe or each member of the Intertribal Consortium is recognized by the Secretary of the Interior;

(b) The Tribe or each member of the Intertribal Consortium has a governing

body carrying out substantial governmental duties and powers over any area;

(c) The functions to be exercised under the grant are within the area of the Tribal government's jurisdiction; and

(d) The Tribe or each member of the Intertribal Consortium is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised under the grant.

#### **§ 35.678 Award limitations.**

(a) *Initial grant.* The Regional Administrator will not make an initial award unless the Tribe or each member of the Intertribal Consortium has:

(1) Met the requirements of § 35.676 (Eligible recipients);

(2) Established an approved public water system supervision program or agrees to establish an approvable program within three years of the initial award and assumed primary enforcement responsibility within this period; and

(3) Agreed to use at least one year of the grant funding to demonstrate program capability to implement the requirements found in 40 CFR 142.10.

(b) *Subsequent grants.* The Regional Administrator will not make a subsequent grant, after the initial award, unless the Tribe or each member of the Intertribal Consortia can demonstrate reasonable progress towards assuming primary enforcement responsibility within the three-year period after initial award. After the three-year period expires, the Regional Administrator will not award section 1443(a) funds to an Indian Tribe or Intertribal Consortium unless the Tribe or each member of the Intertribal Consortia has assumed primary enforcement responsibility for the public water system supervision program.

#### **Underground Water Source Protection (Section 1443(b))**

#### **§ 35.680 Purpose.**

(a) *Purpose of section.* Sections 35.680 through 35.688 govern underground water source protection grants to Tribes and Intertribal Consortia under section 1443(b) of the Safe Drinking Water Act.

(b) *Purpose of program.* The Underground Water Source Protection grants are awarded to carry out underground water source protection programs.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 124, 144, 145, 146, and 147.

**§ 35.682 Definition.**

*Tribe.* Any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area.

**§ 35.683 Annual amount reserved by EPA.**

EPA shall reserve up to five percent of the underground water source protection funds each year for underground water source protection grants to Tribes under section 1443(b) of the Safe Drinking Water Act.

**§ 35.685 Maximum federal share.**

(a) The Regional Administrator may provide up to 75 percent of the approved work plan costs.  
 (b) The Regional Administrator may increase the maximum federal share if the Tribe or Intertribal Consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe or Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship, except that the federal share shall not be greater than 90 percent.

**§ 35.686 Eligible recipients.**

A Tribe or Intertribal Consortium is eligible to apply for an underground water source protection grant if the Tribe or each member of the Intertribal Consortium meets the following criteria:

(a) The Tribe or each member of the Intertribal Consortium is recognized by the Secretary of the Interior;

(b) The Tribe or each member of the Intertribal Consortium has a governing body carrying out substantial governmental duties and powers over any area;

(c) The functions to be exercised under the grant are within the area of the Tribal government's jurisdiction; and

(d) The Tribe or each member of the Intertribal Consortium is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised under the grant.

**§ 35.688 Award limitations.**

(a) *Initial grants.* The Regional Administrator will not make an initial award unless the Tribe or each member of the Intertribal Consortium has:

(1) Met the requirements of § 35.676 (Eligible recipients); and

(2) Established an approved underground water source protection program or agrees to establish an approvable program within four years of the initial award.

(b) *Subsequent grants.* The Regional Administrator will not make a

subsequent grant, after the initial award, unless the Tribe can demonstrate reasonable progress towards assuming primary enforcement responsibility within the four-year period after initial award. After the four-year period expires, the Regional Administrator shall not award section 1443(b) funds to an Indian Tribe unless the Tribe has assumed primary enforcement responsibility for the underground water source protection program.

**Lead-Based Paint Program (Section 404(g))****§ 35.690 Purpose.**

(a) *Purpose of section.* Sections 35.690 through 35.693 govern grants to Tribes and Intertribal Consortia under section 404(g) for the Toxic Substances Control Act.

(b) *Purpose of program.* Lead-Based Paint Program grants are awarded to develop and carry out authorized programs to ensure that individuals employed in lead-based paint activities are properly trained; that training programs are accredited; and that contractors employed in such activities are certified.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR part 745.

**§ 35.691 Funding coordination.**

Recipients must use the Lead-Based Paint program funding in a way that complements any related assistance they receive from other federal sources for lead-based paint activities.

**§ 35.693 Eligible recipients.**

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for a Lead-Based Paint Program grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of the Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the Lead-Based Paint Program required by paragraphs (b)(3) and (4) of this section.

**Indoor Radon Grants (Section 306)****§ 35.700 Purpose.**

(a) *Purpose of section.* Sections 35.700 through 35.708 govern Indoor Radon Grants to Tribes and Intertribal Consortia under section 306 of the Toxic Substances Control Act.

(b) *Purpose of program.* (1) Indoor Radon Grants are awarded to assist Tribes and Intertribal Consortia with the development and implementation of programs that assess and mitigate radon and that aim at reducing radon health risks. Indoor Radon Grant funds may be used for the following eligible activities.

(i) Survey of radon levels, including special surveys of geographic areas or classes of buildings (such as public buildings, school buildings, high-risk residential construction types);

(ii) Development of public information and education materials concerning radon assessment, mitigation, and control programs;

(iii) Implementation of programs to control radon on existing and new structures;

(iv) Purchase, by the Tribe or Intertribal Consortium of radon measurement equipment and devices;

(v) Purchase and maintenance of analytical equipment connected to radon measurement and analysis, including costs of calibration of such equipment;

(vi) Payment of costs of Environmental Protection Agency-approved training programs related to radon for permanent Tribal employees;

(vii) Payment of general overhead and program administration costs;

(viii) Development of a data storage and management system for information concerning radon occurrence, levels, and programs;

(ix) Payment of costs of demonstration of radon mitigation methods and technologies as approved by EPA, including Tribal and Intertribal Consortia participation in the Environmental Protection Agency Home Evaluation Program; and

(x) A toll-free radon hotline to provide information and technical assistance.

(2) In implementing paragraphs (b)(1)(iv) and (ix) of this section, a Tribe or Intertribal Consortium should make every effort, consistent with the goals and successful operation of the Tribal Indoor Radon program, to give preference to low-income persons.

**§ 35.702 Basis for allotment.**

(a) The Regional Administrator will allot Indoor Radon Grant funds based on the criteria in EPA guidance in accordance with section 306(d) and (e) of the Toxic Substances Control Act.

(b) No Tribe or Intertribal Consortium may receive an Indoor Radon Grant in excess of 10 percent of the total appropriated amount made available each fiscal year.

**§ 35.703 Eligible recipients.**

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for an Indoor Radon Grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of the Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that a Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the radon grant program required by paragraphs (a)(3) and (4) of this section.

**§ 35.705 Maximum federal share.**

The Regional Administrator may provide Tribes and Intertribal Consortia up to 75 percent of the approved costs for the development and implementation of radon program activities incurred by the Tribe in the first year of a grant to the Tribe or Consortium; 60 percent in the second year; and 50 percent in the third and each year thereafter.

**§ 35.708 Award limitations.**

(a) The Regional Administrator shall consult with the Tribal agency which has the primary responsibility for radon programs as designated by the affected Tribe before including Indoor Radon Grant funds in a Performance Partnership Grant with another Tribal agency.

(b) No grant may be made in any fiscal year to a Tribe or Intertribal Consortium which did not satisfactorily implement the activities funded by the most recent grant awarded to the Tribe or Intertribal Consortium for an Indoor Radon program.

(c) The costs of radon measurement equipment or devices (see § 35.820(b)(1)(iv)) and demonstration of radon mitigation, methods, and technologies (see § 35.820(b)(1)(ix)) shall not, in aggregate, exceed 50 percent of a Tribe's or Intertribal Consortium's radon grant award in a fiscal year.

(d) The costs of general overhead and program administration (see § 35.820(b)(1)(vii)) of an indoor radon grant shall not exceed 25 percent of the amount of a Tribe's or Intertribal Consortium's Indoor Radon Grant in a fiscal year.

(e) A Tribe or Intertribal Consortium may use funds for financial assistance to persons only to the extent such assistance is related to demonstration projects or the purchase and analysis of radon measurement devices.

(f) Recipients must provide the Regional Administrator all radon-related information generated in its grant supported activities, including the results of radon surveys, mitigation demonstration projects, and risk communication studies.

(g) Recipients must maintain and make available to the public, a list of firms and individuals that have received a passing rating under the EPA proficiency rating program under section 305(a)(2) of the Act.

(h) Funds appropriated for section 306 may not be used to cover the costs of federal proficiency rating programs under section 305(a)(2) of the Act. Funds appropriated for section 306 and grants awarded under section 306 may be used to cover the costs of the Tribal proficiency rating programs.

**Toxic Substances Compliance Monitoring (Section 28)**

**§ 35.710 Purpose.**

(a) *Purpose of section.* Sections 35.710 through 35.715 govern Toxic Substances Compliance Monitoring grants to Tribes and Intertribal Consortia under section 28 of the Toxic Substances Control Act.

(b) *Purpose of program.* Toxic Substances Compliance Monitoring grants are awarded to establish and operate compliance monitoring programs to prevent or eliminate unreasonable risks to health or the environment associated with chemical substances or mixtures on Tribal lands with respect to which the Administrator is unable or not likely to take action for their prevention or elimination.

(c) *Associated program regulations.* Refer to 40 CFR parts 700 through 799 for associated program regulations.

**§ 35.712 Competitive process.**

EPA will award Toxic Substances Control Act Compliance Monitoring grants to Tribes or Intertribal Consortia through a competitive process in accordance with national program guidance.

**§ 35.713 Eligible recipients.**

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as

eligible to apply for a Toxic Substances Compliance Monitoring grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of the Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the Toxic Substances Compliance Monitoring grant program required by paragraphs (a)(3) and (4) of this section.

**§ 35.715 Maximum federal share.**

The Regional Administrator may provide up to 75 percent of the approved work plan costs.

**§ 35.718 Award limitation.**

If the Toxic Substances Compliance Monitoring grant funds are included in a Performance Partnership Grant, the toxic substances compliance monitoring work plan commitments must be included in the Performance Partnership Grant work plan.

**Hazardous Waste Management Program Grants (P.L. 105-276)**

**§ 35.720 Purpose.**

(a) *Purpose of section.* Sections 35.720 through 35.725 govern hazardous waste program grants to eligible Tribes and Intertribal Consortia under the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, P.L. 105-276, 112 Stat. 2461, 2499; 42 U.S.C. 6908a (1998).

(b) *Purpose of program.* Tribal hazardous waste program grants are awarded to assist Tribes and Intertribal Consortia in developing and implementing programs to manage hazardous waste.

**§ 35.723 Competitive process.**

EPA will award Tribal hazardous waste program grants to Tribes or Intertribal Consortia on a competitive basis in accordance with national program guidance. After the competitive process is complete, the recipient can, at its discretion, accept the award as a Tribal hazardous waste program grant or add the funds to a Performance Partnership Grant. If the recipient

chooses to add the funds to a Performance Partnership Grant, the Tribal hazardous waste program work plan commitments must be included in the Performance Partnership Grant work plan.

**§ 35.725 Maximum federal share.**

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

**Underground Storage Tanks Program Grants (P.L. 105-276)**

**§ 35.730 Purpose.**

(a) *Purpose of section.* Section 35.730 through 35.733 govern underground

storage tank program grants to eligible Tribes and Intertribal Consortia under P.L. 105-276.

(b) *Purpose of program.* Tribal underground storage tank program grants are awarded to assist Tribes and Intertribal Consortia in developing and implementing programs to manage underground storage tanks.

**§ 35.731 Eligible recipients.**

Eligible recipients of underground storage tank program grants are Tribes and Intertribal Consortia.

**§ 35.732 Basis for allotment.**

The Administrator allots underground storage tank program grant funds to each regional office based on applicable EPA guidance. Regional offices award funds to Tribes and Intertribal Consortia based on their programmatic needs and applicable EPA guidance.

**§ 35.735 Maximum Federal share.**

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

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