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Title 40—Protection of Environment

(This book contains parts 1 to 49)

Part

CHAPTER I—Environmental Protection Agency 1

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

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SUBCHAPTER A—GENERAL

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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Subpart A—Introduction

§ 1.1 Creation and authority.

Reorganization Plan 3 of 1970, established the U.S. Environmental Protection Agency (EPA) in the Executive branch as an independent Agency, effective December 2, 1970.

§ 1.3 Purpose and functions.

The U.S. Environmental Protection Agency permits coordinated and effective governmental action to assure the protection of the environment by abating and controlling pollution on a systematic basis. Reorganization Plan 3 of 1970 transferred to EPA a variety of research, monitoring, standard setting, and enforcement activities related to pollution abatement and control to provide for the treatment of the environment as a single interrelated system. Complementary to these activities are the Agency's coordination and support of research and antipollution activities carried out by State and local governments, private and public groups, individuals, and educational institutions. EPA reinforces efforts among other Federal agencies with respect to the impact of their operations on the environment.

§ 1.5 Organization and general information.

(a) The U.S. Environmental Protection Agency's basic organization consists of Headquarters and 10 Regional Offices. EPA Headquarters in Washington, DC maintains overall planning, coordination and control of EPA programs. Regional Administrators head the Regional Offices and are responsible directly to the Administrator for the execution of the Agency's programs within the boundaries of their Regions.

(b) EPA's Directives System contains definitive statements of EPA's organization, policies, procedures, assignments of responsibility, and delegations of authority. Copies are available for public inspection and copying at the Management and Organization Division, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Information can be obtained from the Office of Public Affairs at all Regional Offices.

(c) EPA conducts procurement pursuant to the Federal Property and Administrative Services Act, the Federal Procurement Regulations, and implementing EPA regulations.

§ 1.7 Location of principal offices.

(a) The EPA Headquarters is in Washington, DC. The mailing address is 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(b) The addresss of (and States served by) the EPA Regional Offices (see § 1.61) are:

(1) Region I, U.S. Environmental Protection Agency, room 2203, John F. Kennedy Federal Building, Boston, MA 02203. (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.)

(2) Region II, U.S. Environmental Protection Agency, Room 900, 26 Federal Plaza, New York, NY 10278. (New Jersey, New York, Puerto Rico, and the Virgin Islands.)

(3) Region III, U.S. Environmental Protection Agency, 841 Chestnut Street, Philadelphia, PA 19107. (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia.)

(4) Region IV, U.S. Environmental Protection Agency, 345 Courtland Street NE., Atlanta, GA 30365. (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.)

(5) Region V, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL 60604. (Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.)

(6) Region VI, U.S. Environmental Protection Agency, 1201 Elm Street, Dallas, TX 75270. (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.)

(7) Region VII, U.S. Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, KS 66101. (Iowa, Kansas, Missouri, and Nebraska.)

(8) Region VIII, U.S. Environmental Protection Agency, 999 18th street, One Denver Place, Denver, CO 80202. (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.)

(9) Region IX, U.S. Environmental Protection Agency, 215 Fremont Street, San Francisco, CA 94105. (Arizona, California, Hawaii, Nevada, American Samoa, Trust Territories of the Pacific Islands, Guam, Wake Islands, and the Northern Marianas.)

(10) Region X, U.S. Environmental Protection Agency, 1200 Sixth Avenue, Seattle, WA 98101. (Alaska, Idaho, Oregon, and Washington.)

[50 FR 26721, June 28, 1985, as amended at 62 FR 1833, Jan. 14, 1997]

Subpart B—Headquarters

§ 1.21 General.

EPA Headquarters is comprised of:

(a) The Office of the Administrator;

(b) Two Associate Administrators and four staff offices which advise the Administrator on cross-cutting Agency headquarters and regional issues and conduct programs with respect to EPA's interface with other national and international governmental organizations;

(c) The Office of Inspector General;

(d) The Office of General Counsel; and

(e) Nine operational offices, each headed by an Assistant Administrator, responsible for carrying out EPA's major environmental and administrative programs.

§ 1.23 Office of the Administrator.

The Environmental Protection Agency is headed by an Administrator who is appointed by the President, by and with the consent of the Senate. The Administrator is responsible to the President for providing overall supervision to the Agency, and is assisted by a Deputy Administrator also appointed by the President, by and with the consent of the Senate. The Deputy Administrator assists the Administrator in the discharge of Agency duties and responsibilities and serves as Acting Administrator in the absence of the Administrator.

§ 1.25 Staff Offices.

(a) *Office of Administrative Law Judges.* The Office of Administrative Law Judges, under the supervision of the Chief Administrative Law Judge, is responsible for presiding over and conducting formal hearings, and issuance of initial decisions, if appropriate, in such proceedings. The Office provides supervision of the Administrative Law Judges, who operate as a component of the Office of Administrative Law Judges, in certain Agency Regional Offices. The Office provides the Agency Hearing Clerk.

(b) *Office of Civil Rights.* The Office of Civil Rights, under the supervision of a Director, serves as the principal adviser to the Administrator with respect to EPA's civil rights programs. The Office develops policies, procedures, and regulations to implement the Agency's civil rights responsibilities, and provides direction to Regional and field

activities in the Office's area of responsibilities. The Office implements and monitors the Agency's equal employment opportunity program; provides advice and guidance to EPA program officials and Regional Administrators on EEO matters; serves as advocate for furthering career opportunities for minorities and women; and processes complaints of discrimination for Agency disposition. The office assures:

(1) Maximum participation of minority business enterprises under EPA contracts and grants;

(2) Equal employment opportunity under Agency service contracts, construction contracts, and grants;

(3) Compliance with the Davis-Bacon Act and related acts;

(4) Compliance with the provisions of laws affecting Agency programs requiring nondiscrimination on account of age and physical handicap and;

(5) Services or benefits are dispensed under any program or activity receiving Agency financial assistance on a nondiscrimination basis.

(c) *Science Advisory Board.* The Science Advisory Board, under the direction of a Director, provides expert and independent advice to the Administrator on the scientific and technical issues facing the Agency. The Office advises on broad, scientific, technical and policy matters; assesses the results of specific research efforts; assists in identifying emerging environmental problems; and advises the Administrator on the cohesiveness and currency of the Agency's scientific programs.

(d) *Office of Small and Disadvantaged Business Utilization.* The Office of Small and Disadvantaged Business Utilization, under the supervision of a Director, is responsible for developing policy and procedures implementing the Agency's small and disadvantaged business utilization responsibilities. The Office provides information and assistance to components of the Agency's field offices responsible for carrying out related activities. The Office develops and implements a program to provide the maximum utilization of women-owned business enterprises in all aspects of EPA contract work; in collaboration with the Procurement and Contracts Management Division, develops programs to stimulate and improve involvement of small and minority business enterprises; and recommends the assignment of technical advisers to assist designated Procurement Center Representatives of the Small Business Administration in their duties. The Office represents EPA at hearings, interagency meetings, conferences and other appropriate forums on matters related to the advancement of these cited business enterprises in EPA's Federal Contracting Program.

(e)(1) *Environmental Appeals Board.* The Environmental Appeals Board is a permanent body with continuing functions composed of no more than four Board Members designated by the Administrator. The Board shall decide each matter before it in accordance with applicable statutes and regulations. The Board typically shall sit on matters before it in three-Member panels, and shall decide each matter by a majority vote. In the event that absence or recusal prevents a three-Member panel, the Board shall sit on a matter as a panel of two Members, and two Members shall constitute a quorum under such circumstances. The Board in its sole discretion shall establish panels to consider matters before it. The Board's decisions regarding panel size and composition shall not be reviewable. In the case of a tie vote, the matter shall be referred to the Administrator to break the tie.

(2) *Functions.* The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate. In performing its functions, the Environmental Appeals Board may consult with any EPA employee concerning any matter governed by the rules set forth in this title, provided such consultation does not violate applicable ex parte rules in this title.

(3) *Qualifications.* Each member of the Environmental Appeals Board shall be a graduate of an accredited law school and a member in good standing of a recognized bar association of any State or the District of Columbia. Board Members shall not be employed by the Office of Enforcement, the Office of the General Counsel, a Regional Office, or any other office directly associated with matters that could come before the Environmental Appeals Board. A Board Member shall recuse himself or herself from deciding a particular case if that Board Member in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.

[50 FR 26721, June 28, 1985, as amended at 57 FR 5323, Feb. 13, 1992; 63 FR 67780, Dec. 9, 1998]

§ 1.27 Offices of the Associate Administrators.

(a) *Office of International Activities.* The Office of International Activities, under the supervision of an Associate Administrator, provides direction to and supervision of the activities, programs, and staff assigned to the Office of International Activities. All of the functions and responsibilities of the Associate Administrator are Agency-wide, and apply to all international activities of the Agency. The Office develops policies and procedures for the direction of the Agency's international programs and activities, subject to U.S. foreign policy, and assures that adequate program, scientific, and legal inputs are provided. It conducts continuing evaluations of the Agency's international activities and makes appropriate recommendations to the Administrator. The Office advises the Administrator and principal Agency officials on the progress and effect of foreign and international programs and issues. The Office serves as the Administrator's representative in contacts with the Department of State and other Federal agencies concerned with international affairs. It negotiates arrangements or understandings relating to international cooperation with foreign organizations. The Office coordinates Agency international contacts and commitments; serves as the focal point for responding to requests for information relating to EPA international activities; and provides an initial point of contact for all foreign visitors. The Office maintains liaison with all relevant international organizations and provides representation where appropriate. It establishes Agency policy, and approves annual plans and modifications for travel abroad and attendance at international conferences and events. It provides administrative support for the general activities of the Executive Secretary of the U.S. side of the US–USSR/PRC agreements on environmental protection and of the U.S. Coordinator for the NATO Committee on the Challenges of Modern Society. The Office supervises these programs with respect to activities which are completely within the purview of EPA.

(b) *Office of Regional Operations.* The Office of Regional Operations, under the supervision of an Associate Administrator, reports directly to the Administrator and Deputy Administrator. The Office serves as the primary communications link between the Administrator/Deputy Administrator and the Regional Administrators. It provides a Headquarters focus for ensuring the involvement of Regions, or consideration of Regional views and needs, in all aspects of the Agency's work. The Office is responsible for assuring Regional participation in Agency decision-making processes, assessing the impact of Headquarters actions on Regional operations, and acting as ombudsman to resolve Regional problems on behalf of the Administrator. The Associate Administrator coordinates Regional issues, organizes Regional Administrator meetings and work groups; and coordinates Regional responses to specific issues. In addition, the Office is responsible for working with the Regional Offices to further the consistent application of national program policies by reinforcing existing administrative, procedural, and program policy mechanisms as well as through initiation of reviews of significant Regional issues of interest to the Administrator. It continually monitors responsiveness

and compliance with established policies and technical needs through formal and informal contact and free dialogue. The Office initiates and conducts on-site field visits to study, analyze, and resolve problems of Regional, sectional, and national scale.

§ 1.29 Office of Inspector General.

The Office of Inspector General assumes overall responsibility for audits and investigations relating to EPA programs and operations. The Office provides leadership and coordination and recommends policies for other Agency activities designed to promote economy and efficiency and to prevent and detect fraud and abuse is such programs and operations. The Office of the Inspector General informs the Administrator, Deputy Administrator, and Congress of serious problems, abuses and deficiencies relating to EPA programs and operations, and of the necessity for and progress of corrective action; and reviews existing and proposed legislation and regulations to assess the impact on the administration of EPA's programs and operations. The Office recommends policies for, and conducts or coordinates relationships between, the Agency and other Federal, State and local government agencies, and nongovernmental entities on all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered by the Agency.

§ 1.31 Office of General Counsel.

The Office of General Counsel is under the supervision of the General Counsel who serves as the primary legal adviser to the Administrator. The office provides legal services to all organizational elements of the Agency with respect to all Agency programs and activities and also provides legal opinions, legal counsel, and litigation support; and assists in the formulation and administration of the Agency's policies and programs as legal adviser.

§ 1.33 Office of Administration and Resources Management.

The Office of Administration and Resources Management is under the supervision of the Assistance Administrator for Administration and Resources Management who provides services to all of the programs and activities of the Agency, except as may be specifically noted. In addition, the Assistant Administrator has primary responsibility Agencywide for policy and procedures governing the functional areas outlined below. The major functions of the Office include resources management and systems (including budget and financial management), personnel services, occupational health and safety, administrative services, organization and management analysis and systems development, information management and services, automated data processing systems, procurement through contracts and grants, and human resources management. This Office is the primary point of contact and manages Agencywide internal controls, audit resolution and follow up, and government-wide management improvement initiatives. In the performance of the above functions and responsibilities, the Assistant Administrator for Administration and Resources Management represents the Administrator in communications with the Office of Management and Budget, Office of Personnel Management, General Accounting Office, General Services Administration, Department of the Treasury, and other Federal agencies prescribing requirements for the conduct of Government budget, fiscal management and administrative activities.

(a) *Office of Administration and Resources Management, Research Triangle Park, North Carolina, (RTP).* The Office of Administration and Resources Management (OARM), RTP, under the supervision of a Director, provides services to all of the programs and activities at RTP and certain financial and automated data processing services Agencywide. The major functions of the Office include personnel services, financial management, procurement through contracts, library and other information services, general services (including safety and security, property and supply, printing, distribution, facilities and other administrative services) and providing both local RTP and Agencywide automated data processing systems services. The Director,

OARM, RTP, supervises the Office of Administration, Financial Management and Data Processing, RTP.

(b) *Office of Administration, Cincinnati, Ohio.* The Office of Administration at Cincinnati, Ohio, under the supervision of a Director, provides and administers personnel, procurement, safety and security, property and supply, printing, distribution, facilities, and other administrative service programs at Cincinnati and other specified geographic locations.

(c) *Office of the Comptroller.* The Office of the Comptroller, under the supervision of the Comptroller, is responsible for Agencywide budget, resources management and financial management functions, including program analysis and planning; budget formulation, preparation and execution; funding allotments and allocations; and developing and maintaining accounting systems, fiscal controls, and systems for payroll and disbursements. The Assistant Administrator's resource systems responsibilities are administered by this Office.

(d) *Office of Administration.* The Office of Administration, under the supervision of a Director, is responsible for the development and conduct of programs for personnel policies, procedures and operations; organization and management systems, control, and services; facilities, property and space management; personnel and property security; policies, procedures, and operations related to procurement through grants, contracts, and interagency agreements; and occupational health and safety.

(e) *Office of Information Resources Management.* The Office of Information Resources Management (OIRM), under the supervision of a Director, provides for an information resource management program (IRM) consistent with the provisions of Public Law 96–511. The Office establishes policy, goals and objectives for implementation of IRM; develops annual and long-range plans and budgets for IRM functions and activities; and promotes IRM concepts throughout the Agency. The Office coordinates IRM activities; plans, develops and operates information systems and services in support of the Agency's management and administrative functions, and other Agency programs and functions as required. The Office oversees the performance of these activities when carried out by other Agency components. The Office performs liaison for interagency sharing of information and coordinates IRM activities with OMB and GSA. The Office ensures compliance with requirements of Public Law 96–511 and other Federal laws, regulations, and guidelines relative to IRM; and chairs the Agency's IRM Steering Committee. The Office develops Agency policies and standards; and administers or oversees Agency programs for library systems and services, internal records management, and the automated collection, processing, storage, retrieval and transmission of data by or for Agency components and programs. The Office provides national program policy and technical guidance for: The acquisition of all information technology, systems and services by or for Agency components and programs, inculding those systems and services acquired by grantees and contractors using Agency funds; the operation of all Agency computers and telecommunications hardware and facilities; and the establishment and/or application of telecommunications and Federal information processing standards. The Office reviews and evaluates information systems and services, including office automation, which are operated by other Agency components; and sets standards for and approves the selection of Agency personnel who are responsible for the technical management of these activities. The Office coordinates its performance of these functions and activities with the Agency's information collection policies and budgets managed by the Office of Policy, Planning and Evaluation.

(f) *The Office of Human Resources Management.* The Office of Human Resources Management (OHRM), under the supervision of a Director, designs strategies, plans, and policies aimedat developing and training all employees, revitalizing EPA organizations, and matching the right people with the right jobs. The Office is responsible for developing and assuring implementation of policies and practices necessary for EPA to meet its present and future

workforce needs. This includes consideration of the interrelationships between the environmental protection workforce needs of EPA and State governments. For Senior Executive Service (SES) personnel, SES candidates, Presidential Executive Interchange Participants, and Management Interns, OHRM establishes policies; assesses and projects Agency executive needs and workforce capabilities; creates, establishes, and implements training and development strategies and programs; provides the full range of personnel functions; supports the Performance Review Board (PRB) and the Executive Resources Board (ERB); and reassigns SES personnel with the concurrence of the ERB. For the areas of workforce management and employee and organizational development, OHRM develops strategies, plans, and policies; coordinates Agencywide implementation of those strategies, plans, and policies; and provides technical assistance to operating personnel offices and States. OHRM, in cooperation with the Office of the Comptroller, evaluates problems with previous workyear use, monitors current workyear utilization, and projects future workyear needs in coordination with the Agency's budget process. The Office is the lead office for coordination of human resources management with the Agency's Strategic Planning and Management System. The Office develops methodologies and procedures for evaluations of Agency human resources management activities; conducts evaluations of human resources management activities Agencywide; and carries out human resources management projects of special interest to Agency management. The Office coordinates its efforts with the Office of Administration (specifically the Personnel Management Division and the Management and Organization Division), the Office of the Comptroller, the Office of Information Resources Management, and the Office of Policy, Planning and Evaluation.

§ 1.35 Office of Enforcement and Compliance Monitoring.

The Office of Enforcement and Compliance Monitoring, under the supervision of the Assistant Administrator for Enforcement and Compliance Monitoring, serves as the principal adviser to the Administrator in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics, and radiation. The Assistant Administrator reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program. The Office manages the national criminal enforcement program; ensures coordination of media office administrative compliance programs, and civil and criminal enforcement activities; and provides technical expertise for enforcement activities.

§ 1.37 Office of External Affairs.

(a) *Office of Federal Activities.* The Office of Federal Activities is headed by a Director who reports to the Assistant Administrator for External Affairs and supervises all the functions of the Office. The Director acts as national program manager for five major programs that include:

(1) The review of other agency environmental impact statements and other major actions under the authority of Section 309 of the Clean Air Act;

(2) EPA compliance with the National Environmental Policy Act (NEPA) and related laws, directives, and Executive policies concerning special environmental areas and cultural resources;

(3) Compliance with Executive policy on American Indian affairs and the development of programs for environmental protection on Indian lands; and

(4) The development and oversight of national programs and internal policies, strategies, and procedures for implementing Executive Order 12088 and other administrative or statutory provisions concerning compliance with environmental requirements by Federal facilities. The Director chairs the Standing Committee on Implementation of Executive Order 12088. The Office serves as the Environmental Protection Agency's (EPA) principal point of contact and liaison with other Federal agencies and provides consultation

and technical assistance to those agencies relating to EPA's areas of expertise and responsibility. The Office administers the filing and information system for all Federal Environmental Impact Statements under agreement with the Council on Environmental Quality (CEQ) and provides liaison with CEQ on this function and related matters of NEPA program administration. The Office provides a central point of information for EPA and the public on environmental impact assessment techniques and methodologies.

(b) *Office of Public Affairs.* The Office of Public Affairs is under the supervision of a Director who serves as chief spokesperson for the Agency and as a principal adviser, along with the Assistant Administrator for External Affairs, to the Adminstrator, Deputy Administrator, and Senior Management Officials, on public affairs aspects of the Agency's activities and programs. The Office of Public Affairs provides to the media adequate and timely information as well as responses to queries from the media on all EPA program activities. It assures that the policy of openness in all information matters, as enunciated by the Administrator, is honored in all respects. Develops publications to inform the general public of major EPA programs and activities; it also develops informational materials for internal EPA use in Headquarters and at the Regions, Labs and Field Offices. It maintains clearance systems and procedures for periodicals and nontechnical information developed by EPA for public distribution, and reviews all publications for public affairs interests. The Office of Public Affairs provides policy direction for, and coordination and oversight of EPA's community relations program. It provides a system for ensuring that EPA educates citizens and responds to their concerns about all environmental issues and assures that there are opportunities for public involvement in the resolution of problems. The Office supervises the production of audio-visual materials, including graphics, radio and video materials, for the general public and for internal audiences, in support of EPA policies and programs. The Office provides program direction and professional review of the performance of public affairs functions in the Regional Offices of EPA, as well as at laboratories and other field offices. The Office of Public Affairs is responsible for reviewing interagency agreements and Headquarters purchase request requisitions expected to result in contracts in the area of public information and community relations. It develops proposals and reviews Headquarters grant applications under consideration when public affairs goals are involved.

(c) *Office of Legislative Analysis.* The Office of Legislative Analysis, under the supervision of a Director who serves in the capacity of Legislative Counsel, is responsible for legislative drafting and liaison activities relating to the Agency's programs. It exercises responsibility for legislative drafting; reports to the Office of Management and Budget and congressional committees on proposed legislation and pending and enrolled bills, as required by OMB Circular No. A–19 and Bulletin No. 72–6; provides testimony on legislation and other matters before congressional committees; and reviews transcripts of legislative hearings. It maintains liaison with the Office of Congressional Liaison on all Agency activities of interest to the Congress. The Office works closely with the staffs of various Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors in accordance with established Agency procedures, in the development of the Agency's legislative program. The Office assists the Assistant Administrator for External Affairs and the Agency's senior policy officials in guiding legislative initiatives through the legislative process. It advises the Assistant Administrator for Administration and Resources Management in matters pertaining to appropriations legislation. It works closely with the Office of Federal Activities to assure compliance with Agency procedures for the preparation of environmental impact statements, in relation to proposed legislation and reports on legislation. The Office coordinates with the Office of Management and Budget, other agencies, and congressional staff members on matters within its area of responsibility; and develops suggested

State and local environmental legislative proposals, using inputs provided by other Agency components. The Legislative Reference Library provides legislative research services for the Agency. The Library secures and furnishes congressional materials to all EPA employees and, if available, to other Government agencies and private organizations; and it also provides the service of securing, upon request, EPA reports and materials for the Congress.

(d) *Office of Congressional Liaison.* The Office of Congressional Liaison is under the supervision of a Director who serves as the principal adviser to the Administrator with respect to congressional activities. All of the functions and responsibilities of the Director are Agencywide and apply to the provision of services with respect to all of the programs and activities of the Agency. The Office serves as the principal point of congressional contact with the Agency and maintains an effective liaison with the Congress on Agency activities of interest to the Congress and, as necessary, maintains liaison with Agency Regional and field officials, other Government agencies, and public and private groups having an interest in legislative matters affecting the Agency. It assures the provision of prompt response to the Congress on all inquiries relating to activities of the Agency; and monitors and coordinates the continuing operating contacts between the staff of the Office of the Comptroller and staff of the Appropriations Subcommittees of Congress.

(e) *Office of Community and Intergovernmental Relations.* The Office of Community and Intergovernmental Relations is under the supervision of a Director who serves as the principal point of contact with public interest groups representing general purpose State and local governments, and is the principal source of advice and information for the Administrator and the Assistant Administrator for External Affairs on intergovernmental relations. The Office maintains liaison on intergovernmental issues with the White House and Office of Management and Budget (OMB); identifies and seeks solutions to emerging intergovernmental issues; recommends and coordinates personal involvement by the Administrator and Deputy Administrator in relations with State, county, and local government officials; coordinates and assists Headquarters components in their handling of broad-gauged and issue-oriented intergovernmental problems. It works with the Regional Administrators and the Office of Regional Operations to encourage the adoption of improved methods for dealing effectively with State and local governments on specific EPA program initiatives; works with the Immediate Office of the Administrator, Office of Congressional Liaison, Office of Public Affairs, and the Regional Offices to develop and carry out a comprehensive liaison program; and tracks legislative initiatives which affect the Agency's intergovernmental relations. It advises and supports the Office Director in implementing the President's Environmental Youth Awards program.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30359, Aug. 14, 1987]

§ 1.39 Office of Policy, Planning and Evaluation.

The Assistant Administrator for Policy, Planning and Evaluation services as principal adviser to the Administrator on Agency policy and planning issues and as such is responsible for supervision and management of the following: Policy analysis; standards and regulations; and management strategy and evaluation. The Assistant Administrator represents the Administrator with Congress and the Office of Management and Budget, and other Federal agencies prescribing requirements for conduct for Government management activities.

(a) *Office of Policy Analysis.* The Office of Policy Analysis is under the supervision of a Director who performs the following functions on an Agencywide basis: economic analysis of Agency programs, policies, standards, and regulations, including the estimation of abatement costs; research into developing new benefits models; benefit-cost analyses; impact assessments; intermediate and long-range strategic studies; consultation and analytical assistance in the areas described above to senior policy and program officials and other offices in the Agency; development and coordination proposals for

major new Agency initiatives; liaison with other agencies; universities, and interest groups on major policy issues and development of a coordinated Agency position; and development of integrated pollution control strategies for selected industrial and geographical areas.

(b) *Office of Standards and Regulations.* The Office of Standards and Regulations is under the supervision of a Director who is responsible for: involving the Office of Policy, Planning and Evaluation (OPPE) in regulatory review; conducting technical and statistical analyses of proposed standards, regulations and guidelines; serving as the Agency focal point for identifying, developing and implementing alternatives to conventional "command and control" regulations; conducting analyses of Agency activities related to chemical substances and providing mechanisms for establishing regulatory priorities and resolving scientific issues affecting rulemaking; ensuring Agency compliance with the Paperwork Reduction Act; evaluating and reviewing all Agency information collection requests and activities, and, in cooperation with the Office of Administration and Resources Management and the Office of Management Systems and Evaluation, evaluating Agency management and uses of data for decision-making.

(c) *Office of Management Systems and Evaluation.* The Office of Management Systems and Evaluation is under the supervision of a Director who directs and coordinates the development, implementation and administration of Agencywide systems for planning, tracking, and evaluating the accomplishments of Agency programs. In consultation with other offices, the Office develops a long-range policy framework for Agency goals, and objectives, identifies strategies for achieving goals, establishes timetables for objectives, and ensures that programs are evaluated against their accomplishments of goals.

§ 1.41 Office of Air and Radiation.

The Office of Air and Radiation is under supervision of the Assistant Administrator for Air and Radiation who serves as principal adviser to the Administrator in matters pertaining to air and radiation programs, and is responsible for the management of these EPA programs: Program policy development and evaluation; environmental and pollution sources' standards development; enforcement of standards; program policy guidance and overview, technical support or conduct of compliance activities and evaluation of Regional air and radiation program activities; development of programs for technical assistance and technology transfer; and selected demonstration programs.

(a) *Office of Mobile Sources.* The Office of Mobile Sources, under the supervision of a Director, is responsible for the mobile source air pollution control functions of the Office of Air and Radiation. The Office is responsible for: Characterizing emissions from mobile sources and related fuels; developing programs for their control, including assessment of the status of control technology and in-use vehicle emissions; for carrying out, in coordination with the Office of Enforcement and Compliance Monitoring as appropriate, a regulatory compliance program to ensure adherence of mobile sources to standards; and for fostering the development of State motor vehicles emission inspection and maintenance programs.

(b) *Office of Air Quality Planning and Standards.* The Office of Air Quality Planning and Standards, under the supervision of a Director, is responsible for the air quality planning and standards functions of the Office of Air and Radiation. The Director for Air Quality Planning and Standards is responsible for emission standards for new stationary sources, and emission standards for hazardous pollutants; for developing national programs, technical policies, regulations, guidelines, and criteria for air pollution control; for assessing the national air pollution control program and the success in achieving air quality goals; for providing assistance to the States, industry and other organizations through personnel training activities and technical information; for providing technical direction and support to Regional Offices and other organizations; for

evaluating Regional programs with respect to State implementation plans and strategies, technical assistance, and resource requirements and allocations for air related programs; for developing and maintaining a national air programs data system, including air quality, emissions and other technical data; and for providing effective technology transfer through the translation of technological developments into improved control program procedures.

(c) *Office of Radiation Programs.* The Office of Radiation Programs, under the supervision of a Director, is responsible to the Assistant Administrator for Air and Radiation for the radiation activities of the Agency, including development of radiation protection criteria, standards, and policies; measurement and control of radiation exposure; and research requirements for radiation programs. The Office provides technical assistance to States through EPA Regional Offices and other agencies having radiation protection programs; establishes and directs a national surveillance and investigation program for measuring radiation levels in the environment; evaluates and assesses the impact of radiation on the general public and the environment; and maintains liaison with other public and private organizations involved in environmental radiation protection activities. The Office coordinates with and assists the Office of Enforcement and Compliance Monitoring in enforcement activities where EPA has jurisdiction. The Office provides editorial policy and guidance, and assists in preparing publications.

§ 1.43 Office of Prevention, Pesticides and Toxic Substances.

The Assistant Administrator serves as the principal adviser to the Administrator in matters pertaining to assessment and regulation of pesticides and toxic substances and is responsible for managing the Agency's pesticides and toxic substances programs under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act; the Toxic Substances Control Act (TSCA); and for promoting coordination of all Agency programs engaged in toxic substances activities. The Assistant Administrator has responsibility for establishing Agency strategies for implementation and integration of the pesticides and the toxic substances programs under applicable Federal statutes; developing and operating Agency programs and policies for assessment and control of pesticides and toxic substances; developing recommendations for Agency priorities for research, monitoring, regulatory, and information-gathering activities relating to pesticides and toxic substances; developing scientific, technical, economic, and social data bases for the conduct of hazard assessments and evaluations in support of toxic substances and pesticides activities; directing pesticides and toxic substances compliance programs; providing toxic substances and pesticides program guidance to EPA Regional Offices; and monitoring, evaluating, and assessing pesticides and toxic substances program operations in EPA Headquarters and Regional Offices.

(a) *Office of Pesticide Programs.* The Office of Pesticide Programs, under the management of a Director and Deputy Director are responsible to the Assistant Administrator for leadership of the overall pesticide activities of the Agency under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act and several provisions of the Federal Food, Drug, and Cosmetic Act, including the development of strategic plans for the control of the national environmental pesticide situation. Such plans are implemented by the Office of Pesticide Programs, other EPA components, other Federal agencies, or by State, local, and private sectors. The Office is also responsible for establishment of tolerance levels for pesticide residues which occur in or on food; registration and reregistration of pesticides; special review of pesticides suspected of posing unreasonable risks to human health or the environment; monitoring of pesticide residue levels in food, humans, and nontarget fish and wildlife; preparation of pesticide registration guidelines; development of standards for the registration and reregistration of pesticide products; provision of program policy direction to

technical and manpower training activities in the pesticides area; development of research needs and monitoring requirements for the pesticide program and related areas; review of impact statements dealing with pesticides; and carrying out of assigned international activities.

(b) *Office of Pollution Prevention and Toxics.* The Office of Pollution Prevention and Toxics (OPPT), under the management of a Director and Deputy Director is responsible to the Assistant Administrator for those activities of the Agency mandated by the Toxic Substances Control Act. The Director is responsible for developing and operating Agency programs and policies for new and existing chemicals. In each of these areas, the Director is responsible for information collection and coordination; data development; health, environmental and economic assessment; and negotiated or regulatory control actions. The Director provides operational guidance to EPA Regional Offices, reviews and evaluates toxic substances activities at EPA Headquarters and Regional Offices; coordinates TSCA activities with other EPA offices and Federal and State agencies, and conducts the export notification required by TSCA and provides information to importers. The Director is responsible for developing policies and procedures for the coordination and integration of Agency and Federal activities concerning toxic substances. The Director is also responsible for coordinating communication with the industrial community, environmental groups, and other interested parties on matters relating to the implementation of TSCA; providing technical support to international activities managed by the Office of International Activities; and managing the joint planning of toxic research and development under the auspices of the Pesticides/Toxic Substances Research Committee.

(c) *Office of Compliance Monitoring.* The Office of Compliance Monitoring, under the supervision of a Director, plans, directs, and coordinates the pesticides and toxic substances compliance programs of the Agency. More specifically, the Office provides a national pesticides and toxic substances compliance overview and program policy direction to the Regional Offices and the States, prepares guidance and policy on compliance issues, establishes compliance priorities, provides technical support for litigation activity, concurs on enforcement actions, maintains liaison with the National Enforcement Investigations Center, develops annual fiscal budgets for the national programs, and manages fiscal and personnel resources for the Headquarters programs. The Office directs and manages the Office of Prevention, Pesticides and Toxic Substances' laboratory data integrity program which conducts laboratory inspections and audits of testing data. The Office issues civil administrative complaints and other administrative orders in cases of first impression, overriding national significance, or violations by any entity located in more than one Region. The office coordinates with the Office of General Counsel and the Office of Enforcement and Compliance Monitoring in an attorney-client relationship, with those Offices providing legal support for informal and formal administrative resolutions of violations; for conducting litigation; for interpreting statutes, regulations and other legal precedents covering EPA's activities; and for advising program managers on the legal implications of alternative courses of action. The Office of Compliance Monitoring coordinates with the Office of Pesticide Programs in the conduct of pesticide enforcement compliance and registration programs under the Federal Insecticide, Fungicide, and Rodenticide Act and participates in decisions involving the cancellation or suspension of registration. The Office establishes policy and operating procedures for pesticide compliance activities including sampling programs, export certification, monitoring programs to assure compliance with experimental use permits, pesticide use restrictions, and recordkeeping requirements, and determines when and whether compliance actions are appropriate. The Office establishes policy and guidance for the State cooperative enforcement agreement program and the applicator training and certification program. The Office of

Compliance Monitoring also coordinates with the Office of Pollution Prevention and Toxics in the conduct of regulatory and compliance programs under the Toxic Substances Control Act and participates in regulation development for TSCA. The Office participates in the control of imminent hazards under TSCA, inspects facilities subject to TSCA regulation as a part of investigations which are national in scope or which require specialized expertise, and samples and analyzes chemicals to determine compliance with TSCA. The Office coordinates and provides guidance to other TSCA compliance activities, including the State cooperative enforcement agreement program and the preparation of administrative suits.

[50 FR 26721, June 28, 1985, as amended at 57 FR 28087, June 24, 1992]

§ 1.45 Office of Research and Development.

The Office of Research and Development is under the supervision of the Assistant Administrator for Research and Development who serves as the principal science adviser to the Administrator, and is responsible for the development, direction, and conduct of a national research, development and demonstration program in: Pollution sources, fate, and health and welfare effects; pollution prevention and control, and waste management and utilization technology; environmental sciences; and monitoring systems. The Office participates in the development of Agency policy, standards, and regulations and provides for dissemination of scientific and technical knowledge, including analytical methods, monitoring techniques, and modeling methodologies. The Office serves as coordinator for the Agency's policies and programs concerning carcinogenesis and related problems and assures appropriate quality control and standardization of analytical measurement and monitoring techniques utilized by the Agency. The Office exercises review and concurrence responsibilities on an Agencywide basis in all budgeting and planning actions involving monitoring which require Heardquarters approval.

(a) *Office of Acid Deposition, Environmental Monitoring and Quality Assurance.* The Office of Acid Deposition, Environmental Monitoring and Quality Assurance (OADEMQA), under the supervision of an Office Director, is responsible for planning, managing and evaluating a comprehensive program for:

(1) Monitoring the cause and effects of acid deposition;

(2) Research and development on the causes, effects and corrective steps for the acid deposition phenomenon;

(3) Research with respect to the transport and fate of pollutants which are released into the atmosphere;

(4) Development and demonstration of techniques and methods to measure exposure and to relate ambient concentrations to exposure by critical receptors;

(5) Research, development and demonstration of new monitoring methods, systems, techniques and equipment for detection, identification and characterization of pollutants at the source and in the ambient environment and for use as reference or standard monitoring methods;

(6) Establishment, direction and coordination of Agencywide Quality Assurance Program; and

(7) Development and provision of quality assurance methods, techniques and material including validation and standardization of analytical methods, sampling techniques, quality control methods, standard reference materials, and techniques for data collection, evaluation and interpretation. The Office identifies specific research, development, demonstration and service needs and priorities; establishes program policies and guidelines; develops program plans including objectives and estimates of resources required to accomplish objectives; administers the approved program and activities; assigns program responsibility and resources to the laboratories assigned by the Assistant Administrator; directs and supervises assigned laboratories in program administration; and conducts reviews of program progress and takes action as necessary to assure timeliness, quality and responsiveness of outputs.

(b) *Office of Environmental Engineering and Technology Demonstration.* The Office of Environmental Engineering and

Technology Demonstration (OEETD) under the supervision of a Director, is responsible for planning, managing, and evaluating a comprehensive program of research, development, and demonstration of cost effective methods and technologies to:

(1) Control Environmental impacts associated with the extraction, processing, conversion, and transportation of energy, minerals, and other resources, and with industrial processing and manufacturing facilities;

(2) Control environmental impacts of public sector activities including publicly-owned waste water and solid waste facilities;

(3) Control and manage hazardous waste generation, storage, treatment, and disposal;

(4) Provide innovative technologies for response actions under Superfund and technologies for control of emergency spills of oils and hazardous waste;

(5) Improve drinking water supply and system operations, including improved understanding of water supply technology and water supply criteria;

(6) Characterize, reduce, and mitigate indoor air pollutants including radon; and

(7) Characterize, reduce, and mitigate acid rain precursors from stationary sources. Development of engineering data needed by the Agency in reviewing premanufacturing notices relative to assessing potential release and exposure to chemicals, treatability by waste treatment systems, containment and control of genetically engineered organisms, and development of alternatives to mitigate the likelihood of release and exposure to existing chemicals. In carrying out these responsibilities, the Office develops program plans and manages the resources assigned to it; implements the approved programs and activities; assigns objectives and resources to the OEETD laboratories; conducts appropriate reviews to assure the quality, timeliness, and responsiveness of outputs; and conducts analyses of the relative environmental and socioeconomic impacts of engineering methods and control technologies and strategies. The Office of Environmental Engineering and Technology Demonstration is the focal point within the Office of Research and Development for providing liaison with the rest of the Agency and with the Department of Energy on issues associated with energy development. The Office is also the focal point within the Office of Research and Development for liaison with the rest of the Agency on issues related to engineering reseach and development and the control of pollution discharges.

(c) *Office of Environmental Processes and Effects Research.* The Office of Environmental Processes and Effects Research, under the supervision of the Director, is responsible for planning, managing, and evaluating a comprehensive research program to develop the scientific and technological methods and data necessary to understand ecological processes, and predict broad ecosystems impacts, and to manage the entry, movement, and fate of pollutants upon nonhuman organisms and ecosystems. The comprehensive program includes:

(1) The development of organism and ecosystem level effect data needed for the establishment of standards, criteria or guidelines for the protection of nonhuman components of the environment and ecosystems integrity and the prevention of harmful human exposure to pollutants;

(2) The development of methods to determine and predict the fate, transport, and environmental levels which may result in human exposure and exposure of nonhuman components of the environment, resulting from the discharge of pollutants, singly or in combination into the environment, including development of source criteria for protection of environmental quality;

(3) The development and demonstration of methods for the control or management of adverse environmental impacts from agriculture and other rural nonprofit sources;

(4) The development and demonstration of integrated pest management strategies for the management of agriculture and urban pests which utilize alternative biological, cultural and chemical controls;

(5) The development of a laboratory and fieldscale screening tests to provide data that can be used to predict the behavior of pollutants in terms of

movement in the environmental, accumulation in the food chain, effects on organisms, and broad escosystem impacts;

(6) Coordination of interagency research activities associated with the health and environmental impacts of energy production and use; and

(7) development and demonstration of methods for restoring degraded ecosystem by means other than source control.

(d) *Office of Health Research.* The Office of Health Research under the supervision of a Director, is responsible for the management of planning, implementing, and evaluating a comprehensive, integrated human health research program which documents acute and chronic adverse effects to man from environmental exposure to pollutants and determines those exposures which have a potentially adverse effect on humans. This documentation is utilized by ORD for criteria development and scientific assessments in support of the Agency's regulating and standard-setting activities. To attain this objective, the program develops tests systems and associated methods and protocols, such as predictive models to determine similarities and differences among test organisms and man; develops methodology and conducts laboratory and field research studies; and develops interagency programs which effectively use pollutants. The Office of Health Research is the Agency's focal point within the Office of Research and Development for providing liaison relative to human health effects and related human exposure issues (excluding issues related to the planning and implementation of research on the human health effects of energy pollutants that is conducted under the Interagency Energy/Environment Program). It responds with recognized authority to changing requirements of the Regions, program offices and other offices for priority technical assistance. In close coordination with Agency research and advisory committees, other agencies and offices, and interaction with academic and other independent scientific bodies, the Office develops health science policy for the Agency. Through these relationships and the scientific capabilities of its laboratories and Headquarters staffs, the Office provides a focal point for matters pertaining to the effects of human exposure to environmental pollutants.

(e) *Office of Health and Environmental Assessment (OHEA).* The Office of Health and Environmental Assessment, under the supervision of a Director, is the principal adviser on matters relating to the development of health criteria, health affects assessment and risk estimation, to the Assistant Administrator for Research and Development. The Director's Office: Develops recommendations on OHEA programs including the identification and development of alternative program goals, priorities, objectives and work plans; develops recommendations on overall office policies and means for their implementation; performs the critical path planning necessary to assure a timely production of OHEA information in response to program office needs; serves as an Agency health assessment advocate for issue resolution and regulatory review in the Agency Steering Committee, Science Advisory Board, and in cooperation with other Federal agencies and the scientific and technical community; and provides administrative support services to the components of OHEA. The Director's Office provides Headquarters coordination for the Environmental Criteria and Assessment Offices.

(f) *Office of Exploratory Research.* The Office of Exploratory Research (OER), under the supervision of a Director, is responsible for overall planning, administering, managing, and evaluating EPA's anticipatory and extramural grant research in response to Agency priorities, as articulated by Agency planning mechanisms and ORD's Research Committees. The Director advises the Assistance Administrator on the direction, scientific quality and effectiveness of ORD's long-term scientific review and evaluation; and research funding assistance efforts. The responsibilities of this office include: Administering ORD's scientific review of extramural requests for research funding assistance; developing research proposal solicitations; managing grant projects; and ensuring project quality and optimum dissemination of results.

The OER is responsible for analyzing EPA's long-range environmental research concerns; forecasting emerging and potential environmental problems and manpower needs; identifying Federal workforce training programs to be used by State and local governments; assuring the participation of minority institutions in environmental research and development activities; and conducting special studies in response to high priority national environmental needs and problems. This office serves as an ORD focal point for university relations and other Federal research and development agencies related to EPA's extramural research program.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

§ 1.47 Office of Solid Waste and Emergency Response.

The Office of Solid Waste and Emergency Response (OSWER), under the supervision of the Assistant Administrator for Solid Waste and Emergency Response, provides Agencywide policy, guidance, and direction for the Agency's solid and hazardous wastes and emergency response programs. This Office has primary responsibility for implementing the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA—"Superfund"). In addition to managing those programs, the Assistant Administrator serves as principal adviser to the Administrator in matters pertaining to them. The Assistant Administrator's responsibilities include: Program policy development and evaluation; development of appropriate hazardous waste standards and regulations; ensuring compliance with applicable laws and regulations; program policy guidance and overview, technical support, and evaluation of Regional solid and hazardous wastes and emergency response activities; development of programs for technical, programmatic, and compliance assistance to States and local governments; development of guidelines and standards for the land disposal of hazardous wastes; analyses of the recovery of useful energy from solid waste; development and implementation of a program to respond to uncontrolled hazardous waste sites and spills (including oil spills); long-term strategic planning and special studies; economic and long-term environmental analyses; economic impact assessment of RCRA and CERCLA regulations; analyses of alternative technologies and trends; and cost-benefit analyses and development of OSWER environmental criteria.

(a) *Office of Waste Programs Enforcement.* The Office of Waste Programs Enforcement (OWPE), under the supervision of a Director, manages a national program of technical compliance and enforcement under CERCLA and RCRA. The Office provides guidance and support for the implementation of the CERCLA and RCRA compliance and enforcement programs. This includes the development of program strategies, long-term and yearly goals, and the formulation of budgets and plans to support implementation of strategies and goals. The Office provides program guidance through the development and issuance of policies, guidance and other documents and through training and technical assistance. The Office oversees and supports Regions and States in the implementation of the CERCLA and RCRA enforcement programs. The Office may assume responsibility for direct management of a limited number of CERCLA and RCRA enforcement actions which are multi-regional in nature or are cases of national significance. The Office serves as the national technical expert for all matters relating to CERCLA and RCRA compliance and enforcement. It represents the interest of the CERCLA and RCRA enforcement programs to other offices of the Agency. In coordination with the Office of External Affairs (OEA) and IO–OSWER, represents the program to external organizations, including the Office of Management and Budget (OMB), Congress, U.S. Department of Justice and other Federal agencies, the media, public interest and industry groups, State and local governments and their associations and the public.

(b) *Office of Solid Waste.* The Office of Solid Waste, under the supervision of a Director, is responsible for the solid and hazardous waste activities of the

Agency. In particular, this Office is responsible for implementing the Resource Conservation and Recovery Act. The Office provides program policy direction to and evaluation of such activities throughout the Agency and establishes solid and hazardous wastes research requirements for EPA.

(c) *Office of Emergency and Remedial Response.* The Office of Emergency and Remedial Response, under the supervision of a Director, is responsible for the emergency and remedial response functions of the Agency (i.e., CERCLA). The Office is specifically responsible for:

(1) Developing national strategy, programs, technical policies, regulations, and guidelines for the control of abandoned hazardous waste sites, and response to and prevention of oil and hazardous substance spills;

(2) Providing direction, guidance, and support to the Environmental Response Teams and overseeing their activities;

(3) Providing direction, guidance, and support to the Agency's non-enforcement emergency and remedial response programs, including emergency and remedial responses to hazardous waste sites;

(4) Developing national accomplishment plans and resources;

(5) Scheduling the guidelines for program plans;

(6) Assisting in the training of personnel;

(7) Monitoring and evaluating the performance, progress, and fiscal status of the Regions in implementing emergency and remedial response program plans;

(8) Maintaining liaison with concerned public and private national organizations for emergency response;

(9) Supporting State emergency response programs; and

(10) Coordinating Office activities with other EPA programs.

(d) *Office of Underground Storage Tanks.* The Office of Underground Storage Tanks, under the supervision of a Director, is responsible for defining, planning, and implementing regulation of underground storage tanks containing petroleum, petroleum products, and chemical products. In particular, this Office is responsible for overseeing implementation of Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended. The Office develops and promulgates regulations and policies including notification, tank design and installation, corrective action, and State program approvals. It also plans for an oversees utilization of the Underground Storage Tank Trust Fund established by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

§ 1.49 Office of Water.

The Office of Water, under the supervision of the Assistant Administrator for Water who serves as the principal adviser to the Administrator in matters pertaining to water programs, is responsible for management of EPA's water programs. Functions of the Office include program policy development and evaluation; environmental and pollution source standards development; program policy guidance and overview; technical support; and evaluation of Regional water activities; the conduct of compliance and permitting activities as they relate to drinking water and water programs; development of programs for technical assistance and technology transfer; development of selected demonstration programs; economic and long-term environmental analysis; and marine and estuarine protection.

(a) *Office of Water Enforcement and Permits.* The Office of Water Enforcement and Permits, under the supervision of a Director, develops policies, strategies, procedures and guidance for EPA and State compliance monitoring, evaluation, and enforcement programs for the Clean Water Act and the Marine Protection Research and Sanctuaries Act. The Office also provides national program direction to the National Pollutant Discharge Elimination System permit program. The office has overview responsibilities and provides technical assistance to the regional activities in both enforcement and permitting programs.

(b) *Office of Water Regulations and Standards.* The Office of Water Regulations and Standards, under the supervision of a Director, is responsible for

the Agency's water regulations and standards functions. The Office is responsible for developing an overall program strategy for the achievement of water pollution abatement in cooperation with other appropriate program offices. The Office assures the coordination of all national water-related activities within this water program strategy, and monitors national progress toward the achievement of water quality goals and is responsible for the development of effluent guidelines and water quality standards, and other pollutant standards, regulations, and guidelines within the program responsibilities of the Office. It exercises overall responsibility for the development of effective State and Regional water quality regulatory control programs. The Office is responsible for the development and maintenance of a centralized water programs data system including compatible water quality, discharger, and program data files utilizing, but not displacing, files developed and maintained by other program offices. It is responsible for developing national accomplishment plans and resource and schedule guidelines for monitoring and evaluating the performance, progress, and fiscal status of the organization in implementing program plans. The Office represents EPA in activities with other Federal agencies concerned with water quality regulations and standards.

(c) *Office of Municipal Pollution Control.* The Office of Municipal Pollution Control, under the supervision of a Director, is responsible for the Agency's water program operations functions. The Office is responsible for developing national strategies, program and policy recommendations, regulations and guidelines for municipal water pollution control; for providing technical direction and support to Regional Offices and other organizations; and for evaluating Regional and State programs with respect to municipal point source abatement and control, and manpower development for water-related activities. The Office assures that priority Headquarters and regional activities are planned and carried out in a coordinated and integrated fashion, including developing and implementing data submission systems.

(d) *Office of Drinking Water.* The Office of Drinking Water, under the supervision of a Director, is responsible for water supply activities of the Agency, including the development of an implementation strategy which provides the national policy direction and coordination for the program. This Office develops regulations and guidelines to protect drinking water quality and existing and future underground sources of drinking water, develops program policy and guidance for enforcement and compliance activities, and recommends policy for water supply protection activities. The office provides guidance and technical information to State agencies, local utilities, and Federal facilities through the Regional Offices on program planning and phasing; evaluates the national level of compliance with the regulations; plans and develops policy guidance for response to national, Regional, and local emergencies; reviews and evaluates, with Regional Offices, technical data for the designation of sole-source aquifers; designs a national program of public information; provides program policy direction for technical assistance and manpower training activities in the water supply area; identifies research needs and develops monitoring requirements for the national water supply program; develops national accomplishments' plans and resource schedule guidelines for monitoring and evaluating the program plans, and program performance, and fiscal status; develops program plans, and budget and program status reports for the water supply program; coordinates water supply activities with other Federal agencies as necessary; and serves as liaison with the National Drinking Water Advisory Council.

(e) *Office of Ground-Water Protection.* The Office of Ground-Water Protection, under the supervision of a Director, oversees implementation of the Agency's Ground-water Protection Strategy. This Office coordinates support of Headquarters and regional activities to develop stronger State government organizations and programs which foster ground-water protection. The Office directs and coordinates Agency analysis

and approaches to unaddressed problems of ground-water contamination; is principally responsible for establishing and implementing a framework for decision-making at EPA on ground-water protection issues; and serves as the focus of internal EPA policy coordination for ground-water.

(f) *Office of Marine and Estuarine Protection*. The Office of Marine and Estuarine Protection, under the supervision of a Director, is responsible for the development of policies and strategies and implementation of a program to protect the marine/estuarine environment, including ocean dumping. The Office provides national direction for the Chesapeake Bay and other estuarine programs, and policy oversight of the Great Lakes Program.

(g) *Office of Wetlands Protection*. The Office of Wetlands Protection, under the supervision of a Director, administers the 404/Wetlands Program and develops policies, procedures, regulations, and strategies addressing the maintenance, enhancement, and protection of the Nations Wetlands. The Office coordinates Agency issues related to wetlands.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

Subpart C—Field Installations

§ 1.61 Regional Offices.

Regional Administrators are responsible to the Administrator, within the boundaries of their Regions, for the execution of the Regional Programs of the Agency and such other responsibilities as may be assigned. They serve as the Administrator's prinicipal representatives in their Regions in contacts and relationships with Federal, State, interstate and local agencies, industry, academic institutions, and other public and private groups. Regional Administrators are responsible for:

(a) Accomplishing national program objectives within the Regions as established by the Administrator, Deputy Administrator, Assistant Administrators, Associate Administrators, and Heads of Headquarters Staff Offices;

(b) Developing, proposing, and implementing approved Regional programs for comprehensive and integrated environmental protection activities;

(c) Total resource management in their Regions within guidelines provided by Headquarters;

(d) Conducting effective Regional enforcement and compliance programs;

(e) Translating technical program direction and evaluation provided by the various Assistant Administrators, Associate Administrators and Heads of Headquarters Staff Offices, into effective operating programs at the Regional level, and assuring that such programs are executed efficiently;

(f) Exercising approval authority for proposed State standards and implementation plans; and

(g) Providing for overall and specific evaluations of Regional programs, both internal Agency and State activities.

PART 2—PUBLIC INFORMATION

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AUTHORITY: 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 205, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C. 300j–4, 300j–9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 8(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136h, 136j, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1414(f), 1418); secs. 104 and 115, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9604 and 9615); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

SOURCE: 41 FR 36902, Sept. 1, 1976, unless otherwise noted.

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

SOURCE: 67 FR 67307, Nov. 5, 2002, unless otherwise noted.

§ 2.100 General provisions.

(a) This subpart contains the rules that the Environmental Protection Agency (EPA or Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Agency also has rules that it follows in processing Freedom of Information (FOI) requests for records submitted to it as Confidential Business Information (CBI). Such records are covered in subpart B of this part. Requests made by individuals for records about themselves under the Privacy Act of 1974 which are processed under 40 CFR part 16, will also be treated as FOIA requests under this subpart. This ensures that the requestor has access to all responsive records. Information routinely provided to the public as part of a regular EPA activity may be provided to the public without following this subpart.

(b) When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not

limited to, the Government Printing Office or the National Technical Information Service, EPA will inform the requester of the steps necessary to obtain records from these sources.

§2.101 Where requests for records are to be filed.

(a) You may request records by writing to the Records, FOIA, and Privacy Branch, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue (2822T), NW, Washington, DC 20460; e-mail: *hq.foia@epa.gov*. You may also access EPA Headquarters and Regional Freedom of Information Offices' Web sites at *http://www.epa.gov/foia* and submit a request via an online form. If you believe the records sought may be located in an EPA regional office, you should send your request to the appropriate regional FOI Officer as indicated in the following list:

(1) Region I (CT, ME, MA, NH, RI, VT): EPA, FOI Officer, One Congress Street, Suite 1100, Boston, MA 02114–2023; e-mail: *r1foia@epa.gov*.

(2) Region II (NJ, NY, PR, VI): EPA, FOI Officer, 290 Broadway, 26th Floor, New York, NY 10007–1866; e-mail: *r2foia@epa.gov*.

(3) Region III (DE, DC, MD, PA, VA, WV): EPA, FOI Officer, 1650 Arch Street, Philadelphia, PA 19103–2029; e-mail: *r3foia@epa.gov*.

(4) Region IV (AL, FL, GA, KY, MS, NC, SC, TN): EPA, Freedom of Information Officer, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303–8960; e-mail: *r4foia@epa.gov*.

(5) Region V (IL, IN, MI, MN, OH, WI): EPA. Freedom of Information Officer, 77 West Jackson Boulevard, Chicago, IL 60604–3507; e-mail: *r5foia@epa.gov*.

(6) Region VI (AR, LA, NM, OK, TX): EPA, Freedom of Information Officer, 1445 Ross Avenue, Dallas, TX 75202–2733; e-mail: *r6foia@epa.gov*.

(7) Region VII (IA, KS, MO, NE): EPA, Freedom of Information Officer, 901 North Fifth Street, Kansas City, KS 66101; e-mail: *r7foia@epa.gov*.

(8) Region VIII (CO, MT, ND, SD, UT, WY): EPA, Freedom of Information Officer, 999 18th Street, Suite 500, Denver, CO 80202–2466, e-mail: *r8foia@epa.gov*.

(9) Region IX (AZ, CA, HI, NV, AS, GU): EPA, Freedom of Information Officer, 75 Hawthorne Street, San Francisco, CA 94105; e-mail: *r9foia@epa.gov*.

(10) Region X (AK, ID, OR, WA): EPA, Freedom of Information Officer, 1200 Sixth Avenue, Seattle, WA 98101; e-mail: *r10foia@epa.gov*.

(b) EPA provides access to all records that the FOIA requires an agency to make regularly available for public inspection and copying. Each office is responsible for determining which of the records it generates are required to be made publicly available and for providing access by the public to them. The Agency will also maintain and make available for public inspection and copying a current subject-matter index of such records and provide a copy or a link to the respective Web site for Headquarters or the Regions. Each index will be updated regularly, at least quarterly, with respect to newly-included records.

(c) All records created by EPA on or after November 1, 1996, which the FOIA requires an agency to make regularly available for public inspection and copying, will be made available electronically through EPA's worldwide Web site, located at *http://www.epa.gov*, or, upon request, through other electronic means. EPA will also include on its worldwide Web site the current subject-matter index of all such records.

§2.102 Procedures for making requests.

(a) *How made and addressed.* You may make a request for EPA records that are not publicly available under §2.201(a)–(b) by writing directly to the appropriate FOI Officer, as listed in §2.101(a). Only written requests for records will be accepted for processing under this subpart. For records located at EPA Headquarters, or in those instances when you cannot determine where to send your request, you may send it to the Records, FOIA, and Privacy Branch, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; e-mail: *hq.foia@epa.gov*. That office will forward your request to the regional FOI Office it believes most likely to have the records that you want. Your

request will be considered received as of the date it is received by the correct FOI Office. Misdirected requests will not be considered received by EPA until the appropriate FOI Office receives the request. For proper handling, you should mark both your request letter and its envelope or e-mail subject line "Freedom of Information Act Request." You should also include your name, mailing address, and daytime telephone number in the event we need to contact you.

(b) EPA employees may attempt in good faith to comply with oral requests for inspection or disclosure of EPA records publicly available under §2.201(a)–(b) , but such requests are not subject to the FOIA or the regulations in this part.

(c) *Description of records sought.* Your request should reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request. If EPA determines that your request does not reasonably describe the records, it will tell you either what additional information you need to provide or why your request is otherwise insufficient. EPA will also give you an opportunity to discuss and modify your request to meet the requirements of this section. Should it be necessary for you to provide a revised description of the records you are seeking, the time necessary to do so will be excluded from the statutory 20 working day period (or any authorized extension of time) that EPA has to respond to your request as discussed in §2.104.

(d) *Agreement to pay fees.* If you make a FOIA request, EPA will consider your request to be an agreement that you will pay all applicable fees charged under §2.107, up to $25.00, unless you seek a waiver of fees. The EPA office responsible for responding to your request ordinarily will confirm this agreement in writing. When making a request, you may specify a willingness to pay a greater or lesser amount. Should it be necessary for you to provide a written agreement to pay additional fees, the time necessary to do so will be excluded from the statutory 20 working day period (or any authorized extension of time).

§2.103 Responsibility for responding to requests.

(a) *In general.* Except as stated in paragraphs (c), (d), (e), and (f) of this section, the EPA office that has possession of that record is the office responsible for responding to you. In determining which records are within the scope of a request, an office will ordinarily include only those records in its possession as of the date the request was received in the Headquarters or Regional FOI Office. If any other date is used, the office will inform you of that date.

(b) *Authority to grant or deny requests.* The head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate.

(c) *Authority to grant or deny fee waivers or requests for expedited treatment.* The head of the Headquarters FOIA Office and Regional FOI Officers, or their designees, are authorized to grant or deny fee waivers or requests for expedited treatment.

(d) *Consultations and referrals.* When a request to EPA seeks records in its possession that originated with another Federal agency, the EPA office receiving the request shall either:

(1) Consult with the Federal agency where the record or portion thereof originated and then respond to your request, or

(2) Direct the FOI Office to refer your request to the Federal agency where the record or portion thereof originated. Whenever all or any part of the responsibility for responding to a request has been referred to another agency, the FOI Office will notify you accordingly.

(e) *Law enforcement information.* Whenever a request is made for a

record containing information that relates to an investigation of a possible violation of law and was originated by another agency, the receiving office will either direct the FOI Office to refer the request to that other agency or consult with that other agency prior to making any release determination.

§2.104 Responses to requests and appeals.

(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal.

(b) On receipt of a request, the FOI Office ordinarily will send a written acknowledgment advising you of the date it was received and of the processing number assigned to the request for future reference.

(c) *Multitrack processing.* The Agency uses three or more processing tracks by distinguishing between simple and complex requests based on the amount of work and/or time needed to process the request, including limits based on the number of pages involved. The Agency will advise you of the processing track in which your request has been placed and of the limits of the different processing tracks. The Agency may place your request in its slower track(s) while providing you the opportunity to limit the scope of your request in order to qualify for faster processing within the specified limits of the faster track(s). If your request is placed in a slower track, the Agency will contact you either by telephone or by letter, whichever is most efficient in each case.

(d) *Unusual circumstances.* When the statutory time limits for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and the time limits are extended on that basis, you will be notified in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed. When the extension is for more than 10 working days, the Agency will provide you with an opportunity either to modify the request so that it may be processed within the 10 working day time limit extension or to arrange an alternative time period for processing the original or modified request.

(e) *Expedited processing.* (1) Requests or appeals will be taken out of order and given expedited treatment whenever EPA determines that such requests or appeals involve a compelling need, as follows:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

(2) A request for expedited processing must be made at the time of the initial request for records or at the time of appeal.

(3) If you are seeking expedited processing, you must submit a statement, certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for the request. For example, if you fit within the category described in paragraph (e)(1)(ii) of this section and are not a full-time member of the news media, you must establish that you are a person whose primary professional activity or occupation is information dissemination, although it need not be your sole occupation. If you fit within the category described in paragraph (e)(1)(ii) of this section, you must also establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days from the date of your request for expedited processing, the head of the Headquarters FOI Staff or Regional FOI Officer will

decide whether to grant your request and will notify you of the decision. If your request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If your request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

(f) *Grants of requests.* Once an office makes a determination to grant a request in whole or in part, it will release the records or parts of records to you and notify you of any applicable fee charged under § 2.107. Records released in part will be annotated, whenever technically feasible, with the applicable FOIA exemption(s) at that part of the record from which the exempt information was deleted.

(g) *Adverse determinations of requests.* Once the Agency makes an adverse determination of a request, the requestor will be notified of that determination in writing. An adverse determination consists of a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; or a denial of a request for expedited treatment.

(h) *Initial denials of requests.* The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations. However, the authority to issue initial denials of requests for existing, located records (other than initial denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent. Each letter will include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including an identification of records being withheld (individual, or if a large number of similar records are being denied, by described category), and any FOIA exemption applied by the office in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under, and a description of the requirements of, paragraph (j) of this section.

(i) *Denial of fee waiver.* The letter denying a request for a fee waiver or expedited treatment will be signed by the head of the Headquarters FOI Staff or Regional FOI Officers.

(j) *Appeals of adverse determinations.* If you are dissatisfied with any adverse determination of your request by an office, you may appeal that determination to the Headquarters Freedom of Information Staff, Records, Privacy and FOIA Branch, Office of Information Collection, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue (2822T), NW., Washington, DC 20460; e-mail: *hq.foia@epa.gov*. The appeal must be made in writing, and it must be submitted to the Headquarters FOI Staff no later than 30 calendar days from the date of the letter denying the request. The Agency will not consider appeals received after the 30-day limit. The appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number, if known). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal." Unless the Administrator directs otherwise, the General Counsel or his/her designee will act on behalf of the Administrator on all appeals under this section, except that:

(1) In the case of an adverse initial determination by the General Counsel or his/her designee, the Administrator or his/her designee will act on the appeal;

(2) The Counsel to the Inspector General will act on any appeal where the Inspector General or his/her designee has made the initial adverse determination; however, if the Counsel to the Inspector General has signed the initial adverse determination, the General Counsel or his/her designee will act on the appeal;

(3) An adverse determination by the Administrator on an initial request will serve as the final action of the Agency; and

(4) If a requester seeks judicial review because the Agency has not responded in a timely manner, any further action on an appeal will take place through the lawsuit.

(k) The decision on your appeal will be made in writing, normally within 20 working days of its receipt by the Headquarters Freedom of Information Staff. A decision affirming an adverse determination in whole or in part will contain a statement of the reason(s) for the decision, including any FOIA exemption(s) applied, and inform you of the FOIA provisions for judicial review of the decision. If the adverse determination is reversed or modified on appeal, you will be notified in a written decision. This written decision will either have the requested information that has been determined on appeal to be releasable attached to it, or your request will be returned to the appropriate office so that it may be reprocessed in accordance with the appeal decision.

(l) If you wish to seek judicial review of any adverse determination, you must first appeal that adverse determination under this section, except when EPA has not responded to your request within the statutory 20 working day time limit. In such cases, you may seek judicial review without making an administrative appeal.

§2.105 Exemption categories.

(a) The FOIA, 5 U.S.C. 552(b), establishes the following nine categories of information which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a):

(1)(i) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and

(ii) Are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding information or refers to particular types of information to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the affected agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety or any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) [Reserved]

§ 2.106 Preservation of records.

Each FOI Officer shall preserve all correspondence pertaining to the FOIA requests that it receives until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Copies of all responsive records should be maintained by the appropriate program office. Records shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 2.107 Fees.

(a) *In general.* The Agency will charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (l) of this section. Requesters will pay fees by check or money order made payable to the U.S. Environmental Protection Agency.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation. FOI Officers will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because an office has reasonable cause to doubt a requester's stated use, the FOI Officer will provide the requester a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses that the Agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work and the cost of operating duplication equipment. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(3) *Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape, disk, or compact disk), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(5) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific

research which is not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(6) *Representative of the news media* or *news media requester* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but FOI Officers will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use.

(7) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter requesting confidential treatment, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Offices will ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, offices will not search line-by-line where duplicating an entire document would be quicker and less expensive.

(c) *Fees to be charged.* (1) There are four categories of requests. Fees for each of these categories will be charged as follows:

(i) *Commercial use requests.* A requester seeking access to records for a commercial use will be charged for the time spent searching for the records, reviewing the records for possible disclosure, and for the cost of each page of duplication. The charges for searching for and/or reviewing the records may be charged even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(ii) *Educational or non-commercial scientific requests.* Requesters from educational or scientific institutions, whose purpose is scholarly, noncommercial research, will be charged only for the cost of record duplication, except that the first 100 pages of duplication will be furnished at no charge.

(iii) *News media requests.* Requesters who are representatives of the news media, and whose purpose in seeking records is noncommercial, will be charged only for the cost of duplication, except that the first 100 pages of duplication will be furnished at no charge.

(iv) *All other requests.* Requesters not covered by one of the three categories above will be charged for the full cost of search and duplication, except that the first two hours of search time and the first 100 pages of duplication will be furnished without charge. The charges for searching for the records will be assessed even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(2) In responding to FOIA requests, the Agency will charge the following

fees unless a waiver or reduction of fees has been granted under paragraph (l) of this section:

(i) *Search.* (A) Search fees will be charged for all requests except for those made by educational institutions, noncommercial scientific institutions, or representatives of the news media subject to the limitations of paragraph (d) of this section. Offices will charge for time spent searching even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(B) For searches and retrievals of requested records, either manually or electronically, conducted by clerical personnel, the fee will be $4.00 for each quarter hour of time. For searches and retrievals of requested records, either manually or electronically, requiring the use of professional personnel, the fee will be $7.00 for each quarter hour of time. For searches and retrievals of requested records, either manually or electronically, requiring the use of managerial personnel, the fee will be $10.25 for each quarter hour of time.

(C) When searches and retrievals are conducted by contractors, requesters will be charged for the actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search. The costs of actual computer resource usage in connection with such searches will also be charged, to the extent they can be determined.

(ii) *Duplication.* Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For either a photocopy or a computer-generated printout of a record (no more than one copy of which need be supplied), the fee will be fifteen (15) cents per page. For electronic forms of duplication, other than a computer-generated printout, offices will charge the direct costs of that duplication. Such direct costs will include the costs of the requested electronic medium on which the copy is to be made and the actual operator time and computer resource usage required to produce the copy, to the extent they can be determined.

(iii) *Review.* Review fees will be charged only to requesters who make a commercial use request. Review fees will be charged only for the initial record review (that is, the review done when an office is deciding whether an exemption applies to a particular record or portion of a record at the initial request level). No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or portions of records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review will be charged when it is made necessary by a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(i) of this section.

(d) *Limitations on charging fees.* (1) No search or review fees will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, offices will provide without charge:

(i) The first 100 pages of duplication, and

(ii) The first two hours of search.

(4) Whenever a total fee calculated under paragraph (c) of this section is $14.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than $14.00.

(e) *Notice of anticipated fees in excess of $25.00.* When the Agency determines or estimates that the fees to be charged under this section will amount to more than $25.00, the Agency will notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. The amount of $25.00 is cumulative for

multi-office requests. If only a portion of the fee can be estimated readily, the Agency will advise the requester that the estimated fee may be only a portion of the total fee. When a requester has been notified that actual or estimated fees will amount to more than $25.00, EPA will do no further work on the request until the requester agrees to pay the anticipated total fee. This time will be excluded from the twenty (20) working day time limit. EPA will memorialize any such agreement in writing. A notice under this paragraph will offer the requester an opportunity to discuss the matter with Agency personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, when an office chooses as a matter of administrative discretion to provide a special service-such as certifying that records are true copies or sending records by other than ordinary mail-the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest.* EPA may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the Agency. EPA will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset. No penalty will be assessed against FOIA requesters for exercising their statutory right to ask that a fee be waived or reduced or to dispute a billing. If a fee is in dispute, penalties will be suspended upon notification.

(h) *Delinquent requesters.* If requesters fail to pay all fees within 60 calendar days of the fees assessment, they will be placed on a delinquency list. Subsequent FOIA requests will not be processed until payment of the overdue fees has first been made.

(i) *Aggregating requests.* When the Agency reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. When requests are separated by a longer period, the Agency will aggregate them only if there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(j) *Advance payments.* (1) For requests other than those described in paragraphs (j)(2) and (3) of this section, an office will not require the requester to make an advance payment (that is, a payment made before EPA begins or continues work on a request). Payment owed for work already completed (that is, a prepayment before copies are sent to a requester) is not an advance payment.

(2) When the Agency determines or estimates that a total fee to be charged under this section will be more than $250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except when it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) When a requester has previously failed to pay a properly charged FOIA fee to the Agency within 30 calendar days of the date of billing, the Agency may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the Agency begins to process a new request or continues to process a pending request from that requester.

(4) When the Agency requires advance payment or payment due under paragraph (j)(3) of this section, the request will not be considered, and EPA will do no further work on the request until the required payment is made.

(k) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any other statute that specifically requires an agency to set and collect fees for particular types of records. When

records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, EPA will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(l) *Waiver or reduction of fees.* (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section when a FOI Office determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, FOI Offices will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, FOI Offices will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. FOI Offices will consider any commercial interest of the requester (with reference to the definition of "commercial use request" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied

the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(4) When only some of the requested records satisfy the requirements for a waiver of fees, a waiver will be granted for only those records.

(5) Requests for the waiver or reduction of fees must address the factors listed in paragraphs (k) (l)–(3) of this section, insofar as they apply to each request. FOI Offices will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in deciding whether to grant waivers or reductions of fees and will consult the appropriate EPA offices as needed. Requests for the waiver or reduction of fees must be submitted along with the request.

(6) When a fee waiver request is denied, EPA will do no further work on the request until it receives an assurance of payment or an appeal of the fee waiver adverse determination is made and a final appeal determination is made pursuant to §2.104(j).

§2.108 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Subpart B—Confidentiality of Business Information

§2.201 Definitions.

For the purposes of this subpart:

(a) *Person* means an individual, partnership, corporation, association, or other public or private organization or legal entity, including Federal, State or local governmental bodies and agencies and their employees.

(b) *Business* means any person engaged in a business, trade, employment, calling or profession, whether or not all or any part of the net earnings derived from such engagement by such person inure (or may lawfully inure) to the benefit of any private shareholder or individual.

(c) *Business information* (sometimes referred to simply as *information*) means any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in recorded form.

(d) *Affected business* means, with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.

(e) *Reasons of business confidentiality* include the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in §2.301 through §2.309.

(f) [Reserved]

(g) Information which is *available to the public* is information in EPA's possession which EPA will furnish to any member of the public upon request and which EPA may make public, release or otherwise make available to any person whether or not its disclosure has been requested.

(h) *Business confidentiality claim* (or, simply, *claim*) means a claim or allegation that business information is entitled to confidential treatment for reasons of business confidentiality, or a request for a determination that such information is entitled to such treatment.

(i) *Voluntarily submitted information* means business information in EPA's possession—

(1) The submission of which EPA had no statutory or contractual authority to require; and

(2) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by EPA of contracts or grants.

(j) *Recorded* means written or otherwise registered in some form for preserving information, including such forms as drawings, photographs, videotape, sound recordings, punched cards, and computer tape or disk.

(k) [Reserved]

(l) *Administrator, Regional Administrator, General Counsel, Regional Counsel,* and *Freedom of Information Officer* mean the EPA officers or employees occupying the positions so titled.

(m) *EPA office* means any organizational element of EPA, at any level or location. (The terms *EPA office* and *EPA legal office* are used in this subpart for the sake of brevity and ease of reference. When this subpart requires that an action be taken by an *EPA office* or by an *EPA legal office,* it is the responsibility of the officer or employee in charge of that office to take the action or ensure that it is taken.)

(n) *EPA legal office* means the EPA General Counsel and any EPA office over which the General Counsel exercises supervisory authority, including the various Offices of Regional Counsel. (See paragraph (m) of this section.)

(o) A *working day* is any day on which Federal Government offices are open for normal business. Saturdays, Sundays, and official Federal holidays are not working days; all other days are.

§ 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.

(a) Sections 2.201 through 2.215 establish basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.

(b) Various statutes (other than 5 U.S.C. 552) under which EPA operates contain special provisions concerning the entitlement to confidential treatment of information gathered under such statutes. Sections 2.301 through 2.311 prescribe rules for treatment of certain categories of business information obtained under the various statutory provisions. Paragraph (b) of each of those sections should be consulted to determine whether any of those sections applies to the particular information in question.

(c) The basic rules of §§ 2.201 through 2.215 govern except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.311. In the event of a conflict between the provisions of the basic rules and those of a special rule which is applicable to the particular information in question, the provision of the special rule shall govern.

(d) If two or more of the sections containing special rules apply to the particular information in question, and the applicable sections prescribe conflicting special rules for the treatment of the information, the rule which provides greater or wider availability to the public of the information shall govern.

(e) For most purposes, a document or other record may usefully be treated as a single unit of *information,* even though in fact the document or record is comprised of a collection of individual items of information. However, in applying the provisions of this subpart, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for differentiation of this type may arise, e.g., because a business confidentiality claim covers only a portion of a record, or because only a portion of the record is eligible for confidential treatment. EPA offices taking action under this subpart must be alert to this problem.

(f) In taking actions under this subpart, EPA offices should consider whether it is possible to obtain the affected business's consent to disclosure of useful portions of records while protecting the information which is or

may be entitled to confidentiality (e.g., by withholding such portions of a record as would identify a business, or by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some similar form).

(g) This subpart does not apply to questions concerning entitlement to confidential treatment or information which concerns an individual solely in his personal, as opposed to business, capacity.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.

(a) *Notice to be included in certain requests and demands for information, and in certain forms.* Whenever an EPA office makes a written request or demand that a business furnish information which, in the office's opinion, is likely to be regarded by the business as entitled to confidential treatment under this subpart, or whenever an EPA office prescribes a form for use by businesses in furnishing such information, the request, demand, or form shall include or enclose a notice which—

(1) States that the business may, if it desires, assert a business confidentiality claim covering part or all of the information, in the manner described by paragraph (b) of this section, and that information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in this subpart;

(2) States that if no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the business; and

(3) Furnishes a citation of the location of this subpart in the Code of Federal Regulations and the FEDERAL REGISTER.

(b) *Method and time of asserting business confidentiality claim.* A business which is submitting information to EPA may assert a business confidentiality claim covering the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as *trade secret, proprietary,* or *company confidential.* Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

(c) *Effect of failure to assert claim at time of submission of information.* If information was submitted by a business to EPA on or after October 1, 1976, in response to an EPA request or demand (or on an EPA-prescribed form) which contained the substance of the notice required by paragraph (a) of this section, and if no business confidentiality claim accompanied the information when it was received by EPA, the inquiry to the business normally required by § 2.204(c)(2) need not be made. If a claim covering the information is received after the information itself is received, EPA will make such efforts as are administratively practicable to associate the late claim with copies of the previously-submitted information in EPA files (see § 2.204(c)(1)). However, EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure or widespread prior dissemination of the information.

§ 2.204 Initial action by EPA office.

(a) *Situations requiring action.* This section prescribes procedures to be used by EPA offices in making initial determinations of whether business information is entitled to confidential treatment for reasons of business confidentiality. Action shall be taken under this section whenever an EPA office:

(1) Learns that it is responsible for responding to a request under 5 U.S.C. 552 for the release of business information; in such a case, the office shall issue an initial determination within the period specified in § 2.112;

(2) Desires to determine whether business information in its possession is entitled to confidential treatment,

even though no request for release of the information has been received; or

(3) Determines that it is likely that EPA eventually will be requested to disclose the information at some future date and thus will have to determine whether the information is entitled to confidential treatment. In such a case this section's procedures should be initiated at the earliest practicable time, in order to increase the time available for preparation and submission of comments and for issuance of determinations, and to make easier the task of meeting response deadlines if a request for release of the information is later received under 5 U.S.C. 552.

(b) *Previous confidentiality determination.* The EPA office shall first ascertain whether there has been a previous determination, issued by a Federal court or by an EPA legal office acting under this subpart, holding that the information in question is entitled to confidential treatment for reasons of business confidentiality.

(1) If such a determination holds that the information is entitled to confidential treatment, the EPA Office shall furnish any person whose request for the information is pending under 5 U.S.C. 552 an initial determination (see § 2.111 and § 2.113) that the information has previously been determined to be entitled to confidential treatment, and that the request is therefore denied. The office shall furnish such person the appropriate case citation or EPA determination. If the EPA office believes that a previous determination which was issued by an EPA legal office may be improper or no longer valid, the office shall so inform the EPA legal office, which shall consider taking action under § 2.205(h).

(2) With respect to all information not known to be covered by such a previous determination, the EPA office shall take action under paragraph (c) of this section.

(c) *Determining existence of business confidentiality claims.* (1) Whenever action under this paragraph is required by paragraph (b)(2) of this section, the EPA office shall examine the information and the office's records to determine which businesses, if any, are affected businesses (see § 2.201(d)), and to determine which businesses if any, have asserted business confidentiality claims which remain applicable to the information. If any business is found to have asserted an applicable claim, the office shall take action under paragraph (d) of this section with respect to each such claim.

(2)(i) If the examination conducted under paragraph (c)(1) of this section discloses the existence of any business which, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information. However, no such inquiry need be made to any business—

(A) Which failed to assert a claim covering the information when responding to an EPA request or demand, or supplying information on an EPA form, which contained the substance of the statements prescribed by § 2.203(a);

(B) Which otherwise failed to assert a claim covering the information after being informed by EPA that such failure could result in disclosure of the information to the public; or

(C) Which has otherwise waived or withdrawn a claim covering the information.

(ii) If a request for release of the information under 5 U.S.C. 552 is pending at the time inquiry is made under this paragraph (c)(2), the inquiry shall be made by telephone or equally prompt means, and the responsible official contacted shall be informed that any claim the business wishes to assert must be brought to the EPA office's attention no later than the close of business on the third working day after such inquiry.

(iii) A record shall be kept of the results of any inquiry under this paragraph (c)(2). If any business makes a claim covering the information, the EPA office shall take further action under paragraph (d) of this section.

(3) If, after the examination under paragraph (c)(1) of this section, and after any inquiry made under paragraph (c)(2) of this section, the EPA office knows of no claim covering the information and the time for response to any inquiry has passed, the information shall be treated for purposes of

this subpart as not entitled to confidential treatment.

(d) *Preliminary determination.* Whenever action under this paragraph is required by paragraph (c)(1) or (2) of this section on any business's claim, the EPA Office shall make a determination with respect to each such claim. Each determination shall be made after consideration of the provisions of §2.203, the applicable substantive criteria in §2.208 or elsewhere in this subpart, and any previously-issued determinations under this subpart which are applicable.

(1) If, in connection with any business's claim, the office determines that the information may be entitled to confidential treatment, the office shall—

(i) Furnish the notice of opportunity to submit comments prescribed by paragraph (e) of this section to each business which is known to have asserted an applicable claim and which has not previously been furnished such notice with regard to the information in question;

(ii) Furnish, to any person whose request for release of the information is pending under 5 U.S.C. 552, a determination (in accordance with §2.113) that the information may be entitled to confidential treatment under this subpart and 5 U.S.C. 552(b)(4), that further inquiry by EPA pursuant to this subpart is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final determination will be issued by an EPA legal office; and

(iii) Refer the matter to the appropriate EPA legal office, furnishing the information required by paragraph (f) of this section after the time has elapsed for receipt of comments from the affected business.

(2) If, in connection with all applicable claims, the office determines that the information clearly is not entitled to confidential treatment, the office shall take the actions required by §2.205(f). However, if a business has previously been furnished notice under §2.205(f) with respect to the same information, no further notice need be furnished to that business. A copy of each notice furnished to a business under this paragraph (d)(2) and §2.205(f) shall be forwarded promptly to the appropriate EPA legal office.

(e) *Notice to affected businesses; opportunity to comment.* (1) Whenever required by paragraph (d)(1) of this section, the EPA office shall promptly furnish each business a written notice stating that EPA is determining under this subpart whether the information is entitled to confidential treatment, and affording the business an opportunity to comment. The notice shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the business's comments shall be addressed (the EPA office furnishing the notice, unless the General Counsel has directed otherwise), the time allowed for comments, and the method for requesting a time extension under §2.205(b)(2). The notice shall further state that EPA will construe a business's failure to furnish timely comments as a waiver of the business's claim.

(2) If action under this section is occasioned by a request for the information under 5 U.S.C. 552, the period for comments shall be 15 working days after the date of the business's receipt of the written notice. In other cases, the EPA office shall establish a reasonable period for comments (not less than 15 working days after the business's receipt of the written notice). The time period for comments shall be considered met if the business's comments are postmarked or hand delivered to the office designated in the notice by the date specified. In all cases, the notice shall call the business's attention to the provisions of §2.205(b).

(3) At or about the time the written notice is furnished, the EPA office shall orally inform a responsible representative of the business (by telephone or otherwise) that the business should expect to receive the written notice, and shall request the business to contact the EPA office if the written notice has not been received within a few days, so that EPA may furnish a duplicate notice.

(4) The written notice required by paragraph (e)(1) of this section shall invite the business's comments on the following points (subject to paragraph (e)(5) of this section):

(i) The portions of the information which are alleged to be entitled to confidential treatment;

(ii) The period of time for which confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently);

(iii) The purpose for which the information was furnished to EPA and the approximate date of submission, if known;

(iv) Whether a business confidentiality claim accompanied the information when it was received by EPA;

(v) Measures taken by the business to guard against undesired disclosure of the information to others;

(vi) The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;

(vii) Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination, or reference to it, if available;

(viii) Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and

(ix) Whether the business asserts that the information is voluntarily submitted information as defined in § 2.201(i), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

(5) To the extent that the EPA office already possesses the relevant facts, the notice need not solicit responses to the matters addressed in paragraphs (e)(4) (i) through (ix) of this section, although the notice shall request confirmation of EPA's understanding of such facts where appropriate.

(6) The notice shall refer to § 2.205(c) and shall include the statement prescribed by § 2.203(a).

(f) *Materials to be furnished to EPA legal office.* When a matter is referred to an EPA legal office under paragraph (d)(1) of this section, the EPA office taking action under this section shall forward promptly to the EPA legal office the following items:

(1) A copy of the information in question, or (where the quantity or form of the information makes forwarding a copy of the information impractical) representative samples, a description of the information, or both;

(2) A description of the circumstances and date of EPA's acquisition of the information;

(3) The name, address, and telephone number of the EPA employee(s) most familiar with the information;

(4) The name, address and telephone number of each business which asserts an applicable business confidentiality claim;

(5) A copy of each applicable claim (or the record of the assertion of the claim), and a description of when and how each claim was asserted;

(6) Comments concerning each business's compliance or noncompliance with applicable requirements of § 2.203;

(7) A copy of any request for release of the information pending under 5 U.S.C. 552;

(8) A copy of the business's comments on whether the information is entitled to confidential treatment;

(9) The office's comments concerning the appropriate substantive criteria under this subpart, and information the office possesses concerning the information's entitlement to confidential treatment; and

(10) Copies of other correspondence or memoranda which pertain to the matter.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.205 Final confidentiality determination by EPA legal office.

(a) *Role of EPA legal office.* (1) The appropriate EPA legal office (see paragraph (i) of this section) is responsible

for making the final administrative determination of whether or not business information covered by a business confidentiality claim is entitled to confidential treatment under this subpart.

(2) When a request for release of the information under 5 U.S.C. 552 is pending, the EPA legal office's determination shall serve as the final determination on appeal from an initial denial of the request.

(i) If the initial denial was issued under §2.204(b)(1), a final determination by the EPA legal office is necessary only if the requestor has actually filed an appeal.

(ii) If the initial denial was issued under §2.204(d)(1), however, the EPA legal office shall issue a final determination in every case, unless the request has been withdrawn. (Initial denials under §2.204(d)(1) are of a procedural nature, to allow further inquiry into the merits of the matter, and a requestor is entitled to a decision on the merits.) If an appeal from such a denial has not been received by the EPA Freedom of Information Officer on the tenth working day after issuance of the denial, the matter shall be handled as if an appeal had been received on that day, for purposes of establishing a schedule for issuance of an appeal decision under §2.117 of this part.

(b) *Comment period; extensions; untimeliness as waiver of claim.* (1) Each business which has been furnished the notice and opportunity to comment prescribed by §2.204(d)(1) and §2.204(e) shall furnish its comments to the office specified in the notice in time to be postmarked or hand delivered to that office not later than the date specified in the notice (or the date established in lieu thereof under this section).

(2) The period for submission of comments may be extended if, before the comments are due, a request for an extension of the comment period is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(3) The period for submission of comments by a business may be shortened in the manner described in paragraph (g) of this section.

(4) If a business's comments have not been received by the specified EPA office by the date they are due (including any approved extension), that office shall promptly inquire whether the business has complied with paragraph (b)(1) of this section. If the business has complied with paragraph (b)(1) but the comments have been lost in transmission, duplicate comments shall be requested.

(c) *Confidential treatment of comments from business.* If information submitted to EPA by a business as part of its comments under this section pertains to the business's claim, is not otherwise possessed by EPA, and is marked when received in accordance with §2.203(b), it will be regarded by EPA as entitled to confidential treatment and will not be disclosed by EPA without the business's consent, unless its disclosure is duly ordered by a Federal court, notwithstanding other provisions of this subpart to the contrary.

(d) *Types of final determinations; matters to be considered.* (1) If the EPA legal office finds that a business has failed to furnish comments under paragraph (b) of this section by the specified due date, it shall determine that the business has waived its claim. If, after application of the preceding sentence, no claim applies to the information, the office shall determine that the information is not entitled to confidential treatment under this subpart and, subject to §2.210, is available to the public.

(2) In all other cases, the EPA legal office shall consider each business's claim and comments, the various provisions of this subpart, any previously-issued determinations under this subpart which are pertinent, the materials furnished it under §2.204(f), and such other materials as it finds appropriate. With respect to each claim, the office shall determine whether or not the information is entitled to confidential treatment for the benefit of the business that asserted the claim, and the period of any such entitlement (e.g., until a certain date, until the occurrence of a specified event, or permanently), and shall take further action under paragraph (e) or (f) of this section, as appropriate.

(3) Whenever the claims of two or more businesses apply to the same information, the EPA legal office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).

(e) *Determination that information is entitled to confidential treatment.* If the EPA legal office determines that the information is entitled to confidential treatment for the full period requested by the business which made the claim, EPA shall maintain the information in confidence for such period, subject to paragraph (h) of this section, § 2.209, and the other provisions of this subpart which authorize disclosure in specified circumstances, and the office shall so inform the business. If any person's request for the release of the information is then pending under 5 U.S.C. 552, the EPA legal office shall issue a final determination denying that request.

(f) *Determination that information is not entitled to confidential treatment; notice; waiting period; release of information.* (1) Notice of denial (or partial denial) of a business confidentiality claim, in the form prescribed by paragraph (f)(2) of this section, shall be furnished—

(i) By the EPA office taking action under § 2.204, to each business on behalf of which a claim has been made, whenever § 2.204(d)(2) requires such notice; and

(ii) By the EPA legal office taking action under this section, to each business which has asserted a claim applicable to the information and which has furnished timely comments under paragraph (b) of this section, whenever the EPA legal office determines that the information is not entitled to confidential treatment under this subpart for the benefit of the business, or determines that the period of any entitlement to confidential treatment is shorter than that requested by the business.

(2) The notice prescribed by paragraph (f)(1) of this section shall be written, and shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact of receipt and the date of receipt. The notice shall state the basis for the determination, that it constitutes final agency action concerning the business confidentiality claim, and that such final agency action may be subject to judicial review under Chapter 7 of Title 5, United States Code. With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the tenth working day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof by the EPA legal office under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination, and to obtain preliminary injunctive relief against disclosure. The notice shall further state that if such an action is timely commenced, EPA may nonetheless make the information available to the public (in the absence of an order by the court to the contrary), once the court has denied a motion for a preliminary injunction in the action or has otherwise upheld the EPA determination, or whenever it appears to the EPA legal office, after reasonable notice to the business, that the business is not taking appropriate measures to obtain a speedy resolution of the action. If the information has been found to be temporarily entitled to confidential treatment, the notice shall further state that the information will not be disclosed prior to the end of the period of such temporary entitlement to confidential treatment.

(3) The period established in a notice under paragraph (f)(2) of this section for commencement of an action to obtain judicial review may be extended if, before the expiration of such period, a request for an extension is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(4) After the expiration of any period of temporary entitlement to confidential treatment, a determination under this paragraph (f) shall be implemented by the EPA legal office by making the information available to the public (in the absence of a court order prohibiting disclosure) whenever—

(i) The period provided for commencement by a business of an action to obtain judicial review of the determination has expired without notice to the EPA legal office of commencement of such an action;

(ii) The court, in a timely-commenced action, has denied the business' motion for a preliminary injunction, or has otherwise upheld the EPA determination; or

(iii) The EPA legal office, after reasonable notice has been provided to the business, finds that the business is not taking appropriate measures to obtain a speedy resolution of the timely-commenced action.

(5) Any person whose request for release of the information under 5 U.S.C. 552 is pending at the time notice is given under paragraph (f)(2) of this section shall be furnished a determination under 5 U.S.C. 552 stating the circumstances under which the information will be released.

(g) *Emergency situations.* If the General Counsel finds that disclosure of information covered by a claim would be helpful in alleviating a situation posing an imminent and substantial danger to public health or safety, he may prescribe and make known to interested persons such shorter comment period (paragraph (b) of this section), post-determination waiting period (paragraph (f) of this section), or both, as he finds necessary under the circumstances.

(h) *Modification of prior determinations.* A determination that information is entitled to confidential treatment for the benefit of a business, made under this subpart by an EPA legal office, shall continue in effect in accordance with its terms until an EPA legal office taking action under this section, or under §2.206 or §2.207, issues a final determination stating that the earlier determination no longer describes correctly the information's entitlement to confidential treatment because of change in the applicable law, newly-discovered or changed facts, or because the earlier determination was clearly erroneous. If an EPA legal office tentatively concludes that such an earlier determination is of questionable validity, it shall so inform the business, and shall afford the business an opportunity to furnish comments on pertinent issues in the manner described by §2.204(e) and paragraph (b) of this section. If, after consideration of any timely comments submitted by the business, the EPA legal office makes a revised final determination that the information is not entitled to confidential treatment, or that the period of entitlement to such treatment will end sooner than it would have ended under the earlier determination, the office will follow the procedure described in paragraph (f) of this section. Determinations under this section may be made only by, or with the concurrence of, the General Counsel.

(i) *Delegation and redelegation of authority.* Unless the General Counsel otherwise directs, or this subpart otherwise specifically provides, determinations and actions required by this subpart to be made or taken by an EPA legal office shall be made or taken by the appropriate Regional counsel whenever the EPA office taking action under §2.204 or §2.206(b) is under the supervision of a Regional Administrator, and by the General Counsel in all other cases. The General Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the General Counsel's supervision. A Regional Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the Regional counsel's supervision.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51661, Dec. 18, 1985]

§2.206 Advance confidentiality determinations.

(a) An advance determination under this section may be issued by an EPA legal office if—

(1) EPA has requested or demanded that a business furnish business information to EPA;

(2) The business asserts that the information, if submitted, would constitute voluntarily submitted information under § 2.201(i);

(3) The business will voluntarily submit the information for use by EPA only if EPA first determines that the information is entitled to confidential treatment under this subpart; and

(4) The EPA office which desires submission of the information has requested that the EPA legal office issue a determination under this section.

(b) The EPA office requesting an advance determination under this section shall—

(1) Arrange to have the business furnish directly to the EPA legal office a copy of the information (or, where feasible, a description of the nature of the information sufficient to allow a determination to be made), as well as the business's comments concerning the matters addressed in § 2.204(e)(4), excluding, however, matters addressed in § 2.204 (e)(4)(iii) and (e)(4)(iv); and

(2) Furnish to the EPA legal office the materials referred to in § 2.204(f) (3), (7), (8), and (9).

(c) In making a determination under this section, the EPA legal office shall first determine whether or not the information would constitute voluntarily submitted information under § 2.201(i). If the information would constitute voluntarily submitted information, the legal office shall further determine whether the information is entitled to confidential treatment.

(d) If the EPA legal office determines that the information would not constitute voluntarily submitted information, or determines that it would constitute voluntarily submitted information but would not be entitled to confidential treatment, it shall so inform the business and the EPA office which requested the determination, stating the basis of the determination, and shall return to the business all copies of the information which it may have received from the business (except that if a request under 5 U.S.C. 552 for release of the information is received while the EPA legal office is in possession of the information, the legal office shall retain a copy of the information, but shall not disclose it unless ordered by a Federal court to do so). The legal office shall not disclose the information to any other EPA office or employee and shall not use the information for any purpose except the determination under this section, unless otherwise directed by a Federal court.

(e) If the EPA legal office determines that the information would constitute voluntarily submitted information and that it is entitled to confidential treatment, it shall so inform the EPA office which requested the determination and the business which submitted it, and shall forward the information to the EPA office which requested the determination.

§ 2.207 Class determinations.

(a) The General Counsel may make and issue a class determination under this section if he finds that—

(1) EPA possesses, or is obtaining, related items of business information;

(2) One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item under one or more of the provisions in this subpart, and that it is therefore proper to treat all such items as a class for one or more purposes under this subpart; and

(3) A class determination would serve a useful purpose.

(b) A class determination shall clearly identify the class of information to which it pertains.

(c) A class determination may state that all of the information in the class—

(1) Is, or is not, voluntarily submitted information under § 2.201(i);

(2) Is, or is not, governed by a particular section of this subpart, or by a particular set of substantive criteria under this subpart;

(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the

Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in §2.204(d)(1)(ii) and §2.205(b), and the list of materials required to be furnished to the EPA legal office under §2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under §2.204(b)(1), §2.204(d), §2.205(d), or §2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under §2.204(d)(2) or §2.205(f).

§2.208 Substantive criteria for use in confidentiality determinations.

Determinations issued under §§2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(d) No statute specifically requires disclosure of the information; and

(e) Either—

(1) The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

(2) The information is voluntarily submitted information (see §2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

§2.209 Disclosure in special circumstances.

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* (1) Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee of Congress, or to the Comptroller General, unless a statute forbids such disclosure.

(2) If the request is for business information claimed as confidential or determined to be confidential, the EPA office processing the request shall provide notice to each affected business of the type of information disclosed and to whom it is disclosed. Notice shall be given at least ten days prior to disclosure, except where it is not possible to provide notice ten days in advance of any date established by the requesting body for responding to the request. Where ten days advance notice cannot be given, as much advance notice as possible shall be provided. Where notice cannot be given before the date established by the requesting body for responding to the request, notice shall be given as promptly after disclosure as possible. Such notice may be given by notice published in the FEDERAL REGISTER or by letter sent by certified mail, return receipt requested, or telegram. However, if the requesting body asks in writing that no notice under

this subsection be given, EPA will give no notice.

(3) At the time EPA discloses the business information, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information and of any determination under this subpart that the information is entitled to confidential treatment.

(c) *Disclosure to other Federal agencies.* EPA may disclose business information to another Federal agency if—

(1) EPA receives a written request for disclosures of the information from a duly authorized officer or employee of the other agency or on the initiative of EPA when such disclosure is necessary to enable the other agency to carry out a function on behalf of EPA;

(2) The request, if any, sets forth the official purpose for which the information is needed;

(3) When the information has been claimed as confidential or has been determined to be confidential, the responsible EPA office provides notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such notice may be given by notice published in the FEDERAL REGISTER at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure. However, no notice shall be required when EPA furnishes business information to another Federal agency to perform a function on behalf of EPA, including but not limited to—

(i) Disclosure to the Department of Justice for purposes of investigation or prosecution of civil or criminal violations of Federal law related to EPA activities;

(ii) Disclosure to the Department of Justice for purposes of representing EPA in any matter; or

(iii) Disclosure to any Federal agency for purposes of performing an EPA statutory function under an interagency agreement.

(4) EPA notifies the other agency of any unresolved business confidentiality claim covering the information and of any determination under this subpart that the information is entitled to confidential treatment, and that further disclosure of the information may be a violation of 18 U.S.C. 1905; and

(5) The other agency agrees in writing not to disclose further any information designated as confidential unless—

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

(ii) The other agency has obtained the consent of each affected business to the proposed disclosure; or

(iii) The other agency has obtained a written statement from the EPA General Counsel or an EPA Regional Counsel that disclosure of the information would be proper under this subpart.

(d) *Court-ordered disclosure.* EPA may disclose any business information in any manner and to the extent ordered by a Federal court. Where possible, and when not in violation of a specific directive from the court, the EPA office disclosing information claimed as confidential or determined to be confidential shall provide as much advance notice as possible to each affected business of the type of information to be disclosed and to whom it is to be disclosed, unless the affected business has actual notice of the court order. At the discretion of the office, subject to any restrictions by the court, such notice may be given by notice in the FEDERAL REGISTER, letter sent by certified mail return receipt requested, or telegram.

(e) *Disclosure within EPA.* An EPA office, officer, or employee may disclose any business information to another EPA office, officer, or employee with an official need for the information.

(f) *Disclosure with consent of business.* EPA may disclose any business information to any person if EPA has obtained the prior consent of each affected business to such disclosure.

(g) *Record of disclosures to be maintained.* Each EPA office which discloses information to Congress, a committee or subcommittee of Congress, the

Comptroller General, or another Federal agency under the authority of paragraph (b) or (c) of this section, shall maintain a record of the fact of such disclosure for a period of not less than 36 months after such disclosure. Such a record, which may be in the form of a log, shall show the name of the affected businesses, the date of disclosure, the person or body to whom disclosure was made, and a description of the information disclosed.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.

(a) Information which is not entitled to confidential treatment under this subpart shall be made available to the public (using the procedures set forth in §§2.204 and 2.205) if its release is requested under 5 U.S.C. 552, unless EPA determines (under subpart A of this part) that, for reasons other than reasons of business confidentiality, the information is exempt from mandatory disclosure and cannot or should not be made available to the public. Any such determination under subpart A shall be coordinated with actions taken under this subpart for the purpose of avoiding delay in responding to requests under 5 U.S.C. 552.

(b) Notwithstanding any other provision of this subpart, if any statute not cited in this subpart appears to require EPA to give confidential treatment to any business information for reasons of business confidentiality, the matter shall be referred promptly to an EPA legal office for resolution. Pending resolution, such information shall be treated as if it were entitled to confidential treatment.

§2.211 Safeguarding of business information; penalty for wrongful disclosure.

(a) No EPA officer or employee may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this subpart.

(b) Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraph (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation of paragraph (a) of this section may result in criminal prosecution under 18 U.S.C. 1905 or other applicable statute.

(d) Each contractor or subcontractor with the United States Government, and each employee of such contractor or subcontractor, who is furnished business information by EPA under §§2.301(h), §2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.308(i), or 2.310(h) shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. Contractors or subcontractors shall take steps to properly safeguard business information including following any security procedures for handling and safeguarding business information which are contained in any manuals, procedures, regulations, or guidelines provided by EPA. Any violation of this paragraph shall constitute grounds for suspension or debarment of the contractor or subcontractor in question. A willful violation of this paragraph may result in criminal prosecution.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51662, Dec. 18, 1985; 58 FR 461, Jan. 5, 1993]

§2.212 Establishment of control offices for categories of business information.

(a) The Administrator, by order, may establish one or more mutually exclusive categories of business information, and may designate for each such category an EPA office (hereinafter referred to as a *control office*) which shall have responsibility for taking actions (other than actions required to be taken by an EPA legal office) with respect to all information within such category.

(b) If a control office has been assigned responsibility for a category of

business information, no other EPA office, officer, or employee may make available to the public (or otherwise disclose to persons other than EPA officers and employees) any information in that category without first obtaining the concurrence of the control office. Requests under 5 U.S.C. 552 for release of such information shall be referred to the control office.

(c) A control office shall take the actions and make the determinations required by § 2.204 with respect to all information in any category for which the control office has been assigned responsibility.

(d) A control office shall maintain a record of the following, with respect to items of business information in categories for which it has been assigned responsibility:

(1) Business confidentiality claims;

(2) Comments submitted in support of claims;

(3) Waivers and withdrawals of claims;

(4) Actions and determinations by EPA under this subpart;

(5) Actions by Federal courts; and

(6) Related information concerning business confidentiality.

§ 2.213 Designation by business of addressee for notices and inquiries.

(a) A business which wishes to designate a person or office as the proper addressee of communications from EPA to the business under this subpart may do so by furnishing in writing to the Headquarters Freedom of Information Operations (1105), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, the following information: The name and address of the business making the designation; the name, address, and telephone number of the designated person or office; and a request that EPA inquiries and communications (oral and written) under this subpart, including inquiries and notices which require reply within deadlines if the business is to avoid waiver of its rights under this subpart, be furnished to the designee pursuant to this section. Only one person or office may serve at any one time as a business's designee under this subpart.

(b) If a business has named a designee under this section, the following EPA inquiries and notices to the business shall be addressed to the designee:

(1) Inquiries concerning a business's desire to assert a business confidentiality claim, under § 2.204(c)(2)(i)(A);

(2) Notices affording opportunity to substantiate confidentiality claims, under § 2.204(d)(1) and § 2.204(e);

(3) Inquires concerning comments, under § 2.205(b)(4);

(4) Notices of denial of confidential treatment and proposed disclosure of information, under § 2.205(f);

(5) Notices concerning shortened comment and/or waiting periods under § 2.205(g);

(6) Notices concerning modifications or overrulings of prior determinations, under § 2.205(h);

(7) Notices to affected businesses under §§ 2.301(g) and 2.301(h) and analogous provisions in §§ 2.302, 2.303, 2.304, 2.305, 2.306, 2.307, and 2.308; and

(8) Notices to affected businesses under § 2.209.

(c) The Freedom of Information Officer shall, as quickly as possible, notify all EPA offices that may possess information submitted by the business to EPA, the Regional Freedom of Information Offices, the Office of General Counsel, and the offices of Regional Counsel of any designation received under this section. Businesses making designations under this section should bear in mind that several working days may be required for dissemination of this information within EPA and that some EPA offices may not receive notice of such designations.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40001, Sept. 8, 1978]

§ 2.214 Defense of Freedom of Information Act suits; participation by affected business.

(a) In making final confidentiality determinations under this subpart, the EPA legal office relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. The EPA legal office may be unable to verify the accuracy of much of the information submitted by the affected business.

(b) If the EPA legal office makes a final confidentiality determination

under this subpart that certain business information is entitled to confidential treatment, and EPA is sued by a requester under the Freedom of Information Act for disclosure of that information, EPA will:

(1) Notify each affected business of the suit within 10 days after service of the complaint upon EPA;

(2) Where necessary to preparation of EPA's defense, call upon each affected business to furnish assistance; and

(3) Not oppose a motion by any affected business to intervene as a party to the suit under rule 24(b) of the Federal Rules of Civil Procedure.

(c) EPA will defend its final confidentiality determination, but EPA expects the affected business to cooperate to the fullest extent possible in this defense.

[43 FR 40001, Sept. 8, 1978]

§ 2.215 Confidentiality agreements.

(a) No EPA officer, employee, contractor, or subcontractor shall enter into any agreement with any affected business to keep business information confidential unless such agreement is consistent with this subpart. No EPA officer, employee, contractor, or subcontractor shall promise any affected business that business information will be kept confidential unless the promise is consistent with this subpart.

(b) If an EPA office has requested information from a State, local, or Federal agency and the agency refuses to furnish the information to EPA because the information is or may constitute confidential business information, the EPA office may enter into an agreement with the agency to keep the information confidential, notwithstanding the provisions of this subpart. However, no such agreement shall be made unless the General Counsel determines that the agreement is necessary and proper.

(c) To determine that an agreement proposed under paragraph (b) of this section is necessary, the General Counsel must find:

(1) The EPA office requesting the information needs the information to perform its functions;

(2) The agency will not furnish the information to EPA without an agreement by EPA to keep the information confidential; and

(3) Either:

(i) EPA has no statutory power to compel submission of the information directly from the affected business, or

(ii) While EPA has statutory power to compel submission of the information directly from the affected business, compelling submission of the information directly from the business would—

(A) Require time in excess of that available to the EPA office to perform its necessary work with the information,

(B) Duplicate information already collected by the other agency and overly burden the affected business, or

(C) Overly burden the resources of EPA.

(d) To determine that an agreement proposed under paragraph (b) of this section is proper, the General Counsel must find that the agreement states—

(1) The purpose for which the information is required by EPA;

(2) The conditions under which the agency will furnish the information to EPA;

(3) The information subject to the agreement;

(4) That the agreement does not cover information acquired by EPA from another source;

(5) The manner in which EPA will treat the information; and

(6) That EPA will treat the information in accordance with the agreement subject to an order of a Federal court to disclose the information.

(e) EPA will treat any information acquired pursuant to an agreement under paragraph (b) of this section in accordance with the procedures of this subpart except where the agreement specifies otherwise.

[43 FR 40001, Sept. 8, 1978]

§§ 2.216–2.300 [Reserved]

§ 2.301 Special rules governing certain information obtained under the Clean Air Act.

(a) *Definitions.* For the purpose of this section:

(1) *Act* means the Clean Air Act, as amended, 42 U.S.C. 7401 *et seq.*

(2)(i) *Emission data* means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *emission data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) *Standard or limitation* means any emission standard or limitation established or publicly proposed pursuant to the Act or pursuant to any regulation under the Act.

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(5) *Manufacturer* has the meaning given it in section 216(1) of the Act, 42 U.S.C. 7550(1).

(b) *Applicability*. (1) This section applies to business information which was—

(i) Provided or obtained under section 114 of the Act, 42 U.S.C. 7414, by the owner or operator of any stationary source, for the purpose (A) of developing or assisting in the development of any implementation plan under section 110 or 111(d) of the Act, 42 U.S.C. 7410, 7411(d), any standard of performance under section 111 of the Act, 42 U.S.C. 7411, or any emission standard under section 112 of the Act, 42 U.S.C. 7412, (B) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (C) of carrying out any provision of the Act (except a provision of Part II of the Act with respect to a manufacturer of new motor vehicles or new motor vehicle engines);

(ii) Provided or obtained under section 208 of the Act, 42 U.S.C. 7542, for the purpose of enabling the Administrator to determine whether a manufacturer has acted or is acting in compliance with the Act and regulations under the Act, or provided or obtained under section 206(c) of the Act, 42 U.S.C. 7525(c); or

(iii) Provided in response to a subpoena for the production of papers, books, or documents issued under the authority of section 307(a) of the Act, 42 U.S.C. 7607(a).

(2) Information will be considered to have been provided or obtained under section 114 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 114, or if its submission could have been required under section 114, regardless of whether section 114 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 113(a) of the Act, 42 U.S.C. 7413(a), whether an action was brought under section 113(b) of the Act, 42

U.S.C. 7413(b), or whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 208 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 208, or if its submission could have been required under section 208, regardless of whether section 208 was cited as the authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(4) Information will be considered to have been provided or obtained under section 206(c) of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 206(c), or if its submission could have been required under section 206(c) regardless of whether section 206(c) was cited as authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(5) Information will be considered to have been provided or obtained under section 307(a) of the Act if it was provided in response to a subpoena issued under section 307(a), or if its production could have been required by subpoena under section 307(a), regardless of whether section 307(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, §2.209 and §§2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is emission data, a standard or limitation, or is collected pursuant to section 211(b)(2)(A) of the Act is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Emission data, standards or limitations, and any other information provided under section 114 or 208 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Emission data and standards or limitations provided in response to a subpoena issued under section 307(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than emission data and standards or limitations) provided in response to a subpoena issued under section 307(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 114, 208 and 307 of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) In connection with any proceeding other than a proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public under this paragraph (g)(2). No information shall be made available to the public under this paragraph (g)(2) until any affected business

has been informed that EPA is considering making the information available to the public under this paragraph (g)(2) in connection with an identified proceeding, and has afforded the business a reasonable period for comment (such notice and opportunity to comment may be afforded in connection with the notice prescribed by § 2.204(d)(1) and § 2.204(e)). Information may be made available to the public under this paragraph (g)(2) only if, after consideration of any timely comments submitted by the business, the General Counsel determines that the information is relevant to the subject of the proceeding and the EPA office conducting the proceeding determines that the public interest would be served by making the information available to the public. Any affected business shall be given at least 5 days' notice by the General Counsel prior to making the information available to the public.

(3) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public, or to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(3). An EPA office proposing disclosure of information under this paragraph (g)(3), shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g)(3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies may be made available to one or more parties of record to the proceeding, upon request of a party, under this paragraph (g)(4). A party of record seeking disclosure of information shall direct his request to the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this paragraph (g)(4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that (i) the party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him, and (ii) any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and to the public interest that would result from the disclosure. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the

eligibility of information to confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(h) *Disclosure to authorized representatives.* (1) Under sections 114, 208 and 307(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h) (2) or (3) of this section.

(2)(i) A person under contract or subcontract to the United States government to perform work in support of EPA in connection with the Act or regulations which implement the Act may be considered an authorized representative of the United States for purposes of this paragraph (h). For purposes of this section, the term "contract" includes grants and cooperative agreements under the Environmental Programs Assistance Act of 1984 (Pub. L. 98–313), and the term "contractor" includes grantees and cooperators under the Environmental Programs Assistance Act of 1984. Subject to the limitations in this paragraph (h)(2), information to which this section applies may be disclosed:

(A) To a contractor or subcontractor with EPA, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract; or

(B) To a contractor or subcontractor with an agency other than EPA, if the EPA program office which provides the information to that agency, contractor, or subcontractor first determines in writing, in consultation with the General Counsel, that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract.

(ii) No information shall be disclosed under this paragraph (h)(2), unless this contract or subcontract in question provides:

(A) That the contractor or subcontractor and the contractor's or subcontractor's employees shall use the information only for the purpose of carrying out the work required by the contract or subcontract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required by the contractor or subcontractor for the performance of the work required under the contract or subcontract, or upon completion of the contract or subcontract (where the information was provided to the contractor or subcontractor by an agency other than EPA, the contractor may disclose or return the information to that agency);

(B) That the contractor or subcontractor shall obtain a written agreement to honor such terms of the contract or subcontract from each of the contractor's or subcontractor's employees who will have access to the information, before such employee is allowed such access; and

(C) That the contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both the United States government and any affected business having an interest in information concerning it supplied to the contractor or subcontractor by the United States government under the contract or subcontract.

(iii) No information shall be disclosed under this paragraph (h)(2) until each affected business has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than 5 working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the

identity of the contractor or subcontractor, the contract or subcontract number, if any, and the purposes to be served by the disclosure.

(iv) The EPA program office shall prepare a record of each disclosure under this paragraph (h)(2), showing the contractor or subcontractor, the contract or subcontract number, the information disclosed, the date(s) of disclosure, and each affected business. The EPA program office shall maintain the record of disclosure and the determination of necessity prepared under paragraph (h)(2)(i) of this section for a period of not less than 36 months after the date of the disclosure.

(3) A State or local governmental agency which has duties or responsibilities under the Act, or under regulations which implement the Act, may be considered an authorized representative of the United States for purposes of this paragraph (h). Information to which this section applies may be furnished to such an agency at the agency's written request, but only if—

(i) The agency has first furnished to the EPA office having custody of the information a written opinion from the agency's chief legal officer or counsel stating that under applicable State or local law the agency has the authority to compel a business which possesses such information to disclose it to the agency, or

(ii) Each affected business is informed of those disclosures under this paragraph (h)(3) which pertain to it, and the agency has shown to the satisfaction of an EPA legal office that the agency's use and disclosure of such information will be governed by State or local law and procedures which will provide adequate protection to the interests of affected businesses.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40002, Sept. 8, 1978; 43 FR 42251, Sept. 20, 1978; 50 FR 51662, Dec. 18, 1985; 58 FR 461, Jan. 5, 1993; 58 FR 5061, Jan 19, 1993; 58 FR 7189, Feb. 5, 1993]

§ 2.302 Special rules governing certain information obtained under the Clean Water Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

(2)(i) *Effluent data* means, with reference to any source of discharge of any pollutant (as that term is defined in section 502(6) of the Act, 33 U.S.C. 1362 (6))—

(A) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *effluent data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any product, method, device, or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) *Standard or limitation* means any prohibition, any effluent limitation, or

any toxic, pre-treatment or new source performance standard established or publicly proposed pursuant to the Act or pursuant to regulations under the Act, including limitations or prohibitions in a permit issued or proposed by EPA or by a State under section 402 of the Act, 33 U.S.C. 1342.

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this part.

(b) *Applicability*. (1) This section applies only to business information—

(i) Provided to or obtained by EPA under section 308 of the Act, 33 U.S.C. 1318, by or from the owner or operator of any point source, for the purpose of carrying out the objective of the Act (including but not limited to developing or assisting in the development of any standard or limitation under the Act, or determining whether any person is in violation of any such standard or limitation); or

(ii) Provided to or obtained by EPA under section 509(a) of the Act, 33 U.S.C. 1369(a).

(2) Information will be considered to have been provided or obtained under section 308 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 308, or if its submission could have been required under section 308, regardless of whether section 308 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 309(a)(3) of the Act, 33 U.S.C. 1319(a)(3), whether a civil action was brought under section 309(b) of the Act, 33 U.S.C. 1319(b), and whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 509(a) of the Act if it was provided in response to a subpoena issued under section 509(a), or if its production could have been required by subpoena under section 509(a), regardless of whether section 509(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(4) This section specifically does not apply to information obtained under section 310(d) or 312(g)(3) of the Act, 33 U.S.C. 1320(d), 1322(g)(3).

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is effluent data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Effluent data, standards or limitations, and any other information provided or obtained under section 308 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Effluent data and standards or limitations provided in response to a subpoena issued under section 509(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than effluent data and standards or limitations) provided in response to a subpoena issued under section 509(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 308 and 509(a) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this

subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 308 and 509(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*

(2) *Manufacturer* has the meaning given it in 42 U.S.C. 4902(6).

(3) *Product* has the meaning given it in 42 U.S.C. 4902(3).

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 13 of the Act, 42 U.S.C. 4912, by or from any manufacturer of any product to which regulations under section 6 or 8 of the Act (42 U.S.C. 4905, 4907) apply. Information will be deemed to have been provided or obtained under section 13 of the Act, if it was provided in response to a request by EPA made for the purpose of enabling EPA to determine whether the manufacturer has acted or is acting in compliance with the Act, or if its submission could have been required under section 13 of the Act, regardless of whether section 13 was cited as authority for the request, whether an order to provide such information was issued under section 11(d) of the Act, 42 U.S.C. 4910(d), and whether the information was provided directly to EPA by the manufacturer or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 13 of the Act, any information to which this section applies may be released by EPA because of its relevance to a matter in controversy in a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*

(2) *Contaminant* means any physical, chemical, biological, or radiological substance or matter in water.

(3) *Proceeding* means any rulemaking, adjudication, or licensing process conducted by EPA under the Act or under regulations which implement the Act, except for any determination under this part.

(b) *Applicability*. (1) This section applies only to information—

(i) Which was provided to or obtained by EPA pursuant to a requirement of a regulation which was issued by EPA under the Act for the purpose of—

(A) Assisting the Administrator in establishing regulations under the Act;

(B) Determining whether the person providing the information has acted or is acting in compliance with the Act; or

(C) Administering any program of financial assistance under the Act; and

(ii) Which was provided by a person—

(A) Who is a supplier of water, as defined in section 1401(5) of the Act, 42 U.S.C. 300f(5);

(B) Who is or may be subject to a primary drinking water regulation under section 1412 of the Act, 42 U.S.C. 300g–1;

(C) Who is or may be subject to an applicable underground injection control program, as defined in section 1422(d) of the Act, 42 U.S.C.300h–1(d);

(D) Who is or may be subject to the permit requirements of section 1424(b) of the Act, 42 U.S.C. 300h–3(b);

(E) Who is or may be subject to an order issued under section 1441(c) of the Act, 42 U.S.C. 300j(c); or

(F) Who is a grantee, as defined in section 1445(e) of the Act, 42 U.S.C. 300j–4(e).

(2) This section applies to any information which is described by paragraph (b)(1) of this section if it was provided in response to a request by EPA or its authorized representative (or by a State agency administering any program under the Act) made for any purpose stated in paragraph (b)(1) of this section, or if its submission could have been required under section 1445 of the Act, 42 U.S.C. 300j–4, regardless of whether such section was cited in any request for the information, or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, and 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.* Section 2.210 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water shall be available to the public notwithstanding any other provision of this part.

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 1445(d) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 1445(d) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act, as amended.

(a) *Definitions.* For purposes of this section:

(1) *Act* means the Solid Waste Disposal Act, as amended, including amendments made by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 *et seq.*

(2) *Person* has the meaning given it in section 1004(15) of the Act, 42 U.S.C. 6903(15).

(3) *Hazardous waste* has the meaning given it in section 1004(5) of the Act, 42 U.S.C. 6903(5).

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act including the issuance of administrative orders and the approval or disapproval of plans (e.g. closure plans) submitted by persons subject to regulation under the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies to information provided to or obtained by EPA under section 3001(b)(3)(B), 3007, or 9005 of the Act, 42 U.S.C 6921(b)(3)(B), 6927, or 6995. Information will be considered to have been provided or obtained under sections 3001(b)(3)(B), 3007, or 9005 of the Act if it was provided in response to a request from EDA made for any of the purposes stated in the Act or if its submission could have been required under those provisions of the Act regardless of whether a specific section was cited as the authority for any request for the information or whether the information was provide directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant in a proceeding.* (1) Under sections 3007(b) and 9005(b) of the Act (42 U.S.C. 6927(b) and 6995(b)), any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 3001(b)(3)(B), 3007(b), and 9005(b) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), and 6995(b)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or State or local government agency under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or State or local government agency shall notify the contractor, subcontractor, or State or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or State or local government agency and its employees to penalties in section 3001(b)(3)(B), 3007(b)(2), or 9005(b)(1) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), or 6995(b)).

[43 FR 40003, Sept. 8, 1978, as amended at 50 FR 51662, Dec. 18, 1985]

§ 2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*

(2) *Chemical substance* has the meaning given it in section 3(2) of the Act, 15 U.S.C. 2602(2).

(3)(i) *Health and safety data* means the information described in paragraphs (a)(3)(i) (A), (B), and (C) of this section with respect to any chemical substance or mixture offered for commercial distribution (including for test marketing purposes and for use in research and development), any chemical substance included on the inventory of chemical substances under section 8 of the Act (15 U.S.C. 2607), or any chemical substance or mixture for which testing is required under section 4 of the Act (15 U.S.C. 2603) or for which notification is required under section 5 of the Act (15 U.S.C. 2604).

(A) Any study of any effect of a chemical substance or mixture on health, on the environment, or on both, including underlying data and epidemiological studies; studies of occupational exposure to a chemical substance or mixture; and toxicological, clinical, and ecological studies of a chemical substance or mixture;

(B) Any test performed under the Act; and

(C) Any data reported to, or otherwise obtained by, EPA from a study described in paragraph (a)(3)(i)(A) of this section or a test described in paragraph (a)(3)(i)(B) of this section.

(ii) Notwithstanding paragraph (a)(3)(i) of this section, no information shall be considered to be *health and safety data* if disclosure of the information would—

(A) In the case of a chemical substance or mixture, disclose processes used in the manufacturing or processing the chemical substance or mixture or,

(B) In the case of a mixture, disclose the portion of the mixture comprised by any of the chemical substances in the mixture.

(4) [Reserved]

(5) *Mixture* has the meaning given it in section 3(8) of the Act, 15 U.S.C. 2602(8).

(6) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies to all information submitted to EPA for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose and either relied upon to avoid some requirement or condition of the Act or incorporated into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. Information will be considered to have been provided under the Act if the information could have been obtained under authority of the Act, whether the Act was cited as authority or not, and whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e)(3) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under §2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding §2.205(i), the General Counsel (or his designee), rather than the regional counsel, shall make the determinations and take the actions required by §2.205;

(2) In addition to the statement prescribed by the second sentence of §2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 20(a) of the Act, 15 U.S.C. 2619, the business may commence an action in an appropriate Federal district court to prevent disclosure.

(3) The following sentence is substituted for the third sentence of §2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to §2.210) EPA will make the information

available to the public on the thirty-first (31st) calendar day after the date of the business' receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business' commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that health and safety data are not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* Section 2.209 applies to information to which this section applies, except that the following two additional provisions apply to § 2.209(c):

(1) The official purpose for which the information is needed must be in connection with the agency's duties under any law for protection of health or the environment or for specific law enforcement purposes; and

(2) EPA notifies the other agency that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the officers and employees of the other agency to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(i) *Disclosure of information relevant in a proceeding.* (1) Under section 14(a)(4) of the Act (15 U.S.C. 2613(a)(4)), any information to which this section applies may be disclosed by EPA when the information is relevant in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. However, any such disclosure shall be made in a manner that preserves the confidentiality of the information to the extent practicable without impairing the proceeding. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (i).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (i) (2), (3), and (4), respectively, of this section.

(j) *Disclosure of information to contractors and subcontractors.* (1) Under section 14(a)(2) of the Act (15 U.S.C. 2613(a)(2)), any information to which this section applies may be disclosed by EPA to a contractor or subcontractor of the United States performing work under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Subject to the limitations in this paragraph (j), information to which this section applies may be disclosed:

(i) To a contractor or subcontractor with EPA, if the EPA program office managing the contract first determines in writing that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract; or

(ii) To a contractor or subcontractor with an agency other than EPA, if the EPA program office which provides the information to that agency, contractor, or subcontractor first determines in writing, in consultation with the General Counsel, that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract.

(2)–(4) The provisions of § 2.301(h)(2) (ii), (iii), and (iv) are incorporated by reference as paragraphs (j) (2), (3), and (4), respectively, of this section.

(5) At the time any information is furnished to a contractor or subcontractor under this paragraph (j), the EPA office furnishing the information to the contractor or subcontractor shall notify the contractor or subcontractor that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the contractor or subcontractor and its employees to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(k) *Disclosure of information when necessary to protect health or the environment against an unreasonable risk of injury.* (1) Under section 14(a)(3) of the Act (15 U.S.C 2613(a)(3)), any information to which this section applies may be disclosed by EPA when disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. However, any disclosure shall be made in a manner that preserves the confidentiality of the information to the extent not inconsistent with protecting health or the environment against the unreasonable risk of injury. Disclosure of information to which this section applies because of the need to protect health or the environment against an unreasonable risk of injury shall be made only in accordance with this paragraph (k).

(2) If any EPA office determines that there is an unreasonable risk of injury to health or the environment and that to protect health or the environment against the unreasonable risk of injury it is necessary to disclose information to which this section applies that otherwise might be entitled to confidential treatment under this subpart, the EPA office shall notify the General Counsel in writing of the nature of the unreasonable risk of injury, the extent of the disclosure proposed, how the proposed disclosure will serve to protect health or the environment against the unreasonable risk of injury, and the proposed date of disclosure. Such notification shall be made as soon as practicable after discovery of the unreasonable risk of injury. If the EPA office determines that the risk of injury is so imminent that it is impracticable to furnish written notification to the General Counsel, the EPA office shall notify the General Counsel orally.

(3) Upon receipt of notification under paragraph (k)(2) of this section, the General Counsel shall make a determination in writing whether disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury. The General Counsel shall also determine the extent of disclosure necessary to protect against the unreasonable risk of injury as well as when the disclosure must be made to protect against the unreasonable risk of injury.

(4) If the General Counsel determines that disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury, the General Counsel shall furnish notice to each affected business of the contemplated disclosure and of the General Counsel's determination. Such notice shall be made in writing by certified mail, return receipt requested, at least 15 days before the disclosure is to be made. The notice shall state the date upon which disclosure will be made. However, if the General Counsel determines that the risk of injury is so imminent that it is impracticable to furnish such notice 15 days before the proposed date of disclosure, the General Counsel may provide notice by means that will provide receipt of the notice by the affected business at least 24 hours before the disclosure is to be made. This may be done by telegram, telephone, or other reasonably rapid means.

[43 FR 40003, Sept. 8, 1978, as amended at 44 FR 17674, Mar. 23, 1979; 58 FR 462, Jan. 5, 1993]

§ 2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide and Rodenticide Act.

(a) *Definitions.* For the purposes of this section;

(1) *Act* means the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.,* and its predecessor, 7 U.S.C. 135 *et seq.*

(2) *Applicant* means any person who has submitted to EPA (or to a predecessor agency with responsibility for administering the Act) a registration statement or application for registration under the Act of a pesticide or of an establishment.

(3) *Registrant* means any person who has obtained registration under the Act of a pesticide or of an establishment.

(b) *Applicability.* This section applies to all information submitted to EPA by an applicant or registrant for the purpose of satisfying some requirement

or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose but incorporated by the applicant or registrant into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. This section does not apply to information supplied to EPA by a petitioner in support of a petition for a tolerance under 21 U.S.C. 346a(d), unless the information is also described by the first sentence of this paragraph.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under §2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding §2.205(i), the General Counsel (or his designee), rather than the Regional Counsel, shall make the determinations and take the actions required by §2.205;

(2) In addition to the statement prescribed by the second sentence of §2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 10(c) of the Act, 7 U.S.C. 136h(c), the business may commence an action in an appropriate Federal district court for a declaratory judgment;

(3) The following sentence is substituted for the third sentence of §2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to §2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination or to obtain a declaratory judgment under section 10(c) of the Act and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding §2.205(g), the 31 calendar day period prescribed by §2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* (1) Section 2.209 applies without change to information to which this section applies. In addition, under section 12(a)(2)(D) of the Act, 7 U.S.C. 136j(a)(2)(D), EPA possesses authority to disclose any information to which this section applies to physicians, pharmacists, and other qualified persons needing such information for the performance of their duties, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority under section 12(a)(2)(D) of the Act may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it might otherwise be entitled to confidential treatment under this subpart) to physicians, pharmacists, hospitals, veterinarians, law enforcement personnel, or governmental agencies with responsibilities for protection of public health, and to employees of any such persons or agencies, or to other qualified persons, when and to the extent that disclosure is necessary in order to treat illness or injury or to prevent imminent harm to persons, property, or the environment, in the opinion of the Administrator or his designee.

(3) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise

might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedure and requirements of §2.301(h)(2) (ii) through (iv).

(4) Information to which this section applies, and which relates to formulas of products, may be disclosed at any public hearing or in findings of fact issued by the Administrator, to the extent and in the manner authorized by the Administrator or his designee.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§2.308 Special rules governing certain information obtained under the Federal Food, Drug and Cosmetic Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. 301 *et seq.*

(2) *Petition* means a petition for the issuance of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, pursuant to section 408(d) of the Act, 21 U.S.C. 346a(d).

(3) *Petitioner* means a person who has submitted a petition to EPA (or to a predecessor agency).

(b) *Applicability.* (1) This section applies only to business information submitted to EPA (or to an advisory committee established under the Act) by a petitioner, solely in support of a petition which has not been acted on by the publication by EPA of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, as provided in section 408(d) (2) or (3) of the Act, 21 U.S.C. 346a(d) (2) or (3).

(2) Section 2.307, rather than this section, applies to information described by the first sentence of §2.307(b) (material incorporated into submissions in order to satisfy the requirements of the Federal Insecticide, Fungicide and Rodenticide Act, as amended), even though such information was originally submitted by a petitioner in support of a petition.

(3) This section does not apply to information gathered by EPA under a proceeding initiated by EPA to establish a tolerance under section 408(e) of the Act, 21 U.S.C. 346a(e).

(c) *Basic rules which apply without change.* Sections 2.201, 2.202, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Effect of submission of information without claim.* Section 2.203 (a) and (b) apply without change to information to which this section applies. Section 2.203(c), however, does not apply to information to which this section applies. A petitioner's failure to assert a claim when initially submitting a petition shall not constitute a waiver of any claim the petitioner may have.

(e) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that—

(1) Unless the EPA office has on file a written waiver of a petitioner's claim, a petitioner shall be regarded as an affected business, a petition shall be treated as if it were covered by a business confidentiality claim, and an EPA office acting under §2.204(d) shall determine that the information in the petition is or may be entitled to confidential treatment and shall take action in accordance with §2.204(d)(1);

(2) In addition to other required provisions of any notice furnished to a petitioner under §2.204(e), such notice shall state that—

(i) Section 408(f) of the Act, 21 U.S.C. 346a(f), affords absolute confidentiality to information to which this section applies, but after publication by EPA of a regulation establishing a tolerance (or exempting the pesticide chemical from the necessity of a tolerance) neither the Act nor this section affords any protection to the information;

(ii) Information submitted in support of a petition which is also incorporated into a submission in order to satisfy a

requirement or condition of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.*, is regarded by EPA as being governed, with respect to business confidentiality, by § 2.307 rather than by this section;

(iii) Although it appears that this section may apply to the information at this time, EPA is presently engaged in determining whether for any reason the information is entitled to confidential treatment or will be entitled to such treatment if and when this section no longer applies to the information; and

(iv) Information determined by EPA to be covered by this section will not be disclosed for as long as this section continues to apply, but will be made available to the public thereafter (subject to § 2.210) unless the business furnishes timely comments in response to the notice.

(f) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel or his designee, rather than the Regional counsel, shall in all cases make the determinations and take the actions required by § 2.205;

(2) In addition to the circumstances mentioned in § 2.205(f)(1), notice in the form prescribed by § 2.205(f)(2) shall be furnished to each affected business whenever information is found to be entitled to confidential treatment under section 408(f) of the Act but not otherwise entitled to confidential treatment. With respect to such cases, the following sentences shall be substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure; provided, that the information will not be made available to the public for so long as it is entitled to confidential treatment under section 408(f) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(f)."; and

(3) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (f)(2) of this section, shall not be shortened without the consent of the business.

(g) [Reserved]

(h) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Such information shall be determined to be entitled to confidential treatment for so long as this section continues to apply to it.

(i) *Disclosure in special circumstances.* (1) Section 2.209 applies to information to which this section applies. In addition, under Section 408(f) of the Act, 21 U.S.C. 346a(f), EPA is authorized to disclose the information to other persons. Such authority under section 408(f) of the Act may be exercised only in accordance with paragraph (i)(2) or (i)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act, with the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, or regulations which implement either such Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedures and requirements of § 2.301(h)(2) (ii) through (iv).

(3) Information to which this section applies may be disclosed by EPA to an advisory committee in accordance with section 408(d) of the Act, 21 U.S.C. 346a(d).

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§2.309 Special rules governing certain information obtained under the Marine Protection, Research and Sanctuaries Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*

(2) *Permit* means any permit applied for or granted under the Act.

(3) *Application* means an application for a permit.

(b) *Applicability.* This section applies to all information provided to or obtained by EPA as a part of any application or in connection with any permit.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Pursuant to section 104(f) of the Act, 33 U.S.C. 1414(f), no information to which this section applies is eligible for confidential treatment.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§2.310 Special rules governing certain information obtained under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Definitions.* For purposes of this section:

(1) *Act* means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, including amendments made by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601, *et seq.*

(2) *Person* has the meaning given it in section 101(21) of the Act, 42 U.S.C. 9601(21).

(3) *Facility* has the meaning given it in section 101(9) of the Act, 42 U.S.C. 9601(9).

(4) *Hazardous substance* has the meaning given it in section 101(14) of the Act, 42 U.S.C. 9601(14).

(5) *Release* has the meaning given it in section 101(22) of the Act, 42 U.S.C. 9601(22).

(6) *Proceeding* means any rulemaking or adjudication conducted by EPA under the Act or under regulations which implement the Act (including the issuance of administrative orders under section 106 of the Act and cost recovery pre-litigation settlement negotiations under sections 107 or 122 of the Act), any cost recovery litigation under section 107 of the Act, or any administrative determination made under section 104 of the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 104 of the Act, 42 U.S.C. 9604, by or from any person who stores, treats, or disposes of hazardous wastes; or where necessary to ascertain facts not available at the facility where such hazardous substances are located, by or from any person who generates, transports, or otherwise handles or has handled hazardous substances, or by or from any person who performs or supports removal or remedial actions pursuant to section 104(a) of the Act. Information will be considered to have been provided or obtained under section 104 of the Act if it was provided in response to a request from EPA or a representative of EPA made for any of the purposes stated in section 104, if it was provided pursuant to the terms of a contract, grant or other agreement to perform work pursuant to section 104, or if its submission could have been required under section 104, regardless of whether section 104 was cited as authority for any request for the information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g)(1) Under section 104(e)(7)(A) of the Act (42 U.S.C. 9604(e)(7)(A)) any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, except with respect to litigation conducted by a Federal court, information to which this section applies which may be entitled to confidential treatment may be made available to the public, or to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(3). An EPA office proposing disclosure of information under this paragraph (g)(3) shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g)(3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, except with respect to litigation conducted by a Federal court, information to which this section applies which may be entitled to confidential treatment may be made available to one or more parties of record to the proceeding, upon request of a party, under this paragraph (g)(4). A party of record seeking disclosure of information shall direct his request to the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this paragraph (g)(4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that:

(i) The party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him; and

(ii) Any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and the public interest that would result from the disclosure.

The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected

business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(5) In connection with cost recovery pre-litigation settlement negotiations under sections 107 or 122 of the Act (42 U.S.C. 9607, 9622), any information to which this section applies that may be entitled to confidential treatment may be made available to potentially responsible parties pursuant to a contractual agreement to protect the information.

(6) In connection with any cost recovery proceeding under section 107 of the Act involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, any information to which this section applies that may be entitled to confidential treatment may be made available to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(6). Such disclosure must be made pursuant to a stipulation and protective order signed by all parties to whom disclosure is made and by the presiding officer.

(h) *Disclosure to authorized representatives.* (1) Under section 104(e)(7) of the Act (42 U.S.C. 9604(e)(7)), EPA possesses authority to disclose to any authorized representative of the Untied States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) The provisions of §2.301(h)(2) are to be used as paragraph (h)(2) of this section.

(3) The provisions of §2.301(h)(3) are to be used as paragraph (h)(3) of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or State or local government under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or State or local government agency shall notify the contractor, subcontractor, or State or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or State or local government agency and its employees to penalties in section 104(e)(7)(B) of the Act (42 U.S.C. 9604(e)(7)(B)).

[50 FR 51663, Dec. 18, 1985, as amended at 58 FR 462, Jan. 5, 1993]

§2.311 Special rules governing certain information obtained under the Motor Vehicle Information and Cost Savings Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Motor Vehicle Information and Cost Savings Act, as amended, 15 U.S.C. 1901 *et seq.*

(2) *Average fuel economy* has the meaning given it in section 501(4) of the Act, 15 U.S.C. 2001(4).

(3) *Fuel economy* has the meaning given it in section 501(6) of the Act, 15 U.S.C. 2001(6).

(4) *Fuel economy data* means any measurement or calculation of fuel economy for any model type and average fuel economy of a manufacturer under section 503(d) of the Act, 15 U.S.C. 2003(d).

(5) *Manufacturer* has the meaning given it in section 501(9) of the Act, 15 U.S.C. 2001(9).

(6) *Model type* has the meaning given it in section 501(11) of the Act, 15 U.S.C. 2001(11).

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under Title V, Part A of the Act, 15 U.S.C. 2001 through 2012. Information will be considered to have been provided or obtained under Title V, Part A of the Act if it was provided in response to a request from EPA made for any purpose stated in Title V, Part A, or if its submission could have been required under Title V Part A, regardless of whether Title V Part A was cited as the authority for any request for information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that information this is fuel economy data is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 505(d)(1) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding under Title V, Part A of the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) The provisions of § 2.301(g)(3) are to be used as paragraph (g)(3) of this section.

(4) The provisions of § 2.301(g)(4) are to be used as paragraph (g)(3) of this section.

[50 FR 51663, Dec. 18, 1985]

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 3 of 1970, 5 U.S.C. App.; 33 U.S.C. 361(a); 42 U.S.C. 300j–9; 42 U.S.C. 6911a, 42 U.S.C. 7601(a).

SOURCE: 50 FR 32387, Aug. 9, 1985, unless otherwise noted.

§ 2.401 Scope and purpose.

This subpart sets forth procedures to be followed when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. (In such cases, employees must state for the record that their testimony does not necessarily represent the official position of EPA. If they are called to state the official position of EPA, they should ascertain that position before appearing.) These procedures also apply to subpoenas *duces tecum* for any document in the possession of EPA and to requests for certification of copies of documents.

(a) These procedures apply to:

(1) State court proceedings (including grand jury proceedings);

(2) Federal civil proceedings, except where the United States, EPA or another Federal agency is a party; and

(3) State and local legislative and administrative proceedings.

(b) These procedures do not apply:

(1) To matters which are not related to EPA;

(2) To Congressional requests or subpoenas for testimony or documents;

(3) Where employees provide expert witness services as approved outside activities in accordance with 40 CFR part 3, subpart E (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA);

(4) Where employees voluntarily testify as private citizens with respect to environmental matters (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA).

(c) The purpose of this subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

§ 2.402 Policy on presentation of testimony and production of documents.

(a) With the approval of the cognizant Assistant Administrator, Office Director, Staff Office Director or Regional Administrator or his designee, EPA employees (as defined in 40 CFR 3.102 (a) and (b)) may testify at the request of another Federal agency, or, where it is in the interests of EPA, at the request of a State or local government or State legislative committee.

(b) Except as permitted by paragraph (a) of this section, no EPA employee may provide testimony or produce documents in any proceeding to which this subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee under §§ 2.403 through 2.406.

§ 2.403 Procedures when voluntary testimony is requested.

A request for testimony by an EPA employee under § 2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

§ 2.404 Procedures when an employee is subpoenaed.

(a) Copies of subpoenas must immediately be sent to the General Counsel or his designee with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director, determines whether compliance with the subpoena would clearly be in the interests of EPA and responds as soon as practicable.

(b) If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn), produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(c) Where employees in the Office of Inspector General are subpoenaed, the Inspector General or his designee makes the determination under paragraphs (a) and (b) of this section in consultation with the General Counsel.

(d) The General Counsel will request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Agency and the employee.

§ 2.405 Subpoenas duces tecum.

Subpoenas *duces tecum* for documents or other materials are treated the same as subpoenas for testimony. Unless the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director (or, as to employees in the Office of Inspector General, the Inspector General) determines that compliance with the subpoena is clearly in the interests of EPA, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn) and respectfully refuse to produce the subpoenaed materials. However, where a subpoena *duces tecum* is essentially a written request for documents, the requested documents will be provided or denied in accordance with subparts A and B of this part where approval to respond to the subpoena has not been granted.

§ 2.406 Requests for authenticated copies of EPA documents.

Requests for authenticated copies of EPA documents for purposes of admissibility under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents which would otherwise be released pursuant to subpart A. For purposes of Rule 44 the *person having legal custody of the record* is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director

or his designee. The advice of the Office of General Counsel should be obtained concerning the proper form of authentication.

PART 4—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

§ 4.1 Uniform relocation assistance and real property acquisition.

Effective April 2, 1989, regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17, 101 Stat. 246–255, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48023, Dec. 17, 1987 and 54 FR 8912, Mar. 2, 1989]

PART 5—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52890, Aug. 30, 2000, unless otherwise noted.

Subpart A—Introduction

§5.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

§5.105 Definitions.

As used in these Title IX regulations, the term:

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

Designated agency official means the Director, Office of Civil Rights.

Educational institution means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth at §§ 5.100 through 5.605.

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

[65 FR 52865, 52890, Aug. 30, 2000]

§ 5.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-

academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§5.115 Assurance required.

(a) *General.* Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §5.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§5.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§5.205 through 5.235(a).

§5.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as

amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 5.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 5.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 5.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 5.300 through 5.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 5.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B—Coverage

§ 5.200 Application.

Except as provided in §§ 5.205 through 5.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 5.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 5.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 5.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 5.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 5.225 and 5.230, and §§ 5.300 through 5.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§5.300 through .310.* Except as provided in paragraphs (d) and (e) of this section, §§5.300 through 5.310 apply to each recipient. A recipient to which §§5.300 through 5.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§5.300 through 5.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§5.300 through 5.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§5.300 through 5.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 5.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§5.300 through 5.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§5.300 through 5.310.

§ 5.230 Transition plans.

(a) *Submission of plans.* An institution to which §5.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §5.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§5.300 through 5.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §5.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§5.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a "program or activity" subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save

the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 5.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 5.300 through §§ 5.310 apply, except as provided in §§ 5.225 and 5.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 5.300 through 5.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 5.300 through 5.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 5.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 5.305 Preference in admission.

A recipient to which §§ 5.300 through 5.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 5.300 through 5.310.

§ 5.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 5.300 through 5.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be

required to undertake additional recruitment efforts for one sex as remedial action pursuant to §5.110(a), and may choose to undertake such efforts as affirmative action pursuant to §5.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§5.300 through 5.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§5.300 through 5.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§5.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 5.400 through 5.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§5.300 through 5.310 do not apply, or an entity, not a recipient, to which §§5.300 through 5.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§5.400 through 5.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no

action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 5.405 Housing.

(a) *Generally*. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient*. (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing*. (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 5.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 5.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§5.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§5.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§5.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 5.450.

§ 5.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 5.500 through 5.550.

§ 5.440 Health and insurance benefits and services.

Subject to § 5.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 5.500 through 5.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 5.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 5.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification

for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 5.450 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

§ 5.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 5.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether

full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 5.500 through 5.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application*. The provisions of §§ 5.500 through 5.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 5.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 5.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 5.500 through 5.550.

§ 5.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§5.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in §5.550.

§5.525 Fringe benefits.

(a) "*Fringe benefits*" *defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §5.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§5.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to §5.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§5.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§5.500 through

5.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 5.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 5.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss" or "Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 5.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 5.500 through 5.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Procedures

§ 5.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

§ 5.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 40 CFR 7.105 through 7.135.

[65 FR 52890, Aug. 30, 2000]

PART 6—PROCEDURES FOR IMPLEMENTING THE REQUIREMENTS OF THE COUNCIL ON ENVIRONMENTAL QUALITY ON THE NATIONAL ENVIRONMENTAL POLICY ACT

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APPENDIX A TO PART 6—STATEMENT OF PROCEDURES ON FLOODPLAIN MANAGEMENT AND WETLANDS PROTECTION

AUTHORITY: 42 U.S.C. 4321 *et seq.*, 7401-7671q; 40 CFR part 1500.

SOURCE: 44 FR 64177, Nov. 6, 1979, unless otherwise noted.

Subpart A—General

§6.100 Purpose and policy.

(a) The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, as implemented by Executive Orders 11514 and 11991 and the Council on Environmental Quality (CEQ) Regulations of November 29, 1978 (43 FR 55978) requires that Federal agencies include in their decision-making processes appropriate and careful consideration of all environmental effects of proposed actions, analyze potential environmental effects of proposed actions and their alternatives for public understanding and scrutiny, avoid or minimize adverse effects of proposed actions, and restore and enhance environmental quality as much as possible.

The Environmental Protection Agency (EPA) shall integrate these NEPA factors as early in the Agency planning processes as possible. The environmental review process shall be the focal point to assure NEPA considerations are taken into account. To the extent applicable, EPA shall prepare environmental impact statements (EISs) on those major actions determined to have significant impact on the quality of the human environment. This part takes into account the EIS exemptions set forth under section 511(c)(1) of the Clean Water Act (Pub. L. 92–500) and section 7(c)(1) of the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93–319).

(b) This part establishes EPA policy and procedures for the identification and analysis of the environmental impacts of EPA-related activities and the preparation and processing of EISs.

§ 6.101 Definitions.

(a) *Terminology.* All terminology used in this part will be consistent with the terms as defined in 40 CFR part 1508 (the CEQ Regulations). Any qualifications will be provided in the definitions set forth in each subpart of this regulation.

(b) The term *CEQ Regulations* means the regulations issued by the Council on Environmental Quality on November 29, 1978 (see 43 FR 55978), which implement Executive Order 11991. The CEQ Regulations will often be referred to throughout this regulation by reference to 40 CFR part 1500 *et al.*

(c) The term *environmental review* means the process whereby an evaluation is undertaken by EPA to determine whether a proposed Agency action may have a significant impact on the environment and therefore require the preparation of the EIS.

(d) The term *environmental information document* means any written analysis prepared by an applicant, grantee or contractor describing the environmental impacts of a proposed action. This document will be of sufficient scope to enable the responsible official to prepare an environmental assessment as described in the remaining subparts of this regulation.

(e) The term *grant* as used in this part means an award of funds or other assistance by a written grant agreement or cooperative agreement under 40 CFR chapter I, subpart B.

§ 6.102 Applicability.

(a) *Administrative actions covered.* This part applies to the activities of EPA in accordance with the outline of the subparts set forth below. Each subpart describes the detailed environmental review procedures required for each action.

(1) Subpart A sets forth an overview of the regulation. Section 6.102(b) describes the requirements for EPA legislative proposals.

(2) Subpart B describes the requirements for the content of an EIS prepared pursuant to subparts E, F, G, H, and I.

(3) Subpart C describes the requirements for coordination of all environmental laws during the environmental review undertaken pursuant to subparts E, F, G, H, and I.

(4) Subpart D describes the public information requirements which must be undertaken in conjunction with the environmental review requirements under subparts E, F, G, H, and I.

(5) Subpart E describes the environmental review requirements for the wastewater treatment construction grants program under Title II of the Clean Water Act.

(6) Subpart F describes the environmental review requirements for new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act.

(7) Subpart G describes the environmental review requirements for research and development programs undertaken by the Agency.

(8) Subpart H describes the environmental review requirements for solid waste demonstration projects undertaken by the Agency.

(9) Subpart I describes the environmental review requirements for construction of special purpose facilities and facility renovations by the Agency.

(b) *Legislative proposals.* As required by the CEQ Regulations, legislative EISs are required for any legislative proposal developed by EPA which significantly affects the quality of the human environment. A preliminary

draft EIS shall be prepared by the responsible EPA office concurrently with the development of the legislative proposal and contain information required under subpart B. The EIS shall be processed in accordance with the requirements set forth under 40 CFR 1506.8.

(c) *Application to ongoing activities*—(1) *General.* The effective date for these regulations is December 5, 1979. These regulations do not apply to an EIS or supplement to that EIS if the draft EIS was filed with the Office of External Affairs, (OEA) before July 30, 1979. No completed environmental documents need be redone by reason of these regulations.

(2) With regard to activities under subpart E, these regulations shall apply to all EPA environmental review procedures effective December 15, 1979. However, for facility plans begun before December 15, 1979, the responsible official shall impose no new requirements on the grantee. Such grantees shall comply with requirements applicable before the effective date of this regulation. Notwithstanding the above, this regulation shall apply to any facility plan submitted to EPA after September 30, 1980.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§6.103 Responsibilities.

(a) *General responsibilities.* (1) The responsible official's duties include:

(i) Requiring applicants, contractors, and grantees to submit environmental information documents and related documents and assuring that environmental reviews are conducted on proposed EPA projects at the earliest possible point in EPA's decision-making process. In this regard, the responsible official shall assure the early involvement and availability of information for private applicants and other non-Federal entities requiring EPA approvals.

(ii) When required, assuring that adequate draft EISs are prepared and distributed at the earliest possible point in EPA's decision-making process, their internal and external review is coordinated, and final EISs are prepared and distributed.

(iii) When an EIS is not prepared, assuring documentation of the decision to grant a categorical exclusion, or assuring that findings of no significant impact (FNSIs) and environmental assessments are prepared and distributed for those actions requiring them.

(iv) Consulting with appropriate officials responsible for other environmental laws set forth in subpart C.

(v) Consulting with the Office of External Affairs (OEA) on actions involving unresolved conflicts concerning this part or other Federal agencies.

(vi) When required, assuring that public participation requirements are met.

(2) *Office of External Affairs duties include:* (i) Supporting the Administrator in providing EPA policy guidance and assuring that EPA offices establish and maintain adequate administrative procedures to comply with this part.

(ii) Monitoring the overall timeliness and quality of the EPA effort to comply with this part.

(iii) Providing assistance to responsible officials as required, i.e., preparing guidelines describing the scope of environmental information required by private applicants relating to their proposed actions.

(iv) Coordinating the training of personnel involved in the review and preparation of EISs and other associated documents.

(v) Acting as EPA liaison with the Council on Environmental Quality and other Federal and State entities on matters of EPA policy and administrative mechanisms to facilitate external review of EISs, to determine lead agency and to improve the uniformity of the NEPA procedures of Federal agencies.

(vi) Advising the Administrator and Deputy Administrator on projects which involve more than one EPA office, are highly controversial, are nationally significant, or *pioneer* EPA policy, when these projects have had or should have an EIS prepared on them.

(vii) Carrying out administrative duties relating to maintaining status of EISs within EPA, i.e., publication of notices of intent in the FEDERAL REGISTER and making available to the public status reports on EISs and other elements of the environmental review process.

(3) *Office of an Assistant Administrator duties include:* (i) Providing specific policy guidance to their respective offices and assuring that those offices establish and maintain adequate administrative procedures to comply with this part.

(ii) Monitoring the overall timeliness and quality of their respective office's efforts to comply with this part.

(iii) Acting as liaison between their offices and the OEA and between their offices and other Assistant Administrators or Regional Administrators on matters of agencywide policy and procedures.

(iv) Advising the Administrator and Deputy Administrator through the OEA on projects or activities within their respective areas of responsibilities which involve more than one EPA office, are highly controversial, are nationally significant, or *pioneer* EPA policy, when these projects will have or should have an EIS prepared on them.

(v) Pursuant to § 6.102(b) of this subpart, preparing legislative EISs as appropriate on EPA legislative initiatives.

(4) The Office of Policy, Planning, and Evaluation duties include: responsibilities for coordinating the preparation of EISs required on EPA legislative proposals in accordance with § 6.102(b).

(b) *Responsibilities for subpart E*—(1) *Responsible official.* The responsible official for EPA actions covered by this subpart is the Regional Administrator.

(2) *Assistant Administrator.* The responsibilities of the Assistant Administrator, as described in § 6.103(a)(3), shall be assumed by the Assistant Administrator for Water for EPA actions covered by this subpart.

(c) *Responsibilities for subpart F*—(1) *Responsible official.* The responsible official for activities covered by this subpart is the Regional Administrator.

(2) *Assistant Administrator.* The responsibilities of the Assistant Administrator, as described in § 6.103(a)(3), shall be assumed by the Assistant Administrator for Enforcement and Compliance Monitoring for EPA actions covered by this subpart.

(d) *Responsibilities for subpart G.* The Assistant Administrator for Research and Development will be the responsible official for activities covered by this subpart.

(e) *Responsibilities for subpart H.* The Assistant Administrator for Solid Waste and Emergency Response will be the responsible official for activities covered by this subpart.

(f) *Responsibilities for subpart I.* The responsible official for new construction and modification of special purpose facilities is as follows:

(1) The Chief, Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, Office of the Assistant Administrator for Administration and Resource Management (OARM) shall be the responsible official on all new construction of special purpose facilities and on all new modification projects for which the Facilities Engineering and Real Estate Branch has received a funding allowance and for all other field components not covered elsewhere in paragraph (f) of this section.

(2) The Regional Administrator shall be the responsible official on all improvement and modification projects for which the regional office has received the funding allowance.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982; 50 FR 26315, June 25, 1985; 51 FR 32609, Sept. 12, 1986]

§ 6.104 Early involvement of private parties.

As required by 40 CFR 1501.2(d) and § 6.103(a)(3)(v) of this regulation, responsible officials must ensure early involvement of private applicants or other non-Federal entities in the environmental review process related to EPA grant and permit actions set forth under subparts E, F, G, and H. The responsible official in conjunction with OEA shall:

(a) Prepare where practicable, generic guidelines describing the scope and level of environmental information required from applicants as a basis for evaluating their proposed actions, and make these guidelines available upon request.

(b) Provide such guidance on a project-by-project basis to any applicant seeking assistance.

(c) Upon receipt of an application for agency approval, or notification that an application will be filed, consult as

required with other appropriate parties to initiate and coordinate the necessary environmental analyses.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§6.105 Synopsis of environmental review procedures.

(a) *Responsible official.* The responsible official shall utilize a systematic, interdisciplinary approach to integrate natural and social sciences as well as environmental design arts in planning programs and making decisions which are subject to environmental review. The respective staffs may be supplemented by professionals from other agencies (see 40 CFR 1501.6) or consultants whenever in-house capabilities are insufficiently interdisciplinary.

(b) *Environmental information documents (EID).* Environmental information documents (EIDs) must be prepared by applicants, grantees, or permittees and submitted to EPA as required in subparts E, F, G, H, and I. EIDs will be of sufficient scope to enable the responsible official to prepare an environmental assessment as described under §6.105(d) of this part and subparts E through I. EIDs will not have to be prepared for actions where a categorical exclusion has been granted.

(c) *Environmental reviews.* Environmental reviews shall be conducted on the EPA activities outlined in §6.102 of this part and set forth under subparts E, F, G, H and I. This process shall consist of a study of the action to identify and evaluate the related environmental impacts. The process shall include a review of any related environmental information document to determine whether any significant impacts are anticipated and whether any changes can be made in the proposed action to eliminate significant adverse impacts; when an EIS is required, EPA has overall responsibility for this review, although grantees, applicants, permittees or contractors will contribute to the review through submission of environmental information documents.

(d) *Environmental assessments.* Environmental assessments (i.e., concise public documents for which EPA is responsible) are prepared to provide sufficient data and analysis to determine whether an EIS or finding of no significant impact is required. Where EPA determines that a categorical exclusion is appropriate or an EIS will be prepared, there is no need to prepare a formal environmental assessment.

(e) *Notice of intent and EISs.* When the environmental review indicates that a significant environmental impact may occur and significant adverse impacts can not be eliminated by making changes in the project, a notice of intent to prepare an EIS shall be published in the FEDERAL REGISTER, scoping shall be undertaken in accordance with 40 CFR 1501.7, and a draft EIS shall be prepared and distributed. After external coordination and evaluation of the comments received, a final EIS shall be prepared and disseminated. The final EIS shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(f) *Finding of no significant impact* (FNSI). When the environmental review indicates no significant impacts are anticipated or when the project is altered to eliminate any significant adverse impacts, a FNSI shall be issued and made available to the public. The environmental assessment shall be included as a part of the FNSI. The FNSI shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(g) *Record of decision.* At the time of its decision on any action for which a final EIS has been prepared, the responsible official shall prepare a concise public record of the decision. The record of decision shall describe those mitigation measures to be undertaken which will make the selected alternative environmentally acceptable. Where the final EIS recommends the alternative which is ultimately chosen by the responsible official, the record of decision may be extracted from the executive summary to the final EIS.

(h) *Monitoring.* The responsible official shall provide for monitoring to assure that decisions on any action where a final EIS has been prepared are properly implemented. Appropriate mitigation measures shall be included in actions undertaken by EPA.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26315, June 25, 1985; 51 FR 32610, Sept. 12, 1986]

§ 6.106 Deviations.

(a) *General.* The Assistant Administrator, OEA, is authorized to approve deviations from these regulations. Deviation approvals shall be made in writing by the Assistant Administrator, OEA.

(b) *Requirements.* (1) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the substantive provisions of these regulations or the CEQ Regulations, the responsible official shall notify the Assistant Administrator, OEA, before taking such action. The responsible official shall consider to the extent possible alternative arrangements; such arrangements will be limited to actions necessary to control the immediate impacts of the emergency; other actions remain subject to the environmental review process. The Assistant Administrator, OEA, after consulting CEQ, will inform the responsible official, as expeditiously as possible of the disposition of his request.

(2) Where circumstances make it necessary to take action without observing procedural provisions of these regulations, the responsible official shall notify the Assistant Administrator, OEA, before taking such action. If the Assistant Administrator, OEA, determines such a deviation would be in the best interest of the Government, he shall inform the responsible official, as soon as possible, of his approval.

(3) The Assistant Administrator, OEA, shall coordinate his action on a deviation under § 6.106(b) (1) or (2) of this part with the Director, Grants Administration Division, Office of Planning and Management, for any required grant-related deviation under 40 CFR 30.1000, as well as the appropriate Assistant Administrator.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.107 Categorical exclusions.

(a) *General.* Categories of actions which do not individually, cumulatively over time, or in conjunction with other Federal, State, local, or private actions have a significant effect on the quality of the human environment and which have been identified as having no such effect based on the requirements in § 6.505, may be exempted from the substantive environmental review requirements of this part. Environmental information documents and environmental assessments or environmental impact statements will not be required for excluded actions.

(b) *Determination.* The responsible official shall determine whether an action is eligible for a categorical exclusion as established by general criteria in § 6.107 (d) and (e) and any applicable criteria in program specific subparts of part 6 of this title. A determination shall be made as early as possible following the receipt of an application. The responsible official shall document the decision to issue or deny an exclusion as soon as practicable following review in accordance with § 6.400(f). For qualified actions, the documentation shall include the application, a brief description of the proposed action, and a brief statement of how the action meets the criteria for a categorical exclusion without violating criteria for not granting an exclusion.

(c) *Revocation.* The responsible official shall revoke a categorical exclusion and shall require a full environmental review if, subsequent to the granting of an exclusion, the responsible official determines that: (1) The proposed action no longer meets the requirements for a categorical exclusion due to changes in the proposed action; or (2) determines from new evidence that serious local or environmental issues exist; or (3) that Federal, State, local, or tribal laws are being or may be violated.

(d) *General categories of actions eligible for exclusion.* Actions consistent with any of the following categories are eligible for a categorical exclusion:

(1) Actions which are solely directed toward minor rehabilitation of existing facilities, functional replacement of equipment, or towards the construction of new ancillary facilities adjacent or appurtenant to existing facilities;

(2) Other actions specifically allowed in program specific subparts of this regulation; or

(3) Other actions developed in accordance with paragraph (f) of this section.

(e) *General criteria for not granting a categorical exclusion.* (1) The full environmental review procedures of this part must be followed if undertaking an action consistent with allowable categories in paragraph (d) of this section may involve serious local or environmental issues, or meets any of the criteria listed below:

(i) The action is known or expected to have a significant effect on the quality of the human environment, either individually, cumulatively over time, or in conjunction with other Federal, State, local, tribal or private actions;

(ii) The action is known or expected to directly or indirectly affect:

(A) Cultural resource areas such as archaeological and historic sites in accordance with §6.301,

(B) Endangered or threatened species and their critical habitats in accordance with §6.302 or State lists,

(C) Environmentally important natural resource areas such as floodplains, wetlands, important farmlands, aquifer recharge zones in accordance with §6.302, or

(D) Other resource areas identified in supplemental guidance issued by the OEA;

(iii) The action is known or expected not to be cost-effective or to cause significant public controversy; or

(iv) Appropriate specialized program specific criteria for not granting an exclusion found in other subparts of this regulation are applicable to the action.

(2) Notwithstanding the provisions of paragraph (d) of this section, if any of the conditions cited in paragraph (e)(1) of this section exist, the responsible official shall ensure:

(i) That a categorical exclusion is not granted or, if previously granted, that it is revoked according to paragraph (c) of this section;

(ii) That an adequate EID is prepared; and

(iii) That either an environmental assessment and FNSI or a notice of intent for an EIS and ROD is prepared and issued.

(f) *Developing new categories of excluded actions.* The responsible official, or other interested parties, may request that a new general or specialized program specific category of excluded actions be created, or that an existing category be amended or deleted. The request shall be in writing to the Assistant Administrator, OEA, and shall contain adequate information to support the request. Proposed new categories shall be developed by OEA and published in the FEDERAL REGISTER as a proposed rule, amending paragraph (d) of this section when the proposed new category applies to all eligible programs or, amending appropriate paragraphs in other subparts of this part when the proposed new category applies to one specific program. The publication shall include a thirty (30) day public comment period. In addition to criteria for specific programs listed in other subparts of this part, the following general criteria shall be considered in evaluating proposals for new categories:

(1) Any action taken seldom results in the effects identified in general or specialized program specific criteria identified through the application of criteria for not granting a categorical exclusion;

(2) Based upon previous environmental reviews, actions consistent with the proposed category have not required the preparation of an EIS; and

(3) Whether information adequate to determine if a potential action is consistent with the proposed category will normally be available when needed.

[50 FR 26315, June 25, 1985, as amended at 51 FR 32610, Sept. 12, 1986]

§6.108 Criteria for initiating an EIS.

The responsible official shall assure that an EIS will be prepared and issued for actions under subparts E, G, H, and I when it is determined that any of the following conditions exist:

(a) The Federal action may significantly affect the pattern and type of land use (industrial, commercial, agricultural, recreational, residential) or growth and distribution of population;

(b) The effects resulting from any structure or facility constructed or operated under the proposed action may conflict with local, regional or State land use plans or policies;

(c) The proposed action may have significant adverse effects on wetlands, including indirect and cumulative effects, or any major part of a structure or facility constructed or operated

under the proposed action may be located in wetlands;

(d) The proposed action may significantly affect threatened and endangered species or their habitats identified in the Department of the Interior's list, in accordance with § 6.302, or a State's list, or a structure or a facility constructed or operated under the proposed action may be located in the habitat;

(e) Implementation of the proposed action or plan may directly cause or induce changes that significantly:

(1) Displace population;

(2) Alter the character of existing residential areas;

(3) Adversely affect a floodplain; or

(4) Adversely affect significant amounts of important farmlands as defined in requirements in § 6.302(c), or agricultural operations on this land.

(f) The proposed action may, directly, indirectly or cumulatively have significant adverse effect on parklands, preserves, other public lands or areas of recognized scenic, recreational, archaeological, or historic value; or

(g) The Federal action may directly or through induced development have a significant adverse effect upon local ambient air quality, local ambient noise levels, surface water or groundwater quality or quantity, water supply, fish, shellfish, wildlife, and their natural habitats.

[50 FR 26315, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

Subpart B—Content of EISs

§ 6.200 The environmental impact statement.

Preparers of EISs must conform with the requirements of 40 CFR part 1502 in writing EISs.

§ 6.201 Format.

The format used for EISs shall encourage good analysis and clear presentation of alternatives, including the proposed action, and their environmental, economic and social impacts. The following standard format for EISs should be used unless the responsible official determines that there is a compelling reason to do otherwise:

(a) Cover sheet;

(b) Executive Summary;

(c) Table of contents;

(d) Purpose of and need for action;

(e) Alternatives including proposed action;

(f) Affected environment;

(g) Environmental consequences of the alternatives;

(h) Coordination (includes list of agencies, organizations, and persons to whom copies of the EIS are sent);

(i) List of preparers;

(j) Index (commensurate with complexity of EIS);

(k) Appendices.

§ 6.202 Executive summary.

The executive summary shall describe in sufficient detail (10–15 pages) the critical facets of the EIS so that the reader can become familiar with the proposed project or action and its net effects. The executive summary shall focus on:

(a) The existing problem;

(b) A brief description of each alternative evaluated (including the preferred and no action alternatives) along with a listing of the environmental impacts, possible mitigation measures relating to each alternative, and any areas of controversy (including issues raised by governmental agencies and the public); and

(c) Any major conclusions.

A comprehensive summary may be prepared in instances where the EIS is unusually long in nature. In accordance with 40 CFR 1502.19, the comprehensive summary may be circulated in lieu of the EIS; however, both documents shall be distributed to any Federal, State and local agencies who have EIS review responsibilities and also shall be made available to other interested parties upon request.

§ 6.203 Body of EISs.

(a) *Purpose and need.* The EIS shall clearly specify the underlying purpose and need to which EPA is responding. If the action is a request for a permit or a grant, the EIS shall clearly specify the goals and objectives of the applicant.

(b) *Alternatives including the proposed action.* In addition to 40 CFR 1502.14, the EIS shall discuss:

(1) *Alternatives considered by the applicant.* This section shall include a *balanced* description of each alternative considered by the applicant. These discussions shall include size and location of facilities, land requirements, operation and maintenance requirements, auxiliary structures such as pipelines or transmission lines, and construction schedules. The alternative of no action shall be discussed and the applicant's preferred alternative(s) shall be identified. For alternatives which were eliminated from detailed study, a brief discussion of the reasons for their having been eliminated shall be included.

(2) *Alternatives available to EPA.* EPA alternatives to be discussed shall include: (i) Taking an action; or (ii) taking an action on a modified or alternative project, including an action not considered by the applicant; and (iii) denying the action.

(3) *Alternatives available to other permitting agencies.* When preparing a joint EIS, and if applicable, the alternatives available to other Federal and/or State agencies shall be discussed.

(4) *Identifying preferred alternative.* In the final EIS, the responsible official shall signify the preferred alternative.

(c) *Affected environment and environmental consequences of the alternatives.* The affected environment on which the evaluation of each alternative shall be based includes, for example, hydrology, geology, air quality, noise, biology, socioeconomics, energy, land use, and archeology and historic subjects. The discussion shall be structured so as to present the total impacts of each alternative for easy comparison among all alternatives by the reader. The effects of a "no action" alternative should be included to facilitate reader comparison of the beneficial and adverse impacts of other alternatives to the applicant doing nothing. A description of the environmental setting shall be included in the "no action" alternative for the purpose of providing needed background information. The amount of detail in describing the affected environment shall be commensurate with the complexity of the situation and the importance of the anticipated impacts.

(d) *Coordination.* The EIS shall include:

(1) The objections and suggestions made by local, State, and Federal agencies before and during the EIS review process must be given full consideration, along with the issues of public concern expressed by individual citizens and interested environmental groups. The EIS must include discussions of any such comments concerning our actions, and the author of each comment should be identified. If a comment has resulted in a change in the project or the EIS, the impact statement should explain the reason.

(2) Public participation through public hearings or scoping meetings shall also be included. If a public hearing has been held prior to the publication of the EIS, a summary of the transcript should be included in this section. For the public hearing which shall be held after the publication of the draft EIS, the date, time, place, and purpose shall be included here.

(3) In the final EIS, a summary of the coordination process and EPA responses to comments on the draft EIS shall be included.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.204 Incorporation by reference.

In addition to 40 CFR 1502.21, material incorporated into an EIS by reference shall be organized to the extent possible into a Supplemental Information Document and be made available for review upon request. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the period allowed for comment.

§ 6.205 List of preparers.

When the EIS is prepared by contract, either under direct contract to EPA or through an applicant's or grantee's contractor, the responsible official must independently evaluate the EIS prior to its approval and take responsibility for its scope and contents. The EPA officials who undertake this evaluation shall also be described under the list of preparers.

Subpart C—Coordination With Other Environmental Review and Consultation Requirements

§ 6.300 General.

Various Federal laws and executive orders address specific environmental concerns. The responsible official shall integrate to the greatest practicable extent the applicable procedures in this subpart during the implementation of the environmental review process under subparts E through I. This subpart presents the central requirements of these laws and executive orders. It refers to the pertinent authority and regulations or guidance that contain the procedures. These laws and executive orders establish review procedures independent of NEPA requirements. The responsible official shall be familiar with any other EPA or appropriate agency procedures implementing these laws and executive orders.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.301 Landmarks, historical, and archeological sites.

EPA is subject to the requirements of the Historic Sites Act of 1935, 16 U.S.C. 461 *et seq.*, the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 *et seq.*, the Archaeological and Historic Preservation Act of 1974, 16 U.S.C. 469 *et seq.*, and Executive Order 11593, entitled "Protection and Enhancement of the Cultural Environment." These statutes, regulations and executive orders establish review procedures independent of NEPA requirements.

(a) *National natural landmarks.* Under the Historic Sites Act of 1935, the Secretary of the Interior is authorized to designate areas as national natural landmarks for listing on the National Registry of Natural Landmarks. In conducting an environmental review of a proposed EPA action, the responsible official shall consider the existence and location of natural landmarks using information provided by the National Park Service pursuant to 36 CFR 62.6(d) to avoid undesirable impacts upon such landmarks.

(b) *Historic, architectural, archeological, and cultural sites.* Under section 106 of the National Historic Preservation Act and Executive Order 11593, if an EPA undertaking affects any property with historic, architectural, archeological or cultural value that is listed on or eligible for listing on the National Register of Historic Places, the responsible official shall comply with the procedures for consultation and comment promulgated by the Advisory Council on Historic Preservation in 36 CFR part 800. The responsible official must identify properties affected by the undertaking that are potentially eligible for listing on the National Register and shall request a determination of eligibility from the Keeper of the National Register, Department of the Interior, under the procedures in 36 CFR part 63.

(c) *Historic, prehistoric and archeological data.* Under the Archeological and Historic Preservation Act, if an EPA activity may cause irreparable loss or destruction of significant scientific, prehistoric, historic or archeological data, the responsible official or the Secretary of the Interior is authorized to undertake data recovery and preservation activities. Data recovery and preservation activities shall be conducted in accordance with implementing procedures promulgated by the Secretary of the Interior. The National Park Service has published technical standards and guidelines regarding archeological preservation activities and methods at 48 FR 44716 (September 29, 1983).

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.302 Wetlands, floodplains, important farmlands, coastal zones, wild and scenic rivers, fish and wildlife, and endangered species.

The following procedures shall apply to EPA administrative actions in programs to which the pertinent statute or executive order applies.

(a) *Wetlands protection.* Executive Order 11990, Protection of Wetlands, requires Federal agencies conducting certain activities to avoid, to the extent possible, the adverse impacts associated with the destruction or loss of wetlands and to avoid support of new

construction in wetlands if a practicable alternative exists. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection (dated January 5, 1979, incorporated as appendix A hereto) requires EPA programs to determine if proposed actions will be in or will affect wetlands. If so, the responsible official shall prepare a floodplains/wetlands assessment, which will be part of the environmental assessment or environmental impact statement. The responsible official shall either avoid adverse impacts or minimize them if no practicable alternative to the action exists.

(b) *Floodplain management.* Executive Order 11988, Floodplain Management, requires Federal agencies to evaluate the potential effects of actions they may take in a floodplain to avoid, to the extent possible, adverse effects associated with direct and indirect development of a floodplain. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection (dated January 5, 1979, incorporated as appendix A hereto), requires EPA programs to determine whether an action will be located in or will affect a floodplain. If so, the responsible official shall prepare a floodplain/wetlands assessment. The assessment will become part of the environmental assessment or environmental impact statement. The responsible official shall either avoid adverse impacts or minimize them if no practicable alternative exists.

(c) *Important farmlands.* It is EPA's policy as stated in the EPA Policy To Protect Environmentally Significant Agricultural Lands, dated September 8, 1978, to consider the protection of the Nation's significant/important agricultural lands from irreversible conversion to uses which result in its loss as an environmental or essential food production resource. In addition the Farmland Protection Policy Act, (FPPA) 7 U.S.C. 4201 *et seq.,* requires Federal agencies to use criteria developed by the Soil Conservation Service, U.S. Department of Agriculture, to:

(1) Identify and take into account the adverse effects of their programs on the preservation of farmlands from conversion to other uses;

(2) Consider alternative actions, as appropriate, that could lessen such adverse impacts; and

(3) Assure that their programs, to the extent possible, are compatible with State and local government and private programs and policies to protect farmlands. If an EPA action may adversely impact farmlands which are classified prime, unique or of State and local importance as defined in the Act, the responsible official shall in all cases apply the evaluative criteria promulgated by the U.S. Department of Agriculture at 7 CFR part 658. If categories of important farmlands, which include those defined in both the FPPA and the EPA policy, are identified in the project study area, both direct and indirect effects of the undertaking on the remaining farms and farm support services within the project area and immediate environs shall be evaluated. Adverse effects shall be avoided or mitigated to the extent possible.

(d) *Coastal zone management.* The Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.,* requires that all Federal activities in coastal areas be consistent with approved State Coastal Zone Management Programs, to the maximum extent possible. If an EPA action may affect a coastal zone area, the responsible official shall assess the impact of the action on the coastal zone. If the action significantly affects the coastal zone area and the State has an approved coastal zone management program, a consistency determination shall be sought in accordance with procedures promulgated by the Office of Coastal Zone Management in 15 CFR part 930.

(e) *Wild and scenic rivers.* (1) The Wild and Scenic Rivers Act, 16 U.S.C. 1274 *et seq.,* establishes requirements applicable to water resource projects affecting wild, scenic or recreational rivers within the National Wild and Scenic Rivers system as well as rivers designated on the National Rivers Inventory to be studied for inclusion in the national system. Under the Act, a Federal agency may not assist, through grant, loan, license or otherwise, the construction of a water resources project that would have a direct and adverse effect on the values for which a river in the National System or study river on the National

Rivers Inventory was established, as determined by the Secretary of the Interior for rivers under the jurisdiction of the Department of the Interior and by the Secretary of Agriculture for rivers under the jurisdiction of the Department of Agriculture. Nothing contained in the foregoing sentence, however, shall:

(i) Preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968; or

(ii) Preclude licensing of, or assistance to, developments below or above a study river or any stream tributary thereto which will not invade the area or diminish the scenic, recreational and fish and wildlife values present in the area on October 2, 1968.

(2) The responsible official shall:

(i) Determine whether there are any wild, scenic or study rivers on the National Rivers Inventory or in the planning area, and

(ii) Not recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the administering Secretary in request of appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the administering Secretary, in writing of this intention at least sixty days in advance, and without specifically reporting to the Congress in writing at the time the recommendation or request is made in what respect construction of such project would be in conflict with the purposes of the Wild and Scenic Rivers Act and would affect the component and the values to be protected by the Responsible Official under the Act.

(3) Applicable consultation requirements are found in section 7 of the Act. The Department of Agriculture has promulgated implementing procedures, under section 7 at 36 CFR part 297, which apply to water resource projects located within, above, below or outside a wild and scenic river or study river under the Department's jurisdiction.

(f) *Barrier islands.* The Coastal Barrier Resources Act, 16 U.S.C. 3501 *et seq.,* generally prohibits new Federal expenditures or financial assistance for any purpose within the Coastal Barrier Resources System on or after October 18, 1982. Specified exceptions to this prohibition are allowed only after consultation with the Secretary of the Interior. The responsible official shall ensure that consultation is carried out with the Secretary of the Interior before making available new expenditures or financial assistance for activities within areas covered by the Coastal Barriers Resources Act in accord with the U.S. Fish and Wildlife Service published guidelines defining new expenditures and financial assistance, and describing procedures for consultation at 48 FR 45664 (October 6, 1983).

(g) *Fish and wildlife protection.* The Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.,* requires Federal agencies involved in actions that will result in the control or structural modification of any natural stream or body of water for any purpose, to take action to protect the fish and wildlife resources which may be affected by the action. The responsible official shall consult with the Fish and Wildlife Service and the appropriate State agency to ascertain the means and measures necessary to mitigate, prevent and compensate for project-related losses of wildlife resources and to enhance the resources. Reports and recommendations of wildlife agencies should be incorporated into the environmental assessment or environmental impact statement. Consultation procedures are detailed in 16 U.S.C. 662.

(h) *Endangered species protection.* Under the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* Federal agencies are prohibited from jeopardizing threatened or endangered species or adversely modifying habitats essential to their survival. The responsible official shall identify all designated endangered or threatened species or their habitat that may be affected by an EPA action. If listed species or their habitat may be affected, formal consultation must be undertaken with the

Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate. If the consultation reveals that the EPA activity may jeopardize a listed species or habitat, mitigation measures should be considered. Applicable consultation procedures are found in 50 CFR part 402.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§6.303 Air quality.

(a) The Clean Air Act, as amended in 1990, 42 U.S.C. 7476(c), requires Federal actions to conform to any State implementation plan approved or promulgated under section 110 of the Act. For EPA actions, the applicable conformity requirements specified in 40 CFR part 51, subpart W, 40 CFR part 93, subpart B, and the applicable State implementation plan must be met.

(b) In addition, with regard to wastewater treatment works subject to review under subpart E of this part, the responsible official shall consider the air pollution control requirements specified in section 316(b) of the Clean Air Act, 42 U.S.C. 7616, and Agency implementation procedures.

(c)–(g) [Reserved]

[58 FR 63247, Nov. 30, 1993]

Subpart D—Public and Other Federal Agency Involvement

§6.400 Public involvement.

(a) *General.* EPA shall make diligent efforts to involve the public in the environmental review process consistent with program regulations and EPA policies on public participation. The responsibile official shall ensure that public notice is provided for in accordance with 40 CFR 1506.6(b) and shall ensure that public involvement is carried out in accordance with EPA Public Participation Regulations, 40 CFR part 25, and other applicable EPA public participation procedures.

(b) *Publication of notices of intent.* As soon as practicable after his decision to prepare an EIS and before the scoping process, the responsible official shall send the notice of intent to interested and affected members of the public and shall request the OEA to publish the notice of intent in the FEDERAL REGISTER. The responsible official shall send to OEA the signed original notice of intent for FEDERAL REGISTER publication purposes. The scoping process should be initiated as soon as practicable in accordance with the requirements of 40 CFR 1501.7. Participants in the scoping process shall be kept informed of substantial changes which evolve during the EIS drafting process.

(c) *Public meetings or hearings.* Public meetings or hearings shall be conducted consistent with Agency program requirements. There shall be a presumption that a scoping meeting will be conducted whenever a notice of intent has been published. The responsible official shall conduct a public hearing on a draft EIS. The responsible official shall ensure that the draft EIS is made available to the public at least 30 days in advance of the hearing.

(d) *Findings of no significant impact (FNSI).* The responsible official shall allow for sufficient public review of a FNSI before it becomes effective. The FNSI and attendant publication must state that interested persons disagreeing with the decision may submit comments to EPA. The responsible official shall not take administrative action on the project for at least thirty (30) calendar days after release of the FNSI and may allow more time for response. The responsible official shall consider, fully, comments submitted on the FNSI before taking administrative action. The FNSI shall be made available to the public in accordance with the requirements and all appropriate recommendations contained in §1506.6 of this title.

(e) *Record of Decision (ROD).* The responsible official shall disseminate the ROD to those parties which commented on the draft or final EIS.

(f) *Categorical exclusions.* (1) For categorical exclusion determinations under subpart E (Wastewater Treatment Construction Grants Program), an applicant who files for and receives a determination of categorical exclusion under §6.107(a), or has one rescinded under §6.107(c), shall publish a notice indicating the determination of eligibility or rescission in a local newspaper of community-wide circulation and indicate the availability of the supporting documentation for public

inspection. The responsible official shall, concurrent with the publication of the notice, make the documentation as outlined in §6.107(b) available to the public and distribute the notice of the determination to all known interested parties.

(2) For categorical exclusion determinations under other subparts of this regulation, no public notice need be issued; however, information regarding these determinations may be obtained by contacting the U.S. Environmental Protection Agency's Office of Research Program Management for ORD actions, or the Office of Federal Activities for other program actions.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32611, Sept. 12, 1986; 56 FR 20543, May 6, 1991]

§ 6.401 Official filing requirements.

(a) *General.* OEA is responsible for the conduct of the official filing system for EISs. This system was established as a central repository for all EISs which serves not only as means of advising the public of the availability of each EIS but provides a uniform method for the computation of minimum time periods for the review of EISs. OEA publishes a weekly notice in the FEDERAL REGISTER listing all EISs received during a given week. The 45-day and 30-day review periods for draft and final EISs, respectively, are computed from the Friday following a given reporting week. Pursuant to 40 CFR 1506.9, responsible officials shall comply with the guidelines established by OEA on the conduct of the filing system.

(b) *Minimum time periods.* No decision on EPA actions shall be made until the later of the following dates:

(1) Ninety (90) days after the date established in §6.401(a) of this part from which the draft EIS review time period is computed.

(2) Thirty (30) days after the date established in §6.401(a) of this part from which the final EIS review time period is computed.

(c) *Filing of EISs.* All EISs, including supplements, must be officially filed with OEA. Responsible officials shall transmit each EIS in five (5) copies to the Director, Office of Environmental Review, EIS Filing Section (A–104). OEA will provide CEQ with one copy of each EIS filed. No EIS will be officially filed by OER unless the EIS has been made available to the public. OEA will not accept unbound copies of EISs for filing.

(d) *Extensions or waivers.* The responsible official may independently extend review periods. In such cases, the responsible official shall notify OEA as soon as possible so that adequate notice may be published in the weekly FEDERAL REGISTER report. OEA upon a showing of compelling reasons of national policy may reduce the prescribed review periods. Also, OEA upon a showing by any other Federal agency of compelling reasons of national policy may extend prescribed review periods, but only after consultation with the responsible official. If the responsible official does not concur with the extension of time, OEA may not extend a prescribed review period more than 30 days beyond the minimum prescribed review period.

(e) *Rescission of filed EISs.* The responsible official shall file EISs with OEA at the same time they are transmitted to commenting agencies and made available to the public. The responsible official is required to reproduce an adequate supply of EISs to satisfy these distribution requirements prior to filing an EIS. If the EIS is not made available, OEA will consider retraction of the EIS or revision of the prescribed review periods based on the circumstances.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.402 Availability of documents.

(a) *General.* The responsible official will ensure sufficient copies of the EIS are distributed to interested and affected members of the public and are made available for further public distribution. EISs, comments received, and any underlying documents should be available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552(b)), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed actions. To the extent practicable, materials made available to

the public shall be provided without charge; otherwise, a fee may be imposed which is not more than the actual cost of reproducing copies required to be sent to another Federal agency.

(b) *Public information.* Lists of all notices, determinations and other reports/documentation, related to these notices and determinations, involving CEs, EAs, FNSIs, notices of intent, EISs, and RODs prepared by EPA shall be available for public inspection and maintained by the responsible official as a monthly status report. OEA shall maintain a comprehensive list of notices of intent and draft and final EISs provided by all responsible officials for public inspection including publication in the FEDERAL REGISTER. In addition, OEA will make copies of all EPA-prepared EISs available for public inspection; the responsible official shall do the same for any EIS he/she undertakes.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32611, Sept. 12, 1986]

§6.403 The commenting process.

(a) *Inviting comments.* After preparing a draft EIS and before preparing a final EIS, the responsible official shall obtain the comments of Federal agencies, other governmental entities and the public in accordance with 40 CFR 1503.1.

(b) *Response to comments.* The responsible official shall respond to comments in the final EIS in accordance with 40 CFR 1503.4.

§6.404 Supplements.

(a) *General.* The responsible official shall consider preparing supplements to draft and final EISs in accordance with 40 CFR 1502.9(c). A supplement shall be prepared, circulated and filed in the same fashion (exclusive of scoping) as draft and final EISs.

(b) *Alternative procedures.* In the case where the responsible official wants to deviate from existing procedures, OEA shall be consulted. OEA shall consult with CEQ on any alternative arrangements.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

Subpart E—Environmental Review Procedures for Wastewater Treatment Construction Grants Program

SOURCE: 50 FR 26317, June 25, 1985, unless otherwise noted.

§6.500 Purpose.

This subpart amplifies the procedures described in subparts A through D with detailed environmental review procedures for the Municipal Wastewater Treatment Works Construction Grants Program under Title II of the Clean Water Act.

§6.501 Definitions.

(a) *Step 1 facilities planning* means preparation of a plan for facilities as described in 40 CFR part 35, subpart E or I.

(b) *Step 2* means a project to prepare design drawings and specifications as described in 40 CFR part 35, subpart E or I.

(c) *Step 3* means a project to build a publicly owned treatment works as described in 40 CFR part 35, subpart E or I.

(d) *Step 2+3* means a project which combines preparation of design drawings and specifications as described in §6.501(b) and building as described in §6.501(c).

(e) *Applicant* means any individual, agency, or entity which has filed an application for grant assistance under 40 CFR part 35, subpart E or I.

(f) *Grantee* means any individual, agency, or entity which has been awarded wastewater treatment construction grant assistance under 40 CFR part 35, subpart E or I.

(g) *Responsible Official* means a Federal or State official authorized to fulfill the requirements of this subpart. The responsible Federal official is the EPA Regional Administrator and the responsible State official is as defined in a delegation agreement under 205(g) of the Clean Water Act. The responsibilities of the State official are subject to the limitations in §6.514 of this subpart.

(h) *Approval of the facilities plan* means approval of the facilities plan for a proposed wastewater treatment

works pursuant to 40 CFR part 35, subpart E or I.

§ 6.502 Applicability and limitations.

(a) *Applicability.* This subpart applies to the following actions:

(1) Approval of a facilities plan or an amendment to the plan;

(2) Award of grant assistance for a project where signficant change has occurred in the project or its impact since prior compliance with this part; and

(3) Approval of preliminary Step 3 work prior to the award of grant assistance pursuant to 40 CFR part 35, subpart E or I.

(b) *Limitations.* (1) Except as provided in § 6.504(c), all recipients of Step 1 grant assistance must comply with the requirements, steps, and procedures described in this subpart.

(2) As specified in 40 CFR 35.2113, projects that have not received Step 1 grant assistance must comply with the requirements of this subpart prior to submission of an application for Step 3 or Step 2+3 grant assistance.

(3) Except as otherwise provided in § 6.507, no step 3 or 2=3 grant assistance may be awarded for the construction of any component/portion of a proposed wastewater treatment system(s) until the responsible official has:

(i) Completed the environmental review for all complete wastewater treatment system alternatives under consideration for the facilities planning area, or any larger study area identified for the purposes of conducting an adequate environmental review as required under this subpart; and

(ii) Recorded the selection of the preferred alternative(s) in the appropriate decision document (ROD for EISs, FNSI for environmental assessments, or written determination for categorical exclusions).

(4) In accord with § 6.302(f), on or after October 18, 1982, no new expenditures or financial assistance involving the construction grants program can be made within the Coastal Barrier Resource System, or for projects outside the system which would have the effect of encouraging development in the system, other than specified exceptions made by the EPA after consultation with the Secretary of the Interior.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

§ 6.503 Overview of the environmental review process.

The process for conducting an environmental review of wastewater treatment construction grant projects includes the following steps:

(a) *Consultation.* The Step 1 grantee or the potential Step 3 or Step 2+3 applicant is encouraged to consult with the State and EPA early in project formulation or the facilities planning stage to determine whether a project is eligible for a categorical exclusion from the remaining substantive environmental review requirements of this part (§ 6.505), to determine alternatives to the proposed project for evaluation, to identify potential environmental issues and opportunities for public recreation and open space, and to determine the potential need for partitioning the environmental review process and/or the need for an Environmental Impact Statement (EIS).

(b) *Determining categorical exclusion eligibility.* At the request of a potential Step 3 or Step 2+3 grant applicant, or a Step 1 facilities planning grantee, the responsible official will determine if a project is eligible for a categorical exclusion in accordance with § 6.505. A Step 1 facilities planning grantee awarded a Step 1 grant on or before December 29, 1981 may request a categorical exclusion at any time during Step 1 facilities planning. A potential Step 3 or Step 2+3 grant applicant may request a categorical exclusion at any time before the submission of a Step 3 or Step 2+3 grant application.

(c) *Documenting environmental information.* If the project is determined to be ineligible for a categorical exclusion, or if no request for a categorical exclusion is made, the potential Step 3 or Step 2+3 applicant or the Step 1 grantee subsequently prepares an Environmental Information Document (EID) (§ 6.506) for the project.

(d) *Preparing environmental assessments.* Except as provided in § 6.506(c)(4) and following a review of the EID by

EPA or by a State with delegated authority, EPA prepares an environmental assessment (§6.506), or a State with delegated authority (§6.514) prepares a preliminary environmental assessment. EPA reviews and finalizes any preliminary assessments. EPA subsequently:

(1) Prepares and issues a Finding of No Significant Impact (FNSI) (§6.508); or

(2) Prepares and issues a Notice of Intent to prepare an original or supplemental EIS (§6.510) and Record of Decision (ROD) (§6.511).

(e) *Monitoring.* The construction and post-construction operation and maintenance of the facilities are monitored (§6.512) to ensure implementation of mitigation measures (§6.511) identified in the FNSI or ROD.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

§6.504 Consultation during the facilities planning process.

(a) *General.* Consistent with 40 CFR 1501.2 and 35.2030(c), the responsible official shall initiate the environmental review process early to identify environmental effects, avoid delays, and resolve conflicts. The environmental review process should be integrated throughout the facilities planning process. Two processes for consultation are described in this section to meet this objective. The first addresses projects awarded Step 1 grant assistance on or before December 29, 1981. The second applies to projects not receiving grant assistance for facilities planning on or before December 29, 1981 and, therefore, subject to the regulations implementing the Municipal Wastewater Treatment Construction Grant Amendments of 1981 (40 CFR part 35, subpart I).

(b) *Projects receiving Step 1 grant assistance on or before December 29, 1981.* (1) During facilities planning, the grantee shall evaluate project alternatives and the existence of environmentally important resource areas including those identified in §6.108 and §6.509 of this subpart, and potential for open space and recreation opportunities in the facilities planning area. This evaluation is intended to be brief and concise and should draw on existing information from EPA, State agencies, regional planning agencies, areawide water quality management agencies, and the Step 1 grantee. The Step 1 grantee should submit this information to EPA or a delegated State at the earliest possible time during facilities planning to allow EPA to determine if the action is eligible for a categorical exclusion. The evaluation and any additional analysis deemed necessary by the responsible official may be used by EPA to determine whether the action is eligible for a categorical exclusion from the substantive environmental review requirements of this part. If a categorical exclusion is granted, the grantee will not be required to prepare a formal EID nor will the responsible official be required to prepare an environmental assessment under NEPA. If an action is not granted a categorical exclusion, this evaluation may be used to determine the scope of the EID required of the grantee. This information can also be used to make an early determination of the need for partitioning the environmental review or for an EIS. Whenever possible, the Step 1 grantee should discuss this initial evaluation with both the delegated State and EPA.

(2) A review of environmental information developed by the grantee should be conducted by the responsible official whenever meetings are held to assess the progress of facilities plan development. These meetings should be held after completion of the majority of the EID document and before a preferred alternative is selected. Since any required EIS must be completed before the approval of a facilities plan, a decision whether to prepare an EIS is encouraged early during the facilities planning process. These meetings may assist in this early determination. EPA should inform interested parties of the following:

(i) The preliminary nature of the Agency's position on preparing an EIS;

(ii) The relationship between the facilities planning and environmental review processes;

(iii) The desirability of public input; and

(iv) A contact person for further information.

(c) *Projects not receiving grant assistance for Step 1 facilities planning on or before December 29, 1981.* Potential Step 3 or Step 2+3 grant applicants should, in accordance with §35.2030(c), consult with EPA and the State early in the facilities planning process to determine the appropriateness of a categorical exclusion, the scope of an EID, or the appropriateness of the early preparation of an environmental assessment or an EIS. The consultation would be most useful during the evaluation of project alternatives prior to the selection of a preferred alternative to assist in resolving any identified environmental problems.

§ 6.505 Categorical exclusions.

(a) *General.* At the request of an existing Step 1 facilities planning grantee or of a potential Step 3 or Step 2+3 grant applicant, the responsible official, as provided for in §§6.107(b), 6.400(f) and 6.504(a), shall determine from existing information and document whether an action is consistent with the categories eligible for exclusion from NEPA review identified in §6.107(d) or §6.505(b) and not inconsistent with the criteria in §6.107(e) or §6.505(c).

(b) *Specialized categories of actions eligible for exclusion.* For this subpart, eligible actions consist of any of the categories in §6.107(d), or:

(1) Actions for which the facilities planning is consistent with the category listed in §6.107(d)(1) which do not affect the degree of treatment or capacity of the existing facility including, but not limited to, infiltration and inflow corrections, grant-eligible replacement of existing mechanical equipment or structures, and the construction of small structures on existing sites;

(2) Actions in sewered communities of less than 10,000 persons which are for minor upgrading and minor expansion of existing treatment works. This category does not include actions that directly or indirectly involve the extension of new collection systems funded with Federal or other sources of funds;

(3) Actions in unsewered communities of less than 10,000 persons where on-site technologies are proposed; or

(4) Other actions are developed in accordance with §6.107(f).

(c) *Specialized Criteria for not granting a categorical exclusion.* (1) The full environmental review procedures of this part must be followed if undertaking an action consistent with the categories described in paragraph (b) of this section meets any of the criteria listed in §6.107(e) or when:

(i) The facilities to be provided will (A) create a new, or (B) relocate an existing, discharge to surface or ground waters;

(ii) The facilities will result in substantial increases in the volume of discharge or the loading of pollutants from an existing source or from new facilities to receiving waters; or

(iii) The facilities would provide capacity to serve a population 30% greater than the existing population.

(d) *Proceeding with grant awards.* (1) After a categorical exclusion on a proposed treatment works has been granted, and notices published in accordance with §6.400(f), grant awards may proceed without being subject to any further environmental review requirements under this part, unless the responsible official later determines that the project, or the conditions at the time the categorical determination was made, have changed significantly since the independent EPA review of information submitted by the grantee in support of the exclusion.

(2) For all categorical exclusion determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project without need for any further environmental review;

(B) *Supplement*—update the information in the decision document on the categorically excluded project and prepare, issue, and distribute a revised notice in accordance with §6.107(f); or

(C) *Reassess*—revoke the categorical exclusion in accordance with §6.107(c) and require a complete environmental review to determine the need for an EIS in accordance with §6.506, followed

by preparation, issuance and distribution of an EA/FNSI or EIS/ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant, the responsible official shall, at the time of plans and specifications review under §35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed and, prior to plans and specifications approval, advise the Regional Administrator if additional environmental review is necessary.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

§6.506 Environmental review process.

(a) *Review of completed facilities plans.* The responsible official shall ensure a review of the completed facilities plan with particular attention to the EID and its utilization in the development of alternatives and the selection of a preferred alternative. An adequate EID shall be an integral part of any facilities plan submitted to EPA or to a State. The EID shall be of sufficient scope to enable the responsible official to make determinations on requests for partitioning the environmental review process in accordance with §6.507 and for preparing environmental assessments in accordance with §6.506(b).

(b) *Environmental assessment.* The environmental assessment process shall cover all potentially significant environmental impacts. The responsible official shall prepare a preliminary environmental assessment on which to base a recommendation to finalize and issue the environmental assessment/FNSI. For those States delegated environmental review responsibilities under §6.514, the State responsible official shall prepare the preliminary environmental assessment in sufficient detail to serve as an adequate basis for EPA's independent NEPA review and decision to finalize and issue an environmental assessment/FNSI or to prepare and issue a notice of intent for an EIS/ROD. The EPA also may require submission of supplementary information before the facilities plan is approved if needed for its independent review of the State's preliminary assessment for compliance with environmental review requirements. Substantial requests for supplementary information by EPA, including the review of the facilities plan, shall be made in writing. Each of the following subjects outlined below, and requirements of subpart C of this part, shall be reviewed by the responsible official to identify potentially significant environmental concerns and their associated potential impacts, and the responsible official shall furthermore address these concerns and impacts in the environmental assessment:

(1) *Description of the existing environment.* For the delineated facilities planning area, the existing environmental conditions relevant to the analysis of alternatives, or to determining the environmental impacts of the proposed action, shall be considered.

(2) *Description of the future environment without the project.* The relevant future environmental conditions shall be described. The no action alternative should be discussed.

(3) *Purpose and need.* This should include a summary discussion and demonstration of the need, or absence of need, for wastewater treatment in the facilities planning area, with particular emphasis on existing public health or water quality problems and their severity and extent.

(4) *Documentation.* Citations to information used to describe the existing environment and to assess future environmental impacts should be clearly referenced and documented. These sources should include, as appropriate but not limited to, local, tribal, regional, State, and Federal agencies as well as public and private organizations and institutions with responsibility or interest in the types of conditions listed in §6.509 and in subpart C of this part.

(5) *Analysis of alternatives.* This discussion shall include a comparative analysis of feasible alternatives, including the no action alternative, throughout the study area. The alternatives shall be screened with respect to capital and operating costs; direct, indirect, and cumulative environmental effects; physical, legal, or institutional constraints; and compliance with regulatory requirements. Special

attention should given to: the environmental consequences of long-term, irreversible, and induced impacts; and for projects initiated after September 30, 1978, that grant applicants have satisfactorily demonstrated analysis of potential recreation and open-space opportunities in the planning of the proposed treatment works. The reasons for rejecting any alternatives shall be presented in addition to any significant environmental benefits precluded by rejection of an alternative. The analysis should consider when relevant to the project:

(i) Flow and waste reduction measures, including infiltration/inflow reduction and pretreatment requirements;

(ii) Appropriate water conservation measures;

(iii) Alternative locations, capacities, and construction phasing of facilities;

(iv) Alternative waste management techniques, including pretreatment, treatment and discharge, wasterwater reuse, land application, and individual systems;

(v) Alternative methods for management of sludge, other residual materials, including utilization options such as land application, composting, and conversion of sludge for marketing as a soil conditioner or fertilizer;

(vi) Improving effluent quality through more efficient operation and maintenance;

(vii) Appropriate energy reduction measures; and

(viii) Multiple use including recreation, other open space, and environmental education.

(6) *Evaluating environmental consequences of proposed action.* A full range of relevant impacts of the proposed action shall be discussed, including measures to mitigate adverse impacts, any irreversible or irretrievable commitments of resources to the project and the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity. Any specific requirements, including grant conditions and areawide waste treatment management plan requirements, should be identified and referenced. In addition to these items, the responsible official may require that other analyses and data in accordance with subpart C which are needed to satisfy environmental review requirements be included with the facilities plan. Such requirements should be discussed whenever meetings are held with Step 1 grantees or potential Step 3 or Step 2 = 3 applicants.

(7) *Minimizing adverse effects of the proposed action.* (i) Structural and nonstructural measures, directly or indirectly related to the facilities plan, to mitigate or eliminate adverse effects on the human and natural environments, shall be identified during the environmental review. Among other measures, structual provisions include changes in facility design, size, and location; non-structural provisions include staging facilities, monitoring and enforcement of environmental regulations, and local commitments to develop and enforce land use regulations.

(ii) The EPA shall not accept a facilities plan, nor award grant assistance for its implementation, if the applicant/grantee has not made, or agreed to make, changes in the project, in accordance with determinations made in a FNSI based on its supporting environmental assessment or the ROD for a EIS. The EPA shall condition a grant, or seek other ways, to ensure that the grantee will comply with such environmental review determinations.

(c) *FNSI/EIS determination.* The responsible official shall apply the criteria under § 6.509 to the following:

(1) A complete facilities plan;

(2) The EID;

(3) The preliminary environmental assessment; and

(4) Other documentation, deemed necessary by the responsible official adequate to make an EIS determination by EPA. Where EPA determines that an EIS is to be prepared, there is no need to prepare a formal environmental assessment. If EPA or the State identifies deficiencies in the EID, preliminary environmental assessment, or other supporting documentation, necessary corrections shall be made to this documentation before the conditions of the Step 1 grant are considered satisfied or before the Step 3 or Step 2+3 application is considered complete. The responsible official's determination to issue a FNSI or to prepare an

EIS shall constitute final Agency action, and shall not be subject to administrative review under 40 CFR part 30, subpart L.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32612, Sept. 12, 1986]

§6.507 Partitioning the environmental review process.

(a) *Purpose.* Under certain circumstances the building of a component/portion of a wastewater treatment system may be justified in advance of completing all NEPA requirements for the remainder of the system(s). When there are overriding considerations of cost or impaired program effectiveness, the responsible official may award a construction grant, or approve procurement by other than EPA funds, for a discrete component of a complete wastewater treatment system(s). The process of partitioning the environmental review for the discrete component shall comply with the criteria and procedures described in paragraph (b) of this section. In addition, all reasonable alternatives for the overall wastewater treatment works system(s) of which the component is a part shall have been previously identified, and each part of the environmental review for the remainder of the overall facilities system(s) in the planning area in accordance with §6.502(b)(3) shall comply with all requirements under §6.506.

(b) *Criteria for partitioning.* (1) Projects may be partitioned under the following circumstances:

(i) To overcome impaired program effectiveness, the project component, in addition to meeting the criteria listed in paragraph (b)(2) of this section, must immediately remedy a severe public health, water quality or other environmental problem; or

(ii) To significantly reduce direct costs on EPA projects, or other related public works projects, the project component (such as major pieces of equipment, portions of conveyances or small structures) in addition to meeting the criteria listed in paragraph (b)(2) of this section, must achieve a cost savings to the Federal Government and/or to the grantee's or potential grantee's overall costs incurred in procuring the wastewater treatment component(s) and/or the installation of other related public works projects funded in coordination with other Federal, State, tribal or local agencies.

(2) The project component also must:

(i) Not foreclose any reasonable alternatives identified for the overall wastewater treatment works system(s);

(ii) Not cause significant adverse direct or indirect environmental impacts including those which cannot be acceptably mitigated without completing the entire wastewater treatment system of which the component is a part; and

(iii) Not be highly controversial.

(c) *Requests for partitioning.* The applicant's or State's request for partitioning must contain the following:

(1) A description of the discrete component proposed for construction before completing the environmental review of the entire facilities plan;

(2) How the component meets the above criteria;

(3) The environmental information required by §6.506 of this subpart for the component; and

(4) Any preliminary information that may be important to EPA in an EIS determination for the entire facilities plan (§6.509).

(d) *Approval of requests for partitioning.* The responsible official shall:

(1) Review the request for partitioning against all requirements of this subpart;

(2) If approvable, prepare and issue a FNSI in accordance with §6.508;

(3) Include a grant condition prohibiting the building of additional or different components of the entire facilities system(s) in the planning area as described in §6.502(b)(3)(i).

[50 FR 26317, June 25, 1985, as amended at 51 FR 32612, Sept. 12, 1986]

§6.508 Finding of No Significant Impact (FNSI) determination.

(a) *Criteria for producing and distributing FNSIs.* If, after completion of the environmental review, EPA determines that an EIS will not be required, the responsible official shall issue a FNSI in accordance with §§6.105(f) and 6.400(d). The FNSI will be based on EPA's independent review of the preliminary environmental assessment

and any other environmental information deemed necessary by the responsible official consistent with the requirements of §6.506(c). Following the Agency's independent review, the environmental assessment will be finalized and either be incorporated into, or attached to, the FNSI. The FNSI shall list all mitigation measures as defined in §1508.20 of this title, and specifically identify those mitigation measures necessary to make the recommended alternative environmentally acceptable.

(b) *Proceeding with grant awards.* (1) Once an environmental assessment has been prepared and the issued FNSI becomes effective for the treatment works within the study area, grant awards may proceed without preparation of additional FNSIs, unless the responsible official later determines that the project or environmental conditions have changed significantly from that which underwent environmental review.

(2) For all environmental assessment/FNSI determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project without revising the environmental assessment;

(B) *Supplement*—update information and prepare, issue and distribute a revised EA/FNSI in accordance with §§6.105(f) and 6.400(d); or

(C) *Reassess*—withdraw the FNSI and publish a notice of intent to produce an EIS followed by the preparation, issuance and distribution of the EIS/ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant, the responsible official shall, at the time of plans and specifications review under §35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed and, prior to plans and specifications approval, advise the Regional Administrator if additional environmental review is necessary.

[51 FR 32612, Sept. 12, 1986]

§6.509 Criteria for initiating Environmental Impact Statements (EIS).

(a) *Conditions requiring EISs.* (1) The responsible official shall assure that an EIS will be prepared and issued when it is determined that the treatment works or collector system will cause any of the conditions under §6.108 to exist, or when

(2) The treated effluent is being discharged into a body of water where the present classification is too lenient or is being challenged as too low to protect present or recent uses, and the effluent will not be of sufficient quality or quantity to meet the requirements of these uses.

(b) *Other conditions.* The responsible official shall also consider preparing an EIS if: The project is highly controversial; the project in conjunction with related Federal, State, local or tribal resource projects produces significant cumulative impacts; or if it is determined that the treatment works may violate Federal, State, local or tribal laws or requirements imposed for the protection of the environment.

§6.510 Environmental Impact Statement (EIS) preparation.

(a) *Steps in preparing EISs.* In addition to the requirements specified in subparts A, B, C, and D of this part, the responsible official will conduct the following activities:

(1) *Notice of intent.* If a determination is made that an EIS will be required, the responsible official shall prepare and distribute a notice of intent as required in §6.105(e) of this part.

(2) *Scoping.* As soon as possible, after the publication of the notice of intent, the responsible official will convene a meeting of affected Federal, State and local agencies, or affected Indian tribes, the grantee and other interested parties to determine the scope of the EIS. A notice of this scoping meeting must be made in accordance with §6.400(a) and 40 CFR 1506.6(b). As part of the scoping meeting EPA, in cooperation with any delegated State, will as a minimum:

(i) Determine the significance of issues for and the scope of those significant issues to be analyzed in depth, in the EIS;

(ii) Identify the preliminary range of alternatives to be considered;

(iii) Identify potential cooperating agencies and determine the information or analyses that may be needed from cooperating agencies or other parties;

(iv) Discuss the method for EIS preparation and the public participation strategy;

(v) Identify consultation requirements of other environmental laws, in accordance with subpart C; and

(vi) Determine the relationship between the EIS and the completion of the facilities plan and any necessary coordination arrangements between the preparers of both documents.

(3) *Identifying and evaluating alternatives.* Immediately following the scoping process, the responsible official shall commence the identification and evaluation of all potentially viable alternatives to adequately address the range of issues identified in the scoping process. Additional issues may be addressed, or others eliminated, during this process and the reasons documented as part of the EIS.

(b) *Methods for preparing EISs.* After EPA determines the need for an EIS, it shall select one of the following methods for its preparation:

(1) Directly by EPA's own staff;

(2) By EPA contracting directly with a qualified consulting firm;

(3) By utilizing a third party method, whereby the responsible official enters into "third party agreements" for the applicant to engage and pay for the services of a third party contractor to prepare the EIS. Such agreement shall not be initiated unless both the applicant and the responsible official agree to its creation. A third party agreement will be established prior to the applicant's EID and eliminate the need for that document. In proceeding under the third party agreement, the responsible official shall carry out the following practices:

(i) In consultation with the applicant, choose the third party contractor and manage that contract;

(ii) Select the consultant based on ability and an absence of conflict of interest. Third party contractors will be required to execute a disclosure statement prepared by the responsible official signifying they have no financial or other conflicting interest in the outcome of the project; and

(iii) Specify the information to be developed and supervise the gathering, analysis and presentation of the information. The responsible official shall have sole authority for approval and modification of the statements, analyses, and conclusions included in the third party EIS; or

(4) By utilizing a joint EPA/State process on projects within States which have requirements and procedures comparable to NEPA, whereby the EPA and the State agree to prepare a single EIS document to fulfill both Federal and State requirements. Both EPA and the State shall sign a Memorandum of Agreement which includes the responsibilities and procedures to be used by both parties for the preparation of the EIS as provided for in 40 CFR 1506.2(c).

§6.511 Record of Decision (ROD) for EISs and identification of mitigation measures.

(a) *Record of Decision.* After a final EIS has been issued, the responsible official shall prepare and issue a ROD in accordance with 40 CFR 1505.2 prior to, or in conjunction with, the approval of the facilities plan. The ROD shall include identification of mitigation measures derived from the EIS process including grant conditions which are necessary to minimize the adverse impacts of the selected alternative.

(b) *Specific mitigation measures.* Prior to the approval of a facilities plan, the responsible official must ensure that effective mitigation measures identified in the ROD will be implemented by the grantee. This should be done by revising the facilities plan, initiating other steps to mitigate adverse effects, or including conditions in grants requiring actions to minimize effects. Care should be exercised if a condition is to be imposed in a grant document to assure that the applicant possesses the authority to fulfill the conditions.

(c) *Proceeding with grant awards.* (1) Once the ROD has been prepared on the selected, or preferred, alternative(s) for the treatment works described within the EIS, grant awards may proceed without the preparation of supplemental EISs unless the responsible official later determines that the project or the environmental conditions described within the current EIS have changed significantly from the previous environmental review in accordance with §1502.9(c) of this title.

(2) For all EIS/ROD determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project, and documenting that no additional significant impacts were identified during the re-evaluation which would require supplementing the EIS; or

(B) *Supplement*—conduct additional studies and prepare, issue and distribute a supplemental EIS in accordance with §6.404 and document the original, or any revised, decision in an addendum to the ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant, the responsible official shall, at the time of plans and specifications review under §35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed, and prior to plans and specifications approval, advise the Regional Administrator if additional environmental review is necessary.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.512 Monitoring for compliance.

(a) *General.* The responsible official shall ensure adequate monitoring of mitigation measures and other grant conditions identified in the FNSI, or ROD.

(b) *Enforcement.* If the grantee fails to comply with grant conditions, the responsible official may consider applying any of the sanctions specified in 40 CFR 30.900.

§ 6.513 Public participation.

(a) *General.* Consistent with public participation regulations in part 25 of this title, and subpart D of this part, it is EPA policy that certain public participation steps be achieved before the State and EPA complete the environmental review process. As a minimum, all potential applicants that do not qualify for a categorical exclusion shall conduct the following steps in accordance with procedures specified in part 25 of this title:

(1) One public meeting when alternatives have been developed, but before an alternative has been selected, to discuss all alternatives under consideration and the reasons for rejection of others; and

(2) One public hearing prior to formal adoption of a facilities plan to discuss the proposed facilities plan and any needed mitigation measures.

(b) *Coordination.* Public participation activities undertaken in connection with the environmental review process should be coordinated with any other applicable public participation program wherever possible.

(c) *Scope.* The requirements of 40 CFR 6.400 shall be fulfilled, and consistent with 40 CFR 1506.6, the responsible official may institute such additional NEPA-related public participation procedures as are deemed necessary during the environmental review process.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.514 Delegation to States.

(a) *General.* Authority delegated to the State under section 205(g) of the Clean Water Act to review a facilities plan may include all EPA activities under this part except for the following:

(1) Determinations of whether or not a project qualifies for a categorical exclusion;

(2) Determinations to partition the environmental review process;

(3) Finalizing the scope of an EID when required to adequately conclude an independent review of a preliminary environmental assessment;

(4) Finalizing the scope of an environmental assessment, and finalization,

approval and issuance of a final environmental assessment;

(5) Determination to issue, and issuance of, a FNSI based on a completed (§6.508) or partitioned (§6.507(d)(2)) environmental review;

(6) Determination to issue, and issuance of, a notice of intent for preparing an EIS;

(7) Preparation of EISs under §6.510(b) (1) and (2), final decisions required for preparing an EIS under §6.510(b)(3), finalizing the agreement to prepare an EIS under §6.510(b)(4), finalizing the scope of an EIS, and issuance of draft, final and supplemental EISs;

(8) Preparation and issuance of the ROD based on an EIS;

(9) Final decisions under other applicable laws described in subpart C of this part;

(10) Determination following re-evaluations of projects awaiting grant funding in the case of Step 3 projects whose existing evaluations and/or decision documents are five or more years old, or determinations following re-evaluations on projects submitted for plans and specifications review and approval in the case of awarded Step 2+3 projects where the EPA Regional Administrator has been advised that additional environmental review is necessary, in accordance with §6.505(d)(2), §6.508(b)(2) or §6.511(c)(2); and

(11) Maintenance of official EPA monthly status reports as required under §6.402(b).

(b) *Elimination of duplication.* The responsible official shall assure that maximum efforts are undertaken to minimize duplication within the limits described under paragraph (a) of this section. In carrying out requirements under this subpart, maximum consideration shall be given to eliminating duplication in accordance with §1506.2 of this title. Where there are State or local procedures comparable to NEPA, EPA should enter into memoranda of understanding with these States concerning workload distribution and responsibilities not specifically reserved to EPA in paragraph (a) of this section for implementing the environmental review and facilities planning process.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

Subpart F—Environmental Review Procedures for the New Source NPDES Program

§6.600 Purpose.

(a) *General.* This subpart provides procedures for carrying out the environmental review process for the issuance of new source National Pollutant Discharge Elimination System (NPDES) discharge permits authorized under section 306, section 402, and section 511(c)(1) of the Clean Water Act.

(b) *Permit regulations.* All references in this subpart to the *permit regulations* shall mean parts 122 and 124 of title 40 of the CFR relating to the NPDES program.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§6.601 Definitions.

(a) The term *administrative action* for the sake of this subpart means the issuance by EPA of an NPDES permit to discharge as a new source, pursuant to 40 CFR 124.15.

(b) The term *applicant* for the sake of this subpart means any person who applies to EPA for the issuance of an NPDES permit to discharge as a new source.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§6.602 Applicability.

(a) *General.* The procedures set forth under subparts A, B, C and D, and this subpart shall apply to the issuance of new source NPDES permits, except for the issuance of a new source NPDES permit from any State which has an approved NPDES program in accordance with section 402(b) of the Clean Water Act.

(b) *New Source Determination.* An NPDES permittee must be determined a *new source* before these procedures apply. New source determinations will be undertaken pursuant to the provisions of the permit regulations under §122.29(a) and (b) of this chapter and §122.53(h).

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982; 51 FR 32613, Sept. 12, 1986]

§ 6.603 Limitations on actions during environmental review process.

The processing and review of an applicant's NPDES permit application shall proceed concurrently with the procedures within this subpart. Actions undertaken by the applicant or EPA shall be performed consistent with the requirements of § 122.29(c) of this chapter.

[47 FR 9831, Mar. 8, 1982, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.604 Environmental review process.

(a) *New source.* If EPA's initial determination under § 6.602(b) is that the facility is a new source, the responsible official shall evaluate any environmental information to determine if any significant impacts are anticipated and an EIS is necessary. If the permit applicant requests, the responsible official shall establish time limits for the completion of the environmental review process consistent with 40 CFR 1501.8.

(b) *Information needs.* Information necessary for a proper environmental review shall be provided by the permit applicant in an environmental information document. The responsible official shall consult with the applicant to determine the scope of an environmental information document. In doing this the responsible official shall consider the size of the new source and the extent to which the applicant is capable of providing the required information. The responsible official shall not require the applicant to gather data or perform analyses which unnecessarily duplicate either existing data or the results of existing analyses available to EPA. The responsible official shall keep requests for data to the minimum consistent with his responsibilities under NEPA.

(c) *Environmental assessment.* The responsible official shall prepare a written environmental assessment based on an environmental review of either the environmental information document and/or any other available environmental information.

(d) *EIS determination.* (1) When the environmental review indicates that a significant environmental impact may occur and that the significant adverse impacts cannot be eliminated by making changes in the proposed new source project, a notice of intent shall be issued, and a draft EIS prepared and distributed. When the environmental review indicates no significant impacts are anticipated or when the proposed project is changed to eliminate the significant adverse impacts, a FNSI shall be issued which lists any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(2) The FNSI together with the environmental assessment that supports the finding shall be distributed in accordance with § 6.400(d) of this regulation.

(e) *Lead agency.* (1) If the environmental review reveals that the preparation of an EIS is required, the responsible official shall determine if other Federal agencies are involved with the project. The responsible official shall contact all other involved agencies and together the agencies shall decide the lead agency based on the criteria set forth in 40 CFR 1501.5.

(2) If, after the meeting of involved agencies, EPA has been determined to be the lead agency, the responsible official may request that other involved agencies be cooperating agencies. Cooperating agencies shall be chosen and shall be involved in the EIS preparation process in the manner prescribed in the 40 CFR 1501.6(a). If EPA has been determined to be a cooperating agency, the responsible official shall be involved in assisting in the preparation of the EIS in the manner prescribed in 40 CFR 1501.6(b).

(f) *Notice of intent.* (1) If EPA is the lead agency for the preparation of an EIS, the responsible official shall arrange through OER for the publication of the notice of intent in the FEDERAL REGISTER, distribute the notice of intent and arrange and conduct a scoping meeting as outlined in 40 CFR 1501.7.

(2) If the responsible official and the permit applicant agree to a third party method of EIS preparation, pursuant to § 6.604(g)(3) of this part, the responsible official shall insure that a notice of intent is published and that a scoping meeting is held before the third party contractor begins work which may influence the scope of the EIS.

(g) *EIS method.* EPA shall prepare EISs by one of the following means:

(1) Directly by its own staff;

(2) By contracting directly with a qualified consulting firm; or

(3) By utilizing a third party method, whereby the responsible official enters into a *third party agreement* for the applicant to engage and pay for the services of a third party contractor to prepare the EIS. Such an agreement shall not be initiated unless both the applicant and the responsible official agree to its creation. A third party agreement will be established prior to the applicant's environmental information document and eliminate the need for that document. In proceeding under the third party agreement, the responsible official shall carry out the following practices:

(i) In consultation with the applicant, choose the third party contractor and manage that contract.

(ii) Select the consultant based on his ability and an absence of conflict of interest. Third party contractors will be required to execute a disclosure statement prepared by the responsible official signifying they have no financial or other conflicting interest in the outcome of the project.

(iii) Specify the information to be developed and supervise the gathering, analysis and presentation of the information. The responsible official shall have sole authority for approval and modification of the statements, analyses, and conclusions included in the third party EIS.

(h) *Documents for the administrative record.* Pursuant to 40 CFR 124.9(b)(6) and 124.18(b)(5) any environmental assessment, FNSI EIS, or supplement to an EIS shall be made a part of the administrative record related to permit issuance.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§6.605 Criteria for preparing EISs.

(a) *General guidelines.* (1) When determining the significance of a proposed new source's impact, the responsible official shall consider both its short term and long term effects as well as its direct and indirect effects and beneficial and adverse environmental impacts as defined in 40 CFR 1508.8.

(2) If EPA is proposing to issue a number of new source NPDES permits during a limited time span and in the same general geographic area, the responsible official shall examine the possibility of tiering EISs. If the permits are minor and environmentally insignificant when considered separately, the responsible official may determine that the cumulative impact of the issuance of all these permits may have a significant environmental effect and require an EIS for the area. Each separate decision to issue an NPDES permit shall then be based on the information in this areawide EIS. Site specific EISs may be required in certain circumstances in addition to the areawide EIS.

(b) *Specific criteria.* An EIS will be prepared when:

(1) The new source will induce or accelerate significant changes in industrial, commercial, agricultural, or residential land use concentrations or distributions which have the potential for significant environmental effects. Factors that should be considered in determining if these changes are environmentally significant include but are not limited to: The nature and extent of the vacant land subject to increased development pressure as a result of the new source; the increases in population or population density which may be induced and the ramifications of such changes; the nature of land use regulations in the affected area and their potential effects on development and the environment; and the changes in the availability or demand for energy and the resulting environmental consequences.

(2) The new source will directly, or through induced development, have significant adverse effect upon local ambient air quality, local ambient noise levels, floodplains, surface or groundwater quality or quantity, fish, wildlife, and their natural habitats.

(3) Any major part of the new source will have significant adverse effect on the habitat of threatened or endangered species on the Department of the Interior's or a State's lists of threatened and endangered species.

(4) The environmental impact of the issuance of a new source NPDES permit will have significant direct and adverse effect on a property listed in or eligible for listing in the National Register of Historic Places.

(5) Any major part of the source will have significant adverse effects on parklands, wetlands, wild and scenic rivers, reservoirs or other important bodies of water, navigation projects, or agricultural lands.

§ 6.606 Record of decision.

(a) *General.* At the time of permit award, the responsible official shall prepare a record of decision in those cases where a final EIS was issued in accordance with 40 CFR 1505.2 and pursuant to the provisions of the permit regulations under 40 CFR 124.15 and 124.18(b)(5). The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(b) *Mitigation measures.* The mitigation measures derived from the EIS process shall be incorporated as conditions of the permit; ancillary agreements shall not be used to require mitigation.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§ 6.607 Monitoring.

In accordance with 40 CFR 1505.3 and pursuant to 40 CFR 122.66(c) and 122.10 the responsible official shall ensure that there is adequate monitoring of compliance with all NEPA related requirements contained in the permit.

[47 FR 9831, Mar. 8, 1982]

Subpart G—Environmental Review Procedures for Office of Research and Development Projects

SOURCE: 56 FR 20543, May 6, 1991, unless otherwise noted.

§ 6.700 Purpose.

(a) This subpart amplifies the requirements described in subparts A through D by providing specific environmental review procedures for activities undertaken or funded by the Office of Research and Development (ORD).

(b) The ORD Program provides scientific support for setting environmental standards as well as the technology needed to prevent, monitor and control pollution. Intramural research is conducted at EPA laboratories and field stations throughout the United States. Extramural research is implemented through grants, cooperative agreements, and contracts. The majority of ORD's research is conducted within the confines of laboratories. Outdoor research includes monitoring, sampling, and environmental stress and ecological effects studies.

§ 6.701 Definition.

The term *appropriate program* official means the official at each decision level within ORD to whom the Assistant Administrator has delegated responsibility for carrying out the environmental review process.

§ 6.702 Applicability.

The requirements of this subpart apply to administrative actions undertaken to approve intramural and extramural projects under the purview of ORD.

§ 6.703 General.

(a) *Environmental information.* (1) For intramural research projects, information necessary to perform the environmental review shall be obtained by the appropriate program official.

(2) For extramural research projects, environmental information documents shall be submitted to EPA by applicants to facilitate the Agency's environmental review process. Guidance on environmental information documents shall be included in all assistance application kits and in contract proposal instructions. If there is a question concerning the preparation of an environmental information document, the applicant should consult with the project officer or contract officer for guidance.

(b) *Environmental review.* The diagram in figure 1 represents the various stages of the environmental review process to be undertaken for ORD projects.

(1) For intramural research projects, an environmental review will be performed for each laboratory's projects at the start of the planning year. The review will be conducted before projects are incorporated into the ORD program planning system. Projects added at a later date and, therefore, not identified at the start of the planning year, or any redirection of a project that could have significant environmental effects, also will be subjected to an environmental review. This review will be performed in accordance with the process set forth in this subpart and depicted in figure 1.

(2) For extramural research projects, the environmental review shall be conducted before an initial or continuing award is made. The appropriate program official will perform the environmental review in accordance with the process set forth in this subpart and depicted in figure 1. EPA form 5300–23 will be used to document categorical exclusion determinations or, with appropriate supporting analysis, as the environmental assessment (EA). The completed form 5300–23 and any finding of no significant impact (FNSI) or environmental impact statement (EIS) will be submitted with the proposal package to the appropriate EPA assistance or contract office.

(c) *Agency coordination*. In order to avoid duplication of effort and ensure consistency throughout the Agency, environmental reviews of ORD projects will be coordinated, as appropriate and feasible, with reviews performed by other program offices. Technical support documents prepared for reviews in other EPA programs may be adopted for use in ORD's environmental reviews and supplemented, as appropriate.

§6.704 Categorical exclusions.

(a) At the beginning of the environmental review process (see Figure 1), the appropriate program official shall determine whether an ORD project can be categorically excluded from the substantive requirements of a NEPA review. This determination shall be based on general criteria in §6.107(d) and specialized categories of ORD actions eligible for exclusion in §6.704(b). If the appropriate program official determines that an ORD project is consistent with the general criteria and any of the specialized categories of eligible activities, and does not satisfy the criteria in §6.107(e) for not granting a categorical exclusion, then this finding shall be documented and no further action shall be required. A categorical exclusion shall be revoked by the appropriate program official if it is determined that the project meets the criteria for revocation in §6.107(c). Projects that fail to qualify for categorical exclusion or for which categorical exclusion has been revoked must undergo full environmental review in accordance with §6.705 and §6.706.

(b) The following specialized categories of ORD actions are eligible for categorical exclusion from a detailed NEPA review:

(1) Library or literature searches and studies;

(2) Computer studies and activities;

(3) Monitoring and sample collection wherein no significant alteration of existing ambient conditions occurs;

(4) Projects conducted completely within a contained facility, such as a laboratory or other enclosed building, where methods are employed for appropriate disposal of laboratory wastes and safeguards exist against hazardous, toxic, and radioactive materials entering the environment. Laboratory directors or other appropriate officials must certify and provide documentation that the laboratory follows good laboratory practices and adheres to applicable Federal statutes, regulations and guidelines.

§6.705 Environmental assessment and finding of no significant impact.

(a) When a project does not meet any of the criteria for categorical exclusion, the appropriate program official shall undertake an environmental assessment in accordance with 40 CFR 1508.9 in order to determine whether an EIS is required or if a FNSI can be made. ORD projects which normally result in the preparation of an EA include the following:

(1) Initial field demonstration of a new technology;

(2) Field trials of a new product or new uses of an existing technology;

(3) Alteration of a local habitat by physical or chemical means.

(b) If the environmental assessment reveals that the research is not anticipated to have a significant impact on the environment, the appropriate program official shall prepare a FNSI in accordance with §6.105(f). Pursuant to §6.400(d), no administrative action will be taken on a project until the prescribed 30-day comment period for a FNSI has elapsed and the Agency has fully considered all comments.

(c) On actions involving potentially significant impacts on the environment, a FNSI may be prepared if changes have been made in the proposed action to eliminate any significant impacts. These changes must be documented in the proposal and in the FNSI.

(d) If the environmental assessment reveals that the research may have a significant impact on the environment, an EIS must be prepared. The appropriate program official may make a determination that an EIS is necessary without preparing a formal environmental assessment. This determination may be made by applying the criteria for preparation of an EIS in §6.706.

§ 6.706 Environmental impact statement.

(a) *Criteria for preparation.* In performing the environmental review, the appropriate program official shall assure that an EIS is prepared when any of the conditions under §6.108 (a) through (g) exist or when:

(1) The proposed action may significantly affect the environment through the release of radioactive, hazardous or toxic substances;

(2) The proposed action, through the release of an organism or organisms, may involve environmental effects which are significant;

(3) The proposed action involves effects upon the environment which are likely to be highly controversial;

(4) The proposed action involves environmental effects which may accumulate over time or combine with effects of other actions to create impacts which are significant;

(5) The proposed action involves uncertain environmental effects or highly unique environmental risks which may be significant.

(b) *ORD actions which may require preparation of an EIS.* There are no ORD actions which normally require the preparation of an EIS. However, each ORD project will be evaluated using the EIS criteria as stated in §6.706(a) to determine whether an EIS must be prepared.

(c) *Notice of intent.* (1) If the environmental review reveals that a proposed action may have a significant effect on the environment and this effect cannot be eliminated by redirection of the research or other means, the appropriate program official shall issue a notice of intent to prepare an EIS pursuant to §6.400(b).

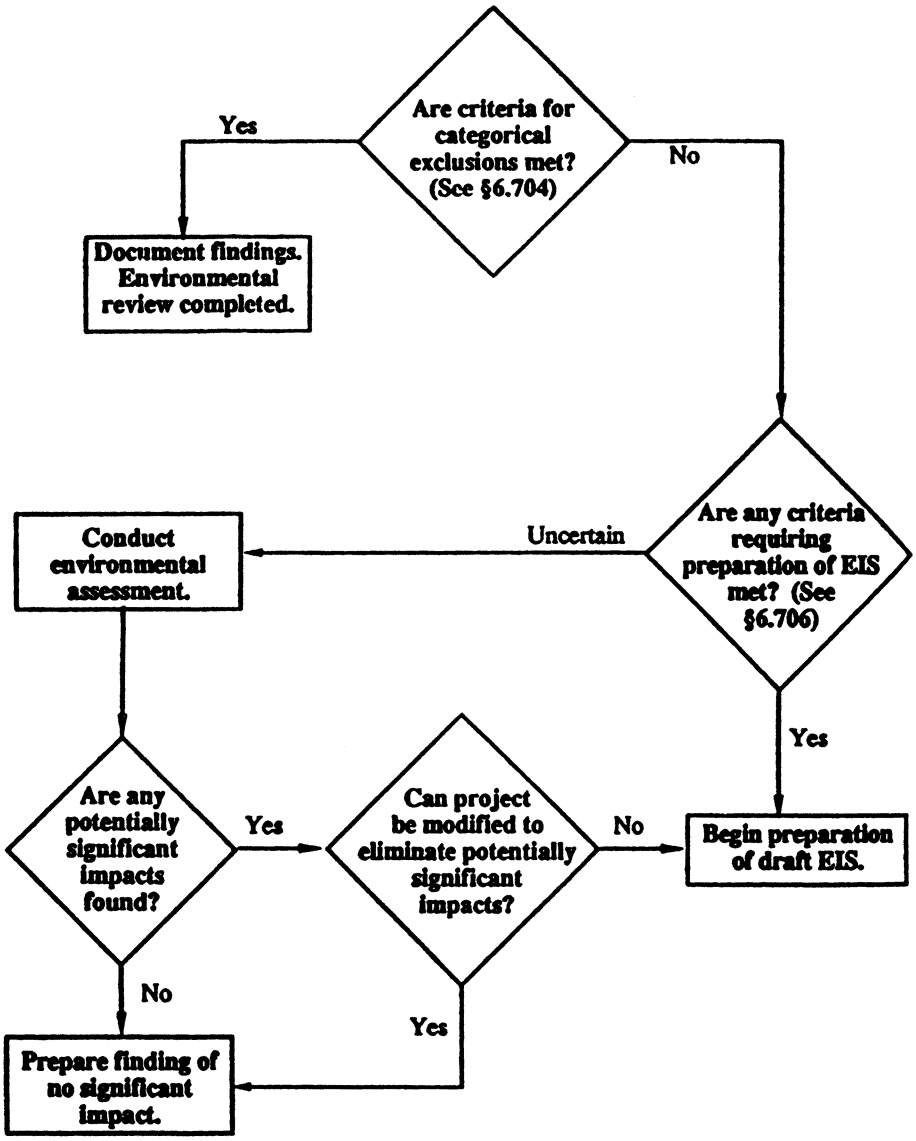
(2) As soon as possible after release of the notice of intent, the appropriate program official shall ensure that a draft EIS is prepared in accordance with subpart B and that the public is involved in accordance with subpart D.

(3) Draft and final EISs shall be sent to the Assistant Administrator for ORD for approval.

(4) Pursuant to §6.401(b), a decision on whether to undertake or fund a project must be made in conformance with the time frames indicated.

(d) *Record of decision.* Before the project is undertaken or funded, the appropriate program official shall prepare, in accordance with §6.105 (g) and (h), a record of decision in any case where a final EIS has been issued.

Figure 1. Environmental review process for ORD projects.



Subpart H—Environmental Review Procedures for Solid Waste Demonstration Projects

§ 6.800 Purpose.

This subpart amplifies the procedures described in subparts A through D by providing more specific environmental review procedures for demonstration projects undertaken by the Office of Solid Waste and Emergency Response.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.801 Applicability.

The requirements of this subpart apply to solid waste demonstration projects for resource recovery systems and improved solid waste disposal facilities undertaken pursuant to section 8006 of the Resource Conservation and Recovery Act of 1976.

§ 6.802 Criteria for preparing EISs.

The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions in § 6.108 exist.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26323, June 25, 1985]

§ 6.803 Environmental review process.

(a) *Environmental information.* (1) Environmental information documents shall be submitted to EPA by grant applicants or contractors. If there is a question concerning the need for a document, the potential contractor or grantee should consult with the appropriate project officer for the grant or contract.

(2) The environmental information document shall contain the same sections specified for EIS's in subpart B. Guidance alerting potential grantees and contractors of the environmental information documents shall be included in all grant application kits, attached to letters concerning the submission of unsolicited proposals, and included with all requests for proposal.

(b) *Environmental review.* An environmental review will be conducted before a grant or contract award is made. This review will include the preparation of an environmental assessment by the responsible official; the appropriate Regional Administrator's input will include his recommendations on the need for an EIS.

(c) *Notice of intent and EIS.* Based on the environmental review if the criteria in § 6.802 of this part apply, the responsible official will assure that a notice of intent and a draft EIS are prepared. The responsible official may request the appropriate Regional Administrator to assist him in the preparation and distribution of the environmental documents.

(d) *Finding of no significant impact.* If the environmental review indicated no significant environmental impacts, the responsible official will assure that a FNSI is prepared which lists any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(e) *Timing of action.* Pursuant to § 6.401(b), in no case shall a contract or grant be awarded until the prescribed 30-day review period for a final EIS has elapsed. Similarly, no action shall be taken until the 30-day comment period for a FNSI is completed.

§ 6.804 Record of decision.

The responsible official shall prepare a record of decision in any case where final EIS has been issued in accordance with 40 CFR 1505.2. It shall be prepared at the time of contract or grant award. The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

Subpart I—Environmental Review Procedures for EPA Facility Support Activities

§ 6.900 Purpose.

This subpart amplifies the general requirements described in subparts A through D by providing environmental procedures for the preparation of EISs on construction and renovation of special purpose facilities.

§ 6.901 Definitions.

(a) The term *special purpose facility* means a building or space, including land incidental to its use, which is wholly or predominantly utilized for the special purpose of an agency and not generally suitable for other uses,

as determined by the General Services Administration.

(b) The term *program of requirements* means a comprehensive document (booklet) describing program activities to be accomplished in the new special purpose facility or improvement. It includes architectural, mechanical, structural, and space requirements.

(c) The term *scope of work* means a document similar in content to the program of requirements but substantially abbreviated. It is usually prepared for small-scale projects.

§6.902 Applicability.

(a) *Actions covered.* These procedures apply to all new special purpose facility construction, activities related to this construction (e.g., site acquisition and clearing), and any improvements or modifications to facilities having potential environmental effects external to the facility, including new construction and improvements undertaken and funded by the Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, Office of the Assistant Administrator for Administration and Resource Management; or by a regional office .

(b) *Actions excluded.* This subpart does not apply to those activities of the Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, for which the branch does not have full fiscal responsibility for the entire project. This includes pilot plant construction, land acquisition, site clearing and access road construction where the Facilities Engineering and Real Estate Branch's activity is only supporting a project financed by a program office. Responsibility for considering the environmental impacts of such projects rests with the office managing and funding the entire project. Other subparts of this regulation apply depending on the nature of the project.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32613, Sept. 12, 1986]

§6.903 Criteria for preparing EISs.

(a) *Preliminary information.* The responsible official shall request an environmental information document from a construction contractor or consulting architect/engineer employed by EPA if he is involved in the planning, construction or modification of special purpose facilities when his activities have potential environmental effects external to the facility. Such modifications include but are not limited to facility additions, changes in central heating systems or wastewater treatment systems, and land clearing for access roads and parking lots.

(b) *EIS preparation criteria.* The responsible official shall conduct an environmental review of all actions involving construction of special purpose facilities and improvements to these facilities. The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions in §6.108 of this part exist.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26323, June 25, 1985]

§6.904 Environmental review process.

(a) *Environmental review.* (1) An environmental review shall be conducted when the program of requirements or scope of work has been completed for the construction, improvements, or modification of special purpose facilities. For special purpose facility construction, the Chief, Facilities Engineering and Real Estate Branch, shall request the assistance of the appropriate program office and Regional Administrator in the review. For modifications and improvement, the appropriate responsible official shall request assistance in making the review from other cognizant EPA offices.

(2) Any environmental information documents requested shall contain the same sections listed for EISs in subpart B. Contractors and consultants shall be notified in contractual documents when an environmental information document must be prepared.

(b) *Notice of intent, EIS, and FNSI.* The responsible official shall decide at the completion of the Environmental review whether there may be any significant environmental impacts. If there could be significant environmental impacts, a notice of intent and an EIS shall be prepared according to the procedures under subparts A, B, C and D. If there are not any significant environmental impacts, a FNSI shall be prepared according to the procedures in subparts A and D. The FNSI shall list

any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(c) *Timing of action.* Pursuant to § 6.401(b), in no case shall a contract be awarded or construction activities begun until the prescribed 30-day wait period for a final EIS has elapsed. Similarly, under § 6.400(d), no action shall be taken until the 30-day comment period for FNSIs is completed.

§ 6.905 Record of decision.

At the time of contract award, the responsible official shall prepare a record of decision in those cases where a final EIS has been issued in accordance with 40 CFR 1505.2. The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

Subpart J—Assessing the Environmental Effects Abroad of EPA Actions

AUTHORITY: Executive Order 12114, 42 U.S.C. 4321, note.

SOURCE: 46 FR 3364, Jan. 14, 1981, unless otherwise noted.

§ 6.1001 Purpose and policy.

(a) *Purpose.* On January 4, 1979, the President signed Executive Order 12114 entitled "Environmental Effects Abroad of Major Federal Actions." The purpose of this Executive Order is to enable responsible Federal officials in carrying out or approving major Federal actions which affect foreign nations or the global commons to be informed of pertinent environmental considerations and to consider fully the environmental impacts of the actions undertaken. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and the Marine Protection Research and Sanctuaries Act (MPRSA) (33 U.S.C. 1401 *et seq.*). It should be noted, however, that in fulfilling its responsibilities under Executive Order 12114, EPA shall be guided by CEQ regulations only to the extent that they are made expressly applicable by this subpart. The procedures set forth below reflect EPA's duties and responsibilities as required under the Executive Order and satisfy the requirement for issuance of procedures under section 2–1 of the Executive Order.

(b) *Policy.* It shall be the policy of this Agency to carry out the purpose and requirements of the Executive Order to the fullest extent possible. EPA, within the realm of its expertise, shall work with the Department of State and the Council on Environmental Quality to provide information to other Federal agencies and foreign nations to heighten awareness of and interest in the environment. EPA shall further cooperate to the extent possible with Federal agencies to lend special expertise and assistance in the preparation of required environmental documents under the Executive Order. EPA shall perform environmental reviews of activities significantly affecting the global commons and foreign nations as required under Executive Order 12114 and as set forth under these procedures.

§ 6.1002 Applicability.

(a) Administrative actions requiring environmental review. The environmental review requirements apply to the activities of EPA as set forth below:

(1) Major research or demonstration projects which affect the global commons or a foreign nation.

(2) Ocean dumping activities carried out under section 102 of the MPRSA which affect the related environment.

(3) Major permitting or licensing by EPA of facilities which affect the global commons or the environment of a foreign nation. This may include such actions as the issuance by EPA of hazardous waste treatment, storage, or disposal facility permits pursuant to section 3005 of the Resource Conservation and Recovery Act (42 U.S.C. 6925), NPDES permits pursuant to section 402 of the Clean Water Act (33 U.S.C. 1342), and prevention of significant deterioration approvals pursuant to Part C of the Clean Air Act (42 U.S.C. 7470 *et seq.*).

(4) Wastewater Treatment Construction Grants Program under section 201 of the Clean Water Act when activities

addressed in the facility plan would have environmental effects abroad.

(5) Other EPA activities as determined by OER and OIA (see § 6.1007(c)).

§ 6.1003 Definitions.

As used in this subpart, *environment* means the natural and physical environment and excludes social, economic and other environments; *global commons* is that area (land, air, water) outside the jurisdiction of any nation; and *responsible official* is either the EPA Assistant Administrator or Regional Administrator as appropriate for the particular EPA program. Also, an action *significantly* affects the environment if it does *significant* harm to the environment even though on balance the action may be beneficial to the environment. To the extent applicable, the responsible official shall address the considerations set forth in the CEQ Regulations under 40 CFR 1508.27 in determining significant effect.

§ 6.1004 Environmental review and assessment requirements.

(a) *Research and demonstration projects.* The appropriate Assistant Administrator is responsible for performing the necessary degree of environmental review on research and demonstration projects undertaken by EPA. If the research or demonstration project affects the environment of the global commons, the applicant shall prepare an environmental analysis. This will assist the responsible official in determining whether an EIS is necessary. If it is determined that the action significantly affects the environment of the global commons, then an EIS shall be prepared. If the undertaking significantly affects a foreign nation EPA shall prepare a unilateral, bilateral or multilateral environmental study. EPA shall afford the affected foreign nation or international body or organization an opportunity to participate in this study. This environmental study shall discuss the need for the action, analyze the environmental impact of the various alternatives considered and list the agencies and other parties consulted.

(b) *Ocean dumping activities.* (1) The Assistant Administrator for Water and Waste Management shall ensure the preparation of appropriate environmental documents relating to ocean dumping activities in the global commons under section 102 of the MPRSA. For ocean dumping site designations prescribed pursuant to section 102(c) of the MPRSA and 40 CFR part 228, EPA shall prepare an environmental impact statement consistent with the requirements of EPA's Procedures for the Voluntary Preparation of Environmental Impact Statements dated October 21, 1974 (see 39 FR 37419). Also EPA shall prepare an environmental impact statement for the establishment or revision of criteria under section 102(a) of MPRSA.

(2) For individual permits issued by EPA under section 102(b) an environmental assessment shall be made by EPA. Pursuant to 40 CFR part 221, the permit applicant shall submit with the application an environmental analysis which includes a discussion of the need for the action, an outline of alternatives, and an analysis of the environmental impact of the proposed action and alternatives consistent with the EPA criteria established under section 102(a) of MPRSA. The information submitted under 40 CFR part 221 shall be sufficient to satisfy the environmental assessment requirement.

(c) *EPA permitting and licensing activities.* The appropriate Regional Administrator is responsible for conducting concise environmental reviews with regard to permits issued under section 3005 of the Resource Conservation and Recovery Act (RCRA permits), section 402 of the Clean Water Act (NPDES permits), and section 165 of the Clean Air Act (PSD permits), for such actions undertaken by EPA which affect the global commons or foreign nations. The information submitted by applicants for such permits or approvals under the applicable consolidated permit regulations (40 CFR parts 122 and 124) and Prevention of Significant Deterioration (PSD) regulations (40 CFR part 52) shall satisfy the environmental document requirement under section 2–4(b) of Executive Order 12114. Compliance with applicable requirements in part 124 of the consolidated permit regulations (40 CFR part 124) shall be sufficient to satisfy the requirements to

conduct a concise environmental review for permits subject to this paragraph.

(d) *Wastewater treatment facility planning.* 40 CFR 6.506 details the environmental review process for the facilities planning process under the wastewater treatment works construction grants program. For the purpose of these regulations, the facility plan shall also include a concise environmental review of those activities that would have environmental effects abroad. This shall apply only to the Step 1 grants awarded after January 14, 1981, but on or before December 29, 1981, and facilities plans developed after December 29, 1981. Where water quality impacts identified in a facility plan are the subject or water quality agreements with Canada or Mexico, nothing in these regulations shall impose on the facility planning process coordination and consultation requirements in addition to those required by such agreements.

(e) *Review by other Federal agencies and other appropriate officials.* The responsible officials shall consult with other Federal agencies with relevant expertise during the preparation of the environmental document. As soon as feasible after preparation of the environmental document, the responsible official shall make the document available to the Council on Environmental Quality, Department of State, and other appropriate officials. The responsible official with assistance from OIA shall work with the Department of State to establish procedures for communicating with and making documents available to foreign nations and international organizations.

[46 FR 3364, Jan. 14, 1981, as amended at 50 FR 26323, June 25, 1985]

§ 6.1005 Lead or cooperating agency.

(a) *Lead Agency.* Section 3–3 of Executive Order 12114 requires the creation of a lead agency whenever an action involves more than one Federal agency. In implementing section 3–3, EPA shall, to the fullest extent possible, follow the guidance for the selection of a lead agency contained in 40 CFR 1501.5 of the CEQ regulations.

(b) *Cooperating Agency.* Under section 2–4(d) of the Executive Order, Federal agencies with special expertise are encouraged to provide appropriate resources to the agency preparing environmental documents in order to avoid duplication of resources. In working with a lead agency, EPA shall to the fullest extent possible serve as a cooperating agency in accordance with 40 CFR 1501.6. When other program commitments preclude the degree of involvement requested by the lead agency, the responsible EPA official shall so inform the lead agency in writing.

§ 6.1006 Exemptions and considerations.

Under section 2–5 (b) and (c) of the Executive Order, Federal agencies may provide for modifications in the contents, timing and availability of documents or exemptions from certain requirements for the environmental review and assessment. The responsible official, in consultation with the Director, Office of Environmental Review (OER), and the Director, Office of International Activities (OIA), may approve modifications for situations described in section 2–5(b). The responsible official, in consultation with the Director, OER and Director OIA, shall obtain exemptions from the Administrator for situations described in section 2–5(c). The Department of State and the Council on Environmental Quality shall be consulted as soon as possible on the utilization of such exemptions.

§ 6.1007 Implementation.

(a) *Oversight.* OER is responsible for overseeing the implementation of these procedures and shall consult with OIA wherever appropriate. OIA shall be utilized for making formal contacts with the Department of State. OER shall assist the responsible officials in carrying out their responsibilities under these procedures.

(b) *Information exchange.* OER with the aid of OIA, shall assist the Department of State and the Council on Environmental Quality in developing the informational exchange on environmental review activities with foreign nations.

(c) *Unidentified activities.* The responsible official shall consult with OER

and OIA to establish the type of environmental review or document appropriate for any new EPA activities or requirements imposed upon EPA by statute, international agreement or other agreements.

APPENDIX A TO PART 6—STATEMENT OF PROCEDURES ON FLOODPLAIN MANAGEMENT AND WETLANDS PROTECTION

Contents:

Section 1 General
Section 2 Purpose
Section 3 Policy
Section 4 Definitions
Section 5 Applicability
Section 6 Requirements
Section 7 Implementation

Section 1 General

a. Executive Order 11988 entitled "Floodplain Management" dated May 24, 1977, requires Federal agencies to evaluate the potential effects of actions it may take in a floodplain to avoid adversely impacting floodplains wherever possible, to ensure that its planning programs and budget requests reflect consideration of flood hazards and floodplain management, including the restoration and preservation of such land areas as natural undeveloped floodplains, and to prescribe procedures to implement the policies and procedures of this Executive Order. Guidance for implementation of the Executive Order has been provided by the U.S. Water Resources Council in its Floodplain Management Guidelines dated February 10, 1978 (see 40 FR 6030).

b. Executive Order 11990 entitled "Protection of Wetlands", dated May 24, 1977, requires Federal agencies to take action to avoid adversely impacting wetlands wherever possible, to minimize wetlands destruction and to preserve the values of wetlands, and to prescribe procedures to implement the policies and procedures of this Executive Order.

c. It is the intent of these Executive Orders that, wherever possible, Federal agencies implement the floodplains/wetlands requirements through existing procedures, such as those internal procedures established to implement the National Environmental Policy Act (NEPA) and OMB A–95 review procedures. In those instances where the environmental impacts of a proposed action are not significant enough to require an environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, or where programs are not subject to the requirements of NEPA, alternative but equivalent floodplain/wetlands evaluation and notice procedures must be established.

Section 2 Purpose

a. The purpose of this Statement of Procedures is to set forth Agency policy and guidance for carrying out the provisions of Executive Orders 11988 and 11990.

b. EPA program offices shall amend existing regulations and procedures to incorporate the policies and procedures set forth in this Statement of Procedures.

c. To the extent possible, EPA shall accommodate the requirements of Executive Orders 11988 and 11990 through the Agency NEPA procedures contained in 40 CFR part 6.

Section 3 Policy

a. The Agency shall avoid wherever possible the long and short term impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

b. The Agency shall incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes. It shall also promote the preservation and restoration of floodplains so that their natural and beneficial values can be realized. To the extent possible EPA shall:

(1) Reduce the hazard and risk of flood loss and wherever it is possible to avoid direct or indirect adverse impact on floodplains;

(2) Where there is no practical alternative to locating in a floodplain, minimize the impact of floods on human safety, health, and welfare, as well as the natural environment;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of EPA structures and facilities to be in accordance with the standards and criteria, of the regulations promulgated pursuant to the National Flood Insurance Program;

(5) Identify floodplains which require restoration and preservation and recommend management programs necessary to protect these floodplains and to include such considerations as part of on-going planning programs; and

(6) Provide the public with early and continuing information concerning floodplain management and with opportunities for participating in decision making including the (evaluation of) tradeoffs among competing alternatives.

c. The Agency shall incorporate wetlands protection considerations into its planning, regulatory, and decisionmaking processes. It shall minimize the destruction, loss, or degradation of wetlands and preserve and enhance the natural and beneficial values of wetlands. Agency activities shall continue to

be carried out consistent with the Administrator's Decision Statement No. 4 dated February 21, 1973 entitled "EPA Policy to Protect the Nation's Wetlands."

Section 4 Definitions

a. *Base Flood* means that flood which has a one percent chance of occurrence in any given year (also known as a 100-year flood). This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a community in its floodplain management regulations.

b. *Base Floodplain* means the land area covered by a 100-year flood (one percent chance floodplain). Also see definition of floodplain.

c. *Flood or Flooding* means a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source, or flooding from any other source.

d. *Floodplain* means the lowland and relatively flat areas adjoining inland and coastal waters and other floodprone areas such as offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year. The base floodplain shall be used to designate the 100-year floodplain (one percent chance floodplain). The critical action floodplain is defined as the 500-year floodplain (0.2 percent chance floodplain).

e. *Floodproofing* means modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out or to reduce effects of water entry.

f. *Minimize* means to reduce to the smallest possible amount or degree.

g. *Practicable* means capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors such as environment, community welfare, cost, or technology.

h. *Preserve* means to prevent modification to the natural floodplain environment or to maintain it as closely as possible to its natural state.

i. *Restore* means to re-establish a setting or environment in which the natural functions of the floodplain can again operate.

j. *Wetlands* means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

Section 5 Applicability

a. The Executive Orders apply to activities of Federal agencies pertaining to (1) acquiring, managing, and disposing of Federal lands and facilities, (2) providing Federally undertaken, financed, or assisted construction and improvements, and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

b. These procedures shall apply to EPA's programs as follows: (1) All Agency actions involving construction of facilities or management of lands or property. This will require amendment of the EPA Facilities Management Manual (October 1973 and revisions thereafter).

(2) All Agency actions where the NEPA process applies. This would include the programs under sections 306/402 of the Clean Water Act pertaining to new source permitting and section 201 of the Clean Water Act pertaining to wastewater treatment construction grants.

(3) All agency actions where there is sufficient independent statutory authority to carry out the floodplain/wetlands procedures.

(4) In program areas where there is no EIS requirement nor clear statutory authority for EPA to require procedural implementation, EPA shall continue to provide leadership and offer guidance so that the value of floodplain management and wetlands protection can be understood and carried out to the maximum extent practicable in these programs.

c. These procedures shall not apply to any permitting or source review programs of EPA once such authority has been transferred or delegated to a State. However, EPA shall, to the extent possible, require States to provide equivalent effort to assure support for the objectives of these procedures as part of the State assumption process.

Section 6 Requirements

a. Floodplain/Wetlands review of proposed Agency actions.

(1) *Floodplain/Wetlands Determination*— Before undertaking an Agency action, each program office must determine whether or not the action will be located in or affect a floodplain or wetlands. The Agency shall utilize maps prepared by the Federal Insurance Administration of the Federal Emergency Management Agency (Flood Insurance Rate Maps or Flood Hazard Boundary Maps), Fish and Wildlife Service (National Wetlands Inventory Maps), and other appropriate agencies to determine whether a proposed action is located in or will likely affect a floodplain or wetlands. If there is no floodplain/wetlands impact identified, the action may proceed without further consideration of the remaining procedures set forth below.

(2) *Early Public Notice*—When it is apparent that a proposed or potential agency action is likely to impact a floodplain or wetlands, the public should be informed through appropriate public notice procedures.

(3) *Floodplain/Wetlands Assessment*—If the Agency determines a proposed action is located in or affects a floodplain or wetlands, a floodplain/wetlands assessment shall be undertaken. For those actions where an environmental assessment (EA) or environmental impact statement (EIS) is prepared pursuant to 40 CFR part 6, the floodplain/wetlands assessment shall be prepared concurrently with these analyses and shall be included in the EA or EIS. In all other cases, a *floodplain/wetlands assessment* shall be prepared. Assessments shall consist of a description of the proposed action, a discussion of its effect on the floodplain/wetlands, and shall also describe the alternatives considered.

(4) *Public Review of Assessments*—For proposed actions impacting floodplain/wetlands where an EA or EIS is prepared, the opportunity for public review will be provided through the EIS provisions contained in 40 CFR parts 6, 25, or 35, where appropriate. In other cases, an equivalent public notice of the floodplain/wetlands assessment shall be made consistent with the public involvement requirements of the applicable program.

(5) *Minimize, Restore or Preserve*—If there is no practicable alternative to locating in or affecting the floodplain or wetlands, the Agency shall act to minimize potential harm to the floodplain or wetlands. The Agency shall also act to restore and preserve the natural and beneficial values of floodplains and wetlands as part of the analysis of all alternatives under consideration.

(6) *Agency Decision*—After consideration of alternative actions, as they have been modified in the preceding analysis, the Agency shall select the desired alternative. For all Agency actions proposed to be in or affecting a floodplain/wetlands, the Agency shall provide further public notice announcing this decision. This decision shall be accompanied by a Statement of Findings, not to exceed three pages. This Statement shall include: (i) The reasons why the proposed action must be located in or affect the floodplain or wetlands; (ii) a description of significant facts considered in making the decision to locate in or affect the floodplain or wetlands including alternative sites and actions; (iii) a statement indicating whether the proposed action conforms to applicable State or local floodplain protection standards; (iv) a description of the steps taken to design or modify the proposed action to minimize potential harm to or within the floodplain or wetlands; and (v) a statement indicating how the proposed action affects the natural or beneficial values of the floodplain or wetlands. If the provisions of 40 CFR part 6 apply, the Statement of Findings may be incorporated in the final EIS or in the environmental assessment. In other cases, notice should be placed in the FEDERAL REGISTER or other local medium and copies sent to Federal, State, and local agencies and other entities which submitted comments or are otherwise concerned with the floodplain/wetlands assessment. For floodplain actions subject to Office of Management and Budget (OMB) Circular A–95, the Agency shall send the Statement of Findings to State and areawide A–95 clearinghouse in the geographic area affected. At least 15 working days shall be allowed for public and interagency review of the Statement of Findings.

(7) *Authorizations/Appropriations*—Any requests for new authorizations or appropriations transmitted to OMB shall include, a floodplain/wetlands assessment and, for floodplain impacting actions, a Statement of Findings, if a proposed action will be located in a floodplain or wetlands.

b. *Lead agency concept.* To the maximum extent possible, the Agency shall relay on the lead agency concept to carry out the provisions set forth in section 6.a of this appendix. Therefore, when EPA and another Federal agency have related actions, EPA shall work with the other agency to identify which agency shall take the lead in satisfying these procedural requirements and thereby avoid duplication of efforts.

c. *Additional floodplain management provisions relating to Federal property and facilities.*

(1) *Construction Activities*—EPA controlled structures and facilities must be constructed in accordance with existing criteria and standards set forth under the NFIP and must include mitigation of adverse impacts wherever feasible. Deviation from these requirements may occur only to the extent NFIP standards are demonstrated as inappropriate for a given structure or facility.

(2) *Flood Protection Measures*—If newly constructed structures or facilities are to be located in a floodplain, accepted floodproofing and other flood protection measures shall be undertaken. To achieve flood protection, EPA shall, wherever practicable, elevate structures above the base flood level rather than filling land.

(3) *Restoration and Preservation*—As part of any EPA plan or action, the potential for restoring and preserving floodplains and wetlands so that their natural and beneficial values can be realized must be considered and incorporated into the plan or action wherever feasible.

(4) *Property Used by Public*—If property used by the public has suffered damage or is located in an identified flood hazard area, EPA shall provide on structures, and other places where appropriate, conspicuous indicators of past and probable flood height to enhance public knowledge of flood hazards.

(5) *Transfer of EPA Property*—When property in flood plains is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, EPA shall reference in the conveyance those uses that are restricted under Federal, State and local floodplain regulations and attach other restrictions to uses of the property as may be deemed appropriate. Notwithstanding, EPA shall consider withholding such properties from conveyance.

Section 7 Implementation

a. Pursuant to section 2, the EPA program offices shall amend existing regulations, procedures, and guidance, as appropriate, to incorporate the policies and procedures set forth in this Statement of Procedures. Such amendments shall be made within six months of the date of these Procedures.

b. The Office of External Affairs (OEA) is responsible for the oversight of the implementation of this Statement of Procedures and shall be given advanced opportunity to review amendments to regulations, procedures, and guidance. OEA shall coordinate efforts with the program offices to develop necessary manuals and more specialized supplementary guidance to carry out this Statement of Procedures.

[44 FR 64177, Nov. 6, 1976, as amended at 50 FR 26323, June 25, 1985]

PART 7—NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY

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APPENDIX A TO PART 7—TYPES OF EPA ASSISTANCE AS LISTED IN THE "CATALOG OF FEDERAL DOMESTIC ASSISTANCE"

AUTHORITY: 42 U.S.C. 2000d to 2000d–7; 29 U.S.C. 794; 33 U.S.C. 1251 nt.

SOURCE: 49 FR 1659, Jan. 12, 1984, unless otherwise noted.

Subpart A—General

§ 7.10 Purpose of this part.

This part implements: Title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; and section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, (collectively, the Acts).

§ 7.15 Applicability.

This part applies to all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance beginning February 13, 1984. New construction (§ 7.70) for which design was initiated prior to February 13, 1984, shall comply with the accessibility requirements in the Department of Health, Education and Welfare (now the Department of Health and Human Services) nondiscrimination regulation, 45 CFR 84.23, issued June 3, 1977, or with equivalent standards that ensure the facility is readily accessible to and usable by handicapped persons. Such assistance includes but is not limited to

that which is listed in the *Catalogue of Federal Domestic Assistance* under the 66.000 series. It supersedes the provisions of former 40 CFR parts 7 and 12.

§ 7.20 Responsible agency officers.

(a) The EPA Office of Civil Rights (OCR) is responsible for developing and administering EPA's means of ensuring compliance under the Acts.

(b) EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.25 Definitions.

As used in this part:

Administrator means the Administrator of EPA. It includes any other agency official authorized to act on his or her behalf, unless explicity stated otherwise.

Alcohol abuse means any misuse of alcohol which demonstrably interferes with a person's health, interpersonal relations or working ability.

Applicant means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance (see definition for *EPA assistance*).

Assistant Attorney General is the head of the Civil Rights Division, U.S. Department of Justice.

Award Official means the EPA official with the authority to approve and execute assistance agreements and to take other assistance related actions authorized by this part and by other EPA regulations or delegation of authority.

Drug abuse means:

(a) The use of any drug or substance listed by the Department of Justice in 21 CFR 1308.11, under authority of the Controlled Substances Act, 21 U.S.C. 801, as a controlled substance unavailable for prescription because:

(1) The drug or substance has a high potential for abuse,

(2) The drug or other substance has no currently accepted medical use in treatment in the United States, or

(3) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

NOTE: Examples of drugs under paragraph (a)(1) of this section include certain opiates and opiate derivatives (e.g., heroin) and hallucinogenic substances (e.g., marijuana, mescaline, peyote) and depressants (e.g., methaqualone). Examples of (a)(2) include opium, coca leaves, methadone, amphetamines and barbiturates.

(b) The misuse of any drug or substance listed by the Department of Justice in 21 CFR 1308.12–1308.15 under authority of the Controlled Substances Act as a controlled substance available for prescription.

EPA means the United States Environmental Protection Agency.

EPA assistance means any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of personnel; or

(3) Real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA.

Facility means all, or any part of, or any interests in structures, equipment, roads, walks, parking lots, or other real or personal property.

Handicapped person:

(a) *Handicapped person* means any person who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. For purposes of employment, the term *handicapped person* does not include any person who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current drug or alcohol abuse, would constitute a direct threat to property or the safety of others.

(b) As used in this paragraph, the phrase:

(1) *Physical or mental impairment* means (i) any physiological disorder or

condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; and (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined above but is treated by a recipient as having such an impairment.

Office of Civil Rights or OCR means the Director of the Office of Civil Rights, EPA Headquarters or his/her designated representative.

Project Officer means the EPA official designated in the assistance agreement (as defined in *EPA assistance*) as EPA's contact with the recipient; Project Officers are responsible for monitoring the project.

Program or activity and *program* mean all of the operations of any entity described in paragraphs (1) through (4) of this definition, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

Qualified handicapped person means:

(a) With respect to employment: A handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.

(b) With respect to services: A handicapped person who meets the essential eligibility requirements for the receipt of such services.

Racial classifications: [1]

[1] Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Subparagraphs (a) through (e) are in conformity with Directive 15 of the Office of Federal Statistical Policy and Standards, whose function is now in the Office of Information and Regulatory Affairs, Office of Management and Budget. Should that office, or any successor office, change or otherwise amend the categories listed in Directive 15, the categories in this

(a) *American Indian or Alaskan native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(b) *Asian or Pacific Islander.* A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

(c) *Black and not of Hispanic origin.* A person having origins in any of the black racial groups of Africa.

(d) *Hispanic.* A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless or race.

(e) *White, not of Hispanic origin.* A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Recipient means, for the purposes of this regulation, any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

Section 13 refers to section 13 of the Federal Water Pollution Control Act Amendments of 1972.

United States includes the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and all other territories and possessions of the United States; the term *State* includes any one of the foregoing.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

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paragraph shall be interpreted to conform with any such changes or amendments.

Subpart B—Discrimination Prohibited on the Basis of Race, Color, National Origin or Sex

§ 7.30 General prohibition.

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

§ 7.35 Specific prohibitions.

(a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:

(1) Deny a person any service, aid or other benefit of the program or activity;

(2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program or activity;

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program or activity;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program or activity;

(5) Deny a person or any group of persons the opportunity to participate as members of any planning or advisory body which is an integral part of the program or activity, such as a local sanitation board or sewer authority;

(6) Discriminate in employment on the basis of sex in any program or activity subject to section 13, or on the basis of race, color, or national origin in any program or activity whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of EPA assistance, or subject the beneficiaries to prohibited discrimination.

(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

(b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

(c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

(d) The specific prohibitions of discrimination enumerated above do not limit the general prohibition of § 7.30.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

Subpart C—Discrimination Prohibited on the Basis of Handicap

§ 7.45 General prohibition.

No qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance.

§ 7.50 Specific prohibitions against discrimination.

(a) A recipient, in providing any aid, benefit or service under any program or activity receiving EPA assistance shall not, on the basis of handicap, directly or through contractual, licensing, or other arrangement:

(1) Deny a qualified handicapped person any service, aid or other benefit of a federally assisted program or activity;

(2) Provide different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless the action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others;

(3) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an entity that discriminates on the basis of handicap in providing aids, benefits, or services to beneficiaries of the recipient's program or activity;

(4) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(5) Limit a qualified handicapped person in any other way in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service from the program or activity.

(b) A recipient may not, in determining the site or location of a facility, make selections: (1) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives EPA assistance or (2) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity receiving EPA assistance with respect to handicapped persons.

(c) A recipient shall not use criteria or methods of administering any program or activity receiving EPA assistance which have the effect of subjecting individuals to discrimination because of their handicap, or have the effect of defeating or substantially impairing accomplishment of the objectives of such program or activity with respect to handicapped persons.

(d) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

(e) The exclusion of non-handicapped persons or specified classes of handicapped persons from aid, benefits, or services limited by Federal statute or Executive Order to handicapped persons or a different class of handicapped persons is not prohibited by this subpart.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.55 Separate or different aid, benefits, or services.

Recipients shall not deny a qualified handicapped person an opportunity equal to that afforded others to participate in or benefit from the aid, benefit, or service in the program or activity receiving EPA assistance. Recipients shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.60 Prohibitions and requirements relating to employment.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives Federal assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur, and shall not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; or

(9) Any other term, condition, or privilege of employment.

(d) A recipient shall not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(e) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(f) A recipient shall not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(g) A recipient shall not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except as permitted by the Department of Justice in 28 CFR 42.513.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.65 Accessibility.

(a) *General.* A recipient shall operate each program or activity receiving EPA assistance so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons. This paragraph does not:

(1) Necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(2) Require a recipient to take any action that the recipient can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alternation or such financial and administrative burdens, the recipient shall be required to take any other action that would not result in such an alteration or financial and administrative burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity receiving EPA assistance.

(b) *Methods of ensuring compliance in existing facilities.* A recipient may comply with the accessibility requirements of this section by making structural changes, redesigning equipment, reassigning services to accessible buildings, assigning aides to beneficiaries, or any other means that make its program or activity accessible to handicapped persons. In choosing among alternatives, a recipient must give priority to methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Deadlines.* (1) Except where structural changes in facilities are necessary, recipients must adhere to the provisions of this section within 60 days after the effective date of this part.

(2) Recipients having an existing facility which does require alterations in order to comply with paragraph (a) of this section must prepare a transition plan in accordance with § 7.75 within six months from the effective date of this part. The recipient must complete the changes as soon as possible, but not later than three years from date of award.

(d) *Notice of accessibility.* The recipient must make sure that interested persons, including those with impaired vision or hearing, can find out about the existence and location of the services, activities, and facilities that are accessible to and usable by handicapped persons.

(e) *Structural and financial feasibility.* This section does not require structural alterations to existing facilities if making such alterations would not be structurally or financially feasible. An alteration is not structurally feasible when it has little likelihood of being accomplished without removing or altering a load-bearing structural member. Financial feasibility shall take into account the degree to which the alteration work is to be assisted by EPA assistance, the cost limitations of the statute under which such assistance is provided, and the relative cost of accomplishing such alterations in manners consistent and inconsistent with accessibility.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.70 New construction.

(a) *General.* New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their

intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[49 FR 1659, Jan. 12, 1984, as amended at 55 FR 52138, 52142, Dec. 19, 1990]

§ 7.75 Transition plan.

If structural changes to facilities are necessary to make the program or activity accessible to handicapped persons, a recipient must prepare a transition plan.

(a) *Requirements.* The transition plan must set forth the steps needed to complete the structural changes required and must be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. At a minimum, the transition plan must:

(1) Identify the physical obstacles in the recipient's facilities that limit handicapped persons' access to its program or activity,

(2) Describe in detail what the recipient will do to make the facilities accessible,

(3) Specify the schedule for the steps needed to achieve full accessibility under §7.65(a), and include a year-by-year timetable if the process will take more than one year,

(4) Indicate the person responsible for carrying out the plan.

(b) *Availability.* Recipients shall make available a copy of the transition plan to the OCR upon request and to the public for inspection at either the site of the project or at the recipient's main office.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

Subpart D—Requirements for Applicants and Recipients

§ 7.80 Applicants.

(a) *Assurances*—(1) *General.* Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part.

(2) *Duration of assurance*—(i) *Real property.* When EPA awards assistance in the form of real property, or assistance to acquire real property, or structures on the property, the assurance will obligate the recipient, or transferee, during the period the real property or structures are used for the purpose for which EPA assistance is extended, or for another purpose in which similar services or benefits are provided. The transfer instrument shall contain a covenant running with the land which assures nondiscrimination. Where applicable, the covenant shall also retain a right of reverter which will permit EPA to recover the property if the covenant is ever broken.

(ii) *Personal property.* When EPA provides assistance in the form of personal property, the assurance will obligate the recipient for so long as it continues to own or possess the property.

(iii) *Other forms of assistance.* In all other cases, the assurance will obligate the recipient for as long as EPA assistance is extended.

(b) *Wastewater treatment project.* EPA Form 4700–4 shall also be submitted with applications for assistance under Title II of the Federal Water Pollution Control Act.

(c) *Compliance information.* Each applicant for EPA assistance shall submit regarding the program or activity that would receive EPA assistance:

(1) Notice of any lawsuit pending against the applicant alleging discrimination on the basis of race, color, sex, handicap, or national origin;

(2) A brief description of any applications pending to other Federal agencies for assistance, and of Federal assistance being provided at the time of the application; and

(3) A statement describing any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, and information concerning the agency

or organization performing the reviews.

(Approved by the Office of Management and Budget under control number 2000–0006)

§ 7.85 Recipients.

(a) *Compliance information.* Each recipient shall collect, maintain, and on request of the OCR, provide the following information to show compliance with this part:

(1) A brief description of any lawsuits pending against the recipient that allege discrimination which this part prohibits;

(2) Racial/ethnic, national origin, sex and handicap data, or EPA Form 4700–4 information submitted with its application;

(3) A log of discrimination complaints which identifies the complaint, the date it was filed, the date the recipient's investigation was completed, the disposition, and the date of disposition; and

(4) Reports of any compliance reviews conducted by any other agencies.

(b) *Additional compliance information.* If necessary, the OCR may require recipients to submit data and information specific to certain programs or activities to determine compliance where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance or to investigate a complaint alleging discrimination in a program or activity receiving EPA assistance. Requests shall be limited to data and information which is relevant to determining compliance and shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.

(c) *Self-evaluation.* Each recipient must conduct a self-evaluation of its administrative policies and practices, to consider whether such policies and practices may involve handicap discrimination prohibited by this part. When conducting the self-evaluation, the recipient shall consult with interested and involved persons including handicapped persons or organizations representing handicapped persons. The evaluation shall be completed within 18 months after the effective date of this part.

(d) Preparing compliance information. In preparing compliance information, a recipient must:

(1) [Reserved]

(2) Use the racial classifications set forth in § 7.25 in determining categories of race, color or national origin.

(e) *Maintaining compliance information.* Recipients must keep records for paragraphs (a) and (b) of this section for three (3) years after completing the project. When any complaint or other action for alleged failure to comply with this part is brought before the three-year period ends, the recipient shall keep records until the complaint is resolved.

(f) Accessibility to compliance information. A recipient shall:

(1) Give the OCR access during normal business hours to its books, records, accounts and other sources of information, including its facilities, as may be pertinent to ascertain compliance with this part;

(2) Make compliance information available to the public upon request; and

(3) Assist in obtaining other required information that is in the possession of other agencies, institutions, or persons not under the recipient's control. If such party refuses to release that information, the recipient shall inform the OCR and explain its efforts to obtain the information.

(g) *Coordination of compliance effort.* If the recipient employs fifteen (15) or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part.

(Approved by the Office of Management and Budget under control number 2000–0006)

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.90 Grievance procedures.

(a) *Requirements.* Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.

(b) *Exception.* Recipients with fewer than fifteen (15) full-time employees need not comply with this section unless the OCR finds a violation of this part or determines that creating a

grievance procedure will not significantly impair the recipient's ability to provide benefits or services.

§7.95 Notice of nondiscrimination.

(a) *Requirements.* A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, or handicap in a program or activity receiving EPA assistance or, in programs or activities covered by section 13, on the basis of sex. Methods of notice must accommodate those with impaired vision or hearing. At a minimum, this notice must be posted in a prominent place in the recipient's offices or facilities. Methods of notice may also include publishing in newspapers and magazines, and placing notices in recipient's internal publications or on recipient's printed letterhead. Where appropriate, such notice must be in a language or languages other than English. The notice must identify the responsible employee designated in accordance with §7.85.

(b) *Deadline.* Recipients of assistance must provide initial notice by thirty (30) calendar days after award and continuing notice for the duration of EPA assistance.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§7.100 Intimidation and retaliation prohibited.

No applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either:

(a) For the purpose of interfering with any right or privilege guaranteed by the Acts or this part, or

(b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation.

Subpart E—Agency Compliance Procedures

§7.105 General policy.

EPA's Administrator, Director of the Office of Civil Rights, Project Officers and other responsible officials shall seek the cooperation of applicants and recipients in securing compliance with this part, and are available to provide help.

§7.110 Preaward compliance.

(a) *Review of compliance information.* Within EPA's application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by §7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, including handicapped persons or organizations representing such persons. The OCR may also conduct an on-site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.

(b) *Voluntary compliance.* If the review indicates noncompliance, an applicant may agree in writing to take the steps the OCR recommends to come into compliance with this part. The OCR must approve the written agreement before any award is made.

(c) *Refusal to comply.* If the applicant refuses to enter into such an agreement, the OCR shall follow the procedure established by paragraph (b) of §7.130.

§7.115 Postaward compliance.

(a) *Periodic review.* The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.

(b) *Notice of review.* After selecting a recipient for review or initiating a complaint investigation in accordance with §7.120, the OCR will inform the recipient of:

(1) The nature of and schedule for review, or investigation; and

(2) Its opportunity, before the determination in paragraph (d) of this section is made, to make a written submission responding to, rebutting, or denying the allegations raised in the review or complaint.

(c) *Postreview notice.* (1) Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of:

(i) Preliminary findings;

(ii) Recommendations, if any, for achieving voluntary compliance; and

(iii) Recipient's right to engage in voluntary compliance negotiations where appropriate.

(2) The OCR will notify the Award Official and the Assistant Attorney General for Civil Rights of the preliminary findings of noncompliance.

(d) *Formal determination of noncompliance.* After receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may:

(1) Agree to the OCR's recommendations, or

(2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR.

If the recipient does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, the OCR shall, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

(e) *Voluntary compliance time limits.* The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, the OCR must start proceedings under paragraph (b) of § 7.130.

(f) *Form of voluntary compliance agreements.* All agreements to come into voluntary compliance must:

(1) Be in writing;

(2) Set forth the specific steps the recipient has agreed to take, and

(3) Be signed by the Director, OCR or his/her designee and an official with authority to legally bind the recipient.

§ 7.120 Complaint investigations.

The OCR shall promptly investigate all complaints filed under this section unless the complainant and the party complained against agree to a delay pending settlement negotiations.

(a) *Who may file a complaint.* A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of Federal assistance (see 28 CFR part 42, subpart H and 29 CFR part 1691). Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2 of this section.

(b) *Where, when and how to file complaint.* The complainant may file a complaint at any EPA office. The complaint may be referred to the region in which the alleged discriminatory acts occurred.

(1) The complaint must be in writing and it must describe the alleged discriminatory acts which violate this part.

(2) The complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause. The filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts.

(c) *Notification.* The OCR will notify the complainant and the recipient of the agency's receipt of the complaint within five (5) calendar days.

(d) *Complaint processing procedures.* After acknowledging receipt of a complaint, the OCR will immediately initiate complaint processing procedures.

(1) *Preliminary investigation.* (i) Within twenty (20) calendar days of acknowledgment of the complaint, the OCR will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the OCR will notify the complainant and the Award Official. The OCR will also notify the applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the OCR a response to the notice of complaint within thirty (30) calendar days of receiving it.

(2) *Informal resolution.* (i) OCR shall attempt to resolve complaints informally whenever possible. When a complaint cannot be resolved informally, OCR shall follow the procedures established by paragraphs (c) through (e) of §7.115.

(ii) [Reserved]

(e) *Confidentiality.* EPA agrees to keep the complainant's identity confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Ordinarily in complaints of employment discrimination, the name of the complainant will be given to the recipient with the notice of complaint.

(f) [Reserved]

(g) *Dismissal of complaint.* If OCR's investigation reveals no violation of this part, the Director, OCR, will dismiss the complaint and notify the complainant and recipient.

§7.125 Coordination with other agencies.

If, in the conduct of a compliance review or an investigation, it becomes evident that another agency has jurisdiction over the subject matter, OCR will cooperate with that agency during the continuation of the review of investigation. EPA will:

(a) Coordinate its efforts with the other agency, and

(b) Ensure that one of the agencies is designated the lead agency for this purpose. When an agency other than EPA serves as the lead agency, any action taken, requirement imposed, or determination made by the lead agency, other than a final determination to terminate funds, shall have the same effect as though such action had been taken by EPA.

§7.130 Actions available to EPA to obtain compliance.

(a) *General.* If compliance with this part cannot be assured by informal means, EPA may terminate or refuse to award or to continue assistance. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.

(b) *Procedure to deny, annul, suspend or terminate EPA assistance*—(1) *OCR finding.* If OCR determines that an applicant or recipient is not in compliance with this part, and if compliance cannot be achieved voluntarily, OCR shall make a finding of noncompliance. The OCR will notify the applicant or recipient (by registered mail, return receipt requested) of the finding, the action proposed to be taken, and the opportunity for an evidentiary hearing.

(2) *Hearing.* (i) Within 30 days of receipt of the above notice, the applicant or recipient shall file a written answer, under oath or affirmation, and may request a hearing.

(ii) The answer and request for a hearing shall be sent by registered mail, return receipt requested, to the Chief Administrative Law Judge (ALJ) (A–110), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Upon receipt of a request for a hearing, the ALJ will send the applicant or recipient a copy of the ALJ's procedures. If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and the OCR finding shall be deemed to be the ALJ's determination.

(3) *Final decision and disposition.* (i) The applicant or recipient may, within 30 days of receipt of the ALJ's determination, file with the Administrator

its exceptions to that determination. When such exceptions are filed, the Administrator may, within 45 days after the ALJ's determination, serve to the applicant or recipient, a notice that he/she will review the determination. In the absence of either exceptions or notice of review, the ALJ's determination shall constitute the Administrator's final decision.

(ii) If the Administrator reviews the ALJ's determination, all parties shall be given reasonable opportunity to file written statements. A copy of the Administrator's decision will be sent to the applicant or recipient.

(iii) If the Administrator's decision is to deny an application, or annul, suspend or terminate EPA assistance, that decision becomes effective thirty (30) days from the date on which the Administrator submits a full written report of the circumstances and grounds for such action to the Committees of the House and Senate having legislative jurisdiction over the program or activity involved. The decision of the Administrator shall not be subject to further administrative appeal under EPA's General Regulation for Assistance Programs (40 CFR part 30, subpart L).

(4) *Scope of decision*. The denial, annulment, termination or suspension shall be limited to the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or activity or the part of it in which the discrimination was found.

[49 FR 1659, Jan. 12, 1984, as amended at 68 FR 51372, Aug. 26, 2003]

§ 7.135 Procedure for regaining eligibility.

(a) *Requirements*. An applicant or recipient whose assistance has been denied, annulled, terminated, or suspended under this part regains eligibility as soon as it:

(1) Provides reasonable assurance that it is complying and will comply with this part in the future, and

(2) Satisfies the terms and conditions for regaining eligibility that are specified in the denial, annulment, termination or suspension order.

(b) *Procedure*. The applicant or recipient must submit a written request to restore eligibility to the OCR declaring that it has met the requirements set forth in paragraph (a) of this section. Upon determining that these requirements have been met, the OCR must notify the Award Official, and the applicant or recipient that eligibility has been restored.

(c) Rights on denial of restoration of eligibility. If the OCR denies a request to restore eligibility, the applicant or recipient may file a written request for a hearing before the EPA Chief Administrative Law Judge in accordance with paragraph (c) § 7.130, listing the reasons it believes the OCR was in error.

APPENDIX A TO PART 7—TYPES OF EPA ASSISTANCE AS LISTED IN THE "CATALOG OF FEDERAL DOMESTIC ASSISTANCE"

1. Assistance provided by the Office of Air, Noise and Radiation under the Clean Air Act of 1977, as amended; Pub. L. 95–95, 42 U.S.C. 7401 *et seq.* (ANR 66.001)

2. Assistance provided by the Office of Air, Noise and Radiation under the Clean Air Act of 1977, as amended; Pub. L. 95–95, 42 U.S.C. 7401 *et seq.* (ANR 66.003)

3. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; sections 101(e), 109(b), 201–05, 207, 208(d), 210–12, 215–19, 304(d)(3), 313, 501, 502, 511 and 516(b); Pub. L. 97–117; Pub. L. 95–217; Pub. L. 96–483; 33 U.S.C. 1251 *et seq.* (OW 66.418)

4. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; section 106; Pub. L. 95–217; 33 U.S.C. 1251 *et seq.* (OW 66.419)

5. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; Pub. L. 95–217; 33 U.S.C. 1251 *et seq.* (OW 66.426)

6. Assistance provided by the Office of Water under the Public Health Service Act, as amended by the Safe Drinking Water Act, Pub. L. 93–523; as amended by Pub. L. 93–190; Pub. L. 96–63; and Pub. L. 93–502. (OW 66.432)

7. Assistance provided by the Office of Water under the Safe Drinking Water Act, Pub. L. 93–523, as amended by Pub. L. 96–63, Pub. L. 95–190, and Pub. L. 96–502. (OW 66.433)

8. Assistance provided by the Office of Water under the Clean Water Act of 1977, section 205(g), as amended by Pub. L. 95–217 and the Federal Water Pollution Control Act, as amended; Pub. L. 97–117; 33 U.S.C. 1251 *et seq.* (OW 66.438)

9. Assistance provided by the Office of Water under the Resource Conservation and Recovery Act of 1976; as amended by the Solid Waste Disposal Act; Pub. L. 94–580; section 3011, 42 U.S.C. 6931, 6947, 6948–49. (OW 66.802).

10. Assistance provided by the Office of Research and Development under the Clean Air Act of 1977, as amended; Pub. L. 95–95; 42 U.S.C. *et seq.*; Clean Water Act of 1977, as amended; Pub. L. 95–217; 33 U.S.C. 1251 *et seq.*, section 8001 of the Solid Water Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976; Pub. L. 94–580; 42 U.S.C. 6901, Public Health Service Act as amended by the Safe Drinking Water Act as amended by Pub. L. 95–190; Federal Insecticide, Fungicide and Rodenticide Act; Pub. L. 95–516; 7 U.S.C. 136 *et seq.*, as amended by Pub. L.'s 94–140 and 95–396; Toxic Substances Control Act; 15 U.S.C. 2609; Pub. L. 94–469. (ORD 66.500)

11. Assistance provided by the Office of Research and Development under the Clean Air Act of 1977, as amended; Pub. L. 95–95; 42 U.S.C. 7401 *et seq.* (ORD 66.501)

12. Assistance provided by the Office of Research and Development under the Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. 95–516, 7 U.S.C. 136 *et seq.*, as amended by Pub. L.'s 94–140 and 95–396. (ORD 66.502)

13. Assistance provided by the Office of Research and Development under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976; 42 U.S.C. 6901, Pub. L. 94–580, section 8001. (ORD 66.504)

14. Assistance provided by the Office of Research and Development under the Clean Water Act of 1977, as amended; Pub. L. 95–217; 33 U.S.C. 1251 *et seq.* (ORD 66.505)

15. Assistance provided by the Office of Research and Development under the Public Health Service Act as amended by the Safe Drinking Water Act, as amended by Pub. L. 95–190 (ORD 66.506)

16. Assistance provided by the Office of Research and Development under the Toxic Substances Control Act; Pub. L. 94–469; 15 U.S.C. 2609; section 10. (ORD 66.507)

17. Assistance provided by the Office of Administration, including but not limited to: Clean Air Act of 1977, as amended, Pub. L. 95–95; 42 U.S.C. 7401 *et seq.*, Clean Water Act of 1977, as amended; Pub. L. 95–217; 33 U.S.C. 1251 *et seq.;* Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976; 42 U.S.C. 6901; Pub. L. 94–580; Federal Insecticide, Fungicide and Rodenticide Act; Pub. L. 92–516; 7 U.S.C. 136 *et seq.* as amended by Pub. L.'s 94–140 and 95–396; Public Health Service Act, as amended by the Safe Drinking Water Act, as amended by Pub. L. 95–190. (OA 66.600)

18. Assistance provided by the Office of Administration under the Clean Water Act of 1977, as amended; Pub. L. 95–217; section 213; 33 U.S.C. 1251 *et seq.* (OA 66.603)

19. Assistance provided by the Office of Enforcement Counsel under the Federal Insecticide and Rodenticide Act, as amended; Pub. L. 92–516; 7 U.S.C. 136 *et seq.*, as amended by Pub. L. 94–140, section 23(a) and Pub. L. 95–396. (OA 66.700)

20. Assistance provided by the Office of Solid Waste and Emergency Response under the Comprehensive Environmental Responses, Compensation and Liability Act of 1980; Pub. L. 96–510, section 3012, 42 U.S.C. 9601, *et seq.* (OSW—number not to be assigned since Office of Management and Budget does not catalog one-year programs.)

21. Assistance provided by the Office of Water under the Clean Water Act as amended; Pub. L. 97–117, 33 U.S.C. 1313. (OW—66.454)

PART 8—ENVIRONMENTAL IMPACT ASSESSMENT OF NONGOVERNMENTAL ACTIVITIES IN ANTARCTICA

Sec.
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AUTHORITY: 16 U.S.C. 2401 *et seq.*, as amended, 16 U.S.C. 2403a.

SOURCE: 66 FR 63468, Dec. 6, 2001, unless otherwise noted.

§8.1 Purpose.

(a) This part is issued pursuant to the Antarctic Science, Tourism, and Conservation Act of 1996. As provided in that Act, this part implements the requirements of Article 8 and Annex I to the Protocol on Environmental Protection to the Antarctic Treaty of 1959 and provides for:

(1) The environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Antarctic Treaty of 1959; and

(2) Coordination of the review of information regarding environmental impact assessment received by the United

States from other Parties under the Protocol.

(b) The procedures in this part are designed to: ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. These procedures are consistent with and implement the environmental impact assessment provisions of Article 8 and Annex I to the Protocol on Environmental Protection to the Antarctic Treaty.

§ 8.2 Applicability and effect.

(a) This part is intended to ensure that potential environmental effects of nongovernmental activities undertaken in Antarctica are appropriately identified and considered by the operator during the planning process and that to the extent practicable, appropriate environmental safeguards which would mitigate or prevent adverse impacts on the Antarctic environment are identified by the operator.

(b) The requirements set forth in this part apply to nongovernmental activities for which the United States is required to give advance notice under paragraph 5 of Article VII of the Antarctic Treaty of 1959: All nongovernmental expeditions to and within Antarctica organized in or proceeding from its territory.

(c) This part does not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the Conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. 1371 *et seq.*

§ 8.3 Definitions.

As used in this part:

Act means 16 U.S.C. 2401 *et seq.*, Public Law 104–227, the Antarctic Science, Tourism, and Conservation Act of 1996.

Annex I refers to Annex I, Environmental Impact Assessment, of the Protocol.

Antarctic environment means the natural and physical environment of Antarctica and its dependent and associated ecosystems, but excludes social, economic, and other environments.

Antarctic Treaty area means the area south of 60 degrees south latitude.

Antarctic Treaty Consultative Meeting (ATCM) means a meeting of the Parties to the Antarctic Treaty, held pursuant to Article IX(1) of the Treaty.

Antarctica means the Antarctic Treaty area; i.e., the area south of 60 degrees south latitude.

Comprehensive Environmental Evaluation (CEE) means a study of the reasonably foreseeable potential effects of a proposed activity on the Antarctic environment, prepared in accordance with the provisions of this part and includes all comments received thereon. (See: § 8.8.)

Environmental document or environmental documentation (Document) means a preliminary environmental review memorandum, an initial environmental evaluation, or a comprehensive environmental evaluation.

Environmental impact assessment (EIA) means the environmental review process required by the provisions of this part and by Annex I of the Protocol, and includes preparation by the operator and U.S. government review of an environmental document, and public access to and circulation of environmental documents to other Parties and the Committee on Environmental Protection as required by Annex I of the Protocol.

EPA means the Environmental Protection Agency.

Expedition means any activity undertaken by one or more nongovernmental persons organized within or proceeding from the United States to or within the Antarctic Treaty area for which advance notification is required under Paragraph 5 of Article VII of the Treaty.

Impact means impact on the Antarctic environment and dependent and associated ecosystems.

Initial Environmental Evaluation (IEE) means a study of the reasonably foreseeable potential effects of a proposed

activity on the Antarctic environment prepared in accordance with §8.7.

More than a minor or transitory impact has the same meaning as the term "significantly" as defined in regulations under the National Environmental Policy Act at 40 CFR 1508.27.

Operator or *operators* means any person or persons organizing a nongovernmental expedition to or within Antarctica.

Person has the meaning given that term in section 1 of title 1, United States code, and includes any person subject to the jurisdiction of the United States except that the term does not include any department, agency, or other instrumentality of the Federal Government.

Preliminary environmental review means the environmental review described under that term in §8.6.

Preliminary Environmental Review Memorandum (PERM) means the documentation supporting the conclusion of the preliminary environmental review that the impact of a proposed activity will be less than minor or transitory on the Antarctic environment.

Protocol means the Protocol on Environmental Protection to the Antarctic Treaty, done at Madrid October 4, 1991, and all annexes thereto which are in force for the United States.

This part means 40 CFR part 8.

§8.4 Preparation of environmental documents, generally.

(a) *Basic information requirements.* In addition to the information required pursuant to other sections of this part, all environmental documents shall contain the following:

(1) The name, mailing address, and phone number of the operator;

(2) The anticipated date(s) of departure of each expedition to Antarctica;

(3) An estimate of the number of persons in each expedition;

(4) The means of conveyance of expedition(s) to and within Antarctica;

(5) Estimated length of stay of each expedition in Antarctica;

(6) Information on proposed landing sites in Antarctica; and

(7) Information concerning training of staff, supervision of expedition members, and what other measures, if any, that will be taken to avoid or minimize possible environmental impacts.

(b) *Preparation of an environmental document.* Unless an operator determines and documents that a proposed activity will have less than a minor or transitory impact on the Antarctic environment, the operator will prepare an IEE or CEE in accordance with this part. In making the determination what level of environmental documentation is appropriate, the operator should consider, as applicable, whether and to what degree the proposed activity:

(1) Has the potential to adversely affect the Antarctic environment;

(2) May adversely affect climate or weather patterns;

(3) May adversely affect air or water quality;

(4) May affect atmospheric, terrestrial (including aquatic), glacial, or marine environments;

(5) May detrimentally affect the distribution, abundance, or productivity of species, or populations of species of fauna and flora;

(6) May further jeopardize endangered or threatened species or populations of such species;

(7) May degrade, or pose substantial risk to, areas of biological, scientific, historic, aesthetic, or wilderness significance;

(8) Has highly uncertain environmental effects, or involves unique or unknown environmental risks; or

(9) Together with other activities, the effects of any one of which is individually insignificant, may have at least minor or transitory cumulative environmental effects.

(c) *Type of environmental document.* The type of environmental document required under this part depends upon the nature and intensity of the environmental impacts that could result from the activity under consideration. A PERM must be prepared by the operator to document the conclusion of the operator's preliminary environmental review that the impact of a proposed activity on the Antarctic environment will be less than minor or transitory. (See §8.6.) An IEE must be prepared by the operator for proposed activities which may have at least (but no more than) a minor or transitory impact on

the Antarctic environment. (See §8.7.) A CEE must be prepared by the operator if an IEE indicates, or if it is otherwise determined, that a proposed activity is likely to have more than a minor or transitory impact on the Antarctic environment (See §8.8.)

(d) *Incorporation of information, consolidation of environmental documentation, and multi-year environmental documentation.* (1) An operator may incorporate material into an environmental document by referring to it in the document when the effect will be to reduce paperwork without impeding the review of the environmental document by EPA and other federal agencies. The incorporated material shall be cited and its content briefly described. No material may be incorporated by referring to it in the document unless it is reasonably available to the EPA.

(2) Provided that environmental documentation complies with all applicable provisions of Annex I to the Protocol and this part and is appropriate in light of the specific circumstances of the operator's proposed expedition or expeditions, an operator may include more than one proposed expedition within one environmental document and one environmental document may also be used to address expeditions being carried out by more than one operator provided that the environmental document indicates the names of each operator for which the environmental documentation is being submitted pursuant to obligations under this part.

(e) *Multi-year environmental documentation.* (1) Provided that environmental documentation complies with all applicable provisions of Annex I to the Protocol and this part, an operator may submit environmental documentation for proposed expeditions for a period of up to five consecutive austral summer seasons, provided that the conditions described in the multi-year environmental document, including the assessment of cumulative impacts, are unchanged and meets the provisions of paragraphs (e)(1) (i) through (iii) of this section.

(i) The operator shall identify the environmental documentation submitted for multi-year documentation purposes in the first year it is submitted. If the operator, or operators, fail to make this initial identification to EPA, this provision shall not be in effect although subsequent years' submissions by the operator, or operators, may use this environmental documentation as provided in paragraphs (d) (1) and (2) of this section.

(ii) In subsequent years, up to a total maximum of five years, the operator, or operators, shall reference the multi-year documentation identified initially if it is necessary to update the basic information requirements listed in paragraph (a) of this section.

(iii) An operator, or operators, may supplement a multi-year environmental document for an additional activity or activities by providing information regarding the proposed activity in accordance with the appropriate provisions of this part. The operator, or operators, shall identify this submission as a proposed supplement to the multi-year documentation in effect. Addition of the supplemental information shall not extend the period of the multi-year environmental documentation beyond the time period associated with the documentation as originally submitted.

(2) Multi-year environmental documentation may include more than one proposed expedition within the environmental document and the multi-year environmental document may also be used to address expeditions being carried out by more than one operator provided that the environmental document indicates the names of each operator for which the environmental documentation is being submitted pursuant to obligations under this part.

(3) The schedules for multi-year environmental documentation depend on the level of the environmental document and shall be the same as the schedules for comparable environmental documentation submitted on an annual basis; *e.g.*, a multi-year PERM shall comply with the schedule in §8.6, a multi-year IEE shall comply with the schedule in §8.7, and a multi-year CEE shall comply with the schedule in §8.8. These schedules apply to the operator's submission of the initial multi-year environmental document; the operator's subsequent annual submissions pursuant to paragraphs (e)(1) (ii) and (iii) of

this section; EPA's review, in consultation with other interested federal agencies, and comment on the multi-year environmental documentation and subsequent annual submissions; and a finding the EPA may make, with the concurrence of the National Science Foundation, that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part.

§8.5 Submission of environmental documents.

(a) An operator shall submit environmental documentation to the EPA for review. The EPA, in consultation with other interested federal agencies, will carry out a review to determine if the submitted environmental documentation meets the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. The EPA will provide its comments, if any, on the environmental documentation to the operator and will consult with the operator regarding any suggested revisions. If EPA has no comments, or if the documentation is satisfactorily revised in response to EPA's comments, and the operator does not receive a notice from EPA that the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part, the operator will have no further obligations pursuant to the applicable requirements of this part provided that any appropriate measures, which may include monitoring, are put in place to assess and verify the impact of the activity. Alternatively, following final response from the operator, the EPA, in consultation with other federal agencies and with the concurrence of the National Science Foundation, will inform the operator that EPA finds that the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. If the operator then proceeds with the expedition without fulfilling the requirements of this part, the operator is subject to enforcement proceedings pursuant to sections 7, 8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672.

(b) The EPA may waive or modify deadlines pursuant to this part where EPA determines an operator is acting in good faith and that circumstances outside the control of the operator created delays, provided that the environmental documentation fully meets deadlines under the Protocol.

§8.6 Preliminary environmental review.

(a) Unless an operator has determined to prepare an IEE or CEE, the operator shall conduct a preliminary environmental review that assesses the potential direct and reasonably foreseeable indirect impacts on the Antarctic environment of the proposed expedition. A Preliminary Environmental Review Memorandum (PERM) shall contain sufficient detail to assess whether the proposed activity may have less than a minor or transitory impact, and shall be submitted to the EPA for review no less than 180 days before the proposed departure of the expedition. The EPA, in consultation with other interested federal agencies, will review the PERM to determine if it is sufficient to demonstrate that the activity will have less than a minor or transitory impact or whether additional environmental documentation, *i.e.*, an IEE or CEE, is required to meet the obligations of Article 8 and Annex I of the Protocol. The EPA will provide its comments to the operator within fifteen (15) days of receipt of the PERM, and the operator shall have seventy-five (75) days to prepare a revised PERM or an IEE, if necessary. Following the final response from the operator, EPA may make a finding that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This finding will be made with the concurrence of the National Science Foundation. If EPA does not provide such notice within thirty (30) days, the operator will be deemed to have met the requirements of this part provided that any required procedures, which may include appropriate monitoring, are put in place to assess and verify the impact of the activity.

(b) If EPA recommends an IEE and one is prepared and submitted within the seventy-five (75) day response period, it will be reviewed under the time frames set out for an IEE in §8.7. If EPA recommends a CEE and one is prepared, it will be reviewed under the time frames set out for a CEE in §8.8.

§ 8.7 Initial environmental evaluation.

(a) *Submission of IEE to the EPA.* Unless a PERM has been submitted pursuant to §8.6 which meets the environmental documentation requirements under Article 8 and Annex I to the Protocol and the provisions of this part or a CEE is being prepared, an IEE shall be submitted by the operator to the EPA no fewer than ninety (90) days before the proposed departure of the expedition.

(b) *Contents.* An IEE shall contain sufficient detail to assess whether a proposed activity may have more than a minor or transitory impact on the Antarctic environment and shall include the following information:

(1) A description of the proposed activity, including its purpose, location, duration, and intensity; and

(2) Consideration of alternatives to the proposed activity and any impacts that the proposed activity may have on the Antarctic environment, including consideration of cumulative impacts in light of existing and known proposed activities.

(c) *Further environmental review.* (1) The EPA, in consultation with other interested federal agencies, will review an IEE to determine whether the IEE meets the requirements under Annex I to the Protocol and the provisions of this part. The EPA will provide its comments to the operator within thirty (30) days of receipt of the IEE, and the operator will have forty-five (45) days to prepare a revised IEE, if necessary. Following the final response from the operator, EPA may make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This finding will be made with the concurrence of the National Science Foundation. If such a notice is required, EPA will provide it within fifteen (15) days of receiving the final IEE from the operator or, if the operator does not provide a final IEE, within sixty (60) days following EPA's comments on the original IEE. If EPA does not provide notice within these time limits, the operator will be deemed to have met the requirements of this part provided that any required procedures, which may include appropriate monitoring, are put in place to assess and verify the impact of the activity.

(2) If a CEE is required, the operator must adhere to the time limits applicable to such documentation. (See: §8.8.) In this event EPA, at the operator's request, will consult with the operator regarding possible changes in the proposed activity which would allow preparation of an IEE.

§ 8.8 Comprehensive environmental evaluation.

(a) *Preparation of a CEE.* Unless a PERM or an IEE has been submitted and determined to meet the environmental documentation requirements of this part, the operator shall prepare a CEE. A CEE shall contain sufficient information to enable informed consideration of the reasonably foreseeable potential environmental effects of a proposed activity and possible alternatives to that proposed activity. A CEE shall include the following:

(1) A description of the proposed activity, including its purpose, location, duration and intensity, and possible alternatives to the activity, including the alternative of not proceeding, and the consequences of those alternatives;

(2) A description of the initial environmental reference state with which predicted changes are to be compared and a prediction of the future environmental reference state in the absence of the proposed activity;

(3) A description of the methods and data used to forecast the impacts of the proposed activity;

(4) Estimation of the nature, extent, duration and intensity of the likely direct impacts of the proposed activity;

(5) A consideration of possible indirect or second order impacts from the proposed activity;

(6) A consideration of cumulative impacts of the proposed activity in light of existing activities and other known planned activities;

(7) Identification of measures, including monitoring programs, that could be taken to minimize or mitigate impacts of the proposed activity and to detect unforeseen impacts and that could provide early warning of any adverse effects of the activity as well as to deal promptly and effectively with accidents;

(8) Identification of unavoidable impacts of the proposed activity;

(9) Consideration of the effects of the proposed activity on the conduct of scientific research and on other existing uses and values;

(10) An identification of gaps in knowledge and uncertainties encountered in compiling the information required under this section;

(11) A non-technical summary of the information provided under this section; and

(12) The name and address of the person or organization which prepared the CEE and the address to which comments thereon should be directed.

(b) *Submission of Draft CEE to the EPA and Circulation to Other Parties.* (1) Any operator who plans a nongovernmental expedition that would require a CEE must submit a draft of the CEE by December 1 of the preceding year. Within fifteen (15) days of receipt of the draft CEE, EPA will: send it to the Department of State which will circulate it to all Parties to the Protocol and forward it to the Committee for Environmental Protection established by the Protocol, and publish notice of receipt of the CEE and request for comments on the CEE in the FEDERAL REGISTER, and will provide copies to any person upon request. The EPA will accept public comments on the CEE for a period of ninety (90) days following notice in the FEDERAL REGISTER. The EPA, in consultation with other interested federal agencies, will evaluate the CEE to determine if the CEE meets the requirements under Article 8 and Annex I to the Protocol and the provisions of this part and will transmit its comments to the operator within 120 days following publication in the FEDERAL REGISTER of the notice of availability of the CEE.

(2) The operator shall send a final CEE to EPA at least seventy-five (75) days before commencement of the proposed activity in the Antarctic Treaty area. The CEE must address and must include (or summarize) any comments on the draft CEE received from EPA, the public, and the Parties. Following the final response from the operator, the EPA will inform the operator if EPA, with the concurrence of the National Science Foundation, makes the finding that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This notification will occur within fifteen (15) days of submittal of the final CEE by the operator if the final CEE is submitted by the operator within the time limits set out in this section. If no final CEE is submitted or the operator fails to meet these time limits, EPA will provide such notification sixty (60) days prior to departure of the expedition. If EPA does not provide such notice, the operator will be deemed to have met the requirements of this part provided that procedures, which include appropriate monitoring, are put in place to assess and verify the impact of the activity. The EPA will transmit the CEE, along with a notice of any decisions by the operator relating thereto, to the Department of State which shall circulate it to all Parties no later than sixty (60) days before commencement of the proposed activity in the Antarctic Treaty area. The EPA will also publish a notice of availability of the final CEE in the FEDERAL REGISTER.

(3) No final decision shall be taken to proceed with any activity for which a CEE is prepared unless there has been an opportunity for consideration of the draft CEE by the Antarctic Treaty Consultative Meeting on the advice of the Committee for Environmental Protection, provided that no expedition need be delayed through the operation of paragraph 5 of Article 3 to Annex I of the Protocol for longer than 15 months from the date of circulation of the draft CEE.

(c) *Decisions based on CEE.* The decision to proceed, based on environmental documentation that meets the requirements under Article 8 and Annex I to the Protocol and the provisions of this part, rests with the operator. Any decision by an operator on whether to proceed with or modify a

proposed activity for which a CEE was required shall be based on the CEE and other relevant considerations.

§ 8.9 Measures to assess and verify environmental impacts.

(a) The operator shall conduct appropriate monitoring of key environmental indicators as proposed in the CEE to assess and verify the potential environmental impacts of activities which are the subject of a CEE. The operator may also need to carry out monitoring in order to assess and verify the impact of an activity for which an IEE has been prepared.

(b) All proposed activities for which an IEE or CEE has been prepared shall include procedures designed to provide a regular and verifiable record of the impacts of these activities, in order, *inter alia,* to:

(1) Enable assessments to be made of the extent to which such impacts are consistent with the Protocol; and

(2) Provide information useful for minimizing and mitigating those impacts, and, where appropriate, information on the need for suspension, cancellation, or modification of the activity.

§ 8.10 Cases of emergency.

This part shall not apply to activities taken in cases of emergency relating to the safety of human life or of ships, aircraft, equipment and facilities of high value, or the protection of the environment, which require an activity to be undertaken without completion of the procedures set out in this part. Notice of any such activities which would have otherwise required the preparation of a CEE shall be provided within fifteen (15) days to the Department of State, as provided in this paragraph, for circulation to all Parties to the Protocol and to the Committee on Environmental Protection, and a full explanation of the activities carried out shall be provided within forty-five (45) days of those activities. Notification shall be provided to: The Director, The Office of Oceans Affairs, OES/OA, Room 5805, Department of State, 2201 C Street, NW, Washington, DC 20520–7818.

§ 8.11 Prohibited acts, enforcement and penalties.

(a) It shall be unlawful for any operator to violate this part.

(b) An operator who violates any of this part is subject to enforcement, which may include civil and criminal enforcement proceedings, and penalties, pursuant to sections 7,8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672.

§ 8.12 Coordination of reviews from other Parties.

(a) Upon receipt of a draft CEE from another Party, the Department of State shall publish notice in the FEDERAL REGISTER and shall circulate a copy of the CEE to all interested federal agencies. The Department of State shall coordinate responses from federal agencies to the CEE and shall transmit the coordinated response to the Party which has circulated the CEE. The Department of State shall make a copy of the CEE available upon request to the public.

(b) Upon receipt of the annual list of IEEs from another Party prepared in accordance with Article 2 of Annex I and any decisions taken in consequence thereof, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy of the list of IEEs prepared in accordance with Article 2 and any decisions taken in consequence thereof available upon request to the public.

(c) Upon receipt of a description of appropriate national procedures for environmental impact assessments from another Party, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy of these descriptions available upon request to the public.

(d) Upon receipt from another Party of significant information obtained, and any action taken in consequence therefrom from procedures put in place with regard to monitoring pursuant to Articles 2(2) and 5 of Annex I to the Protocol, the Department of State shall circulate a copy to all interested federal agencies. The Department of

State shall make a copy of this information available upon request to the public.

(e) Upon receipt from another Party of a final CEE, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy available upon request to the public.

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

AUTHORITY: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

§9.1 OMB approvals under the Paperwork Reduction Act.

This part consolidates the display of control numbers assigned to collections of information in certain EPA regulations by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). No person is required to respond to an information collection request regulated by the PRA unless a valid control number assigned by OMB is displayed in either this part, another part of the Code of Federal Regulations, a valid FEDERAL REGISTER notice, or by other appropriate means.

40 CFR citation	OMB control No.
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40 CFR citation	OMB control No.
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40 CFR citation	OMB control No.
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79.57(f)(5)	2060–0150
79.58(e)	2060–0150
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142.14(d)(2)–(7)	2040–0204
142.14(d)(4)–(5)	2040–0228
142.14(d)(6)–(7)	2040–0090
142.14(d)(12)(i)–(iv)	2040–0204
142.14(d)(13)–(16)	2040–0204
142.15(a)–(b)	2040–0090
142.15(c)(1)–(5)	2040–0205
142.15(c)(5)	2040–0090
142.15(c)(6)–(7)	2040–0228
142.15(d)	2040–0090
142.16(b)	2040–0205
142.16(c)	2040–0090
142.16(e)	2040–0204
142.16(f)	2040–0090
142.16(g)	2040–0205
142.16(h)	2040–0204
142.16(i)	2040–0205
142.16(j)	2040–0229
142.16(k)(1)	2040–0204
142.16(l)(1) and (2)	2040–0204
142.17–142.24	2040–0090
142.51	2040–0090
142.56–142.57	2040–0090
142.60–142.61	2040–0090
142.62	2040–0090
142.63–142.64	2040–0090
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142.81	2040–0090
142.306–142.308	2040–0090
142.311–142.312	2040–0090
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144.12	2040–0042
144.14–144.15	2040–0042
144.23	2040–0042
144.25–144.28	2040–0042
144.31–144.33	2040–0042
144.38	2040–0042
144.41	2040–0042
144.51–144.55	2040–0042
144.62–144.66	2040–0042
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144.79–144.89	2040–0214
145.23	2040–0214
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146.12–146.15	2040–0042
146.22–146.25	2040–0042
146.32–146.35	2040–0042
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40 CFR citation	OMB control No.
146.64	2040–0042
146.66–146.73	2040–0042
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147.304–147.305	2040–0042
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147.754	2040–0042
147.904	2040–0042
147.1154	2040–0042
147.1354–147.1355	2040–0042
147.1454	2040–0042
147.1654	2040–0042
147.1954	2040–0042
147.2103–147.2104	2040–0042
147.2154	2040–0042
147.2402	2040–0042
147.2905	2040–0042
147.2912–147.2913	2040–0042
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147.2920–147.2926	2040–0042
147.2929	2040–0042
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147.3006–147.3007	2040–0042
147.3011	2040–0042
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152.80	2070–0040, 2070–0060
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152.98	2070–0060
152.122	2070–0060
152.132	2070–0044
152.135	2070–0060
152.164	2070–0060
152.404	2070–0040, 2070–0060
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152.412	2070–0040, 2070–0060
152.414	2070–0040, 2070–0060
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155.30	2070–0057
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156.10	2070–0060
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156.208	2070–0060
156.210	2070–0060
156.212	2070–0060
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157.22	2070–0052
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157.34	2070–0052
157.36	2070–0052
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158.30	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.32	2070–0040, 2070–0053, 2070–0057, 2070–0060, 2070–0107
158.34	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.45	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.75	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.101	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.155	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.160	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.162	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.165	2070–0040, 2070–0057, 2070–0060, 2070–0107
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158.170	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.175	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.180	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.190	2070–0040, 2070–0057, 2070–0060, 2070–0107
158.240	2070–0057, 2070–0060, 2070–0107

40 CFR citation	OMB control No.
158.290	2070–0057, 2070–0060, 2070–0107
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158.390	2070–0057, 2070–0060, 2070–0107
158.440	2070–0057, 2070–0060, 2070–0107
158.490	2070–0057, 2070–0060, 2070–0107
158.540	2070–0057, 2070–0060, 2070–0107
158.590	2070–0057, 2070–0060, 2070–0107
158.640	2070–0057, 2070–0060, 2070–0107
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166.50	2070–0032
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168.75	2070–0027
168.85	2070–0027, 2070–0028,, 2070–0078
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171.8	2070–0029
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171.11	2070–0029
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177.92	2070–0024
177.98	2070–0024
177.99	2070–0024
177.102	2070–0024
177.105	2070–0024
177.110	2070–0024
177.116	2070–0024
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180.8	2070–0024
180.9	2070–0024
180.31	2070–0024
180.32	2070–0024
180.33	2070–0024
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233.30	2040–0168
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257.21(b)	2050–0154
257.21(h)	2050–0154
257.23	2050–0154
257.24	2050–0154
257.25	2050–0154
257.27	2050–0154
257.30	2050–0154

40 CFR citation	OMB control No.
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258.10–258.16	2050–0122
258.20	2050–0122
258.23	2050–0122
258.28–258.29	2050–0122
258.51	2050–0122
258.53–258.55	2050–0122
258.57–258.58	2050–0122
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262.22–262.23	2050–0039
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262.40(b)	2050–0024
262.40(c)	2050–0035
262.41	2050–0024
262.42	2050–0039
262.43	2050–0035
262.44(a)–(b)	2050–0039
262.44(c)	2050–0035
262.53–262.57	2050–0035
262.60	2050–0035
262.83–262.85.	2050–0143
262.87	2050–0143
262.90(c), (d), (f), (g)	2010–0026
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263.11	2050–0028
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263.30	2050–0039
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264.11	2050–0028
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264.15	2050–0120, 2050–0009
264.16	2050–0120, 2050–0009
264.17	2050–0120
264.18	2050–0009
264.19	2050–0009
264.32	2050–0009
264.35	2050–0009
264.37	2050–0120
264.51	2050–0009
264.52	2050–0009
264.53	2050–0120
264.54	2050–0120
264.56	2050–0120
264.71	2050–0039
264.72	2050–0039
264.73	2050–0120
264.74	2050–0120
264.75	2050–0024
264.76	2050–0039
264.90	2050–0009
264.96	2050–0120
264.97(g)	2050–0120
264.97(h)	2050–0009
264.97(j)	2050–0120
264.98(c), (g)(1), (g)(5), (g)(6)	2050–0033
264.98(g)(4), (h)	2050–0009
264.99(c), (g), (h)(1), (i)(1), (i)(2)	2050–0033
264.99(h)(2), (i)(3), (j)	2050–0009
264.100(e), (f), (g)	2050–0033
264.100(h)	2050–0009
264.101	2050–0120
264.112(a), (b), (c)	2050–0009
264.112(d)	2050–0120
264.113(a), (b), (d)	2050–0120
264.113(e)	2050–0050
264.115	2050–0120
264.116	2050–0120
264.118	2050–0009
264.119(a), (b)	2050–0120
264.119(c)	2050–0009
264.120	2050–0120
264.142(a)	2050–0009
264.142(b), (c), (d)	2050–0120
264.143	2050–0120
264.144(a)	2050–0009
264.144(b), (c), (d)	2050–0120
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264.147(a)(1), (b)(1), (c), (f), (g), (h), (i), (j)	2050–0009
264.148	2050–0120
264.149	2050–0009
264.150	2050–0009
264.190	2050–0050
264.191	2050–0050
264.192(a)	2050–0009
264.192(g)	2050–0050
264.193(c), (d), (e), (g), (h)	2050–0009
264.193(i)	2050–0050
264.196	2050–0050
264.197(b)	2050–0050
264.197(c)	2050–0009
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264.222(b)	2050–0050
264.223(a)	2050–0009
264.223(b), (c)	2050–0050
264.226(c)	2050–0050, 2050–0009
264.226(d)	2050–0050
264.227	2050–0050
264.231	2050–0009
264.251	2050–0009
264.252(a)	2050–0009
264.252(b)	2050–0050
264.253(a)	2050–0009
264.253(b), (c)	2050–0050
264.254	2050–0050
264.259	2050–0009
264.271	2050–0009
264.272	2050–0009
264.276	2050–0050, 2050–0009
264.278(a)–(f), (h)	2050–0050
264.278(g)	2050–0050, 2050–0009

40 CFR citation	OMB control No.
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264.283	2050–0009
264.301	2050–0009
264.302(a)	2050–0009
264.302(b)	2050–0050
264.303(a)	2050–0009
264.303(b)	2050–0050
264.304(a)	2050–0009
264.304(b), (c)	2050–0050
264.314	2050–0050
264.317	2050–0009
264.340	2050–0009
264.343	2050–0050
264.344	2050–0009
264.347	2050–0050
264.552	2050–0009
264.570	2050–0050
264.571	2050–0050
264.573	2050–0050
264.574	2050–0050
264.575	2050–0009
264.603	2050–0050
264.1033(a)	2050–0009
264.1033(j)	2050–0050
264.1034	2050–0050
264.1035	2050–0050
264.1036	2050–0050
264.1061	2050–0050
264.1062	2050–0050
264.1063	2050–0050
264.1064	2050–0050, 2050–0009
264.1065	2050–0050
264.1089	2060–0318
264.1090	2060–0318
264.1100	2050–0050
264.1101	2050–0050

Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities

40 CFR citation	OMB control No.
265.11	2050–0028
265.12(a)	2050–0120
265.13	2050–0120
265.15	2050–0120
265.16	2050–0120
265.19	2050–0120
265.37	2050–0120
265.51	2050–0120
265.52	2050–0120
265.53	2050–0120
265.54	2050–0120
265.56	2050–0120
265.71	2050–0039
265.72	2050–0039
265.73	2050–0120
265.75	2050–0024
265.76	2050–0039
265.90	2050–0033
265.92	2050–0033
265.93	2050–0033
265.94	2050–0033
265.112	2050–0120
265.113(a), (b), (d)	2050–0120
265.113(e)	2050–0050
265.115	2050–0120
265.116	2050–0120
265.118	2050–0120
265.119	2050–0120
265.120	2050–0120
265.142	2050–0120
265.143	2050–0120
265.144	2050–0120
265.145	2050–0120
265.147	2050–0120
265.148	2050–0120
265.149	2050–0120
265.150	2050–0120
265.190	2050–0035, 2050–0050
265.191	2050–0035, 2050–0050
265.192	2050–0035, 2050–0050
265.193	2050–0035, 2050–0050
265.195	2050–0120
265.196	2050–0035, 2050–0050
265.197(b)	2050–0050
265.197(c)	2050–0120
265.221	2050–0050
265.222	2050–0050
265.223	2050–0050
265.225	2050–0050
265.226	2050–0050
265.229	2050–0050
265.254	2050–0050
265.255	2050–0050
265.259	2050–0050
265.260	2050–0050
265.273	2050–0120
265.276	2050–0050
265.278	2050–0050
265.280	2050–0050
265.301	2050–0050
265.302	2050–0050
265.303	2050–0050
265.304	2050–0050
265.314	2050–0050
265.340	2050–0050
265.352	2050–0050
265.383	2050–0050
265.404	2050–0050
265.440	2050–0050
265.441	2050–0050
265.443	2050–0050
265.444	2050–0050
265.445	2050–0120
265.1033	2050–0050
265.1034	2050–0050
265.1035	2050–0050
265.1061	2050–0050
265.1062	2050–0050
265.1063	2050–0050
265.1064	2050–0050
265.1090	2060–0318
265.1100	2050–0050
265.1101	2050–0050

Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities

40 CFR citation	OMB control No.
266.70 (b)	2050–0028
266.70(c)	2050–0050
266.80	2050–0028
266.100	2050–0073
266.102	2050–0073
266.103	2050–0073
266.104	2050–0073
266.106	2050–0073
266.107	2050–0073
266.108	2050–0073
266.109	2050–0073

40 CFR citation	OMB control No.
266.111	2050–0073
266.112	2050–0073
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270.10	2050–0009
270.11	2050–0034
270.13	2050–0034
270.14	2050–0009
270.14(b)(21)	2050–0062, 2050–0085
270.15	2050–0009
270.16	2050–0009
270.17	2050–0009
270.18	2050–0009
270.19	2050–0009
270.20	2050–0009
270.21	2050–0009
270.22	2050–0073
270.23	2050–0009
270.24	2050–0009
270.25	2050–0009
270.26	2050–0115
270.30	2050–0120
270.33	2050–0009
270.40	2050–0009
270.41	2050–0009
270.42	2050–0009
270.51	2050–0009
270.62	2050–0009, 2050–0149
270.63	2050–0009
270.65	2050–0009
270.66	2050–0073, 2050–0149
270.72	2050–0034
270.73	2050–0009
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273.18	2050–0145
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273.34	2050–0145
273.35	2050–0145
273.38	2050–0145
273.39	2050–0145
273.61	2050–0145
273.62	2050–0145
273.80	2050–0145

40 CFR citation	OMB control No.
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279.10–279.11	2050–0124
279.42	2050–0028, 2050–0124
279.43–279.44	2050–0124
279.46	2050–0050
279.51	2050–0028
279.52–279.55	2050–0124
279.56	2050–0050
279.57	2050–0050, 2050–0124
279.62	2050–0028
279.63	2050–0124
279.65–279.66	2050–0050
279.72	2050–0050
279.73	2050–0028
279.74–279.75	2050–0050
279.82	2050–0124
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280.11(a)	2050–0068
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280.20(e)	2050–0068
280.22(a)–(f)	2050–0068
280.22(g)	2050–0068
280.31	2050–0068
280.33(f)	2050–0068
280.34(a)	2050–0068
280.34(b)	2050–0068
280.34(c)	2050–0068
280.40	2050–0068
280.43	2050–0068
280.44	2050–0068
280.45	2050–0068
280.50	2050–0068
280.53	2050–0068
280.61	2050–0068
280.62	2050–0068
280.63	2050–0068
280.64	2050–0068
280.65	2050–0068
280.66(a)	2050–0068
280.66(c)	2050–0068
280.66(d)	2050–0068
280.67	2050–0068
280.71(a)	2050–0068
280.72(a)	2050–0068
280.74	2050–0068
280.95	2050–0068
280.96	2050–0068
280.97	2050–0068
280.98	2050–0068
280.99	2050–0068
280.100	2050–0068
280.101	2050–0068
280.102	2050–0068
280.103	2050–0068
280.104	2050–0068
280.105	2050–0068
280.106	2050–0068
280.107	2050–0068
280.108	2050–0068
280.109(a)	2050–0068
280.109(b)	2050–0068
280.110	2050–0068
280.111	2050–0068
280.111(b)(11)	2050–0068
280.114(a)–(d)	2050–0068
280.114(e)	2050–0068

40 CFR citation	OMB control No.
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281.120(a)	2050–0068
281.120(g)	2050–0068
281.121	2050–0068
281.122	2050–0068
281.124	2050–0068
281.125	2050–0068
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281.143(a)	2050–0068
281.150	2050–0068
281.152	2050–0068
281.161	2050–0068
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302.6	2050–0046
302.8	2050–0086
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310.30	2050–0077
310.40	2050–0077
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430.24(c)	2040–0202
430.24(d)	2040–0033
430.24(e)	2040–0033
430.25–430.27	2040–0033
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430.104–430.107	2040–0033
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721.5740	2070–0012
721.5760	2070–0012
721.5763	2070–0012
721.5769	2070–0012
721.5775	2070–0012
721.5780	2070–0012
721.5800	2070–0012
721.5820	2070–0012
721.5840	2070–0012
721.5860	2070–0012
721.5867	2070–0012
721.5880	2070–0012
721.5900	2070–0012
721.5912	2070–0012
721.5913	2070–0012
721.5914	2070–0012
721.5915	2070–0012
721.5920	2070–0012
721.5925	2070–0012
721.5930	2070–0012
721.5960	2070–0012
721.5965	2070–0012
721.5970	2070–0012
721.5980	2070–0012
721.5985	2070–0012
721.5995	2070–0012
721.6000	2070–0038
721.6005	2070–0012
721.6020	2070–0012
721.6045	2070–0012
721.6060	2070–0012
721.6070	2070–0012
721.6075	2070–0012
721.6078	2070–0012
721.6080	2070–0012
721.6085	2070–0012
721.6090	2070–0012
721.6097	2070–0012
721.6100	2070–0012
721.6110	2070–0012
721.6120	2070–0012
721.6140	2070–0012
721.6160	2070–0012
721.6165	2070–0012
721.6170	2070–0012
721.6175	2070–0012
721.6176	2070–0012
721.6178	2070–0012
721.6180	2070–0012
721.6181	2070–0012
721.6183	2070–0012
721.6186	2070–0012
721.6193	2070–0012
721.6196	2070–0012
721.6197	2070–0012
721.6200	2070–0012
721.6205	2070–0012
721.6220	2070–0012
721.6440	2070–0012
721.6470	2070–0012
721.6475	2070–0012
721.6477	2070–0012
721.6479	2070–0012
721.6485	2070–0012
721.6490	2070–0012
721.6493	2070–0012
721.6495	2070–0012
721.6498	2070–0012
721.6505	2070–0012
721.6515	2070–0012
721.6520	2070–0012
721.6540	2070–0012
721.6560	2070–0012
721.6600	2070–0012
721.6620	2070–0012
721.6625	2070–0012
721.6660	2070–0012
721.6680	2070–0012
721.6900	2070–0012
721.6920	2070–0012
721.6980	2070–0012
721.7000	2070–0012
721.7020	2070–0012
721.7046	2070–0012
721.7160	2070–0012
721.7200	2070–0012
721.7210	2070–0012
721.7220	2070–0012

40 CFR citation	OMB control No.
721.7260	2070–0012
721.7280	2070–0012
721.7285	2070–0012
721.7286	2070–0038
721.7375	2070–0012
721.7378	2070–0012
721.7440	2070–0012
721.7450	2070–0012
721.7480	2070–0012
721.7500	2070–0012
721.7600	2070–0012
721.7620	2070–0012
721.7655	2070–0012
721.7700	2070–0012
721.7710	2070–0012
721.7720	2070–0012
721.7770	2070–0012
721.7780	2070–0012
721.7785	2070–0012
721.8079	2070–0012
721.8082	2070–0012
721.8085	2070–0012
721.8090	2070–0012
721.8095	2070–0012
721.8100	2070–0012
721.8153	2070–0012
721.8155	2070–0012
721.8160	2070–0012
721.8175	2070–0012
721.8225	2070–0012
721.8250	2070–0012
721.8350	2070–0012
721.8450	2070–0012
721.8500	2070–0012
721.8657	2070–0012
721.8658	2070–0012
721.8660	2070–0012
721.8670	2070–0012
721.8673	2070–0012
721.8675	2070–0012
721.8700	2070–0012
721.8750	2070–0012
721.8775	2070–0012
721.8780	2070–0012
721.8825	2070–0012
721.8850	2070–0012
721.8875	2070–0012
721.8900	2070–0012
721.8920	2070–0012
721.8965	2070–0012
721.9000	2070–0038
721.9005	2070–0012
721.9010	2070–0012
721.9075	2070–0012
721.9080	2070–0012
721.9100	2070–0012
721.9220	2070–0012
721.9265	2070–0012
721.9270	2070–0012
721.9280	2070–0012
721.9285	2070–0012
721.9300	2070–0012
721.9400	2070–0012
721.9460	2070–0012
721.9470	2070–0038
721.9480	2070–0012
721.9484	2070–0012
721.9485	2070–0012
721.9486	2070–0012
721.9487	2070–0012
721.9488	2070–0012
721.9490	2070–0012
721.9492	2070–0012
721.9495	2070–0012
721.9497	2070–0012
721.9499	2070–0012
721.9500	2070–0012
721.9502	2070–0012
721.9503	2070–0012
721.9504	2070–0012
721.9505	2070–0012
721.9507	2070–0012
721.9508	2070–0012
721.9509	2070–0012
721.9513	2070–0012
721.9514	2070–0012
721.9515	2070–0012
721.9516	2070–0012
721.9517	2070–0012
721.9518	2070–0012
721.9520	2070–0012
721.9526	2070–0012
721.9527	2070–0012
721.9530	2070–0012
721.9535	2070–0012
721.9538	2070–0012
721.9540	2070–0012
721.9545	2070–0012
721.9550	2070–0012
721.9570	2070–0012
721.9573	2070–0012
721.9575	2070–0012
721.9576	2070–0012
721.9577	2070–0012
721.9580	2070–0038
721.9582	2070–0038
721.9595	2070–0012
721.9597	2070–0012
721.9620	2070–0012
721.9630	2070–0012
721.9635	2070–0012
721.9650	2070–0012
721.9656	2070–0012
721.9657	2070–0012
721.9658	2070–0012
721.9659	2070–0012
721.9660	2070–0038
721.9661	2070–0012
721.9662	2070–0012
721.9663	2070–0012
721.9664	2070–0012
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721.9668	2070–0012
721.9670	2070–0012
721.9671	2070–0012
721.9672	2070–0012
721.9675	2070–0012
721.9680	2070–0012
721.9685	2070–0012
721.9700	2070–0012
721.9717	2070–0012
721.9719	2070–0012
721.9720	2070–0012
721.9730	2070–0012
721.9740	2070–0012
721.9750	2070–0012
721.9785	2070–0012
721.9790	2070–0012
721.9795	2070–0012
721.9798	2070–0012
721.9800	2070–0012
721.9810	2070–0012
721.9820	2070–0012
721.9825	2070–0012
721.9830	2070–0012
721.9840	2070–0012

40 CFR citation	OMB control No.
721.9850	2070–0012
721.9892	2070–0012
721.9900	2070–0012
721.9920	2070–0012
721.9925	2070–0012
721.9928	2070–0012
721.9930	2070–0038
721.9952	2070–0012
721.9957	2070–0038
721.9965	2070–0012
721.9969	2070–0012
721.9970	2070–0012
721.9973	2070–0012
Premanufacture Notification Exemptions	
723.50	2070–0012
723.175	2070–0012
723.250(m)(1)	2070–0012
Lead-Based Paint Poisioning Prevention in Certain Residential Structures	
Part 745, subpart E	2070–0158
Part 745, subpart F	2070–0151
Part 745, subpart L	2070–0155
Part 745, subpart Q	2070–0155
Water Treatment Chemicals	
Part 749, subpart D	2060–0193
749.68	2060–0193
Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions	
761.20	2070–0112
761.30	2070–0112
761.35	2070–0112
761.40	2070–0112
761.60	2070–0112
761.61	2070–0112
761.62	2070–0112
761.65	2070–0112
761.70	2070–0112
761.71	2070–0112
761.72	2070–0112
761.75(b) and (c)	2070–0112
761.77	2070–0112
761.79(f) and (h)	2070–0112
761.80(e), (g), (i) and (n)	2070–0112
761.125	2070–0112
761.180	2070–0112
761.185	2070–0112
761.187	2070–0112
761.193	2070–0112
761.202(a)	2070–0112
761.205	2070–0112
761.207	2070–0112
761.208	2070–0112
761.209	2070–0112
761.210	2070–0112
761.211	2070–0112
761.215	2070–0112
761.218	2070–0112
761.253	2070–0112
761.274	2070–0112
761.295	2070–0112
761.314	2070–0112
761.357	2070–0112
761.359	2070–0112
761.395	2070–0112
761.398	2070–0112

40 CFR citation	OMB control No.
Asbestos	
Part 763, subpart E	2070–0091
Part 763, subpart G	2070–0072
Dibenzo-para-dioxin/Dibenzofurans	
766.35(b)(1)	2070–0054
766.35(b)(2)	2070–0054
766.35(b)(3)	2070–0017
766.35(b)(4)(iii)	2070–0054
766.35(c)(1)(i)	2070–0054
766.35(c)(1)(ii)	2070–0054
766.35(c)(1)(iii)	2070–0017
766.35(d) Form	2070–0017
766.38	2070–0054
Procedures Governing Testing Consent Agreements and Test Rules	
790.5	2070–0033
790.42	2070–0033
790.45	2070–0033
790.50	2070–0033
790.55	2070–0033
790.60	2070–0033
790.62	2070–0033
790.68	2070–0033
790.80	2070–0033
790.82	2070–0033
790.85	2070–0033
790.99	2070–0033
Good Laboratory Practice Standards	
Part 792	2070–0004, 2070–0017, 2070–0033, 2070–0054, 2070–0067
Provisional Test Guidelines	
795.45	2070–0067
795.232	2070–0033
Identification of Specific Chemical Substance and Mixture Testing Requirements	
799.1053	2070–0033
799.1250	2070–0033
799.1560	2070–0033
799.1575	2070–0033
799.1645	2070–0033
799.1700	2070–0033
799.2155	2070–0033
799.2325	2070–0033
799.2475	2070–0033
799.2500	2070–0033
799.2700	2070–0033
799.3300	2070–0033
799.4360	2070–0033
799.4440	2070–0033
799.5000	2070–0033
799.5025	2070–0033
799.5050	2070–0033
799.5055	2070–0033
799.5075	2070–0033
799.5115	2070–0033
Distribution of Off-Site Consequence Analysis Information	
1400.3	2050–0172

40 CFR citation	OMB control No.
1400.4	2050–0172
1400.6	2050–0172
1400.9	2050–0172
Uniform National Discharge Standards for Vessels of the Armed Forces	
1700.9–1700.12	2040–0187

[1] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 60, subpart A, which are not independent information collection requirements.

[2] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 61, subpart A, which are not independent information collection requirements.

[3] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 63, subpart A, which are not independent information collection requirements.

[58 FR 27472, May 10, 1993]

EDITORIAL NOTE: For Federal Register citations affecting §9.1 see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EDITORIAL NOTE: At 65 FR 76745, Dec. 7, 2000, the table in §9.1 was amended but amendments could not be incorporated because of inaccurate amendatory instructions.

EFFECTIVE DATE NOTE: At 69 FR 39165, June 29, 2004, §9.1 was amended in the table by adding center headings and entries in numerical order, effective Aug. 30, 2004. For the convenience of the user, the added text is set forth as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

CONTROL OF EMISSIONS FROM NEW, LARGE NONROAD SPARK-IGNITION ENGINES

1048.20 2040–0460
1048.201–250 2040–0460
1048.345 2040–0460
1048.350 2040–0460
1048.420 2040–0460
1048.425 2040–0460

* * * * *

CONTROL OF EMISSIONS FROM RECREATIONAL ENGINES AND VEHICLES

1051.201–255 2060–0104
1051.345 2060–0104
1051.350 2060–0104
1051.725 2060–0104
1051.730 2060–0104

* * * * *

GENERAL COMPLIANCE PROVISIONS FOR NONROAD PROGRAMS

1068.5 2040–0460
1068.25 2040–0460
1068.27 2040–0460
1068.120 2040–0460
1068.201–260 2040–0460
1068.301–355 2040–0460
1068.450 2040–0460
1068.455 2040–0460
1068.501 2040–0460
1068.525 2040–0460
1068.530 2040–0460

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PART 10—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Subpart A—General

Sec.
10.1 Scope of regulations.

Subpart B—Procedures

10.2 Administrative claim; when presented; place of filing.
10.3 Administrative claims; who may file.
10.4 Evidence to be submitted.
10.5 Investigation, examination, and determination of claims.
10.6 Final denial of claim.
10.7 Payment of approved claim.
10.8 Release.
10.9 Penalties.
10.10 Limitation on Environmental Protection Agency's authority.
10.11 Relationship to other agency regulations.

AUTHORITY: Sec. 1, 80 Stat. 306; 28 U.S.C. 2672; 28 CFR part 14.

SOURCE: 38 FR 16868, June 27, 1973, unless otherwise noted.

Subpart A—General

§ 10.1 Scope of regulations.

The regulations in this part apply only to claims asserted under the Federal Tort Claims Act, as amended, 28 U.S.C. 2671–2680, for money damages against the United States because of damage to or loss of property or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Environmental Protection Agency (EPA) while acting

within the scope of his/her employment.

[51 FR 25832, July 16, 1986]

Subpart B—Procedures

§ 10.2 Administrative claim; when presented; place of filing.

(a) For purpose of the regulations in this part, a claim shall be deemed to have been presented when the Environmental Protection Agency receives, at a place designated in paragraph (c) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. A claim which should have been presented to EPA, but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to EPA as of the date that the claim is received by EPA. A claim mistakenly addressed to or filed with EPA shall forthwith be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Administrator, or his designee, or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, EPA shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

(c) Forms may be obtained and claims may be filed with the EPA office having jurisdiction over the employee involved in the accident or incident, or with the EPA Claims Officer, Office of General Counsel (2311), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

§ 10.3 Administrative claims; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest which is the subject of the claim, his duly authorized agent, or his legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or his legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, he shall present with his claim appropriate evidence that he has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 10.4 Evidence to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings

(if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decendent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payments for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal Injury*. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed or designated by EPA. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that the claimant has, upon request, furnished the report referred to in the first sentence of this subparagraph and has made or agrees in writing to make available to EPA any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, hospital and related expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected duration of and expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(6) Any other evidence or information which may have a bearing on the responsibility of the United States for either the personal injury or the damages claimed.

(c) *Property Damage*. In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, market value of the property as of date of damage, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on the responsibility of the United States either for the injury to or loss of property or for the damage claimed.

(d) *Time limit*. All evidence required to be submitted by this section shall be furnished by the claimant within a reasonable time. Failure of a claimant to furnish evidence necessary to a determination of his claim within three months after a request therefor has been mailed to his last known address may be deemed an abandonment of the claim. The claim may be thereupon disallowed.

§ 10.5 Investigation, examination, and determination of claims.

The EPA Claims Officer adjusts, determines, compromises and settles all administrative tort claims filed with EPA. In carrying out these functions, the EPA Claims Officer makes such investigations as are necessary for a determination of the validity of the claim. The decision of the EPA Claims Officer is a final agency decision of purposes of 28 U.S.C. 2675.

[51 FR 25832, July 16, 1986]

§ 10.6 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with EPA's action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period after the date of mailing by certified or registered mail of notice of final denial of the claim as provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the EPA for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration, EPA shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) to bring suit shall not accrue until 6 months after the filing of a request for reconsideration. Final action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

§ 10.7 Payment of approved claim.

(a) Upon allowance of his claim, claimant or his duly authorized agent shall sign the voucher for payment, Standard Form 1145, before payment is made.

(b) When the claimant is represented by an attorney, the voucher for payment (SF 1145) shall designate both the claimant and his attorney as "payees." The check shall be delivered to the attorney whose address shall appear on the voucher.

(c) No attorney shall charge fees in excess of 25 percent of a judgment or settlement after litigation, or in excess of 20 percent of administrative settlements (28 U.S.C. 2678).

§ 10.8 Release.

Acceptance by the claimant, his agent or legal representative of any award, compromise or settlement made hereunder, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of all claims against either the United States or any employee of the Government arising out of the same subject matter.

§ 10.9 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment of not more than 5 years, or both (18 U.S.C. 287,1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C. 3729).

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

§ 10.10 Limitation on Environmental Protection Agency's authority.

(a) An award, compromise or settlement of a claim hereunder in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled hereunder only after consultation with the Department of Justice when, in the opinion of the Environmental Protection Agency:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the Agency is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled by EPA hereunder only after consultation with the Department of Justice when EPA is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

§ 10.11 Relationship to other agency regulations.

The regulations in this part supplement the Attorney General's regulations in part 14 of chapter 1 of title 28, CFR, as amended. Those regulations, including subsequent amendments thereto, and the regulations in this part apply to the consideration by the Environmental Protection Agency of administrative claims under the Federal Tort Claims Act.

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

PART 11—SECURITY CLASSIFICATION REGULATIONS PURSUANT TO EXECUTIVE ORDER 11652

Sec.

11.1 Purpose.
11.2 Background.
11.3 Responsibilities.
11.4 Definitions.
11.5 Procedures.
11.6 Access by historical researchers and former Government officials.

AUTHORITY: Executive Order 11652 (37 FR 5209, March 10, 1972) and the National Security Directive of May 17, 1972 (37 FR 10053, May 19, 1972).

SOURCE: 37 FR 23541, Nov. 4, 1972, unless otherwise noted.

§ 11.1 Purpose.

These regulations establish policy and procedures governing the classification and declassification of national security information. They apply also to information or material designated under the Atomic Energy Act of 1954, as amended, as "Restricted Data," or "Formerly Restricted Data" which, additionally, is subject to the provisions of the Act and regulations of the Atomic Energy Commission.

§ 11.2 Background.

While the Environmental Protection Agency does not have the authority to originally classify information or material in the interest of the national security, it may under certain circumstances downgrade or declassify previously classified material or generate documents incorporating classified information properly originated by other agencies of the Federal Government which must be safeguarded. Agency policy and procedures must conform to applicable provisions of Executive Order 11652, and the National Security Council Directive of May 17, 1972, governing the safeguarding of national security information.

§ 11.3 Responsibilities.

(a) Classification and Declassification Committee: This committee, appointed by the Administrator, has the authority to act on all suggestions and complaints with respect to EPA's administration of this order. It shall establish procedures to review and act within 30 days upon all applications and appeals regarding requests for declassification. The Administrator, acting through the committee, shall be authorized to overrule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the committee determines that continued classification is required under section 5(B) of Executive Order 11652, it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

(b) Director, Security and Inspection Division, Office of Administration: The

Director, Security and Inspection Division, is responsible for the overall management and direction of a program designed to assure the proper handling and protection of classified information, and that classified information in the Agency's possession bears the appropriate classification markings. He also will assure that the program operates in accordance with the policy established herein, and will serve as Secretary of the Classification and Declassification Committee.

(c) Assistant Administrators, Regional Administrators, Heads of Staff Offices, Directors of National Environmental Research Centers are responsible for designating an official within their respective areas who shall be responsible for:

(1) Serving as that area's liaison with the Director, Security and Inspection Division, for questions or suggestions concerning security classification matters.

(2) Reviewing and approving, as the representative of the contracting offices, the DD Form 254, Contract Security Classification Specification, issued to contractors.

(d) Employees; (1) Those employees generating documents incorporating classified information properly originated by other agencies of the Federal Government are responsible for assuring that the documents are marked in a manner consistent with security classification assignments.

(2) Those employees preparing information for public release are responsible for assuring that such information is reviewed to eliminate classified information.

(3) All employees are responsible for bringing to the attention of the Director, Security and Inspection Division, any security classification problems needing resolution.

§ 11.4 Definitions.

(a) *Classified information.* Official information which has been assigned a security classification category in the interest of the national defense or foreign relations of the United States.

(b) *Classified material.* Any document, apparatus, model, film, recording, or any other physical object from which classified information can be derived by study, analysis, observation, or use of the material involved.

(c) *Marking.* The act of physically indicating the classification assignment on classified material.

(d) *National security information.* As used in this order this term is synonymous with "classified information." It is any information which must be protected against unauthorized disclosure in the interest of the national defense or foreign relations of the United States.

(e) *Security classification assignment.* The prescription of a specific security classification for a particular area or item of information. The information involved constitutes the sole basis for determining the degree of classification assigned.

(f) *Security classification category.* The specific degree of classification (Top Secret, Secret or Confidential) assigned to classified information to indicate the degree of protection required.

(1) *Top Secret.* Top Secret refers to national security information or material which requires the highest degree of protection. The test for assigning Top Secret classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(2) *Secret.* Secret refers to that national security information or material which requires a substantial degree of protection. The test for assigning Secret classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption

of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of scientific or technological developments relating to national security. The classification Secret shall be sparingly used.

(3) *Confidential.* Confidential refers to that national security information or material which requires protection. The test for assigning Confidential classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

§ 11.5 Procedures.

(a) *General.* Agency instructions on access, marking, safekeeping, accountability, transmission, disposition, and destruction of classification information and material will be found in the EPA Security Manual for Safeguarding Classified Material. These instructions shall conform with the National Security Council Directive of May 17, 1972, governing the classification, downgrading, declassification, and safeguarding of National Security Information.

(b) *Classification.* (1) When information or material is originated within EPA and it is believed to require classification, the person or persons responsible for its origination shall protect it in the manner prescribed for protection of classified information. The information will then be transmitted under appropriate safeguards to the Director, Security and Inspection Division, who will forward it to the department having primary interest in it with a request that a classification determination be made.

(2) A holder of information or material which incorporates classified information properly originated by other agencies of the Federal Government shall observe and respect the classification assigned by the originator.

(3) If a holder believes there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification, he shall so advise the Director, Security and Inspection Division, who will be responsible for obtaining a resolution.

(c) *Downgrading and declassification.* Classified information and material officially transferred to the Agency during its establishment, pursuant to Reorganization Plan No. 3 of 1970, shall be declassified in accordance with procedures set forth below. Also, the same procedures will apply to the declassification of any information in the Agency's possession which originated in departments or agencies which no longer exist, except that no declassification will occur in such cases until other departments having an interest in the subject matter have been consulted. Other classified information in the Agency's possession may be downgraded or declassified by the official authorizing its classification, by a successor in capacity, or by a supervisory official of either.

(1) *General Declassification Schedule*—(i) *Top Secret.* Information or material originally classified Top Secret shall become automatically downgraded to Secret at the end of the second full calendar year following the year in which it was originated, downgraded to Confidential at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the 10th full calendar year following the year in which it was originated.

(ii) *Secret.* Information and material originally classified Secret shall become automatically downgraded to Confidential at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(iii) *Confidential.* Information and material originally classified Confidential shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(2) *Exemption from the General Declassification Schedule.* Information or material classified before June 1, 1972, assigned to Group 4 under Executive Order No. 10501, as amended, shall be subject to the General Declassification Schedule. All other information or material classified before June 1, 1972,

whether or not assigned to Groups 1, 2, or 3, of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of 10 years after the date of origin it shall be subject to a mandatory classification review and disposition in accordance with the following criteria and conditions:

(i) It shall be declassified unless it falls within one of the following criteria:

(*a*) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(*b*) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(*c*) Classified information or material disclosing a system, plan, installation, project, or specific foreign relations matter, the continuing protection of which is essential to the national security.

(*d*) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(ii) *Mandatory review of exempted material.* All classified information and material originated after June 1, 1972, which is exempted under any of the above criteria shall be subject to a classification review by the originating department at any time after the expiration of 10 years from the date of origin provided:

(*a*) A department or member of the public requests a review;

(*b*) The request describes the document or record with sufficient particularity to enable the department to identify it; and

(*c*) The record can be obtained with a reasonable amount of effort.

(*d*) Information or material which no longer qualifies for exemption under any of the above criteria shall be declassified. Information or material which continues to qualify under any of the above criteria shall be so marked, and, unless impossible, a date for automatic declassification shall be set.

(iii) All requests for "mandatory review" shall be directed to:

Director, Security and Inspection Division, Environmental Protection Agency, Washington, DC 20460.

The Director, Security and Inspection Division shall promptly notify the action office of the request, and the action office shall immediately acknowledge receipt of the request in writing.

(iv) *Burden of proof for administrative determinations.* The burden of proof is on the originating Agency to show that continued classification is warranted within the terms of this paragraph (c)(2).

(v) *Availability of declassified material.* Upon a determination under paragraph (ii) of this paragraph (c)(2), that the requested material no longer warrants classification, it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

(vi) *Classification review requests.* As required by paragraph (ii) of this paragraph (c)(2) of this order, a request for classification review must describe the document with sufficient particularity to enable the Department or Agency to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If nonetheless the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

§ 11.6 Access by historical researchers and former Government officials.

(a) Access to classified information or material may be granted to historical researchers or to persons who formerly occupied policymaking positions to which they were appointed by the President: *Provided, however,* That in each case the head of the originating Department shall:

(1) Determine that access is clearly consistent with the interests of the national security; and

(2) Take appropriate steps to assure that classified information or material is not published or otherwise compromised.

(b) Access granted a person by reason of his having previously occupied a policymaking position shall be limited to those papers which the former official originated, reviewed, signed, or received while in public office, except as related to the "Declassification of Presidential Papers," which shall be treated as follows:

(1) *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential library. Such declassification shall only be undertaken in accord with:

(i) The terms of the donor's deed of gift;

(ii) Consultations with the Departments having a primary subject-matter interest; and

(iii) The provisions of § 11.5(c).

(2) [Reserved]

PART 12—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ENVIRONMENTAL PROTECTION AGENCY

Sec.

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 52 FR 30606, Aug. 14, 1987, unless otherwise noted.

§ 12.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the U.S. Postal Service. Section 504 regulations applicable to recipients of financial assistance from the Environmental Protection Agency (EPA) may be found at 40 CFR part 7 (1986).

§ 12.102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 12.103 Definitions.

For purposes of this part, the term—

Agency means Environmental Protection Agency.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity, without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 12.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 12.104–12.109 [Reserved]

§ 12.110 Self-evaluation.

(a) The agency shall, by November 13, 1987, begin a nationwide evaluation, of its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to, participate in the self-evaluation process by submitting comments (both oral and written).

(b) The evaluation shall be concluded by September 14, 1988, with a written report submitted to the Administrator that states the findings of the self-evaluation, any remedial action taken, and recommendations, if any, for further remedial action.

(c) The Administrator shall, within 60 days of the receipt of the report of the evaluation and recommendations, direct that certain remedial actions be taken as he/she deems appropriate.

(d) The agency shall, for at least three years following completion of the evaluation required under paragraph (b) of this section, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of the areas examined and any problems identified; and

(3) A description of any modifications made.

§ 12.111 Notice.

The agency shall make available to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 12.112–12.129 [Reserved]

§ 12.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the program or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 12.131–12.139 [Reserved]

§ 12.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 12.141–12.148 [Reserved]

§ 12.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 12.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 12.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 12.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the

agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 13, 1987, except that where structural changes in facilities are undertaken, such changes shall be made by September 14, 1990, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 14, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 12.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 12.152–12.159 [Reserved]

§ 12.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall

give primary consideration to the requests of the individuals with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §12.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 12.161–12.169 [Reserved]

§ 12.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for coordinating implementation of this section shall be vested in the Director of the Office of Civil Rights, EPA or his/her designate.

(d) The complainant may file a complete complaint at any EPA office. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause. The agency shall accept and investigate all complete complaints for which it has jurisdiction.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building of facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be

filed by the complainant within 90 days of receipt from the agency of the letter required by paragraph (g) of this section. The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Administrator or a designee.

(j) The Administrator or a designee shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator or designee determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section above may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 12.171–12.999 [Reserved]

PART 13—CLAIMS COLLECTION STANDARDS

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AUTHORITY: 5 U.S.C. 552a, 5512, and 5514; 31 U.S.C. 3711 *et seq.* and 3720A; 4 CFR parts 101–10.

SOURCE: 53 FR 37270, Sept. 23, 1988, unless otherwise noted.

Subpart A—General

§ 13.1 Purpose and scope.

This regulation prescribes standards and procedures for the Environmental Protection Agency's (EPA's) collection and disposal of debts. These standards and procedures are applicable to all debts for which a statute, regulation or contract does not prescribe different

standards or procedures. This regulation covers EPA's collection, compromise, suspension, termination, and referral of debts.

§ 13.2 Definitions.

(a) *Debt* means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, grants, contracts, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources. As used in this regulation, the terms *debt* and *claim* are synonymous.

(b) *Delinquent debt* means any debt which has not been paid by the date specified by the Government for payment or which has not been satisfied in accordance with a repayment agreement.

(c) *Debtor* means an individual, organization, association, corporation, or a State or local government indebted to the United States or a person or entity with legal responsibility for assuming the debtor's obligation.

(d) *Agency* means the United States Environmental Protection Agency.

(e) *Administrator* means the Administrator of EPA or an EPA employee or official designated to act on the Administrator's behalf.

(f) *Administrative offset* means the withholding of money payable by the United States to, or held by the United States for, a person to satisfy a debt the person owes the Government.

(g) *Creditor agency* means the Federal agency to which the debt is owed.

(h) *Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount described in 5 CFR 581.105 (b) through (f). These deductions include, but are not limited to: Social security withholdings; Federal, State and local tax withholdings; health insurance premiums; retirement contributions; and life insurance premiums.

(i) *Employee* means a current employee of the Federal Government including a current member of the Armed Forces.

(j) *Person* means an individual, firm, partnership, corporation, association and, except for purposes of administrative offsets under subpart C and interest, penalty and administrative costs under subpart B of this regulation, includes State and local governments and Indian tribes and components of tribal governments.

(k) *Employee salary offset* means the administrative collection of a debt by deductions at one or more officially established pay intervals from the current pay account of an employee without the employee's consent.

(l) *Waiver* means the cancellation, remission, forgiveness or non-recovery of a debt or debt-related charge as permitted or required by law.

§ 13.3 Interagency claims.

This regulation does not apply to debts owed EPA by other Federal agencies. Such debts will be resolved by negotiation between the agencies or by referral to the General Accounting Office (GAO).

§ 13.4 Other remedies.

(a) This regulation does not supersede or require omission or duplication of administrative proceedings required by contract, statute, regulation or other Agency procedures, e.g., resolution of audit findings under grants or contracts, informal grant appeals, formal appeals, or review under a procurement contract.

(b) The remedies and sanctions available to the Agency under this regulation for collecting debts are not intended to be exclusive. The Agency may impose, where authorized, other appropriate sanctions upon a debtor for inexcusable, prolonged or repeated failure to pay a debt. For example, the Agency may stop doing business with a grantee, contractor, borrower or lender; convert the method of payment under a grant or contract from an advance payment to a reimbursement method; or revoke a grantee's or contractor's letter-of-credit.

§ 13.5 Claims involving criminal activities or misconduct.

(a) The Administrator will refer cases of suspected criminal activity or misconduct to the EPA Office of Inspector General. That office has the responsibility for investigating or referring the matter, where appropriate, to the Department of Justice (DOJ), and/or returning it to the Administrator for further actions. Examples of activities which should be referred are matters involving fraud, anti-trust violations, embezzlement, theft, false claims or misuse of Government money or property.

(b) The Administrator will not administratively compromise, terminate, suspend or otherwise dispose of debts involving criminal activity or misconduct without the approval of DOJ.

§ 13.6 Subdivision of claims not authorized.

A claim will not be subdivided to avoid the $20,000 limit on the Agency's authority to compromise, suspend, or terminate a debt. A debtor's liability arising from a particular transaction or contract is a single claim.

§ 13.7 Omission not a defense.

Failure by the Administrator to comply with any provision of this regulation is not available to a debtor as a defense against payment of a debt.

Subpart B—Collection

§ 13.8 Collection rule.

(a) The Administrator takes action to collect all debts owed the United States arising out of EPA activities and to reduce debt delinquencies. Collection actions may include sending written demands to the debtor's last known address. Written demand may be preceded by other appropriate action, including immediate referral to DOJ for litigation, when such action is necessary to protect the Government's interest. The Administrator may contact the debtor by telephone, in person and/or in writing to demand prompt payment, to discuss the debtor's position regarding the existence, amount or repayment of the debt, to inform the debtor of its rights (e.g., to apply for waiver of the indebtedness or to have an administrative review) and of the basis for the debt and the consequences of nonpayment or delay in payment.

(b) The Administrator maintains an administrative file for each debt and/or debtor which documents the basis for the debt, all administrative collection actions regarding the debt (including communications to and from the debtor) and its final disposition. Information from a debt file relating to an individual may be disclosed only for purposes which are consistent with this regulation, the Privacy Act of 1974 and other applicable law.

§ 13.9 Initial notice.

(a) When the Administrator determines that a debt is owed EPA, he provides a written initial notice to the debtor. Unless otherwise provided by agreement, contract or order, the initial notice informs the debtor:

(1) Of the amount, nature and basis of the debt;

(2) That payment is due immediately upon receipt of the notice;

(3) That the debt is considered delinquent if it is not paid within 30 days of the date mailed or hand-delivered;

(4) That interest charges and, except for State and local governments and Indian tribes, penalty charges and administrative costs may be assessed against a delinquent debt;

(5) Of any rights available to the debtor to dispute the validity of the debt or to have recovery of the debt waived (citing the available review or waiver authority, the conditions for review or waiver, and the effects of the review or waiver request on the collection of the debt), and of the possibility of assessment of interest, penalty and administrative costs; and

(6) The address, telephone number and name of the person available to discuss the debt.

(b) EPA will respond promptly to communications from the debtor. Response generally will be within 20 days of receipt of communication from the debtor.

(c) Subsequent demand letters also will advise the debtor of any interest, penalty or administrative costs which have been assessed and will advise the debtor that the debt may be referred to

a credit reporting agency (see § 13.14), a collection agency (see § 13.13) or to DOJ (see § 13.33) if it is not paid.

§ 13.10 Aggressive collection actions; documentation.

(a) EPA takes actions and effective follow-up on a timely basis to collect all claims of the United States for money and property arising out of EPA's activities. EPA cooperates with other Federal agencies in their debt collection activities.

(b) All administrative collection actions are documented in the claim file, and the bases for any compromise, termination or suspension of collection actions is set out in detail. This documentation, including the Claims Collection Litigation Report required § 13.33, is retained in the appropriate debt file.

§ 13.11 Interest, penalty and administrative costs.

(a) *Interest.* EPA will assess interest on all delinquent debts unless prohibited by statute, regulation or contract.

(1) Interest begins to accrue on all debts from the date of the initial notice to the debtor. EPA will not recover interest where the debt is paid within 30 days of the date of the notice. EPA will assess an annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.,* the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the FEDERAL REGISTER and the Treasury Fiscal Requirements Manual Bulletins, unless a different rate is necessary to protect the interest of the Government. EPA will notify the debtor of the basis for its finding that a different rate is necessary to protect the interest of the Government.

(2) The Administrator may extend the 30-day period for payment where he determines that such action is in the best interest of the Government. A decision to extend or not to extend the payment period is final and is not subject to further review.

(3) The rate of interest, as initially assessed, remains fixed for the duration of the indebtedness. If a debtor defaults on a repayment agreement, interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(4) Interest will not be assessed on interest charges, administrative costs or later payment penalties. However, where a debtor defaults on a previous repayment agreement and interest, administrative costs and penalties charges have been waived under the defaulted agreement, these charges can be reinstated and added to the debt principal under any new agreement and interest charged on the entire amount of the debt.

(b) *Administrative costs of collecting overdue debts.* The costs of the Agency's administrative handling of overdue debts, based on either actual or average cost incurred, will be charged on all debts except those owed by State and local governments and Indian tribes. These costs include both direct and indirect costs. Administrative costs will be assessed monthly throughout the period the debt is overdue except as provided by § 13.12.

(c) *Penalties.* As provided by 31 U.S.C. 3717(e)(2), a penalty charge will be assessed on all debts, except those owned by State and local governments and Indian tribes, more than 90 days delinquent. The penalty charge will be at a rate not to exceed 6% per annum and will be assessed monthly.

(d) *Allocation of payments.* A partial payment by a debtor will be applied first to outstanding administrative costs, second to penalty assessments, third to accrued interest and then to the outstanding debt principal.

(e) *Waiver.* (1) The Administrator may (without regard to the amount of the debt) waive collection of all or part of accrued interest, penalty or administrative costs, where he determines that—

(i) Waiver is justified under the criteria of § 13.25;

(ii) The debt or the charges resulted from the Agency's error, action or inaction, and without fault by the debtor; or

(iii) Collection of these charges would be against equity and good conscience or not in the best interest of the United States.

(2) A decision to waive interest, penalty charges or administrative costs

may be made at any time prior to payment of a debt. However, where these charges have been collected prior to the waiver decision, they will not be refunded. The Administrator's decision to waive or not waive collection of these charges is a final agency action.

§ 13.12 Interest and charges pending waiver or review.

Interest, penalty charges and administrative costs will continue to accrue on a debt during administrative appeal, either formal or informal, and during waiver consideration by the Agency; *except,* that interest, penalty charges and administrative costs will not be assessed where a statute or a regulation specifically prohibits collection of the debt during the period of the administrative appeal or the Agency review.

§ 13.13 Contracting for collection services.

EPA will use private collection services where it determines that their use is in the best interest of the Government. Where EPA determines that there is a need to contract for collection services it will—

(a) Retain sole authority to resolve any dispute by the debtor of the validity of the debt, to compromise the debt, to suspend or terminate collection action, to refer the debt to DOJ for litigation, and to take any other action under this part which does not result in full collection of the debt;

(b) Require the contractor to comply with the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m), with applicable Federal and State laws pertaining to debt collection practices (e.g., the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*)), and with applicable regulations of the Internal Revenue Service;

(c) Require the contractor to account accurately and fully for all amounts collected; and

(d) Require the contractor to provide to EPA, upon request, all data and reports contained in its files relating to its collection actions on a debt.

§ 13.14 Use of credit reporting agencies.

EPA reports delinquent debts to appropriate credit reporting agencies.

(a) EPA provides the following information to the reporting agencies:

(1) A statement that the claim is valid and is overdue;

(2) The name, address, taxpayer identification number and any other information necessary to establish the identity of the debtor;

(3) The amount, status and history of the debt; and

(4) The program or pertinent activity under which the debt arose.

(b) Before disclosing debt information, EPA will:

(1) Take reasonable action to locate the debtor if a current address is not available; and

(2) If a current address is available, notify the debtor by certified mail, return receipt requested, that:

(i) The designated EPA official has reviewed the claim and has determined that it is valid and overdue;

(ii) That within 60 days EPA intends to disclose to a credit reporting agency the information authorized for disclosure by this subsection; and

(iii) The debtor can request a complete explanation of the claim, can dispute the information in EPA's records concerning the claim, and can file for an administrative review, waiver or reconsideration of the claim, where applicable.

(c) Before information is submitted to a credit reporting agency, EPA will provide a written statement to the reporting agency that all required actions have been taken. Additionally, EPA will, thereafter, ensure that the credit reporting agency is promptly informed of any substantive change in the conditions or amounts of the debt, and promptly verify or correct information relevant to the claim.

(d) If a debtor disputes the validity of the debt, the credit reporting agency will refer the matter to the appropriate EPA official. The credit reporting agency will exclude the debt from its reports until EPA certifies in writing that the debt is valid.

§ 13.15 Taxpayer information.

(a) The Administrator may obtain a debtor's current mailing address from the Internal Revenue Service.

(b) Addresses obtained from the Internal Revenue Service will be used by

the Agency, its officers, employees, agents or contractors and other Federal agencies only to collect or dispose of debts, and may be disclosed to credit reporting agencies only for the purpose of their use in preparing a commercial credit report on the taxpayer for use by EPA.

§ 13.16 Liquidation of collateral.

Where the Administrator holds a security instrument with a power of sale or has physical possession of collateral, he may liquidate the security or collateral and apply the proceeds to the overdue debt. EPA will exercise this right where the debtor fails to pay within a reasonable time after demand, unless the cost of disposing of the collateral is disproportionate to its value or special circumstances require judicial foreclosure. However, collection from other businesses, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance company unless expressly required by contract or statute. The Administrator will give the debtor reasonable notice of the sale and an accounting of any surplus proceeds and will comply with any other requirements of law or contract.

§ 13.17 Suspension or revocation of license or eligibility.

When collecting statutory penalties, forfeitures, or debts for purposes of enforcement or compelling compliance, the Administrator may suspend or revoke licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay a claim. Additionally, the Administrator may suspend or disqualify any contractor, lender, broker, borrower, grantee or other debtor from doing business with EPA or engaging in programs EPA sponsors or funds if a debtor fails to pay its debts to the Government within a reasonable time. Debtors will be notified before such action is taken and applicable suspension or debarment procedures will be used. The Administrator will report the failure of any surety to honor its obligations to the Treasury Department for action under 6 U.S.C. 11.

§ 13.18 Installment payments.

(a) Whenever, feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalty and administrative costs, as required by § 13.11, will be collected in a single payment. However, where the Administrator determines that a debtor is financially unable to pay the indebtedness in a single payment or that an alternative payment mechanism is in the best interest of the United States, the Administrator may approve repayment of the debt in installments. The debtor has the burden of establishing that it is financially unable to pay the debt in a single payment or that an alternative payment mechanism is warranted. If the Administrator agrees to accept payment by installments, the Administrator may require a debtor to execute a written agreement which specifies all the terms of the repayment arrangement and which contains a provision accelerating the debt in the event of default. The size and frequency of installment payments will bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment payments will be sufficient in size and frequency to liquidate the debt in not more than 3 years, unless the Administrator determines that a longer period is required. Installment payments of less than $50 per month generally will not be accepted, but may be accepted where the debtor's financial or other circumstances justify. If the debt is unsecured, the Administrator may require the debtor to execute a confess-judgment note with a tax carry-forward and a tax carry-back provision. Where the Administrator secures a confess-judgment note, the Administrator will provide the debtor a written explanation of the consequences of the debtor's signing the note.

(b) If a debtor owes more than one debt and designates how a voluntary installment payment is to be applied among the debts, that designation will be approved if the Administrator determines that the designation is in the best interest of the United States. If the debtor does not designate how the payment is to be applied, the Administrator will apply the payment to the

various debts in accordance with the best interest of the United States, paying special attention to applicable statutes of limitations.

§ 13.19 Analysis of costs; automation; prevention of overpayments, delinquencies or defaults.

(a) The Administrator may periodically compare EPA's costs in handling debts with the amounts it collects,

(b) The Administrator may periodically consider the need, feasibility, and cost effectiveness of automated debt collection operations.

(c) The Administrator may establish internal controls to identify the causes of overpayments and delinquencies and may issue procedures to prevent future occurrences of the identified problems.

Subpart C—Administrative Offset

§ 13.20 Administrative offset of general debts.

This subpart provides for EPA's collection of debts by administrative offset under section 5 of the Debt Collection Act of 1982 (31 U.S.C. 3716), other statutory authorities and the common law. It does not apply to offsets against employee salaries covered by §§ 13.21, 13.22 and 13.23 of this subpart. EPA will collect debts by administrative offsets where it determines that such collections are feasible and are not otherwise prohibited by statute or contract.

EPA will decide, on a case-by-case basis, whether collection by administrative offset is feasible and that its use furthers and protects the interest of the United States.

(a) *Standards.* (1) The Administrator collects debts by administrative offset if—

(i) The debt is certain in amount;

(ii) Efforts to obtain direct payment from the debtor have been, or would most likely be, unsuccessful or the Administrator and the debtor agree to the offset;

(iii) Offset is not expressly or implicitly prohibited by statute, regulation or contract;

(iv) Offset is cost-effective or has significant deterrent value;

(v) Offset does not substantially impair or defeat program objectives; and

(vi) Offset is best suited to further and protect the Government's interest.

(2) The Administrator may, in determining the method and amount of the offset, consider the financial impact on the debtor.

(b) *Interagency offset.* The Administrator may offset a debt owed to another Federal agency from amounts due or payable by EPA to the debtor, or may request another Federal agency to offset a debt owed to EPA. The Administrator may request the Internal Revenue Service to offset an overdue debt from a Federal income tax refund due a debtor where reasonable attempts to obtain payment have failed. Interagency offsets from employee salaries will be made in accordance with the procedures contained in §§ 13.22 and 13.23.

(c) *Multiple debts.* Where moneys are available for offset against multiple debts of a debtor, it will be applied in accordance with the best interest of the Government as determined by the Administrator on a case-by-case basis.

(d) *Statutory bar to offset.* Administrative offset will not be made more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not have been known through the exercise of reasonable care by the officer responsible for discovering or collecting the debt. For purposes of offset, the right to collect a debt accrues when the appropriate EPA official determines that a debt exists (e.g., contracting officer, grant award official, etc.), when it is affirmed by an administrative appeal or a court having jurisdiction, or when a debtor defaults on a payment agreement, whichever is latest. An offset occurs when money payable to the debtor is first withheld or when EPA requests offset from money held by another agency.

(e) *Pre-offset notice.* Before initiating offset, the Administrator sends the debtor written notice of:

(1) The basis for and the amount of the debt as well as the Agency's intention to collect the debt by offset if payment or satisfactory response has not been received within 30 days of the notice;

(2) The debtor's right to submit an alternative repayment schedule, to inspect and copy agency records pertaining to the debt, to request review of the determination of indebtedness or to apply for waiver under any available statute or regulation; and

(3) Applicable interest, penalty charges and administrative costs.

(f) *Alternative repayment.* The Administrator may, at the Administrator's discretion, enter into a repayment agreement with the debtor in lieu of offset. In deciding whether to accept payment of the debt by an alternative repayment agreement, the Administrator may consider such factors as the amount of the debt, the length of the proposed repayment period, whether the debtor is willing to sign a confess-judgment note, past Agency dealings with the debtor, documentation submitted by the debtor indicating that an offset will cause undue financial hardship, and the debtor's financial ability to adhere to the terms of a repayment agreement. The Administrator may require financial documentation from the debtor before considering the repayment arrangement.

(g) *Review of administrative determination.* (1) A debt will not be offset while a debtor is seeking either formal or informal review of the validity of the debt under this section or under another statute, regulation or contract. However, interest, penalty and administrative costs will continue to accrue during this period, unless otherwise waived by the Administrator. The Administrator may initiate offset as soon as practical after completion of review or after a debtor waives the opportunity to request review.

(2) The Administrator may administratively offset a debt prior to the completion of a formal or informal review where the determines that:

(i) Failure to take the offset would substantially prejudice EPA's ability to collect the debt; and

(ii) The time before the first offset is to be made does not reasonably permit the completion of the review procedures. (Offsets taken prior to completion of the review process will be followed promptly by the completion of the process. Amounts recovered by offset but later found not to be owed will be refunded promptly.)

(3) The debtor must provide a written request for review of the decision to offset the debt no later than 15 days after the date of the notice of the offset unless a different time is specifically prescribed. The debtor's request must state the basis for the request for review.

(4) The Administrator may grant an extension of time for filing a request for review if the debtor shows good cause for the late filing. A debtor who fails timely to file or to request an extension waives the right to review.

(5) The Administrator will issue, no later than 60 days after the filing of the request, a written final decision based on the evidence, record and applicable law.

§ 13.21 Employee salary offset—general.

(a) *Purpose.* This section establishes EPA's policies and procedures for recovery of debts owed to the United States by installment collection from the current pay account of an employee.

(b) *Scope.* The provisions of this section apply to collection by salary offset under 5 U.S.C. 5514 of debts owed EPA and debts owed to other Federal agencies by EPA employees. This section does not apply to debts owed EPA arising from travel advances under 5 U.S.C. 5705, employee training expenses under 5 U.S.C. 4108 and to other debts where collection by salary offset is explicitly provided for or prohibited by another statute.

(c) *References.* The following statutes and regulations apply to EPA's recovery of debts due the United States by salary offset:

(1) 5 U.S.C. 5514, as amended, governing the installment collection of debts;

(2) 31 U.S.C. 3716, governing the liquidation of debts by administrative offset;

(3) 5 CFR part 550, subpart K, setting forth the minimum requirements for executive agency regulations on salary offset; and

(4) 4 CFR parts 101–105, the Federal Claims Collection Standards.

§ 13.22 Salary offset when EPA is the creditor agency.

(a) *Entitlement to notice, hearing, written response and decision.* (1) Prior to initiating collection action through salary offset, EPA will first provide the employee with the opportunity to pay in full the amount owed, unless such notification will compromise the Government's ultimate ability to collect the debt.

(2) Except as provided in paragraph (b) of this section, each employee from whom the Agency proposes to collect a debt by salary offset under this section is entitled to receive a written notice as described in paragraph (c) of this section.

(3) Each employee owing a debt to the United States which will be collected by salary offset is entitled to request a hearing on the debt. This request must be filed as prescribed in paragraph (d) of this section. The Agency will make appropriate hearing arrangements which are consistent with law and regulations. Where a hearing is held, the employee is entitled to a written decision on the following issues:

(i) The determination of the Agency concerning the existence or amount of the debt; and

(ii) The repayment schedule, if it was not established by written agreement between the employee and the Agency.

(b) *Exceptions to entitlement to notice, hearing, written response and final decision.* The procedural requirements of paragraph (a) of this section are not applicable to any adjustment of pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program (such as health insurance) requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, if the amount to be recovered was accumulated over more than four pay periods the full procedures prescribed under paragraph (d) of this section will be extended to the employee.

(c) *Notification before deductions begin.* Except as provided in paragraph (b) of this section, deductions will not be made unless the employee is first provided with a minimum of 30 calendar days written notice. Notice will be sent by certified mail (return receipt requested), and must include the following:

(1) The Agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The Agency's intention to collect the debt by means of deductions from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date and duration of the intended deductions. (The proposed beginning date for salary offset cannot be earlier than 30 days after the date of notice, unless this would compromise the Government's ultimate ability to resolve the debt);

(4) An explanation of the requirements concerning interest, penalty and administrative costs;

(5) The employee's right to inspect and copy all records relating to the debt or to request and receive a copy of such records;

(6) If not previously provided, the employee's right to enter into a written agreement for a repayment schedule differing from that proposed by the Agency where the terms of the proposed repayment schedule are acceptable to the Agency. (Such an agreement must be in writing and signed by both the employee and the appropriate EPA official and will be included in the employee's personnel file and documented in the EPA payroll system);

(7) The right to a hearing conducted by a hearing official not under the control of the Administrator, if a request is filed;

(8) The method and time for requesting a hearing;

(9) That the filing of a request for hearing within 15 days of receipt of the original notification will stay the assessment of interest, penalty and administrative costs and the commencement of collection proceedings;

(10) That a final decision on the hearing (if requested) will be issued at the earliest practical date, but no later than 60 days after the filing of the request, unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That knowingly false or frivolous statements, representations or evidence may subject the employee to—

(i) Disciplinary procedures under 5 U.S.C. chapter 75 or any other applicable statutes or regulations;

(ii) Criminal penalties under 18 U.S.C. 286, 287, 1001 and 1002 or other applicable statutory authority; or

(iii) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority;

(12) Any other rights and remedies available under statutes or regulations governing the program for which the collection is being made; and

(13) That amounts paid or deducted for the debt, except administrative costs and penalty charges where the entire debt is not waived or terminated, which are later waived or found not owed to the United States will be promptly refunded to the employee.

(d) *Request for hearing.* An employee may request a hearing by filing a written request directly with the Director, Financial Management Division (2734R) , U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The request must state the bases upon which the employee disputes the proposed collection of the debt. The request must be signed by the employee and be received by EPA within 15 days of the employee's receipt of the notification of proposed deductions. The employee should submit in writing all facts, evidence and witnesses which support his/her position to the Director, Financial Management Division, within 15 days of the date of the request for a hearing. The Director, Financial Management Division, will arrange for the services of a hearing official not under the control of the Administrator and will provide the hearing official with all documents relating to the claim.

(e) *Requests for hearing made after time expires.* Late requests for a hearing may be accepted if the employee can show that the delay in filing the request for a hearing was due to circumstances beyond the employee's control.

(f) *Form of hearing, written response and final decision.* (1) Normally, a hearing will consist of the hearing official making a decision based upon a review of the claims file and any materials submitted by the debtor. However, in instances where the hearing official determines that the validity of the debt turns on an issue of veracity or credibility which cannot be resolved through review of documentary evidence, the hearing official at his discretion may afford the debtor an opportunity for an oral hearing. Such oral hearings will consist of an informal conference before a hearing official in which the employee and the Agency will be given the opportunity to present evidence, witnesses and argument. If desired, the employee may be represented by an individual of his/her choice. The Agency shall maintain a summary record of oral hearings provided under these procedures.

(2) Written decisions provided after a request for hearing will, at a minimum, state the facts evidencing the nature and origin of the alleged debt; and the hearing official's analysis, findings and conclusions.

(3) The decision of the hearing official is final and binding on the parties.

(g) *Request for waiver.* In certain instances, an employee may have a statutory right to request a waiver of overpayment of pay or allowances, e.g., 5 U.S.C. 5584 or 5 U.S.C. 5724(i). When an employee requests waiver consideration under a right authorized by statute, further collection on the debt will be suspended until a final administrative decision is made on the waiver request. However, where it appears that the Government's ability to recover the debt may be adversely affected because of the employee's resignation, termination or other action, suspension of recovery is not required. During the period of the suspension, interest, penalty charges and administrative costs will not be assessed against the debt. The Agency will not duplicate, for purposes of salary offset, any of the procedures already provided the debtor under a request for waiver.

(h) *Method and source of collection.* A debt will be collected in a lump-sum or by installment deductions at established pay intervals from an employee's current pay account, unless the employee and the Agency agree to alternative arrangements for payment. The alternative payment schedule must be in writing, signed by both the employee and the Administrator and

will be documented in the Agency's files.

(i) *Limitation on amount of deduction.* The size and frequency of installment deductions generally will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period may not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payments will be in amounts sufficient to liquidate the debt in three years or less. Installment payments of less than $25 normally will be accepted only in the most unusual circumstances.

(j) *Duration of deduction.* If the employee is financially unable to pay a debt in a lump-sum or the amount of the debt exceeds 15 percent of disposable pay, collection will be made in installments. Installment deductions will be made over the period of active duty or employment except as provided in paragraph (a)(1) of this section.

(k) *When deductions may begin.* (1) Deductions to liquidate an employee's debt will begin on the date stated in the Agency's notice of intention to collect from the employee's current pay unless the debt has been repaid or the employee has filed a timely request for hearing on issues for which a hearing is appropriate.

(2) If the employee has filed a timely request for hearing with the Agency, deductions will begin after the hearing official has provided the employee with a final written decision indicating the amount owed the Government. Following the decision by the hearing official, the employee will be given 30 days to repay the amount owed prior to collection through salary offset, unless otherwise provided by the hearing official.

(l) *Liquidation from final check.* If the employee retires, resigns, or the period of employment ends before collection of the debt is completed, the remainder of the debt will be offset from subsequent payments of any nature due the employee (e.g., final salary payment, lump-sum leave, etc.).

(m) *Recovery from other payments due a separated employee.* If the debt cannot be liquidated by offset from any final payment due the employee on the date of separation, EPA will liquidate the debt, where appropriate, by administrative offset from later payments of any kind due the former employee (e.g., retirement pay). Such administrative offset will be taken in accordance with the procedures set forth in § 13.20.

(n) *Employees who transfer to another Federal agency.* If an EPA employee transfers to another Federal agency prior to repaying a debt owed to EPA, the following action will be taken:

(1) The appropriate debt-claim form specified by the Office of Personnel Management (OPM) will be completed and certified to the new paying office by EPA. EPA will certify: That the employee owes a debt; the amount and the basis for the debt; the date on which payment is due; the date the Government's rights to collect the debt first accrued; and that EPA's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) The new paying agency will be advised of the amount which has already been collected, the number of installments and the commencement date for the first installment, if other than the next officially established pay period. EPA will also identify to the new paying agency the actions it has taken and the dates of such actions.

(3) EPA will place or will arrange to have placed in the employee's official personnel file the information required by paragraphs (n) (1) and (2) of this section.

(4) Upon receipt of the official personnel file from EPA, the new paying agency will resume collection from the employee's current pay account and will notify both the employee and EPA of the resumption.

(o) *Interest, penalty and administrative cost.* EPA will assess interest and administrative costs on debts collected under these procedures. The following guidelines apply to the assessment of these costs on debts collected by salary offset:

(1) A processing and handling charge will be assessed on debts collected through salary offset under this section. Where offset begun prior to the

employee's receipt of the 30-day written notice of the proposed offset, processing and handling costs will only be assessed after the expiration of the 30-day notice period and after the completion of any hearing requested under paragraph (d) of this section or waiver consideration under paragraph (g) of this section.

(2) Interest will be assessed on all debts not collected within 30 days of either the date of the notice where the employee has not requested a hearing within the allotted time, completion of a hearing pursuant to paragraph (d) of this section, or completion of waiver consideration under paragraph (g) of this section, whichever is later. Interest will continue to accrue during the period of the recovery.

(3) Deductions by salary offset normally begin prior to the time for assessment of a penalty. Therefore, a penalty charge will not be assessed unless deductions occur more than 120 days from the date of notice to the debtor and penalty assessments have not been suspended because of waiver consideration by EPA.

(p) *Non-waiver of right by payment.* An employee's payment under protest of all or any portion of a debt does not waive any rights which the employee may have under either these procedures or any other provision of law.

(q) *Refunds.* EPA will promptly refund to the employee amounts paid or deducted pursuant to this section, the recovery of which is subsequently waived or otherwise found not owing to the United States. Refunds do not bear interest unless specifically authorized by law.

(r) *Time limit for commencing recovery by salary setoff.* EPA will not initiate salary offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the right to collect the debt were not known and could not have been known through the exercise of reasonable care by the Government official responsible for discovering and collecting such debts.

§ 13.23 Salary offset when EPA is not the creditor agency.

The requirements below apply when EPA has been requested to collect a debt owed by an EPA employee to another Federal agency.

(a) *Format for the request for recovery.* (1) The creditor agency must complete fully the appropriate claim form specified by OPM.

(2) The creditor agency must certify to EPA on the debt claim form: The fact that the employee owes a debt; the date that the debt first accrued; and that the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM and send it to the Director, Financial Management Division (2734R), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(3) If the collection is to be made in installments, the creditor agency must also advise EPA of the number of installments to be collected, the amount of each installment, and the commencement date of the first installment, if a date other than the next established pay period.

(4) Unless the employee has consented in writing to the salary deductions or signed a statement acknowledging receipt of the required procedures and this information is attached to the claim form, the creditor agency must indicate the actions it took under its procedures for salary offset and the dates of such actions.

(b) *Processing of the claim by EPA*—(1) *Incomplete claims.* If EPA receives an improperly completed claim form, the claim form and all accompanying material will be returned to the requesting (creditor) agency with notice that OPM procedures must be followed and a properly completed claim form must be received before any salary offset can be taken. The notice should identify specifically what is needed from the requesting agency for the claim to be processed.

(2) *Complete claims.* If the claim procedures in paragraph (a) of this section have been properly completed, deduction will begin on the next established pay period. EPA will not review the merits of the creditor agency's determinations with respect to the amount or validity of the debt as stated in the debt claim form. EPA will not assess a handling or any other related charge to cover the cost of its processing the claim.

(c) *Employees separating from EPA before a debt to another agency is collected*—(1) *Employees separating from Government service.* If an employee begins separation action before EPA collects the total debt due the creditor agency, the following actions will be taken:

(i) To the extent possible, the balance owed the creditor agency will be liquidated from subsequent payments of any nature due the employee from EPA in accordance with § 13.22(1);

(ii) If the total amount of the debt cannot be recovered, EPA will certify to the creditor agency and the employee the total amount of EPA's collection; and

(iii) If EPA is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund or other similar payments, it will forward a copy of the claim form to the agency responsible for making such payments as notice that a debt is outstanding. EPA will also send a copy of the claim form to the creditor agency so that it can file a certified claim against the payments.

(2) *Employees who transfer to another Federal agency.* If an EPA employee transfers to another Federal agency before EPA collects the total amount due the creditor agency, the following actions will be taken:

(i) EPA will certify the total amount of the collection made on the debt; and

(ii) The employee's official personnel folder will be sent to the new paying agency. (It is the responsibility of the creditor agency to ensure that the collection is resumed by the new paying agency.)

Subpart D—Compromise of Debts

§ 13.24 General.

EPA may compromise claims for money or property where the claim, exclusive of interest, penalty and administrative costs, does not exceed $20,000. Where the claim exceeds $20,000, the authority to accept the compromise rests solely with DOJ. The Administrator may reject an offer of compromise in any amount. Where the claim exceeds $20,000 and EPA recommends acceptance of a compromise offer, it will refer the claim with its recommendation to DOJ for approval. The referral will be in the form of the Claims Collection Litigation Report (CCLR) and will outline the basis for EPA's recommendation. EPA refers compromise offers for claims in excess of $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530, unless otherwise provided by Department of Justice delegations or procedures. EPA refers offers of compromise for claims of $20,000 to $100,000 to the United States Attorney in whose judicial district the debtor can be found. If the Administrator has a debtor's firm written offer for compromise which is substantial in amount but the Administrator is uncertain as to whether the offer should be accepted, he may refer the offer and the supporting data to DOJ or GAO for action.

§ 13.25 Standards for compromise.

(a) EPA may compromise a claim pursuant to this section if EPA cannot collect the full amount because the debtor does not have the financial ability to pay the full amount of the debt within a reasonable time, or the debtor refuses to pay the claim in full and the Government does not have the ability to enforce collection in full within a reasonable time by enforced collection proceedings. In evaluating the acceptability of the offer, the Administrator may consider, among other factors, the following:

(1) *Individual debtors.* (i) Age and health of the debtor;

(ii) Present and potential income;

(iii) Inheritance prospects;

(iv) The possibility that assets have been concealed or improperly transferred by the debtor;

(v) The availability of assets or income which may be realized by enforced collection proceedings; or

(vi) The applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection.

(2) *Municipal and quasi-municipal debtors.* (i) The size of the municipality or quasi-municipal entity;

(ii) The availability of current and future resources sufficient to pay the

debt (e.g., bonding authority, rate adjustment authority, or taxing authority); or

(iii) The ratio of liabilities (both short and long term) to assets.

(3) *Commercial debtors.* (i) Ratio of assets to liabilities;

(ii) Prospects of future income or losses; or

(iii) The availability of assets or income which may be realized by enforced collection proceedings.

(b) EPA may compromise a claim, or recommend acceptance of a compromise to DOJ, where there is substantial doubt concerning the Government's ability to prove its case in court for the full amount of the claim, either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases will fairly reflect the probability of prevailing on the legal issues involved, considering fully the availability of witnesses and other evidentiary data required to support the Government's claim. In determining the litigative risks involved, EPA will give proportionate weight to the likely amount of court costs and attorney fees the Government may incur if it is unsuccessful in litigation.

(c) EPA may compromise a claim, or recommend acceptance of a compromise to DOJ, if the cost of collection does not justify the enforced collection of the full amount of the debt. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, taking into consideration the time it will take to effect collection. Costs of collection may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collection justifies enforced collection of the full amount, EPA may consider the positive effect that enforced collection of the claim may have on the collection of other similar claims.

(d) Statutory penalties, forfeitures or debts established as an aid to enforcement and to compel compliance may be compromised where the Administrator determines that the Agency's enforcement policy, in terms of deterrence and securing compliance (both present and future), will be adequately served by accepting the offer.

§ 13.26 Payment of compromised claims.

The Administrator normally will not approve a debtor's request to pay a compromised claim in installments. However, where the Administrator determines that payment of a compromise by installments is necessary to effect collection, a debtor's request to pay in installments may be approved. Normally, where installment repayment is approved, the debtor will be required to execute a confess-judgment agreement which accelerates payment of the balance due upon default.

§ 13.27 Joint and several liability.

When two or more debtors are jointly and severally liable, collection action will not be withheld against one debtor until the other or others pay their proportionate share. The amount of a compromise with one debtor is not precedent in determining compromises from other debtors who have been determined to be jointly and severally liable on the claim.

§ 13.28 Execution of releases.

Upon receipt of full payment of a claim or the amount compromised, EPA will prepare and execute a release on behalf of the United States. The release will include a provision which voids the release if it was procured by fraud, misrepresentation, a false claim or by mutual mistake of fact.

Subpart E—Suspension of Collection Action

§ 13.29 Suspension—general.

The Administrator may suspend the Agency's collection actions on a debt where the outstanding debt principal does not exceed $20,000, the Government cannot presently collect or enforce collection of any significant sum from the debtor, the prospects of future collection justify retention of the debt for periodic review and there is no risk of expiration of the statute of limitations during the period of suspension. Additionally, the Administrator may

waive the assessment of interest, penalty charges and administrative costs during the period of the suspension. Suspension will be for an established time period and generally will be reviewed at least every six months to ensure the continued propriety of the suspension. DOJ approval is required to suspend debts exceeding $20,000. Unless otherwise provided by DOJ delegations or procedures, the Administrator refers requests for suspension of debts of $20,000 to $100,000 to the United States Attorney in whose district the debtor resides. Debts exceeding $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval.

§ 13.30 Standards for suspension.

(a) *Inability to locate debtor.* The Administrator may suspend collection on a debt where he determines that the debtor cannot be located presently but that there is a reasonable belief that the debtor can be located in the future.

(b) *Financial condition of debtor.* The Administrator may suspend collection action on a claim when the debtor owns no substantial equity in real or personal property and is unable to make payment on the claim or effect a compromise but the debtor's future financial prospects justify retention of the claim for periodic review, provided that:

(1) The applicable statute of limitations will not expire during the period of the suspension, can be tolled or has started running anew;

(2) Future collection can be effected by offset, notwithstanding the 10-year statute of limitations for administrative offsets; or

(3) The debtor agrees to pay interest on the debt and suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date.

(c) *Request for waiver or administrative review—mandatory.* The Administrator will suspend collection activity where a statute provides for mandatory waiver consideration or administrative review prior to agency collection of a debt. The Administrator will suspend EPA's collection actions during the period provided for the debtor to request review or waiver and during the period of the Agency's evaluation of the request.

(d) *Request for waiver or administrative review—permissive.* The Administrator may suspend collection activities on debts of $20,000 or less during the pendency of a permissive waiver or administrative review where he determines that:

(1) There is a reasonable possibility that waiver will be granted and the debtor may be found not owing the debt (in whole or in part);

(2) The Government's interest is protected, if suspension is granted, by the reasonable assurance that the debt can be recovered if the debtor does not prevail; or

(3) Collection of the debt will cause undue hardship to the debtor.

(e) *Refund barred by statute or regulation.* The Administrator will ordinarily suspend collection action during the pendency of his consideration of a waiver request or administrative review where statute and regulation preclude refund of amounts collected by the Agency should the debtor prevail. The Administrator may decline to suspend collection where he determines that the request for waiver or administrative review is frivolous or was made primarily to delay collection.

Subpart F—Termination of Debts

§ 13.31 Termination—general.

The Administrator may terminate collection actions and write-off debts, including accrued interest, penalty and administrative costs, where the debt principal does not exceed $20,000. If the debt exceeds $20,000, EPA obtains the approval of DOJ in order to terminate further collection actions. Unless otherwise provided for by DOJ regulations or procedures, requests to terminate collection on debts in excess of $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval. Debts in excess of $20,000 but $100,000 or less are referred to the United States Attorney in whose judicial district the debtor can be found.

§ 13.32 Standards for termination.

A debt may be terminated where the Administrator determines that:

(a) The Government cannot collect or enforce collection of any significant sum from the debtor, having due regard for available judicial remedies, the debtor's ability to pay, and the exemptions available to the debtor under State and Federal law;

(b) The debtor cannot be located, there is no security remaining to be liquidated, the applicable statute of limitations has expired, and the prospects of collecting by offset are too remote to justify retention of the claim;

(c) The cost of further collection action is likely to exceed the amount recoverable;

(d) The claim is determined to be legally without merit; or

(e) The evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment have failed.

Subpart G—Referrals

§ 13.33 Referrals to the Department of Justice.

(a) *Prompt referral.* The Administrator refers to DOJ for litigation all claims on which aggressive collection actions have been taken but which could not be collected, compromised, suspended or terminated. Referrals are made as early as possible, consistent with aggressive agency collection action, and within the period for bringing a timely suit against the debtor.

(1) Unless otherwise provided by DOJ regulations or procedures, EPA refers for litigation debts of more than $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530.

(2) Unless otherwise provided by DOJ regulations or procedures, EPA refers for litigation debts of $100,000 or less to the United States Attorney in whose judicial district the debtor can be found.

(b) *Claims Collection Litigation Report (CCLR).* Unless an exception has been granted by DOJ, the CCLR is used for referrals of all administratively uncollectible claims to DOJ and is used to refer all offers of compromise.

Subpart H—Referral of Debts to IRS for Tax Refund Offset

SOURCE: 59 FR 651, Jan. 5, 1994, unless otherwise noted.

§ 13.34 Purpose.

This subpart establishes procedures for the Environmental Protection Agency (EPA) to refer past-due debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to EPA. It specifies the Agency procedures and the rights of the debtor applicable to claims for the payment of debts owed to EPA.

§ 13.35 Applicability and scope.

(a) This subpart implements 31 U.S.C. 3720A, which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Agency against amounts payable to or on behalf of the debtor by or on behalf of the Agency;

(4) With respect to which EPA has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or not legally enforceable, has considered evidence presented by such taxpayer, if any, and has determined that an amount of such debt is past-due and legally enforceable;

(5) Has been disclosed by EPA to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which EPA has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any overpayment of tax;

(7) Is at least $25.00; and

(8) All other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations at 26 CFR 301.6402–6 relating to the eligibility of a debt for tax return offset have been satisfied.

§ 13.36 Administrative charges.

In accordance with § 13.11, all administrative charges incurred in connection with the referral of a debt to the IRS shall be assessed on the debt and thus increase the amount of the offset.

§ 13.37 Notice requirement before offset.

A request for reduction of an IRS tax refund will be made only after EPA makes a determination that an amount is owed and past-due and provides the debtor with 60 days written notice. EPA's notice of intention to collect by IRS tax refund offset (Notice of Intent) will state:

(a) The amount of the debt;

(b) That unless the debt is repaid within 60 days from the date of EPA's Notice of Intent, EPA intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as refunds of Federal taxes paid by an amount equal to the amount of the debt and all accumulated interest and other charges;

(c) That the debtor has a right to present evidence that all or part of the debt is not past-due or not legally enforceable; and

(d) A mailing address for forwarding any written correspondence and a contact name and phone number for any questions.

§ 13.38 Review within the Agency.

(a) *Notification by debtor.* A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past-due or not legally enforceable. To exercise this right, the debtor must:

(1) Send a written request for a review of the evidence to the address provided in the notice;

(2) State in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable; and

(3) Include in the request any documents which the debtor wishes to be considered or state that additional information will be submitted within the remainder of the 60-day period.

(b) *Submission of evidence.* The debtor may submit evidence showing that all or part of the debt is not past-due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within 60 days will result in an automatic referral of the debt to the IRS without further action by EPA.

(c) *Review of the evidence.* EPA will consider all available evidence related to the debt. Within 30 days, if feasible, EPA will notify the debtor whether EPA has sustained, amended, or cancelled its determination that the debt is past-due and legally enforceable.

§ 13.39 Agency determination.

(a) Following review of the evidence, EPA will issue a written decision.

(b) If EPA either sustains or amends its determination, it shall notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund. If EPA cancels its original determination, the debt will not be referred to IRS.

§ 13.40 Stay of offset.

If the debtor timely notifies the EPA that he or she is exercising the right described in § 13.38(a) and timely submits evidence in accordance with § 13.38(b), any notice to the IRS will be stayed until the issuance of a written decision which sustains or amends its original determination.

PART 14—EMPLOYEE PERSONAL PROPERTY CLAIMS

Sec.

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AUTHORITY: Military Personnel and Civilian Employees' Claims Act of 1964, as amended (31 U.S.C. 3721).

SOURCE: 51 FR 24146, July 2, 1986, unless otherwise noted.

§ 14.1 Scope and purpose.

This part prescribes regulations for the Military Personnel and Civilian Employees' Claims Act of 1964 (the Act), 31 U.S.C. 3721. The Act allows the Administrator of the U.S. Environmental Protection Agency (EPA) to settle and pay claims of EPA employees for damage to or loss of their personal property which was incident to service. A claim under the Act is allowed only where the claim is substantiated and the Administrator determines that possession of the property was reasonable or proper under the circumstances existing at the time and place of the loss and no part of the loss was caused by any negligent or wrongful act or omission of the employee or his/her agent.

§ 14.2 Definitions.

As used in this part:

(a) *EPA Claims Officer* is the Agency official delegated the responsibility by the Administrator to carry out the provisions of the Act.

(b) *Claim* means a demand for payment by an employee or his/her representative for the value or the repair cost of an item of personal property damaged, lost or destroyed as an incident to government service.

(c) *Employee* means a person appointed to a position with EPA.

(d) *Settle* means the act of considering, ascertaining, adjusting, determining or otherwise resolving a claim.

(e) *Accrual date* means the date of the incident causing the loss or damage or the date on which the loss or damage should have been discovered by the employee through the exercise of reasonable care.

(f) *Depreciation* is the reduction in value of an item caused by the elapse of time between the date of acquisition and the date of loss or damage.

§ 14.3 Incident to service.

In order for a claim to be allowed under this part, the EPA Claims Officer must determine that the item of personal property, at the time of damage or loss, was used by the employee as an incident to government service. An item is incident to service when possession of the item by the employee had substantial relationship to the employee's performance of duty. Whether an item is incident to service is determined by the facts of each claim. The employee has the burden of showing that the item was incident to his/her governmental service.

§ 14.4 Reasonable and proper.

EPA does not insure its employees from every loss or damage to personal property they may sustain. In order for a claim to be allowed, the item must not only have been incident to service, it must also have been reasonable and proper for the employee to possess the item at the time and place of its loss or damage. Generally, the possession of an item is reasonable and proper when the item is of a type and quantity which EPA reasonably expected its employees to possess at the time and place of the loss or damage. Consequently, items which are exceptionally expensive, excessive quantities of otherwise allowable items, personal items which are used in place of items usually provided to employees by EPA or items which are primarily of aesthetic value are not considered reasonable or proper items and are unallowable.

§ 14.5 Who may file a claim.

A claim may be filed by an employee or by his/her authorized agent or legal representative. If a claim is otherwise allowable under this part, a claim can be filed by a surviving spouse, child, parent, brother or sister of a deceased employee.

§ 14.6 Time limits for filing a claim.

A claim under this part is considered by the EPA Claims Officer only if it is

in writing and received within two years after the claim accrues. The EPA Claims Officer may consider a claim not filed within this period when the claim accrued during a period of armed conflict and the requirements of 31 U.S.C. 3721(g) are met.

§ 14.7 Where to file a claim.

An employee or his/her representative may file a claim with his/her Administrative Office or the Safety Office for the facility. The employee should complete and submit to the Administrative Office or the Safety Office a completed EPA Form 3370–1, "Employee Claim for Loss of or Damage to Personal Property." That Office then forwards the form and any other relevant information to the EPA Claims Officer, Office of General Counsel (2311), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

§ 14.8 Investigation of claims.

The EPA Claims Officer investigates claims filed under this part. The EPA Claims Officer may request additional documentation from an employee (e.g., repair estimates and receipts), interview witnesses, and conduct any further investigation he believes is warranted by the facts of the claim.

§ 14.9 Approval and payment of claims.

(a) EPA's approval and payment of a claim is limited by the Act to $25,000. The EPA Claims Officer considers, adjusts, determines, compromises and settles all claims filed under this part. The decision of the EPA Claims Officer is final unless reconsideration under § 14.10 is granted.

(b) The EPA Claims Officer will approve and pay claims filed for a deceased employee by persons specified in § 14.5 in the following order:

(1) The spouse's claim.

(2) A child's claim.

(3) A parent's claim.

(4) A brother's or sister's claim.

§ 14.10 Procedures for reconsideration.

The EPA Claims Officer, at his discretion, may reconsider a decision when the employee establishes that an error was made in the computation of the award or that evidence or material facts were unavailable to the employee at the time of the filing of the claim and the failure to provide the information was not the result of the employee's lack of care. An employee seeking reconsideration of a decision must file, within 30 days of the date of the decision, a written request with the EPA Claims Officer for reconsideration. The request for reconsideration must specify, where applicable, the error, the evidence or material facts not previously considered by the EPA Claims Officer and the reason why the employee believes that the evidence or facts previously were not available.

§ 14.11 Principal types of allowable claims.

(a) *General.* A claim under this part is allowed for tangible personal property of a type and quantity that was reasonable and proper for the employee to possess under the circumstances at the time of the loss or damage. In evaluating whether a claim is allowable, the EPA Claims Officer may consider such factors as: The employee's use of the item; whether EPA generally is aware that such items are used by its employees; or whether the loss was caused by a failure of EPA to provide adequate protection against the loss.

(b) *Examples of claims which are allowable.* Claims which are ordinarily allowed include loss or damage which occurred:

(1) In a place officially designated for storage of property such as a warehouse, office, garage, or other storage place;

(2) In a marine, rail, aircraft, or other common disaster or natural disaster such as a fire, flood, or hurricane;

(3) When the personal property was subjected to an extraordinary risk in the employee's performance of duty, such as in connection with an emergency situation, a civil disturbance, common or natural disaster, or during efforts to save government property or human life;

(4) When the property was used for the benefit of the government at the specific direction of a supervisor;

(5) When the property was money or other valuables deposited with an authorized government agent for safekeeping; and

(6) When the property was a vehicle which was subjected to an extraordinary risk in the employee's performance of duty and the use of the vehicle was at the specific direction of the employee's supervisor.

(c) *Claims for articles of clothing.* Claims for loss or damage to clothing and accessories worn by an employee may be allowed where:

(1) The damage or loss occurred during the employee's performance of official duty in an unusual or extraordinary risk situation;

(2) The loss or damage occurred during the employee's response to an emergency situation, to a natural disaster such as fire, flood, hurricane, or to a man-made disaster such as a chemical spill;

(3) The loss or damage was caused by faulty or defective equipment or furniture maintained by EPA; or

(4) The item was stolen even though the employee took reasonable precautions to protect the item from theft.

(d) *Claims for loss or damage to household items.* (1) Claims for damages to household goods may be allowed where:

(i) The loss or damages occurred while the goods were being shipped pursuant to an EPA authorized change in duty station;

(ii) The employee filed a claim for the damages with the appropriate carrier; and

(iii) The employee substantiates that he/she has suffered a loss in excess of the amount paid by the carrier.

(2) Where a carrier has refused to make an award to an employee because of his/her failure to comply with the carrier's claims procedures, any award by EPA will be reduced by the maximum amount payable for the item by the carrier under its contract of shipment. Where an employee fails to notify the carrier of damages or loss, either at the time of delivery of the household goods or within a reasonable time after discovery, any award by EPA will be reduced by the amount of the carrier's maximum contractual liability for the damage or loss. The employee has the burden of proving his/her entitlement to reimbursement from EPA for amounts in excess of that allowed by the carrier.

§ 14.12 Principal types of unallowable claims.

Claims that ordinarily will not be allowed include:

(a) Loss or damage totaling less than $25;

(b) Money or currency, except when deposited with an authorized government agency for safekeeping;

(c) Loss or damage to an item of extraordinary value or to an antique where the item was shipped with household goods, unless the employee filed a valid appraisal or authentication with the carrier prior to shipment of the item;

(d) Loss of bankbooks, checks, notes, stock certifications, money orders, or travelers checks;

(e) Property owned by the United States unless the employee is financially responsible for it to another government agency;

(f) Claims for loss or damage to a bicycle or a private motor vehicle, unless allowable under § 14.11(b)(6);

(g) Losses of insurers or subrogees;

(h) Losses recoverable from insurers or carriers;

(i) Losses recovered or recoverable pursuant to contract;

(j) Claims for damage or loss caused, in whole or in part, by the negligent or wrongful acts of the employee or his/her agent;

(k) Property used for personal business or profit;

(l) Theft from the possession of the employee unless the employee took reasonable precautions to protect the item from theft;

(m) Property acquired, possessed or transported in violation of law or regulations;

(n) Unserviceable property; or

(o) Damage or loss to an item during shipment of household goods where the damage or loss was caused by the employee's negligence in packing the item.

§ 14.13 Items fraudulently claimed.

Where the EPA Claims Officer determines that an employee has intentionally misrepresented the cost, condition, cost of repair or a material fact concerning a claim, he/she may, at his discretion, deny the entire amount claimed for the item. Further, where

the EPA Claims Officer determines that the employee intentionally has materially misrepresented the costs, conditions or nature of repairs of the claim, he will refer it to appropriate officials (e.g., Inspector General, the employee's supervisor, etc.) for action.

§ 14.14 Computation of award.

(a) The amount awarded on any item may not exceed its adjusted cost. Adjusted cost is either the purchase price of the item or its value at the time of acquisition, less appropriate depreciation. The amount normally payable for property damaged beyond economical repair is its depreciated value immediately before the loss or damage, less any salvage value. If the cost of repair is less than the depreciated value, it will be considered to be economically repairable and only the cost of repair will be allowable.

(b) Notwithstanding a contract to the contrary, the representative of an employee is limited by 31 U.S.C. 3721(i) to receipt of not more than 10 percent of the amount of an award under this part for services related to the claim. A person violating this paragraph is subject to a fine of not more than $1,000. 31 U.S.C. 3721(i).

PART 16—IMPLEMENTATION OF PRIVACY ACT OF 1974

Sec.

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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 40 FR 53582, Nov. 19, 1975, unless otherwise noted.

§ 16.1 Purpose and scope.

(a) This part sets forth the Environmental Protection Agency procedures under the Privacy Act of 1974 as required by 5 U.S.C. 552a(f).

(b) These procedures describe how an individual may request notification of whether EPA maintains a record pertaining to him or her in any of its systems of records, request access to the record or to an accounting of its disclosure, request that the record be amended or corrected, and appeal an initial adverse determination concerning any such request.

(c) These procedures apply only to requests by individuals and only to records maintained by EPA, excluding those systems specifically exempt under §§ 16.13 and 16.14 and those determined as government-wide and published by the Civil Service Commission in 5 CFR parts 293 and 297.

§ 16.2 Definitions.

As used in this part:

(a) The terms *individual, maintain, record, system of records,* and *routine use* shall have the meaning given them by 5 U.S.C. 552a (a)(2), (a)(3), (a)(4), (a)(5) and (a)(7), respectively.

(b) *EPA* means the Environmental Protection Agency.

(c) *Working days* means calendar days excluding Saturdays, Sundays, and legal public holidays.

§ 16.3 Procedures for requests pertaining to individual records in a record system.

Any individual who wishes to have EPA inform him or her whether a system of records maintained by EPA contains any record pertaining to him or her which is retrieved by name or personal identifier, or who wishes to request access to any such record, shall submit a written request in accordance with the instructions set forth in EPA's annual notice of systems for that system of records. This request shall include:

(a) The name of the individual making the request;

(b) The name of the system of records (as set forth in the EPA notice of systems) to which the request relates;

(c) Any other information which the system notice indicates should be included; and

(d) If the request is for access, a statement as to whether a personal inspection or a copy by mail is desired.

§ 16.4 Times, places, and requirements for identification of individuals making requests.

(a) If an individual submitting a request for access under § 16.3 has asked that EPA authorize a personal inspection of records, and EPA has granted the request, he or she may present himself or herself at the time and place specified in EPA's response or arrange another time with the appropriate agency official.

(b) Prior to inspection of records, an individual shall present sufficient identification (e.g., driver's license, employee identification card, social security card, credit card) to establish that he or she is the individual to whom the records pertain. An individual who is unable to provide such identification shall complete and sign, in the presence of an agency official, a statement declaring his or her identity and stipulating that he or she understands it is a misdemeanor punishable by fine up to $5,000 to knowingly and willfully seek or obtain access to records about another individual under false pretenses.

(c) If an individual, having requested personal inspection of his or her records, wishes to have another person accompany him or her during inspection, he or she shall submit a written statement authorizing disclosure in the presence of the other person(s).

(d) An individual who has made a personal inspection of records may then request copies of those records. Such requests may be granted, but fees may be charged in accordance with § 16.11.

(e) If an individual submitting a request under § 16.3 wishes to have copies furnished by mail, he or she must include with the request sufficient data to allow EPA to verify his or her identity. Should sensitivity of the records warrant it, EPA may require a requester to submit a signed and notarized statement indicating that he or she is the individual to whom the records pertain and that he or she understands it is a misdemeanor punishable by fine up to $5,000 to knowingly and willfully seek or obtain access to records about another individual under false pretenses. Such mail requests may be granted, but fees may be charged in accordance with § 16.11.

(f) No verification of identity will be required where the records sought are publicly available under the Freedom of Information Act, as EPA procedures under 40 CFR part 2 will then apply.

§ 16.5 Disclosure of requested information to individuals.

(a) Each request received will be acted upon promptly.

(b) Within 10 working days of receipt of a request, the system manager shall acknowledge the request. Whenever practicable, the acknowledgment will indicate whether or not access will be granted and, if so, when and where. When access is to be granted, it shall be provided within 30 working days of first receipt. If the agency is unable to meet this deadline, the records system manager shall so inform the requester stating reasons for the delay and an estimate of when access will be granted.

(c) If a request pursuant to § 16.3 for access to a record is in a system of records which is exempted, the records system manager will determine whether the information will nonetheless be made available. If the determination is to deny access, the reason for denial and the appeal procedure will be given to the requester.

(d) Any person whose request is initially denied may appeal that denial to the Privacy Act Officer, who shall make an appeal determination within 10 working days.

(e) If the appeal under paragraph (d) of this section is denied, the requester may bring a civil action under 5 U.S.C. 552a(g) to seek review of the denial.

§ 16.6 Special procedures: Medical records.

Should EPA receive a request for access to medical records (including psychological records) disclosure of which the system manager determines would be harmful to the individual to whom

they relate, EPA may refuse to disclose the records directly to the individual and instead offer to transmit them to a physician designated by the individual.

§ 16.7 Request for correction or amendment of record.

(a) An individual may request correction or amendment of any record pertaining to him or her in a system of records maintained by EPA by submitting to the system manager, in writing, the following:

(1) The name of the individual making the request;

(2) The name of the system, as described in the notice of systems;

(3) A description of the nature and substance of the correction or amendment request; and

(4) Any additional information specified in the system notice.

(b) Any person submitting a request under this section shall include sufficient information in support of that request to allow EPA to apply the standards set forth in 5 U.S.C. 552a (e)(1) and (e)(5).

(c) Any person whose request is denied may appeal that denial to the Privacy Act Officer.

(d) In the event that appeal is denied, the requester may bring a civil action to seek review of the denial, under 5 U.S.C. 552a(g).

§ 16.8 Initial determination on request for correction or amendment of record.

(a) Within 10 working days of receipt of a request for amendment or correction, the system manager shall acknowledge the request, and promptly either:

(1) Make any correction, deletion, or addition which the requester believes should be made; or

(2) Inform the requester of his or her refusal to correct or amend the record, the reason for refusal, and the procedures for appeal.

(b) If the system manager is unable to comply with the preceding paragraphs within 30 working days of his or her receipt of a request, he or she will inform the requester of that fact, the reasons, and an estimate of when a determination will be reached.

(c) In conducting the review of the request, the system manager will be guided by the requirements of 5 U.S.C. 552a (e)(1) and (e)(5).

(d) If the system manager determines to grant all or any portion of the request, he or she will:

(1) Advise the individual of that determination;

(2) Make the correction or amendment; and

(3) So inform any person or agency outside EPA to whom the record has been disclosed, and, where an accounting of that disclosure is maintained in accordance with 5 U.S.C. 552a(c), note the occurrence and substance of the correction or amendment in the accounting.

(e) If the system manager determines not to grant all or any portion of a request for correction or amendment, he or she will:

(1) Comply with paragraph (d)(3) of this section (if necessary);

(2) Advise the individual of the determination and its basis;

(3) Inform the individual that an appeal may be made; and

(4) Describe the procedures for making the appeal.

(f) If EPA receives from another Federal agency a notice of correction or amendment of information furnished by that agency and contained in one of EPA's systems of records, the system manager shall advise the individual and make the correction as if EPA had originally made the correction or amendment.

§ 16.9 Appeal of initial adverse agency determination on request for correction or amendment.

(a) Any individual whose request for correction or amendment is initially denied by EPA and who wishes to appeal may do so by letter to the Privacy Act Officer. The appeal shall contain a description of the initial request sufficient to identify it.

(b) The Privacy Act Officer shall make a final determination not later than 30 working days from the date on which the individual requests the review, unless, for good cause shown, the Privacy Act Officer extends the 30-day period and notifies the requester. Such

extension will be utilized only in exceptional circumstances.

(c) In conducting the review of an appeal, the Privacy Act Officer will be guided by the requirements of 5 U.S.C. 552a (e)(1) and (e)(5).

(d) If the Privacy Act Officer determines to grant all or any portion of an appeal he or she shall so inform the requester and EPA shall make the correction or amendment and comply with § 16.8(d)(3).

(e) If the Privacy Act Officer determines not to grant all or any portion of an appeal he or she shall inform the requester:

(1) Of the determination and its basis;

(2) Of the requester's right to file a concise statement of reasons for disagreeing with EPA's decision;

(3) Of the procedures for filing such statement of disagreement;

(4) That such statements of disagreements will be made available in subsequent disclosures of the record, together with an agency statement (if deemed appropriate) summarizing its refusal;

(5) That prior recipients of the disputed record will be provided with statements as in paragraph (e)(4) of this section, to the extent that an accounting of disclosures is maintained under 5 U.S.C. 552a(c); and

(6) Of the requester's right to seek judicial review under 5 U.S.C. 552a(g).

§ 16.10 Disclosure of record to person other than the individual to whom it pertains.

EPA shall not disclose any record which is contained in a system of records it maintains except pursuant to a written request by, or with the written consent of, the individual to whom the record pertains, unless the disclosure is authorized by one or more of the provisions of 5 U.S.C. 552a(b).

§ 16.11 Fees.

No fees shall be charged for providing the first copy of a record or any portion to an individual to whom the record pertains. The fee schedule for reproducing other records is the same as that set forth in 40 CFR 2.120.

§ 16.12 Penalties.

The Act provides, in pertinent part:

"Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000." (5 U.S.C. 552a(i)(3).)

§ 16.13 General exemptions.

(a) *Systems of records affected.*

¶EPA–4 OIG Criminal Investigative Index and Files—EPA/OIG.

¶EPA–17 NEIC Criminal Investigative Index and Files—EPA/NEIC/OCI.

(b) *Authority.* Under 5 U.S.C. 552a(j)(2), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws and which consists of:

(1) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(2) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(3) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(c) *Scope of exemption.* (1) The EPA–4 system of records identified in § 16.13(a) is maintained by the Office of Investigations of the Office of Inspector General (OIG), a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities of the OIG's Office of Investigations is the Inspector General Act of 1978, 5 U.S.C. app.

(2) The EPA–17 system of records identified in § 16.13(a) is maintained by the Office of Criminal Investigations

(OCI) of the National Enforcement Investigations Center (NEIC), a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities of the NEIC's Office of Criminal Investigations is 28 U.S.C. 533, with appointment letter from Benjamin Civiletti, Attorney General, to Douglas Costle, Administrator, EPA, dated January 16, 1981.

(3) The systems of records identified in §16.13(a) are exempted from the following provisions of the Privacy Act of 1974: 5 U.S.C. 552a (c)(3) and (4); (d); (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8); (f); and (g).

(4) To the extent that the exemption claimed under 5 U.S.C. 552a(j)(2) is held to be invalid for the systems of records identified in §16.13(a), then an exemption under 5 U.S.C. 552a(k)(2) is claimed for these systems of records.

(d) *Reasons for exemption*. The systems of records identified in §16.13(a) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, this section is inapplicable and is exempted to the extent that these systems of records are exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in these systems of records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In

addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his jurisdiction. In the interest of effective law enforcement, the EPA investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation of the existence of the investigation, enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances the subject of an investigation cannot be required to provide information to investigators, and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation, which could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise on undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record, and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(8) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(9) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination

about the individual. Since the Act defines *maintain* to include the collection of information, complying with this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(10) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby on an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation was able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that these systems of records are exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in these systems of records. These procedures are described elsewhere in this part.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since EPA is claiming that these systems of records are exempt from subsections (c)(3) and (4), (d), (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act are inapplicable and are exempted to the extent that these systems of records are exempted from those subsections of the Act.

(e) *Exempt records provided by another agency.* Individuals may not have access to records maintained by the EPA if such records were provided by another agency which has determined by regulation that such records are subject to general exemption under 5 U.S.C. 552a(j). If an individual requests access to such exempt records, EPA will consult with the source agency.

(f) *Exempt records included in a nonexempt system of records.* All records obtained from a system of records which has been determined by regulation to be subject to general exemption under 5 U.S.C. 552a(j) retain their exempt status even if such records are also included in a system of records for which a general exemption has not been claimed.

[51 FR 24146, July 2, 1986]

§ 16.14 Specific exemptions.

(a) *Exemptions under 5 U.S.C. 552a(k)(2)*—(1) *Systems of records affected.*

¶ EPA–2 General Personnel Records—EPA.
¶ EPA–4 OIG Criminal Investigative Index and Files—EPA/OIG.
¶ EPA–5 OIG Personnel Security Files—EPA/OIG.
¶ EPA–17 NEIC Criminal Investigative Index and Files— EPA/NEIC/OCI.
¶ EPA–30 OIG Hotline Allegation System—EPA/OIG.

(2) *Authority.* Under 5 U.S.C. 552a(k)(2), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2).

(3) *Scope of exemption.* (i) The systems of records identified in § 16.14(a)(1) are exempted from the following provisions of the Privacy Act of 1974, subject to the limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a (c)(3); (d); (e)(1), (4)(G), (H), and (I); and (f).

(ii) An individual is "denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material," only if the Agency actually uses the material in denying or proposing to deny such right, privilege, or benefit.

(iii) To the extent that records contained in the systems of records identified in § 16.14(a)(1) are maintained by the Office of Investigations of the OIG or by the Office of Criminal Investigations of the NEIC, components of EPA which perform as their principal function activities pertaining to the enforcement of criminal laws, then an exemption under 5 U.S.C. 552a(j)(2) is claimed for these records.

(4) *Reasons for exemption.* The systems of records identified in § 16.14(a)(1) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in these systems of records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required

by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his jurisdiction. In the interest of effective law enforcement, EPA investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(iv) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record, and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation was able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that these systems of records are exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f), EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in these systems of records. These procedures are described elsewhere in this part.

(b) *Exemption under 5 U.S.C. 552a(k)(5)*—(1) *Systems of records affected.*

¶EPA–2 General Personnel Records—EPA.

¶EPA–4 OIG Criminal Investigative Index and Files—EPA/OIG.

¶EPA–5 OIG Personnel Security Files—EPA/OIG.

(2) *Authority*. Under 5 U.S.C. 552a(k)(5), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity would be held in confidence.

(3) *Scope of exemption*. (i) The systems of records identified in §16.14(b)(1) are exempted from the following provisions of the Privacy Act of 1974, subject to the limitations of 5 U.S.C. 552a(k)(5): 5 U.S.C. 552a (c)(3); (d); (e)(1), (4)(H) and (I); and (f)(2) through (5).

(ii) To the extent that records contained in the systems of records identified in §16.14(b)(1) reveal a violation or potential violation of law, then an exemption under 5 U.S.C. 552a(k)(2) is also claimed for these records.

(4) *Reasons for exemption*. The systems of records identified in §16.14(b)(1) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Making such an accounting could cause the identity of a confidential source to be revealed, endangering the physical safety of the confidential source, and could impair the future ability of the EPA to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting such access could cause the identity of a confidential source to be revealed, endangering the physical safety of the confidential source, and could impair the future ability of the EPA to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(iv) 5 U.S.C. 552a(e)(4)(H) requires an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request how he can gain access to any record pertaining to him and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsections (f)(2) through (5) of the Act, concerning agency rules, and subsection (b) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f)(2) through (5) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its access and contest procedures because, under certain circumstances, EPA

might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552a(f)(2) through (5) require an agency to promulgate rules for obtaining access to records. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsections (f)(2) through (5) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in this system of records. These procedures are described elsewhere in this part.

(c) *Exemption under 5 U.S.C. 552a(k)(1)*—(1) *System of records affected.*

¶EPA–5 OIG Personnel Security Files—EPA/OIG.

(2) *Authority.* Under 5 U.S.C. 552a(k)(1), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is subject to the provisions of 5 U.S.C. 552(b)(1). A system of records is subject to the provisions of 5 U.S.C. 552(b)(1) if it contains records that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. Executive Order 12356 establishes criteria for classifying records which are to be kept secret in the interest of national defense or foreign policy.

(3) *Scope of exemption.* To the extent that the system of records identified in §16.14(c)(1) contains records provided by other Federal agencies that are specifically authorized under criteria established by Executive Order 12356 to be kept secret in the interest of national defense or foreign policy and are in fact properly classified by other Federal agencies pursuant to that Executive order, the system of records is exempted from the following provisions of the Privacy Act of 1974: 5 U.S.C. 552a (c)(3); (d); (e)(1), (4)(G), (H), and (I); and (f).

(4) *Reasons for exemption.* The system of records identified in §16.14(c)(1) is exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Making such an accounting could result in the release of properly classified information, which would compromise the national defense or disrupt foreign policy.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting such access could cause the release of properly classified information, which would compromise the national defense or disrupt foreign policy.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the

President. The application of this provision could impair personnel security investigations which use properly classified information, because it is not always possible to know the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(iv) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record, and how he can contest its content. Since EPA is claiming that this system of records is exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that this system of records is exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in this system of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to prevent the release of properly classified information, which would compromise the national defense or disrupt foreign policy. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552(a)(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him. The application of this provision could result in the release of properly classified information, which would compromise the national defense or disrupt foreign policy. Since EPA is claiming that this system of records is exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in this system of records. These procedures are described elsewhere in this part.

(d) *Exempt records provided by another agency.* Individuals may not have access to records maintained by the EPA if such records were provided by another agency which has determined by regulation that such records are subject to general exemption under 5 U.S.C. 552a(j) or specific exemption under 5 U.S.C. 552a(k). If an individual requests access to such exempt records, EPA will consult with the source agency.

(e) *Exempt records included in a nonexempt system of records.* All records obtained from a system of records which has been determined by regulation to be subject to specific exemption under 5 U.S.C. 552a(k) retain their exempt status even if such records are also included in a system of records for which a specific exemption has not been claimed.

[51 FR 24147, July 2, 1986, as amended at 59 FR 17485, Apr. 13, 1994]

PART 17—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN EPA ADMINISTRATIVE PROCEEDINGS

Subpart A—General Provisions

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AUTHORITY: Section 504, Title 5 U.S.C., as amended by sec. 203(a)(1), Equal Access to Justice Act (Title 2 of Pub. L. 96–481, 94 Stat. 2323).

SOURCE: 48 FR 39936, Sept. 2, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 17.1 Purpose of these rules.

These rules are adopted by EPA pursuant to section 504 of title 5 U.S.C., as added by section 203(a)(1) of the Equal Access to Justice Act, Public Law No. 96–481. Under the Act, an eligible party may receive an award for attorney's fees and other expenses when it prevails over EPA in an adversary adjudication before EPA unless EPA's position as a party to the proceeding was substantially justified or special circumstances make an award unjust. The purpose of these rules is to establish procedures for the submission and consideration of applications for awards against EPA when the underlying decision is not reviewed by a court.

§ 17.2 Definitions.

As used in this part:

(a) *The Act* means section 504 of title 5 U.S.C., as amended by section 203(a)(1) of the Equal Access to Justice Act, Public Law No. 96–481.

(b) *Administrator* means the Administrator of the Environmental Protection Agency.

(c) *Adversary adjudication* means an adjudication required by statute to be held pursuant to 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of granting or renewing a license.

(d) *EPA* means the Environmental Protection Agency, an Agency of the United States.

(e) *Presiding officer* means the official, without regard to whether he is designated as an administrative law judge or a hearing officer or examiner, who presides at the adversary adjudication.

(f) *Proceeding* means an adversary adjudication as defined in § 17.2(b).

§ 17.3 Proceedings covered.

(a) These rules apply to adversary adjudications required by statute to be conducted by EPA under 5 U.S.C. 554. To the extent that they are adversary adjudications, the proceedings conducted by EPA to which these rules apply include:

(1) A hearing to consider the assessment of a noncompliance penalty under section 120 of the Clean Air Act as amended (42 U.S.C. 7420);

(2) A hearing to consider the termination of an individual National Pollution Discharge Elimination System permit under section 402 of the Clean Water Act as amended (33 U.S.C. 1342);

(3) A hearing to consider the assessment of any civil penalty under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(4) A hearing to consider ordering a manufacturer of hazardous chemical substances or mixtures to take actions under section 6(b) of the Toxic Substances Control Act (15 U.S.C. 2605(b)), to decrease the unreasonable risk posed by a chemical substance or mixture;

(5) A hearing to consider the assessment of any civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361);

(6) A hearing to consider suspension of a registrant for failure to take appropriate steps in the development of registration data under section

3(c)(2)(B) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136a);

(7) A hearing to consider the suspension or cancellation of a registration under section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136d);

(8) A hearing to consider the assessment of any civil penalty or the revocation or suspension of any permit under section 105(a) or 105(f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a), 33 U.S.C. 1415(f));

(9) A hearing to consider the issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Resource Conservation and Recovery Act as amended (42 U.S.C. 6928);

(10) A hearing to consider the issuance of a compliance order under section 11(d) of the Noise Control Act as amended (42 U.S.C. 4910(d)).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 17.4 Applicability to EPA proceedings.

The Act applies to an adversary adjudication pending before EPA at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final EPA action has not been taken before that date, and proceedings pending on September 30, 1984.

§ 17.5 Eligibility of applicants.

(a) To be eligible for an award of attorney's fees and other expenses under the Act, the applicant must be a prevailing party in the adversary adjudication for which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than $5 million and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of adversary adjudication was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal interests rather than to business interest.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. An individual or group of individuals, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares of another business' board of directors, trustees, or other persons exercising similar functions, shall be considered an affiliate of that business for purposes of this part. In addition, the Presiding Officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant is not eligible if it has participated in the proceeding on behalf of other persons or entities that are ineligible.

§ 17.6 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantially justified or unless special circumstances make the award sought unjust. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 17.7 Allowable fees and other expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) The reasonable cost of any study, analysis, engineering report, test, or project which EPA finds necessary for the preparation of the party's case;

(3) Reasonable attorney or agent fees;

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that:

(1) Compensation for an expert witness will not exceed $24.09 per hour; and

(2) Attorney or agent fees will not be in excess of $75 per hour.

(c) In determining the reasonableness of the fee sought, the Presiding Officer shall consider the following:

(1) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(2) The time actually spent in the representation of the applicant;

(3) The difficulty or complexity of the issues raised by the application;

(4) Any necessary and reasonable expenses incurred;

(5) Such other factors as may bear on the value of the services performed.

§ 17.8 Delegation of authority.

The Administrator delegates to the Environmental Appeals Board authority to take final action relating to the Equal Access to Justice Act. The Environmental Appeals Board is described at 40 CFR 1.25(e). This delegation does not preclude the Environmental Appeals Board from referring any matter related to the Equal Access to Justice Act to the Administrator when the Environmental Appeals Board deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

[57 FR 5323, Feb 13, 1992]

Subpart B—Information Required From Applicants

§ 17.11 Contents of application.

(a) An application for award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of EPA in the proceeding that the applicant alleges was not substantially justified.

(b) The application shall include a statement that the applicant's net worth as of the time the proceeding was initiated did not exceed $1 million if the applicant is an individual (other than a sole owner of an unincorporated business seeking an award in that capacity) or $5 million in the case of all other applicants. An applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) and is exempt from taxation under section 501(a) of the Code or, in the case of such an organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under section 501(c)(3) of the Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)).

(c) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the application shall state that the applicant did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall itemize the amount of fees and expenses sought.

(e) The application may include any other matters that the applicant believes should be considered in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain or be accompanied by a written verification under oath or affirmation or under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

(Approved by the Office of Management and Budget under control number 2000–0403)

§ 17.12 Net worth exhibit.

(a) Each applicant except a qualified tax exempt organization or a qualified cooperative must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. If any individual, corporation, or other entity directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or if the applicant directly or indirectly owns or controls a majority of the voting shares or other interest of any corporation or other entity, the exhibit must include a showing of the net worth of all such affiliates or of the applicant including the affiliates. The exhibit may be in any form that provides full disclosure of assets and liabilities of the applicant and any affiliates and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). The Presiding Officer may require an applicant to file additional information to determine the applicant's eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate occurring in the one-year period prior to the date on which the proceeding was initiated that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the applicant shall so state.

(c) The net worth exhibit shall be included in the public record of the proceeding.

(Approved by the Office of Management and Budget under control number 2000–0430)

§ 17.13 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of fees and expenses, including the cost of any study, engineering report, test, or project, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The Presiding Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(Approved by the Office of Management and Budget under control number 2000–0430)

§ 17.14 Time for submission of application.

(a) An application must be filed no later than 30 days after final disposition of the proceeding. If agency review or reconsideration is sought or taken of a decision in which an applicant believes it has prevailed, action on the award of fees shall be stayed pending final agency disposition of the underlying controversy.

(b) Final disposition means the later of:

(1) The date on which the Agency decision becomes final, either through disposition by the Environmental Appeals Board of a pending appeal or through an initial decision becoming final due to lack of an appeal or

(2) The date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.

(c) If judicial review is sought or taken of the final agency disposition of the underlying controversy, then agency proceedings for the award of fees will be stayed pending completion of judicial review. If, upon completion of review, the court decides what fees to award, if any, then EPA shall have no authority to award fees.

[48 FR 39936, Sept. 2, 1983, as amended at 57 FR 5323, Feb. 13, 1992]

Subpart C—Procedures for Considering Applications

§ 17.21 Filing and service of documents.

An application for an award and any other pleading or document related to the application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 17.22 Answer to application.

(a) Within 30 calendar days after service of the application, EPA counsel shall file an answer.

(b) If EPA counsel and the applicant believe that they can reach a settlement concerning the award, EPA counsel may file a statement of intent to negotiate. The filing of such a statement shall extend the time for filing an answer an additional 30 days.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on to support the objection. If the answer is based on any alleged facts not already reflected in the record of the proceeding, EPA counsel shall include with the answer either a supporting affidavit or affidavits or request for further proceedings under § 17.25.

§ 17.23 Comments by other parties.

Any party to a proceeding other than the applicant and EPA counsel may file comments on an application within 30 calendar days after it is served or on an answer within 15 calendar days after it is served.

§ 17.24 Settlement.

A prevailing party and EPA counsel may agree on a proposed settlement of an award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded. If the party and EPA counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 17.25 Extensions of time and further proceedings.

(a) The Presiding Officer may, on motion and for good cause shown, grant extensions of time, other than for filing an application for fees and expenses, after final disposition in the adversary adjudication.

(b) Ordinarily, the determination of an award will be made on the basis of the written record of the underlying proceeding and the filings required or permitted by the foregoing sections of these rules. However, the adjudicative officer may *sua sponte* or on motion of

any party to the proceedings require or permit further filings or other action, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further action shall be allowed only when necessary for full and fair resolution of the issues arising from the application and shall take place as promptly as possible. A motion for further filings or other action shall specifically identify the information sought on the disputed issues and shall explain why the further filings or other action is necessary to resolve the issues.

(c) In the event that an evidentiary hearing is required or permitted by the adjudicative officer, such hearing and any related filings or other action required or permitted shall be conducted pursuant to the procedural rules governing the underlying adversary adjudication.

§ 17.26 Decision on application.

The Presiding Officer shall issue a recommended decision on the application which shall include proposed written findings and conclusions on such of the following as are relevant to the decision:

(a) The applicant's status as a prevailing party;

(b) The applicant's qualification as a "party" under 5 U.S.C. 504(b)(1)(B);

(c) Whether EPA's position as a party to the proceeding was substantially justified;

(d) Whether the special cirumstances make an award unjust;

(e) Whether the applicant during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and

(f) The amounts, if any, awarded for fees and other expenses, explaining any difference between the amount requested and the amount awarded.

§ 17.27 Agency review.

The recommended decision of the Presiding Officer will be reviewed by EPA in accordance with EPA's procedures for the type of substantive proceeding involved.

§ 17.28 Judicial review.

Judicial review of final EPA decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 17.29 Payment of award.

An applicant seeking payment of an award shall submit a copy of the final decision granting the award to the Office of Financial Management for Processing. A statement that review of the underlying decision is not being sought in the United States courts or that the process for seeking review of the award has been completed must also be included.

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.
19.1 Applicability.
19.2 Effective Date.
19.3 [Reserved].
19.4 Penalty Adjustment and Table.

AUTHORITY: Pub. L. 101–410, 28 U.S.C. 2461 note; Pub. L. 104–134, 31 U.S.C. 3701 note.

SOURCE: 69 FR 7124, Feb. 13, 2004, unless otherwise noted.

§ 19.1 Applicability.

This part applies to each statutory provision under the laws administered by the Environmental Protection Agency concerning the maximum civil monetary penalty which may be assessed in either civil judicial or administrative proceedings.

§ 19.2 Effective Date.

The increased penalty amounts set forth in this part apply to all violations under the applicable statutes and regulations which occur after March 15, 2004.

§ 19.3 [Reserved]

§ 19.4 Penalty Adjustment and Table.

The adjusted statutory penalty provisions and their maximum applicable amounts are set out in Table 1. The last column in the table provides the newly effective maximum penalty amounts.

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Civil monetary penalty description	Penalties effective between January 30, 1997 and March 15, 2004	New maximum penalty amount
7 U.S.C. 136l.(a)(1) ...	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—GENERAL—COMMERCIAL APPLICATORS, ETC.	$5,500	$6,500
7 U.S.C. 136l.(a)(2) ...	FEDERAL INSECTICIDE, FUNGICIDE, & RODENTICIDE ACT CIVIL PENALTY—PRIVATE APPLICATORS—FIRST AND SUBSEQUENT OFFENSES OR VIOLATIONS.	$550/$1000	$650/$1,200
15 U.S.C. 2615(a)	TOXIC SUBSTANCES CONTROL ACT CIVIL PENALTY	$27,500	$32,500
15 U.S.C. 2647(a)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT CIVIL PENALTY.	$5,500	$6,500
15 U.S.C. 2647(g)	ASBESTOS HAZARD EMERGENCY RESPONSE ACT—CONTRACTOR VIOLATIONS.	$5000	$5,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE CLAIM.	$5,500	$6,500
31 U.S.C. 3802(a)(2)	PROGRAM FRAUD CIVIL REMEDIES ACT/VIOLATION INVOLVING FALSE STATEMENT.	$5,500	$6,500
33 U.S.C. 1319(d)	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY	$27,500	$32,500
33 U.S.C. 1319(g)(2)(A).	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/$27,500 ..	$11,000/$32,500
33 U.S.C. 1319(g)(2)(B).	CLEAN WATER ACT VIOLATION/ADMINISTRATIVE PENALTY PER VIOLATION AND MAXIMUM.	$11,000/$137,500	$11,000/$157,500
33 U.S.C. 1321(b)(6)(B)(I).	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/$27,500 ..	$11,000/$32,500
33 U.S.C. 1321(b)(6)(B)(ii).	CLEAN WATER ACT VIOLATION/ADMIN PENALTY OF SEC 311(b)(3)&(j) PER VIOLATION AND MAXIMUM.	$11,000/$137,500	$11,000/$157,500
33 U.S.C. 1321(b)(7)(A).	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION PER DAY OR PER BARREL OR UNIT.	$27,500 or $1,100 per barrel or unit.	$32,500 or $1,100 per barrell or unit
33 U.S.C. 1321(b)(7)(B).	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(c)&(e)(1)(B).	$27,500	$32,500
33 U.S.C. 1321(b)(7)(C).	CLEAN WATER ACT VIOLATION/CIVIL JUDICIAL PENALTY OF SEC 311(j).	$27,500	$32,500
33 U.S.C. 1321(b)(7)(D).	CLEAN WATER ACT VIOLATION/MINIMUM CIVIL JUDICIAL PENALTY OF SEC 311(b)(3)—PER VIOLATION OR PER BARREL/UNIT.	$110,000 or $3,300 per barrel or unit.	$130,000 or $4,300 per barrel or unit.
33 U.S.C. 1414b(d)	MARINE PROTECTION, RESEARCH & SANCTUARIES ACT VIOL SEC 104b(d).	$660	$760
33 U.S.C. 1415(a)	MARINE PROTECTION RESEARCH AND SANCTUARIES ACT VIOLATIONS—FIRST & SUBSEQUENT VIOLATIONS.	$55,000/$137,500	$65,000/$157,500
42 U.S.C. 300g–3(b) ..	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(b).	$27,500	$32,500
42 U.S.C. 300g–3(c) ..	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(c).	$27,500	$32,500
42 U.S.C. 300g–3(g)(3)(A).	SAFE DRINKING WATER ACT/CIVIL JUDICIAL PENALTY OF SEC 1414(g)(3)(a).	$27,500	$32,500
42 U.S.C. 300g–3(g)(3)(B).	SAFE DRINKING WATER ACT/ MAXIMUM ADMINISTRATIVE PENALTIES PER SEC 1414(g)(3)(B).	$5,000/$25,000	$6,000/$27,500
42 U.S.C. 300g–3(g)(3)(C).	SAFE DRINKING WATER ACT/THRESHOLD REQUIRING CIVIL JUDICIAL ACTION PER SEC 1414(g)(3)(C).	$25,000	$27,500
42 U.S.C. 300h–2(b)(1).	SDWA/CIVIL JUDICIAL PENALTY/VIOLATIONS OF REQS—UNDERGROUND INJECTION CONTROL (UIC).	$27,500	$32,500
42 U.S.C. 300h–2(c)(1).	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$11,000/$137,500	$11,000/$157,500
42 U.S.C.300h–2(c)(2)	SDWA/CIVIL ADMIN PENALTY/VIOLATIONS OF UIC REQS—PER VIOLATION AND MAXIMUM.	$5,500/$137,500 ..	$6,500/$157,500
42 U.S.C. 300h–3(c)(1).	SDWA/VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	$5,500	$6,500
42 U.S.C. 300h–3(c)(2).	SDWA/WILLFUL VIOLATION/OPERATION OF NEW UNDERGROUND INJECTION WELL.	$11,000	$11,000
42 U.S.C. 300i(b)	SDWA/FAILURE TO COMPLY WITH IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER.	$15,000	$16,500
42 U.S.C. 300i–1(c) ...	SDWA/ATTEMPTING TO OR TAMPERING WITH PUBLIC WATER SYSTEM/CIVIL JUDICIAL PENALTY.	$22,000/$55,000 ..	$100,000/ $1,000,000
42 U.S.C. 300j(e)(2) ..	SDWA/FAILURE TO COMPLY W/ORDER ISSUED UNDER SEC. 1441(c)(1).	$2,750	$2,750
42 U.S.C. 300j–4(c) ...	SDWA/REFUSAL TO COMPLY WITH REQS. OF SEC. 1445(a) OR (b).	$27,500	$32,500
42 U.S.C. 300j–6(b)(2)	SDWA/FAILURE TO COMPLY WITH ADMIN. ORDER ISSUED TO FEDERAL FACILITY.	$25,000	$27,500

TABLE 1 OF SECTION 19.4.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. code citation	Civil monetary penalty description	Penalties effective between January 30, 1997 and March 15, 2004	New maximum penalty amount
42 U.S.C. 300j–23(d)	SDWA/VIOLATIONS/SECTION 1463(b)—FIRST OFFENSE/REPEAT OFFENSE.	$5,500/$55,000	$6,500/$65,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992, SEC 1018—CIVIL PENALTY.	$11,000	$11,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972—CIVIL PENALTY	$11,000	$11,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C ASSESSED PER ORDER.	$27,500	$32,500
42 U.S.C. 6928(c)	RES. CONS. & REC. ACT/CONTINUED NONCOMPLIANCE OF COMPLIANCE ORDER.	$27,500	$32,500
42 U.S.C. 6928(g)	RESOURCE CONSERVATION & RECOVERY ACT/VIOLATION SUBTITLE C.	$27,500	$32,500
42 U.S.C. 6928(h)(2)	RES. CONS. & REC. ACT/NONCOMPLIANCE OF CORRECTIVE ACTION ORDER.	$27,500	$32,500
42 U.S.C. 6934(e)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH SECTION 3013 ORDER.	$5,500	$6,500
42 U.S.C. 6973(b)	RES. CONS. & REC. ACT/VIOLATIONS OF ADMINISTRATIVE ORDER.	$5,500	$6,500
42 U.S.C. 6991e(a)(3)	RES. CONS. & REC. ACT/NONCOMPLIANCE WITH UST ADMINISTRATIVE ORDER.	$27,500	$32,500
42 U.S.C. 6991e(d)(1)	RES. CONS. & REC. ACT/FAILURE TO NOTIFY OR FOR SUBMITTING FALSE INFORMATION.	$11,000	$11,000
42 U.S.C. 6991e(d)(2)	RCRA/VIOLATIONS OF SPECIFIED UST REGULATORY REQUIREMENTS.	$11,000	$11,000
42 U.S.C. 14304(a)(1)	BATTERY ACT VIOLATIONS	$10,000	$11,000
42 U.S.C. 14304(g)	BATTERY ACT/VIOLATIONS OF CORRECTIVE ACTION ORDERS.	$10,000	$11,000
42 U.S.C. 7413(b)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES–JUDICIAL PENALTIES.	$27,500	$32,500
42 U.S.C. 7413 (d)(1)	CLEAN AIR ACT/VIOLATION/OWNERS & OPERATORS OF STATIONARY AIR POLLUTION SOURCES–ADMINISTRATIVE PENALTIES PER VIOLATION & MAX.	$27,500/$220,000	$32,500/$270,000
42 U.S.C. 7413(d)(3)	CLEAN AIR ACT/MINOR VIOLATIONS/STATIONARY AIR POLLUTION SOURCES—FIELD CITATIONS.	$5,500	$6,500
42 U.S.C. 7524(a)	TAMPERING OR MANUFACTURE/SALE OF DEFEAT DEVICES IN VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY PERSONS.	$2,750	$2,750
42 U.S.C. 7524(a)	VIOLATION OF 7522(a)(3)(A) OR (a)(3)(B)—BY MANUFACTURERS OR DEALERS; ALL VIOLATIONS OF 7522(a)(1),(2), (4),&(5) BY ANYONE.	$27,500	$32,500
42 U.S.C. 7524(c)	ADMINISTRATIVE PENALTIES AS SET IN 7524(a) & 7545(d) WITH A MAXIMUM ADMINISTRATIVE PENALTY.	$220,000	$270,000
42 U.S.C. 7545(d)	VIOLATIONS OF FUELS REGULATIONS	$27,500	$32,500
42 U.S.C. 9604(e)(5)(B).	SUPERFUND AMEND. & REAUTHORIZATION ACT/NONCOMPLIANCE W/REQUEST FOR INFO OR ACCESS.	$27,500	$32,500
42 U.S.C. 9606(b)(1)	SUPERFUND/WORK NOT PERFORMED W/IMMINENT, SUBSTANTIAL ENDANGERMENT.	$27,500	$32,500
42 U.S.C. 9609(a)&(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS UNDER 42 U.S.C. SECT. 9603, 9608, OR 9622.	$27,500	$32,500
42 U.S.C. 9609(b)	SUPERFUND/ADMIN. PENALTY VIOLATIONS—SUBSEQUENT.	$82,500	$97,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/VIOLATIONS OF SECT. 9603, 9608, 9622.	$27,500	$32,500
42 U.S.C. 9609(c)	SUPERFUND/CIVIL JUDICIAL PENALTY/SUBSEQUENT VIOLATIONS OF SECT. 9603, 9608, 9622.	$82,500	$97,500
42 U.S.C. 11045(a)&(b)(1),(2)&(3).	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES.	$27,500	$32,500
42 U.S.C. 11045(b)(2)&(3).	EPCRA CLASS I & II ADMINISTRATIVE AND CIVIL PENALTIES—SUBSEQUENT VIOLATIONS.	$82,500	$97,500
42 U.S.C. 11045(c)(1)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11022 OR 11023.	$27,500	$32,500
42 U.S.C. 11045(c)(2)	EPCRA CIVIL AND ADMINISTRATIVE REPORTING PENALTIES FOR VIOLATIONS OF SECTIONS 11021 OR 11043(b).	$11,000	$11,000
42 U.S.C. 11045(d)(1)	EPCRA—FRIVOLOUS TRADE SECRET CLAIMS—CIVIL AND ADMINISTRATIVE PENALTIES.	$27,500	$32,500

PART 20—CERTIFICATION OF FACILITIES

Sec.
20.1 Applicability.
20.2 Definitions.
20.3 General provisions.
20.4 Notice of intent to certify.
20.5 Applications.
20.6 State certification.
20.7 General policies.
20.8 Requirements for certification.
20.9 Cost recovery.
20.10 Revocation.
APPENDIX A TO PART 20—GUIDELINES FOR CERTIFICATION

AUTHORITY: Secs. 301, 704, 80 Stat. 379, 83 Stat. 667; 5 U.S.C. 301, 26 U.S.C. 169.

SOURCE: 36 FR 22382, Nov. 25, 1971, unless otherwise noted.

§ 20.1 Applicability.

The regulations of this part apply to certifications by the Administrator of water or air pollution control facilities for purposes of section 169 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 169, as to which the amortization period began after December 31, 1975. Certification of air or water pollution control facilities as to which the amortization period began before January 1, 1976, will continue to be governed by Environmental Protection Agency regulations published November 25, 1971, at 36 FR 22382. Applicable regulations of the Department of Treasury are at 26 CFR 1.169 *et seq.*

[43 FR 1340, Jan. 9, 1978]

§ 20.2 Definitions.

As used in this part, the following terms shall have the meaning indicated below:

(a) *Act* means, when used in connection with water pollution control facilities, the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 *et seq.*) or, when used in connection with air pollution control facilities, the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(b) *State certifying authority* means:

(1) For water pollution control facilities, the State pollution control agency as defined in section 502 of the Act.

(2) For air pollution control facilities, the air pollution control agency designated pursuant to section 302(b)(1) of the Act; or

(3) For both air and water pollution control facilities, any interstate agency authorized to act in place of the certifying agency of a State.

(c) *Applicant* means any person who files an application with the Administrator for certification that a facility is in compliance with the applicable regulations of Federal agencies and in furtherance of the general policies of the United States for cooperation with the States in the prevention and abatement of water or air pollution under the Act.

(d) *Administrator* means the Administrator, Environmental Protection Agency.

(e) *Regional Administrator* means the Regional designee appointed by the Administrator to certify facilities under this part.

(f) *Facility* means property comprising any new identifiable treatment facility which removes, alters, disposes of, stores, or prevents the creation of pollutants, contaminants, wastes, or heat.

(g) *State* means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§ 20.3 General provisions.

(a) An applicant shall file an application in accordance with this part for each separate facility for which certification is sought; *Provided,* That one application shall suffice in the case of substantially identical facilities which the applicant has installed or plans to install in connection with substantially identical properties; *Provided further,* That an application may incorporate by reference material contained in an application previously submitted by the applicant under this part and pertaining to substantially identical facilities.

(b) The applicant shall, at the time of application to the State certifying authority, submit an application in the form prescribed by the Administrator

to the Regional Administrator for the region in which the facility is located.

(c) Applications will be considered complete and will be processed when the Regional Administrator receives the completed State certification.

(d) Applications may be filed prior or subsequent to the commencement of construction, acquisition, installation, or operation of the facility.

(e) An amendment to an application shall be submitted in the same manner as the original application and shall be considered a part of the original application.

(f) If the facility is certified by the Regional Administrator, notice of certification will be issued to the Secretary of the Treasury or his delegate, and a copy of the notice shall be forwarded to the applicant and to the State certifying authority. If the facility is denied certification, the Regional Administrator will advise the applicant and State certifying authority in writing of the reasons therefor.

(g) No certification will be made by the Regional Administrator for any facility prior to the time it is placed in operation and the application, or amended application, in connection with such facility so states.

(h) An applicant may appeal any decision of the Regional Administrator which:

(1) Denies certification;

(2) Disapproves the applicant's suggested method of allocating costs pursuant to § 20.8(e); or

(3) Revokes a certification pursuant to § 20.10.

Any such appeal may be taken by filing with the Administrator within 30 days from the date of the decision of the Regional Administrator a written statement of objections to the decision appealed from. Within 60 days after receipt of such appeal the Administrator shall affirm, modify, or revoke the decision of the Regional Administrator, stating in writing his reasons therefor.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§ 20.4 Notice of intent to certify.

(a) On the basis of applications submitted prior to the construction, reconstruction, erection, acquisition, or operation of a facility, the Regional Administrator may notify applicants that such facility will be certified if:

(1) The Regional Administrator determines that such facility, if constructed, reconstructed, erected, acquired, installed, and operated in accordance with such application will be in compliance with requirements identified in § 20.8; and if

(2) The application is accompanied by a statement from the State certifying authority that such facility, if constructed, reconstructed, acquired, erected, installed, and operated in accordance with such application, will be in conformity with the State program or requirements for abatement or control of water or air pollution.

(b) Notice of actions taken under this section will be given to the appropriate State certifying authority.

§ 20.5 Applications.

Applications for certification under this part shall be submitted in such manner as the Administrator may prescribe, shall be signed by the applicant or agent thereof, and shall include the following information:

(a) Name, address, and Internal Revenue Service identifying number of the applicant;

(b) Type and narrative description of the new identifiable facility for which certification is (or will be) sought, including a copy of schematic or engineering drawings, and a description of the function and operation of such facility;

(c) Address (or proposed address) of facility location;

(d) A general description of the operation in connection with which the facility is (or will be) used and a description of the specific process or processes resulting in discharges or emissions which are (or will be) controlled or prevented by the facility.

(e) If the facility is (or will be) used in connection with more than one plant or other property, one or more of which were not in operation before January 1, 1976, a description of the operations of the facility in respect to each plant or other property, including a reasonable allocation of the costs of the facility among the plants being serviced, and a description of the reasoning and accounting method or

methods used to arrive at these allocations.

(f) A description of the effect of the facility in terms of type and quantity of pollutants, contaminants, wastes, or heat, removed, altered, stored, disposed of, or prevented by the facility.

(g) If the facility performs a function other than removal, alteration, storage, prevention, or disposal of pollutants, contaminants, wastes, or heat, a description of all functions performed by the facility, including a reasonable identification of the costs of the facility allocable to removal, alteration, storage, prevention, or disposal of pollutants, contaminants, wastes, or heat and a description of the reasoning and accounting method or methods used to arrive at the allocation.

(h) Date when such construction, reconstruction, or erection will be completed or when such facility was (or will be) acquired;

(i) Date when such facility is placed (or is intended to be placed) in operation;

(j) Identification of the applicable State and local water or air pollution control requirements and standards, if any;

(k) Expected useful life of facility;

(l) Cost of construction, acquisition, installation, operation, and maintenance of the facility;

(m) Estimated profits reasonably expected to be derived through the recovery of wastes or otherwise in the operation of the facility over the period referred to in paragraph (a)(6) of 26 CFR 1.169–2;

(n) The percentage (if any, and if the taxpayer claims that the percentage is 5 percent or less) by which the facility (1) increases the output or capacity, (2) extends the useful life, or (3) reduces the total operating costs of the operating unit of the plant or other property most directly associated with the pollution control facility and a description of the reasoning and accounting method or methods used to arrive at this percentage.

(o) Such other information as the Administrator deems necessary for certification.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§20.6 State certification.

The State certification shall be by the State certifying authority having jurisdiction with respect to the facility in accordance with 26 U.S.C. 169(d)(1)(A) and (d)(2). The certification shall state that the facility described in the application has been constructed, reconstructed, erected, or acquired in conformity with the State program or requirements for abatement or control of water or air pollution. It shall be executed by an agent or officer authorized to act on behalf of the State certifying authority.

§20.7 General policies.

(a) The general policies of the United States for cooperation with the States in the prevention and abatement of water pollution are: To enhance the quality and value of our water resources; to eliminate or reduce the pollution of the nation's waters and tributaries thereof; to improve the sanitary condition of surface and underground waters; and to conserve such waters for public water supplies, propagation of fish and aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.

(b) The general policy of the United States for cooperation with the States in the prevention and abatement of air pollution is to cooperate with and to assist the States and local governments in protecting and enhancing the quality of the Nation's air resources by the prevention and abatement of conditions which cause or contribute to air pollution which endangers the public health or welfare.

§20.8 Requirements for certification.

(a) Subject to §20.9, the Regional Administrator will certify a facility if he makes the following determinations:

(1) It has been certified by the State certifying authority.

(2) That the facility:

(i) Removes, alters, disposes of, stores, or prevents the creation of pollutants, contaminants, wastes, or heat, which, but for the facility, would be released into the environment;

(ii) Does not by a factor or more than 5 percent: (A) Increase the output or capacity, (B) extend the useful life, or (C) reduce the total operating costs of

the operating unit (of the plant or other property) most directly associated with the pollution control facility; and

(iii) Does not significantly alter the nature of the manufacturing or production process or facility.

(3) The applicant is in compliance with all regulations of Federal agencies applicable to use of the facility, including conditions specified in any NPDES permit issued to the applicant under section 402 of the Act.

(4) The facility furthers the general policies of the United States and the States in the prevention and abatement of pollution.

(5) The applicant has complied with all the other requirements of this part and has submitted all requested information.

(b) In determining whether use of a facility furthers the general policies of the United States and the States in the prevention and abatement of water pollution, the Regional Administrator shall consider whether such facility is consistent with the following, insofar as they are applicable to the waters which will be affected by the facility:

(1) All applicable water quality standards, including water quality criteria and plans of implementation and enforcement established pursuant to section 303 of the Act or State laws or regulations;

(2) Decisions issued pursuant to section 310 of the Act;

(3) Water pollution control programs required pursuant to any one or more of the following sections of the Act: Section 306, section 307, section 311, section 318, or section 405; or in order to be consistent with a plan under section 208.

(c) In determining whether use of a facility furthers the general policies of the United States and the States in the prevention and abatement of air pollution, the Regional Administrator shall consider whether such facility is consistent with and meets the following requirements, insofar as they are applicable to the air which will be affected by the facility;

(1) Plans for the implementation, maintenance, and enforcement of ambient air quality standards adopted or promulgated pursuant to section 110 of the Act;

(2) Recommendations issued pursuant to sections 103(e) and 115 of the Act which are applicable to facilities of the same type and located in the area to which the recommendations are directed;

(3) Local government requirements for control of air pollution, including emission standards;

(4) Standards promulgated by the Administrator pursuant to the Act.

(d) A facility that removes elements or compounds from fuels that would be released as pollutants when such fuels are burned is eligible for certification if the facility is—

(1) Used in connection with a plant or other property in operation before January 1, 1976 (whether located and used at a particular plant or as a centralized facility for one or more plants), and

(2) Is otherwise eligible for certification.

(e) Where a facility is used in connection with more than one plant or other property, one or more of which were not in operation before January 1, 1976, or where a facility will perform a function other than the removal, alteration, storage, disposal, or prevention of pollutants, contaminants, wastes, or heat, the Regional Administrator will so indicate on the notice of certification and will approve or disapprove the applicant's suggested method of allocating costs. If the Regional Administrator disapproves the applicant's suggested method, he shall identify the proportion of costs allocable to each such plant, or to the removal, alteration, storage, disposal, or prevention of pollutants, contaminants, wastes, or heat.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1341, Jan. 9, 1978]

§ 20.9 Cost recovery.

Where it appears that, by reason of estimated profits to be derived through the recovery of wastes, through separate charges for use of the facility in question, or otherwise in the operation of such facility, all or a portion of its costs may be recovered over the period referred to in paragraph (a)(6) of 26 CFR 1.169–2, the Regional Administrator shall so signify in the notice of

certification. Determinations as to the meaning of the term *estimated profits* and as to the percentage of the cost of a certified facility which will be recovered over such period shall be made by the Secretary of the Treasury, or his delegate: *Provided,* That in no event shall estimated profits be deemed to arise from the use or reuse by the applicant of recovered waste.

§ 20.10 Revocation.

Certification hereunder may be revoked by the Regional Administrator on 30 days written notice to the applicant, served by certified mail, whenever the Regional Administrator shall determine that the facility in question is no longer being operated consistent with the § 20.8 (b) and (c) criteria in effect at the time the facility was placed in service. Within such 30-day period, the applicant may submit to the Regional Administrator such evidence, data or other written materials as the applicant may deem appropriate to show why the certification hereunder should not be revoked. Notification of a revocation under this section shall be given to the Secretary of the Treasury or his delegate. See 26 CFR 1.169–4(b)(1).

APPENDIX A TO PART 20—GUIDELINES FOR CERTIFICATION

1. General.
2. Air Pollution Control Facilities.
   a. Pollution control or treatment facilities normally eligible for certification.
   b. Air pollution control facility boundaries.
   c. Examples of eligibility limits.
   d. Replacement of manufacturing process by another nonpolluting process.
3. Water Pollution Control Facilities.
   a. Pollution control or treatment facilities normally eligible for certification.
   b. Examples of eligibility limits.
4. Multiple-purpose facilities.
5. Facilities serving both old and new plants.
6. State certification.
7. Dispersal of pollutants.
8. Profit-making facilities.
9. Multiple applications.

1. *General.* Section 2112 of the Tax Reform Act of 1976 (Pub. L. 94–455, October 4, 1976) amended section 169 of the Internal Revenue Code of 1954, "Amortization of Pollution Control Facilities." The amendment made permanent the rapid amortization provisions of section 704 of the Tax Reform Act of 1969 (Pub. L. 91–172, December 30, 1969) and redefined eligibility limits to allow certification of facilities which prevent the creation or emission of pollutants.

The law defines a *certified pollution control facility* as *a new identifiable treatment facility* which is:

(a) Used in connection with a plant or other property in operation before January 1, 1976, to abate or control air or water pollution by removing, altering, disposing of, storing, or preventing the creation or emission of pollutants, contaminants, wastes, or heat;

(b) Constructed, reconstructed, erected or (if purchased) first placed in service by the taxpayer after December 31, 1975;

(c) Not to *significantly* increase the output or capacity, extend the useful life, alter the nature of the manufacturing or production process or facility or reduce the total operating costs of the operating unit of the plant or other property most directly associated with the pollution control facility (as suggested by the legislative history, EPA regulations define the term *significant* as any increase, reduction or extension greater than 5%); and

(d) Certified by both State and Federal authorities, as provided in section 169(d)(1) (A) and (B) of the Internal Revenue Code.

If the facility is a building, the statute requires that it be exclusively devoted to pollution control. Most questions as to whether a facility is a *building* and, if so, whether it is *exclusively* devoted to pollution control are resolved by § 1.169–2(b)(2) of the Treasury Department regulations.

Since a treatment facility is eligible only if it furthers the general policies of the United States under the Clean Air Act and the Clean Water Act, a facility will be certified only if its purpose is to improve the quality of the air or water outside the plant. Facilities to protect the health or safety of employees inside the plant are not eligible.

Facilities installed before January 1, 1976, in plants placed in operation after December 31, 1968, are ineligible for certification under the statute. 26 U.S.C. 169.

2. *Air pollution control facilities.*

a. *Pollution control or treatment facilities normally eligible for certification.* The following devices are illustrative of facilities for removal, alteration, disposal, storage or preventing the creation or emission of air pollution:

(1) Inertial separators (cyclones, etc.).
(2) Wet collection devices (scrubbers).
(3) Electrostatic precipitators.
(4) Cloth filter collectors (baghouses).
(5) Director fired afterburners.
(6) Catalytic afterburners.
(7) Gas absorption equipment.
(8) Vapor condensers.
(9) Vapor recovery systems.
(10) Floating roofs for storage tanks.
(11) Fuel cleaning equipment.
(12) Combinations of the above.

(b) *Air Pollution control facility boundaries.* Most facilities are systems consisting of several parts. A facility need not start at the point where the gaseous effluent leaves the last unit of the processing equipment, nor will it always extend to the point where the effluent is emitted to the atmosphere or existing stack, breeching, ductwork or vent. It includes all the auxiliary equipment used to operate the control system, such as fans, blowers, ductwork, valves, dampers and electrical equipment. It also includes all equipment used to handle, store, transport or dispose of the collected pollutants.

(c) *Examples of eligibility limits.* The amortization deduction is limited to new identifiable treatment facilities which remove, alter, destroy, dispose of, store, or prevent the creation or emission of pollutants, contaminants or wastes. It is not available for all expenditures for air pollution control and is limited to devices which are installed for the purpose of pollution control and which actually remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants by removing potential pollutants at any stage of the production process.

(1) *Boiler modifications or replacements.* Modifications of boilers to accommodate *cleaner* fuels are not eligible for rapid amortization: e.g., removal of stokers from a coal-fired boiler and the addition of gas or oil burners. The purpose of the burners is to produce heat, and they are not identifiable as treatment facilities nor do they prevent the creation or emission of pollutants by removing potential pollutants. A new gas or oil-fired boiler that replaces a coal-fired boiler would also be ineligible for certification.

(2) *Fuel processing.* Eligible air pollution control facilities include preprocessing equipment which removes potential air pollutants from fuels before they are burned. A desulfurization facility would thus be eligible provided it is used in connection with the plant where the desulfurized coal will be burned or is used as a centralized facility for one or more plants. However, fluidized bed facilities would generally not be eligible for rapid amortization. Such facilities would almost certainly increase output or capacity, reduce total operating costs, or extend the useful life of the plant or other property by more than 5%, since the boiler itself would be the operating unit of the plant most closely associated with the pollution control facility. Where the Regional Office and the taxpayer disagree as to the applicability of the 5% rule, the Regional office should nonetheless certify the facility if it is otherwise eligible and leave the ultimate determination to the Treasury Department. The certification should alert Treasury to the possibility that the facility is ineligible for rapid amortization.

(3) *Incinerators.* The addition of an afterburner, secondary combustion chamber or particulate collector would be eligible as would any device added to effect more efficient combustion.

(4) *Collection devices used to collect products or process material.* In some manufacturing operations, devices are used to collect product or process material, as in the case of the manufacture of carbon black. The baghouse would be eligible for certification, but the certification should notify the Treasury Department of the profitable waste recovery involved. (See paragraph 8 below.)

(5) *Intermittent control systems.* Measuring devices which inform the taxpayer that ambient air quality standards are being exceeded are not eligible for certification since they do not physically remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants, but merely act as a signal to curtail operations. Of course, measuring devices used in connection with an eligible pollution control facility would be eligible.

d. *Replacement of manufacturing process by another, nonpolluting process.* An installation does not qualify for certification where it uses a process known to be *cleaner* than an alternative, but which does not actually remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants by removing potential pollutants at any stage in the production process. For example, a minimally polluting electric induction furnace to melt cast iron which replaces, or is installed instead of, a heavily polluting iron cupola furnace would be ineligible for this reason and because it is not an identifiable treatment facility. However, if the replacement equipment has an air pollution control device added to it, the control device would be eligible even though the process equipment would not. For example, where a primary copper smelting reverberatory furnace is replaced by a flash smelting furnace, followed by the installation of a contact sulfuric acid plant, the acid plant would qualify since it is a control device not necessary to the production process. The flash smelting furnace would not qualify because its purpose is to produce copper matte.

3. *Water Pollution Control Facilities.*

a. *Pollution control or treatment facilities normally eligible for certification.* The following types of equipment are illustrative of facilities to remove, alter, destroy, store or prevent the creation of water pollution:

(1) Pretreatment facilities which neutralize or stabilize industrial or sanitary wastes, or both, from a point immediately preceding the point of such treatment to the point of disposal to, and acceptance by, a publicly-owned treatment works. The necessary pumping and transmitting facilities are also eligible.

(2) Treatment facilities which neutralize or stabilize industrial or sanitary wastes, or both, to comply with Federal, State or local

effluent or water quality standards, from a point immediately preceding the point of such treatment to the point of disposal, including necessary pumping and transmitting facilities, including those for recycle or segregation of wastewater.

(3) Ancillary devices and facilities such as lagoons, ponds and structures for storage, recycle, segregation or treatment, or any combination of these, of wastewaters or wastes from a plant or other property.

(4) Devices, equipment or facilities constructed or installed for the primary purpose of recovering a by-product of the operation (saleable or otherwise) previously lost either to the atmosphere or to the waste effluent. Examples are:

(A) A facility to concentrate and recover vaporous by-products from a process stream for reuse as raw feedstock or for resale, unless the estimated profits from resale exceed the cost of the facility (see paragraph 8 below).

(B) A facility to concentrate or remove *gunk* or similar *tars* or polymerized tar-like materials from the process waste effluent previously discharged in the plant effluents. Removal may occur at any stage of the production process.

(C) A device used to extract or remove insoluble constitutents from a solid or liquid by use of a selective solvent; an open or closed tank or vessel in which such extraction or removal occurs; a diffusion battery of tanks or vessels for countercurrent decantation, extraction, or leaching, etc.

(D) A skimmer or similar device for removing grease, oils and fat-like materials from the process or effluent stream.

(b) *Examples of eligibility limits.*

(1) In-plant process changes which may result in the reduction or elimination of pollution but which do not themselves remove, alter, destroy, dispose of, store or prevent the creation of pollutants by removing potential pollutants at some point in the process stream are not eligible for certification.

(2) A device, piece of equipment or facility is not eligible if it is associated with or included in a stream for subsurface injection of untreated or inadequately treated industrial or sanitary waste.

4. *Multiple-purpose facilities.* A facility can qualify for rapid amortization if it serves a function other than the abatement of pollution (unless it is a building). Otherwise, the effect might be to discourage installation of sensible pollution abatement facilities in favor of less efficient single-function facilities.

The regulations require applicants to state what percentage of the cost of a facility is properly allocable to its abatement function and to justify the allocation. The Regional Office will review these allocations, and the certification will inform the Treasury Department if the allocation appears to be incorrect. Although not generally necessary or desireable, site inspections may be appropriate in cases involving large sums of money or unusual types of equipment.

5. *Facilities serving both old and new plants.* The statute provides that pollution control facilities must be used in connection with a plant or other property in operation before January 1, 1976. When a facility is used in connection with both pre-1976 and newer property, it may qualify for rapid amortization to the extent it is used in connection with pre-1976 property.

Again, the applicant will submit a theory of allocation for review by the Regional Office. The usual method of allocation is to compare the effluent capacity of the pre-1976 plant to the treatment capacity of the control facility. For example, if the old plant has a capacity of 80 units of effluent (but an average output of 60 units), the new plant has a capacity of 40 units (but an average output of 20 units), and the control facility has a capacity of 150 units, then $^{80}/_{150}$ of the cost of the control facility would be eligible for rapid amortization.

If a taxpayer presents a seemingly reasonable method of allocation different from the foregoing, Regional Office personnel should consult with the Office of Air Quality Planning and Standards or the Office of Water Planning and Standards, and with the Office of General Counsel.

6. *State certification.* To qualify for rapid amortization under section 169, a facility must first be certified by the State as having been installed "in conformity with the State program or requirements for abatement or control of water or atmospheric pollution or contamination." Significantly, the statute does not say that the State must require that a facility be installed. If use of a facility will not actually contravene a State requirement, the State may certify. However, since State certification is a prerequisite to EPA certification, EPA may not certify if the State has denied certification for whatever reason.

It should be noted that certification of a facility does not constitute the personal warranty of the certifying official that the conditions of the statute have been met. EPA certification is binding on the Government only to the extent the submitted facts are accurate and complete.

7. *Dispersal of pollutants.* Section 169 applies to facilities which remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants—including heat. Facilities which merely disperse pollutants (such as tall stacks) do not qualify. However, there is no way to *dispose of* heat other than by transferring B.t.u.'s to the environment. A cooling tower is therefore eligible for certification provided it is used in connection with a pre-1976 plant. A cooling pond or an

addition to an outfall structure which results in a decrease in the amount by which the temperature of the receiving water is raised and which meets applicable State standards is likewise eligible.

8. *Profit-making facilities.* The statute denies rapid amortization where the cost of pollution control facilities will be recovered from profits derived through the recovery or wastes *or otherwise.*

If a facility recovers marketable wastes, estimated profits on which are not sufficient to recover the entire cost of the facility, the amortization basis of the facility will be reduced in accordance with Treasury Department regulations. The responsibility of the Regional Offices is merely to identify for the Treasury Department those cases in which estimated profits will arise. The Treasury Department will determine the amount of such profits and the extent to which they can be expected to result in cost recovery, but the EPA certification should inform the Treasury whether cost recovery is possible.

The phrase *or otherwise* also includes situations where the taxpayer is in the business of renting the facility for a fee or charging for the treatment of waste. In such cases, the facility may theoretically qualify for EPA certification. The decision as to the extent of its profitability is for the Treasury Department. Situations may also arise where use of a facility is furnished at no additional charge to a number of users, or to the public, as part of a package of other services. In such cases, no profits will be deemed to arise from operation of the facility unless the other services included in the package are merely ancillary to use of the facility. Of course, the cost recovery provision does not apply where a taxpayer merely recovers the cost of a facility through general revenues; otherwise no profitable firm would ever be eligible for rapid amortization.

It should be noted that §20.9 of the EPA regulation is not meant to affect general principles of Federal income tax law. An individual other than the title holder of a piece of property may be entitled to take depreciation deductions on it if the arrangements by which such individual has use of the property may, for all practical purposes, be viewed as a purchase. In any such case, the facility could qualify for full rapid amortization, notwithstanding the fact that the title holder charges a separate fee for the use of the facility, so long as the taxpayer—in such a case, the user—does not charge a separate fee for use of the facility.

9. *Multiple applications.* Under EPA regulations, a multiple application may be submitted by a taxpayer who applies for certification of substantially identical pollution abatement facilities used in connection with substantially identical properties. It is not contemplated that the multiple application option will be used with respect to facilities in different States, since each such facility would require a separate application for certification to the State involved. EPA regulations also permit an applicant to incorporate by reference in an application material contained in an application previously filed. The purpose of this provision is to avoid the burden of furnishing detailed information (which may in some cases include portions of catalogs or process flow diagrams) which the certifying official has previously received. Accordingly, material filed with a Regional Office of EPA may be incorporated by reference only in an application subsequently filed with the same Regional Office.

[47 FR 38319, Aug. 31, 1982]

PART 21—SMALL BUSINESS

Sec.
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AUTHORITY: 15 U.S.C. 636, as amended by Pub. L. 92–500.

SOURCE: 42 FR 8083, Feb. 8, 1977, unless otherwise noted.

§21.1 Scope.

This part establishes procedures for the issuance by EPA of the statements, referred to in section 7(g) of the Small Business Act and section 8 of the Federal Water Pollution Control Act Amendments of 1972, to the effect that additions to or alterations in the equipment, facilities (including the construction of pretreatment facilities and interceptor sewers), or methods of operations of small business concerns are necessary and adequate to comply with requirements established under the Federal Water Pollution Control Act, 33 U.S.C. 1151, *et seq.*

§21.2 Definitions.

(a) *Small business concern* means a concern defined by section 2[3] of the Small Business Act, 15 U.S.C. 632, 13 CFR part 121, and regulations of the

Small Business Administration promulgated thereunder.

(b) For purposes of paragraph 7(g)(2) of the Small Business Act, *necessary and adequate* refers to additions, alterations, or methods of operation in the absence of which a small business concern could not comply with one or more applicable standards. This can be determined with reference to design specifications provided by manufacturers, suppliers, or consulting engineers; including, without limitations, additions, alterations, or methods of operation the design specifications of which will provide a measure of treatment or abatement of pollution in excess of that required by the applicable standard.

(c) *Applicable Standard* means any requirement, not subject to an exception under §21.6, relating to the quality of water containing or potentially containing pollutants, if such requirement is imposed by:

(1) The Act;

(2) EPA regulations promulgated thereunder or permits issued by EPA or a State thereunder;

(3) Regulations by any other Federal Agency promulgated thereunder;

(4) Any State standard or requirement as applicable under section 510 of the Act;

(5) Any requirements necessary to comply with an areawide management plan approved pursuant to section 208(b) of the Act;

(6) Any requirements necessary to comply with a facilities plan developed under section 201 of the Act (see 35 CFR, subpart E);

(7) Any State regulations or laws controlling the disposal of aqueous pollutants that may affect groundwater.

(d) *Regional Administrator* means the Regional Administrator of EPA for the region including the State in which the facility or method of operation is located, or his designee.

(e) *Act* means the Federal Water Pollution Control Act, 33 U.S.C. 1151, *et seq.*

(f) *Pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. For the purposes of this section, the term also means sewage from vessels within the meaning of section 312 of the Act.

(g) *Permit* means any permit issued by either EPA or a State under the authority of section 402 of the Act; or by the Corps of Engineers under section 404 of the Act.

(h) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

Comment: As the SBA does not extend its programs to the Canal Zone, the listing of the Canal Zone as a State for the purposes of meeting a requirement imposed by section 311 or 312 of the Act is not effective in this regulation.

(i) *Statement* means a written approval by EPA, or if appropriate, a State, of the application.

(j) *Facility* means any building, structure, installation or vessel, or portion thereof.

(k) *Construction* means the erection, building, acquisition, alteration, remodeling, modification, improvement, or extension of any facility; *Provided,* That it does not mean preparation or undertaking of: Plans to determine feasibility; engineering, architectural, legal, fiscal, or economic investigations or studies; surveys, designs, plans, writings, drawings, specifications or procedures.

Comment: This provision would not later preclude SBA financial assistance being utilized for any planning or design effort conducted previous to construction.

(l) The term *additions and alterations* means the act of undertaking construction of any facility.

(m) The term *methods of operation* means the installation, emplacement, or introduction of materials, including those involved in construction, to achieve a process or procedure to control: Surface water pollution from nonpoint sources—that is, agricultural, forest practices, mining, construction; ground or surface water pollution from well, subsurface, or surface disposal operations; activities resulting in salt water intrusion; or changes in the

movement, flow, or circulation of navigable or ground waters.

(n) The term *vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters of the United States other than a vessel owned or operated by the United States or a State or a political subdivision thereof, or a foreign nation; and is used for commercial purposes by a small business concern.

(o) *EPA* means the Environmental Protection Agency.

(p) *SBA* means the Small Business Administration.

(q) *Areawide agency* means an areawide management agency designated under section 208(c)(1) of the Act.

(r) *Lateral sewer* means a sewer which connects the collector sewer to the interceptor sewer.

(s) *Interceptor sewer* means a sewer whose primary purpose is to transport wastewaters from collector sewers to a treatment facility.

§ 21.3 Submission of applications.

(a) Applications for the statement described in §21.5 of this part shall be made to the EPA Regional Office for the region covering the State in which the additions, alterations, or methods of operation covered by the application are located. A listing of EPA Regional Offices, with their mailing addresses, and setting forth the States within each region is as follows:

Region	Address	State
I	Regional Administrator, region I, EPA, John F. Kennedy Federal Bldg., room 2303, Boston, MA 02203.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
II	Regional Administrator, region II, EPA, 26 Federal Plaza, room 908, New York, NY 10007.	New Jersey, New York, Virgin Islands, and Puerto Rico.
III	Regional Administrator, region III, EPA, Curtis Bldg., 6th and Walnut Sts., Philadelphia, PA 19106.	Delaware, District of Columbia, Pennsylvania, Maryland, Virginia, and West Virginia.
IV	Regional Administrator, region IV, EPA, 345 Courtland St. NE., Atlanta, GA 30308.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	Regional Administrator, region V, EPA, 77 West Jackson Boulevard, Chicago, IL 60604.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Regional Administrator, region VI, EPA, 1201 Elm St., 27th floor, First International Bldg., 70 Dallas, TX 75201.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Regional Administrator, region VII, EPA, 1735 Baltimore Ave., Kansas City, MO 64108.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Regional Administrator, region VIII, EPA, 1860 Lincoln St., Suite 900, Denver, CO 80203.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Regional Administrator, region IX, EPA, 100 California St., San Francisco, CA 94111.	Arizona, California, Hawaii, Nevada, Guam, American Samoa, and Trust Territory of the Pacific Islands.
X	Regional Administrator, region X, EPA, 1200 6th Ave., Seattle, WA 98101.	Alaska, Idaho, Oregon, and Washington.

(b) An application described in paragraph (1) of §21.3(c) may be submitted directly to the appropriate State, where a State has assumed responsibility for issuing the statement. Information on whether EPA has retained responsibility for certification or whether it has been assumed by the State may be obtained from either the appropriate Regional Administrator or the State Water Pollution Control Authority in which the facility is located.

(c) An application need be in no particular form, but it must be in writing and must include the following:

(1) Name of applicant (including business name, if different) and mailing address. Address of the affected facility or operation, if different, should also be included.

(2) Signature of the owner, partner, or principal executive officer requesting the statement.

(3) The Standard Industrial Classification number for the business for which an application is being submitted. Such SIC number shall be obtained from the Standard Industrial Classification Manual, 1972 edition. If the applicant does not know the SIC for the business, a brief description of the type of business activity being conducted should be provided.

(4) A description of the process or activity generating the pollution to be abated by the additions, alterations, or methods of operation covered by the application, accompanied by a schematic diagram of the major equipment and process, where practicable.

(5) A specific description of the additions, alterations, or methods of operation covered by the application. Where appropriate, such description will include a summary of the facility construction to be undertaken; a listing of the major equipment to be purchased or utilized in the operation of the facility; the purchase of any land or easements necessary to the operation of the facility; and any other items that the applicant deems pertinent. Any information that the applicant considers to be a trade secret shall be identified as such.

(6) A declaration of the requirement, or requirements, for compliance with which the alterations, additions, or methods of operation are claimed to be necessary and adequate.

(i) If the requirement results from a permit issued by EPA or a State under section 402 of the Act, the permit number shall be included.

(ii) If the requirement results from a permit issued by EPA or a State for a publicly-owned treatment works, the municipal permit number shall be included along with a written declaration from the authorized agent for the publicly owned treatment works that received the permit detailing the specific pretreatment requirements being placed upon the applicant.

(iii) If the requirement initiates from a plan to include the applicant's effluent in an existing municipal sewer system through the construction of lateral or interceptor sewers, a written declaration from the authorized agent for the publicly owned treatment works shall be included noting that the sewer construction is consistent with the integrity of the system; will not result in the capacity of the publicly owned treatment works being exceeded; and where applicable, is consistent with a facilities plan developed under section 201 of the Act (see 35 CFR part 917).

(iv) If the requirement results from a State order, regulation, or other enforceable authority controlling pollution from a vessel as provided by section 312(f)(3) of the Act, a written declaration from the authorized agent of the State specifying the control measures being required of the applicant shall be included.

(v) If the requirement is a result of a permit issued by the Corps of Engineers related to permits for dredged or fill material as provided by section 404 of the Act, a copy of the permit as issued shall be included.

(vi) If the requirement results from a standard of performance for control of sewage from vessels as promulgated by the Coast Guard under section 312(b) of the Act, the vessel registration number or documentation number shall be included.

(vii) If the requirement results from a plan to control or prevent the discharge or spill of pollutants as identified in section 311 of the Act, the title and date of that plan shall be included.

(viii) If the requirement is the result of an order by a State or an areawide management agency controlling the disposal of aqueous pollutants so as to protect groundwater, a copy of the order as issued shall be included.

(7) Additionally, if the applicant has received from a State Water Pollution Control Agency a permit issued by the State within the preceding two years, and if such permit was not issued under the authorities of section 402 of the Act, and where the permit directly relates to abatement of the discharge for which a statement is sought, a copy of that permit shall also be included.

Comment: Some States under State permit programs, separate and distinct from the NPDES permit program under the Act, conduct an engineering review of the facilities or equipment that would be used to control pollution. The results of such a review would be materially helpful in determining the necessity and adequacy of any alterations or additions.

(8) Any written information from a manufacturer, supplier, or consulting engineer, or similar independent source, concerning the design capabilities of the additions or alterations covered by the application, including any warranty limitations or certifications obtained from or provided by such sources which would bear upon these

design or performance capabilities. The Regional Administrator may waive the requirement for this paragraph if it appears that there is no independent source for the information described herein; as, for example, when the applicant has designed and constructed the additions or alterations with in-house capability.

(9) An estimated schedule for the construction or implementation of the alterations, additions, or methods of operation.

(10) An estimated cost of the alterations, additions, or methods of operation, and where practicable, the individual costs of major elements of the construction to be undertaken.

(11) Information on previously received loan assistance under this section for the facility or method of operation, including a description and dates of the activity funded.

(d) A separate application must be submitted for every addition, alteration, or method of operation that is at a separate geographical location from the initial application.

Comment: As an example, a chain has four dry cleaning establishments scattered through a community. A separate application would have to be filed for each.

(e) No statement shall be approved for any application that has not included the information or declaration requirements imposed by paragraph (c)(6) of § 21.3.

(f) All applications are to be submitted in duplicate.

(g) All applications are subject to the provisions of 18 U.S.C. 1001 regarding prosecution for the making of false statements or the concealing of material facts.

(h) Instructional guidelines to assist in the submission of applications for EPA certification are available from EPA or a certifying State.

[42 FR 8083, Feb. 8, 1977, as amended at 62 FR 1833, Jan. 14, 1997]

§ 21.4 Review of application.

(a) The Regional Administrator or his designee will conduct a review of the application. This review will consist of a general assessment of the adequacy of the proposed alterations, additions, or methods of operation. The review will corroborate that the proposed alterations, additions, or methods of operation are required by an applicable standard. The review will identify any proposed alterations, additions, or methods of operation that are not required by an applicable standard, or that are extraneous to the achievement of an applicable standard.

(b) The assessment of adequacy will be conducted to ensure that the proposed additions, alterations, or methods of operation are sufficient to meet one or more applicable standards whether alone or in conjunction with other plans. The assessment will not generally examine whether other alternatives exist or would be more meritorious from a cost-effective, efficiency, or technological standpoint.

(c) An application which proposes additions, alterations, or methods of operation whose design, in anticipation of a future requirement, will achieve a level of performance above the requirements imposed by a presently applicable standard shall be reviewed and approved by EPA or a State without prejudice. The amount of financial assistance for such an application will be determined by SBA.

(d) The Regional Administrator shall retain one copy of the application and a summary of the action taken on it. Upon completion of his review, the Regional Administrator shall return the original application along with any other supporting documents or information provided to the applicant along with a copy to the appropriate SBA district office for processing.

§ 21.5 Issuance of statements.

(a) Upon application by a small business concern pursuant to § 21.3 the Regional Administrator will, if he finds that the additions, alterations, or methods of operation covered by the application are adequate and necessary to comply with an applicable standard, issue a written statement to the applicant to that effect, within 45 working days following receipt of the application, or within 45 working days following receipt of all information required to be submitted pursuant to § 21.3(c), whichever is later. Such a written statement shall be classified as

a full approval. If an application is deficient in any respect, with regard to the specifications for submission listed in §21.3(c), the Regional Administrator shall promptly, but in no event later than 30 working days following receipt of the application, notify the applicant of such deficiency.

(b)(1) If an application contains proposed alterations, additions, or methods of operation that are adequate and necessary to comply with an applicable standard but also contains proposed alterations, additions, or methods of operation that are not necessary to comply with an applicable standard, the Regional Administrator shall conditionally approve the application within the time limit specified in paragraph (a) of this section, and shall also identify in the approval those alterations, additions, or methods of operation that he determines are not necessary.

(2) Conditional approvals as contained in a statement will satisfy the requirements for approval by EPA for those alterations, additions, or methods of operation determined to be necessary and adequate. Such conditional approvals may be submitted to SBA in satisfaction of the requirements of section 7(g)(2)(B) of the Small Business Act.

(3) Conditional approvals will not satisfy the requirements for approval by EPA for those alterations, additions, or methods of operation included in the application that are determined not to be necessary. Unnecessary alterations, additions, or methods of operation are those which are extraneous to the achievement of an applicable standard.

(4) Conditional approvals may be appealed to the Deputy Administrator by an applicant in accordance with the procedures identified in §21.8.

(c) If the Regional Administrator determines that the additions, alterations, or methods of operation covered by an application are not necessary and adequate to comply with an applicable standard, he shall disapprove the application and shall so advise the applicant of such determination within the time limit specified in paragraph (a) of this section, and shall state in writing the reasons for his determination.

(d) Any application shall be disapproved if the Regional Administrator determines that the proposed addition, alteration, or method of operation would result in the violation of any other requirement of this Act, or of any other Federal or State law or regulation with respect to the protection of the environment.

(e) An applicant need not demonstrate that its facility or method of operation will meet all applicable requirements established under the Act. The applicant need only demonstrate that the additions, alterations, or methods of operation will assist in ensuring compliance with one or more of the applicable standards for which financial assistance is being requested.

Comment: As an example, a small business has two discharge pipes—one for process water, the other for cooling water. The application for loan assistance is to control pollution from the process water discharge. However, EPA or a State may review the applicant's situation and identify for SBA that the applicant is subject to other requirements for which the applicant has not sought assistance.

(f) An application should not include major alternative designs significantly differing in scope, concept, or capability. It is expected that the applicant at the time of submission will have selected the most appropriate or suitable design for the addition, alteration, or method of operation.

(g) EPA will not provide assistance in the form of engineering, design, planning or other technical services to any applicant in the preparation of his application.

(h) An applicant may be issued a certification for additions, alterations, or methods of operation constructed or undertaken before loan assistance was applied for by the applicant. Any such applications would be reviewed by SBA for eligibility under SBA criteria, including refinancing and loan exposure.

§21.6 Exclusions.

(a) Statements shall not be issued for applications in the following areas:

(1) *Local requirements.* Applications for statements for additions, alterations, or methods of operation that result from requirements imposed by municipalities, counties or other forms

of local or regional authorities and governments, except for areawide management agencies designated and approved under section 208 of the Act, shall not be approved; except for those requirements resulting from the application of pretreatment requirements under section 307(b) of the Act; or those resulting from an approved project for facilities plans, and developed under section 201 of the Act. (See 35 CFR, subpart E); or under a delegation of authority under the Act.

(2) *Cost recovery and user charges.* Applications for statements involving a request for financial assistance in meeting revenue and service charges imposed upon a small business by a municipality conforming to regulations governing a user charge or capital cost system under section 204(b)(2) of the Act (see 35 CFR 925–11 and 925–12) shall not be approved.

(3) *New facility sewer construction.* Applications for statements involving projects that involve the construction of a lateral, collection, or interceptor sewer, at a facility that was not in existence on October 18, 1972, shall not be approved. Applications for additions, alterations, or methods of operation for new facilities that do not involve sewer construction are not affected by this preclusion. Further, if an applicant is compelled to move as a result of a relocation requirement but operated at the facility prior to October 18, 1972, the cost of construction for a lateral, collection, or interceptor sewer can be approved for the new, relocated site. For the purpose of this exclusion lateral, collection, or interceptor sewer is determined as any sewer transporting waste from a facility or site to any publicly owned sewer.

(4) Other non-water related pollution abatement additions, alterations, or methods of operation which are not integral to meeting the requirements of the Act, although they may be achieving the requirements of another Federal or State law or regulation.

Comment: An example would be where stack emission controls were required on equipment that operated the water pollution control facility. This emission control equipment as an integral part of the water pollution control systems would be approvable. However, emission control equipment for a general purpose incinerator that only incidentally burned sewage sludge would not be approvable. The general purpose incinerator might also receive loan assistance but under separate procedures than those set out for water pollution control.

(5) *Privately owned treatment facility service or user costs.* Applications for statements involving financial assistance in meeting user cost or fee schedules related to participating in a privately owned treatment facility not under the ownership or control of the applicant shall not be approved.

(6) *Operation and maintenance charges.* Applications for statements containing a request for financial assistance in meeting the operations and maintenance costs of operating the applicant's additions, alterations, or methods of operation shall not be approved for any elements relating to such areas of cost.

(7) *Evidence of financial responsibility.* Applications for statements containing a request for financial assistance in meeting any requirements relating to evidence of financial responsibility as provided in section 311(p) of the Act shall not be approved.

§ 21.7 [Reserved]

Comment: Applications for a statement resulting from a requirement to control pollution from non-point sources as identified in section 304(e)(2)(A–F) of the Act and described in § 21.2(m) will not presently be issued a statement under § 21.5 unless the requirement is established through a permit under section 402. There is no requirement under the current Act that the Federal Government control pollution from such sources, and the nature and scope of State or areawide management agency proposals or programs to control such sources cannot be determined at this time. As State and areawide plans for control of nonpoint sources being prepared under section 208 of the Act, will not be completed for several years, this section is being reserved pending a future determination on the eligibility of applications relating to non-profit sources to receive a statement under this part.

§ 21.8 Resubmission of application.

(a) A small business concern whose application is disapproved may submit an amended or corrected application to the Regional Administrator at any time. The applicant shall provide the date of any previous application.

(b) [Reserved]

§21.9 Appeals.

(a) An applicant aggrieved by a determination of a Regional Administrator under §21.5 may appeal in writing to the Deputy Administrator of the Environmental Protection Agency, within 30 days of the date of the determination from which an appeal is taken; *Provided,* That the Deputy Administrator may, on good cause shown, accept an appeal at a later time.

(b) The applicant in requesting such an appeal shall submit to the Deputy Administrator a copy of the complete application as reviewed by the Regional Administrator.

(c) The applicant should also provide information as to why it believes the determination made by the Regional Administrator to be in error.

(d) The Deputy Administrator shall act upon such appeal within 60 days of receipt of any complete application for a review of the determination.

(e) Where a State has been delegated certification authority, the procedure for appeals shall be established in the State submission required in §21.12.

§21.10 Utilization of the statement.

(a) Statements issued by the Regional Administrator will be mailed to the small business applicant and to the district office of the Small Business Administration serving the geographic area where the business is located. It is the responsibility of the applicant to also forward the statement to SBA as part of the application for a loan.

(b) Any statement or determination issued under §21.5 shall not be altered, modified, changed, or destroyed by any applicant in the course of providing such statement to SBA. To do so can result in the revocation of any approval contained in the statement and subject the applicant to the penalties provided in 18 U.S.C. 1001.

(c) If an application for which a statement is issued under §21.5 is substantively changed in scope, concept, design, or capability prior to the approval by SBA of the financial assistance requested, the statement as issued shall be revoked. The applicant must resubmit a revised application under §21.3 and a new review must be conducted. Failure to meet the requirements of this paragraph could subject the applicant to the penalties specified in 18 U.S.C. 1001 and 18 U.S.C. 286. A substantive change is one which materially affects the performance or capability of the proposed addition, alteration, or method of operation.

(d) An agency, Regional Administrator, or State issuing a statement under §21.5 shall retain a complete copy of the application for a period of five years after the date of issuance of the statement. The application shall be made available upon request for inspection or use at any time by any agency of the Federal Government.

(e) No application for a statement or for financial assistance under this section or statement issued under this section shall constitute or be construed as suspending, modifying, revising, abrogating or otherwise changing the requirements imposed on the applicant by the terms, conditions, limitations or schedules of compliance contained in an applicable standard, permit, or other provision established or authorized under the Act or any State or local statute, ordinance or code.

(f) No statement as issued and reviewed shall be construed as a waiver to the applicants fulfilling the requirements of any State or local law, statute, ordinance, or code (including building, health, or zoning codes).

(g) An amended application need not be submitted if the facility, property, or operation for which the statement is issued is sold, leased, rented, or transferred by the applicant to another party prior to approval by SBA of the financial assistance: *Provided,* That there is or will be no substantive change in the scope, concept, design, capability, or conduct of the facility or operation.

Comment: However, eligibility for financial assistance would be reexamined by SBA with regard to any such sale, lease, rental or transfer.

(h) The Regional Administrator may include in any statement a date of expiration, after which date the approval by the Regional Administrator contained in the statement shall no longer apply. The date of expiration shall not become effective if the applicant has submitted the statement to the SBA, prior to the date of expiration, as part

of the application for financial assistance.

§ 21.11 Public participation.

(a) Applications shall not generally be subject to public notice, public comment, or public hearings. Applications during the period of review as stated in § 21.5, or during the period of appeal as provided in § 21.8, shall be available for public inspection. Approved applications as provided in § 21.10(d) shall be available for public inspection at all times during the five year period.

(b) The Regional Administrator, if he believes that the addition, alteration, or method of operation may adversely and significantly affect an interest of the public, shall provide for a public notice and/or public hearing on the application. The public notice and/or public hearing shall be conducted in accordance with the procedures specified for a permit under 40 CFR 125.32 and 125.34(b).

(c) Where the applicant is able to demonstrate to the satisfaction of the Regional Administrator that disclosure of certain information or parts thereof as provided in § 21.3(c)(5) would result in the divulging of methods or processes entitled to protection as trade secrets, the Regional Administrator shall treat the information or the particular part as confidential in accordance with the purposes of section 1905 of Title 18 of the United States Code and not release it to any unauthorized person. *Provided, however,* That if access to such information is subsequently requested by any person, there will be compliance with the procedures specified in 40 CFR part 2. Such information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out the Act or when relevant in any proceeding under the Act.

§ 21.12 State issued statements.

(a) Any State after the effective date of these regulations may submit to the Regional Administrator for his approval an application to conduct a program for issuing statements under this section.

(1) A State submission shall specify the organizational, legal, financial, and administrative resources and procedures that it believes will enable it to conduct the program.

(2) The State program shall constitute an equivalent effort to that required of EPA under this section.

(3) The State organization responsible for conducting the program should be the State water pollution control agency, as defined in section 502 of the Act.

(4) The State submission shall propose a procedure for adjudicating applicant appeals as provided under § 21.9.

(5) The State submission shall identify any existing or potential conflicts of interest on the part of any personnel who will or may review or approve applications.

(i) A conflict of interest shall exist where the reviewing official is the spouse of or dependent (as defined in the Tax Code, 26 U.S.C. 152) of an owner, partner, or principal officer of the small business, or where he has or is receiving from the small business concern applicant 10 percent of gross personal income for a calendar year, except that it shall mean 50 percent gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangements.

(ii) If the State is unable to provide alternative parties to review or approve any application subject to conflict of interest, the Regional Administrator shall review and approve the application.

(b) The Regional Administrator, within 60 days after such application, shall approve any State program that conforms to the requirements of this section. Any such approval shall be after sufficient notice has been provided to the Regional Director of SBA.

(c) If the Regional Administrator disapproves the application, he shall notify the State, in writing, of any deficiency in its application. A State may resubmit an amended application at any later time.

(d) Upon approval of a State submission, EPA will suspend all review of applications and issuance of statements for small businesses in that State, pending transferral. *Provided, however,* That in the event of a State conflict of interest as identified in § 21.12(a)(4) of

this section, EPA shall review the application and issue the statement.

(e) Any applications shall, if received by an EPA Regional Office, be forwarded promptly to the appropriate State for action pursuant to section 7(g)(2) of the Small Business Act and these regulations.

(f)(1) EPA will generally not review or approve individual statements issued by a State. However, SBA, upon receipt and review of a State approved statement may request the Regional Administrator of EPA to review the statement. The Regional Administrator, upon such request can further approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

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22.1 Scope of this part.
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22.5 Filing, service, and form of all filed documents; business confidentiality claims.
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Subpart E—Initial Decision and Motion to Reopen a Hearing

22.27 Initial decision.
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Subpart F—Appeals and Administrative Review

22.29 Appeal from or review of interlocutory orders or rulings.
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Subpart G—Final Order

22.31 Final order.
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Subpart H—Supplemental Rules

22.33 [Reserved]
22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
22.36 [Reserved]
22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
22.40 [Reserved]
22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.
22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.
22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.
22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.
22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

22.50 Scope of this subpart.
22.51 Presiding Officer.
22.52 Information exchange and discovery.

AUTHORITY: 7 U.S.C. 136(l); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty

under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g–3(g)(3)(B), 300h–2(c), and 300j–6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accordance with §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer or any other person who will participate or advise in the adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

Party means any person that participates in a proceeding as complainant, respondent, or intervenor.

Permit action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1412) or termination under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or section 3005(d) of the Solid Waste Disposal Act (42 U.S.C. 6925(d)).

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of

Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate §22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to §22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

(2) Rule upon motions, requests, and offers of proof, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and §22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with

regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

§ 22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to §22.18(b)(3).

§22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances

§22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to §22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals

Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§22.16 Motions.

(a) *General.* Motions shall be served as provided by §22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in §22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to §22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

§22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of §22.19(a) or an order of the Presiding Officer; or upon failure to appear at a

conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The

parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under §22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to §22.13(b), the consent agreement shall also contain the elements described at §22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in §22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents

and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this

section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with §22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under §22.17(c).

§22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any

other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under §22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand deliveries may be made at Suite 600, 1341 G Street, NW.).). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party , non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to § 22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003]

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

§ 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

§ 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies

exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA")(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved]

§ 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section

207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under § 122.64 or § 270.43 of this chapter during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in § 124.8 of this chapter;

(2) The Director (as defined in § 124.2 of this chapter) shall provide public notice of the complaint in accordance with § 124.10 of this chapter, and allow for public comment in accordance with § 124.11 of this chapter; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in § 124.9 of this chapter, and any public comments received.

[65 FR 30904, May 15, 2000]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice.*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period

provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

Sec.
23.1 Definitions.
23.2 Timing of Administrator's action under Clean Water Act.
23.3 Timing of Administrator's action under Clean Air Act.
23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.
23.5 Timing of Administrator's action under Toxic Substances Control Act.
23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.
23.7 Timing of Administrator's action under Safe Drinking Water Act.
23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.
23.9 Timing of Administrator's action under the Atomic Energy Act.
23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.
23.11 Holidays.
23.12 Filing notice of judicial review.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j–7(a)(2), 300j–9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 348; 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

§ 23.1 Definitions.

As used in this part, the term:

(a) *Federal Register document* means a document intended for publication in the FEDERAL REGISTER and bearing in its heading an identification code including the letters *FRL*.

(b) *Admininstrator* means the Administrator or any official exercising authority delegated by the Administrator.

(c) *General Counsel* means the General Counsel of EPA or any official exercising authority delegated by the General Counsel.

[50 FR 7270, Feb. 21, 1985, as amended at 53 FR 29322, Aug. 3, 1988]

§ 23.2 Timing of Administrator's action under Clean Water Act.

Unless the Administrator otherwise explicity provides in a particular promulgation or approval action, the time and date of the Administrator's action in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date that is two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.3 Timing of Administrator's action under Clean Air Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.

Unless the Administrator otherwise explicitly provides in taking a particular action, for purposes of section 7006(b), the time and date of the Administrator's action in issuing, denying, modifying, or revoking any permit under section 3005, or in granting, denying, or withdrawing authorization or interim authorization under section 3006, shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.5 Timing of Administrator's action under Toxic Substances Control Act.

Unless the Administrator otherwise explicitly provides in promulgating a particular rule or issuing a particular order, the time and date of the Administrator's promulgation or issuance for purposes of section 19(a)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of entry of an order issued by the Administrator following a public hearing for purposes of section 16(b) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after it is signed.

§ 23.7 Timing of Administrator's action under Safe Drinking Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER or (b) for any other document, two weeks after it is signed.

§ 23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.

Unless the Administrator otherwise explicitly provides in a particular rule, the time and date of the Administrator's promulgation for purposes of 42

U.S.C. 2022(c)(2) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice of promulgation is published in the FEDERAL REGISTER.

§ 23.9 Timing of Administrator's action under the Atomic Energy Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order for purposes of 28 U.S.C. 2344 shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice thereof is published in the FEDERAL REGISTER.

§ 23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order issued after a public hearing for purposes of 21 U.S.C. 346a(i) or 348(g) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.11 Holidays.

If the date determined under §§ 23.2 to 23.10 falls on a Federal holiday, then the time and date of the Administrator's action shall be at 1:00 p.m. eastern time on the next day that is not a Federal holiday.

§ 23.12 Filing notice of judicial review.

(a) For the purposes of 28 U.S.C. 2112(a), a copy of any petition filed in any United States Court of Appeals challenging a final action of the Administrator shall be sent by certified mail, return receipt requested, or by personal delivery to the General Counsel. The petition copy shall be time-stamped by the Clerk of the Court when the original is filed with the Court. The petition should be addressed to: Correspondence Control Unit, Office of General Counsel (2311), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(b) If the General Counsel receives two or more petitions filed in two or more United States Courts of Appeals for review of any Agency action within ten days of the effective date of that action for purposes of judicial review (as specified under §§ 23.2 through 23.10 of this part), the General Counsel will notify the United States Judicial Panel of Multidistrict Litigation of any petitions that were received within the ten day period, in accordance with the applicable rules of the Panel.

(c) For purposes of determining whether a petition for review has been received within the ten day period under paragraph (b) of this section, the petition shall be considered received on the date of service, if served personally. If service is accomplished by mail, the date of receipt shall be considered to be the date noted on the return receipt card.

[53 FR 29322, Aug. 3, 1988]

PART 24—RULES GOVERNING ISSUANCE OF AND ADMINISTRATIVE HEARINGS ON INTERIM STATUS CORRECTIVE ACTION ORDERS

Subpart A—General

Sec.
24.01 Scope of these rules.
24.02 Issuance of initial orders; definition of final orders and orders on consent.
24.03 Maintenance of docket and official record.
24.04 Filing and service of orders, decisions, and documents.
24.05 Response to the initial order; request for hearing.
24.06 Designation of Presiding Officer.
24.07 Informal settlement conference.
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Subpart B—Hearings on Orders Requiring Investigations or Studies

24.09 Qualifications of Presiding Officer; *ex parte* discussion of the proceeding.
24.10 Scheduling the hearing; pre-hearing submissions by respondent.
24.11 Hearing; oral presentations and written submissions by the parties.
24.12 Summary of hearing; Presiding Officer's recommendation.

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24.13 Qualifications of Presiding Officer; *ex parte* discussion of the proceeding.
24.14 Scheduling the hearing; pre-hearing submissions by the parties.
24.15 Hearing; oral presentations and written submissions by the parties.
24.16 Transcript or recording of hearing.
24.17 Presiding Officer's recommendation.

Subpart D—Post-Hearing Procedures

24.18 Final decision.
24.19 Final order.
24.20 Final agency action.

AUTHORITY: 42 U.S.C. sections 6912, 6928, 6991b.

SOURCE: 53 FR 12263, Apr. 13, 1988, unless otherwise noted.

Subpart A—General

§ 24.01 Scope of these rules.

(a) These rules establish procedures governing issuance of administrative orders for corrective action pursuant to sections 3008(h) and 9003(h) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (the Act), and conduct of administrative hearings on such orders, except as specified in paragraphs (b) and (c) of this section.

(b) The hearing procedures appearing at 40 CFR part 22 govern administrative hearings on any order issued pursuant to section 3008(h) of the Act which:

(1) Is contained within an administrative order that includes claims under section 3008(a) of the Act; or

(2) Includes a suspension or revocation of authorization to operate under section 3005(e) of the Act; or

(3) Seeks penalties under section 3008(h)(2) of the Act for non-compliance with a section 3008(h) order.

(c) The hearing procedures appearing at 40 CFR part 22 govern administrative hearings on any order issued pursuant to section 9003(h) of the Act that is contained within an administrative order that includes claims under section 9006 of the Act.

(d) Questions arising at any stage of the proceeding which are not addressed in these rules shall be resolved at the discretion of the Regional Administrator or Presiding Officer, as appropriate.

[53 FR 12263, Apr. 13, 1988, as amended at 56 FR 49380, Sept. 27, 1991]

§ 24.02 Issuance of initial orders; definition of final orders and orders on consent.

(a) An administrative action under section 3008(h) or 9003(h) of the Act shall be commenced by issuance of an administrative order. When the order is issued unilaterally, the order shall be referred to as an initial administrative order and may be referenced as a proceeding under section 3008(h) or 9003(h) of the Act. When the order has become effective, either after issuance of a final order following a final decision by the Regional Administrator, or after thirty days from issuance if no hearing is requested, the order shall be referred to as a final administrative order. Where the order is agreed to by the parties, the order shall be denominated as a final administrative order on consent.

(b) The initial administrative order shall be executed by an authorized official of EPA (petitioner), other than the Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response. For orders issued by EPA Headquarters, rather than by a Regional office, all references in these procedures to the Regional Administrator shall be understood to be to the Assistant Administrator for Solid Waste and Emergency Response or his delegatee.

(c) The initial administrative order shall contain:

(1) A reference to the legal authority pursuant to which the order is issued,

(2) A concise statement of the factual basis upon which the order is issued, and

(3) Notification of respondent's right to request a hearing with respect to any issue of material fact or the appropriateness of the proposed corrective action.

[53 FR 12263, Apr. 13, 1988, as amended at 56 FR 49380, Sept. 27, 1991]

§ 24.03 Maintenance of docket and official record.

(a) A Clerk shall be designated by the Regional Administrator to receive all

initial orders, final orders, decisions, responses, memoranda, and documents regarding the order and to maintain the official record and docket.

(b) On or before the date the initial order is served on respondent the EPA office issuing the order shall deliver to the Clerk (a copy of) the administrative record supporting the findings of fact, determinations of law, and relief sought in the initial administrative order. This record shall include all relevant documents and oral information (which has been reduced to writing), which the Agency considered in the process of developing and issuing the order, exclusive of privileged internal communications. The administrative record delivered to the Clerk must have an index and be available for review in the appropriate Agency Regional or Headquarters office during normal business hours after the order is issued.

§ 24.04 Filing and service of orders, decisions, and documents.

(a) *Filing of orders, decisions, and documents.* The original and one copy of the initial administrative order, the recommended decision of the Presiding Officer, the final decision and the final administrative order, and one copy of the administrative record and an index thereto must be filed with the Clerk designated for 3008(h) or 9003(h) orders. In addition, all memoranda and documents submitted in the proceeding shall be filed with the clerk.

(b) *Service of orders, decisions, and rulings.* The Clerk (or in the case of the initial administrative order, any other designated EPA employee) shall arrange for the effectuation of service of the initial administrative order, the recommended decision of the Presiding Officer, the final decision, and final administrative order. Service of a copy of the initial administrative order together with a copy of these procedures, the recommended decision of the Presiding Officer, the final decision, or a final administrative order, shall be made personally or by certified mail, return receipt requested or, if personal service cannot be effectuated or certified mail is returned refused or unsigned, by regular mail, on the respondent or his representative. The Clerk shall serve other documents from the Presiding Officer by regular mail.

(c) *Service of documents filed by the parties.* Service of all documents, filed by the parties, shall be made by the parties or their representatives on other parties or their representatives and may be regular mail, with the original filed with the Clerk. The original of any pleading, letter, or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter, or other document, that to the best of his knowledge, information, and belief, the statements made therein are true, and that it is not interposed for delay.

(d) *Service in general.* Service of orders, decisions, rulings, or documents by either the Clerk or the parties shall, in the case of a domestic or foreign corporation, a partnership, or other unincorporated association, which is subject to suit under a common name, be made, as prescribed in § 24.04 (b) and (c), upon an officer, partner, managing or general agent, or any person authorized by appointment or by Federal or State law to receive service of process.

(e) *Effective date of service.* Service of the initial administrative order and final administrative order is complete upon receipt by respondent (or the respondent's agent, attorney, representative or other person employed by respondent and receiving such service), personally or by certified mail, or upon mailing by regular mail, if personal service or service by certified mail cannot be accomplished, in accordance with § 24.04(b). Service of all other pleadings and documents is complete upon mailing, except as provided in §§ 24.10(b) and 24.14(e).

[53 FR 12263, Apr. 13, 1988, as amended at 56 FR 49380, Sept. 27, 1991]

§ 24.05 Response to the initial order; request for hearing.

(a) The initial administrative order becomes a final administrative order thirty (30) days after service of the order, unless the respondent files with the Clerk within thirty (30) days after service of the order, a response to the initial order and requests a hearing.

(b) The response to the initial order and request for a hearing must be in writing and mailed to, or personally served on, the Clerk of the Regional office which issued the order.

(c) The response to the initial order shall specify each factual or legal determination, or relief provision in the initial order the respondent disputes and shall briefly indicate the basis upon which it disputes such determination or provision.

(d) Respondent may include with its response to the initial order and request for a hearing a statement indicating whether it believes the subpart B or subpart C hearing procedures should be employed for the requested hearing and the reason(s) therefore.

§ 24.06 Designation of Presiding Officer.

Upon receipt of a request for a hearing, the Regional Administrator shall designate a Presiding Officer to conduct the hearing and preside over the proceedings.

§ 24.07 Informal settlement conference.

The respondent may request an informal settlement conference at any time by contacting the appropriate EPA employee, as specified in the initial administrative order. A request for an informal conference will not affect the respondent's obligations to timely request a hearing. Whether or not the respondent requests a hearing, the parties may confer informally concerning any aspect of the order. The respondent and respondent's representatives shall generally be allowed the opportunity at an informal conference to discuss with the appropriate Agency technical and legal personnel all aspects of the order, and in particular the basis for the determination that a release has occurred and the appropriateness of the ordered corrective action.

§ 24.08 Selection of appropriate hearing procedures.

(a) The hearing procedures set forth in subpart B of this part shall be employed for any requested hearing if the initial order directs the respondent—

(1) To undertake only a RCRA Facility Investigation and/or Corrective Measures Study, which may include monitoring, surveys, testing, information gathering, analyses, and/or studies (including studies designed to develop recommendations for appropriate corrective measures), or

(2) To undertake such investigations and/or studies and interim corrective measures, and if such interim corrective measures are neither costly nor technically complex and are necessary to protect human health and the environment prior to development of a permanent remedy, or

(3) To undertake investigations/studies with respect to a release from an underground storage tank.

(b) The hearing procedures set forth in subpart C of this part shall be employed if the respondent seeks a hearing on an order directing that—

(1) Corrective measures or such corrective measures together with investigations/studies be undertaken, or

(2) Corrective action or such corrective action together with investigations/studies be undertaken with respect to any release from an underground storage tank.

(c) The procedures contained in subparts A and D of this part shall be followed regardless of whether the initial order directs the respondent to undertake an investigation pursuant to the procedures in subpart B of this part, or requires the respondent to implement corrective measures pursuant to the procedures in subpart C of this part.

[56 FR 49380, Sept. 27, 1991]

Subpart B—Hearings on Orders Requiring Investigations or Studies

§ 24.09 Qualifications of Presiding Officer; ex parte discussion of the proceeding.

The Presiding Officer shall be either the Regional Judicial Officer (as described in 40 CFR 22.04(b)) or another attorney employed by the Agency, who has had no prior connection with the case, including the performance of any investigative or prosecuting functions. At no time after issuance of the initial administrative order and prior to issuance of the final order shall the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case, discuss *ex parte* the merits of the

proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an *ex parte* communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

§ 24.10 Scheduling the hearing; prehearing submissions by respondent.

(a) *Date and time for hearing.* The Presiding Officer shall establish the date, time, location, and agenda for the requested public hearing and transmit this information to the parties. Subject to § 24.10(c), the hearing shall be scheduled and held within thirty (30) days of the Agency's receipt of the request for a public hearing.

(b) *Pre-hearing submissions by respondent.* At any time up to five (5) business days before the hearing respondent may, but is not required to, submit for inclusion in the administrative record information and argument supporting respondent's positions on the facts, law and relief, as each relates to the order in question. A copy of any information or argument submitted by respondent shall be served such that the Clerk and petitioner receive same at least five (5) business days before hearing.

(c) *Postponment of hearing.* The Presiding Officer may grant an extension of time for the conduct of the hearing upon written request of either party, for good cause shown, and after consideration of any prejudice to other parties. The Presiding Officer may not extend the date by which the request for hearing is due under § 24.05(a).

(d) *Location of hearing.* The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

§ 24.11 Hearing; oral presentations and written submissions by the parties.

The Presiding Officer shall conduct the hearing in a fair and impartial way, taking action as needed to avoid unnecessary delay, exclude redundant material and maintain order during the proceedings. Representatives of EPA shall introduce the administrative record and be prepared to summarize the basis for the order. The respondent shall have a reasonable opportunity to address relevant issues and present its views through legal counsel or technical advisors. The Presiding Officer may also allow technical and legal discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or respondent an opportunity to engage in direct examination or cross-examination of witnesses. The Presiding Officer may address questions to the respondent's or EPA's representative(s) during the hearing. Each party shall insure that a representative(s) is (are) present at the hearing, who is (are) capable of responding to questions and articulating that party's position on the law and facts at issue. Where respondent can demonstrate that through no fault of its own certain documents supportive of its position could not have been submitted before hearing in accordance with the requirements of § 24.10(b), it may submit such documents at the hearing. Otherwise no new documentary support may be submitted at hearing. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this section or § 24.10(b). The Presiding Officer shall have the discretion to order either party to submit additional information (including but not limited to posthearing briefs on undeveloped factual, technical, or legal matters) in whatever form he deems appropriate either at or after the hearing.

§24.12 Summary of hearing; Presiding Officer's recommendation.

(a) As soon as practicable after the conclusion of the hearing a written summary of the proceeding shall be prepared. This summary shall, at a minimum, identify:

(1) The dates of and known attendees at the hearing; and

(2) The bases upon which the respondent contested the terms of the order.

The summary must be signed by the Presiding Officer.

(b) The Presiding Officer will evaluate the entire administrative record and, on the basis of that review and the representations of EPA and respondent at the hearing, shall prepare and file a recommended decision with the Regional Administrator. The recommended decision must address all material issues of fact or law properly raised by respondent, and must recommend that the order be modified, withdrawn or issued without modification. The recommended decision must provide an explanation with citation to material contained in the record for any decision to modify a term of the order, to issue the order without change, or to withdraw the order. The recommended decision shall be based on the administrative record. If the Presiding Officer finds that any contested relief provision in the order is not supported by a preponderance of the evidence in the record, the Presiding Officer shall recommend that the order be modified and issued on terms that are supported by the record or withdrawn.

(c) At any time within twenty-one (21) days of service of the recommended decision on the parties, the parties may file comments on the recommended decision with the Clerk. The Clerk shall promptly transmit any such comments received to the Regional Administrator for his consideration in reaching a final decision.

Subpart C—Hearings on Orders Requiring Corrective Measures

§24.13 Qualifications of Presiding Officer; ex parte discussion of the proceeding.

(a) *Qualifications of Presiding Officer.* The Presiding Officer shall be either the Regional Judicial Officer (as described in 40 CFR 22.04(b)) of another attorney employed by the Agency, who has had no prior connection with the case, including the performance of any investigative or prosecuting functions.

(b) *Ex parte discussion of the proceeding.* At no time after issuance of the initial administrative order and prior to issuance of the final order shall the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an *ex parte* communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

§24.14 Scheduling the hearing; prehearing submissions by the parties.

(a) The Presiding Officer shall establish an expeditious schedule for:

(1) The submission by respondent of a memorandum, with appropriate affidavits and exhibits, stating and supporting respondent's position on the facts, law and relief, specifying the bases upon and manner in which such determinations or relief provisions, if erroneous, require modification or withdrawal of the order:

(2) Submission of a response by EPA; and

(3) A public hearing.

Subject to § 24.14(b), a hearing shall be scheduled within 45 days of the order setting the schedule. The Presiding Officer shall establish the date, time, location and agenda for the hearing and shall transmit this information to the parties along with the schedule for the hearing.

(b) *Postponement of the hearing.* The Presiding Officer, as appropriate, may grant an extension of time for the filing of any document, other than a request for a hearing under § 24.05(a), or may grant an extension of time for the conduct of the hearing, upon written request of either party, for good cause shown and after consideration of any prejudice to other parties.

(c) *Respondent's pre-hearing submission.* In accordance with the schedule set by the Presiding Officer, the respondent shall file a memorandum stating and supporting respondent's position on the facts, law and relief. The memorandum must identify each factual allegation and all issues regarding the appropriateness of the terms of the relief in the initial order that respondent contests and for which respondent requests a hearing. The memorandum must clearly state respondent's position with respect to each such issue. Respondent must also include any proposals for modification of the order. The memorandum shall also present any arguments on the legal conclusions contained in the order.

(d) *Written questions to EPA.* The respondent may file a request with the Presiding Officer for permission to submit written questions to the EPA Regional Office issuing the order concerning issues of material fact in the order.

(1) Requests shall be accompanied by the proposed questions. In most instances, no more than twenty-five (25) questions, including subquestions and subparts, may be posed. The request and questions must be submitted to the Presiding Officer at least twenty-one (21) days before the hearing.

(2) The Presiding Officer may direct EPA to respond to such questions as he designates. In deciding whether or not to direct the Agency to respond to written questions the Presiding Officer should consider whether such responses are required for full disclosure and adequate resolution of the facts. No questions shall be allowed regarding privileged internal communications. The Presiding Officer shall grant, deny, or modify such requests expeditiously. If a request is granted the Presiding Officer may revise questions and may limit the number and scope of questions. Questions may be deleted or revised in the discretion of the Presiding Officer for reasons, which may include the fact that he finds the questions to be irrelevant, redundant, unnecessary, or an undue burden on the Agency. The Presiding Officer shall transmit the questions as submitted or as modified to EPA. EPA shall respond to the questions within fourteen (14) calendar days of service of the questions by the Presiding Officer, unless an extension is granted.

(e) *Submission of additional information.* The Presiding Officer shall have the discretion to order either party to submit additional information (including but not limited to post-hearing briefs on undeveloped factual, technical, or legal matters) in whatever form he deems appropriate either before, at, or after the hearing. The Presiding Officer may issue subpoenas for the attendance and testimony of persons and the production of relevant papers, books and documents. Since these hearing procedures provide elsewhere that the parties are not to engage in direct or cross-examination of witnesses, the subpoena power is to serve only as an adjunct to the Presiding Officer's authority to ask questions and otherwise take steps to clarify factual matters which are in dispute. Upon request of the respondent the Presiding Officer may, in his discretion, allow submittal by the respondent of additional information in support of its claim, if it is received by the Clerk and petitioner at least five (5) business days before the hearing.

(f) *Location of hearing.* The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

§24.15 Hearing; oral presentations and written submissions by the parties.

(a) The Presiding Officer shall conduct the hearing in a fair and impartial manner, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. The Presiding Officer shall permit oral statements on behalf of the respondent and EPA. The Presiding Officer may address questions to the respondent's or the EPA's representative(s) during the hearing. Each party shall ensure that a representative(s) is (are) present at the hearing, who is (are) capable of responding to questions and articulating that party's position on the law and facts at issue. Apart from questions by the Presiding Officer, no direct examination or cross-examination shall be allowed.

(b) Upon commencement of the hearing, a representative of EPA shall introduce the order and record supporting issuance of the order, and summarize the basis for the order. The respondent may respond to the administrative record and offer any facts, statements, explanations or documents which bear on any issue for which the hearing has been requested. Any such presentation by respondent may include new documents only to the extent that respondent can demonstrate that, through no fault of its own, such documents could not have been submitted before hearing in accordance with the requirements of §24.14 (c) and (e). The Agency may then present matters solely in rebuttal to matters previously presented by the respondent. The Presiding Officer may allow the respondent to respond to any such rebuttal submitted. The Presiding Officer may exclude repetitive or irrelevant matter. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this paragraph or §24.14(e).

§24.16 Transcript or recording of hearing.

(a) The hearing shall be either transcribed stenographically or tape recorded. Upon written request, such transcript or tape recording shall be made available for inspection or copying.

(b) The transcript or recording of the hearing and all written submittals filed with the Clerk by the parties subsequent to initial issuance of the order including post-hearing submissions will become part of the administrative record for the proceeding, for consideration by the Presiding Officer and Regional Administrator.

§24.17 Presiding Officer's recommendation.

(a) The Presiding Officer will, as soon as practicable after the conclusion of the hearing, evaluate the entire administrative record and, on the basis of the administrative record, prepare and file a recommended decision with the Regional Administrator. The recommended decision must address all material issues of fact or law properly raised by respondent, and must recommend that the order be modified, withdrawn or issued without modification. The recommended decision must provide an explanation, with citation to material contained in the record for any decision to modify a term of the order, to issue the order without change or to withdraw the order. The recommended decision shall be based on the administrative record. If the Presiding Officer finds that any contested relief provision in the order is not supported by a preponderance of the evidence in the record, the Presiding Officer shall recommend that the order be modified and issued on terms that are supported by the record, or withdrawn.

(b) At any time within twenty-one (21) days of service of the recommended decision on the parties, the parties may file comments on the recommended decision with the Clerk. The Clerk shall promptly transmit any such comments received to the Regional Administrator for his consideration in reaching a final decision.

Subpart D—Post-Hearing Procedures

§24.18 Final decision.

As soon as practicable after receipt of the recommended decision, the Regional Administrator will either sign or modify such recommended decision, and issue it as a final decision. If the

Regional Administrator modifies the recommended decision, he shall insure that the final decision indicates the legal and factual basis for the decision as modified. The Regional Administrator's decision shall be based on the administrative record.

§ 24.19 Final order.

If the Regional Administrator does not adopt portions of the initial order, or finds that modification of the order is necessary, the signatory official on the initial administrative order shall modify the order in accordance with the terms of the final decision and file and serve a copy of the final administrative order. If the Regional Administrator finds the initial order appropriate as originally issued, the final decision shall declare the initial administrative order to be a final order, effective upon service of the final decision. If the Regional Administrator declares that the initial order must be withdrawn, the signatory official on the initial administrative order will file and serve a withdrawal of the initial administrative order. This may be done without prejudice.

§ 24.20 Final agency action.

The final decision and the final administrative order are final agency actions that are effective on filing and service. These actions are not appealable to the Administrator.

PART 25—PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Sec.

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25.12 Assuring compliance with public participation requirements.
25.13 Coordination and non-duplication.
25.14 Termination of reporting requirements.

AUTHORITY: Sec. 101(e), Clean Water Act, as amended (33 U.S.C. 1251(e)); sec. 7004(b), Resource Conservation and Recovery Act (42 U.S.C. 6974(b)); sec. 1450(a)(1), Safe Drinking Water Act, as amended (42 U.S.C. 300j–9).

SOURCE: 44 FR 10292, Feb. 16, 1979, unless otherwise noted.

§ 25.1 Introduction.

This part sets forth minimum requirements and suggested program elements for public participation in activities under the Clean Water Act (Pub. L. 95–217), the Resource Conservation and Recovery Act (Pub. L. 94–580), and the Safe Drinking Water Act (Pub. L. 93–523). The applicability of the requirements of this part is as follows:

(a) Basic requirements and suggested program elements for public information, public notification, and public consultation are set forth in § 25.4. These requirements are intended to foster public awareness and open processes of government decisionmaking. They are applicable to all covered activities and programs described in § 25.2(a).

(b) Requirements and suggested program elements which govern the structure of particular public participation mechanisms (for example, advisory groups and responsiveness summaries) are set forth in §§ 25.5, 25.6, 25.7, and 25.8. This part does not mandate the use of these public participation mechanisms. It does, however, set requirements which those responsible for implementing the mechanisms must follow if the mechanisms are required elsewhere in this chapter.

(c) Requirements which apply to Federal financial assistance programs (grants and cooperative agreements) under the three acts are set forth in §§ 25.10 and 25.12(a).

(d) Requirements for public involvement which apply to specific activities are set forth in § 25.9 (Permit enforcement), § 25.10 (Rulemaking), and § 25.12 (Assuring compliance with requirements).

§25.2 Scope.

(a) The activities under the three Acts which are covered by this part are:

(1) EPA rulemaking, except non-policy rulemaking (for example publication of funding allotments under statutory formulas); and State rulemaking under the Clean Water Act and Resource Conservation and Recovery Act;

(2) EPA issuance and modification of permits, and enforcement of permits as delineated by §25.9;

(3) Development by EPA of major informational materials, such as citizen guides or handbooks, which are expected to be used over several years and which are intended to be widely distributed to the public;

(4) Development by EPA of strategy and policy guidance memoranda when a Deputy Assistant Administrator determines it to be appropriate;

(5) Development and implementation of plans, programs, standards, construction, and other activities supported with EPA financial assistance (grants and cooperative agreements) to State, interstate, regional and local agencies (herein after referred to as "State, interstate, and substate agencies");

(6) The process by which EPA makes a determination regarding approval of State administration of the Construction Grants program in lieu of Federal administration; and the administration of the Construction Grants Program by the State after EPA approval;

(7) The process by which EPA makes a determination regarding approval of State administration of the following programs in lieu of Federal administration: The State Hazardous Waste Program; the NPDES Permit Program; the Dredge and Fill Permit Program; and the Underground Injection Control Program;

(8) Other activities which the Assistant Administrator for Water and Waste Management, the Assistant Administrator for Enforcement, or any EPA Regional Administrator deems appropriate in view of the Agency's responsibility to involve the public in significant decisions.

(b) Activities which are not covered by this part, except as otherwise provided under (a)(8) or (c) of this section, are activities under parts 33 (Subagreements), 39 (Loan Guarantees for Construction of Treatment Works), 40 (Research and Development Grants), 45 (Training Grants and Manpower Forecasting) and 46 (Fellowships) of this chapter.

(c) Some programs covered by these regulations contain further provisions concerning public participation. These are found elsewhere in this chapter in provisions which apply to the program of interest. Regulations which govern the use and release of public information are set forth in part 2 of this chapter.

(d) Specific provisions of court orders which conflict with requirements of this part, such as court-established timetables, shall take precedence over the provisions in this part.

(e) Where the State undertakes functions in the construction grants program, the State shall be responsible for meeting these requirements for public participation, and any applicable public participation requirements found elsewhere in this chapter, to the same extent as EPA.

(f) Where the State undertakes functions in those programs specifically cited in §25.2(a)(7), the State shall be responsible for meeting the requirements for public participation included in the applicable regulations governing those State programs. The requirements for public participation in State Hazardous Waste Programs, Dredge and Fill Permit programs, Underground Injection Control programs and NPDES permit programs are found in part 123 of this chapter. These regulations embody the substantive requirements of this part.

(g) These regulations apply to the activities of all agencies receiving EPA financial assistance which is awarded after [the effective date of final regulations], and to all other covered activities of EPA, State, interstate, and substate agencies which occur after that date. These regulations will apply to ongoing grants or other covered activities upon any significant change in the activity (for example, upon a significant proposed increase in project scope of a construction grant). Parts 105

(Public Participation in Water Pollution Control) and 249 (Public Participation in Solid Waste Management) will no longer appear in the Code of Federal Regulations; however, they will remain applicable, in uncodified form, to grants awarded prior to the effective date of this part and to all other ongoing activities.

§ 25.3 Policy and objectives.

(a) EPA, State, interstate, and substate agencies carrying out activities described in § 25.2(a) shall provide for, encourage, and assist the participation of the public. The term, "the public" in the broadest sense means the people as a whole, the general populace. There are a number of identifiable "segments of the public" which may have a particular interest in a given program or decision. Interested and affected segments of the public may be affected directly by a decision, either beneficially or adversely; they may be affected indirectly; or they may have some other concern about the decision. In addition to private citizens, the public may include, among others, representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations.

(b) Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official. Disagreement on significant issues is to be expected among government agencies and the diverse groups interested in and affected by public policy decisions. Public agencies should encourage full presentation of issues at an early stage so that they can be resolved and timely decisions can be made. In the course of this process, responsible officials should make special efforts to encourage and assist participation by citizens representing themselves and by others whose resources and access to decision-making may be relatively limited.

(c) The following are the objectives of EPA, State, interstate, and substate agencies in carrying out activities covered by this part:

(1) To assure that the public has the opportunity to understand official programs and proposed actions, and that the government fully considers the public's concerns;

(2) To assure that the government does not make any significant decision on any activity covered by this part without consulting interested and affected segments of the public;

(3) To assure that government action is as responsive as possible to public concerns;

(4) To encourage public involvement in implementing environmental laws;

(5) To keep the public informed about significant issues and proposed project or program changes as they arise;

(6) To foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public; and

(7) To use all feasible means to create opportunities for public participation, and to stimulate and support participation.

§ 25.4 Information, notification, and consultation responsibilities.

(a) *General.* EPA, State, interstate, and substate agencies shall conduct a continuing program for public information and participation in the development and implementation of activities covered by this part. This program shall meet the following requirements:

(b) *Information and assistance requirements.* (1) Providing information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and facilitate the public's participation in all significant decisions covered by § 25.2(a), particularly where alternative courses of action are proposed.

(2) Each agency shall provide the public with continuing policy, program, and technical information and assistance beginning at the earliest

practicable time. Informational materials shall highlight significant issues that will be the subject of decision-making. Whenever possible, consistent with applicable statutory requirements, the social, economic, and environmental consequences of proposed decisions shall be clearly stated in such material. Each agency shall identify segments of the public likely to be affected by agency decisions and should consider targeting informational materials toward them (in addition to the materials directed toward the general public). Lengthy documents and complex technical materials that relate to significant decisions should be summarized for public and media uses. Fact sheets, news releases, newsletters, and other similar publications may be used to provide notice that materials are available and to facilitate public understanding of more complex documents, but shall not be a substitute for public access to the full documents.

(3) Each agency shall provide one or more central collections of reports, studies, plans, and other documents relating to controversial issues or significant decisions in a convenient location or locations, for example, in public libraries. Examples of such documents are catalogs of documents available from the agency, grant applications, fact sheets on permits and permit applications, permits, effluent discharge information, and compliance schedule reports. Copying facilities at reasonable cost should be available at the depositories.

(4) Whenever possible, agencies shall provide copies of documents of interest to the public free of charge. Charges for copies should not exceed prevailing commercial copying costs. EPA requirements governing charges for information and documents provided to the public in response to requests made under the Freedom of Information Act are set forth in part 2 of this chapter. Consistent with the objectives of §25.3(b), agencies may reserve their supply of free copies for private citizens and others whose resources are limited.

(5) Each agency shall develop and maintain a list of persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity. Generally, this list will be most useful where subdivided by area of interest or geographic area. Whenever possible, the list should include representatives of the several categories of interests listed under §25.3(a). Those on the list, or relevant portions if the list is subdivided, shall receive timely and periodic notification of the availability of materials under §25.4(b)(2).

(c) *Public notification.* Each agency shall notify interested and affected parties, including appropriate portions of the list required by paragraph (b)(5) of this section, and the media in advance of times at which major decisions not covered by notice requirements for public meetings or public hearings are being considered. Generally, notices should include the timetable in which a decision will be reached, the issues under consideration, any alternative courses of action or tentative determinations which the agency has made, a brief listing of the applicable laws or regulations, the location where relevant documents may be reviewed or obtained, identification of any associated public participation opportunities such as workshops or meetings, the name of an individual to contact for additional information, and any other appropriate information. All advance notifications under this paragraph must be provided far enough in advance of agency action to permit time for public response; generally this should not be less than 30 days.

(d) *Public consultation.* For the purposes of this part, "public consultation" means an exchange of views between governmental agencies and interested or affected persons and organizations in order to meet the objectives set forth in §25.3. Requirements for three common forms of public consultation (public hearings, public meetings, and advisory groups) are set forth in §§25.5, 25.6, and 25.7. Other less formal consultation mechanisms may include but are not limited to review groups, ad hoc committees, task forces, workshops, seminars and informal personal communications with individuals and groups. Public consultation must be

preceded by timely distribution of information and must occur sufficiently in advance of decision-making to allow the agency to assimilate public views into agency action. EPA, State, interstate, and substate agencies shall provide for early and continuing public consultation in any significant action covered by this part. Merely conferring with the public after an agency decision does not meet this requirement. In addition to holding hearings and meetings as specifically required in this chapter, a hearing or meeting shall be held if EPA, the State, interstate, or substate agency determines that there is significant public interest or that a hearing or meeting would be useful.

(e) *Public information concerning legal proceedings.* EPA, State, interstate, and substate agencies shall provide full and open information on legal proceedings to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation. EPA actions with regard to affording opportunities for public comment before the Department of Justice consents to a proposed judgment in an action to enjoin discharges of pollutants into the environment shall be consistent with the Statement of Policy issued by the Department of Justice (see title 28, CFR, chapter 1, § 50.7).

§ 25.5 Public hearings.

(a) *Applicability.* Any non-adjudicatory public hearing, whether mandatory or discretionary, under the three Acts shall meet the following minimum requirements. These requirements are subordinate to any more stringent requirements found elsewhere in this chapter or otherwise imposed by EPA, State, interstate, or substate agencies. Procedures developed for adjudicatory hearings required by this chapter shall be consistent with the public participation objectives of this part, to the extent practicable.

(b) *Notice.* A notice of each hearing shall be well publicized, and shall also be mailed to the appropriate portions of the list of interested and affected parties required by § 25.4(b)(5). Except as otherwise specifically provided elsewhere in this chapter, these actions must occur at least 45 days prior to the date of the hearing. However, where EPA determines that there are no substantial documents which must be reviewed for effective hearing participation and that there are no complex or controversial matters to be addressed by the hearing, the notice requirement may be reduced to no less than 30 days. EPA may further reduce or waive the hearing notice requirement in emergency situations where EPA determines that there is an imminent danger to public health. To the extent not duplicative, the agency holding the hearing shall also provide informal notice to all interested persons or organizations that request it. The notice shall identify the matters to be discussed at the hearing and shall include or be accompanied by a discussion of the agency's tentative determination on major issues (if any), information on the availability of a bibliography of relevant materials (if deemed appropriate), and procedures for obtaining further information. Reports, documents and data relevant to the discussion at the public hearing shall be available to the public at least 30 days before the hearing. Earlier availability of materials relevant to the hearing will further assist public participation and is encouraged where possible.

(c) *Locations and time.* Hearings must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public. Accessibility of public transportation, and use of evening and weekend hearings, should be considered. In the case of actions with Statewide interest, holding more than one hearing should be considered.

(d) *Scheduling presentations.* The agency holding the hearing shall schedule witnesses in advance, when necessary, to ensure maximum participation and allotment of adequate time for all speakers. However, the agency shall reserve some time for unscheduled testimony and may consider reserving blocks of time for major categories of witnesses.

(e) *Conduct of hearing.* The agency holding the hearing shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if

any), and the information which is particularly solicited from the public. The agency should consider allowing a question and answer period. Procedures shall not unduly inhibit free expression of views (for example, by onerous written statement requirements or qualification of witnesses beyond minimum identification).

(f) *Record.* The agency holding the hearing shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it. A copy of the record shall be available for public review.

§25.6 Public meetings.

Public meetings are any assemblies or gathering, (such as conferences, informational sessions, seminars, workshops, or other activities) which the responsible agency intends to be open to anyone wishing to attend. Public meetings are less formal than public hearings. They do not require formal presentations, scheduling of presentations and a record of proceedings. The requirements of §25.5 (b) and (c) are applicable to public meetings, except that the agency holding the meeting may reduce the notice to not less than 30 days if there is good reason that longer notice cannot be provided.

§25.7 Advisory groups.

(a) *Applicability.* The requirements of this section on advisory groups shall be met whenever provisions of this chapter require use of an advisory group by State, interstate, or substate agencies involved in activities supported by EPA financial assistance under any of the three Acts.

(b) *Role.* Primary responsibility for decision-making in environmental programs is vested by law in the elected and appointed officials who serve on public bodies and agencies at various levels of government. However, all segments of the public must have the opportunity to participate in environmental quality planning. Accordingly, where EPA identifies a need for continued attention of an informed core group of citizens in relation to activities conducted with EPA financial assistance, program regulations elsewhere in this chapter will require an advisory group to be appointed by the financially assisted agency. Such advisory groups will not be the sole mechanism for public participation, but will complement other mechanisms. They are intended to assist elected or appointed officials with final decision-making responsibility by making recommendations to such officials on important issues. In addition, advisory groups should foster a constructive interchange among the various interests present on the group and enhance the prospect of community acceptance of agency action.

(c) *Membership.* (1) The agency receiving financial assistance shall assure that the advisory group reflects a balance of interests in the affected area. In order to meet this requirement, the assisted agency shall take positive action, in accordance with paragraph (c)(3) of this section, to establish an advisory group which consists of substantially equivalent proportions of the following four groups:

(i) *Private citizens.* No person may be included in this portion of the advisory group who is likely to incur a financial gain or loss greater than that of an average homeowner, taxpayer or consumer as a result of any action likely to be taken by the assisted agency.

(ii) *Representatives of public interest groups.* A "public interest group" is an organization which reflects a general civic, social, recreational, environmental or public health perspective in the area and which does not directly reflect the economic interests of its membership.

(iii) Public officials.

(iv) Citizens or representatives of organizations with substantial economic interests in the plan or project.

(2) Generally, where the activity has a particular geographic focus, the advisory group shall be made up of persons who are residents of that geographic area.

(3) In order to meet the advisory group membership requirements of paragraph (c)(1) of this section, the assisted agency shall:

(i) Identify public interest groups, economic interests, and public officials who are interested in or affected by the assisted activity.

(ii) Make active efforts to inform citizens in the affected area, and the persons or groups identified under paragraph (c)(3)(i) of this section, of this opportunity for participation on the advisory group. This may include such actions as placing notices or announcements in the newspapers or other media, mailing written notices to interested parties, contacting organizations or individuals directly, requesting organizations to notify their members through meetings, newsletters, or other means.

(iii) Where the membership composition set forth in paragraph (c)(1) of this section is not met after the above actions, the assisted agency shall identify the causative problems and make additional efforts to overcome such problems. For example, the agency should make personal contact with prospective participants to invite their participation.

(iv) Where problems in meeting the membership composition arise, the agency should request advice and assistance from EPA.

(d) The assisted agency shall record the names and mailing addresses of each member of the advisory group, with the attributes of each in relation to the membership requirements set forth in paragraph (c)(1) of this section, provide a copy to EPA, and make the list available to the public. In the event that the membership requirements set forth in paragraph (c)(1) of this section are not met, the assisted agency shall append to the list a description of its efforts to comply with those requirements and an explanation of the problems which prevented compliance. EPA shall review the agency's efforts to comply and approve the advisory group composition or, if the agency's efforts were inadequate, require additional actions to achieve the required membership composition.

(e) *Responsibilities of the assisted agency.* (1) The assisted agency shall designate a staff contact who will be responsible for day-to-day coordination among the advisory group, the agency, and any agency contractors or consultants. The financial assistance agreement shall include a budget item for this staff contact. Where substantial portions of the assisted agency's responsibilities will be met under contract, the agency shall require a similar designation, and budget specification, of its contractor. In the latter event, the assisted agency does not have to designate a separate staff contact on its own staff, if the Regional Administrator determines that the contractor's designation will result in adequate coordination. The staff contact shall be located in the project area.

(2) The assisted agency has such responsibilities as providing the advisory group with information, identifying issues for the advisory group's consideration, consulting with the advisory group throughout the project, requesting the advisory group's recommendations prior to major decisions, transmitting advisory group recommendations to decision-making officials, and making written responses to any formal recommendation by the advisory group. The agency shall make any such written responses available to the public. To the maximum extent feasible, the assisted agency shall involve the advisory group in the development of the public participation program.

(3) The assisted agency shall identify professional and clerical staff time which the advisory group may depend upon for assistance, and provide the advisory group with an operating budget which may be used for technical assistance and other purposes agreed upon between the advisory group and the agency.

(4) The assisted agency shall establish a system to make costs of reasonable out-of-pocket expenses of advisory group participation available to group members. Time away from work need not be reimbursed; however, assisted agencies are encouraged to schedule meetings at times and places which will not require members to leave their jobs to attend.

(f) *Advisory group responsibilities and duties.* The advisory group may select its own chairperson, adopt its own rules of order, and schedule and conduct its own meetings. Advisory group meetings shall be announced well in advance and shall be open to the public. At all meetings, the advisory group shall provide opportunity for public comment. Any minutes of advisory

group meetings and recommendations to the assisted agency shall be available to the public. The advisory group should monitor the progress of the project and become familiar with issues relevant to project development. In the event the assisted agency and the advisory group agree that the advisory group will assume public participation responsibilities, the group should undertake those responsibilities promptly. The advisory group should make written recommendations directly to the assisted agency and to responsible decision-making officials on major decisions (including approval of the public participation program) and respond to any requests from the agency or decision-making officials for recommendations. The advisory group should remain aware of community attitudes and responses to issues as they arise. As part of this effort, the advisory group may, within the limitations of available resources, conduct public participation activities in conjunction with the assisted agency; solicit outside advice; and establish, in conjunction with the assisted agency, subcommittees, ad hoc groups, or task forces to investigate and develop recommendations on particular issues as they arise. The advisory group should undertake its responsibilities fully and promptly in accordance with the policies and requirements of this part. Nothing shall preclude the right of the advisory group from requesting EPA to perform an evaluation of the assisted agency's compliance with the requirements of this part.

(g) *Training and assistance.* EPA will promptly provide appropriate written guidance and project information to the newly formed advisory group and may provide advice and assistance to the group throughout the life of the project. EPA will develop and, in conjunction with the State or assisted agency, carry out a program to provide a training session for the advisory group, and appropriate assisted agency representatives, promptly after the advisory group is formed. The assisted agency shall provide additional needed information or assistance to the advisory group.

§25.8 Responsiveness summaries.

Each agency which conducts any activities required under this part shall prepare a Responsiveness Summary at specific decision points as specified in program regulations or in the approved public participation work plan. Responsiveness Summaries are also required for rulemaking activities under §25.10. Each Responsiveness Summary shall identify the public participation activity conducted; describe the matters on which the public was consulted; summarize the public's views, significant comments, criticisms and suggestions; and set forth the agency's specific responses in terms of modifications of the proposed action or an explanation for rejection of proposals made by the public. Responsiveness Summaries prepared by agencies receiving EPA financial assistance shall also include evaluations by the agency of the effectiveness of the public participation program. Assisted agencies shall request such evaluations from any advisory group and provide an opportunity for other participating members of the public to contribute to the evaluation. (In the case of programs with multiple responsiveness summary requirements, these analyses need only be prepared and submitted with the final summary required.) Responsiveness summaries shall be forwarded to the appropriate decision-making official and shall be made available to the public. Responsiveness Summaries shall be used as part of evaluations required under this part or elsewhere in this chapter.

§25.9 Permit enforcement.

Each agency administering a permit program shall develop internal procedures for receiving evidence submitted by citizens about permit violations and ensuring that it is properly considered. Public effort in reporting violations shall be encouraged, and the agency shall make available information on reporting procedures. The agency shall investigate alleged violations promptly.

§25.10 Rulemaking.

(a) EPA shall invite and consider written comments on proposed and interim regulations from any interested

or affected persons and organizations. All such comments shall be part of the public record, and a copy of each comment shall be available for public inspection. EPA will maintain a docket of comments received and any Agency responses. Notices of proposed and interim rulemaking, as well as final rules and regulations, shall be distributed in accordance with §25.4(c) to interested or affected persons promptly after publication. Each notice shall include information as to the availability of the full texts of rules and regulations (where these are not set forth in the notice itself) and places where copying facilities are available at reasonable cost to the public. Under Executive Order 12044 (March 23, 1978), further EPA guidance will be issued concerning public participation in EPA rulemaking. A Responsiveness Summary shall be published as part of the preamble to interim and final regulations. In addition to providing opportunity for written comments on proposed and interim regulations, EPA may choose to hold a public hearing.

(b) State rulemaking specified in §25.2(a)(1) shall be in accord with the requirements of paragraph (a) of this section or with the State's administrative procedures act, if one exists. However, in the event of conflict between a provision of paragraph (a) of this section and a provision of a State's administrative procedures act, the State's law shall apply.

§ 25.11 Work elements in financial assistance agreements.

(a) This section is applicable to activities under §25.2(a)(5) except as otherwise provided in parts 30 or 35.

(b) Each applicant for EPA financial assistance shall set forth in the application a public participation work plan or work element which reflects how public participation will be provided for, encouraged, and assisted in accordance with this part. This work plan or element shall cover the project period. At a minimum, the work plan or element shall include:

(1) Staff contacts and budget resources to be devoted to public participation by category;

(2) A proposed schedule for public participation activities to impact major decisions, including consultation points where responsiveness summaries will be prepared;

(3) An identification of consultation and information mechanisms to be used;

(4) The segments of the public targeted for involvement.

(c) All reasonable costs of public participation incurred by assisted agencies which are identified in an approved public participation work plan or element, or which are otherwise approved by EPA, shall be eligible for financial assistance.

(d) The work plan or element may be revised as necessary throughout the project period with approval of the Regional Administrator.

§ 25.12 Assuring compliance with public participation requirements.

(a) *Financial assistance programs*—(1) *Applications.* EPA shall review the public participation work plan (or, if no work plan is required by this chapter for the particular financial assistance agreement, the public participation element) included in the application to determine consistency with all policies and requirements of this part. No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements of this part and, any applicable public participation requirements found elsewhere in this chapter, will be met.

(2) *Compliance*—(i) *Evaluation.* EPA shall evaluate compliance with public participation requirements using the work plan, responsiveness summary, and other available information. EPA will judge the adequacy of the public participation effort in relation to the objectives and requirements of §25.3 and §25.4 and other applicable requirements. In conducting this evaluation, EPA may request additional information from the assisted agency, including records of hearings and meetings, and may invite public comment on the agency's performance. The evaluation will be undertaken as part of any mid-project review required in various programs under this chapter; where no such review is required the review shall be conducted at an approximate midpoint in continuing EPA oversight activity. EPA may, however, undertake

such evaluation at any point in the project period, and will do so whenever it believes that an assisted agency may have failed to meet public participation requirements.

(ii) *Remedial actions.* Whenever EPA determines that an assisted agency has not fully met public participation requirements, EPA shall take actions which it deems appropriate to mitigate the adverse effects of the failure and assure that the failure is not repeated. For ongoing projects, that action shall include, at a minimum, imposing more stringent requirements on the assisted agency for the next budget period or other period of the project (including such actions as more specific output requirements and milestone schedules for output achievement; interim EPA review of public participation activities and materials prepared by the agency, and phased release of funds based on compliance with milestone schedules.) EPA may terminate or suspend part or all financial assistance for non-compliance with public participation requirements, and may take any further actions that it determines to be appropriate in accordance with parts 30 and 35 of this chapter (see, in particular, §§30.340, Noncompliance and 30.615–3, Withholding of Payments, and subpart H of part 30, Modification, Suspension, and Termination).

(b) *State programs approved in lieu of Federal programs.* State compliance with applicable public participation requirements in programs specified in §25.2(a) (6) and (7) and administered by approved States shall be monitored by EPA during the annual review of the State's program, and during any financial or program audit or review of these programs. EPA may withdraw an approved program from a State for failure to comply with applicable public participation requirements.

(c) *Other covered programs.* Assuring compliance with these public participation requirements for programs not covered by paragraphs (a) and (b) of this section is the responsibility of the Administrator of EPA. Citizens with information concerning alleged failures to comply with the public participation requirements should notify the Administrator. The Administrator will assure that instances of alleged non-compliance are promptly investigated and that corrective action is taken where necessary.

§25.13 Coordination and non-duplication.

The public participation activities and materials that are required under this part should be coordinated or combined with those of closely related programs or activities wherever this will enhance the economy, the effectiveness, or the timeliness of the effort; enhance the clarity of the issue; and not be detrimental to participation by the widest possible public. Hearings and meetings on the same matter may be held jointly by more than one agency where this does not conflict with the policy of this paragraph. Special efforts shall be made to coordinate public participation procedures under this part and applicable regulations elsewhere in this chapter with environmental assessment and analysis procedures under 40 CFR part 6. EPA encourages interstate agencies in particular to develop combined proceedings for the States concerned.

§25.14 Termination of reporting requirements.

All reporting requirements specifically established by this part will terminate on (5 years from date of publication) unless EPA acts to extend the requirements beyond that date.

PART 26—PROTECTION OF HUMAN SUBJECTS

Sec.

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AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 300v–1(b).

SOURCE: 56 FR 28012, 28022, June 18, 1991, unless otherwise noted.

§ 26.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any Federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States.

(1) Research that is conducted or supported by a Federal department or agency, whether or not it is regulated as defined in § 26.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a Federal department or agency but is subject to regulation as defined in § 26.102(e) must be reviewed and approved, in compliance with § 26.101, § 26.102, and § 26.107 through § 26.117 of this policy, by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and

(ii) Any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or

(ii) Federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs;

(ii) Procedures for obtaining benefits or services under those programs;

(iii) Possible changes in or alternatives to those programs or procedures; or

(iv) Possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies,

(i) If wholesome foods without additives are consumed or

(ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent Federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any State or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Protection from Research Risks, Department of Health and Human Services (HHS), and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures.[1]

[56 FR 28012, 28022, June 18, 1991, 56 FR 29756, June 28, 1991]

[1] Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A–D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners, fetuses, pregnant women, or human in vitro fertilization, subparts B and C. The exemption at 45 CFR 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

§ 26.102 Definitions.

(a) *Department or agency head* means the head of any Federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including Federal, State, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation,* and similar terms are intended to encompass those research activities for which a Federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a Federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. "Private information" includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and Federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

§ 26.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a Federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements

set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Protection from Research Risks, HHS, and approved for federalwide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Protection from Research Risks, HHS.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to Federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under § 26.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with § 26.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Protection from Research Risks, HHS.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through

such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a Federal department or agency and not otherwise exempted or waived under § 26.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by § 26.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by § 26.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

(Approved by the Office of Management and Budget under control number 9999–0020)

[56 FR 28012, 28022, June 18, 1991, 56 FR 29756, June 28, 1991]

§§ 26.104–26.106 [Reserved]

§ 26.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which

the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§26.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in §26.103(b)(4) and, to the extent required by, §26.103(b)(5).

(b) Except when an expedited review procedure is used (see §26.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

§26.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with §26.116. The IRB may require that information, in addition to that specifically mentioned in §26.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with §26.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

(Approved by the Office of Management and Budget under control number 9999–0020)

§26.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the FEDERAL REGISTER. A copy of the list is available from the Office for Protection from Research Risks, National Institutes of Health, HHS, Bethesda, Maryland 20892.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in §26.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method

for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

§ 26.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by § 26.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by § 26.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 26.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 26.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 26.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a

cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

§ 26.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described is § 26.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in § 26.103(b)(4) and § 26.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by § 26.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 26.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of State or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable Federal, State, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable Federal, State, or local law.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 26.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed

consent required by § 26.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 26.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

(Approved by the Office of Management and Budget under control number 9999–0020)

§ 26.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under § 26.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

§ 26.119 Research undertaken without the intention of involving human subjects.

In the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

§ 26.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.

The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and

the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

§ 26.121 [Reserved]

§ 26.122 Use of Federal funds.

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§ 26.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to Federal regulation).

§ 26.124 Conditions.

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

PART 27—PROGRAM FRAUD CIVIL REMEDIES

Sec.

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AUTHORITY: 31 U.S.C. 3801–3812; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Pub. L. 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

SOURCE: 53 FR 15182, Apr. 27, 1988, unless otherwise noted.

§27.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law No. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Environmental Protection Agency, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§27.2 Definitions.

Administrative Law Judge means an administrative law judge in the Authority appointed pursuant to 5 U.S.C. 3105 or detailed to the Authority pursuant to 5 U.S.C. 3344.

Administrator means the Administrator of the United States Environmental Protection Agency.

Authority means the United States Environmental Protection Agency.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under §27.7.

Defendant means any person alleged in a complaint under §27.7 to be liable for a civil penalty or assessment under §27.3.

Environmental Appeals Board means the Board within the Agency described in §1.25 of this title.

Government means the United States Government.

Hearing Clerk means the Office of the Hearing Clerk (1900), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Individual means a natural person.

Initial decision means the written decision of the presiding officer required by §27.10 or §27.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the United States Environmental Protection Agency or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of those terms.

Presiding officer means the administrative law judge designated by the Chief administrative law judge to serve as presiding officer.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, or other representative who must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

Reviewing official means the General Counsel of the Authority or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the Authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from,

the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§ 27.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes, or is supported by, any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $6,500[1] for each such claim [The regulatory penalty provisions of this part effective on January 30, 1997 remain in effect for any violation of law occurring between January 30, 1997 and March 15, 2004.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Authority, recipient, or party when such claim is actually made to an an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority, recipient, or party.

[1] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section, shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, factitious, or fraudulent; or

(B) Is false, factitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than 6,500[2] for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the Authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such Authority.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[53 FR 15182, Apr. 27, 1988, as amended at 61 FR 69366, Dec. 31, 1996; 69 FR 7126, Feb. 13, 2004]

§27.4 Investigation.

(a) If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating

[2] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

official to report violations of criminal law to the Attorney General.

§ 27.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 27.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 27.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 27.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 27.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 27.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 27.7 only if—

(1) The Department of Justice approves the issuance of a complaint in written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 27.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 27.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person, claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 27.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 27.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statuory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal as provided in § 27.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 27.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§27.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting requirements of paragraph (b) of this section. The reviewing official shall file promptly with the hearing clerk the complaint, the general answer denying liability, and the request for an extension of time as provided in §27.11. Upon assignment to a presiding officer, the presiding officer may, for good cause shown, grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§27.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in §27.9(a), the reviewing official may file the complaint with the hearing clerk as provided in §27.11.

(b) Upon assignment of the complaint to a presiding officer, the presiding officer shall promptly serve on defendant in the manner prescribed in §27.8, a notice that an initial decision will be issued under this section.

(c) The presiding officer shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under §27.3, the presiding officer shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the presiding officer shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the presiding officer denying a defendant's motion under paragraph (e) of this section, is not subject to reconsideration under §27.38.

(h) The defendant may appeal to the Environmental Appeals Board the decision denying a motion to reopen by filing a notice of appeal within 15 days after the presiding officer denies the section. The timely filing of a notice of appeal shall stay the initial decision the Environmental Appeals Board decides the issue.

(i) If the defendant files a timely notice of appeal, the presiding officer shall forward the record of the proceeding to the Environmental Appeals Board.

(j) The Environmental Appeals Board shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the presiding officer.

(k) If the Environmental Appeals Board decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the Environmental Appeals Board shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

(l) If the Environmental Appeals Board decides that the defendant's failure to file a timely answer is not excused, the Environmental Appeals Board shall reinstate the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the Environmental Appeals Board issues such decision.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§ 27.11 Referral of complaint and answer to the presiding officer.

(a) Upon receipt of an answer, the reviewing official shall file the complaint and answer with the hearing clerk.

(b) The hearing clerk shall forward the complaint and answer to the Chief administrative law judge who shall assign himself or herself or another administrative law judge as presiding officer. The presiding officer shall then obtain the complaint and answer from the Chief administrative law judge and notify the parties of his or her assignment.

§ 27.12 Notice of hearing.

(a) When the presiding officer obtains the complaint and answer, the presiding officer shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 27.8. At the same time, the presiding officer shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The date, time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the presiding officer deems appropriate.

(c) The presiding officer shall issue the notice of hearing at least twenty (20) days prior to the date set for the hearing.

§ 27.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 27.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Authority who takes part in investigating, preparing, or presenting a particular case, may not, in such case or a factually related case—

(1) Participate in the hearing as the presiding officer;

(2) Participate or advise in the initial decision or the review of the initial decision by the Environmental Appeals Board, except as a witness or representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) Neither the presiding officer nor the members of the Environmental Appeals Board shall be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including

in the offices of either the investigating official or the reviewing official.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§27.15 Ex parte contacts.

No party or person (except employees of the presiding officer's office) shall communicate in any way with the presiding officer on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine question concerning administrative functions or procedures.

§27.16 Disqualification of the reviewing official or presiding officer.

(a) A reviewing official or presiding officer in a particular case may disqualify himself or herself at any time.

(b) A party may file a motion for disqualification of a reviewing official or presiding officer with the hearing clerk. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed within 15 days of the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the presiding officer determines that the reviewing official is disqualified because the reviewing official could not have made an impartial determination pursuant to §27.5(a), the presiding officer shall dismiss the complaint without prejudice.

(2) If the presiding officer disqualifies himself or herself, the case shall be reassigned promptly to another presiding officer.

(3) If the presiding officer denies a motion to disqualify, the Environmental Appeals Board may determine the matter only as part of its review of the initial decision upon appeal, if any.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§27.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the presiding officer;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the presiding officer; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§27.18 Authority of the presiding officer.

(a) The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The presiding officer has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this part.

(c) The presiding officer does not have the authority to find Federal statutes or regulations invalid.

§ 27.19 Prehearing conferences.

(a) The presiding officer may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The presiding officer may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a prehearing conference.

§ 27.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 27.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 27.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed following the filing of an answer pursuant to § 27.9.

§ 27.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§27.22 and 27.23, the term *documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion which shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in §27.24.

(3) The presiding officer may grant a motion for discovery only if he finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The presiding officer may grant discovery subject to a protective order under §27.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the presiding officer shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in §27.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§27.22 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §27.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the presiding officer shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the presiding officer finds good cause for the failure or that there is not prejudice to the objecting party.

(c) Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§27.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe

the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 27.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 27.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by a party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the presiding officer;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the presiding officer;

(8) That a trade secret or other confidential research, development, or commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

§ 27.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 27.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the hearing clerk shall include an original and two copies.

(2) The first page of every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the hearing clerk, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the hearing clerk shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document, other than those required to be served as prescribed in § 27.8, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such

representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§27.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

(c) When a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§27.28 Motions.

(a) Any application to the presiding officer for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with hearing clerk and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

(d) The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The presiding officer shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§27.29 Sanctions.

(a) The presiding officer may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the presiding officer may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The presiding officer may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§27.30 The hearing and burden of proof.

(a) The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under §27.3 and, if so, the appropriate

amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the presiding officer for good cause shown.

§ 27.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the presiding officer and the Environmental Appeals Board, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the presiding officer and the Environmental Appeals Board in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the presiding officer or the Environmental Appeals Board from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§ 27.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the presiding officer.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the presiding officer.

§27.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the presiding officer, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in §27.22(a).

(c) The presiding officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The presiding officer shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the presiding officer, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the presiding officer, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the presiding officer shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or empoyee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) an individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§27.34 Evidence.

(a) The presiding officer shall determine the admissibility of evidence.

(b) Except as provided in this part, the presiding officer shall not be bound by the Federal Rules of Evidence. However, the presiding officer may apply the Federal Rules of Evidence when appropriate, e.g., to exclude unreliable evidence.

(c) The presiding officer shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The presiding officer shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to §27.24.

§27.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the

hearing clerk at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the presiding officer and the Environmental Appeals Board.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the presiding officer pursuant to § 27.24.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§ 27.36 Post-hearing briefs.

The presiding officer may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The presiding officer shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file responsive briefs.

§ 27.37 Initial decision.

(a) The presiding officer shall issue an initial decision based only on the record. The decision shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 27.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 27.31.

(c) The presiding officer shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and responsive briefs (if permitted) has expired. The presiding officer shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration or a notice of appeal. If the presiding officer fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the presiding officer is timely appealed to the Environmental Appeals Board, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after it is issued by the presiding officer.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§ 27.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the presiding officer.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The presiding officer may dispose of a motion for reconsideration by denying it or by issuing a revised intial decision.

(f) If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the Environmental Appeals Board in accordance with § 27.39.

(g) If the presiding officer issued a revised initial decision, that decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Environmental Appeals Board in accordance with §27.39.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§27.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Environmental Appeals Board by filing a notice of appeal with the hearing clerk in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the presiding officer issues an initial decision. However, if another party files a motion for reconsideration under §27.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the presiding officer denies the motion or issues a revised initial decision, whichever applies.

(3) The Environmental Appeals Board may extend the initial 30 day period for an additional 30 days if the defendant files a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant filed a timely notice of appeal, and the time for filing motions for reconsideration under §27.38 has expired, the presiding officer shall forward the record of the proceeding to the Environmental Appeals Board.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Environmental Appeals Board.

(g) There is no right to appeal any interlocutory ruling by the presiding officer.

(h) In reviewing the initial decision, the Environmental Appeals Board shall not consider any objection that was not raised before the presiding officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Environmental Appeals Board that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Environmental Appeals Board shall remand the matter to the presiding officer for consideration of such additional evidence.

(j) The Environmental Appeals Board may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the presiding officer in any initial decision.

(k) The Environmental Appeals Board shall promptly serve each party to the appeal with a copy of the decision of the Environmental Appeals Board and a statement describing the right of any person determined to be liable for a civil penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Environmental Appeals Board serves the defendant with a copy of the Environmental Appeals Board's decision, a determination that a defendant is liable under §27.3 is final and is not subject to judicial review.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§27.40 Stay ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Environmental Appeals Board a written finding that continuation of the administrative process described in this part with respect to a

claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Environmental Appeals Board shall stay the process immediately. The Environmental Appeals Board may order the process resumed only upon receipt of the written authorization of the Attorney General.

[57 FR 5327, Feb. 13, 1992]

§ 27.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Environmental Appeals Board.

(b) No administrative stay is available following a final decision of the Environmental Appeals Board.

[57 FR 5327, Feb. 13, 1992]

§ 27.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Environmental Appeals Board imposing penalties or assessments under this part and specifies the procedures for such review.

[57 FR 5327, Feb. 13, 1992]

§ 27.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 27.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §§ 27.42 or 27.43, or any amount agreed upon in a compromise or settlement under § 27.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 27.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 27.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the presiding officer issues an initial decision.

(c) The Environmental Appeals Board has exclusive authority to compromise or settle a case under this part at any time after the date on which the presiding officer issues an initial decision, except during the pendency of any review under § 27.42 or during the pendency of any action to collect penalties and assessments under § 27.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 27.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Environmental Appeals Board, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Environmental Appeals Board or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5327, Feb. 13, 1992]

§ 27.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 27.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 27.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

§ 27.48 Delegated functions.

The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its descretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate the ex parte contacts restrictions set forth in §§ 27.14 and 27.15 of this part.

[57 FR 5328, Feb. 13, 1992]

PART 29—INTERGOVERNMENTAL REVIEW OF ENVIRONMENTAL PROTECTION AGENCY PROGRAMS AND ACTIVITIES

Sec.

29.1 What is the purpose of these regulations?
29.2 What definitions apply to these regulations?
29.3 What programs and activities of the Environmental Protection Agency are subject to these regulations?
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29.12 How may a State simplify, consolidate, or substitute federally required State plans?
29.13 May the Administrator waive any provision of these regulations?

AUTHORITY: E.O. 12372, July 14, 1982 (47 FR 30959), as amended Apr. 8, 1983 (48 FR 15887); sec. 401 of the Intergovernmental Cooperation Act of 1968 as amended (31 U.S.C. 6506); sec. 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3334).

SOURCE: 48 FR 29300, June 24, 1983, unless otherwise noted.

§ 29.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982, and amended, on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968, as amended and section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened federalism by relying on State processes and on State, areawide, regional and local coordination for review of proposed Federal financial assistance and direct Federal development.

(c) These regulations are intended to aid the internal management of the Environmental Protection Agency (EPA) and are not intended to create any right or benefit enforceable at law by a party against EPA or its officers.

§ 29.2 What definitions apply to these regulations?

Administrator means the Administrator of the U.S. Environmental Protection Agency or an official or employee of the Agency acting for the Administrator under a delegation of authority.

Agency means the U.S. Environmental Protection Agency (EPA). *Order* means Executive Order 12372,

issued July 14, 1982, and amended April 8, 1983, and titled "Intergovernmental Review of Federal Programs."

States means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 29.3 What programs and activities of the Environmental Protection Agency are subject to these regulations?

The Administrator publishes in the FEDERAL REGISTER a list of the EPA programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

§ 29.4 What are the Administrator's general responsibilities under the Order?

(a) The Administrator provides opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from, or direct Federal development by, the EPA.

(b) If a State adopts a process under the Order to review and coordinate proposed Federal financial assistance and direct Federal development, the Administrator to the extent permitted by law:

(1) Uses the State process to determine official views of State and local elected officials;

(2) Communicates with State and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the State process;

(4) Allows the States to simplify and consolidate existing federally required State plan submissions;

(5) Where State planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for federally required State plans;

(6) Seeks the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports State and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials,

§ 29.5 What is the Administrator's obligation with respect to Federal interagency coordination?

The Administrator, to the extent practicable, consults with and seeks advice from all other substantially affected Federal departments and agencies in an effort to assure full coordination between such agencies and EPA regarding programs and activities covered under these regulations.

§ 29.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A State may select any program or activity published in the FEDERAL REGISTER in accordance with § 29.3 of this part for intergovernmental review under these regulations. Each State, before selecting programs and activities, shall consult with local elected officials.

(b) Each State that adopts a process shall notify the Administrator of EPA programs and activities selected for that process.

(c) A State may notify the Administrator of changes in its selections at any time. For each change, the State shall submit an assurance to the Administrator that the State has consulted with local elected officials regarding the change. EPA may establish deadlines by which States are required to inform the Administrator of changes in their program selections.

(d) The Administrator uses a State's process as soon as feasible, depending

on individual programs and activities, after the Administrator is notified of its selections.

§29.7 How does the Administrator communicate with State and local officials concerning the EPA programs and activities?

(a) For those programs and activities covered by a State process under §29.6, the Administrator, to the extent permitted by law:

(1) Uses the State process to determine views of State and local elected officials; and

(2) Communicates with State and local elected officials, through the State process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The Administrator provides notice of proposed Federal financial assistance or direct Federal development to directly affected State, areawide, regional, and local entities in a State if:

(1) The State has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the State process.

This notice may be published in the FEDERAL REGISTER or issued by other means which EPA, in its discretion deems appropriate.

§29.8 How does the Administrator provide States an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) Except in unusual circumstances, the Administrator gives State processes or directly affected State, areawide, regional and local officials and entities:

(1) At least 30 days from the date established by the Administrator to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Administrator to comment on proposed direct Federal development or Federal financial assistance, other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Environmental Protection Agency have been delegated.

(c) Applicants for programs and activities subject to section 204 of the Demonstration Cities and Metropolitan Development Act shall allow areawide agencies a 60-day opportunity for review and comment.

§29.9 How does the Administrator receive and respond to comments?

(a) The Administrator follows the procedures in §29.10 if:

(1) A State office or official is designated to act as a single point of contact between a State process and all Federal agencies, and

(2) That office or official transmits a State process recommendation for a program selected under §29.6.

(b) The single point of contact is not obligated to transmit comments from State, areawide, regional or local officials and entities where there is no State process recommendation. However, if a State process recommendation is transmitted by a single point of contact, all comments from State, area-wide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a State has not established a process, or is unable to submit a State process recommendation, the State, areawide, regional and local officials and entities may submit comments directly either to the applicant or to EPA.

(d) If a program or activity is not selected for a State process, the State, areawide, regional and local officials and entities may submit comments either directly to the applicant or to EPA. In addition, if a State process recommendation for a nonselected program or activity is transmitted to EPA by the single point of contact, the Administrator follows the procedures of §29.10 of this part.

(e) The Administrator *considers* comments which do not constitute a State process recommendation submitted under these regulations and for which the Administrator is not required to apply the procedures of §29.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Agency by a commenting party.

§ 29.10 How does the Administrator make efforts to accommodate intergovernmental concerns?

(a) If a State process provides a State process recommendation to the Agency through the State's single point of contact, the Administrator either:

(1) Accepts the recommendation;

(2) reaches a mutually agreeable solution with the State process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Administrator, in his or her discretion, deems appropriate. The Administrator may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Administrator informs the single point of contact that:

(1) EPA will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Administrator has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 29.11 What are the Administrator's obligations in interstate situations?

(a) The Administrator is responsible for:

(1) Identifying proposed Federal financial assistance and direct Federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in States which have adopted a process and selected an EPA program or activity.

(3) Making efforts to identify and notify the affected State, areawide, regional, and local officials and entities in those States that do not adopt a process under the Order or do not select an EPA program or activity;

(4) Responding in accordance with § 29.10 of this part to a recommendation received from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with EPA were delegated.

(b) The Administrator uses the procedures in § 29.10 if a State process provides a State process recommendation to the Agency through a single point of contact.

§ 29.12 How may a State simplify, consolidate, or substitute federally required State plans?

(a) As used in this section:

(1) *Simplify* means that a State may develop its own format, choose its own submission date, and select the planning period for a State plan.

(2) *Consolidate* means that a State may meet statutory and regulatory requirements by combining two or more plans into one document and that the State can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a State may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a State may decide to try to simplify, consolidate, or substitute federally required State plans without prior approval by the Administrator.

(c) The Administrator reviews each State plan that a State has simplified, consolidated, or substituted and accepts the plan only if its contents meet Federal requirements.

§ 29.13 May the Administrator waive any provision of these regulations?

In an emergency, the Administrator may waive any provision of these regulations.

SUBCHAPTER B—GRANTS AND OTHER FEDERAL ASSISTANCE

PART 30—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

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APPENDIX TO PART 30—CONTRACT PROVISIONS

AUTHORITY: 7 U.S.C. 135 *et seq.*; 15 U.S.C. 2601 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 241, 242b, 243, 246, 300f, 300j–1, 300j–2, 300j–3, 1857 *et seq.*, 6901 *et seq.*, 7401 *et seq.*, 9601 *et seq.*; OMB Circular A–110 (64 FR 54926, October 8, 1999).

SOURCE: 61 FR 6067, Feb. 15, 1996, unless otherwise noted.

Subpart A—General

§ 30.1 Purpose.

This subpart establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. The Environmental Protection Agency (EPA) may not impose additional or inconsistent requirements, except as provided in §§ 30.4, and 30.14 or unless specifically required by Federal statute or Executive Order. Non-profit organizations that implement Federal programs for the States are also subject to State requirements.

§ 30.2 Definitions.

(a) Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required.

(b) Accrued income means the sum of:

(1) Earnings during a given period from;

(i) Services performed by the recipient; and

(ii) Goods and other tangible property delivered to purchasers; and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(d) Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

(e) Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

(f) Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

(g) Closeout means the process by which a Federal awarding agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

(h) Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(i) Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

(j) Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

(k) Disallowed costs means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

(l) Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

(m) Excess property means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

(n) Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a

non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

(o) Federal awarding agency means the Federal agency that provides an award to the recipient.

(p) Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

(q) Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(r) Funding period means the period of time when Federal funding is available for obligation by the recipient.

(s) Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

(t) Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

(u) Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

(v) Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

(w) Prior approval means written approval by an authorized official evidencing prior consent.

(x) Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §30.24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

(y) Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

(z) Project period means the period established in the award document during which Federal sponsorship begins and ends.

(aa) Property means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(bb) Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

(cc) Recipient means an organization receiving financial assistance directly

from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

(dd) Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(ee) Small award means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $100,000).

(ff) Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" in paragraph (e) of this section.

(gg) Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

(hh) Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(ii) Suspension means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing Executive Orders 12549 and 12689, "Debarment and Suspension."

(jj) Termination means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(kk) Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

(ll) Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an

accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

(mm) Unobligated balance means the portion of the funds authorized by the Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(nn) Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

(oo) Working capital advance means a procedure where by funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§30.3 Effect on other issuances.

For awards subject to Circular A–110, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of Circular A–110 shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in §30.4.

§30.4 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of Circular A–110 when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of Circular A–110 shall be permitted only in unusual circumstances. EPA may apply more restrictive requirements to a class of recipients when approved by OMB. EPA may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by EPA.

§30.5 Subawards.

Unless sections of Circular A–110 specifically exclude subrecipients from coverage, the provisions of Circular A–110 shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations in 40 CFR part 31 implementing the grants management common rule, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,".

§30.6 Availability of OMB circulars.

OMB circulars cited in this part are available from the Office of Management and Budget (OMB) by writing to the Executive Office of the President, Publications Service, 725 17th Street, NW., Suite 200, Washington, DC 20503.

Subpart B—Pre-Award Requirements

§30.10 Purpose.

Sections 30.11 through 30.18 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§30.11 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, EPA shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* EPA shall notify the public of its intended funding priorities for discretionary grant programs, unless funding

priorities are established by Federal statute.

(c) By submitting an application to EPA, the applicant grants EPA permission to share the application with technical reviewers both within and outside the Agency.

§ 30.12 Forms for applying for Federal assistance.

(a) EPA shall comply with the applicable report clearance requirements of 5 CFR part 1320, "Controlling Paperwork Burdens on the Public," with regard to all forms used by EPA in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by EPA.

(c) For Federal programs covered by Executive Order 12372, "Intergovernmental Review of Federal Programs," the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from EPA or the Catalog of Federal Domestic Assistance. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) If the SF–424 form is not used EPA should indicate whether the application is subject to review by the State under Executive Order 12372.

§ 30.13 Debarment and suspension.

EPA and recipients shall comply with the nonprocurement debarment and suspension regulations in 40 CFR part 32 implementing Executive Orders 12549 and 12689, "Debarment and Suspension." 40 CFR part 32 restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 30.14 Special award conditions.

If an applicant or recipient: has a history of poor performance, is not financially stable; has a management system that does not meet the standards prescribed in Circular A–110; has not conformed to the terms and conditions of a previous award; or is not otherwise responsible, EPA may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 30.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205), declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. EPA shall follow the provisions of Executive Order 12770, "Metric Usage in Federal Government Programs."

§ 30.16 Resource Conservation and Recovery Act (RCRA).

Resource Conservation and Recovery Act (RCRA) (Public Law 94–580 codified at 42 U.S.C. 6962). Under the Act, any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with Section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by EPA (40 CFR parts 247 through 254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or

other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to EPA's guidelines. Further, pursuant to Executive Order 12873 (dated October 20, 1993) recipients are to print documents/reports prepared under an EPA award of assistance double sided on recycled paper. This requirement does not apply to Standard Forms. These forms are printed on recycled paper as available through the General Services Administration.

§30.17 Certifications and representations.

Unless prohibited by statute or codified regulation, EPA will allow recipients to submit certifications and representations required by statute, Executive Order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

§30.18 Hotel and motel fire safety.

The Hotel and Motel Fire Safety Act of 1990 (Public Law 101–391) establishes a number of fire safety standards which must be met for hotels and motels. The law provides further that Federal funds may not be used to sponsor a conference, meeting, or training seminar held in a hotel or motel which does not meet the law's fire protection and control guidelines. If necessary, the head of the Federal agency may waive this prohibition in the public interest.

Subpart C—Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§30.20 Purpose of financial and program management.

Sections 30.21 through 30.28 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§30.21 Standards for financial management systems.

(a) EPA shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in §30.52. If EPA requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from

the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the EPA guarantees or insures the repayment of money borrowed by the recipient, the recipient shall provide adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) Recipients shall obtain adequate fidelity bond coverage where coverage to protect the Federal Government's interest is insufficient.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 30.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain: written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and financial management systems that meet the standards for fund control and accountability as established in § 30.21. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the EPA to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. EPA may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, EPA shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and EPA has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, EPA may provide cash on a working capital advance basis. Under this procedure, EPA shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared

to the awardee's disbursing cycle. Thereafter, EPA shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, EPA shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h) (1) or (2) of this section applies.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, "Managing Federal Credit Programs." Under such conditions, EPA may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, EPA shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k) (1), (2) or (3) of this section applies.

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from EPA, it waives its right to recover the interest under CMIA. In keeping with Electronic Funds Transfer rules, (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check.

(m) Except as noted elsewhere in Circular A–110, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. EPA shall not require more than an original and two copies of these forms.

(1) *SF–270, Request for Advance or Reimbursement.* EPA shall adopt the SF–270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. However, EPA has the option of using this form

for construction programs in lieu of the SF–271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) *SF–271, Outlay Report and Request for Reimbursement for Construction Programs.* EPA shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, the SF–270 may be substituted when EPA determines that it provides adequate information to meet its needs.

§ 30.23 Cost sharing or matching.

EPA shall not require cost sharing or matching unless required by statute, regulation, Executive Order, or official Agency policy.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are identified in the approved budget.

(7) Conform to other provisions of Circular A–110, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the EPA Award Official.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If, after consultation with Agency property management personnel, the EPA Award Official authorizes recipients to donate buildings or land for construction or facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c) (1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the EPA Award Official may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (g) (1) or (2) of this section applies.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the EPA technical program office, after consultation with EPA property management personnel, has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§30.24 Program income.

(a) EPA shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with EPA regulations or the terms and conditions of the award, shall be used in one or more of the ways listed in the following.

(1) Added to funds committed to the project by EPA and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When EPA authorizes the disposition of program income as described in paragraphs (b)(1) or (2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the EPA does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless EPA indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in §30.14.

(e) Unless EPA regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by EPA regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 30.30 through 30.37).

(h) Unless EPA regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 30.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. The budget shall include both the Federal and non-Federal share. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, unless EPA regulations provide otherwise, recipients shall request prior written approvals from:

(1) The EPA Award Official for the following:

(i) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(ii) The need for additional Federal funding.

(iii) The inclusion of costs that require prior approval in accordance with OMB Circular A–21, "Cost Principles for Institutions of Higher Education," OMB Circular A–122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(2) The technical program office for the following:

(i) Change in a key person specified in the application or award document.

(ii) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(iii) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa.

(iv) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(v) Unless described in the application and funded in the approved award, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1)(i) and (ii) of this section, the EPA Award Official may waive cost-related and administrative prior written approvals required by this part and OMB cost principles. For awards that support research, these prior approval requirements are automatically waived unless:

(1) EPA provides otherwise in the award or agency regulation or

(2) One of the conditions in paragraph (f)(2)(i) of this section applies.

(f) Recipients are authorized without prior approval or a waiver to:

(1) Incur pre-award costs 90 calendar days prior to award.

(i) Pre-award costs incurred more than 90 calendar days prior to award require the prior approval of the EPA Award Official.

(ii) The applicant must include all pre-award costs in its application.

(iii) The applicant incurs such costs at its own risk (i.e., EPA is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(iv) EPA will only allow pre-award costs without approval if there are sufficient programmatic reasons for incurring the expenditures prior to the

award (e.g., time constraints, weather factors, etc.), they are in conformance with the appropriate cost principles, and any procurement complies with the requirements of this rule.

(2) Extend the expiration date of the award one time for up to 12 months.

(i) A one-time extension may not be initiated if:

(A) The terms and conditions of the award prohibit the extension;

(B) The extension requires additional Federal funds; or

(C) The extension involves any change in the approved objectives or scope of the project.

(ii) For one-time extensions, the recipient must notify the EPA Award Official in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award.

(iii) This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(3) Carry forward unobligated balances to subsequent funding periods providing the recipient notifies the EPA Award Official by means of the Financial Status Report.

(g) The EPA technical program office may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by EPA. Except as provided for at paragraph (c) of this section, for awards in which the Federal share is less than $100,000 there are no restrictions on transfers of funds among direct cost categories. EPA shall not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(h) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(i) For construction awards, recipients shall request prior written approval promptly from EPA for budget revisions whenever paragraph (h)(1), (2) or (3) of this section applies.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 30.27.

(j) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(k) When EPA makes an award that provides support for both construction and nonconstruction work, EPA may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(l) For both construction and nonconstruction awards, EPA shall require recipients to notify the agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(m) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the EPA indicates that a letter clearly describing the details of the request will suffice.

(n) Within 30 calendar days from the date of receipt of the request for budget revisions, EPA shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, EPA shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 30.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, "Audits of States, Local

Governments, and Non-Profit Organizations."

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations."

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of EPA or the prime recipient as incorporated into the award document.

[61 FR 6067, Feb. 15, 1996, as amended at 62 FR 45939, 45944, Aug. 29, 1997]

§ 30.27 Allowable costs.

(a) For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A–87, "Cost Principles for State and Local Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A–122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A–21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A–122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31. In addition, EPA's annual Appropriations Acts may contain restrictions on the use of assistance funds. For example, the Acts may prohibit the use of funds to support intervention in Federal regulatory or adjudicatory proceedings.

(b) EPA will limit its participation in the salary rate (excluding overhead) paid to individual consultants retained by recipients or by a recipient's contractors or subcontractors to the maximum daily rate for level 4 of the Executive Schedule unless a greater amount is authorized by law. (Recipient's may, however, pay consultants more than this amount.) This limitation applies to consultation services of designated individuals with specialized skills who are paid at a daily or hourly rate. This rate does not include transportation and subsistence costs for travel performed; recipients will pay these in accordance with their normal travel reimbursement practices. Contracts with firms for services which are awarded using the procurement requirements in this part are not affected by this limitation.

§ 30.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by EPA.

PROPERTY STANDARDS

§ 30.30 Purpose of property standards.

Sections 30.31 through 30.37 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. EPA shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 30.31 through 30.37.

§ 30.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient.

Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 30.32 Real property.

EPA shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of EPA.

(b) The recipient shall obtain written approval by EPA for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by EPA.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from EPA or its successor Federal awarding agency. EPA shall observe one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by EPA and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 30.33 Federally-owned and exempt property.

(a) *Federally-owned property*. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to EPA's property management staff. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to EPA's property management staff for further utilization.

(2) If EPA has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless EPA has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with Executive Order 12821, "Improving Mathematics and Science Education in Support of the National Education Goals.") Appropriate instructions shall be issued to the recipient by EPA's property management staff.

(b) *Exempt property*. When statutory authority exists, EPA has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions EPA considers appropriate. Such property is "exempt property." Should EPA not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 30.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest

in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of EPA. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority: Activities sponsored by EPA, then activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by EPA; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by EPA. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of EPA.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates EPA for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify EPA.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established

which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from EPA. EPA shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by EPA to determine whether a requirement for the equipment exists in other Federal agencies. EPA shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse EPA an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by EPA for such costs incurred in its disposition.

(4) EPA may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes. Such transfer shall be subject to the following standards.

(i) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) EPA shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with grant funds and federally-owned equipment. If EPA fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(iii) When EPA exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 30.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 30.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. EPA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) The Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, the EPA shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the EPA obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This "recorded" material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or

(B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of EPA. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 30.34(g).

[61 FR 6067, Feb. 15, 1996, as amended at 65 FR 14407, 14417, Mar. 16, 2000]

§ 30.37 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to

record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 30.40 Purpose of procurement standards.

Sections 30.41 through 30.48 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and Executive Orders. No additional procurement standards or requirements shall be imposed by EPA upon recipients, unless specifically required by Federal statute or Executive Order or approved by OMB.

§ 30.41 Recipient responsibilities.

The standards contained in this part do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to EPA, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 30.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 30.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 30.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a) (1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(6) If the prime contractor awards subcontracts, requiring the contractor to take steps in paragraphs (b)(1) through (5) of this section.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of Executive Orders 12549 and 12689, "Debarment and Suspension."

(e) Recipients shall, on request, make available for EPA, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in EPA's implementation of Circular A–110.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $100,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 30.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 30.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum: Basis for contractor selection; justification for lack of competition when competitive bids or offers are not obtained; and basis for award cost or price.

§ 30.47 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 30.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, EPA may accept the bonding policy and requirements of the recipient, provided EPA has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is

one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, EPA, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of the appendix to Circular A–110, as applicable.

REPORTS AND RECORDS

§ 30.50 Purpose of reports and records.

Sections 30.51 through 30.53 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 30.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 30.26.

(b) EPA shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semiannual reports shall be due 30 days after the reporting period. EPA may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following.

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify EPA of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) EPA may make site visits, as needed.

(h) EPA shall comply with clearance requirements of 5 CFR part 1320 when

requesting performance data from recipients.

§ 30.52 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) *SF–269 or SF–269A, Financial Status Report.* (i) EPA shall require recipients to use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. However, EPA has the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) EPA shall prescribe whether the report shall be on a cash or accrual basis. If EPA requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) EPA shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) EPA shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by EPA upon request of the recipient.

(2) *SF–272, Report of Federal Cash Transactions.* (i) When funds are advanced to recipients EPA shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272A. EPA shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) EPA may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, EPA may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. EPA may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) EPA may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in EPA's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When EPA needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, EPA shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When EPA determines that a recipient's accounting system does not meet the standards in § 30.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. EPA, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) EPA may shade out any line item on any report if not necessary.

(4) EPA may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) EPA may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§ 30.53 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. EPA shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by EPA. The only exceptions are the following.

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by EPA, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by EPA.

(d) EPA shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, EPA may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) EPA, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, EPA shall not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when it can be demonstrated that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to EPA.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation*. If the recipient submits to EPA or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) *If not submitted for negotiation*. If the recipient is not required to submit to EPA or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period)

covered by the proposal, plan, or other computation.

§ 30.54 Quality assurance.

If the project officer determines that the grantee's project involves environmentally related measurements or data generation, the grantee shall develop and implement quality assurance practices consisting of policies, procedures, specifications, standards, and documentation sufficient to produce data of quality adequate to meet project objectives and to minimize loss of data due to out-of-control conditions or malfunctions. The quality system must comply with the requirements of ANSI/ASQC E4, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs", which may be obtained from the National Technical Information Service (NTIS), 5885 Port Royal Road, Springfield, VA 22161.

TERMINATION AND ENFORCEMENT

§ 30.60 Purpose of termination and enforcement.

Sections 30.61 and 30.62 set forth uniform suspension, termination and enforcement procedures.

§ 30.61 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2) or (3) of this section applies.

(1) By EPA, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By EPA with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to EPA written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if EPA determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraph (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 30.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 30.62 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, EPA may, in addition to imposing any of the special conditions outlined in § 30.14, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by EPA.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, EPA shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved. EPA's Dispute Provisions found at 40 CFR part 31, subpart F, Disputes, are applicable to assistance awarded under the provisions of this part.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless EPA expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable

if paragraphs (c)(1) and (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under Executive Orders 12549 and 12689 and EPA's implementing regulations (see § 30.13).

§ 30.63 Disputes.

(a) Disagreements should be resolved at the lowest possible level.

(b) If an agreement cannot be reached, the EPA disputes decision official will provide a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning assistance agreements. If the dispute cannot be resolved the procedures outlined at 40 CFR part 31, subpart F, should be followed.

Subpart D—After-the-Award Requirements

§ 30.70 Purpose.

Sections 30.71 through 30.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 30.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. EPA may approve extensions when requested by the recipient.

(b) Unless EPA authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) EPA shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that EPA has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, EPA shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 30.31 through 30.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, EPA shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 30.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of EPA to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 30.26.

(4) Property management requirements in §§ 30.31 through 30.37.

(5) Records retention as required in § 30.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of EPA and the recipient, provided the responsibilities of the recipient referred to in § 30.73(a), including those for property management as applicable, are considered and

provisions made for continuing responsibilities of the recipient, as appropriate.

§ 30.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, EPA may reduce the debt by paragraph (a) (1), (2) or (3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, EPA shall charge interest on an overdue debt in accordance with 4 CFR chapter II, "Federal Claims Collection Standards."

APPENDIX TO PART 30—CONTRACT PROVISIONS

All contracts awarded by a recipient, including small purchases, shall contain the following provisions as applicable:

1. Equal Employment Opportunity—All contracts shall contain a provision requiring compliance with Executive Order 11246, "Equal Employment Opportunity," as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)—All contracts and subgrants in excess of $100,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to EPA.

3. Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to EPA.

4. Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction contracts and in excess of $2500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1/2 times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. Rights to Inventions Made Under a Contract or Agreement—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under

Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by EPA.

6. Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the Regional Office of the Environmental Protection Agency (EPA).

7. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors who apply or bid for an award of more than $100,000 shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. Debarment and Suspension (Executive Orders 12549 and 12689)—No contract shall be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with Executive Orders 12549 and 12689, "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than Executive Order 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

PART 31—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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AUTHORITY: 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et*

seq.; 42 U.S.C. 9601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1401 *et seq.*

SOURCE: 53 FR 8075 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§31.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§31.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§31.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of:

(1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF–269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF–271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing

agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *equipment* as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§31.4 Applicability.

(a) *General.* Subparts A–D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §31.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I–III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block

Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV–A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV–D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV–E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI–AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 31.4(a)(3) through (8) are subject to subpart E.

§ 31.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 31.6.

§ 31.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(1) In the Environmental Protection Agency, the Director, Grants Administration Division, is authorized to grant the exceptions.

(2) [Reserved]

(d) The EPA Director is also authorized to approve exceptions, on a class or an individual case basis, to EPA program—specific assistance regulations other than those which implement statutory and executive order requirements.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988]

Subpart B—Pre-Award Requirements

§31.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§31.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive Order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§31.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

§ 31.13 Principal environmental statutory provisions applicable to EPA assistance awards.

Grantees shall comply with all applicable Federal laws including:

(a) Section 306 of the Clean Air Act, (42 U.S.C. 7606).

(b) Section 508 of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1368).

(c) Section 1424(e) of the Safe Drinking Water Act, (42 U.S.C. 300h–3(e)).

[53 FR 8075, Mar. 11, 1988]

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 31.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information

must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§31.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1)

Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 31.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 31.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A–87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.	OBM Circular A–122.
Educational institutions.	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR part 31, Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 31.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§31.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in §31.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §31.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 31.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal

funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§31.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §31.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§31.31 and 31.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a)

of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 31.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 31.36 shall be followed.

[53 FR 8075, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45944, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§ 31.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 31.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes.* (1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §31.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §31.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§31.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the

awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 31.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 31.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or

for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 31.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§31.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§31.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§31.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§31.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will

follow paragraphs (b) through (i) in this section.

(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.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §31.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(5) Construction grants awarded under Title II of the Clean Water Act are subject to the following "Buy American" requirements in paragraphs (c)(5) (i)–(iii) of this section. Section 215 of the Clean Water Act requires that contractors give preference to the use of domestic material in the construction of EPA-funded treatment works.

(i) Contractors must use domestic construction materials in preference to nondomestic material if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic material, including all costs of delivery to the construction site and any applicable duty, whether or not assessed. The grantee will normally base the computations on prices and costs in effect on the date of opening bids or proposals.

(ii) The award official may waive the Buy American provision based on factors the award official considers relevant, including:

(A) Such use is not in the public interest;

(B) The cost is unreasonable;

(C) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(D) The articles, materials or supplies of the class or kind to be used or the articles, materials or supplies from which they are manufactured are not mined, produced or manufactured in the United States in sufficient and reasonably available commerical quantities or satisfactory quality for the particular project; or

(E) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(iii) All bidding documents, subagreements, and, if appropriate, requests for proposals must contain the following "Buy American" provision: In accordance with section 215 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) and implementing EPA regulations, the contractor agrees that preference will be given to domestic construction materials by the contractor, subcontractors, materialmen and suppliers in the performance of this subagreement.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in 31.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the

items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 31.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of $2000 awarded by

grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

(j) *Payment to consultants.* (1) EPA will limit its participation in the salary rate (excluding overhead) paid to individual consultants retained by grantees or by a grantee's contractors or subcontractors to the maximum daily rate for a GS–18. (Grantees may, however, pay consultants more than this amount). This limitation applies to consultation services of designated individuals with specialized skills who are paid at a daily or hourly rate. This rate does not include transportation and subsistence costs for travel performed; grantees will pay these in accordance with their normal travel reimbursement practices. (Pub. L. 99–591).

(2) Subagreements with firms for services which are awarded using the procurement requirements in this part are not affected by this limitation.

(k) *Use of the same architect or engineer during construction.* (1) If the grantee is satisfied with the qualifications and performance of the architect or engineer who provided any or all of the facilities planning or design services for a waste-water treatment works project and wishes to retain that firm or individual during construction of the project, it may do so without further public notice and evaluation of qualifications, provided:

(i) The grantee received a facilities planning (Step 1) or design grant (Step 2), and selected the architect or engineer in accordance with EPA's procurement regulations in effect when EPA awarded the grant; or

(ii) The award official approves noncompetitive procurement under § 31.36(d)(4) for reasons other than simply using the same individual or firm that provided facilities planning or design services for the project; or

(iii) The grantee attests that:

(A) The initial request for proposals clearly stated the possibility that the firm or individual selected could be awarded a subagreement for services during construction; and

(B) The firm or individual was selected for facilities planning or design services in accordance with procedures specified in this section.

(C) No employee, officer or agent of the grantee, any member of their immediate families, or their partners have financial or other interest in the firm selected for award; and

(D) None of the grantee's officers, employees or agents solicited or accepted gratuities, favors or anything of monetary value from contractors or other parties to subagreements.

(2) However, if the grantee uses the procedures in paragraph (k)(1) of this section to retain an architect or engineer, any Step 3 subagreements between the architect or engineer and the grantee must meet all of the other procurement provisions in §31.36.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988; 60 FR 19639, 19644, Apr. 19, 1995; 66 FR 3794, Jan. 16, 2001]

§31.37 Subgrants.

(a) *States.* States shall follow State law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with §31.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 31.10;

(2) Section 31.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §31.21; and

(4) Section 31.50.

§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].

[66 FR 3794, Jan. 19, 2001]

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§31.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance

report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 31.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in

paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §31.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are

made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 31.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 31.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 31.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 31.41(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 31.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 31.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 31.41(b)(2).

§ 31.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 31.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits

its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§31.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(i) EPA can also wholly or partly annul the current award for the grantee's or subgrantee's program,

(ii) [Reserved]

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee

an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 31.35).

[53 FR 8068 and 8087, Mar. 11, 1988, as amended at 53 FR 8076, Mar. 11, 1988]

§ 31.44 Termination for convenience.

Except as provided in § 31.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 31.43 or paragraph (a) of this section.

§ 31.45 Quality assurance.

If the grantee's project involves environmentally related measurements or data generation, the grantee shall develop and implement quality assurance practices consisting of policies, procedures, specifications, standards, and documentation sufficient to produce data of quality adequate to meet project objectives and to minimize loss of data due to out-of-control conditions or malfunctions.

[53 FR 8076, Mar. 11, 1988]

Subpart D—After-the-Grant Requirements

§ 31.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable.)

(3) Final request for payment (SF–270) (if applicable).

(4) Invention disclosure (if applicable).

(5) Federally-owned property report: In accordance with § 31.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§31.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in §31.42;

(d) Property management requirements in §§31.31 and 31.32; and

(e) Audit requirements in §31.26.

§31.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlement [Reserved]

Subpart F—Disputes

§31.70 Disputes.

(a) Disagreements should be resolved at the lowest level possible.

(b) If an agreement cannot be reached, the EPA disputes decision official will provide a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning assistance agreements.

(c) The disputes decision official's decision will constitute final agency action unless a request for review is filed by registered mail, return receipt requested, within 30 calendar days of the date of the decision.

(1) For final decisions issued by an EPA disputes decision official at Headquarters, the request for review shall be filed with the Assistant Administrator responsible for the assistance program.

(2) For final decisions issued by a Regional disputes decision official, the request for review shall be filed with the Regional Administrator. If the Regional Administrator issued the final decision, the request for reconsideration shall be filed with the Regional Administrator.

(d) The request shall include:

(1) A copy of the EPA disputes decision official's final decision;

(2) A statement of the amount in dispute;

(3) A description of the issues involved; and

(4) A concise statement of the objections to the final decision.

(e) The disputant(s) may be represented by counsel and may submit documentary evidence and briefs for inclusion in a written record.

(f) Disputants are entitled to an informal conference with EPA officials.

(g) Disputants are entitled to a written decision from the appropriate Regional or Assistant Administrator.

(h) A decision by the Assistant Administrator to confirm the final decision of a Headquarters disputes decision official will constitute the final Agency action.

(i) A decision by the Regional Administrator to confirm the Regional disputes decision official's decision will constitute the final Agency action.

However, a petition for discretionary review by the Assistant Administrator responsible for the assistance program may be filed within 30 calendar days of the Regional Administrator's decision. The petition shall be sent to the Assistant Administrator by registered mail, return receipt requested, and shall include:

(1) A copy of the Regional Administrator's decision; and

(2) A concise statement of the objections to the decision.

(j) If the Assistant Administrator decides not to review the Regional Administrator's decision, the Assistant Administrator will advise the disputant(s) in writing that the Regional Administrator's decision remains the final Agency action.

(k) If the Assistant Administrator decides to review the Regional Administrator's decision, the review will generally be limited to the written record on which the Regional Administrator's decision was based. The Assistant Administrator may allow the disputant(s) to submit briefs in support of the petition for review and may provide an opportunity for an informal conference in order to clarify technical or legal issues. After reviewing the Regional Administrator's decision, the Assistant Administrator will issue a written decision which will then become the final Agency action.

(l) Reviews may not be requested of:

(1) Decisions on requests for exceptions under § 31.6;

(2) Bid protest decisions under § 31.36(b)(12);

(3) National Environmental Policy Act decisions under part 6;

(4) Advanced wastewater treatment decisions of the Administrator; and

(5) Policy decisions of the EPA Audit Resolution Board.

[53 FR 8076, Mar. 11, 1988]

APPENDIX A TO PART 31—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENT RECIPIENTS

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Circular No. A–128

April 12, 1985

To the Heads of Executive Departments and Establishments.

Subject: Audits of State and Local Governments.

1. *Purpose.* This Circular is issued pursuant to the Single Audit Act of 1984, Public Law 98–502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

2. *Supersession.* The Circular supersedes Attachment P, "Audit Requirements," of Circular A–102, "Uniform requirements for grants to State and local governments."

3. *Background.* The Single Audit Act builds upon earlier efforts to improve audits of Federal aid programs. The Act requires State or local governments that receive $100,000 or more a year in Federal funds to have an audit made for that year. Section 7505 of the Act requires the Director of the Office of Management and Budget to prescribe policies, procedures and guidelines to implement the Act. It specifies that the Director shall designate "cognizant" Federal agencies, determine criteria for making appropriate charges to Federal programs for the cost of audits, and provide procedures to assure that small firms or firms owned and controlled by disadvantaged individuals have the opportunity to participate in contracts for single audits.

4. *Policy.* The Single Audit Act requires the following:

a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this Circular.

b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this Circular, or in accordance with Federal laws and regulations governing the programs they participate in.

c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law or in Circular A–102, "Uniform requirements for grants to State or local governments."

5. *Definitions.* For the purposes of this Circular the following definitions from the Single Audit Act apply:

a. *Cognizant agency* means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 11 of this Circular.

b. *Federal financial assistance* means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. *Federal agency* has the same meaning as the term *agency* in section 551(1) of Title 5, United States Code.

d. *Generally accepted accounting principles* has the meaning specified in the generally accepted government auditing standards.

e. *Generally accepted government auditing standards* means the *Standards for Audit of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

f. *Independent auditor* means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

g. *Internal controls* means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

h. *Indian tribe* means any Indian tribe, band, nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. *Local government* means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. *Major Federal Assistance Program,* as defined by Pub. L. 98–502, is described in the Attachment to this Circular.

k. *Public accountants* means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has governmental functions and any Indian tribe.

m. *Subrecipient* means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

6. *Scope of audit.* The Single Audit Act provides that:

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this Circular. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of Circular A–110. "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations."

d. The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles:

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

7. *Frequency of audit.* Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for

biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

8. *Internal control and compliance reviews.* The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether.

—The amounts reported as expenditures were for allowable services, and

—The records show that those who received services or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

—Matching requirements, levels of effort and earmarking limitations were met,

—Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

—Amounts claimed or used for matching were determined in accordance with OMB Circular A–87, "Cost principles for State and local governments," and Attachment F of Circular A–102, "Uniform requirements for grants to State and local governments."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments,* issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

9. *Subrecipients.* State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

a. Determine whether State or local subrecipients have met the audit requirements of this Circular and whether subrecipients covered by Circular A–110. "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations," have met that requirement;

b. Determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this Circular, Circular A–110, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. Consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. Require each subrecipient to permit independent auditors to have access to the

records and financial statements as necessary to comply with this Circular.

10. *Relation to other audit requirements.* The Single Audit Act provides that an audit made in accordance with this Circular shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurance they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this Circular do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this Circular do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in additon to the audits made by recipients pursuant to this Circular shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

11. *Cognizant agency responsibilities.* The Single Audit Act provides for congnizant Federal agencies to oversee the implementation of this Circular.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this Circular.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this Circular. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this Circular, so that the additional audits build up such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

12. *Illegal acts or irregularities.* If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also program 13(a)(3) below for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

13. *Audit Reports.* Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this Circular. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assitance program as identified in the *Catalog of Federal Domestic Assistance.* Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The author's report on the study and evaluation of internal control systems must

identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

—A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;
—Negative assurance on those items not tested;
—A summary of all instances of noncompliance; and
—An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

b. The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

c. All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 13f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

14. *Audit Resolution.* As provided in paragraph 11, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

15. *Audit workpapers and reports.* Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

16. *Audit Costs.* The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provision of Circular A–87, "Cost principles for State and local governments."

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

17. *Sanctions.* The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this Circular. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

—Withholding a percentage of assistance payments until the audit its completed satisfactorily,
—Withholding or disallowing overhead costs, and
—Suspending the Federal assistance agreement until the audit is made.

18. *Auditor Selection.* In arranging for audit services State and local governments shall follow the procurement standards prescribed

by Attachment O of Circular A–102, "Uniform requirements for grants to State and local governments." The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

19. *Small and Minority Audit Firms.* Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this Circular. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

20. *Reporting.* Each Federal agency will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of this Circular. The report must identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with the Circular.

21. *Regulations.* Each Federal agency shall include the provisions of this Circular in its regulations implementing the Single Audit Act.

22. *Effective date.* This Circular is effective upon publication and shall apply to fiscal years of State and local governments that begin after December 31, 1984. Earlier implementation is encouraged. However, until it is implemented, the audit provisions of Attachment P to Circular A–102 shall continue to be observed.

23. *Inquiries,* All questions or inquiries should be addressed to Financial Management Division, Office of Management and Budget, telephone number 202/395–3993.

24. *Sunset review date.* This Circular shall have an independent policy review to ascertain its effectiveness three years from the date of issuance.

DAVID A. STOCKMAN,
Director.

ATTACHMENT—CIRCULAR A–128

Definition of Major Program as Provided in Pub. L. 96–502

Major Federal Assistance Program, for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $308,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million.
$1 billion	$2 billion	$4 million.
$2 billion	$3 billion	$7 million.
$3 billion	$4 billion	$10 million.
$4 billion	$5 billion	$13 million.
$5 billion	$6 billion	$16 million.
$6 billion	$7 billion	$19 million.
Over $7 billion		$20 million.

[51 FR 6353, Feb. 21, 1986. Redesignated at 53 FR 8076, Mar. 11, 1988]

PART 32—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT); AND STATUTORY DISQUALIFICATION UNDER THE CLEAN AIR ACT AND CLEAN WATER ACT

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APPENDIX TO PART 32—COVERED TRANSACTIONS

AUTHORITY: Sec. 2455, Pub. L. 103–355, 108 Stat. 3327; E.O. 12549, 3 CFR, 1986 Comp., p.189; E.O. 12689, 3 CFR, 1989 Comp., p .235.

SOURCE: 68 FR 66544, 66620,66622, Nov. 26, 2003, unless otherwise noted.

§ 32.25 How is this part organized?

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart . . .	You will find provisions related to . . .
A	general information about this rule.
B	the types of EPA transactions that are covered by the Governmentwide nonprocurement suspension and debarment system.
C	the responsibilities of persons who participate in covered transactions.
D	the responsibilities of EPA officials who are authorized to enter into covered transactions.
E	the responsibilities of Federal agencies for the *Excluded Parties List System* (Disseminated by the General Services Administration).
F	the general principles governing suspension, debarment, voluntary exclusion and settlement.
G	suspension actions.
H	debarment actions.
I	definitions of terms used in this part.
J	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are . . .	See subpart(s) . . .
(1) a participant or principal in a nonprocurement transaction.	A, B, C, and I.
(2) a respondent in a suspension action	A, B, F, G and I.
(3) a respondent in a debarment action	A, B, F, H and I.
(4) a suspending official	A, B, D, E, F, G and I.
(5) a debarring official	A, B, D, E, F, H and I.
(6) a (n) EPA official authorized to enter into a covered transaction.	A, B, D, E and I.
(7) Reserved	J.

§ 32.50 How is this part written?

(a) This part uses a "plain language" format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as "I" and "you," change from subpart to subpart depending on the audience being addressed. The pronoun "we" always is the EPA.

(c) The "Covered Transactions" diagram in the appendix to this part shows the levels or "tiers" at which the EPA enforces an exclusion under this part.

§ 32.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded,* which refers only to discretionary actions taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified,* which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible,* which generally refers to a person who is either excluded or disqualified.

Subpart A—General

§ 32.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for EPA nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR 1986 Comp., p. 189), Executive Order 12689, "Debarment and Suspension" (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103–355, 108 Stat. 3327).

§ 32.105 Does this part apply to me?

Portions of this part (see table at § 32.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the EPA has initiated a debarment or suspension action);

(c) EPA debarring or suspending official; or

(d) EPA official who is authorized to enter into covered transactions with non-Federal parties.

§ 32.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

§ 32.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§ 32.120, 32.315, and 32.420, a person who is excluded by the EPA or any other Federal agency may not:

(a) Be a participant in a(n) EPA transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a

covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

§ 32.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The EPA Debarring Official may grant an exception permitting an excluded person to participate in a particular covered transaction. If the EPA Debarring Official grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

§ 32.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

§ 32.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

§ 32.135 May the EPA exclude a person who is not currently participating in a nonprocurement transaction?

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

§ 32.140 How do I know if a person is excluded?

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 32.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS;* and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) EPA transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

Subpart B—Covered Transactions

§ 32.200 What is a covered transaction?

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

§ 32.205 Why is it important if a particular transaction is a covered transaction?

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 32.310 or § 32.415; or

(2) A(n) EPA official obtains an exception from the EPA Debarring Official to allow you to be involved in the transaction, as permitted under § 32.120.

§ 32.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 32.970, are covered transactions unless listed in § 32.215. (See appendix to this part.)

§ 32.215 Which nonprocurement transactions are not covered transactions?

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the EPA needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the EPA specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

§ 32.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 32.210, and the amount of the contract is expected to equal or exceed $25,000.

(2) The contract requires the consent of a(n) EPA official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

(c) The contract is awarded by any contractor, subcontractor, supplier, consultant or its agent or representative in any transaction, regardless of tier, to be funded or provided by the EPA under a nonprocurement transaction that is expected to equal or exceed $25,000. (See optional lower tier coverage shown in the diagram in the appendix to this part.)

§ 32.225 How do I know if a transaction in which I may participate is a covered transaction?

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

Subpart C—Responsibilities of Participants Regarding Transactions

DOING BUSINESS WITH OTHER PERSONS

§ 32.300 What must I do before I enter into a covered transaction with another person at the next lower tier?

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

(a) Checking the *EPLS;* or

(b) Collecting a certification from that person if allowed by this rule; or

(c) Adding a clause or condition to the covered transaction with that person.

§ 32.305 May I enter into a covered transaction with an excluded or disqualified person?

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the EPA grants an exception under § 32.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

§ 32.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the EPA grants an exception under § 32.120.

§ 32.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the EPA grants an exception under § 32.120.

§ 32.320 Must I verify that principals of my covered transactions are eligible to participate?

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS.*

§ 32.325 What happens if I do business with an excluded person in a covered transaction?

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

§ 32.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 32.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

§ 32.335 What information must I provide before entering into a covered transaction with the EPA?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the EPA office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 32.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 32.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

§ 32.340 If I disclose unfavorable information required under § 32.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under § 32.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

§ 32.345 What happens if I fail to disclose information required under § 32.335?

If we later determine that you failed to disclose information under § 32.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 32.350 What must I do if I learn of information required under § 32.335 after entering into a covered transaction with the EPA?

At any time after you enter into a covered transaction, you must give immediate written notice to the EPA office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by § 32.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 32.335.

DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

§ 32.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you

know that you or any of the principals are presently excluded or disqualified.

§ 32.360 What happens if I fail to disclose the information required under § 32.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

§ 32.365 What must I do if I learn of information required under § 32.355 after entering into a covered transaction with a higher tier participant?

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 32.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 32.355.

Subpart D—Responsibilities of EPA Officials Regarding Transactions

§ 32.400 May I enter into a transaction with an excluded or disqualified person?

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 32.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 32.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 32.120.

§ 32.410 May I approve a participant's use of the services of an excluded person?

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 32.120.

§ 32.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 32.120.

§ 32.420 May I approve a transaction with an excluded or disqualified person at a lower tier?

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 32.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

§ 32.425 When do I check to see if a person is excluded or disqualified?

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

§ 32.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in § 32.425.

(b) You must review information that a participant gives you, as required by § 32.335, about its status or the status of the principals of a transaction.

§ 32.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

§ 32.440 What method do I use to communicate those requirements to participants?

To communicate the requirements to participants, you must include a term or condition in the transaction requiring the participant's compliance with subpart C of this part, and requiring them to include a similar term or condition in lower tier covered transactions.

[68 FR 66622, Nov. 26, 2003]

§ 32.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

§ 32.450 What action may I take if a primary tier participant fails to disclose the information required under § 32.335?

If you as an agency official determine that a participant failed to disclose information, as required by § 32.335, at the time it entered into a covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

§ 32.455 What may I do if a lower tier participant fails to disclose the information required under § 32.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by § 32.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

Subpart E—Excluded Parties List System

§ 32.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

§ 32.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under § 32.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under § 32.320; or

(2) Persons with whom they are entering into covered transactions at the

next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

§ 32.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

§ 32.515 What specific information is in the EPLS?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

§ 32.520 Who places the information into the EPLS?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by § 32.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

§ 32.525 Whom do I ask if I have questions about a person in the EPLS?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

§ 32.530 Where can I find the EPLS?

(a) You may access the *EPLS* through the Internet, currently at *http://epls.arnet.gov*.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238.

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 32.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or

debar you to our suspending or debarring official for consideration, if appropriate.

§ 32.605 How does suspension differ from debarment?

Suspension differs from debarment in that—

A suspending official . . .	A debarring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings.	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must— ..... (1) Have *adequate evidence* that there may be a cause for debarment of a person; and. (2) Conclude that *immediate action* is necessary to protect the Federal interest.	Must conclude, based on a *preponderance of the evidence,* that the person has engaged in conduct that warrants debarment.
(c) Usually imposes the suspension *first,* and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted.	Imposes debarment *after* giving the respondent notice of the action and an opportunity to contest the proposed debarment.

§ 32.610 What procedures does the EPA use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

§ 32.615 How does the EPA notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

§ 32.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

§ 32.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

§ 32.630 May the EPA impute conduct of one person to another?

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of

duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

§ 32.635 May the EPA settle a debarment or suspension action?

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

§ 32.640 May a settlement include a voluntary exclusion?

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 32.645 Do other Federal agencies know if the EPA agrees to a voluntary exclusion?

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

Subpart G—Suspension

§ 32.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 32.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under § 32.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

§ 32.705 What does the suspending official consider in issuing a suspension?

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

§ 32.710 When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

§ 32.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;

(b) That your suspension is based on—

(1) An indictment;

(2) A conviction;

(3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

(4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under § 32.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, Subpart F of this part, and any other EPA procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

§ 32.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 32.725 How much time do I have to contest a suspension?

(a) As a respondent you or your representative must either send, or make rrangements to appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 32.730 What information must I provide to the suspending official if I contest a suspension?

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the EPA may seek further criminal, civil or administrative action against you, as appropriate.

§ 32.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

(1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

§ 32.740 Are suspension proceedings formal?

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

§ 32.745 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the EPA agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 32.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 32.755 When will I know whether the suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

§ 32.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S.

Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

§ 32.765 How may I appeal my suspension?

(a) If the EPA suspending official issues a decision under § 32.755 to continue your suspension after you present information in opposition to that suspension under § 32.720, you can ask for review of the suspending official's decision in two ways:

(1) You may ask the suspending official to reconsider the decision for material errors of fact or law that you believe will change the outcome of the matter; and/or

(2) You may request the Director, Office of Grants and Debarment (OGD Director), to review the suspending official's decision to continue your suspension within 30 days of your receipt of the suspending official's decision under § 32.755 or paragraph (a)(1) of this section. However, the OGD Director can reverse the suspending official's decision only where the OGD Director finds that the decision is based on a clear error of material fact or law, or where the OGD Director finds that the suspending official's decision was arbitrary, capricious, or an abuse of discretion.

(b) A request for review under this section must be in writing; state the specific findings you believe to be in error; and include the reasons or legal bases for your position.

(c) A review under paragraph (a)(2) of this section is solely within the discretion of the OGD Director who may also stay the suspension pending review of the suspending official's decision.

(d) The EPA suspending official and the OGD Director must notify you of their decisions under this section, in writing, using the notice procedures at § 32.615 and § 32.975.

[68 FR 66622, Nov. 26, 2003]

Subpart H—Debarment

§ 32.800 What are the causes for debarment?

We may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 32.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts

(including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 32.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

§ 32.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 32.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 32.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 32.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other EPA procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities.

§ 32.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

§ 32.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

§ 32.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

§ 32.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in § 32.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed

Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the EPA may seek further criminal, civil or administrative action against you, as appropriate.

§ 32.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

§ 32.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

§ 32.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the EPA agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

§ 32.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in § 32.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at § 32.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

§ 32.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

§ 32.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

§ 32.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

§ 32.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in § 32.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

§ 32.870 When do I know if the debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.

(b) The debarring official sends you written notice, pursuant to § 32.615 that the official decided, either—

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

§ 32.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

§ 32.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

(a) Newly discovered material evidence;

(b) A reversal of the conviction or civil judgment upon which your debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

§ 32.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

§ 32.890 How may I appeal my debarment?

(a) If the EPA debarring official issues a decision under § 32.870 to debar you after you present information in opposition to a proposed debarment under § 32.815, you can ask for review of the debarring official's decision in two ways:

(1) You may ask the debarring official to reconsider the decision for material errors of fact or law that you believe will change the outcome of the matter; and/or

(2) You may request the Director, Office of Grants and Debarment (OGD Director), to review the debarring official's decision to debar you within 30 days of your receipt of the debarring official's decision under § 32.870 or paragraph (a)(1) of this section. However, the OGD Director can reverse the debarring official's decision only where the OGD Director finds that the decision is based on a clear error of material fact or law, or where the OGD Director finds that the debarring official's decision was arbitrary, capricious, or an abuse of discretion.

(b) A request for review under this section must be in writing; state the specific findings you believe to be in error; and include the reasons or legal bases for your position.

(c) A review under paragraph (a)(2) of this section is solely within the discretion of the OGD Director who may also stay the debarment pending review of the debarring official's decision.

(d) The EPA debarring official and the OGD Director must notify you of their decisions under this section, in writing, using the notice procedures at § 32.615 and § 32.975.

[68 FR 66622, Nov. 26, 2003]

Subpart I—Definitions

§ 32.900 Adequate evidence.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

§ 32.905 Affiliate.

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

(a) Interlocking management or ownership;

(b) Identity of interests among family members;

(c) Shared facilities and equipment;

(d) Common use of employees; or

(e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

§ 32.910 Agency.

Agency means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered "agencies" for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

§ 32.915 Agent or representative.

Agent or representative means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

§ 32.920 Civil judgment.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

§ 32.925 Conviction.

Conviction means—

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

§ 32.930 Debarment.

Debarment means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal

Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

§ 32.935 Debarring official.

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

§ 32.940 Disqualified.

Disqualified means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

§ 32.945 Excluded or exclusion.

Excluded or exclusion means—

(a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or

(b) The act of excluding a person.

§ 32.950 Excluded Parties List System

Excluded Parties List System (EPLS) means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, "List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs," so long as published.

§ 32.955 Indictment.

Indictment means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

§ 32.960 Ineligible or ineligibility.

Ineligible or ineligibility means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

§ 32.965 Legal proceedings.

Legal proceedings means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

§ 32.970 Nonprocurement transaction.

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

(1) Grants.

(2) Cooperative agreements.

(3) Scholarships.

(4) Fellowships.

(5) Contracts of assistance.

(6) Loans.

(7) Loan guarantees.

(8) Subsidies.

(9) Insurances.

(10) Payments for specified uses.

(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

§ 32.975 Notice.

Notice means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 32. 615.)

§ 32.980 Participant.

Participant means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

§ 32.985 Person.

Person means any individual, corporation, partnership, association, unit

of government, or legal entity, however organized.

§ 32.990 Preponderance of the evidence.

Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

§ 32.995 Principal.

Principal means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

(c) Other examples of individuals who are principals in EPA covered transactions include:

(1) Principal investigators;

(2) Technical or management consultants;

(3) Individuals performing chemical or scientific analysis or oversight;

(4) Professional service providers such as doctors, lawyers, accountants, engineers, etc.;

(5) Individuals responsible for the inspection, sale, removal, transportation, storage or disposal of solid or hazardous waste or materials;

(6) Individuals whose duties require special licenses;

(7) Individuals that certify, authenticate or authorize billings; and

(8) Individuals that serve in positions of public trust.

§ 32.1000 Respondent.

Respondent means a person against whom an agency has initiated a debarment or suspension action.

§ 32.1005 State.

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

§ 32.1010 Suspending official.

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

§ 32.1015 Suspension.

Suspension is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

§ 32.1020 Voluntary exclusion or voluntarily excluded.

(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

Subpart J—Statutory Disqualification and Reinstatement Under the Clean Air Act and Clean Water Act

SOURCE: 68 FR 66622, Nov. 26, 2003, unless otherwise noted.

§ 32.1100 What does this subpart do?

This subpart explains how the EPA administers section 306 of the Clean Air Act (CAA) (42 U.S.C. 7606), and section 508 of the Clean Water Act (CWA) (33 U.S.C. 1368), which disqualify persons convicted for certain offenses under those statutes (see § 32.1105), from eligibility to receive certain contracts, subcontracts, assistance, loans and other benefits (see coverage under the Federal Acquisition Regulation (FAR), 48 CFR part 9, subpart 9.4, and subparts A through I of this part). It also explains: the procedures for seeking reinstatement of a person's eligibility under the CAA or CWA; the criteria and standards that apply to EPA's decision-making process; and requirements of award officials and others involved in Federal procurement and nonprocurement activities in carrying out their responsibilities under the CAA and CWA.

§ 32.1105 Does this subpart apply to me?

(a) Portions of this subpart apply to you if you are convicted, or likely be convicted, of any offense under section 7413(c) of the CAA or section 1319(c) of the CWA.

(b) Portions of this subpart apply to you if you are the EPA debarring official, a Federal procurement or nonprocurement award official, a participant in a Federal procurement or nonprocurement program that is precluded from entering into a covered transaction with a person disqualified under the CAA or CWA, or if you are a Federal department or agency anticipating issuing an exception to a person otherwise disqualified under the CAA or CWA.

§ 32.1110 How will a CAA or CWA conviction affect my eligibility to participate in Federal contracts, subcontracts, assistance, loans and other benefits?

If you are convicted of any offense described in § 32.1105, you are automatically disqualified from eligibility to receive any contract, subcontract, assistance, sub-assistance, loan or other nonprocurement benefit or transaction that is prohibited by a Federal department or agency under the Governmentwide debarment and suspension system (*i.e.,* covered transactions under subparts A through I of this part, or prohibited awards under 48 CFR part 9, subpart 9.4), if you:

(a) Will perform any part of the transaction or award at the facility giving rise to your conviction (called the violating facility); and

(b) You own, lease or supervise the violating facility.

§ 32.1115 Can the EPA extend a CAA or CWA disqualification to other facilities?

The CAA specifically authorizes the EPA to extend a CAA disqualification to other facilities that are owned or operated by the convicted person. The EPA also has authority under subparts A through I of this part, or under 48 CFR part 9, subpart 9.4, to take discretionary suspension and debarment actions on the basis of misconduct leading to a CAA or CWA conviction, or for activities that the EPA debarring official believes were designed to improperly circumvent a CAA or CWA disqualification.

§ 32.1120 What is the purpose of CAA or CWA disqualification?

As provided for in Executive Order 11738 (3 CFR, 1973 Comp., p.799), the purpose of CAA and CWA disqualification is to enforce the Federal Government's policy of undertaking Federal procurement and nonprocurement activities in a manner that improves and enhances environmental quality by promoting effective enforcement of the CAA or CWA.

§ 32.1125 How do award officials and others know if I am disqualified?

If you are convicted under these statutes, the EPA enters your name and address and that of the violating facility into the *Excluded Parties List System (EPLS)* as soon as possible after the EPA learns of your conviction. In addition, the EPA enters other information describing the nature of your disqualification. Federal award officials and others who administer Federal programs consult the *EPLS* before entering into or approving procurement and nonprocurement transactions. As of the date of this regulation, award officials and others, including the public,

may obtain a yearly subscription to a printed version of the *EPLS* from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238. Anyone may access the *EPLS* through the internet, currently at *http://epls.arnet.gov*.

§ 32.1130 How does disqualification under the CAA or CWA differ from a Federal discretionary suspension or debarment action?

(a) CAA and CWA disqualifications are exclusions mandated by statute. In contrast, suspensions and debarments imposed under subparts A through I of this part or under 48 CFR part 9, subpart 9.4, are exclusions imposed at the discretion of Federal suspending or debarring officials. This means that if you are convicted of violating the CAA or CWA provisions described under § 32.1105, ordinarily your name and that of the violating facility is placed into the *EPLS* before you receive a confirmation notice of the listing, or have an opportunity to discuss the disqualification with, or seek reinstatement from, the EPA.

(b) CAA or CWA disqualification applies to both the person convicted of the offense, and to the violating facility during performance of an award or covered transaction under the Federal procurement and nonprocurement suspension and debarment system. It is the EPA's policy to carry out CAA and CWA disqualifications in a manner which integrates the disqualifications into the Governmentwide suspension and debarment system. Whenever the EPA determines that the risk presented to Federal procurement or nonprocurement activities on the basis of the misconduct which gives rise to a person's CAA or CWA conviction exceeds the coverage afforded by mandatory disqualification, the EPA may use its discretionary authority to suspend or debar a person under subparts A through I of this part, or under 48 CFR part 9, subpart 9.4.

§ 32.1135 Does CAA or CWA disqualification mean that I must remain ineligible?

You must remain ineligible until the EPA debarring official certifies that the condition giving rise to your conviction has been corrected. If you desire to have your disqualification terminated, you must submit a written request for reinstatement to the EPA debarring official and support your request with persuasive documentation. For information about the process for reinstatement see § 32.1205 and § 32.1300.

§ 32.1140 Can an exception be made to allow me to receive an award even though I may be disqualified?

(a) After consulting with the EPA debarring official, the head of any Federal department or agency (or designee) may exempt any particular award or a class of awards with that department or agency from the prohibitions otherwise resulting from CAA or CWA disqualification. In the event an exemption is granted, the exemption must:

(1) Be in writing; and

(2) State why the exemption is in the paramount interests of the United States.

(b) In the event an exemption is granted, the exempting department or agency must send a copy of the exemption decision to the EPA debarring official for inclusion in the official record.

§ 32.1200 How will I know if I am disqualified under the CAA or CWA?

There may be several ways that you learn about your disqualification. You are legally on notice by the statutes that a criminal conviction under the CAA or CWA automatically disqualifies you. As a practical matter, you may learn about your disqualification from your defense counsel, a Federal contract or award official, or from someone else who sees your name in the *EPLS*. As a courtesy, the EPA will attempt to notify you and the owner, lessor or supervisor of the violating facility that your names have been entered into the *EPLS*. The EPA will inform you of the procedures for seeking reinstatement and give you the name of a person you can contact to discuss your reinstatement request.

§ 32.1205 What procedures must I follow to have my procurement and nonprocurement eligibility reinstated under the CAA or CWA?

(a) You must submit a written request for reinstatement to the EPA debarring official stating what you believe the conditions were that led to your conviction, and how those conditions have been corrected, relieved or addressed. Your request must include documentation sufficient to support all material assertions you make. The debarring official must determine that all the technical and non-technical causes, conditions and consequences of your actions have been sufficiently addressed so that the Government can confidently conduct future business activities with you, and that your future operations will be conducted in compliance with the CAA and CWA.

(b) You may begin the reinstatement process by having informal discussions with the EPA representative named in your notification of listing. Having informal dialogue with that person will make you aware of the EPA concerns that must be addressed. The EPA representative is not required to negotiate conditions for your reinstatement. However, beginning the reinstatement process with informal dialogue increases the chance of achieving a favorable outcome, and avoids unnecessary delay that may result from an incomplete or inadequate reinstatement request. It may also allow you to resolve your disqualification by reaching an agreement with the EPA debarring official under informal procedures. Using your informal option first does not prevent you from submitting a formal reinstatement request with the debarring official at any time.

§ 32.1210 Will anyone else provide information to the EPA debarring official concerning my reinstatement request?

If you request reinstatement under § 32.1205, the EPA debarring official may obtain review and comment on your request by anyone who may have information about, or an official interest in, the matter. For example, the debarring official may consult with the EPA Regional offices, the Department of Justice or other Federal agencies, or state, tribal or local governments. The EPA debarring official will make sure that you have an opportunity to address important allegations or information contained in the administrative record before making a final decision on your request for reinstatement.

§ 32.1215 What happens if I disagree with the information provided by others to the EPA debarring official on my reinstatement request?

(a) If your reinstatement request is based on factual information (as opposed to a legal matter or discretionary conclusion) that is different from the information provided by others or otherwise contained in the administrative record, the debarring official will decide whether those facts are genuinely in dispute, and material to making a decision. If so, a fact-finding proceeding will be conducted in accordance with § 32.830 through § 32.840, and the debarring official will consider the findings when making a decision on your reinstatement request.

(b) If the basis for your disagreement with the information contained in the administrative record relates to a legal issue or discretionary conclusion, or is not a genuine dispute over a material fact, you will not have a fact-finding proceeding. However, the debarring official will allow you ample opportunity to support your position for the record and present matters in opposition to your continued disqualification. A summary of any information you provide orally, if not already recorded, should also be submitted to the debarring official in writing to assure that it is preserved for the debarring official's consideration and the administrative record.

§ 32.1220 What will the EPA debarring official consider in making a decision on my reinstatement request?

(a) The EPA debarring official will consider all information and arguments contained in the administrative record in support of, or in opposition to, your request for reinstatement, including any findings of material fact.

(b) The debarring official will also consider any mitigating or aggravating factors that may relate to your conviction or the circumstances surrounding it, including any of those factors that

appear in § 32.860 that may apply to your situation.

(c) Finally, if disqualification applies to a business entity, the debarring official will consider any corporate or business attitude, policies, practices and procedures that contributed to the events leading to conviction, or that may have been implemented since the date of the misconduct or conviction. You can obtain any current policy directives issued by the EPA that apply to CAA or CWA disqualification or reinstatement by contacting the Office of the EPA Debarring Official, U. S. Environmental Protection Agency, Office of Grants and Debarment (3901–R), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

§ 32.1225 When will the EPA debarring official make a decision on my reinstatement request?

(a) The EPA debarring official will make a decision regarding your reinstatement request under § 32.1205(a), when the administrative record is complete, and he or she can determine whether the condition giving rise to the CAA or CWA conviction has been corrected-usually within 45 days of closing the administrative record.

(b) A reinstatement request is not officially before the debarring official while you are having informal discussions under § 32.1205(b).

§ 32.1230 How will the EPA debarring official notify me of the reinstatement decision?

The EPA debarring official will notify you of the reinstatement decision in writing, using the same methods for communicating debarment or suspension action notices under § 32.615.

§ 32.1300 Can I resolve my eligibility status under terms of an administrative agreement without having to submit a formal reinstatement request?

(a) The EPA debarring official may, at any time, resolve your CAA or CWA eligibility status under the terms of an administrative agreement. Ordinarily, the debarring official will not make an offer to you for reinstatement until after the administrative record for decision is complete, or contains enough information to enable him or her to make an informed decision in the matter.

(b) Any resolution of your eligibility status under the CAA or CWA resulting from an administrative agreement must include a certification that the condition giving rise to the conviction has been corrected.

(c) The EPA debarring official may enter into an administrative agreement to resolve CAA or CWA disqualification issues as part of a comprehensive criminal plea, civil or administrative agreement when it is in the best interest of the United States to do so.

§ 32.1305 What are the consequences if I mislead the EPA in seeking reinstatement or fail to comply with my administrative agreement?

(a) Any certification of correction issued by the EPA debarring official, whether the certification results from a reinstatement decision under § 32.1205(a) and § 32.1230, or from an administrative agreement under § 32.1205(b) and § 32.1300, is conditioned upon the accuracy of the information, representations or assurances made during development of the administrative record.

(b) If the EPA debarring official finds that he or she has certified correction of the condition giving rise to a CAA or CWA conviction or violation on the basis of a false, misleading, incomplete or inaccurate information; or if a person fails to comply with material condition of an administrative agreement, the EPA debarring official may revoke the certification of correction and immediately reinstate the CAA or CWA disqualification. In addition, the EPA debarring official may take suspension or debarment action against the person(s) responsible for the misinformation or noncompliance with the agreement as appropriate. If anyone provides false, inaccurate, incomplete or misleading information to EPA in an attempt to obtain reinstatement, the EPA debarring official will refer the matter to the EPA Office of the Inspector General for potential criminal or civil action.

§ 32.1400 How may I appeal a decision denying my request for reinstatement?

(a) If the EPA debarring official denies your request for reinstatement under the CAA or CWA, you can ask for review of the EPA debarring official's decision in two ways:

(1) You may ask the debarring official to reconsider the decision for material errors of fact or law that you believe will change the outcome of the matter; and/or

(2) You may request the Director, Office of Grants and Debarment (OGD Director), to review the debarring official's denial within 30 days of your receipt of the debarring official's decision under § 32.1230 or paragraph (a)(1) of this section. However, the OGD Director can reverse the debarring official's decision denying reinstatement only where the OGD Director finds that there is a clear error of material fact or law, or where the OGD Director finds that the debarring official's decision was arbitrary, capricious, or an abuse of discretion.

(b) A request for review under this section must be in writing and state the specific findings you believe to be in error and the reason for your position.

(c) A review by the OGD Director under this section is solely within the discretion of the OGD Director.

(d) The OGD Director must notify you of his or her decision under this section, in writing, using the notice procedures identified at § 32.615 and § 32.975.

§ 32.1500 If I am reinstated, when will my name be removed from the EPLS?

If your eligibility for procurement and nonprocurement participation is restored under the CAA or CWA, whether by decision, appeal, or by administrative agreement, the EPA will remove your name and that of the violating facility from the *EPLS*, generally within 5 working days of your reinstatement.

§ 32.1600 What definitions apply specifically to actions under this subpart?

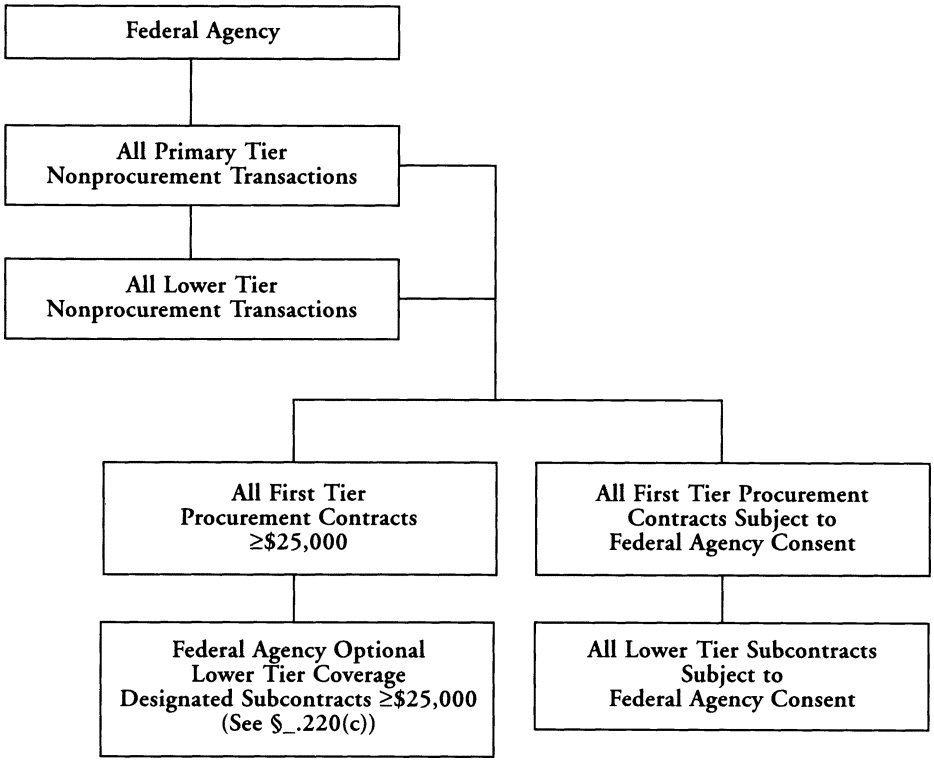
In addition to definitions under subpart I of this part that apply to this part as a whole, the following two definitions apply specifically to CAA and CWA disqualifications under this subpart:

(a) *Person* means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body.

(b) *Violating facility* means any building, plant, installation, structure, mine, vessel, floating craft, location or site of operations that gives rise to a CAA or CWA conviction, and is a location at which or from which a Federal contract, subcontract, loan, assistance award or other covered transaction may be performed. If a site of operations giving rise to a CAA or CWA conviction contains or includes more than one building, plant, installation, structure, mine, vessel, floating craft, or other operational element, the entire location or site of operation is regarded as the violating facility unless otherwise limited by the EPA.

APPENDIX TO PART 32—COVERED TRANSACTIONS

COVERED TRANSACTIONS



PART 34—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

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APPENDIX A TO PART 34—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 34—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319; Pub. L. 101–121 (31 U.S.C. 1352); 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et*

seq.; 42 U.S.C. 9601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1401 *et seq.*

SOURCE: 55 FR 6737 and 6753, Feb. 26, 1990 (interim), unless otherwise noted.

CROSS-REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 34.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 34.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct

appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as

soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 34.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 34.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 34.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of

his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 34.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 34.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 34.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 34.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 34.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 34.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 34.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 34.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 34.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 34—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form–LLL, "Disclosure

Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form–LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 34—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter _____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known*:

Congressional District, *if known*:

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known*:

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable*: _____

8. Federal Action Number, *if known*:

9. Award Amount, *if known*:
$

10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI)*:

b. Individuals Performing Services *(including address if different from No. 10a) (last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply)*:
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply)*:
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

Federal Use Only:

Authorized for Local Reproduction
Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

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AUTHORITY: 42 U.S.C. 4368b, unless otherwise noted.

§ 35.001 Applicability.

This part codifies policies and procedures for financial assistance awarded by the Environmental Protection Agency (EPA) to State, interstate, and local agencies, Indian Tribes and Intertribal Consortia for pollution abatement and control programs. These provisions supplement the EPA general assistance regulations in 40 CFR part 31.

[66 FR 1734, Jan. 9, 2001]

Subpart A—Environmental Program Grants

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).

SOURCE: 66 FR 1734, Jan. 9, 2001, unless otherwise noted.

GENERAL

§ 35.100 Purpose of the subpart.

This subpart establishes administrative requirements for all grants awarded to State, interstate, and local agencies and other entities for the environmental programs listed in § 35.101. This subpart supplements requirements in EPA's general grant regulations found at 40 CFR parts 30 and 31. Sections 35.100—35.118 contain administrative requirements that apply to all environmental program grants included in this subpart. Sections 35.130–35.418 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.

§ 35.101 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 (Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law 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. Law 105–65, 111 Stat. 1344, 1373 (1997)).

(2) Air pollution control (section 105 of the Clean Air Act).

(3) Water pollution control (section 106 of the Clean Water Act).

(4) Public water system supervision (section 1443(a) of the Safe Drinking Water Act).

(5) Underground water source protection (section 1443(b) of the Safe Drinking Water Act).

(6) Hazardous waste management (section 3011(a) of the Solid Waste Disposal Act).

(7) Pesticide cooperative enforcement (section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act).

(8) Pesticide applicator certification and training (section 23(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act).

(9) Pesticide program implementation (section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act).

(10) Nonpoint source management (sections 205(j)(5) and 319(h) of the Clean Water Act).

(11) Lead-based paint program (section 404(g) of the Toxic Substances Control Act).

(12) State indoor radon grants (section 306 of the Toxic Substances Control Act).

(13) Toxic substances compliance monitoring (section 28 of the Toxic Substances Control Act).

(14) State underground storage tanks (section 2007(f)(2) of the Solid Waste Disposal Act).

(15) Pollution prevention state grants (section 6605 of the Pollution Prevention Act of 1990).

(16) Water quality cooperative agreements (section 104(b)(3) of the Clean Water Act).

(17) Wetlands development grants program (section 104(b)(3) of the Clean Water Act).

(18) State administration of construction grant, permit, and planning programs (section 205(g) of the Clean Water Act).

(19) Water quality management planning (section 205(j)(2) of the Clean Water Act).

(b) Unless otherwise prohibited by statute or regulation, the requirements in § 35.100 through § 35.118 of this subpart also apply to grants 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'.

§ 35.102 Definitions of terms.

Terms are defined as follows when they are used in this subpart.

Allotment. EPA's calculation of the funds that may be available to an eligible recipient for an environmental program grant. An allotment is not an entitlement.

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 § 35.101. The grants are subject to the requirements of this subpart.

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.

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 the core performance measures and other information to be used in monitoring progress. The guidance may also set out specific environmental strategies, 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 Agreement. A negotiated agreement signed by the EPA Regional Administrator and an appropriate official of a State agency and designated as a Performance Partnership Agreement. Such agreements typically set out jointly developed goals, objectives, and priorities; the strategies to be used in meeting them; the roles and responsibilities of the State and EPA; and the measures to be used in assessing progress. A Performance Partnership Agreement may be used as all or part of a work plan for a grant if it meets the requirements for a work plan set out in § 35.107.

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 § 35.130). 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 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.

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.

PREPARING AN APPLICATION

§ 35.104 Components of a complete application.

A complete application for an environmental program must:

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

(b) Include a proposed work plan (§ 35.107); and

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

§ 35.105 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.

§ 35.107 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 State 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 core performance measures in the national program guidance associated with the proposed 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 the 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 § 35.115 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 EPA delegations, approvals, or authorizations.

(c) *Performance Partnership Agreement as work plan.* An applicant may use a Performance Partnership Agreement or a portion of a Performance Partnership Agreement as the work plan for an environmental program grant if the portions of the Performance Partnership Agreement that serve as all or part of the grant work plan:

(1) Are clearly identified and distinguished from other portions of the Performance Partnership Agreement; and

(2) Meet the requirements in § 35.107(b).

§ 35.108 Funding period.

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

§ 35.109 Consolidated grants.

(a) 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.

(b) Insular areas that choose to consolidate environmental program grants may be exempted by the Regional Administrator from requirements of this subpart in accordance with 48 U.S.C. 1469a.

EPA Action on Application

§ 35.110 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. This period may be extended by mutual agreement between EPA and the applicant. The Regional Administrator will award the funds for approved or conditionally approved applications when the funds are available.

§ 35.111 Criteria for approving an application.

(a) 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 delegations, approvals, or authorizations;

(3) The proposed work plan complies with the requirements of § 35.107; 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.

§ 35.112 Factors considered in determining award amount.

(a) After approving an application under § 35.111, the Regional Administrator will consider such factors as the applicant's allotment, 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 the requested level of funding is not justified or the work plan does not comply with the requirements of § 35.107, the Regional Administrator will attempt to negotiate a resolution of the issues with the applicant before determining the award amount. The Regional Administrator may determine that the award amount will be less than the amount allotted or requested.

§ 35.113 Reimbursement for pre-award costs.

(a) Notwithstanding the requirements of 40 CFR 31.23(a) 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 and the recipients submitted complete grant applications before the beginning of the budget period. Such costs must be 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 award.

POST-AWARD REQUIREMENTS

§ 35.114 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.* Recipients may make significant changes in work plan commitments only after obtaining the Regional Administrator's prior written approval. EPA, in consultation with the recipient, will document these revisions 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 components of grant agreements, unless the Regional Administrator determines approval requirements should be imposed on a specific recipient for a specified period of time.

(d) *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

§ 35.109 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.

§ 35.115 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. A description of the evaluation process and a reporting schedule must be included in the work plan (see § 35.107(b)(2)(iv)). 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.

§ 35.116 Direct implementation.

If funds remain in a State's allotment for an environmental program grant either after grants for that environmental program have been made or because no grant was made, 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 State in the absence of an acceptable State program.

§ 35.117 Unused funds.

If funds for an environmental program grant remain in a State's allotment either after an initial environmental program grant has been made or because no grant was made, and the Regional Administrator does not use the funds under § 35.116 of this subpart, the Regional Administrator may award the funds to any eligible recipient in the region, including the same State or an Indian Tribe or Tribal consortium, for the same environmental program or for a Performance Partnership Grant, subject to any limitations in appropriation acts.

§ 35.118 Unexpended balances.

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

PERFORMANCE PARTNERSHIP GRANTS

§ 35.130 Purpose of Performance Partnership Grants.

(a) *Purpose of section.* Sections 35.130 through 35.138 govern Performance Partnership Grants to States and interstate agencies authorized in the Omnibus Consolidated Rescissions and

Appropriations Act of 1996, (Pub. L. 104–134; 110 Stat. 1321, 1321–299 (1996)) and the 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 States and interstate agencies 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 State and interstate agencies through joint planning and priority-setting and better deployment of resources;

(2) Provide State and interstate agencies 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.

§ 35.132 Requirements summary.

Applicants and recipients of Performance Partnership Grants must meet:

(a) The requirements in §§ 35.100 to 35.118, which apply to all environmental program grants, including Performance Partnership Grants; and

(b) The requirements in §§ 35.130 to 35.138, which apply only to Performance Partnership Grants.

§ 35.133 Programs eligible for inclusion.

(a) *Eligible programs.* Except as provided in paragraph (b) of this section, the environmental programs eligible, in accordance with appropriation acts, for inclusion in a Performance Partnership Grant are listed in § 35.101(a)(2) through (17). (Funds available from the section 205(g) State Administration Grants program (§ 35.100(b)(18)) and the Water Quality Management Planning Grant program (§ 35.100(b)(19)) may not be included in Performance Partnership Grants.)

(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.

§ 35.134 Eligible recipients.

(a) *Eligible agencies.* All State agencies (including environmental, health, agriculture, and other agencies) and interstate agencies eligible to receive funds from more than one environmental program may receive Performance Partnership Grants

(b) *Designated agency.* A State agency must be designated by a Governor, State legislature, or other authorized State process to receive grants under each of the environmental programs to be combined in the Performance Partnership Grant. If it is not the designated agency for a particular grant program to be included in the Performance Partnership Grant, the State agency must have an agreement with the State agency that does have the designation regarding how the funds will be shared between the agencies.

(c) *Programmatic requirements.* In order to include funds from an environmental program grant listed in § 35.101 of this subpart in a Performance Partnership Grant, applicants must meet the requirements for award of each of the environmental programs from which funds are combined in the agency's Performance Partnership Grant, except the requirements at §§ 35.268(b) and (c), 35.272, and 35.298 (c), (d), (e), and (g). These requirements can be found in this regulation beginning at § 35.140.

§ 35.135 Activities eligible for funding.

(a) A recipient may use a Performance Partnership Grant, subject to the

requirements of paragraph (c) of this section, to fund any activity that is eligible for funding under at least one of the environmental programs from which funds are combined into the grant.

(b) A recipient may also use a Performance Partnership Grant to fund multi-media activities that are eligible in accordance with paragraph (a) of this section and have been agreed to by the Regional Administrator. Such activities may include multi-media permitting and enforcement and pollution prevention, ecosystem management, community-based environmental protection, and other innovative approaches.

(c) A recipient may not use a Performance Partnership Grant to fund activities eligible only under a specific environmental program grant unless some or all of the recipient's allotted funds for that program have been included in the Performance Partnership Grant.

§ 35.136 Cost share requirements.

(a) An applicant for a Performance Partnership Grant must provide a non-federal cost share that is not less than the sum of the minimum non-federal cost share required under each of the environmental programs that are combined in the Performance Partnership Grant. Cost share requirements for the individual environmental programs are described in §§ 35.140 to 35.418.

(b) When an environmental program included in the Performance Partnership Grant has both a matching and maintenance of effort requirement, the greater of the two amounts will be used to calculate the minimum cost share attributed to that environmental program.

§ 35.137 Application requirements.

(a) An application for a Performance Partnership Grant must contain:

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

(2) A consolidated budget;

(3) A consolidated work plan that addresses each program being combined in the grant and that meets the requirements of § 35.107; and,

(4) A rationale, commensurate with the extent of any programmatic flexibility (i.e., increased effort in some programs and decreased effort in others) indicated in the work plan, that explains the basis for the applicant's priorities, the expected environmental or other benefits to be achieved, and the anticipated impact on any environmental programs or program areas proposed for reduced effort.

(b) The applicant and the Regional Administrator will negotiate regarding the information necessary to support the rationale for programmatic flexibility required in paragraph (a)(4) of this section. The rationale may be supported by information from a variety of sources, including a Performance Partnership Agreement or comparable negotiated document, the evaluation report required in § 35.125, and other environmental and programmatic data sources.

(c) A State agency seeking programmatic flexibility is encouraged to include a description of efforts to involve the public in developing the State agency's priorities.

§ 35.138 Competitive grants.

(a) Some environmental program grants are awarded through a competitive process. An applicant and the Regional Administrator may agree to add funds available for a competitive grant to a Performance Partnership Grant. If this is done, the work plan commitments that would have been included in the competitive grant must be included in the Performance Partnership Grant work plan. After the funds have been added to the Performance Partnership Grant, the recipient does not need to account for these funds in accordance with the funds' original environmental program source.

(b) If the projected completion date for competitive grant work plan commitments added to a Performance Partnership Grant is after the end of the Performance Partnership Grant funding period, the Regional Administrator and the applicant will agree in writing as to how the work plan commitments will be carried over into future work plans.

AIR POLLUTION CONTROL (SECTION 105)

§ 35.140 Purpose.

(a) *Purpose of section.* Sections 35.140 through 35.148 govern Air Pollution Control Grants to State, local, interstate, or intermunicipal air pollution control agencies (as defined in section 302(b) of the Clean Air Act) authorized under section 105 of the Act.

(b) *Purpose of program.* Air Pollution Control Grants are awarded to administer programs that prevent and control air pollution or implement national ambient air quality standards.

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

§ 35.141 Definitions.

In addition to the definitions in § 35.102, the following definitions apply to the Clean Air Act's section 105 grant program:

Implementing means any activity related to planning, developing, establishing, carrying-out, improving, or maintaining programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

Nonrecurrent expenditures are those expenditures which are shown by the recipient to be of a nonrepetitive, unusual, or singular nature that 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.

§ 35.143 Allotment.

(a) The Administrator allots air pollution control funds under section 105 of the Clean Air Act based on a number of factors, including:

(1) Population;

(2) The extent of actual or potential air pollution problems; and

(3) The financial need of each agency.

(b) The Regional Administrator shall allot to a State not less than one-half of one percent nor more than 10 percent of the annual section 105 grant appropriation.

(c) The Administrator may award funds on a competitive basis.

§ 35.145 Maximum federal share.

(a) The Regional Administrator may provide air pollution control agencies, as defined in section 302(b) of the Clean Air Act, up to three-fifths of the approved costs of implementing programs for the prevention and control of air pollution or implementing national primary and secondary ambient air quality standards.

(b) Revenue collected pursuant to a State's Title V operating permit program may not be used to meet the cost share requirements of section 105.

§ 35.146 Maintenance of effort.

(a) To receive funds under section 105, an agency 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.

(b) In order to award grants in a timely manner each fiscal year, the Regional Administrator shall compare an agency's proposed expenditure level, as detailed in the agency's grant application, to that agency's 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 agency's compliance with its maintenance of effort requirement.

(c) If the expenditure data for the preceding fiscal year shows that an agency did not meet the requirements of § 35.146, the Regional Administrator will take action to recover the grant funds for the year in which the agency did not maintain its level of effort.

(d) The Regional Administrator may grant an exception to § 35.146(a) if, after notice and opportunity for a public hearing, the Regional Administrator determines that a reduction in expenditure is attributable to a non-selective reduction of the programs of all executive branch agencies of the applicable unit of government.

(e) 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.

§ 35.147 Minimum cost share for a Performance Partnership Grant.

(a) To calculate the cost share for a Performance Partnership Grant (see §§ 35.130 through 35.138) in the initial and subsequent years that it includes section 105 funds, the minimum cost share contribution for the section 105 program will be the match requirement set forth in § 35.145, or the maintenance of effort established under § 35.146 in the first year that the section 105 grant is included in a Performance Partnership Grant, whichever is greater.

(b) If an air pollution control agency includes its section 105 air program funding in a Performance Partnership Grant and subsequently withdraws that program from the grant:

(1) The required maintenance of effort amount for the section 105 program for the first year after the program is withdrawn will be equal to the maintenance of effort amount required in the year the agency included the section 105 program in the Performance Partnership Grant.

(2) The maximum federal share for the section 105 program in the first and subsequent years after the grant is withdrawn may not be more than three-fifths of the approved cost of the program.

(c) The Regional Administrator may approve an exception from paragraph (b) of this section upon determining that exceptional circumstances justify a reduction in the maintenance of effort, including when an air pollution control agency reduces section 105 funding as part of a non-selective reduction of the programs of all executive branch agencies of the applicable unit of government.

§ 35.148 Award limitations.

(a) The Regional Administrator will not award section 105 funds to an interstate or intermunicipal agency:

(1) That does not provide assurance that it can develop a comprehensive plan for the air quality control region which includes representation of appropriate State, interstate, local, Tribal, and international interests; and

(2) Without consulting with the appropriate official designated by the Governor or Governors of the State or States affected or the appropriate official of any affected Indian Tribe or Tribes.

(b) The Regional Administrator will not disapprove an application for or terminate or annul a section 105 grant without prior notice and opportunity for a public hearing in the affected State or States.

WATER POLLUTION CONTROL (SECTION 106)

§ 35.160 Purpose.

(a) *Purpose of section.* Sections 35.160 through 35.168 govern Water Pollution Control Grants to State and interstate agencies (as defined in section 502 of the Clean Water Act) authorized under section 106 of the Clean Water Act.

(b) *Purpose of program.* Water Pollution Control Grants are awarded to assist in administering programs for the prevention, reduction, and elimination of water pollution, including programs for the development and implementation of ground-water protection strategies. Some of these activities may also be eligible for funding under sections 104(b)(3) (Water Quality Cooperative Agreements and Wetlands Development Grants), 205(j)(2) (Water Quality Management Planning), and section 205(g) (State Administration Grants) of the Clean Water Act. (See §§ 35.160, 35.360, 35.380, 35.400, and 35.410.)

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

§ 35.161 Definition.

Recurrent expenditures are those expenditures associated with the activities of a continuing Water Pollution Control program. All expenditures, except those for equipment purchases of $5,000 or more, are considered recurrent unless justified by the applicant as nonrecurrent and approved as such in the grant award or an amendment thereto.

§ 35.162 Basis for allotment.

(a) *Allotments.* Each fiscal year funds appropriated for Water Pollution Control grants to State and interstate agencies will be allotted to States and interstate agencies on the basis of the extent of the pollution problems in the respective States. A portion of the funds appropriated for States under the Water Pollution Control grant program will be set aside for allotment to eligible interstate agencies. The interstate allotment will be 2.6 percent of the funds available under this paragraph.

(b) *State allotment formula.* The Water Pollution Control State grant allotment formula establishes an allotment ratio for each State based on six components selected to reflect the extent of the water pollution problem in the respective States. The formula provides a funding floor for each State with provisions for periodic adjustments for inflation and a maximum funding level (150 percent of its previous fiscal year allotment).

(1) *Components and component weights*—(i) *Components.* The six components used in the Water Pollution Control State grant allotment formula are: Surface Water Area; Ground Water Use; Water Quality Impairment; Point Sources; Nonpoint Sources; and Population of Urbanized Area. The components for the formula are presented in Table 1 of this section, with their associated elements, sub-elements, and supporting data sources.

Table 1: Components of the Revised Section 106 State Allotment Formula

Formula Component	Element	Sub-Element	Data Source
1. Surface Water Area			U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States.*
2. Ground Water Use	**a. Non-agricultural withdrawals**		U.S. Department of the Interior, U.S. Geological Survey, *Preliminary Estimates of Water Use in the United States.*
	b. Population served by CWSs that use GW for the majority of their source water		U.S. Environmental Protection Agency, Office of Water, *Safe Drinking Water Information System.*
3. Water Quality Impairment	**a. Impaired rivers and streams** (miles)		U.S. Environmental Protection Agency, Office of Water, *National Water Quality Inventory* (based on State submitted §305(b) reports).
	b. Impaired lakes, ponds, and reservoirs (acres)		
	c. Impaired estuaries (square miles)		
	d. Impaired wetlands (acres)		
	e. Impaired ocean waters (shoreline miles)		
	f. Impaired Great Lake (shoreline miles)		
4. Potential Point Sources	**a. Agriculture** (total animal units)		U.S. Department of Commerce, Bureau of the Census, *Census of Agriculture.*
	b. Industrial	**i. Manufacturers**	U.S. Department of Commerce, Bureau of the Census, Economic Census, *Census of Manufactures.*
		ii. Mining operations	U.S. Department of Commerce, Bureau of the Census, Economic Census, *Census of Mineral Industries.*
		iii. Power plants	U.S. Department of Energy, Office of Coal, Nuclear, Electric, and Alternate Fuels, *Inventory of Power Plants in the U.S.*
	c. Municipal dischargers		U.S. Environmental Protection Agency, Office of Water, *Wastewater Facilities Database.*
5. Nonpoint Sources	**a. Agriculture**		U.S. Department of Commerce, Bureau of the Census, *Census of Agriculture.*
	b. Logging.		U.S. Department of Commerce, Bureau of the Census, Economic Census, *Census of Manufactures.*
	c. Abandoned mines	**i. Abandoned soft-rock (coal) mining operations**	U.S. Department of the Interior, Office of Surface Mining, *Abandoned Mine Land Inventory System.*
		ii. Abandoned hard-rock mining operations	U.S. Department of the Interior, Bureau of Mines, *Minerals Availability System/ Mineral Inventory Location System.*
6. Population of Urbanized Area			U.S. Department of Commerce, Bureau of the Census, *Census of Population and Housing.*[1]

[1] The population living in urban areas (*Census* designated places with 2,500 or more residents) rather than population living in urbanized areas (one or more *Census* designated places and the associated urban fringe that together have 50,000 or more residents) will be used for PR and the Insular Areas (VI, AS, GU, and CNMI).

(ii) *Component weights.* To account for the fact that not all of the selected formula components contribute equally to the extent of the pollution problem within the States, each formula component is weighted individually. Final component weights will be phased-in by Fiscal Year (FY) 2004, according to the schedule presented in Table 2 of this section:

TABLE 2—COMPONENT WEIGHTS IN THE WATER POLLUTION CONTROL STATE GRANT ALLOTMENT FORMULA

Component	FY 2000 (percent)	FY2001–FY2003 (percent)	FY2004+ (percent)
Surface Water Area	13	13	12
Ground Water Use	11	12	12
Water Quality Impairment	13	25	35
Point Sources	25	17	13
Nonpoint Sources	18	15	13
Population of Urbanized Area	20	18	15
Total	100	100	100

(2) *Funding floor.* A funding floor is established for each State. Each State's funding floor will be at least equal to its FY 2000 allotment in all future years unless the funds appropriated for States under the Water Pollution Control grant program decrease from the FY 2000 amount.

(3) *Funding decrease.* If the appropriation for Water Pollution Control State grants decreases in future years, the funding floor will be disregarded and all State allotments will be reduced by an equal percentage.

(4) *Inflation adjustment.* Funding floors for each State will be adjusted for inflation when the funds appropriated for Water Pollution Control State grants increase from the preceding fiscal year. These adjustments will be made on the basis of the cumulative change in the Consumer Price Index (CPI), published by the U.S. Department of Labor, since the most recent year in which Water Pollution Control State grant funding last increased. Inflation adjustments to State funding floors will be capped at the lesser of the percentage change in appropriated funds or the cumulative percentage change in the inflation rate.

(5) *Cap on annual funding increases.* The maximum allotment to any State will be 150 percent of that State's allotment for the previous fiscal year.

(6) *Cap on component ratio.* A component ratio is equal to each State's share of the national total of a single component. The cap on each of the six State formula components ratios is 10 percent. If a State's calculated component ratio for a particular component exceeds the 10 percent cap, the State will instead be assigned 10 percent for that component. The component ratios for all other States will be adjusted accordingly.

(7) *Update cycle.* The data used in the State formula will be periodically updated. The first update will impact allotments for FY 2001, and will consist of updating the data used to support the Water Quality Impairment component of the formula. These data will be updated using the currently available Clean Water Act section 305(b) reports. After this initial update, the data used to support all six components of the Water Pollution Control State grant allotment formula will be updated in FY 2003 (for use in the determination of FY 2004 allotments). Thereafter, all data will be updated every five years (e.g., in FY 2008 for FY 2009 allotments and in FY 2013 for FY 2014 allotments.) There will be an annual adjustment to the funding floor for all States, based on the appropriation for Water Pollution Control State grants and changes in the CPI.

(c) *Interstate allotment formula.* EPA will set-aside 2.6 percent of the funds appropriated for the Water Pollution Control State grant program for interstate agencies. The interstate agency Water Pollution Control grant allotment formula consists of two parts: a base allotment and a variable allotment.

(1) *Base allotment.* Each eligible interstate agency shall be provided a base allotment of $125,000 to help fund coordination activities among its member States. However, no more than 50 percent of the total available interstate set-aside may be allotted as part of the base allotment. If, given the 50 percent limitation placed on the base allotment, the amount of interstate

set-aside funds is insufficient to provide each interstate agency with $125,000, then each interstate agency will receive a base allotment equal to 50 percent of the total interstate set-aside divided by the total number of eligible interstate agencies.

(2) *Variable allotment.* The variable allotment provides for funds to be distributed to interstate agencies on the basis of the extent of the pollution problems in the respective States. Funds not allotted under the base allotment will be allotted to eligible interstate agencies based on each interstate agency's share of their member States' Water Pollution Control grant formula allotment ratios. Updates of the data for the six components of the Water Pollution Control State grant allocation formula will automatically result in corresponding updates to the variable allotment portion of the interstate allotments. The allotment ratios for those States involved in compacts with more than one interstate agency will be allocated among such interstate agencies based on the percentage of each State's territory that is situated within the drainage basin or watershed area covered by each compact.

§ 35.165 Maintenance of effort.

To receive a Water Pollution Control grant, a State or interstate agency must expend annually for recurrent section 106 program expenditures an amount of non-federal funds at least equal to expenditures during the fiscal year ending June 30, 1971.

§ 35.168 Award limitations.

(a) The Regional Administrator may award section 106 funds to a State only if:

(1) The State monitors and compiles, analyzes, and reports water quality data as described in section 106(e)(1) of the Clean Water Act;

(2) The State has authority comparable to that in section 504 of the Clean Water Act and adequate contingency plans to implement such authority;

(3) There is no federally-assumed enforcement as defined in section 309(a)(2) of the Clean Water Act in effect with respect to the State agency;

(4) The State's work plan shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under sections 205(g) and (j) of the Clean Water Act; and

(5) The State filed with the Administrator within 120 days after October 18, 1972, a summary report of the current status of the State pollution control program, including the criteria used by the State in determining priority of treatment works.

(b) The Regional Administrator may award section 106 funds to an interstate agency only if:

(1) The interstate agency filed with the Administrator within 120 days after October 18, 1972, a summary report of the current status of the State pollution control program, including the criteria used by the State in determining priority of treatment works.

(2) There is no federally-assumed enforcement as defined in section 309(a)(2) of the Clean Water Act in effect with respect to the interstate agency.

PUBLIC WATER SYSTEM SUPERVISION (SECTION 1443(A))

§ 35.170 Purpose.

(a) *Purpose of section.* Sections 35.170 through 35.178 govern Public Water System Supervision Grants to States (as defined in section 1401 (13)(A) of the Safe Drinking Water Act) authorized under section 1443(a) of the 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.

§ 35.172 Allotment.

(a) *Basis for allotment.* The Administrator allots funds for grants to support States' Public Water System Supervision programs based on each State's population, geographic area, numbers of community and non-community water systems, and other relevant factors.

(b) *Allotment limitation.* No State, except American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands, shall be allotted less than $334,500 (which is one percent of the FY 1989 appropriation).

§ 35.175 Maximum federal share.

The Regional Administrator may provide a maximum of 75 percent of the State's approved work plan costs.

§ 35.178 Award limitations.

(a) *Initial grants.* The Regional Administrator will not make an initial award unless the applicant has an approved Public Water System Supervision program or agrees to establish an approvable program within one year of the initial award.

(b) *Subsequent grants.* The Regional Administrator will not award a grant to a State after the initial award unless the applicant has assumed and maintained primary enforcement responsibility for the State's Public Water System Supervision program.

UNDERGROUND WATER SOURCE PROTECTION (SECTION 1443(B))

§ 35.190 Purpose.

(a) *Purpose of section.* Sections 35.190 through 35.198 govern Underground Water Source Protection Grants to States (as defined in section 1401(13)(A) of the Safe Drinking Water Act) authorized under section 1443(b) of the 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 124, 144, 145, 146, and 147.

§ 35.192 Basis for allotment.

The Administrator allots funds for grants to support State's underground water source protection programs based on such factors as population, geographic area, extent of underground injection practices, and other relevant factors.

§ 35.195 Maximum federal share.

The Regional Administrator may provide a maximum of 75 percent of a State's approved work plant costs.

§ 35.198 Award limitation.

The Regional Administrator will only award section 1443(b) funds to States that have primary enforcement responsibility for the underground water source protection program.

HAZARDOUS WASTE MANAGEMENT (SECTION 3011(A))

§ 35.210 Purpose.

(a) *Purpose of section.* Sections 35.210 through 35.218 govern Hazardous Waste Management Grants to States (as defined in section 1004 of the Solid Waste Disposal Act) under section 3011(a) of the Act.

(b) *Purpose of program.* Hazardous Waste Management Grants are awarded to assist States in the development and implementation of authorized State hazardous waste management programs.

(c) *Associated program regulations.* Associated program regulations are at 40 CFR part 124, subparts B, E, and F; 40 CFR parts 260 through 266; 40 CFR parts 268 through 273; and 40 CFR part 279.

§ 35.212 Basis for allotment.

The Administrator allots funds for Hazardous Waste Management Grants in accordance with section 3011(b) of the Solid Waste Disposal Act based on factors including:

(a) The extent to which hazardous waste is generated, transported, treated, stored, and disposed of in the State;

(b) The extent to which human beings and the environment in the State are exposed to such waste, and;

(c) Other factors the Administrator deems appropriate.

§ 35.215 Maximum federal share.

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

§ 35.218 Award limitation.

The Regional Administrator will not award Hazardous Waste Management

Grants to a State with interim or final hazardous waste authorization unless the applicant is the lead agency designated in the authorization agreement.

PESTICIDE COOPERATIVE ENFORCEMENT (SECTION 23(A)(1))

§ 35.230 Purpose.

(a) *Purpose of section.* Sections 35.230 through 35.235 govern Pesticide Enforcement Cooperative Agreements to States (as defined in section 2 of Federal Insecticide, Fungicide, and Rodenticide Act) under section 23(a)(1) of the Act.

(b) *Purpose of program.* Pesticides Enforcement Cooperative Agreements are awarded to assist States to implement pesticide enforcement programs.

(c) *Program regulations.* Associated program regulations are at 40 CFR parts 150 through 189 and 19 CFR part 12.

§ 35.232 Basis for allotment.

(a) *Factors for FIFRA enforcement program funding.* The factors considered in allotment of funds for enforcement of FIFRA are:

(1) The State's population,

(2) The number of pesticide-producing establishments,

(3) The numbers of certified private and commercial pesticide applicators,

(4) The number of farms and their acreage, and

(5) As appropriate, the State's potential farm worker protection concerns.

(b) *Final allotments.* Final allotments are negotiated between each State and the appropriate Regional Administrator.

§ 35.235 Maximum federal share.

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

PESTICIDE APPLICATOR CERTIFICATION AND TRAINING (SECTION 23(A)(2))

§ 35.240 Purpose.

(a) *Purpose of section.* Sections 35.240 through 35.245 govern Pesticide Applicator Certification and Training Grants to States (as defined in section 2 of Federal Insecticide, Fungicide, and Rodenticide Act) under section 23(a)(2) of the 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.

§ 35.242 Basis for allotment.

The Regional Administrator considers two factors in allotting pesticides applicator certification and training funds:

(a) The number of farms in each State; and

(b) The numbers of private and commercial applicators requiring certification and recertification in each State.

§ 35.245 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))

§ 35.250 Purpose.

(a) *Purpose of section.* Sections 35.250 through 35.259 govern Pesticide Program Implementation Cooperative Agreements to States (as defined in section 2 of Federal Insecticide, Fungicide, and Rodenticide Act) under section 23(a)(1) of the Act.

(b) *Purpose of program.* Pesticide Program Implementation Cooperative Agreements are awarded to assist States to develop and implement pesticide programs, including programs that protect workers, groundwater, and endangered species from pesticide risks and for other pesticide management programs designated by the Administrator.

(c) *Program regulations.* Associated program regulations are at 40 CFR parts 150 through 189 and 19 CFR part 12.

§ 35.251 Basis for allotment.

(a) *Factors for pesticide program implementation funding.* The factors considered in allotment of funds for pesticide program implementation are based

upon potential ground water, endangered species, and worker protection concerns in each State relative to other States and on other factors the Administrator deems appropriate for these or other pesticide program implementation activities.

(b) *Final allotments.* Final allotments are negotiated between each State and the appropriate Regional Administrator.

§ 35.252 Maximum federal share.

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

NONPOINT SOURCE-MANAGEMENT (SECTION 319(H))

§ 35.260 Purpose.

(a) *Purpose of section.* Sections 35.260 through 35.268 govern Nonpoint Source Management Grants to States (as defined in section 502 of the Clean Water Act) authorized under section 319 of the Act.

(b) *Purpose of program.* Nonpoint Source Management Grants may be awarded for the implementation of EPA-approved nonpoint source management programs, including groundwater quality protection activities, that will advance the implementation of a comprehensive approved nonpoint source management program.

§ 35.265 Maximum federal share.

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.

§ 35.266 Maintenance of effort.

To receive section 319 funds in any fiscal year, a State must agree to maintain its aggregate expenditures from all other sources for programs for controlling nonpoint pollution and improving the quality of the State's waters at or above the average level of such expenditures in Fiscal Years 1985 and 1986.

§ 35.268 Award limitations.

The following limitations apply to funds appropriated and awarded under section 319(h) of the Act in any fiscal year.

(a) *Award amount.* The Regional Administrator will award no more than 15 percent of the amount appropriated to carry out section 319(h) of the Act to any one State. This amount includes any grants to any local public agency or organization with authority to control pollution from nonpoint sources in any area of the State.

(b) *Financial assistance to persons.* States 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 State 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) *Requirements.* The Regional Administrator will not award section 319(h) funds to a State unless:

(1) *Approved assessment report.* EPA has approved the State's assessment report on nonpoint sources, prepared in accordance with section 319(a) of the Act;

(2) *Approved State management program.* EPA has approved the State'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 that the State made satisfactory progress in the preceding fiscal year 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 State's management program. The State must have developed this schedule in accordance with section 319(b)(2)(c) 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 also contains:

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

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

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

LEAD-BASED PAINT PROGRAM (SECTION 404(G))

§ 35.270 Purpose.

(a) *Purpose of section.* Sections 35.270 through 35.278 govern Lead-Based Paint Program Grants to States (as defined in section 3 of the Toxic Substances Control Act), under section 404(g) of the 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.

§ 35.272 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.

STATE INDOOR RADON GRANTS (SECTION 306)

§ 35.290 Purpose.

(a) *Purpose of section.* Sections 35.290 through 35.298 govern Indoor Radon Grants to States (as defined in section 3 of the Toxic Substances Control Act, which include territories and the District of Columbia) under section 306 of the Toxic Substances Control Act.

(b) *Purpose of program.* (1) State Indoor Radon Grants are awarded to assist States with the development and implementation of programs that assess and mitigate radon and that aim at reducing radon health risks. State 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 State 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 EPA-approved training programs related to radon for permanent State or local employees;

(vii) Payment of general overhead and program administration costs in accordance with § 35.298(d);

(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 State participation in the EPA Home Evaluation Program; and

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

(2) States may use grant funds to assist local governments in implementation of activities eligible for assistance under paragraphs (b)(1)(ii), (iii), and (vi) of this section.

(3) In implementing paragraphs (b)(1)(iv) and (ix) of this section, a State should make every effort, consistent with the goals and successful operation of the State radon program, to give preference to low-income persons.

(4) 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 State proficiency rating programs.

§ 35.292 Basis for allotment.

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

(b) No State may receive a State Indoor Radon Grant in excess of 10 percent of the total appropriated amount made available each fiscal year.

§ 35.295 Maximum federal share.

The Regional Administrator may provide State agencies up to 50 percent of the approved costs for the development and implementation of radon program activities.

§ 35.298 Award limitations.

(a) The Regional Administrator shall not include State Indoor Radon funds in a Performance Partnership Grant awarded to another State Agency without consulting with the State Agency which has the primary responsibility for radon programs as designated by the Governor of the affected State.

(b) No grant may be made in any fiscal year to a State which in the preceding fiscal year did not satisfactorily implement the activities funded by the grant in the preceding fiscal year.

(c) The costs of radon measurement equipment or devices (see § 35.290(b)(1)(iv)) and demonstration of radon mitigation, methods, and technologies (see § 35.290(b)(1)(ix)) shall not, in the aggregate, exceed 50 percent of a State's radon grant award in a fiscal year.

(d) The costs of general overhead and program administration (see § 35.290(b)(1)(vii)) of a State Indoor Radon grant shall not exceed 25 percent of the amount of a State's Indoor Radon Grant in a fiscal year.

(e) A State 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 in the State that have received a passing rating under the EPA proficiency rating program under section 305(a)(2) of the Act.

TOXIC SUBSTANCES COMPLIANCE MONITORING (SECTION 28)

§ 35.310 Purpose.

(a) *Purpose of section.* Sections 35.310 through 35.315 govern Toxic Substances Compliance Monitoring Grants to States (as defined in section 3(13) of the Toxic Substances Control Act) under section 28(a) of the 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 within the States with respect to which the Administrator is unable or not likely to take action for their prevention or elimination.

(c) *Associated program regulations.* Associated program regulations are at 40 CFR parts 700 through 799.

§ 35.312 Competitive process.

EPA will award Toxic Substances Control Act Compliance Monitoring grant funds to States through a competitive process in accordance with national program guidance.

§ 35.315 Maximum federal share.

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

§ 35.318 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.

STATE UNDERGROUND STORAGE TANKS (SECTION 2007(F)(2))

§ 35.330 Purpose.

(a) *Purpose of section.* Sections 35.330 through 35.335 govern Underground Storage Tank Grants to States (as defined in section 1004 of the Solid Waste Disposal Act) under section 2007(f)(2) of the Act.

(b) *Purpose of program.* State Underground Storage Tank Grants are awarded to States to develop and implement a State underground storage tank release detection, prevention, and corrective action program under Subtitle I of the Resource Conservation and Recovery Act.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 280 through 282.

§ 35.332 Basis for allotment.

The Administrator allots State Underground Storage Tank Grant funds to each EPA regional office. Regional Administrators award funds to States based on their programmatic needs and applicable EPA guidance.

§ 35.335 Maximum federal share.

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

POLLUTION PREVENTION STATE GRANTS (SECTION 6605)

§ 35.340 Purpose.

(a) *Purpose of section.* Sections 35.340 through 35.349 govern Pollution Prevention State Grants under section 6605 of the Pollution Prevention Act.

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

§ 35.342 Competitive process.

EPA Regions award Pollution Prevention State Grants to State programs through a competitive process in accordance with EPA guidance. When evaluating State applications, EPA must consider, among other criteria, whether the proposed State 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.

§ 35.343 Definitions.

In addition to the definitions in § 35.102, the following definitions apply to the Pollution Prevention State Grants program and to §§ 35.340 through 35.349:

(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 natural 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.

§ 35.345 Eligible applicants.

Applicants eligible for funding under the Pollution Prevention program include any agency or instrumentality, including State universities, of the 50 States, the District of Columbia, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 35.348 Award limitation.

If a State includes a Pollution Prevention State Grant in a Performance Partnership Grant, the work plan commitments must be included in the Performance Partnership Grant work plan (see § 35.138).

§ 35.349 Maximum federal share.

The federal share for Pollution Prevention State Grants will not exceed 50 percent of the allowable pollution prevention State grant project cost.

WATER QUALITY COOPERATIVE AGREEMENTS (SECTION 104(B)(3))

§ 35.360 Purpose.

(a) *Purpose of section.* Sections 35.360 through 35.364 govern Water Quality Cooperative Agreements to State water pollution control agencies and interstate agencies (as defined in section 502 of the Clean Water Act) and local government agencies under section 104(b)(3) of the Act. These sections do not govern Water Quality Cooperative Agreements to other entities eligible under sections 104(b)(3) which are generally subject to the uniform administrative requirements of 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 program or biosolids projects.

§ 35.362 Competitive process.

EPA will award Water Quality Cooperative Agreement funds through a competitive process in accordance with national program guidance.

§ 35.364 Maximum federal share.

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

STATE WETLANDS DEVELOPMENT GRANTS (SECTION 104(B)(3))

§ 35.380 Purpose.

(a) *Purpose of section.* Sections 35.380 through 35.385 govern State Wetlands Development Grants for State and interstate agencies (as defined in section 502 of the Clean Water Act) and local government agencies under section 104(b)(3) of the Act. These sections do not govern wetlands development grants to other entities eligible under section 104(b)(3) which are generally subject to the uniform administrative requirements of 40 CFR part 30.

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

§ 35.382 Competitive process.

State Wetlands Development Grants are awarded on a competitive basis. EPA annually establishes a deadline for receipt of proposed grant project applications. EPA reviews applications and decides which grant projects to fund in a given year based on criteria established by EPA. After the competitive process is complete, the recipient can, at its discretion, accept the award as a State Wetlands Development 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.

§ 35.385 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.

STATE ADMINISTRATION (SECTION 205(G))

§ 35.400 Purpose.

(a) *Purpose of section.* Sections 35.400 through 35.408 govern State Administration Grants to States (as defined in section 502 of the Clean Water Act) authorized under section 205(g) of the Act.

(b) *Purpose of program.* EPA awards these grants for the following two purposes:

(1) *Construction management grants.* A State may use section 205(g) funds for administering elements of the construction grant program under sections 201, 203, 204, and 212 of the Clean Water Act and for managing waste treatment construction grants for small communities. A State may also use construction management assistance funds for administering elements of a State's construction grant program which are implemented without federal grants, if the Regional Administrator determines that those elements are consistent with 40 CFR part 35, subpart I.

(2) *Permit and planning grants.* A State may use section 205(g) funds for administering permit programs under sections 402 and 404, including Municipal Wastewater Pollution Prevention activities under an approved section 402 program and State operator training programs, and for administering statewide waste treatment management planning programs, including the development of State biosolids management programs, under section 208(b)(4). Some of these activities may also be eligible for funding under sections 106 (Water Pollution Control), 205(j)(2) (Water Quality Management Planning), and 104(b)(3) (Water Quality Cooperative Agreements and Wetlands Development Grants) of the Clean Water Act. (See §§ 35.160, 35.410, 35.360, and 35.380.)

(c) *Associated program requirements.* Program requirements for State construction management activities under delegation are provided in 40 CFR part 35, subparts I and J. Program requirements for water quality management activities are provided in 40 CFR part 130.

§ 35.402 Allotment.

Each State may reserve up to four percent of the State's authorized construction grant allotment as determined by Congress or $400,000, whichever is greater, for section 205 (g) grants.

§ 35.405 Maintenance of effort.

To receive funds under section 205(g), a State agency must expend annually for recurrent section 106 program expenditures an amount of non-federal funds at least equal to such expenditures during fiscal year 1977, unless the Regional Administrator determines that the reduction is attributable to a non-selective reduction of expenditures in State executive branch agencies (see § 35.165).

§ 35.408 Award limitations.

The Regional Administrator will not award section 205(g) funds:

(a) For construction management grants unless there is a signed agreement delegating responsibility for administration of those activities to the State.

(b) For permit and planning grants before awarding funds providing for the management of a substantial portion of the State's construction grants program. The maximum amount of permit and planning grants a State may receive is limited to the amount remaining in its reserve after the Regional Administrator allows for full funding of the management of the construction grant program under full delegation.

(c) For permit and planning grants unless the work plan submitted with the application shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under sections 106 (Water Pollution Control) and 205(j) (Water Quality Management Planning) of the Clean Water Act.

WATER QUALITY MANAGEMENT PLANNING GRANTS (SECTION 205(J)(2))

§ 35.410 Purpose.

(a) *Purpose of section.* Sections 35.410 through 35.418 govern Water Quality Management Planning Grants to States (as defined in section 502 of the Clean Water Act) authorized under section 205(j)(2) of the Act.

(b) *Purpose of program.* EPA awards Water Quality Management Planning Grants to carry out water quality management planning activities. Some of these activities may also be eligible for funding under sections 106 (Water Pollution Control), 104(b)(3) (Water Quality Cooperative Agreements and Wetlands Development Grants) and section 205(g) (State Administration Grants) of

the Clean Water Act. (See §§ 35.160, 35.360, 35.380, and 35.400.) EPA awards these grants for purposes such as:

(1) Identification of the most cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

(2) Development of an implementation plan to obtain State and local financial and regulatory commitments to implement measures developed under paragraph (b)(1) of this section.

(3) Determination of the nature, extent, and causes of water quality problems in various areas of the State and interstate region.

(4) Determination of those publicly owned treatment works which should be constructed with State Revolving Fund assistance. This determination should take into account the relative degree of effluent reduction attained, the relative contributions to water quality of other point or nonpoint sources, and the consideration of alternatives to such construction.

(5) Implementation of section 303(e) of the Clean Water Act.

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

§ 35.412 Allotment.

States must reserve, each fiscal year, not less than $100,000 nor more than one percent of the State's construction grant allotment as determined by Congress for Water Quality Management Planning Grants under section 205(j)(2). However, Guam, the Virgin Islands, American Samoa and the Commonwealth of the Northern Mariana Islands must reserve a reasonable amount for this purpose. (See 40 CFR 35.3110(g)(4) regarding reserves from State allotments under Title VI of the Clean Water Act for section 205(j) grants.)

§ 35.415 Maximum federal share.

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

§ 35.418 Award limitations.

The following limitations apply to funds awarded under section 205(j)(2) of the Clean Water Act. The Regional Administrator will not award these grants to a State agency:

(a) Unless the agency develops its work plan jointly with local, regional and interstate agencies and gives funding priority to such agencies and designated or undesignated public comprehensive planning organizations to carry out portions of that work plan.

(b) Unless the agency reports annually on the nature, extent, and causes of water quality problems in various areas of the State and interstate region.

(c) Unless the work plan submitted with the application shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under section 106 (Water Pollution Control) of the Clean Water Act.

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).

SOURCE: 66 FR 3795, Jan. 16, 2001, unless otherwise noted.

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.

§ 35.542 Definitions. [Reserved]

§ 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 groundwater 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 Tribes'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 Consortia 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 (PUB.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, Pub.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 (PUB.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 Pub.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.

Subparts C–D [Reserved]

Subpart E—Grants for Construction of Treatment Works—Clean Water Act

AUTHORITY: Secs. 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 217, 304(d)(3), 313, 501, 502, 511, and 516(b) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

SOURCE: 43 FR 44049, Sept. 27, 1978, unless otherwise noted.

§ 35.900 Purpose.

(a) This subpart supplements the EPA general grant regulations and procedures (part 30 of this chapter) and establishes policies and procedures for grants to assist in the construction of waste treatment works in compliance with the Clean Water Act.

(b) A number of provisions of this subpart which contained transition dates preceding October 1, 1978, have been modified to delete those dates. However, the earlier requirements remain applicable to grants awarded when those provisions were in effect. The transition provisions in former §§ 35.905–4, 35.917, and 35.925–18 remain applicable to certain grants awarded through March 31, 1981.

(c) Technical and guidance publications (MCD series) concerning this program which are issued by EPA may be ordered from: General Services Administration (8FFS), Centralized Mailing List Services, Building 41, Denver Federal Center, Denver, Colo. 80225. In order to expedite processing of requests, persons desiring to obtain these publications should request a copy of EPA form 7500–21 (the order form listing all available publications), from EPA Headquarters, Municipal Construction Division (WH–547) or from any regional office of EPA.

§ 35.901 Program policy.

The primary purpose of Federal grant assistance available under this subpart is to assist municipalities in meeting enforceable requirements of the Act, particularly, applicable national pollution discharge elimination system (NPDES) permit requirements. The Regional Administrator and States are authorized and encouraged to administer this grant program in a manner which will most effectively achieve the enforceable requirements of the Act.

§ 35.903 Summary of construction grant program.

(a) The construction of federally financed waste treatment works is generally accomplished in three steps: Step 1, facilities plans and related elements; step 2, preparation of construction drawings and specifications; and step 3, building of a treatment works.

(b) The Regional Administrator may award grant assistance for a step 1, step 2, or step 3 project, or, as authorized by § 35.909, for a project involving a combination of step 2 and step 3 (step 2=3 grant). For a step 1, step 2, or step 3 grant award, a "project" may consist of an entire step or any "treatment works segment" (see § 35.905) of construction within a step. In the case of step 2=3 grant awards, a project must consist of all associated step 2 and step 3 work; segmenting is not permitted.

(c) Grants are awarded from State allocations (see § 35.910 *et seq.*) under the Act. No grant assistance may be awarded unless priority for a project has been determined in accordance with an approved State priority system under § 35.915. The State is responsible for determining the amount and timing of Federal assistance to each municipality for which treatment works funding is needed.

(d) An applicant will initially define the scope of a project. The State may revise this initial project scope when priority for the project is established. The Regional Administrator will make the final determination of project scope when grant assistance is awarded (see § 35.930–4).

(e) For each proposed grant, an applicant must first submit his application to the State agency. The basic grant application must meet the requirements for the project in § 35.920–3. If grant assistance for subsequent related projects is necessary, the grantee shall make submissions in the form of amendments to the basic application. The State agency will forward to the appropriate EPA Regional Administrator complete project applications or amendments to them for which the

State agency has determined priority. The grant will consist of the grant agreement resulting from the basic application and grant amendments awarded for subsequent related projects.

(f) Generally, grant assistance for projects involving step 2 or 3 will not be awarded unless the Regional Administrator first determines that the facilities planning requirements of §§35.917 to 35.917–9 of this subpart have been met. Facilities planning may not be initiated prior to approval of a step 1 grant or written approval of a "plan of study" accompanied by a reservation of funds (see §35.925–18 and definition of "construction" in §35.905).

(g) If initiation of step 1, 2, or 3 construction (see definition of "construction" in §35.905) occurs before grant award, costs incurred before the approved date of initiation of construction will not be paid and award will not be made except under the circumstances in §35.925–18.

(h) The Regional Administrator may not award grant assistance unless the application meets the requirements of §35.920–3 and he has made the determinations required by §35.925 *et seq.*

(i) A grant or grant amendment awarded for a project under this subpart shall constitute a contractual obligation of the United States to pay the Federal share of allowable project costs up to the amount approved in the grant agreement (including amendments) in accordance with §35.930–6. However, this obligation is subject to the grantee's compliance with the conditions of the grant (see §35.935 *et seq.*) and other applicable requirements of this subpart.

(j) Sections 35.937–10, 35.938–6 and 35.945 authorize prompt payment for project costs which have been incurred. The initial request for payment may cover the Federal share of allowable costs incurred before the award except as otherwise provided in §35.925–18. Before the award of such assistance, the applicant must claim in the application for grant assistance for that project all allowable costs incurred before initiation of project construction. An applicant may make no subsequent claim for payment for such costs. The estimated amount of any grant or grant amendment, including any prior costs, must be established in conjunction with determination of priority for the project. The Regional Administrator must determine that the project costs are allowable under §35.940 *et seq.*

(k) Under section 204(b) of the Act, the grantee must comply with applicable user charge and industrial cost recovery requirements; see §§35.925–11, 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, 35.935–15, and appendix B to this subpart.

(l) The costs of sewage collection systems for new communities, new subdivisions, or newly developed urban areas should be included as part of the development costs of the new construction in these areas. Under section 211 of the Act, such costs will not be allowed under the construction grant program; see §35.925–13.

(m) The approval of a plan of study for step 1, a facilities plan, or award of grant assistance for step 1, step 2, or step 3, or any segment thereof, will not constitute a Federal commitment for grant assistance for any subequent project.

(n) Where justified, a deviation from any substatutory requirement of this subpart may be granted under §30.1000 of this chapter.

(o) The Act requires EPA and the States to provide for, encourage and assist public participation in the Construction Grants Program. This requirement for public participation applies to the development of the State water pollution control strategy, the State project priority system, and the State project priority list, under §35.915; to the development of user charge and industrial cost recovery systems, under §§35.925.11, 35.928, and 35.929; and to the delegation of administrative responsibilities for the Construction Grants Program under subpart F of this chapter.

(p) Requirements regarding the award and administration of subagreements are set forth in §§35.935 through 35.939.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.905 Definitions.

As used in this subpart, the following words and terms mean:

Act. The Clean Water Act (33 U.S.C. 1251 *et seq.*, as amended).

Ad valorem tax. A tax based upon the value of real property.

Combined sewer. A sewer intended to serve as a sanitary sewer and a storm sewer, or as an industrial sewer and a storm sewer.

Complete waste treatment system. A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involved in: (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the waste water is accomplished; (b) the treatment of the waste waters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated waste waters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities.

Construction. Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items. The phrase *initiation of construction,* as used in this subpart means with reference to a project for:

(a) *Step 1:* The approval of a plan of study (see §§ 35.920–3(a)(1) and 35.925–18(a));

(b) *Step 2:* The award of a step 2 grant;

(c) *Step 3:* Issuance of a notice to proceed under a construction contract for any segment of step 3 project work or, if notice to proceed is not required, execution of the construction contract.

Enforceable requirements of the Act. Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary to meet applicable criteria for best practicable waste treatment technology (BPWTT).

Excessive infiltration/inflow. The quantities of infiltration/inflow which can be economically eliminated from a sewerage system by rehabilitation, as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow, subject to the provisions in § 35.927.

Industrial cost recovery. (a) The grantee's recovery from the industrial users of a treatment works of the grant amount allocable to the treatment of waste from such users under section 204(b) of the Act and this subpart.

(b) The grantee's recovery from the commercial users of an individual system of the grant amount allocable to the treatment of waste from such users under section 201(h) of the Act and this subpart.

Industrial cost recovery period. That period during which the grant amount allocable to the treatment of wastes from industrial users is recovered from the industrial users of such works.

Industrial user. (a) Any nongovernmental, nonresidential user of a publicly owned treatment works which discharges more than the equivalent of 25,000 gallons per day (gpd) of sanitary wastes and which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing.
Division B. Mining.
Division D. Manufacturing.
Division E. Transportation, Communications, Electric, Gas, and Sanitary Services.
Division I. Services.

(1) In determining the amount of a user's discharge for purposes of industrial cost recovery, the grantee may

exclude domestic wastes or discharges from sanitary conveniences.

(2) After applying the sanitary waste exclusion in paragraph (b)(1) of this section (if the grantee chooses to do so), dischargers in the above divisions that have a volume exceeding 25,000 gpd or the weight of biochemical oxygen demand (BOD) or suspended solids (SS) equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users. Sanitary wastes, for purposes of this calculation of equivalency, are the wastes discharged from residential users. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, BOD and SS per volume of flow.

(b) Any nongovernmental user of a publicly owned treatment works which discharges waste water to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(c) All commercial users of an individual system constructed with grant assistance under section 201(h) of the Act and this subpart. (See § 35.918(a)(3).)

Infiltration. Water other than waste water that enters a sewerage system (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

Infiltration/inflow. The total quantity of water from both infiltration and inflow without distinguishing the source.

Inflow. Water other than waste water that enters a sewerage system (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

Interceptor sewer. A sewer whose primary purpose is to transport waste waters from collector sewers to a treatment facility.

Interstate agency. An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

Municipality. A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

(a) This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district, or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of liquid wastes of the general public in a particular geographic area.

(b) This definition excludes the following:

(1) Any revenue producing entity which has as its principal responsibility an activity other than providing waste water treatment services to the general public, such as an airport, turnpike, port facility, or other municipal utility.

(2) Any special district (such as school district or a park district) which has the responsibility to provide waste water treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under State law to provide waste water treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to

serve the community, serves or intends to serve the special district's facility or the surrounding community.

Operable treatment works. An operable treatment works is a treatment works that:

(a) Upon completion of construction will treat waste water, transport waste water to or from treatment, or transport and dispose of waste water in a manner which will significantly improve an objectionable water quality situation or health hazard, and

(b) Is a component part of a complete waste treatment system which, upon completion of construction for the complete waste treatment system (or completion of construction of other treatment works in the system in accordance with a schedule approved by the Regional Administrator) will comply with all applicable statutory and regulatory requirements.

Project. The scope of work for which a grant or grant amendment is awarded under this subpart. The scope of work is defined as step 1, step 2, or step 3 of treatment works construction or segments (see definition of *treatment works segment* and § 35.930–4).

Replacement. Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed. The term *operation and maintenance* includes replacement.

Sanitary sewer. A sewer intended to carry only sanitary or sanitary and industrial waste waters from residences, commercial buildings, industrial plants, and institutions.

Sewage collection system. For the purpose of § 35.925–13, each, and all, of the common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive waste waters directly from facilities which convey waste water from individual structures or from private property, and which include service connection "Y" fittings designed for connection with those facilities. The facilities which convey waste water from individual structures, from private property to the public lateral sewer, or its equivalent, are specifically excluded from the definition, with the exception of pumping units, and pressurized lines, for individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

State. A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas.

State agency. The State water pollution control agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

Storm sewer. A sewer intended to carry only storm waters, surface runoff, street wash waters, and drainage.

Treatment works. Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the useful life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost, and land used for the storage of treated waste water in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in combined storm water and sanitary sewer systems.

Treatment works segment. A treatment works segment may be any portion of an operable treatment works described in an approved facilities plan, under § 35.917, which can be identified as a

contract or discrete subitem or subcontract for step 1, 2, or 3 work. Completion of construction of a treatment works segment may, but need not, result in an operable treatment works.

Useful life. Estimated period during which a treatment works will be operated.

User charge. A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

Value engineering (VE). A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

§ 35.907 Municipal pretreatment program.

(a) The Regional Administrator is authorized to provide grant assistance for the development of an approvable municipal pretreatment program as required by part 403 of this chapter in conjunction with a step 1, step 2, or step 3 project.

(b) The grantee is required to develop a pretreatment program if the Regional Administrator determines that:

(1) The municipal treatment works:

(i) Serves industries subject to proposed or promulgated pretreatment standards under section 307(b) of the Act, or

(ii) Expects to serve industries connecting into the works in accordance with section 301(i)(2), where these industries are subject to the section 307 (b) or (c) standards: and

(2) A work plan under a section 208 planning grant has not provided for the development of a program approvable under part 403 of this chapter.

(c) A pretreatment program may be required for municipal treatment works which receive other nondomestic wastes covered by guidance issued under section 304(g) of the Act.

(d) Development of an approvable municipal pretreatment program under part 403 of this chapter shall include:

(1) An industrial survey as required by § 403.8 of this chapter including identification of system users, the character and volume of pollutants discharged, type of industry, location (see paragraph (f) of this section);

(2) An evaluation of legal authority, including adequacy of enabling legislation, and selection of mechanisms to be used for control and enforcement (e.g., ordinance, joint powers agreement, contract);

(3) An evaluation of financial programs and revenue sources to insure adequate funding to carry out the pretreatment program;

(4) A determination of technical information necessary to support development of an industrial waste ordinance or other means of enforcing pretreatment standards;

(5) Design of a monitoring enforcement program;

(6) A determination of pollutant removals in existing treatment works;

(7) A determination of the treatment works tolerance to pollutants which interfere with its operation, sludge use, or disposal;

(8) A determination of required monitoring equipment for the municipal treatment works;

(9) A determination of municipal facilities to be constructed for monitoring or analysis of industrial waste.

(e) Items (d) (6) and (7) of this section are grant eligible if necessary for the proper design or operation of the municipal treatment works but are not grant eligible when performed solely for the purpose of seeking an allowance for removal of pollutants under § 403.7 of this chapter.

(f) Information concerning the character and volume of pollutants discharged by industry to a municipal treatment works is to be provided to the municipality by the industrial discharger under paragraph (d)(1) of this section. However, the costs of a limited amount of end-of-pipe sampling and associated analysis of industrial discharges to a municipal treatment works properly allocable to the municipality are allowable if the grantee obtains the prior written approval of the Regional Administrator; see § 35.940–3(f).

(g) The pretreatment program developed under paragraph (b) of this section is subject to the Regional Administrator's approval under § 35.935–19 and must be implemented in accordance with part 403 of this chapter.

§ 35.908 Innovative and alternative technologies.

(a) *Policy*. EPA's policy is to encourage and, where possible, to assist in the development of innovative and alternative technologies for the construction of waste water treatment works. Such technologies may be used in the construction of waste water treatment works under this subpart as § 35.915–1, § 35.930–5, appendix E, and this section provide. New technology or processes may also be developed or demonstrated with the assistance of EPA research or demonstration grants awarded under Title I of the Act (see part 40 of this subchapter).

(b) *Funding for innovative and alterative technologies*. (1) Projects or portions of projects which the Regional Administrator determines meet criteria for innovative or alternative technologies in appendix E may receive 85-percent grants (see § 35.930–5).

(i) Only funds from the reserve in § 35.915–1(b) shall be used to increase these grants from 75 to 85 percent.

(ii) Funds for the grant increase shall be distributed according to the chronological approval of grants, unless the State and the Regional Administrator agree otherwise.

(iii) The project must be on the fundable portion of the State project priority list.

(iv) If the project is an alternative to conventional treatment works for a small community (a municipality with a population of 3,500 or less or a highly dispersed section of a larger municipality, as defined by the Regional Administrator), funds from the reserve in § 35.915(e) may be used for the 75 percent portion of the Federal grant.

(v) Only if sewer related costs qualify as alternatives to conventional treatment works for small communities are they entitled to the grant increase from 75 to 85 percent, either as part of the entire treatment works or as components.

(2) A project or portions of a project may be designated innovative or alternative on the basis of a facilities plan or on the basis of plans and specifications. A project that has been designated innovative on the basis of the facilities plan may lose that designation if plans and specifications indicate that it does not meet the appropriate criteria stated in section 6 of appendix E.

(3) Projects or portions of projects that receive step 2, step 3, or step 2=3 grant awards after December 27, 1977, from funds allotted or reallotted in fiscal year 1978 may also receive the grant increase from funds allotted for fiscal year 1979 for eligible portions that meet the criteria for alternative technologies in appendix E, if funds are available for such purposes under § 35.915–1(b).

(c) *Modification or replacement of innovative and alternative projects*. The Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with 85-percent grant assistance if:

(1) He determines that:

(i) The facilities have not met design performance specifications (unless such failure is due to any person's negligence);

(ii) Correction of the failure requires significantly increased capital or operating and maintenance expenditures; and

(iii) Such failure has occurred within the 2-year period following final inspection; and

(2) The replacement or modification project is on the fundable portion of the State's priority list.

(d) *Sole source procurement*. A determination by the Regional Administrator under this section that innovative criteria have been met will serve as the basis for sole source procurement (see § 35.936–13(b)) for step 3, if appropriate, to achieve the objective of demonstrating innovative technology.

§ 35.909 Step 2+3 grants.

(a) *Authority*. The Regional Administrator may award grant assistance for a step 2=3 project for the combination of design (step 2) and construction

(step 3) of a waste water treatment works.

(b) *Limitations.* The Regional Administrator may award step 2=3 grant assistance only if he determines that:

(1) The population is 25,000 or less for the applicant municipality (according to most recent U.S. Census information or disaggregations thereof);

(2) The treatment works has an estimated total step 3 construction cost of $2 million or less, as determined by the Regional Administrator. For any State that the Assistant Administrator for Water and Waste Management finds to have unusually high costs of construction, the Regional Administrator may make step 2=3 awards where the estimated total step 3 construction costs of such treatment works does not exceed $3 million. The project must consist of all associated step 2 and step 3 work; segmenting is not permitted; and

(3) The fundable range of the approved project priority list includes the step 2 and step 3 work.

(c) *Application requirements.* Step 2+3 projects are subject to all requirements of this subpart that apply to separate step 2 and step 3 projects except compliance with § 35.920–3(c) is not required before grant award. An applicant should only submit a single application.

(d) *Cross references.* See §§ 35.920–3(d) (contents of application), 35.930–1(a)(4) (types of projects) and 35.935–4 (grant conditions).

§ 35.910 Allocation of funds.

§ 35.910–1 Allotments.

Allotments are made on a formula or other basis which Congress specifies for each fiscal year. Except where Congress indicates the exact amount of funds which each State should receive, computation of a State's ratio will be carried out to the nearest ten-thousandth percent (0.0001 percent). Unless regulations for allotments for a specific fiscal year otherwise specify, alloted amounts will be rounded to the nearest thousand dollars.

§ 35.910–2 Period of availability; reallotment.

(a) All sums allotted under § 35.910–5 shall remain available for obligation within that State until September 30, 1978. Such funds which remain unobligated on October 1, 1978, will be immediately reallotted in the same manner as sums under paragraph (b) of this section.

(b) All other sums allotted to a State under section 207 of the Act shall remain available for obligation until the end of 1 year after the close of the fiscal year for which the sums were authorized. Sums not obligated at the end of that period shall be immediately reallotted on the basis of the same ratio as applicable to sums allotted for the then-current fiscal year, but none of the funds reallotted shall be made available to any State which failed to obligate any of the funds being reallotted. Any sum made available to a State by reallotment under this section shall be in addition to any funds otherwise allotted to such State for grants under this subpart during any fiscal year.

(c) Sums which are deobligated after the reallotment date for those funds shall be treated in the same manner as the most recent allotment before the deobligation.

§§ 35.910–3—35.910–4 [Reserved]

§ 35.910–5 Additional allotments of previously withheld sums.

(a) A total sum of $9 billion is allotted from sums authorized, but initially unallotted, for fiscal years 1973, 1974, and 1975. This additional allotment shall be available for obligation through September 30, 1977, before reallotment of unobligated sums under § 35.910–2.

(b) Two-thirds of the sum hereby allotted ($6 billion) represents the initially unallotted portion of the amounts authorized for fiscal years 1973 and 1974. Therefore, the portion of the additional allotments derived from this sum were computed by applying the percentages formerly set forth in § 35.910–3(b) to the total sums authorized for fiscal years 1973 and 1974 ($11 billion) and subtracting the previously allotted sums, formerly set forth in § 35.910–3(c).

(c) One-third of the sum hereby allotted ($3 billion) represents the initially unallotted portion of the amounts authorized for fiscal year 1975. Therefore,

the portion of the additional allotments derived from this sum were computed in a three-step process: First, by applying the percentages set forth in § 35.910–4(b) to the total sums authorized for fiscal year 1975 ($7 billion); then, by making adjustments necessary to assure that no State's allotment of such sums fell below its fiscal year 1972 allotment, under Pub. L. 93–243; and, finally, by subtracting the previously allotted sums set forth in § 35.910–4(c).

(d) Based upon the computations set forth in paragraphs (b) and (c) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$43,975,950
Alaska	25,250,500
Arizona	18,833,450
Arkansas	39,822,700
California	945,776,800
Colorado	43,113,300
Connecticut	155,091,800
Delaware	56,394,900
District of Columbia	72,492,000
Florida	345,870,100
Georgia	117,772,800
Hawaii	51,903,300
Idaho	19,219,100
Illinois	571,698,400
Indiana	251,631,800
Iowa	100,044,900
Kansas	53,794,200
Kentucky	90,430,800
Louisiana	71,712,250
Maine	78,495,200
Maryland	297,705,300
Massachusetts	295,809,100
Michigan	625,991,900
Minnesota	172,024,500
Mississippi	38,735,200
Missouri	157,471,200
Montana	12,378,200
Nebraska	38,539,500
Nevada	31,839,800
New Hampshire	77,199,350
New Jersey	660,830,500
New Mexico	15,054,900
New York	1,046,103,500
North Carolina	110,345,000
North Dakota	2,802,000
Ohio	497,227,400
Oklahoma	64,298,700
Oregon	77,582,900
Pennsylvania	498,984,900
Rhode Island	45,599,600
South Carolina	82,341,900
South Dakota	5,688,000
Tennessee	107,351,400
Texas	174,969,850
Utah	21,376,500
Vermont	22,506,600
Virginia	251,809,000
Washington	103,915,600
West Virginia	59,419,900
Wisconsin	145,327,400
Wyoming	2,930,650
Guam	6,399,200
Puerto Rico	84,910,500
Virgin Islands	7,794,800
American Samoa	738,200
Trust Territory of Pacific	2,672,800
Total	9,000,000,000

§ 35.910–6 Fiscal Year 1977 public works allotments.

(a) The $480 million appropriated by Public Law 94–447, 90 Stat. 1498, is available for obligation under the authority of title III of the Public Works Employment Act of 1976 (Pub. L. 94–369, 90 Stat. 999), as provided by section 301 of Public Law 94–369, to carry out title II of the Clean Water Act (other than sections 206, 208, and 209). Allotments of these funds shall remain available until expended. Amounts allotted are in addition to the State's last allotment under the Clean Water Act and are to be used for the same purpose.

(b) The sum of $480 million has been allotted to States identified in column 1 of the Table IV of the House Public Works and Transportation Committee print numbered 94–25 based on percentages shown in column 5 of that table.

(c) The percentages referred to in paragraph (b) of this section and used in computing the State allotments set forth in paragraph (d) of this section are as follows:

State	Percent
Alabama	4.90
Alaska	.91
Arizona	4.69
Arkansas	3.74
California	0
Colorado	3.04
Connecticut	0
Delaware	0
District of Columbia	0
Florida	2.97
Georgia	5.70
Hawaii	.60
Idaho	1.06
Illinois	0
Indiana	0
Iowa	.37
Kansas	2.90
Kentucky	2.70
Louisiana	3.51
Maine	0
Maryland	1.51
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	2.65
Missouri	1.47
Montana	.63
Nebraska	.77
Nevada	.13

State	Percent
New Hampshire	0
New Jersey	0
New Mexico	1.13
New York	0
North Carolina	6.65
North Dakota	1.06
Ohio	0
Oklahoma	3.64
Oregon	.28
Pennsylvania	0
Rhode Island	0
South Carolina	2.92
South Dakota	.89
Tennessee	3.01
Texas	18.46
Utah	1.86
Vermont	0
Virginia	0
Washington	2.49
West Virginia	7.14
Wisconsin	2.65
Wyoming	.91
Guam	.30
Puerto Rico	1.22
Virgin Islands	0
American Samoa	.16
Trust Territory of Pacific	.98
Total	100.00

(d) Based on these percentages, the total additional sums hereby allotted to the States are as follows:

State	Allotments from funds appropriated under Public Law 94–447
Alabama	$23,520.000
Alaska	4,368,000
Arizona	22,512,000
Arkansas	17,952,000
California	0
Colorado	14,592,000
Connecticut	0
Delaware	0
District of Columbia	0
Florida	14,256,000
Georgia	27,360,000
Hawaii	2,880,000
Idaho	5,088,000
Illinois	0
Indiana	0
Iowa	1,776,000
Kansas	13,920,000
Kentucky	12,960,000
Louisiana	16,848,000
Maine	0
Maryland	7,248,000
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	12,720,000
Missouri	7,056,000
Montana	3,024,000
Nebraska	3,696,000
Nevada	624,000
New Hampshire	0
New Jersey	0
New Mexico	5,424,000
New York	0
North Carolina	31,920,000
North Dakota	5,088,000
Ohio	0
Oklahoma	17,472,000
Oregon	1,344,000
Pennsylvania	0
Rhode Island	0
South Carolina	14,016,000
South Dakota	4,272,000
Tennessee	14,448,000
Texas	88,608,000
Utah	8,928,000
Vermont	0
Virginia	0
Washington	11,952,000
West Virginia	34,272,000
Wisconsin	12,720,000
Wyoming	4,368,000
Guam	1,440,000
Puerto Rico	5,856,000
Virgin Islands	0
American Samoa	768,000
Trust Territory of Pacific	4,704,000
Total	480,000,000

§ 35.910–7 Fiscal Year 1977 Supplemental Appropriations Act allotments.

(a) Under title I, chapter V of Public Law 95–26, $1 billion is available for obligation. The allotments are to be used to carry out title II of the Act, excluding sections 206, 208, and 209. These allotments are available until expended but must be obligated by May 3, 1980. After that date, unobligated balances will be subject to reallotment under section 205 (b) of the Act (see § 35.910–2 (b)).

(b) The allotments, computed by proportionally adjusting the table on page 16 of Senate Report No. 95–38, are based on the following four factors:

(1) 25 percent on the States estimated 1975 census population;

(2) 50 percent on each State's partial needs, i.e., on the cost of needed facilities in categories I, II, and IVB (secondary treatment, more stringent treatment required to meet water quality standards, and interceptor sewers and pumping stations), as shown in table IV of the May 6, 1975, EPA report, "cost Estimates for Construction of Publicly Owned Waste Water Treatment Facilities—1974 Needs Survey";

(3) 25 percent on each State's full needs, i.e., on the cost of needed facilities in categories I, II, IIIA, IIIB, IVA, IVB, and V (secondary treatment, more

stringent treatment required to meet water quality standards, infiltration and inflow correction, major sewer system rehabilitation, collector sewers, interceptor sewers, and pumping stations, and treatment of combined sewer overflows), as shown in table V of the EPA report noted in paragraph (b) (2) of this section; and

(4) An allotment adjustment to insure that no State receives less than the one-third of 1 percent of the total amount allocated.

(c) Based on paragraph (b) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$10,906,000
Alaska	4,759,000
Arizona	6,345,000
Arkansas	10,807,000
California	82,391,000
Colorado	8,031,000
Connecticut	12,195,000
Delaware	3,966,000
District of Columbia	3,966,000
Florida	35,792,000
Georgia	19,929,000
Hawaii	6,940,000
Idaho	4,065,000
Illinois	52,151,000
Indiana	21,713,000
Iowa	11,005,000
Kansas	12,195,000
Kentucky	14,971,000
Louisiana	12,493,000
Maine	5,453,000
Maryland	37,874,000
Massachusetts	27,662,000
Michigan	46,897,000
Minnesota	15,070,000
Mississippi	7,535,000
Missouri	19,830,000
Montana	3,272,000
Nebraska	6,147,000
Nevada	3,272,000
New Hampshire	6,742,000
New Jersey	47,591,000
New Mexico	3,272,000
New York	105,294,000
North Carolina	20,722,000
North Dakota	3,272,000
Ohio	55,522,000
Oklahoma	13,484,000
Oregon	8,328,000
Pennsylvania	46,698,000
Rhode Island	3,966,000
South Carolina	13,088,000
South Dakota	3,272,000
Tennessee	14,872,000
Texas	43,030,000
Utah	5,057,000
Vermont	3,272,000
Virginia	22,011,000
Washington	15,368,000
West Virginia	21,614,000
Wisconsin	19,929,000
Wyoming	3,272,000
Guam	992,000
Puerto Rico	8,923,000
Virgin Islands	496,000
American Samoa	298,000
Trust Territory of Pacific	1,983,000
Total	1,000,000,000

§ 35.910–8 Allotments for fiscal years 1978–1981.

(a) Unless later legislation requires otherwise, for each of the fiscal years 1978–1981, all funds appropriated under authorizations in section 207 of the Act will be distributed among the States based on the following percentages drawn from table 3 of Committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alabama	1.2842
Alaska	.4235
Arizona	.7757
Arkansas	.7513
California	7.9512
Colorado	.9187
Connecticut	1.1072
Delaware	.3996
District of Columbia	.3193
Florida	3.8366
Georgia	1.9418
Hawaii	.7928
Idaho	.4952
Illinois	5.1943
Indiana	2.7678
Iowa	1.2953
Kansas	.8803
Kentucky	1.4618
Louisiana	1.2625
Maine	.7495
Maryland	2.7777
Massachusetts	2.9542
Michigan	4.1306
Minnesota	1.8691
Mississippi	.9660
Missouri	2.4957
Montana	.3472
Nebraska	.5505
Nevada	.4138
New Hampshire	.8810
New Jersey	3.5715
New Mexico	.3819
New York	10.6209
North Carolina	1.9808
North Dakota	.3107
Ohio	6.4655
Oklahoma	.9279
Oregon	1.2974
Pennsylvania	4.3616
Rhode Island	.5252
South Carolina	1.1766
South Dakota	.3733
Tennessee	1.5486
Texas	4.3634
Utah	.4457
Vermont	.3845
Virginia	1.9602
Washington	1.7688

State	Percentage
West Virginia	1.7903
Wisconsin	1.9503
Wyoming	.3003
Guam	.0744
Puerto Rico	1.1734
Virgin Islands	.0378
American Samoa	.0616
Trust Territory of Pacific	.1530
Total	100.00

(b) Based on paragraph (a) of this section, and table 4 of the committee print, the following authorizations are allotted among the States subject to the limitations of paragraph (c) of this section:

State	For fiscal year 1978	For each of the fiscal years 1979, 1980, 1981
Alabama	$57,789,000	$64,210,000
Alaska	19,057,500	21,175,000
Arizona	34,906,500	38,785,000
Arkansas	33,808,500	37,565,000
California	357,804,000	397,560,000
Colorado	41,341,500	45,935,000
Connecticut	49,824,000	55,360,000
Delaware	17,982,000	19,980,000
District of Columbia	14,368,500	15,965,000
Florida	172,647,000	191,830,000
Georgia	87,381,000	97,090,000
Hawaii	35,676,000	39,640,000
Idaho	22,284,000	24,760,000
Illinois	233,743,500	259,715,000
Indiana	124,551,000	138,390,000
Iowa	58,288,500	64,765,000
Kansas	39,613,500	44,015,000
Kentucky	65,781,000	73,090,000
Louisiana	56,812,500	63,125,000
Maine	33,727,500	37,475,000
Maryland	124,996,500	138,885,000
Massachusetts	132,939,000	147,710,000
Michigan	185,877,000	206,530,000
Minnesota	84,109,500	93,455,000
Mississippi	43,470,000	48,300,000
Missouri	112,306,500	124,785,000
Montana	15,624,000	17,360,000
Nebraska	24,772,500	27,525,000
Nevada	18,621,000	20,690,000
New Hampshire	39,645,000	44,050,000
New Jersey	160,717,500	178,575,000
New Mexico	17,185,500	19,095,000
New York	477,940,500	531,045,000
North Carolina	89,136,000	99,040,000
North Dakota	13,981,500	15,535,000
Ohio	290,947,500	323,275,000
Oklahoma	41,755,500	46,395,000
Oregon	58,383,000	64,870,000
Pennsylvania	196,272,000	218,080,000
Rhode Island	23,634,000	26,260,000
South Carolina	52,947,000	58,830,000
South Dakota	16,798,500	18,665,000
Tennessee	69,687,000	77,430,000
Texas	196,353,000	218,170,000
Utah	20,056,500	22,285,000
Vermont	17,302,500	19,225,000
Virginia	88,209,000	98,010,000
Washington	79,596,000	88,440,000
West Virginia	80,563,500	89,515,000
Wisconsin	87,763,500	97,515,000
Wyoming	13,513,500	15,015,000
Guam	3,348,000	3,720,000
Puerto Rico	52,803,000	58,670,000
Virgin Islands	1,701,000	1,890,000
American Samoa	2,772,000	3,080,000
Trust Territory of the Pacific Islands	6,885,000	7,650,000
Total	4,500,000,000	5,000,000,000

(c) The authorizations in paragraph (b) of this section depend on appropriation. Therefore, the Regional Administrator may not obligate any portion of any authorization for a fiscal year until a law is enacted appropriating part or all of the sums authorized for that fiscal year. If sums appropriated are less than the sums authorized for a fiscal year, EPA will apply the percentages in paragraph (a) of this section to distribute all appropriated sums among the States, and promptly will notify each State of its share. The Regional Administrator may not obligate more than the State's share of appropriated sums.

(d) If supplementary funds are appropriated in any fiscal year under section 205(e) of the Act to carry out the purposes of this paragraph, no State shall receive less than one-half of 1 percent of the total allotment among all States for that fiscal year, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territories not more than thirty-three one-hundredths of 1 percent of the total allotment shall be allotted to all four of those jurisdictions. If for any fiscal year the amount appropriated to carry out this paragraph is less than the full amount needed, the following States will share in any funds appropriated for the purposes of this paragraph in the following percentages, drawn from the note to table 3 of committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alaska	5.4449
Delaware	7.1459
District of Columbia	12.8612
Idaho	.3416
Montana	10.8755

State	Percentage
Nevada	6.1352
New Mexico	8.4057
North Dakota	13.4733
South Dakota	9.0178
Utah	3.8648
Vermont	8.2206
Wyoming	14.2135
Total	100.0000

§ 35.910–9 Allotment of Fiscal Year 1978 appropriation.

(a) Public Law 95–240 appropriated $4.5 billion. These allotments are available until expended but must be obligated by September 30, 1979. After that date unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) These sums were allotted to the States as shown in § 35.910–8(b).

[43 FR 56200, Nov. 30, 1978]

§ 35.910–10 Allotment of Fiscal Year 1979 appropriation.

(a) Title II of Public Law 95–392 appropriated $4.2 billion. These allotments are available until expended but must be obligated by September 30, 1980. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8(a) and (b) to the funds appropriated for FY 1979 and rounding to the nearest hundred dollars.

(c) The $4.2 billion are allotted as follows:

State	Allotments from funds appropriated under Pub. L. 95–392
Alabama	$53,189,100
Alaska	20,709,000
Arizona	32,128,000
Arkansas	31,117,400
California	329,323,400
Colorado	38,050,800
Connecticut	45,858,100
Delaware	20,709,000
District of Columbia	20,709,000
Florida	158,904,600
Georgia	80,425,600
Hawaii	32,836,300
Idaho	20,709,000
Illinois	215,137,900
Indiana	114,637,000
Iowa	53,648,800
Kansas	36,460,300
Kentucky	60,545,000
Louisiana	52,290,300
Maine	31,042,900
Maryland	115,047,000
Massachusetts	122,357,300
Michigan	171,081,500
Minnesota	77,414,600
Mississippi	40,009,900
Missouri	103,367,100
Montana	20,709,000
Nebraska	22,800,700
Nevada	20,709,000
New Hampshire	36,489,300
New Jersey	147,924,700
New Mexico	20,709,000
New York	439,897,200
North Carolina	82,040,900
North Dakota	20,709,000
Ohio	267,788,600
Oklahoma	38,431,900
Oregon	53,735,800
Pennsylvania	180,649,100
Rhode Island	21,752,800
South Carolina	48,732,500
South Dakota	20,709,000
Tennessee	64,140,000
Texas	180,723,600
Utah	20,709,000
Vermont	20,709,000
Virginia	81,187,700
Washington	73,260,300
West Virginia	74,150,800
Wisconsin	80,777,700
Wyoming	20,709,000
American Samoa	2,551,400
Guam	3,081,500
Northern Mariana Islands	570,300
Puerto Rico	48,600,000
Trust Territory of Pacific	5,766,700
Virgin Islands	1,565,600
Total	4,200,000,000

[43 FR 56201, Nov. 30, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.910–11 Allotment of Fiscal Year 1980 appropriation.

(a) Title II of Public Law 96–103 appropriated $3.4 billion. These allotments are available until expended but must be obligated by September 30, 1981. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8 (a) and (d) to the funds appropriated for FY 1980 and rounding to the nearest hundred dollars.

(c) The $3.4 billion are alloted as follows:

State	Allotments from funds appropriated under Pub. L. 95–372
Alabama	$43,057,800
Alaska	16,764,500
Arizona	26,008,400
Arkansas	25,190,300
California	266,595,100
Colorado	30,803,000
Connecticut	37,123,200
Delaware	16,764,500
District of Columbia	16,764,500
Florida	128,637,000
Georgia	65,106,400
Hawaii	26,581,700
Idaho	16,764,500
Illinois	174,159,300
Indiana	92,801,300
Iowa	43,430,000
Kansas	29,515,500
Kentucky	49,012,600
Louisiana	42,330,300
Maine	25,129,900
Maryland	93,133,300
Massachusetts	99,051,100
Michigan	138,494,500
Minnesota	62,668,900
Mississippi	32,388,900
Missouri	83,678,100
Montana	16,764,500
Nebraska	18,457,700
Nevada	16,764,500
New Hampshire	29,539,000
New Jersey	119,748,500
New Mexico	16,764,500
New York	356,107,300
North Carolina	66,414,100
North Dakota	16,764,500
Ohio	216,781,200
Oklahoma	31,111,500
Oregon	43,500,400
Pennsylvania	146,239,700
Rhode Island	17,609,400
South Carolina	39,450,100
South Dakota	16,764,500
Tennessee	51,922,900
Texas	146,300,100
Utah	16,764,500
Vermont	16,764,500
Virginia	65,723,400
Washington	59,305,900
West Virginia	60,026,800
Wisconsin	65,391,400
Wyoming	16,764,500
American Samoa	2,065,400
Guam	2,494,500
Puerto Rico	39,342,800
Trust Terr	4,667,200
Virgin Islands	1,267,400
Northern Marianas	462,700
Total	3,400,000,000

[45 FR 16486, Mar. 14, 1980]

§ 35.910–12 Reallotment of deobligated funds of Fiscal Year 1978.

(a) Of the 4.5 billion appropriated by Public Law 95–240 for Fiscal Year 1978, $23,902,130 remained unobligated as of September 30, 1979 and thereby became subject to reallotment.

(b) The reallotment was computed by applying the percentages in § 35.910–8(a), adjusted to account for the absence of Ohio and readjusted to comply with the requirements of § 35.910(d) establishing a minimum allotment of .5 percent.

(c) These funds are added to the Fiscal Year 1980 allotments and will remain available through September 30, 1981 (see §§ 35.910–2(b) and 35.910–8).

(d) The $23,902,130 is allotted as follows:

State	Amount
Alabama	$324,543
Alaska	118,190
Arizona	196,050
Arkansas	189,880
California	2,009,389
Colorado	232,191
Connecticut	279,813
Delaware	118,190
District of Columbia	118,190
Florida	969,582
Georgia	490,736
Hawaii	200,367
Idaho	125,148
Illinois	1,312,681
Indiana	699,465
Iowa	327,345
Kansas	222,494
Kentucky	369,430
Louisiana	319,073
Maine	189,428
Maryland	701,974
Massachusetts	746,591
Michigan	1,043,875
Minnesota	472,360
Mississippi	244,147
Missouri	630,710
Montana	118,190
Nebraska	139,138
Nevada	118,190
New Hampshire	222,653
New Jersey	902,590
New Mexico	118,190
New York	2,684,060
North Carolina	500,590
North Dakota	118,190
Oklahoma	234,496
Oregon	327,888
Pennsylvania	1,102,234
Rhode Island	132,719
South Carolina	297,352
South Dakota	118,190
Tennessee	391,354
Texas	1,102,708
Utah	118,190
Vermont	118,190
Virginia	495,392
Washington	447,046
West Virginia	452,493
Wisconsin	492,883
Wyoming	118,190
Guam	18,805
Puerto Rico	296,561
Virgin Islands	9,561
American Samoa	15,573

State	Amount
Tr. Terr. of Pac. Islds	35,192
N. Mariana Islds	3,480
Total	23,902,130

[45 FR 83497, Dec. 19, 1980. Correctly designated at 46 FR 9947, Jan. 30, 1981]

§ 35.912 Delegation to State agencies.

EPA's policy is to maximize the use of staff capabilities of State agencies. Therefore, in the implementation of the construction grant program, optimum use will be made of available State and Federal resources. This will eliminate unnecessary duplicative reviews of documents required in the processing of construction grant awards. Accordingly, the Regional Administrator may enter into a written agreement, where appropriate, with a State agency to authorize the State agency's certification of the technical or administrative adequacy of specifically required documents. The agreement may provide for the review and certification of elements of:

(a) Facilities plans (step 1),

(b) plans and specifications (step 2),

(c) operation and maintenance manuals, and

(d) such other elements as the Regional Administrator determines may be appropriately delegated as the program permits and State competence allows. The agreement will define requirements which the State will be expected to fulfill as part of its general responsibilities for the conduct of an effective preaward applicant assistance program; compensation for this program is the responsibility of the State. The agreement will also define specific duties regarding the review of identified documents prerequisite to the receipt of grant awards. A certification agreement must provide that an applicant or grantee may request review by the Regional Administrator of an adverse recommendation by a State agency. Delegation activities are compensable by EPA only under section 106 of the Act or subpart F of this part.

§ 35.915 State priority system and project priorty list.

Construction grants will be awarded from allotments according to the State priority list, based on the approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act.

(a) *State priority system.* The State priority system describes the methodology used to rate and rank projects that are considered eligible for assistance. It also sets forth the administrative, management, and public participation procedures required to develop and revise the State project priority list. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide water quality management (WQM) plans. The State shall hold a public hearing before submission of the priority system (or revision thereto). Before the hearing, a fact sheet describing the proposed system (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission. The Regional Administrator shall review and approve the State priority system for procedural completeness, insuring that it is designed to obtain compliance with the enforceable requirements of the Act as defined in § 35.905. The Regional Administrator may exempt grants for training facilities under section 109(b)(1) of the Act and § 35.930–1(b) from these requirements.

(1) *Project rating criteria.* (i) The State priority system shall be based on the following criteria:

(A) The severity of the pollution problem;

(B) The existing population affected;

(C) The need for preservation of high quality waters; and

(D) At the State's option, the specific category of need that is addressed.

(ii) The State will have sole authority to determine the priority for each category of need. These categories comprise mutually exclusive classes of facilities and include:

(A) Category I—Secondary treatment;

(B) Category II—More stringent treatment;

(C) Category IIIA—Infiltration/inflow correction;

(D) Category IIIB—Sewer system replacement or major rehabilitation;

(E) Category IVA—New collectors and appurtenances;

(F) Category IVB—New interceptors and appurtenances; and

(G) Category V—Correction of combined sewer overflows.

(iii) Step 2, step 3 and step 2=3 projects utilizing processes and techniques meeting the innovative and alternative guidelines in appendix E of this part may receive higher priority. Also 100 percent grants for projects that modify or replace malfunctioning treatment works constructed with an 85 percent grant may receive a higher priority.

(iv) Other criteria, consistent with these, may be considered (including the special needs of small and rural communities). The State shall not consider: The project area's development needs not related to pollution abatement; the geographical region within the State; or future population growth projections.

(2) *Criteria assessment.* The State shall have authority to determine the relative influence of the rating criteria used for assigning project priority. The criteria must be clearly delineated in the approved State priority system and applied consistently to all projects. A project on the priority list shall generally retain its priority rating until an award is made.

(b) *State needs inventory.* The State shall maintain a listing, including costs by category, of all needed treatment works. The most recent needs inventory, prepared in accordance with section 516(b)(1)(B) of the Act, should be used for this purpose. This State listing should be the same as the needs inventory and fulfills similar requirements in the State WQM planning process. The State project priority list shall be consistent with the needs inventory.

(c) *State project priority list.* The State shall prepare and submit annually a ranked priority listing of projects for which Federal assistance is expected during the 5-year planning period starting at the beginning of the next fiscal year. The list's fundable portion shall include those projects planned for award during the first year of the 5-year period (hereinafter called the funding year). The fundable portion shall not exceed the total funds expected to be available during the year less all applicable reserves provided in § 35.915–1 (a) through (d). The list's planning portion shall include all projects outside the fundable portion that may, under anticipated allotment levels, receive funding during the 5-year period. The Administrator shall provide annual guidance to the States outlining the funding assumptions and other criteria useful in developing the 5-year priority list.

(1) *Project priority list development.* The development of the project priority list shall be consistent with the rating criteria established in the approved priority system, in accordance with the criteria in paragraph (a)(1) of this section. In ranking projects, States must also consider the treatment works and step sequence; the allotment deadline; total funds available; and other management criteria in the approved State priority system. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide WQM plans. The Regional Administrator may request that a State provide justification for the rating or ranking established for specific project(s).

(2) *Project priority list information.* The project priority list shall include the information for each project that is set out below for projects on the fundable portion of the list. The Administrator shall issue specific guidance on these information requirements for the planning portion of the list, including phase-in procedures for the fiscal year 1979 priority planning process.

(i) State assigned EPA project number;

(ii) Legal name and address of applicant;

(iii) Short project name or description;

(iv) Priority rating and rank of each project, based on the approved priority system;

(v) Project step number (step 1, 2, 3, or 2=3);

(vi) Relevant needs authority/facility number(s);

(vii) NPDES number (as appropriate);

(viii) Parent project number (i.e., EPA project number for predecessor project);

(ix) For step 2, 3, or 2=3 projects, indication of alternative system for small community;

(x) For step 2, 3, or 2=3 projects, that portion (if any) of eligible cost to apply to alternative techniques;

(xi) For step 2, 3, or 2=3 projects, that portion (if any) of eligible cost to apply to innovative processes;

(xii) For step 3 or 2=3 projects, the eligible costs in categories IIIB, IV, and V (see § 35.915(a)(1)(ii));

(xiii) Total eligible cost;

(xiv) Date project is expected to be certified by State to EPA for funding;

(xv) Estimated EPA assistance (not including potential grant increase from the reserve in § 35.915–1(b)); and

(xvi) Indication that the project does or does not satisfy the enforceable requirements provision, including (as appropriate) funding estimates for those portions which do not meet the enforceable requirements of the Act.

(d) *Public participation.* Before the State submits its annual project priority list to the Regional Administrator, the State shall insure that adequate public participation (including a public hearing) has taken place as required by subpart G of this part. Before the public hearing, the State shall circulate information about the priority list including a description of each proposed project and a statement concerning whether or not it is necessary to meet the enforceable requirements of the Act. The information on the proposed priority list under paragraph (c)(2) of this section may be used to fulfill these requirements. This public hearing may be conducted jointly with any regular public meeting of the State agency. The public must receive adequate and timely statewide notice of the meeting (including publication of the proposed priority list) and attendees at the meeting must receive adequate opportunity to express their views concerning the list. Any revision of the State priority list (including project bypass and the deletion or addition of projects) requires circulation for public comment and a public hearing unless the State agency and the Regional Administrator determine that the revision is not significant. The approved State priority system shall describe the public participation policy and procedures applicable to any proposed revision to the priority list.

(e) *Submission and review of project priority list.* The State shall submit the priority list as part of the annual State program plan under subpart G of this part. A summary of State agency response to public comment and hearing testimony shall be prepared and submitted with the priority list. The Regional Administrator will not consider a priority list to be final until the public participation requirements are met and all information required for each project has been received. The Regional Administrator will review the final priority list within 30 days to insure compliance with the approved State priority system. No project may be funded until this review is complete.

(f) *Revision of the project priority list.* The State may modify the project priority list at any time during the program planning cycle in accordance with the public participation requirements and the procedures established in the approved State priority system. Any modification (other than clerical) to the priority list must be clearly documented and promptly reported to the Regional Administrator. As a minimum, each State's priority list management procedure must provide for the following conditions:

(1) *Project bypass.* A State may bypass a project on the fundable portion of the list after it gives written notice to the municipality and the NPDES authority that the State has determined that the project to be bypassed will not be ready to proceed during the funding year. Bypassed projects shall retain their relative priority rating for consideration in the future year allotments. The highest ranked projects on the planning portion of the list will replace bypassed projects. Projects considered for funding in accordance with this provision must comply with paragraph (g) of this section.

(2) *Additional allotments.* If a State receives any additional allotment(s), it may fund projects on the planning portion of the priority list without further public participation if:

(i) The projects on the planning portion have met all administrative and public participation requirements outlined in the approved State priority system; and

(ii) The projects included within the fundable range are the highest priority projects on the planning portion.

If sufficient projects that meet these conditions are not available on the planning portion of the list, the State shall follow the procedures outlined in paragraph (e) of this section to add projects to the fundable portion of the priority list.

(3) *Project removal.* A State may remove a project from the priority list only if:

(i) The project has been fully funded;

(ii) The project is no longer entitled to funding under the approved priority system;

(iii) The Regional Administrator has determined that the project is not needed to comply with the enforceable requirements of the Act; or

(iv) The project is otherwise ineligible.

(g) *Regional Administrator review for compliance with the enforceable requirements of the Act.* (1) Unless otherwise provided in paragraph (g)(2) of this section, the Regional Administrator may propose the removal of a specific project or portion thereof from the State project priority list during or after the initial review where there is reason to believe that it will not result in compliance with the enforceable requirements of the Act. Before making a final determination, the Regional Administrator will initiate a public hearing on this issue. Questioned projects shall not be funded during this administrative process. Consideration of grant award will continue for those projects not at issue in accordance with all other requirements of this section.

(i) The Regional Administrator shall establish the procedures for the public notice and conduct of any such hearing, or, as appropriate, the procedures may be adapted from existing agency procedures such as § 6.400 or §§ 123.32 and 123.34 of this chapter. The procedures used must conform to minimum Agency guidelines for public hearings under part 25 of this chapter.

(ii) Within 30 days after the date of the hearing, the Regional Administrator shall transmit to the appropriate State agency a written determination about the questioned projects. If the Regional Administrator determines that the project will not result in compliance with the enforceable requirements of the Act, the State shall remove the project from the priority list and modify the priority list to reflect this action. The Regional Administrator's determination will constitute the final agency action, unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

(2) The State may use 25 percent of its funds during each fiscal year for projects or portions of projects in categories IIIB, IVA, IVB, and V (see § 35.915(a)(1)(ii)). These projects must be eligible for Federal funding to be included on the priority list. EPA will generally not review these projects under paragraph (g)(1) of this section to determine if they will result in compliance with the enforceable requirements of the Act. The Regional Administrator will, however, review all projects or portions thereof which would use funds beyond the 25-percent level according to the criteria in paragraph (g)(1) of this section.

(h) *Regional Administrator review for eligibility.* If the Regional Administrator determines that a project on the priority list is not eligible for assistance under this subpart, the State and municipality will be promptly advised and the State will be required to modify its priority list accordingly. Elimination of any project from the priority list shall be final and conclusive unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.915–1 Reserves related to the project priority list.

In developing the fundable portion of the priority list, the State shall provide for the establishment of the several reserves required or allowed under this section. The State shall submit a statement specifying the amount to be set aside for each reserve with the final project priority list.

(a) *Reserve for State management assistance grants.* The State may (but need not) propose that the Regional Administrator set aside from each allotment a reserve not to exceed 2 percent or $400,000, whichever is greater, for State management assistance grants under subpart F of this part. Grants may be made from these funds to cover the reasonable costs of administering activities delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for innovative and alternative technology project grant increase.* Each State shall set aside from its annual allotment a specific percentage to increase the Federal share of grant awards from 75 percent to 85 percent of the eligible cost of construction (under § 35.908(b)(1)) for construction projects which use innovative or alternative waste water treatment processes and techniques. The set-aside amount shall be 2 percent of the State's allotment for each of fiscal years 1979 and 1980, and 3 percent for fiscal year 1981. Of this amount not less than one-half of 1 percent of the State's allotment shall be set aside to increase the Federal grant share for projects utilizing innovative processes and techniques. Funds reserved under this section may be expended on projects for which facilities plans were initiated before fiscal year 1979. These funds shall be reallotted if not used for this purpose during the allotment period.

(c) *Reserve for grant increases.* The State shall set aside not less than 5 percent of the total funds available during the priority list year for grant increases (including any funds necessary for development of municipal pretreatment programs) for projects awarded assistance under § 35.935–11. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, if they are not needed for grant increases they should be released for funding additional projects before the reallotment deadline.

(d) *Reserve for step 1 and step 2 projects.* The State may (but need not) set aside up to 10 percent of the total funds available in order to provide grant assistance to step 1 and step 2 projects that may be selected for funding after the final submission of the project priority list. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, they should be released for funding additional projects before the reallotment deadline.

(e) *Reserve for alternative systems for small communities.* Each State with a rural population of 25 percent or more (as determined by population estimates of the Bureau of Census) shall set aside an amount equal to 4 percent of the State's annual allotment, beginning with the fiscal year 1979 allotment. The set-aside amount shall be used for funding alternatives to conventional treatment works for small communities. The Regional Administrator may authorize, at the request of the Governor of any non-rural State, a reserve of up to 4 percent of that State's allotment for alternatives to conventional treatment works for small communities. For the purposes of this paragraph, the definition of a small community is any municipality with a population of 3,500 or less, or highly dispersed sections of larger municipalities, as determined by the Regional Administrator. In States where the reserve is mandatory, these funds shall be reallotted if not obligated during the allotment period. In States where the reserve is optional, these funds should be released for funding projects before the reallotment deadline.

§ 35.917 Facilities planning (step 1).

(a) Sections 35.917 through 35.917–9 establish the requirements for facilities plans.

(b) Facilities planning consists of those necessary plans and studies

which directly relate to the construction of treatment works necessary to comply with sections 301 and 302 of the Act. Facilities planning will demonstrate the need for the proposed facilities. Through a systematic evaluation of feasible alternatives, it will also demonstrate that the selected alternative is cost-effective, i.e., is the most economical means of meeting established effluent and water quality goals while recognizing environmental and social considerations. (See appendix A to this subpart.)

(c) EPA requires full compliance with the facilities planning provisions of this subpart before award of step 2 or step 3 grant assistance. (Facilities planning initiated before May 1, 1974, may be accepted under regulations published on February 11, 1974, if the step 2 or step 3 grant assistance is awarded before April 1, 1980.)

(d) Grant assistance for step 2 or step 3 may be awarded before approval of a facilities plan for the entire geographic area to be served by the complete waste treatment system of which the proposed treatment works will be an integral part if:

(1) The Regional Administrator determines that applicable statutory requirements have been met (see §§ 35.925–7 and 35.925–8); that the facilities planning related to the proposed step 2 or step 3 project has been substantially completed; and that the step 2 or step 3 project for which grant assistance is made will not be significantly affected by the completion of the facilities plan and will be a component part of the complete system; and

(2) The applicant agrees to complete the facilities plan on a schedule the State accepts (subject to the Regional Administrator's approval); the schedule shall be inserted as a special condition in the grant agreement.

(e) Facilities planning may not be initiated before award of a step 1 grant or written approval of a plan of study (see § 35.920–3(a)(1)) accompanied by reservation of funds for a step 1 grant (see §§ 35.925–18 and 35.905). Facility planning must be based on load allocations, delineation of facility planning areas and population projection totals and disaggregations in approved water quality management (WQM) plans. (See paragraph 8a(3) of appendix A.) After October 1, 1979, the Regional Administrator shall not approve grant assistance for any project under this subpart if such facility-related information is not available in an approved WQM plan, unless the Regional Administrator determines, in writing, based on information submitted by the State or the grantee, that the facility-related information was not within the scope of the WQM work program, or that award of the grant is necessary to achieve water quality goals of the Act.

(f) If the information required as part of a facilities plan has been developed separately, the facilities plan should incorporate it by reference. Planning which has been previously or collaterally accomplished under local, State, or Federal programs will be utilized (not duplicated).

§ 35.917–1 Content of facilities plan.

Facilities planning must address each of the following to the extent considered appropriate by the Regional Administrator:

(a) A description of the treatment works for which construction drawings and specifications are to be prepared. This description shall include preliminary engineering data, cost estimates for design and construction of the treatment works, and a schedule for completion of design and construction. The preliminary engineering data may include, to the extent appropriate, information such as a schematic flow diagram, unit processes, design data regarding detention times, flow rates, sizing of units, etc.

(b) A description of the selected complete waste treatment system(s) of which the proposed treatment works is a part. The description shall cover all elements of the system, from the service area and collection sewers, through treatment, to the ultimate discharge of treated waste waters and management and disposal of sludge. Planning area maps must include major components of existing and proposed treatment works. For individual systems, planning area maps must include those individual systems which are proposed for funding under § 35.918.

(c) Infiltration/inflow documentation in accordance with § 35.927 *et seq.*

(d) A cost-effectiveness analysis of alternatives for the treatment works and for the complete waste treatment system(s) of which the treatment works is a part. The selection of the system(s) and the choice of the treatment works for which construction drawings and specifications are to be prepared shall be based on the results of the cost-effectiveness analysis. (See appendix A to this subpart.) This analysis shall include:

(1) The relationship of the size and capacity of alternative works to the needs to be served, including reserve capacity;

(2) An evaluation of alternative flow and waste reduction measures, including nonstructural methods;

(3) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to construction of new facilities;

(4) An evaluation of the capability of each alternative to meet applicable effluent limitations. (All step 2, step 3, or step 2=3 projects shall be based on application of best practicable waste treatment technology (BPWTT), as a minimum. Where application of BPWTT would not meet water quality standards, the facilities plan shall provide for attaining such standards. Such provision shall consider the alternative of treating combined sewer overflows.);

(5) An identification of, and provision for, applying BPWTT as defined by the Administrator, based on an evaluation of technologies included under each of the following waste treatment management techniques:

(i) Biological or physical-chemical treatment and discharge to receiving waters;

(ii) Systems employing the reuse of waste water and recycling of pollutants;

(iii) Land application techniques;

(iv) Systems including revenue generating applications; and

(v) Onsite and nonconventional systems;

(6) An evaluation of the alternative methods for the ultimate disposal of treated waste water and sludge materials resulting from the treatment process, and a justification for the method(s) chosen;

(7) An adequate assessment of the expected environmental impact of alternatives (including sites) under part 6 of this chapter. This assessment shall be revised as necessary to include information developed during subsequent project steps;

(8) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of innovative and alternative treatment processes and techniques that reclaim and reuse water, productively recycle waste water constituents, eliminate the discharge of pollutants, recover energy or otherwise achieve the benefits described in appendix E. The provisions of this paragraph are encouraged in all cases. They are required in facilities planning for new treatment works and for treatment works which are being acquired, altered, modified, improved, or extended either to handle a significant increase in the volume of treated waste or to reduce significantly the pollutant discharges from the system. Where certain categories of alternative technologies may not be generally applicable because of prevailing climatic or geological conditions, a detailed analysis of these categories of alternative technologies is not required. However, the reason for such a rejection must be fully substantiated in the facilities plan;

(9) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of the primary energy requirements (operational energy inputs) for each system considered. The alternative selected shall propose adoption of measures to reduce energy consumption or to increase recovery as long as such measures are cost-effective. Where processes or techniques are claimed to be innovative technology on the basis of energy reduction criterion contained in paragraph 6e(2) of appendix E to this subpart, a detailed energy analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

(e) An identification of effluent discharge limitations or, where a permit has been issued, the NPDES permit

number, and a brief description of how the proposed project(s) will result in compliance with the enforceable requirements of the Act.

(f) Required comments or approvals of relevant State, interstate, regional, and local agencies (see § 30.305–8).

(g) A final responsiveness summary, consistent with 40 CFR 25.8 and § 35.917–5.

(h) A brief statement demonstrating that the authorities who will be implementing the plan have the necessary legal, financial, institutional, and managerial resources available to insure the construction, operation, and maintenance of the proposed treatment works.

(i) A statement specifying that the requirements of the Civil Rights Act of 1964 and of part 7 of this chapter have been met.

(j) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, a description of potential opportunities for recreation, open space, and access to bodies of water analyzed in planning the proposed treatment works and the recommended actions. The facilities plan shall also describe measures taken to coordinate with Federal, State, and local recreational programs and with recreational elements of applicable approved areawide WQM plans.

(k) A municipal pretreatment program in accordance with § 35.907,

(l) An estimate of total project costs and charges to customers, in accordance with guidance issued by the Administrator.

(m) A statement concerning the availability and estimated cost of proposed sites.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.917–2 State responsibilities.

(a) *Facilities planning areas.* Facilities planning should focus upon the geographic area to be served by the waste treatment system(s) of which the proposed treatment works will be an integral part. The facilities plan should include the area necessary to prepare an environmental assessment and to assure that the most cost-effective means of achieving the established water quality goals can be implemented. To assure that facilities planning will include the appropriate geographic areas, the State shall:

(1) Delineate, as a preliminary basis for planning, the boundaries of the planning areas. In the determination of each area, appropriate attention should be given to including the entire area where cost savings, other management advantages, or environmental gains may result from interconnection of individual waste treatment systems or collective management of such systems;

(2) Include maps, which shall be updated annually, showing the identified areas and boundary determinations, as part of the State submission under section 106 of the act;

(3) Consult with local officials in making the area and boundary determinations; and

(4) Where individual systems are likely to be cost-effective, delineate a planning area large enough to take advantage of economies of scale and efficiencies in planning and management.

(b) *Facilities planning priorities.* The State shall establish funding priorities for facilities planning in accordance with §§ 35.915 and 35.915–1.

§ 35.917–3 Federal assistance.

(a) *Eligibility*. Only an applicant which is eligible to receive grant assistance for subsequent phases of construction (steps 2 and 3) and which has the legal authority to subsequently construct and manage the facility may apply for grant assistance for step 1. If the area to be covered by the facilities plan includes more than one political jurisdiction, a grant may be awarded for a step 1 project, as appropriate, to:

(1) The joint authority representing such jurisdictions, if eligible;

(2) one qualified (lead agency) applicant; or

(3) two or more eligible jurisdictions. After a waste treatment management agency for an area has been designated in accordance with section 208(c) of the Act (see subpart G of this part) the Regional Administrator shall not make any grant for construction of treatment works within the area except to the designated agency.

(b) *Reports.* Where a grant has been awarded for facilities planning which is

expected to require more than 1 year to complete, the grantee must submit a brief progress report to the Regional Administrator at 3-month intervals. The progress report shall contain a minimum of narrative description, and shall describe progress in completing the approved schedule of specific tasks for the project.

§ 35.917–4 Planning scope and detail.

(a) Initially, the geographic scope of step 1 grant assistance shall be based on the area delineated by the State under § 35.917–2, subject to the Regional Administrator's review. The Regional Administrator may make the preliminary delineation of the boundaries of the planning area, if the State has not done so, or may revise boundaries selected by the locality or State agency, after appropriate consultation with State and local officials.

(b) Facilities planning shall be conducted only to the extent that the Regional Administrator finds necessary in order to insure that facilities for which grants are awarded will be cost-effective and environmentally sound and to permit reasonable evaluation of grant applications and subsequent preparation of designs, construction drawings, and specifications.

§ 35.917–5 Public participation.

(a) *General.* Consistent with section 101(e) of the Clean Water Act and 40 CFR part 25, EPA, the States, and grantees shall provide for, encourage, and assist public participation in the facilities planning process and shall provide citizens with information about and opportunities to become involved in the following:

(1) The assessment of local water quality problems and needs;

(2) The identification and evaluation of locations for waste water treatment facilities and of alternative treatment technologies and systems including those which recycle and reuse waste water (including sludge), use land treatment, reduce waste water volume, and encourage multiple use of facilities;

(3) The evaluation of social, economic, fiscal, and environmental impacts; and

(4) The resolution of other significant facilities planning issues and decisions.

(b) *Basic Public Participation Program.* Since waste water treatment facilities vary in complexity and impact upon the community, these public participation requirements institute a two-tier public participation program for facilities planning consisting of a Basic Public Participation Program, suitable for less complex projects with only moderate community impacts, and a Full-Scale Public Participation Program, for more complex projects with potentially significant community impacts. All facilities planning projects, except those that qualify for the Full-Scale Public Participation Program under paragraph (c) of this section and those exempt under paragraph (d) of this section, require the Basic Public Participation Program. In conducting the Basic Public Participation Program, the grantee shall at a minimum:

(1) Institute, and maintain throughout the facilities planning process, a public information program (including the development and use of a mailing list of interested and affected members of the public), in accordance with 40 CFR 25.4 and § 35.917–5(a).

(2) Notify and consult with the public, during the preparation of the plan of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer.

(3) Include in the plan of study, submitted with the Step 1 grant application, a brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, the types of consultation and informational mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement.

(4) Submit to EPA, within 45 days after the date of acceptance of the Step 1 grant award, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method of coordination between the appropriate Water Quality Management public participation program under subpart G of

this part and the grantee's public participation program as required by 40 CFR 35.917–5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting charges to each affected household.

(5) Consult with the public, in accordance with 40 CFR 25.4, early in the facilities planning process when assessing the existing and future situations and identifying and screening alternatives, but before selecting alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). After consultating with the public, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(6) Hold a meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected and then prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(7) Hold a public hearing before final adoption of the facilities plan, in accordance with 40 CFR 25.5.

(8) Include in the final facilities plan a final responsiveness summary, in accordance with 40 CFR 25.8.

(c) *Full-Scale Public Participation Program.* (1) The Regional Administrator shall require a Full-Scale Public Participation Program for all Step 1 facilities planning projects that fulfill one or more of the following three conditions:

(i) Where EPA prepares or requires the preparation of an Environmental Impact Statement during facilities planning under 40 CFR part 6; or

(ii) Where advanced wastewater treatment (AWT) levels, as defined in EPA guidance, may be required; or

(iii) Where the Regional Administrator determines that more active public participation in decision-making is needed because of the possibility of particularly significant effects on matters of citizen concern, as indicated by one or more of the following:

(A) Significant change in land use or impact on environmentally sensitive areas;

(B) Significant increase in the capacity of treatment facilities or interceptors, significant increase in sewered area, or construction of wholly new treatment and conveyance systems;

(C) Substantial total cost to the community or substantial increased cost to users (i.e., cost not reimbursed under the grant);

(D) Significant public controversy;

(E) Significant impact on local population growth or economic growth;

(F) Substantial opportunity for implementation of innovative or alternative wastewater treatment technologies or systems.

(2) The grantee shall initiate a Full-Scale Public Participation Program as soon as the determination in paragraph (c)(1) of this section is made. Generally, the determination should be made before or at the time of award of the Step 1 grant. However, if the Regional Administrator's determination under paragraph (c)(1) of this section to require a Full-Scale Public Participation Program occurs after initiation of facilities planning because of newly discovered circumstances, the grantee shall initiate and expanded public participation program at that point. The Regional Administrator shall assure that the expanded program is at least as inclusive as a normal Full-Scale Public Participation Program, except for constraints imposed by facilities planning activities that have already been completed. If the project is segmented, the Regional Administrator shall look at the project as a whole when considering whether to require a Full-Scale Public Participation Program.

(3) In conducting the Full-Scale Public Participation Program, the grantee shall at a minimum:

(i) Institute and maintain, throughout the facilities planning process, a public information program, in accordance with 40 CFR 25.4 and § 35.917–5(a);

(ii) Notify and consult with the public, during the development of the plan

of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer;

(iii) Include, in the plan of study submitted with the Step 1 grant application, brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, types of information and consultation mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement;

(iv) Designate or hire a public participation coordinator and establish an advisory group, in accordance with 40 CFR 25.7, immediately upon acceptance of the Step 1 grant award.

(v) Submit to EPA, within 45 days after the date of acceptance of the step 1 grant award and after consultation with the advisory group, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method for coordination between the appropriate Water Quality Management agency public participation program under subpart G of this part, and the grantee's public participation program as required by 40 CFR 35.917–5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting costs to each affected household;

(vi) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, early in the facilities planning process when assessing the existing and future situations, and identifying and screening alternatives, but before selection of alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). Following the public meeting, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8;

(vii) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected, and then prepare and circulate a responsiveness summary, in accordance with 40 CFR 25.8;

(viii) Hold a public hearing prior to final adoption of the facilities plan, in accordance with 40 CFR 25.5. This public hearing may be held in conjunction with the public hearing on the draft Environmental Impact Statement under 40 CFR part 6.

(ix) Include, in the final facilities plan, a final responsiveness summary, in accordance with 40 CFR 25.8.

(d) *Exemptions from public participation requirements.* (1) Upon written request of the grantee, the Regional Administrator may exempt projects in which only minor upgrading of treatment works or minor sewer rehabilitation is anticipated according to the State Project Priority List from the requirements of the Basic and Full-Scale Public Participation Programs under paragraphs (b) and (c) of this section, except for the public hearing and public disclosure of costs. Before granting any exemption, the Regional Administrator shall issue a public notice of intent to waive the above requirements containing the facts of the situation and shall allow 30 days for response. If responses indicate that serious local issues exist, then the Regional Administrator shall deny the exemption request.

(2) During the facilities planning process, if the Regional Administrator determines that the project no longer meets the exemption criteria stated above, the grantee, in consultation with the Regional Administrator, shall undertake public participation activities commensurate with the appropriate public participation program but adjusted for constraints imposed by facilities planning activities that have already been completed.

(3) If a project is segmented, the Regional Administrator shall look at the

project as a whole when considering any petition for exemption.

(e) *Relationship between facilities planning and other environmental protection programs.* Where possible, the grantee shall further the integration of facilities planning and related environmental protection programs by coordinating the facilities planning public participation program with public participation activities carried out under other programs. At a minimum, the grantee shall provide for a formal liaison between the facilities planning advisory group (or the grantee, where there is no advisory group) and any areawide advisory group established under subpart G of this part. The Regional Administrator may request review of the facilities plan by any appropriate State or areawide advisory group in association with the facilities plan review required by 40 CFR 35.1522.

(f) *Mid-project evaluation.* In accordance with 40 CFR 25.12(a)(2), EPA shall, in conjunction with other regular oversight responsibilities, conduct a mid-project review of compliance with public participation requirements.

[44 FR 10302, Feb. 16, 1979]

§ 35.917–6 Acceptance by implementing governmental units.

A facilities plan submitted for approval shall include adopted resolutions or, where applicable, executed agreements of the implementing governmental units, including Federal facilities, or management agencies which provide for acceptance of the plan, or assurances that it will be carried out, and statements of legal authority necessary for plan implementation. The Regional Administrator may approve any departures from these requirements before the plan is submitted.

§ 35.917–7 State review and certification of facilities plan.

Each facilities plan must be submitted to the State agency for review. The State must certify that:

(a) The plan conforms with requirements set forth in this subpart;

(b) The plan conforms with any existing final basin plans approved under section 303(e) of the Act;

(c) Any concerned 208 planning agency has been given the opportunity to comment on the plan; and

(d) The plan conforms with any waste treatment management plan approved under section 208(b) of the Act.

§ 35.917–8 Submission and approval of facilities plan.

The State agency must submit the completed facilities plan for the Regional Administrator's approval. Where deficiencies in a facilities plan are discovered, the Regional Administrator shall promptly notify the State and the grantee or applicant in writing of the nature of such deficiencies and of the recommended course of action to correct such deficiencies. Approval of a plan of study or a facilities plan will not constitute an obligation of the United States for any step 2, step 3, or step 2=3 project.

§ 35.917–9 Revision or amendment of facilities plan.

A facilities plan may provide the basis for several subsequent step 2, step 3, or step 2=3 projects. A facilities plan which has served as the basis for the award of a grant for a step 2, step 3, or step 2=3 project shall be reviewed before the award of any grant for a subsequent project involving step 2 or step 3 to determine if substantial changes have occurred. If the Regional Administrator decides substantial changes have occurred which warrant revision or amendment, the plan shall be revised or amended and submitted for review in the same manner specified in this subpart.

§ 35.918 Individual systems.

(a) For references to individual systems, the following definitions apply:

(1) *Individual systems.* Privately owned alternative wastewater treatment works (including dual waterless/gray water systems) serving one or more principal residences or small commercial establishments which are neither connected into nor a part of any conventional treatment works. Normally, these are on-site systems with localized treatment and disposal of wastewater with minimal or no conveyance of untreated waste water.

Limited conveyance of treated or partially treated effluents to further treatment or disposal sites can be a function of individual systems where cost-effective.

(2) *Principal residence.* Normally the voting residence, the habitation of the family or household which occupies the space for at least 51 percent of the time annually. Second homes, vacation, or recreation residences are not included in this definition. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flows) is included.

(3) *Small commercial establishments.* Private establishments normally found in small communities such as restaurants, hotels, stores, filling stations, or recreational facilities with dry weather wastewater flows less than 25,000 gallons per day. Private, nonprofit entities such as churches, schools, hospitals, or charitable organizations are considered small commercial establishments. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flow) shall be treated as a residence.

(4) *Conventional system.* A collection and treatment system consisting of minimum size (6 or 8 inch) gravity collector sewers normally with manholes, force mains, pumping and lift stations, and interceptors leading to a central treatment plant.

(5) *Alternative waste water treatment works.* A waste water conveyance and/or treatment system other than a conventional system. This includes small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated waste water.

(b) A public body otherwise eligible for a grant under §35.920–1 is eligible for a grant to construct privately owned treatment works serving one or more principal residences or small commercial establishments if the requirements of §§35.918–1, 35.918–2, and 35.918–3 are met.

(c) All individual systems qualify as alternative systems under §35.908 and are eligible for the 4-percent set-aside (§35.915–1(e)) where cost-effective.

§35.918–1 Additional limitations on awards for individual systems.

In addition to those limitations set forth in §35.925, the grant applicant shall:

(a) Certify that the principal residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date;

(b) Demonstrate in the facility plan that the solution chosen is cost-effective and selected in accordance with the cost-effectiveness guidelines for the construction grants program (see appendix A to this subpart);

(c) Apply on behalf of a number of individual units located in the facility planning area;

(d) Certify that public ownership of such works is not feasible and list the reasons in support of such certification;

(e) Certify that such treatment works will be properly installed, operated, and maintained and that the public body will be responsible for such actions;

(f) Certify before the step 2 grant award that the project will be constructed and an operation and maintenance program established to meet local, State, and Federal requirements including those protecting present or potential underground potable water sources;

(g) Establish a system of user charges and industrial cost recovery in accordance with §§35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15;

(h) Obtain assurance (such as an easement or covenant running with the land), before the step 2 grant award, of unlimited access to each individual system at all reasonable times for such purposes as inspection, monitoring, construction, maintenance, operation, rehabilitation, and replacement. An option will satisfy this requirement if it can be exercised no later than the initiation of construction;

(i) Establish a comprehensive program for regulation and inspection of individual systems before EPA approval of the plans and specifications. Planning for this comprehensive program shall be completed as part of the facility plan. The program shall include as a minimum, periodic testing

of water from existing potable water wells in the area. Where a substantial number of onsite systems exist, appropriate additional monitoring of the aquifer(s) shall be provided;

(j) Comply with all other applicable limitations and conditions which treatment works projects funded under this subpart must meet.

§ 35.918–2 Eligible and ineligible costs.

(a) Only the treatment and treatment residue disposal portions of toilets with composting tanks, oil-flush mechanisms or similar in-house systems are grant eligible.

(b) Acquisition of land in which the individual system treatment works are located is not grant eligible.

(c) Commodes, sinks, tubs, drains, and other wastewater generating fixtures and associated plumbing are not grant eligible. Modifications to homes or commercial establishments are also excluded from grant eligibility.

(d) Only reasonable costs of construction site restoration to preconstruction conditions are eligible. Costs of improvement or decoration associated with the installation of individual systems are not eligible.

(e) Conveyance pipes from wastewater generating fixtures to the treatment unit connection flange or joint are not eligible where the conveyance pipes are located on private property.

§ 35.918–3 Requirements for discharge of effluents.

Best practicable waste treatment criteria published by EPA under section 304(d)(2) of the Act shall be met for disposal of effluent on or into the soil from individual systems. Discharges to surface waters shall meet effluent discharge limitations for publicly owned treatment works.

§ 35.920 Grant application.

Grant applications will be submitted and evaluated in accordance with part 30, subpart B of this chapter.

§ 35.920–1 Eligibility.

Municipalities (see § 35.905), intermunicipal agencies, States, or interstate agencies are eligible for grant assistance.

§ 35.920–2 Procedure.

(a) Preapplication assistance, including, where appropriate, a preapplication conference, should be requested from the State agency or the appropriate EPA Regional Office for each project for which State priority has been determined. The State agency must receive an application for each proposed treatment works. The basic application shall meet the project requirements in § 35.920–3. Submissions required for subsequent related projects shall be in the form of amendments to the basic application. The grantee shall submit each application through the State agency. It must be complete (see § 35.920–3), and must relate to a project for which priority has been determined under § 35.915. If any information required by § 35.920–3 has been furnished with an earlier application, the applicant need only incorporate it by reference and, if necessary, revise such information using the previously approved application.

(b) Grant applications (and, for subsequent related projects, amendments to them) are considered received by EPA only when complete and upon official receipt of the State priority certification document (EPA form 5700–28) in the appropriate EPA Regional Office. In a State which has been delegated Federal application processing functions under § 35.912 or under subpart F of this part, applications are considered received by EPA on the date of State certification. Preliminary or partial submittals may be made; EPA may conduct preliminary processing of these submittals.

§ 35.920–3 Contents of application.

(a) *Step 1: Facilities plan and related step 1 elements.* An application for a grant for step 1 shall include:

(1) A plan of study presenting—

(i) The proposed planning area;

(ii) An identification of the entity or entities that will be conducting the planning;

(iii) The nature and scope of the proposed step 1 project and public participation program, including a schedule for the completion of specific tasks;

(iv) An itemized description of the estimated costs for the project; and

(v) Any significant public comments received.

(2) Proposed subagreements, or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work;

(3) Required comments or approvals of relevant State, local and Federal agencies, including clearinghouse requirements of Office of Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter).

(b) *Step 2: Preparation of construction drawings and specifications.* Before the award of a grant or grant amendment for a step 2 project, the applicant must furnish the following:

(1) A facilities plan (including the environmental assessment portion in accordance with part 6 of this chapter) in accordance with §§ 35.917 through 35.917–9;

(2) Adequate information regarding availability of proposed site(s), if relevant;

(3) Proposed subagreements or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work;

(4) Required comments or approvals of relevant State, local, and Federal agencies, including clearinghouse requirements of Office and Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter);

(5) A value engineering (VE) commitment in compliance with § 35.926(a) for all step 2 grant applications for projects with a projected total step 3 grant eligible construction cost of $10 million or more excluding the cost for interceptor and collector sewers. For those projects requiring VE, the grantee may propose, subject to the Regional Administrator's approval, to exclude interceptor and collector sewers from the scope of the VE analysis;

(6) Proposed or executed (as determined appropriate by the Regional Administrator) intermunicipal agreements necessary for the construction and operation of the proposed treatment works, for any treatment works serving two or more municipalities;

(7) A schedule for initiation and completion of the project work (see § 35.935–9), including milestones; and

(8) Satisfactory evidence of compliance with:

(i) Sections 35.925–11, 35.929 *et seq.* and 35.935–13 regarding user charges;

(ii) Sections 35.925–11, 35.928 *et seq.* and 35.935–15, regarding industrial cost recovery, if applicable;

(iii) Section 35.925–16, regarding costs allocable to Federal facilities, if applicable;

(iv) Section 35.927–4 regarding a sewer use ordinance;

(v) Section 30.405–2 and part 4 of this chapter, regarding compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, if applicable; and,

(vi) Other applicable Federal statutory and regulatory requirements (see subpart C of part 30 of this chapter).

(9) After June 30, 1980, for grantees subject to pretreatment requirements under § 35.907(b), the items required by § 35.907(d)(1), (2), and (4).

(10) A public participation work plan, in accordance with § 35.917–5(g), if the grantee, after consultation with the public and its advisory group (if one exists), determines that additional public participation activities are necessary.

(c) *Step 3. Building and erection of a treatment works.* Prior to the award of a grant or grant amendment for a step 3 project, the applicant must furnish the following:

(1) Each of the items specified in paragraph (b) of this section (in compliance with paragraph (b)(6) of this section, the final intermunicipal agreements must be furnished);

(2) Construction drawings and specifications suitable for bidding purposes (in the case of an application for step 3 assistance solely for acquisition of eligible land, the grantee must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property);

(3) A schedule for or evidence of compliance with §§ 35.925–10 and 35.935–12 concerning an operation and maintenance program, including a preliminary plan of operation; and

(4) After December 31, 1980, the items required by § 35.907(d)(1) through (d)(9), as applicable, for grantees subject to

pretreatment requirements under § 35.907(b).

(5) A public participation work plan, in accordance with § 35.917–5(g), if the grantee determines, after consultation with the public, that additional public participation activities are necessary.

(d) *Step 2+3.* Combination design and construction of a treatment works. Before the award of a grant or grant amendment for a step 2=3 project, the grantee must furnish:

(1) Each of the items specified in paragraph (b) of this section, and (2) a schedule for timely submission of plans and specifications, operation and maintenance manual, user charge and industrial cost recovery systems, sewer use ordinance, and a preliminary plan of operation.

(e) *Training facility project.* An application for grant assistance for construction and support of a training facility, facilities or training programs under section 109(b) of the Act shall include:

(1) A statement concerning the suitability of the treatment works facility, facilities or training programs for training operations and maintenance personnel for treatment works throughout one or more States;

(2) A written commitment from the State agency or agencies to carry out at such facility a program of training approved by the Regional Administrator;

(3) An engineering report (required only if a facility is to be constructed) including facility design data and cost estimates for design and construction;

(4) A detailed outline of the training programs, including (for 1-, 3-, and 5-year projections):

(i) An assessment of need for training,

(ii) How the need was determined,

(iii) Who would be trained,

(iv) What curriculum and materials would be used,

(v) What type of delivery system will be used to conduct training, (i.e., State vocational education system, State environmental agency, universities or private organizations),

(vi) What resources are available for the program,

(vii) A budget breakdown on the cost of the program, and

(viii) The relationship of the facility or programs to other training programs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

§ 35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of § 35.920–3 have been met. He shall also determine the following:

§ 35.925–1 Facilities planning.

That, if the award is for step 2, step 3, or step 2=3 grant assistance, the facilities planning requirements in § 35.917 *et seq.* have been met.

§ 35.925–2 Water quality management plans and agencies.

That the project is consistent with any applicable water quality management (WQM) plan approved under section 208 or section 303(e) of the Act; and that the applicant is the wastewater management agency designated in any WQM plan certified by the Governor and approved by the Regional Administrator.

§ 35.925–3 Priority determination.

That such works are entitled to priority in accordance with § 35.915, and that the award of grant assistance for the proposed project will not jeopardize the funding of any treatment works of higher priority.

§ 35.925–4 State allocation.

That the award of grant assistance for a particular project will not cause the total of all grant assistance which applicants within a State received, including grant increases, to exceed the total of all allotments and reallotments available to the State under § 35.910.

§ 35.925–5 Funding and other capabilities.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) The legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction. (Also see § 30.340–3 of this subchapter.)

§ 35.925–6 Permits.

That the applicant has, or has applied for, the permit or permits as required by the national pollutant discharge elimination system (NPDES) with respect to existing discharges affected by the proposed project.

§ 35.925–7 Design.

That the treatment works design will be (in the case of projects involving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in § 35.930–4, achievement of applicable effluent limitations established under the Act, or BPWTT (see § 35.917–1(d)(5)), including consideration, as appropriate, for the application of technology which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants;

(c) The sewer system evaluation and rehabilitation requirements of § 35.927; and

(d) The value engineering requirements of § 35.926 (b) and (c).

§ 35.925–8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2=3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of part 6 of this chapter, as part of facilities planning, in accordance with § 35.917–1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with part 6 of this chapter (particularly §§ 6.108, 6.200, 6.212, and 6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 or step 3 grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator.

§ 35.925–9 Civil rights.

That if the award of grant assistance is for a project involving step 2 or step 3, the applicable requirements of the Civil Rights Act of 1964 and part 7 of this chapter have been met.

§ 35.925–10 Operation and maintenance program.

If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure proper and efficient operation and maintenance of the treatment works (including the sewer system), in accordance with § 35.935–12, and that the State will have an effective operation and maintenance monitoring program to assure that treatment works assisted under this subpart comply with applicable permit and grant conditions.

§ 35.925–11 User charges and industrial cost recovery.

That, in the case of grant assistance for a project involving step 2 or step 3, the grantee has complied or will comply with the requirements for user charge and industrial cost recovery systems. (See §§ 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15.)

(a) *Grants awarded before July 1, 1979.* Grantees must submit a schedule of implementation to show that their user charge and industrial cost recovery systems will be approved in accordance with the requirements of §§ 35.935–13 and 35.935–15.

(b) *Grants awarded after June 30, 1979.* The grantee's user charge and industrial cost recovery systems must be approved before the award of step 3 grant assistance.

(c) *Letters of intent.* In the case of any grant assistance for a project involving step 2 or step 3, the applicant must have received signed letters of intent from each significant industrial user stating that it will pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

§ 35.925–12 Property.

That the applicant has demonstrated to the satisfaction of the Regional Administrator that it has met or will met the property requirements of § 35.935–3.

§ 35.925–13 Sewage collection system.

That, if the project involves sewage collection system work, such work (a) is for the replacement or major rehabilitation of an existing sewer system under § 35.927–3(a) and is necessary to the total integrity and performance of the waste treatment works serving the community, or (b) is for a new sewer system in a community in existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected sewage. Replacement or major rehabilitation of an existing sewer system may be approved only if cost-effective; the result must be a sewer system design capacity equivalent to that of the existing system plus a reasonable amount for future growth. For purposes of this section, a community would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the Regional Administrator further determines that:

(a) The bulk (generally two-thirds) of the expected flow (flow from existing plus projected future habitations) from the collection system will be for waste waters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost-effective;

(c) The population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project:

(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with § 35.925–14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and

(e) The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.

§ 35.925–14 Compliance with environmental laws.

That the treatment works will comply with all pertinent requirements of applicable Federal, State and local environmental laws and regulations. (See § 30.101 and subpart C of part 30 of this chapter and the Clean Air Act.)

§ 35.925–15 Treatment of industrial wastes.

That the allowable project costs do not include (a) costs of interceptor or collector lines constructed exclusively, or almost exclusively, to serve industrial sources or (b) costs allocable to the treatment for control or removal of pollutants in wastewater introduced into the treatment works by industrial sources, unless the applicant is required to remove such pollutants introduced from nonindustrial sources. The project must be included in a complete waste treatment system, a principal purpose of which project (as defined by

the Regional Administrator; see §§ 35.903 (d) and 35.905) and system is the treatment of domestic wastes of the entire community, area, region or the district concerned. See the pretreatment regulations in part 403 of this chapter and § 35.907.

[44 FR 39340, July 5, 1979]

§ 35.925–16 Federal activities.

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A "major activity" includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

§ 35.925–17 Retained amounts for reconstruction and expansion.

That the allowable project costs have been reduced by an amount equal to the unexpended balance of the amounts the applicant retains for future reconstruction and expansion under § 35.928–2(a)(2)(ii), together with interest earned.

§ 35.925–18 Limitation upon project costs incurred prior to award.

That project construction has not been initiated before the approved date of initiation of construction (as defined in § 35.905), unless otherwise provided in this section.

(a) *Step 1 or Step 2:* No grant assistance is authorized for step 1 or step 2 project work performed before award of a step 1 or step 2 grant. However, payment is authorized, in conjunction with the first award of grant assistance, for all preaward allowable project costs in the following cases:

(1) Step 1 work begun after the date of approval by the Regional Administrator of a plan of study, if the State requests and the Regional Administrator has reserved funds for the step 1 grant. However, the step 1 grant must be applied for and awarded within the allotment period of the reserved funds.

(2) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981.

(3) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980.

(b) *Step 3:* Except as otherwise provided in this paragraph, no grant assistance for a step 3 project may be awarded unless the award precedes initiation of the step 3 construction. Preliminary step 3 work, such as advance acquisition of major equipment items requiring long lead times, acquisition of eligible land or of an option for the purchase of eligible land, or advance construction of minor portions of treatment works, including associated engineering costs, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator after completion of environmental review, but only if (1) the applicant submits a written and adequately substantiated request for approval and (2) written approval by the Regional Administrator is obtained before initiation of the advance acquisition or advance construction. (In the case of authorization for acquisition of eligible land, the applicant must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property.)

(c) The approval of a plan of study, a facilities plan, or advance acquisition of equipment or advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested before grant award (see § 35.945(a)). In instances where such approval is obtained, the applicant proceeds at its own risk, since payment for such costs cannot be made unless grant assistance for the project is awarded.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.925–19 [Reserved]

§ 35.925–20 Procurement.

That the applicant has complied or will comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement actions taken before the award of step 1, 2, or 3 grant assistance, such as submission of the information required under § 35.937–6.

§ 35.925–21 Storm sewers.

That, under section 211(c) of the Act, the allowable project costs do not include costs of treatment works for control of pollutant discharges from a separate storm sewer system (as defined in § 35.905).

§ 35.926 Value engineering (VE).

(a) *Value engineering proposal.* All step 2 grant applications for projects having a projected total step 3 grant eligible cost of $10 million or more, excluding the cost for interceptor and collector sewers, will contain a VE commitment. The VE proposal submitted during step 2 must contain enough information to determine the adequacy of the VE effort and the justification of the proposed VE fee. Essential information shall include:

(1) Scope of VE analysis;

(2) VE team and VE coordinator (names and background);

(3) Level of VE effort;

(4) VE cost estimate;

(5) VE schedule in relation to project schedule (including completion of VE analysis and submittal of VE summary reports).

(b) *Value engineering analysis.* For projects subject to the VE requirements of paragraph (a) of this section, a VE analysis of the project design shall be performed. When the VE analysis is completed, a preliminary report summarizing the VE findings and a final report describing implementation of the VE recommendations must be submitted to the project officer on a schedule approved by him.

(c) *Implementation.* For those projects for which a VE analysis has been performed in accordance with paragraph (b) of this section, VE recommendations shall be implemented to the maximum extent feasible, as determined by the grantee, subject to the approval of the EPA project officer. Rejection of any recommendation shall be on the basis of cost-effectiveness, reliability, extent of project delays, and other factors that may be critical to the treatment processes and the environmental impact of the project.

§ 35.927 Sewer system evaluation and rehabilitation.

(a) All applicants for step 2 or step 3 grant assistance must demonstrate to the Regional Administrator's satisfaction that each sewer system discharging into the treatment works project for which grant application is made is not or will not be subject to excessive infiltration/inflow. A determination of whether excessive infiltration/inflow exists may take into account, in addition to flow and related data, other significant factors such as cost-effectiveness (including the cost of substantial treatment works construction delay, see appendix A to this subpart), public health emergencies, the effects of plant bypassing or overloading, or relevant economic or environmental factors.

(b) A sewer system evaluation will generally be used to determine whether or not excessive infiltration/inflow exists. It will consist of:

(1) Certification by the State agency, as appropriate; and, when necessary,

(2) An infiltration/inflow analysis; and, if appropriate,

(3) A sewer system evaluation survey and, if appropriate, a program, including an estimate of costs, for rehabilitation of the sewer system to eliminate excessive infiltration/inflow identified in the sewer system evaluation. Information submitted to the Regional Administrator for such determination should be the minimum necessary to enable him to make a judgment.

(c) Guidelines on sewer system evaluation published by the Administrator provide further advisory information (see § 35.900(c)). Also see §§ 35.925–7(c) and 35.935–16.

§ 35.927–1 Infiltration/inflow analysis.

(a) The infiltration/inflow analysis shall demonstrate the nonexistence or possible existence of excessive infiltration/inflow in the sewer system. The analysis should identify the presence,

flow rate, and type of infiltration/inflow conditions which exist in the sewer system.

(b) For determination of the possible existence of excessive infiltration/inflow, the analysis shall include an estimate of the cost of eliminating the infiltration/inflow conditions. These costs shall be compared with estimated total costs for transportation and treatment of the infiltration/inflow. Cost-effectiveness analysis guidelines (Appendix A to this subpart) should be consulted with respect to this determination.

(c) If the infiltration/inflow analysis demonstrates the existence or possible existence of excessive infiltration/inflow a detailed plan for a sewer system evaluation survey shall be included in the analysis. The plan shall outline the tasks to be performed in the survey and their estimated costs.

§ 35.927–2 Sewer system evaluation survey.

(a) The sewer system evaluation survey shall identify the location, estimated flow rate, method of rehabilitation and cost of rehabilitation versus cost of transportation and treatment for each defined source of infiltration/inflow.

(b) A report shall summarize the results of the sewer system evaluation survey. In addition, the report shall include:

(1) A justification for each sewer section cleaned and internally inspected.

(2) A proposed rehabilitation program for the sewer system to eliminate all defined excessive infiltration/inflow.

§ 35.927–3 Rehabilitation.

(a) Subject to State concurrence, the Regional Administrator may authorize the grantee to perform minor rehabilitation concurrently with the sewer system evaluation survey in any step under a grant if sufficient funding can be made available and there is no adverse environmental impact. However, minor rehabilitation work in excess of $10,000 which is not accomplished with force account labor (see § 35.936–14(a)(2)), must be procured through formal advertising in compliance with the applicable requirements of §§ 35.938 *et seq.* and 35.939, the statutory requirements referenced in §§ 30.415 through 30.415–4 of this subchapter, and other applicable provisions of part 30.

(b) Grant assistance for a step 3 project segment consisting of major rehabilitation work may be awarded concurrently with step 2 work for the design of the new treatment works.

(c) The scope of each treatment works project defined within the facilities plan as being required for implementation of the plan, and for which Federal assistance will be requested, shall define (1) any necessary new treatment works construction and (2) any rehabilitation work (including replacement) determined by the sewer system evaluation to be necessary for the elimination of excessive infiltration/inflow. However, rehabilitation which should be a part of the applicant's normal operation and maintenance responsibilities shall not be included within the scope of a step 3 treatment works project.

(d) Only rehabilitation of the grantee's sewage collection system is eligible for grant assistance. However, the grantee's costs of rehabilitation beyond "Y" fittings (see definition of "sewage collection system" in § 35.905) may be treated on an incremental cost basis.

§ 35.927–4 Sewer use ordinance.

Each applicant for grant assistance for a step 2 or step 3 project shall demonstrate to the satisfaction of the Regional Administrator that a sewer use ordinance or other legally binding requirement will be enacted and enforced in each jurisdiction served by the treatment works project before the completion of construction. The ordinance shall prohibit any new connections from inflow sources into the sanitary sewer portions of the sewer system and shall insure that new sewers and connections to the sewer system are properly designed and constructed.

§ 35.927–5 Project procedures.

(a) *State certification.* The State agency may (but need not) certify that excessive infiltration/inflow does or does not exist. The Regional Administrator will determine that excessive infiltration/inflow does not exist on the basis of State certification, if he finds that

the State had adequately established the basis for its certification through submission of only the minimum information necessary to enable a judgment to be made. Such information could include a preliminary review by the applicant or State, for example, of such parameters as per capita design flow, ratio of flow to design flow, flow records or flow estimates, bypasses or overflows, or summary analysis of hydrological, geographical, and geological conditions, but this review would not usually be equivalent to a complete infiltration/inflow analysis. State certification must be on a project-by-project basis. If, on the basis of State certification, the Regional Administrator determines that the treatment works is or may be subject to excessive infiltration/inflow, no step 2 or step 3 grant assistance may be awarded except as paragraph (c) of this section provides.

(b) *Pre-award sewer system evaluation*. Generally, except as otherwise provided in paragraph (c) of this section, an adequate sewer system evaluation, consisting of a sewer system analysis and, if required, an evaluation survey, is an essential element of step 1 facilities planning. It is a prerequisite to the award of step 2 or 3 grant assistance. If the Regional Administrator determines through State Certification or an infiltration/inflow analysis that excessive infiltration/inflow does not exist, step 2 or 3 grant assistance may be awarded. If on the basis of State certification or the infiltration/inflow analysis, the Regional Administrator determines that possible excessive infiltration/inflow exists, an adequate sewer system evaluation survey and, if required, a rehabilitation program must be furnished, except as set forth in paragraph (c) of this section before grant assistance for step 2 or 3 can be awarded. A step 1 grant may be awarded for the completion of this segment of step 1 work, and, upon completion of step 1, grant assistance for a step 2 or 3 project (for which priority has been determined under § 35.915) may be awarded.

(c) *Exception*. If the Regional Administrator determines that the treatment works would be regarded (in the absence of an acceptable program of correction) as being subject to excessive infiltration/inflow, grant assistance may be awarded if the applicant establishes to the Regional Administrator's satisfaction that the treatment works project for which grant application is made will not be significantly changed by any subsequent rehabilitation program or will be a component part of any rehabilitated system. The applicant must agree to complete the sewer system evaluation and any resulting rehabilitation on an implementation schedule the State accepts (subject to approval by the Regional Administrator), which shall be inserted as a special condition in the grant agreement.

(d) *Regional Administrator review*. Municipalities may submit through the State agency the infiltration/inflow analysis and, when appropriate, the sewer system evaluation survey to the Regional Administrator for his review at any time before application for a treatment works grant. Based on such a review, the Regional Administrator shall provide the municipality with a written response indicating either his concurrence or nonconcurrence. In order for the survey to be an allowable cost, the Regional Administrator must concur with the sewer system evaluation survey plan before the work is performed.

§ 35.928 Requirements for an industrial cost recovery system.

(a) The Regional Administrator shall approve the grantee's industrial cost recovery system and the grantee shall implement and maintain it in accordance with § 35.935–15 and the requirements in §§ 35.928–1 through 35.928–4. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

(b) Grantees awarded step 3 grants under regulations promulgated on February 11, 1974, or grantees who obtained approval of their industrial cost recovery systems before April 25, 1978, may amend their systems to correspond to the definition of industrial users in § 35.905 or to provide for systemwide industrial cost recovery under § 35.928–1(g).

§ 35.928–1 Approval of the industrial cost recovery system.

The Regional Administrator may approve an industrial cost recovery system if it meets the following requirements:

(a) *General.* Each industrial user of the treatment works shall pay an annual amount equal to its share of the total amount of the step 1, 2, and 3 grants and any grant amendments awarded under this subpart, divided by the number of years in the recovery period. An industrial user's share shall be based on factors which significantly influence the cost of the treatment works. Volume of flow shall be a factor in determining an industrial user's share in all industrial cost recovery systems; other factors shall include strength, volume, and delivery flow rate characteristics, if necessary, to insure that all industrial users of the treatment works pay a proportionate distribution of the grant assistance allocable to industrial use.

(b) *Industrial cost recovery period.* The industrial cost recovery period shall be equal to 30 years or to the useful life of the treatment works, whichever is less.

(c) *Frequency of payment.* Except as provided in § 35.928–3, each industrial user shall pay not less often than annually. The first payment by an industrial user shall be made not later than 1 year after the user begins use of the treatment works.

(d) *Reserve capacity.* If an industrial user enters into an agreement with the grantee to reserve a certain capacity in the treatment works, the user's industrial cost recovery payments shall be based on the total reserved capacity in relation to the design capacity of the treatment works. If the discharge of an industrial user exceeds the reserved capacity in volume, strength or delivery flow rate characteristics, the user's industrial cost recovery payment shall be increased to reflect the actual use. If there is no reserve capacity agreement between the industrial user and the grantee, and a substantial change in the strength, volume, or delivery flow rate characteristics of an industrial user's discharge share occurs, the user's share shall be adjusted proportionately.

(e) *Upgrading and expansion.* (1) If the treatment works are upgraded, each existing industrial user's share shall be adjusted proportionately.

(2) If the treatment works are expanded, each industrial user's share shall be adjusted proportionately, except that a user with reserved capacity under paragraph (d) of this section shall incur no additional industrial cost recovery charges unless the user's actual use exceeded its reserved capacity.

(f) [Reserved]

(g) *Collection of industrial cost recovery payments.* Industrial cost recovery payments may be collected on a systemwide or on a project-by-project basis. The total amount collected from all industrial users on a systemwide basis shall equal the sum of the amounts which would be collected on a project-by-project basis.

(h) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the industrial cost recovery system. If the project is a regional treatment works accepting waste-waters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt industrial cost recovery systems in accordance with section 204(b)(1)(B) of the Act with §§ 35.928 through 35.928–4. These industrial cost recovery systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be consulted prior to adoption of the industrial cost recovery system, in accordance with 40 CFR part 25.

(i) *Inconsistent agreements.* The grantee may have pre-existing agreements which address (1) the reservation of capacity in the grantee's treatment works or (2) the charges to be collected by the grantee in providing waste water treatment services or reserving capacity. The industrial cost recovery system shall take precedence over any terms or conditions of agreements or contracts between the grantee and industrial users which are inconsistent with the requirements of section

204(b)(1)(B) of the Act and these industrial cost recovery regulations.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 39340, July 5, 1979]

§ 35.928–2 Use of industrial cost recovery payments.

(a) The grantee shall use industrial cost recovery payments received from industrial users as follows:

(1) The grantee shall return 50 percent of the amounts received from industrial users, together with any interest earned, to the U.S. Treasury annually.

(2) The grantee shall retain 50 percent of the amount recovered from industrial users.

(i) A portion of the amounts which the grantee retains may be used to pay the incremental costs of administration of the industrial cost recovery system. The incremental costs of administration are those costs remaining after deducting all costs reasonably attributable to the administration of the user charge system. The incremental costs shall be segregated from all other administrative costs of the grantee.

(ii) A minimum of 80 percent of the amounts the grantee retains after paying the incremental costs of administration, together with any interest earned, shall be used for the allowable costs (see § 35.940) of any expansion, upgrading or reconstruction of treatment works necessary to meet the requirements of the Act. The grantee shall obtain the written approval of the Regional Administrator before the commitment of the amounts retained for expansion, upgrading, or reconstruction.

(iii) The remainder of the amounts retained by the grantee may be used as the grantee sees fit, except that they may not be used for construction of industrial pretreatment facilities or rebates to industrial users for costs incurred in complying with user charge or industrial cost recovery requirements.

(b) Pending the use of industrial cost recovery payments, as described in paragraph (a) of this section, the grantee shall:

(1) Invest the amounts received in obligations of the U.S. Government or in obligations guaranteed as to principal and interest by the U.S. Government or any agency thereof; or

(2) Deposit the amounts received in accounts fully collateralized by obligations of the U.S. Government or any agency thereof.

§ 35.928–3 Implementation of the industrial cost recovery system.

(a) When a grantee's industrial cost recovery system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain all records that are necessary to document compliance with these regulations.

§ 35.928–4 Moratorium on industrial cost recovery payments.

(a) EPA does not require that industrial users defined in paragraphs (a) and (b) of the definition in § 35.905 pay industrial cost recovery for charges incurred during the period after December 31, 1977, and before July 1, 1979. Any industrial cost recovery charges incurred for accounting periods or portions of periods ending before January 1, 1978, shall be paid by industrial users. These funds are to be used as described in § 35.928–2.

(b) Grantees may either defer industrial cost recovery payments, or require industrial users as defined in paragraphs (a) and (b) of the definition in § 35.905 to pay industrial cost recovery payments for the period after December 31, 1977, and before July 1, 1979. If grantees require payment, the amount held by the municipality for eventual return to the U.S. Treasury under § 35.928–2(a)(1) shall be invested as required under § 35.928–2(b) until EPA advises how such sums shall be distributed. Grantees shall implement or continue operating approved industrial cost recovery systems and maintain their activities of monitoring flows, calculating payments due, and submitting bills to industrial users informing them of their current or deferred obligation.

(c) Industrial users as defined in paragraphs (a) and (b) of the definition in § 35.905 who are served by grantees who defer payment during the 18-month period ending June 30, 1979, shall make industrial cost recovery

payments for that period in a lump sum by June 30, 1980, or in equal annual installments prorated from July 1, 1979, over the remaining industrial cost recovery period.

§ 35.929 Requirements for user charge system.

The Regional Administrator shall approve the grantee's user charge system and the grantee shall implement and maintain it in accordance with § 35.935–13 and the requirements in §§ 35.929–1 through 35.929–3. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

§ 35.929–1 Approval of the user charge system.

The Regional Administrator may approve a user charge system based on either actual use under paragraph (a) of this section or ad valorem taxes under paragraph (b) of this section. The general requirements in §§ 35.929–2 and 35.929–3 must also be satisfied.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.

(b) *User charges based on ad valorem taxes.* A grantee's user charge system (or the user charge system of a subscriber, i.e., a constituent community receiving waste treatment services from the grantee) which is based on ad valorem taxes may be approved if it meets the requirements of paragraphs (b)(1) through (b)(7) of this section. If the Regional Administrator determines that the grantee did not have a dedicated ad valorem tax system on December 27, 1977, meeting the requirements of paragraphs (b)(1) through (b)(3) of this section, the grantee shall develop a user charge system based on actual use under § 35.929–1(a).

(1) The grantee (or subscriber) had in existence on December 27, 1977, a system of ad valorem taxes which collected revenues to pay the cost of operation and maintenance of waste water treatment works within the grantee's service area and has continued to use that system.

(2) The grantee (or subscriber) has not previously obtained approval of a user charge system on actual use.

(3) The system of ad valorem taxes in existence on December 27, 1977, was dedicated ad valorem tax system.

(i) A grantee's system will be considered to be dedicated if the Regional Administrator determines that the system meets all of the following criteria:

(A) The ad valorem tax system provided for a separate tax rate or for the allocation of a portion of the taxes collected for payment of the grantee's costs of waste water treatment services;

(B) The grantee's budgeting and accounting procedures assured that a specified portion of the tax funds would be used for the payment of the costs of operation and maintenance;

(C) The ad valorem tax system collected tax funds for the costs of waste water treatment services which could not be or historically were not used for other purposes; and

(D) The authority responsible for the operation and maintenance of the treatment works established the budget for the costs of operation and maintenance and used those specified amounts solely to pay the costs of operation and maintenance.

(ii) A subscriber's system based on ad valorem taxes will be considered to be dedicated if a contractual agreement or a charter established under State law existed on December 27, 1977, which required the subscriber to pay its share of the cost of waste water treatment services.

(4) A user charge system funded by dedicated ad valorem taxes shall establish, as a minimum, the classes of users listed below:

(i) Residential users, including single-family and multifamily dwellings,

and small nonresidential users, including nonresidential commercial and industrial users which introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works:

(ii) Industrial and commercial users;

(A) Any nongovernmental user of publicly owned treatment works which discharges more than 25,000 gallons per day (gpd) of sanitary waste; or a volume of process waste, or combined process and sanitary waste, equivalent to 25,000 gpd of sanitary waste. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, biochemical oxygen demand (BOD) and suspended solids (SS) per volume of flow. Dischargers with a volume exceeding 25,000 gpd or the weight of BOD or SS equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users.

(B) Any nongovernmental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(iii) Users which pay no ad valorem taxes or receive substantial credits in paying such taxes, such as tax exempt institutions or governmental users, but excluding publicly owned facilities performing local governmental functions (e.g., city office building, police station, school) which discharge solely domestic wastes.

(5) The grantee must be prepared to demonstrate for the Regional Administrator's approval that its system of evaluating the volume, strength, and characteristics of the discharges from users or categories of users classified within the subclass of small nonresidential users is sufficient to assure that such users or the average users in such categories do not discharge either toxic pollutants or more than the equivalent of 25,000 gallons per day of domestic wastewater.

(6) The ad valorem user charge system shall distribute the operation and maintenance costs for all treatment works in the grantee's jurisdiction to the residential and small nonresidential user class, in proportion to the use of the treatment works by this class. The proportional allocation of costs for this user class shall take into account the total waste water loading of the treatment works, the constituent elements of the wastes from this user class and other appropriate factors. The grantee may assess one ad valorem tax rate to this entire class of users or, if permitted under State law, the grantee may assess different ad valorem tax rates for the subclass of residential users and the subclass of small nonresidential users provided the operation and maintenance costs are distributed proportionately between these subclasses.

(7) Each member of the industrial and commercial user class described under paragraph (b)(4)(ii) of this section and of the user class which pays no ad valorem taxes or receives substantial credits in paying such taxes described under paragraph (b)(4)(iii) of this section shall pay its share of the costs of operation and maintenance of the treatment works based upon charges for actual use (in accordance with § 35.929–1(a)). The grantee may use its ad valorem tax system to collect, in whole or in part, those charges from members of the industrial and large commercial class where the following conditions are met:

(i) A portion or all of the ad valorem tax rate assessed to members of this class has been specifically designated to pay the costs of operation and maintenance of the treatment works, and that designated rate is uniformly applied to all members of this class:

(ii) A system of surcharges and rebates is employed to adjust the revenues from the ad valorem taxes collected from each user of this class in accordance with the rate designated under paragraph (b)(7)(i) of this section, such that each member of the class pays a total charge for its share

of the costs of operation and maintenance based upon actual use.

§ 35.929–2 General requirements for all user charge systems.

User charge systems based on actual use under § 35.929–1(a) or ad valorem taxes under § 35.929–1(b) shall also meet the following requirements:

(a) *Initial basis for operation and maintenance charges.* For the first year of operation, operation and maintenance charges shall be based upon past experience for existing treatment works or some other method that can be demonstrated to be appropriate to the level and type of services provided.

(b) *Biennial review of operation and maintenance charges.* The grantee shall review not less often than every 2 years the waste water contribution of users and user classes, the total costs of operation and maintenance of the treatment works, and its approved user charge system. The grantee shall revise the charges for users or user classes to accomplish the following:

(1) Maintain the proportionate distribution of operation and maintenance costs among users and user classes as required herein;

(2) Generate sufficient revenue to pay the total operation and maintenance costs necessary to the proper operation and maintenance (including replacement) of the treatment works; and

(3) Apply excess revenues collected from a class of users to the costs of operation and maintenance attributable to that class for the next year and adjust the rate accordingly.

(c) *Toxic pollutants.* The user charge system shall provide that each user which discharges any toxic pollutants which cause an increase in the cost of managing the effluent or the sludge of the grantee's treatment works shall pay for such increased costs.

(d) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users of the grantee's treatment works system based upon either of the following:

(1) In the same manner that it distributes the costs of operation and maintenance among users (or user classes) for their actual use, or

(2) Under a system which uses one of any combination of the following factors on a reasonable basis:

(i) Flow volume of the users;

(ii) Land area of the users;

(iii) Number of hookups or discharges to the users;

(iv) Property valuation of the users, if the grantee has a user charge system based on ad valorem taxes approved under § 35.929–1(b).

(e) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act and §§ 35.929 through 35.929–3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be informed of the financial impact of the user charge system on them and shall be consulted prior to adoption of the system, in accordance with 40 CFR part 25.

(f) *Notification.* Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill, of the rate and that portion of the user charges or ad valorem taxes which are attributable to waste water treatment services.

(g) *Inconsistent agreements.* The grantee may have preexisting agreements which address: (1) The reservation of capacity in the grantee's treatment works, or (2) the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or Federal agencies or installations) which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and these regulations.

(h) *Costs of pretreatment program.* A user charge system submitted by a municipality with an approved pretreatment program shall provide that the costs necessary to carry out the program and to comply with any applicable requirements of section 405 of the Act and related regulations are included within the costs of operation and maintenance of the system and paid through user charges, or are paid in whole or in part by other identified sources of funds.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§ 35.929–3 Implementation of the user charge system.

(a) When a grantee's user charge system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain such records as are necessary to document compliance with these regulations.

(c) Appendix B to this subpart contains guidelines with illustrative examples of acceptable user charge systems.

(d) The Regional Administrator may review, no more often than annually, a grantee's user charge system to assure that it continues to meet the requirements of §§ 35.929–1 through 35.929–3.

§ 35.930 Award of grant assistance.

The Regional Administrator's approval of an application or amendments to it through execution of a grant agreement (including a grant amendment), in accordance with § 30.345 of this subchapter, shall constitute a contractual obligation of the United States for the payment of the Federal share of the allowable project costs, as determined by the Regional Administrator. Information about the approved project furnished in accordance with § 35.920–3 shall be considered incorporated in the grant agreement.

§ 35.930–1 Types of projects.

(a) The Regional Administrator is authorized to award grant assistance for the following types of projects:

(1) *Step 1.* A facilities plan and related step 1 elements (see § 35.920–3(b)), if he determines that the applicant has submitted the items required under § 35.920–3(a); (In the case of grant assistance awarded solely for the acquisition of eligible land, the following provisions are deferred until the award of the ensuing step 3 assistance for the construction of facilities: §§ 35.925–10, 35.925–11(b), 35.935–12 (c) and (d), 35.935–13(c), 35.935–15(c), 35.935–16 (b) and (c));

(2) *Step 2.* Construction drawings and specifications, if he determines that the applicant has submitted the items required under § 35.920–3(b);

(3) *Step 3.* Building and erection of a treatment works, if he determines that the applicant has submitted the items required under § 35.920–3(c); or

(4) *Steps 2 and 3.* A combination of design (step 2) and construction (step 3) for a treatment works (see § 35.909) if he determines that the applicant has submitted the items required under § 35.920–3(d).

(b) The Regional Administrator may award Federal assistance by a grant or grant amendment from any allotment or reallotment available to a State under § 35.910 *et seq.* for payment of 100 percent of the cost of construction of treatment works required to train and upgrade waste treatment works operations and maintenance personnel and for the costs of other operator training programs. Costs of other operator training programs are limited to mobile training units, classroom rental, specialized instructors, and instructional material, under section 109(b) of the Act.

(1) Where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each State. The Federal funds awarded under section 109(b) to any State for all training facilities or programs shall not exceed $500,000.

(2) Any grantee who received a grant under section 109(b) before December 27, 1977, is eligible to have the grant increased by funds made available under the Act, not to exceed 100 percent of eligible costs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.930–2 Grant amount.

The grant agreement shall set forth the amount of grant assistance. The grant amount may not exceed the

amount of funds available from the State allotments and reallotments under § 35.910 *et seq.* Grant payments will be limited to the Federal share of allowable project costs incurred within the grant amount or any increases effected through grant amendments (see § 35.955).

§ 35.930–3 Grant term.

The grant agreement shall establish the period within which the project must be completed, in accordance with § 30.345–1 of this chapter. This time period is subject to extension for excusable delay, at the discretion of the Regional Administrator.

§ 35.930–4 Project scope.

The grant agreement must define the scope of the project for which Federal assistance is awarded under the grant. The project scope must include a step or an identified segment. Grant assistance may be awarded for a segment of step 3 treatment works construction, when that segment in and of itself does not provide for achievement of applicable effluent discharge limitations, if:

(a) The segment is to be a component of an operable treatment works which will achieve the applicable effluent discharge limitations; and

(b) A commitment for completion of the entire treatment works is submitted to the Regional Administrator and that commitment is reflected in a special condition in the grant agreement.

§ 35.930–5 Federal share.

(a) *General.* The grant shall be 75 percent of the estimated total cost of construction that the Regional Administrator approves in the grant agreement, except as otherwise provided in paragraphs (b) and (c) of this section and in §§ 35.925–15, 35.925–16, 35.925–17, 35.930–1(b), and paragraph 10 of appendix A.

(b) *Innovative and alternative technology.* In accordance with § 35.908(b), the amount of any step 2, step 3, or step 2=3 grant assistance awarded from funds allotted for fiscal years 1979, 1980, and 1981 shall be 85 percent of the estimated cost of construction for those eligible treatment works or significant portions of them that the Regional Administrator determines meet the criteria for innovative or alternative technology in appendix E. These grants depend on the availability of funds from the reserve under § 35.915–1(b). The proportional State contribution to the non-Federal share of construction costs for 85-percent grants must be the same as or greater than the proportional State contribution (if any) to the non-Federal share of eligible construction costs for all treatment works which receive 75-percent grants in the State.

(c) *Modification and replacement of innovative and alternative projects.* In accordance with § 35.908(c) and procedures published by EPA, the Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with grant assistance based upon a Federal share of 85 percent under paragraph (b) of this section.

§ 35.930–6 Limitation on Federal share.

The grantee must exert its best efforts to perform the project work as specified in the grant agreement within the approved cost ceiling. If at any time the grantee believes that the costs which it expects to incur in the performance of the project will exceed or be substantially less than the previously approved estimated total project costs, the grantee must notify the Regional Administrator and the State agency promptly in writing. As soon as practicable, the grantee must give the revised estimate of total cost for the performance of the project (see § 30.900 of this subchapter). Delay in submission of the notice and excess cost information may prejudice approval of an increase in the grant amount. The United States shall not be obligated to pay for costs incurred in excess of the approved grant amount or any amendment to it until the State has approved an increase in the grant amount from available allotments under § 35.915 and the Regional Administrator has issued a written grant amendment under § 35.955.

§ 35.935 Grant conditions.

In addition to the EPA general grant conditions (subpart C and appendix A to part 30 of this subchapter), each

treatment works grant shall be subject to the following conditions:

§ 35.935–1 Grantee responsibilities.

(a) Review or approval of project plans and specifications by or for EPA is for administrative purposes only and does not relieve the grantee of its responsibility to design, construct, operate, and maintain the treatment works described in the grant application and agreement.

(b) By its acceptance of the grant, the grantee agrees to complete the treatment works in accordance with the facilities plan, plans and specifications, and related grant documents approved by the Regional Administrator, and to maintain and operate the treatment works to meet the enforceable requirements of the Act for the design life of the treatment works. The Regional Administrator is authorized to seek specific enforcement or recovery of funds from the grantee, or to take other appropriate action (see § 35.965), if he determines that the grantee has failed to make good faith efforts to meet its obligations under the grant.

(c) The grantee agrees to pay, pursuant to section 204(a)(4) of the Act, the non-Federal costs of treatment works construction associated with the project and commits itself to complete the construction of the operable treatment works and complete waste treatment system (see definitions in § 35.905) of which the project is a part.

(d) The Regional Administrator may include special conditions in the grant or administer this subpart in the manner which he determines most appropriate to coordinate with, restate, or enforce NPDES permit terms and schedules.

§ 35.935–2 Procurement.

The grantee and party to any subagreement must comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement for step 1, 2, or 3 work. The Regional Administrator will cause appropriate review of grantee procurement to be made.

§ 35.935–3 Property.

(a) The grantee must comply with the property provisions of § 30.810 *et seq.* of this subchapter with respect to all property (real and personal) acquired with project funds.

(b) With respect to real property (including easements) acquired in connection with the project, whether such property is acquired with or in anticipation of EPA grant assistance or solely with funds furnished by the grantee or others:

(1) The acquisition must be conducted in accordance with part 4 of this chapter;

(2) Any displacement of a person by or as a result of any acquisition of the real property shall be conducted under the applicable provisions of part 4 of this chapter; and

(3) The grantee must obtain (before initiation of step 3 construction), and must thereafter retain, a fee simple or such estate or interest in the site of a step 3 project, and rights of access, as the Regional Administrator finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project. If a step 3 project serves more than one municipality, the grantee must insure that the participating municipalities have, or will have before the initiation of step 3 construction, such interests or rights in land as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project site for the estimated life of the project.

(c) With respect to real property acquired with EPA grant assistance, the grantee must defer acquisition of such property until approval of the Regional Administrator is obtained under § 35.940–3.

§ 35.935–4 Step 2+3 projects.

A grantee which has received step 2=3 grant assistance must make submittals required by § 35.920–3(c), together with approvable user charge and industrial cost recovery systems and a preliminary plan of operation. The Regional Administrator shall give written approval of these submittals before advertising for bids on the step 3 construction portion of the step 2=3

project. The cost of step 3 work initiated before such approval is not allowable. Failure to make the above submittals as required is cause for invoking sanctions under § 35.965.

§ 35.935–5 Davis-Bacon and related statutes.

Before soliciting bids or proposals for step 3-type work, the grantee must consult with the Regional Administrator concerning compliance with Davis-Bacon and other statutes referenced in § 30.415 *et seq.* of this subchapter.

§ 35.935–6 Equal employment opportunity.

Contracts involving step 3-type work of $10,000 or more are subject to equal employment opportunity requirements under Executive Order 11246 (see part 8 of this chapter). The grantee must consult with the Regional Administrator about equal employment opportunity requirements before issuance of an invitation for bids where the cost of construction work is estimated to be more than $1 million or where required by the grant agreement.

§ 35.935–7 Access.

The grantee must insure that EPA and State representatives will have access to the project work whenever it is in preparation or progress. The grantee must provide proper facilities for access and inspection. The grantee must allow the Regional Administrator, the Comptroller General of the United States, the State agency, or any authorized representative, to have access to any books, documents, plans, reports, papers, and other records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, copies and transcriptions. The grantee must insure that a party to a subagreement will provide access to the project work, sites, documents, and records. See §§ 30.605 and 30.805 of this subchapter, clause 9 of appendix C–1 to this subpart, and clause 10 of appendix C–2 to this subpart.

§ 35.935–8 Supervision.

In the case of any project involving Step 3, the grantee will provide and maintain competent and adequate engineering supervision and inspection of the project to ensure that the construction conforms with the approved plans and specifications.

§ 35.935–9 Project initiation and completion.

(a) The grantee agrees to expeditiously initiate and complete the step 1, 2, or 3 project, or cause it to be constructed and completed, in accordance with the grant agreement and application, including the project progress schedule, approved by the Regional Administrator. Failure of the grantee to promptly initiate and complete step 1, 2, or 3 project construction may result in annulment or termination of the grant.

(b) No date reflected in the grant agreement, or in the project completion schedule, or extension of any such date, shall modify any compliance date established in an NPDES permit. It is the grantee's obligation to request any required modification of applicable permit terms or other enforceable requirements.

(c) The invitation for bids for step 3 project work is expected to be issued promptly after grant award. Generally this action should occur within 90 to 120 days after award unless compliance with State or local laws requires a longer period of time. The Regional Administrator shall annul or terminate the grant if initiation of all significant elements of step 3 construction has not occurred within 12 months of the award for the step 3 project (or approval of plans and specifications, in the case of a step 2=3 project). (See definition of "initiation of construction" under "construction" in § 35.905.) However, the Regional Administrator may defer (in writing) the annulment or termination for not more than 6 additional months if:

(1) The grantee has applied for and justified the extension in writing to the Regional Administrator;

(2) The grantee has given written notice of the request for extension to the NPDES permit authority;

(3) The Regional Administrator determines that there is good cause for the delay in initiation of project construction; and

(4) The State agency concurs in the extension.

§ 35.935–10 Copies of contract documents.

In addition to the notification of project changes under § 30.900 of this chapter, a grantee must promptly submit to the Regional Administrator a copy of any prime contract or modification of it and of revisions to plans and specifications.

§ 35.935–11 Project changes.

(a) In addition to the notification of project changes required under § 30.900–1 of this chapter, the Regional Administrator's and (where necessary) the State agency's prior written approval is required for:

(1) Project changes which may—

(i) Substantially alter the design and scope of the project;

(ii) Alter the type of treatment to be provided;

(iii) Substantially alter the location, size, capacity, or quality of any major item of equipment; or

(iv) Increase the amount of Federal funds needed to complete the project.

However, prior EPA approval is not required for changes to correct minor errors, minor changes, or emergency changes; and

(2) Subagreement amendments amounting to more than $100,000 for which EPA review is required under §§ 35.937–6(b) and 35.938–5 (d) and (g).

(b) No approval of a project change under § 30.900 of this chapter shall obligate the United States to any increase in the amount of the grant or grant payments unless a grant increase is also approved under § 35.955. This does not preclude submission or consideration of a request for a grant amendment under § 30.900–1 of this chapter.

§ 35.935–12 Operation and maintenance.

(a) The grantee must make provision satisfactory to the Regional Administrator for assuring economic and effective operation and maintenance of the treatment works in accordance with a plan of operation approved by the State water pollution control agency or, as appropriate, the interstate agency.

(b) As a minimum, the plan shall include provision for:

(1) An operation and maintenance manual for each facility;

(2) An emergency operating and response program;

(3) Properly trained management, operation and maintenance personnel;

(4) Adequate budget for operation and maintenance;

(5) Operational reports;

(6) Provisions for laboratory testing and monitoring adequate to determine influent and effluent characteristics and removal efficiencies as specified in the terms and conditions of the NPDES permit;

(7) An operation and maintenance program for the sewer system.

(c) Except as provided in paragraphs (d) and (e) of this section, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of any step 3 project unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft; or

(2) More than 90 percent of the Federal share unless the grantee has furnished a satisfactory final operation and maintenance manual.

(d) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft, or

(2) More than 90 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a satisfactory final operation and maintenance manual.

(e) In multiple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless the operation and maintenance manual (or those portions associated with the operating elements of the

treatment works) submitted by the grantee has been approved by the Regional Administrator.

§ 35.935–13 Submission and approval of user charge systems.

The grantee shall obtain the approval of the Regional Administrator of its system of user charges. (See also § 35.929 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974,* (1) Except as paragraph (a)(2) of this section provides, the grantee must obtain the Regional Administrator's approval of its system of user charges based on actual use which complies with § 35.929–1(a). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of user charges nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) A grantee which desires approval of a user charge system based on ad valorem taxes in accordance with § 35.929–1(b) shall submit to the Regional Administrator by July 24, 1978, evidence of compliance of its system with the criteria in § 35.929–1 (b)(1) through (b)(3). As soon as possible, the Regional Administrator shall advise the grantee if the system complies with § 35.929–1 (b)(1). The Regional Administrator's determination may be appealed in accordance with subpart J, "Disputes," of part 30 of this subchapter.

(i) *Grantees whose ad valorem tax systems meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Any step 3 payments held by the Regional Administrator at 50 percent or 80 percent for failure to comply with the requirement for development of a user charge system shall be released. However, the grantee shall obtain approval of its user charge system by June 30, 1979 or no further payments will be made until the sytem is approved and the grants may be terminated or annulled.

(ii) *Grantees whose ad valorem tax systems do not meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Step 3 grants will continue to be administered in accordance with paragraph (a)(1) of this section.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its user charge system based on actual use or ad valorem taxes before July 1, 1979. The Regional Administrator may not make any payments on these grants, may terminate or annul these grants, and may not award any new step 3 grants to the same grantee after June 30, 1979, if the user charge system has not been approved. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The Regional Administrator may not award step 3 grant assistance unless he has approved the user charge system based on actual use or ad valorem taxes. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

§ 35.935–14 Final inspection.

The grantee shall notify the Regional Administrator through the State agency of the completion of step 3 project construction. The Regional Administrator shall cause final inspection to be made within 60 days of the receipt of the notice. When final inspection is completed and the Regional Administrator determines that the treatment works have been satisfactorily constructed in accordance with the grant agreement, the grantee may make a request for final payment under § 35.945(e).

§ 35.935–15 Submission and approval of industrial cost recovery system.

The grantee shall obtain the approval of the Regional Administrator of its system of industrial cost recovery. (See also § 35.928 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974.* (1) The grantee must obtain the approval of the Regional Administrator for the system of industrial cost recovery (see § 35.928 *et seq.*). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of industrial cost recovery nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) Payments of grantees held under paragraph (a)(1) of this section shall be released after April 25, 1978. However, the grantee shall obtain approval of its industrial cost recovery system by June 30, 1979, or no further payments will be made until the system is approved.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its industrial cost recovery system under these regulations, except for the ordinance and rates, before July 1, 1979. The Regional Administrator shall not make any payments on these grants and shall not award any new step 3 grants to the same grantee after June 30, 1979, if the industrial cost recovery system, except for the ordinance and rates, has not been approved. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The grantee must obtain the Regional Administrator's approval of the industrial cost recovery system under these regulations, except for the ordinance and rates, before grant award. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

§ 35.935–16 Sewer use ordinance and evaluation/rehabilitation program.

(a) The grantee must obtain the approval of the Regional Administrator of its sewer use ordinance under § 35.927–4.

(b) Except as provided in paragraphs (c) and (d) of this section, the Regional Administrator shall not pay more than 80 percent of the Federal share of any step 3 project unless he has approved the grantee's sewer use ordinance, and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(c) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay more than 80 percent of the Federal share of the total of all interdependent step 3 segments unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(d) In mulitple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

§ 35.935–17 Training facility.

If assistance has been provided for the construction of a treatment works required to train and upgrade waste treatment personnel under §§ 35.930–1(b) and 35.920–3(e), the grantee must operate the treatment works as a training facility for a period of at least 10 years after construction is completed.

§ 35.935–18 Value engineering.

A grantee must comply with the applicable value engineering requirements of § 35.926.

§ 35.935–19 Municipal pretreatment program.

The grantee must obtain approval by the Regional Administrator of the municipal pretreatment program in accordance with part 403 of this chapter. Prior to granting such approval, the Regional Administrator shall not pay more than 90 percent of the Federal share of any step 3 project or cost of step 3 work under a step 2=3 project awarded after October 1, 1978, except that for any such grant assistance awarded before December 31, 1980, the Regional Administrator may continue grant payments if he determines that significant progress has been made (and is likely to continue) toward the development of an approvable pretreatment program and that withholding of grant payments would not be in the best interest of protecting the environment.

§ 35.935–20 Innovative processes and techniques.

If the grantee receives 85-percent grant assistance for innovative processes and techniques, the following conditions apply during the 5-year period following completion of construction:

(a) The grantee shall permit EPA personnel and EPA designated contractors to visit and inspect the treatment works at any reasonable time in order to review the operation of the innovative processes or techniques.

(b) If the Regional Administrator requests, the grantee will provide EPA with a brief written report on the construction, operation, and costs of operation of the innovative processes or techniques.

§ 35.936 Procurement.

(a) Sections 35.936 through 35.939 set forth policies and minimum standards for procurement of architectural or engineering services as defined in § 35.937 and construction contracts as described in § 35.938 by grantees under all steps of grants for construction of treatment works. Acquisition of real property shall be conducted in accordance with part 4, subpart F of this chapter. Other procurements of goods and services shall be conducted in accordance with the provisions of part 33 of this subchapter.

(b) This subpart does not apply to work beyond the scope of the project for which grant assistance is awarded (i.e., ineligible work).

§ 35.936–1 Definitions.

As used in §§ 35.936 through 35.939, the following words and terms shall have the meaning set forth below. All terms not defined herein shall have the meaning given to them in § 30.135 of this subchapter, and in § 35.905.

(a) *Grant agreement.* The written agreement and amendments thereto between EPA and a grantee in which the terms and conditions governing the grant are stated and agreed to by both parties under § 30.345 of this subchapter.

(b) *Subagreement.* A written agreement between an EPA grantee and another party (other than another public agency) and any tier of agreement thereunder for the furnishing of services, supplies, or equipment necessary to complete the project for which a grant was awarded, including contracts and subcontracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements subject to State or local personnel systems. (See §§ 35.937–12 and 35.938–9 regarding subcontracts of any tier under prime contracts for architectural or engineering services or construction awarded by the grantee—generally applicable only to subcontracts in excess of $10,000.)

(c) *Contractor.* A party to whom a subagreement is awarded.

(d) *Grantee.* Any municipality which has been awarded a grant for construction of a treatment works under this subpart. In addition, where appropriate in §§ 35.936 through 35.939, grantee may also refer to an applicant for a grant.

§ 35.936–2 Grantee procurement systems; State or local law.

(a) *Grantee procurement systems.* Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial, or local laws and ordinances to the extent that these systems and procedures do not conflict

with the minimum requirements of this subchapter.

(b) *State or local law.* The Regional Administrator will generally rely on a grantee's determination regarding the application of State or local law to issues which are primarily determined by such law. The Regional Administrator may request the grantee to furnish a written legal opinion adequately addressing any such legal issues. The Regional Administrator will accept the grantee's determination unless he finds that it does not have a rational basis.

(c) *Preference.* State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant.

§ 35.936–3 Competition.

EPA's policy is to encourage free and open competition appropriate to the type of project work to be performed.

§ 35.936–4 Profits.

Only fair and reasonable profits may be earned by contractors in subagreements under EPA grants. See § 35.937–7 for discussion of profits under negotiated subagreements for architectural or engineering services, and § 35.938–5(f) for discussion of profits under negotiated change orders to construction contracts. Profit included in a formally advertised, competitively bid, fixed price construction contract awarded under § 35.938 is presumed reasonable.

§ 35.936–5 Grantee responsibility.

(a) The grantee is responsible for the administration and successful accomplishment of the project for which EPA grant assistance is awarded. The grantee is responsible for the settlement and satisfaction of all contractual and administrative issues arising out of subagreements entered into under the grant (except as § 35.936–6 provides) in accordance with sound business judgment and good administrative practice. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of contracts, protests of award, claims, disputes, and other related procurement matters.

(b) With the prior written approval of the Regional Administrator, the grantee may retain an individual or firm to perform these functions. Such an agent acts for the grantee and is subject to the provisions of this subpart which apply to the grantee.

(c) In accordance with § 35.970, a grantee may request technical and legal assistance from the Regional Administrator for the administration and enforcement of any contract related to treatment works that are assisted by an EPA grant. The Regional Administrator's assistance does not release the grantee from those responsibilities identified in paragraph (a) of this section.

§ 35.936–6 EPA responsibility.

Generally, EPA will only review grantee compliance with Federal requirements applicable to a grantee's procurement. However, where specifically provided in this chapter (e.g., §§ 8.8(j) and 35.939), EPA is responsible for determining compliance with Federal requirements.

§ 35.936–7 Small and minority business.

Grantees shall make positive efforts to use small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds.

§ 35.936–8 Privity of contract.

Neither EPA nor the United States shall be a party to any subagreement (including contracts or subcontracts), nor to any solicitation or request for proposals. (See §§ 35.937–9(a), 35.938–4(c)(5), and appendices C–1 and C–2 to this subpart for the required solicitation statement and contract provisions.) However, in accordance with § 35.970 the Regional Administrator, if a grantee requests, may provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made.

§35.936–9 Disputes.

Only an EPA grantee may initiate and prosecute an appeal to the Administrator under the disputes provision of a grant with respect to its subagreements (see subpart J of part 30 of this subchapter). Neither a contractor nor a subcontractor may prosecute an appeal under the disputes provisions of a grant in its own name or interest.

§35.936–10 Federal procurement regulations.

Regulations applicable to direct Federal procurement shall not be applicable to subagreements under grants except as stated in this subchapter.

§35.936–11 General requirements for subagreements.

Subagreements must:

(a) Be necessary for and directly related to the accomplishment of the project work;

(b) Be in the form of a bilaterally executed written agreement (except for small purchases of $10,000 or less);

(c) Be for monetary or in-kind consideration; and

(d) Not be in the nature of a grant or gift.

§35.936–12 Documentation.

(a) Procurement records and files for purchases in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Justification for lack of competition if competition appropriate to the type of project work to be performed is required but is not obtained; and

(3) Basis for award cost or price.

(b) The grantee or contractors of the grantee must retain procurement documentation required by §30.805 of this subchapter and by this subpart, including a copy of each subagreement, for the period of time specified in §30.805. The documentation is subject to all the requirements of §30.805. A copy of each subagreement must be furnished to the project officer upon request.

§35.936–13 Specifications.

(a) *Nonrestrictive specifications.* (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words "or equal." If brand or trade names are specified, the grantee must be prepared to identify to the Regional Administrator or in any protest action the salient requirements (relating to the minimum needs of the project) which must be met by any offeror. The single base bid method of solicitation for equipment and parts for determination of a low, responsive bidder may not be utilized. With regard to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the material.

(2) Project specifications shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, except to the extent that innovative technologies may be used under §35.908 of this subpart.

(b) *Sole source restriction.* A specification shall not require the use of structures, materials, equipment, or processes which are known to be available only from a sole source, unless the Regional Administrator determines that the grantee's engineer has adequately justified in writing that the proposed use meets the particular project's minimum needs or the Regional Administrator determines that use of a single source is necessary to promote innovation (see §35.908). Sole source procurement must be negotiated under §33.500 *et seq.*, including full cost review.

(c) *Experience clause restriction.* The general use of experience clauses requiring equipment manufacturers to have a record of satisfactory operation for a specified period of time or of bonds or deposits to guarantee replacement in the event of failure is restricted to special cases where the grantee's engineer adequately justifies

any such requirement in writing. Where such justification has been made, submission of a bond or deposit shall be permitted instead of a specified experience period. The period of time for which the bond or deposit is required should not exceed the experience period specified. No experience restriction will be permitted which unnecessarily reduces competition or innovation.

(d) *Buy American*—(1) *Definitions.* As used in this subpart, the following definitions apply:

(i) *Construction material* means any article, material, or supply brought to the construction site for incorporation in the building or work.

(ii) *Component* means any article, material, or supply directly incorporated in construction material.

(iii) *Domestic construction material* means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

(iv) *Nondomestic construction material* means a construction material other than a domestic construction material.

(2) *Domestic preference.* Domestic construction material may be used in preference to nondomestic materials if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic materials including all costs of delivery to the construction site, any applicable duty, whether or not assessed. Computations will normally be based on costs on the date of opening of bids or proposals.

(3) *Waiver.* The Regional Administrator may waive the Buy American provision based upon those factors that he considers relevant, including:

(i) Such use is not in the public interest;

(ii) The cost is unreasonable;

(iii) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(iv) The articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project; or

(v) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(4) *Contract provision.* Notwithstanding any other provision of this subpart, bidding documents and construction contracts for any step 3 project for which the Regional Administrator receives an application after February 1, 1978, shall contain the "Buy American" provision which requires use of domestic construction materials in preference to nondomestic construction materials.

(5) *Substitution.* If a nondomestic construction material or component is proposed for use, a bidder or contractor may substitute an approved domestic material or component (at no change in price), if necessary to comply with this subsection.

(6) *Procedures.* The Regional Administrator may use the appropriate procedures of § 35.939 in making the determinations with respect to this subsection. He shall generally observe the Buy American procedures, regulations, precedents, and requirements of other Federal departments and agencies.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

§ 35.936–14 Force account work.

(a) A grantee must secure the project officer's prior written approval for use of the force account method for (1) any step 1 or step 2 work in excess of $10,000; (2) any sewer rehabilitation work in excess of $25,000 performed during step 1 (see § 35.927–3(a)); or (3) any step 3 work in excess of $25,000; unless the grant agreement stipulates the force account method.

(b) The project officer's approval shall be based on the grantee's demonstration that he possesses the necessary competence required to accomplish such work and that (1) the work

can be accomplished more economically by the use of the force account method, or (2) emergency circumstances dictate its use.

(c) Use of the force account method for step 3 construction shall generally be limited to minor portions of a project.

§ 35.936–15 Limitations on subagreement award.

No subagreement shall be awarded:

(a) To any person or organization which does not meet the responsibility standards in § 30.340–2 (a) through (d) and (g) of this subchapter;

(b) If any portion of the contract work not exempted by § 30.420–3(b) of this subchapter will be performed at a facility listed by the Director, EPA Office of Federal Activities, in violation of the antipollution requirements of the Clean Air Act and the Clean Water Act, as set forth in § 30.420–3 of this subchapter and 40 CFR part 15 (Administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts, grants, or loans); or

(c) To any person or organization which is ineligible under the conflict of interest requirements of § 30.420–4 of this subchapter.

§ 35.936–16 Code or standards of conduct.

(a) The grantee must maintain a code or standards of conduct which shall govern the performance of its officers, employees, or agents in the conduct of project work, including procurement and expenditure of project funds. The grantee's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors. The grantee must avoid personal or organizational conflicts of interest or noncompetitive procurement practices which restrict or eliminate competition or otherwise restrain trade.

(b) To the extent permissible by State or local law or formal institutional requirements and procedures, the standards shall provide for penalties, sanctions, or other adequate disciplinary actions to be instituted for project-related violations of law or of the code or standards of conduct by either the grantee officers, employees, or agents, or by contractors or their agents.

(c) The grantee must inform the project officer in writing of each serious allegation of a project-related violation and of each known or proven project-related violation of law or code or standards of conduct, by its officers, employees, contractors, or by their agents. The grantee must also inform the project officer of the prosecutive or disciplinary action the grantee takes, and must cooperate with Federal officials in any Federal prosecutive or disciplinary action. Under § 30.245 of this subchapter, the project officer must notify the Director, EPA Security and Inspection Division, of all notifications from the grantee.

(d) EPA shall cooperate with the grantee in its disciplinary or prosecutive actions taken for any apparent project-related violations of law or of the grantee's code or standards of conduct.

§ 35.936–17 Fraud and other unlawful or corrupt practices.

All procurements under grants are covered by the provisions of § 30.245 of this subchapter relating to fraud and other unlawful or corrupt practices.

§ 35.936–18 Negotiation of subagreements.

(a) Formal advertising, with adequate purchase descriptions, sealed bids, and public openings shall be the required method of procurement unless negotiation under paragraph (b) of this section is necessary to accomplish sound procurement.

(b) All negotiated procurement shall be conducted in a manner to provide to the maximum practicable extent open and free competition appropriate to the type of project work to be performed. The grantee is authorized to negotiate subagreements in accordance with the applicable procedures of this subchapter (see §§ 35.937 *et seq.* and 35.500 *et seq.*) if any of the following conditions exist:

(1) Public exigency will not permit the delay incident to formally advertised procurement (e.g., an emergency procurement).

(2) The aggregate amount involved does not exceed $10,000 (see § 35.936–19 for small purchases).

(3) The material or service to be procured is available from only one person or entity. If the procurement is expected to aggregate more than $10,000, the grantee must document its file with a justification of the need for noncompetitive procurement, and provide such documentation to the project officer on request.

(4) The procurement is for personal or professional services (including architectural or engineering services) or for any service that a university or other educational institution may render.

(5) No responsive, responsible bids at acceptable price levels have been received after formal advertising, and, with respect to procurement under § 35.938–4, the Regional Administrator's prior written approval has been obtained.

(6) The procurement is for materials or services where the prices are established by law.

(7) The procurement is for technical items or equipment requiring standardization and interchangeability of parts with existing equipment.

(8) The procurement is for experimental, developmental or research services.

§ 35.936–19 Small purchases.

(a) A small purchase is the procurement of materials, supplies, and services when the aggregate amount involved in any one transaction does not exceed $10,000. The small purchase limitation of $10,000 applies to the aggregate total of an order, including all estimated handling and freight charges, overhead, and profit to be paid under the order. In arriving at the aggregate amount involved in any one transaction, all items which should properly be grouped together must be included. Reasonable competition shall be obtained.

(b) Subagreements for small purchases need not be in the form of a bilaterally executed written agreement. Where appropriate, unilateral purchase orders, sales slips, memoranda of oral price quotations, and the like may be used to minimize paperwork. Retention in the purchase files of these documents and of written quotations received, or references to catalogs or printed price lists used, will suffice as the record supporting the price paid.

§ 35.936–20 Allowable costs.

(a) Incurring costs under subagreements which are not awarded or administered in compliance with this part or part 33 of this subchapter, as appropriate, shall be cause for disallowance of those costs.

(b) Appropriate cost principles which apply to subagreements under EPA grants are identified in § 30.710 of this subchapter. Under that section, the contractor's actual costs, direct and indirect, eligible for Federal participation in a cost reimbursement contract shall be those allowable under the applicable provisions of 41 CFR 1–15.2 (Principles and Procedures for Use in Cost-Reimbursement Type Supply and Research Contracts With Commercial Organizations) and 41 CFR 1–15.4 (Construction and Architect-Engineer Contracts).

(c) Reasonable costs of compliance with the procurement and project management requirements of these regulations are allowable costs of administration under the grant. Costs of announcement, selection, negotiation, and cost review and analysis in connection with procurement of architectural or engineering services are allowable, even when conducted before award of the grant. Legal and engineering costs which a grantee is required to incur in a protest action under § 35.939 are allowable.

§ 35.936–21 Delegation to State agencies; certification of procurement systems.

(a) Under § 35.912 and subpart F of this part, the Regional Administrator may delegate authority to a State agency to review and certify the technical and administrative adequacy of procurement documentation required under these sections.

(b) If a State agency believes that State laws which govern municipal procurement include the same requirements or operate to provide the same protections as do §§ 35.936, 35.937 and

35.938, the State may request the Administrator to approve the State system instead of the procedures of these sections. EPA shall review the State system to determine its adequacy.

(c) If a State agency determines that an applicant's procurement ordinances or applicable statutes include the same requirements or operate to provide the same protections as do §§35.936, 35.937 and 35.938, the State may certify (accompanied by appropriate documentation) the adequacy of the municipality's ordinances and statutes and request the Administrator to approve the municipality's system instead of the procedures of these sections. EPA shall conduct or may request the State to conduct a review of the municipality's system to determine its adequacy.

§ 35.936–22 Bonding and insurance.

(a) On contracts for the building and erection of treatment works or contracts for sewer system rehabilitation exceeding $100,000, each bidder must furnish a bid guarantee equivalent to 5 percent of the bid price. In addition, the contractor awarded a construction contract for the building and erection of treatment works or sewer system rehabilitation must furnish performance and payment bonds, each of which shall be in an amount not less than 100 percent of the contract price. Construction contracts less than $100,000 shall be subject to State and local requirements for bid guarantees, performance bonds, and payment bonds. For contracts or subcontracts in excess of $100,000 the Regional Administrator may authorize the grantee to use its own bonding policies and requirements if he determines, in writing, that the Government's interest is adequately protected.

(b) Contractors should obtain such construction insurance (e.g., fire and extended coverage, workmen's compensation, public liability and property damage, and "all risk" builder's risk or installation floater coverage) as is required by State or local law or the grantee or as is customary and appropriate. Under the Flood Disaster Protection Act of 1973, a contractor must purchase flood insurance to cover his risk of loss if the grantee has not purchased the insurance (see §30.405–10 of this subchapter).

§ 35.937 Subagreements for architectural or engineering services.

(a) *Applicability.* Except as §35.937–2 otherwise provides, the provisions of §§35.937 through 35.937–11 apply to all subagreements of grantees for architectural or engineering services where the aggregate amount of services involved is expected to exceed $10,000. The provisions of §§35.937–2, 35.937–3, and 35.937–4 are not required, but may be followed, where the population of the grantee municipality is 25,000 or less according to the most recent U.S. census. When $10,000 or less of services (e.g., for consultant or consultant subcontract services) is required, the small purchase provisions of §35.936–19 apply.

(b) *Policy.* Step 1, step 2, or administration or management of step 3 project work may be performed by negotiated procurement of architectural or engineering services. The Federal Government's policy is to encourage public announcement of the requirements for personal and professional services, including engineering services. Subagreements for engineering services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. All negotiated procurement shall be conducted in a manner that provides to the maximum practicable extent, open and free competition. Nothing in this subpart shall be construed as requiring competitive bids or price competition in the procurement of architectural or engineering services.

(c) *Definitions.* As used in §§35.937 through 35.937–11 the following words and terms mean:

(1) *Architectural or engineering services.* Those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform,

including studies, investigations, surveys, evaluations, consultations, planning, programing, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operation and maintenance manuals, and other related services.

(2) *Engineer.* A professional firm or individual engaged to provide services as defined in paragraph (c)(1) of this section by subagreement under a grant.

§ 35.937–1 Type of contract (subagreement).

(a) *General.* Cost-plus-percentage-of-cost and percentage-of-construction-cost contracts are prohibited. Cost reimbursement, fixed price, or per diem contracts or combinations of these may be negotiated for architectural or engineering services. A fixed price contract is generally used only when the scope and extent of work to be performed is clearly defined. In most other cases, a cost reimbursement type of contract is more appropriate. A per diem contract may be used if no other type of contract is appropriate. An incentive fee may be used if the grantee submits an adequate independent cost estimate and price comparison under § 35.937–6.

(b) *Cost reimbursement contracts.* Each cost reimbursement contract must clearly establish a cost ceiling which the engineer may not exceed without formally amending the contract and a fixed dollar profit which may not be increased except in case of a contract amendment to increase the scope of work.

(c) *Fixed price contracts.* An acceptable fixed price contract is one which establishes a guaranteed maximum price which may not be increased unless a contract amendment increases the scope of work.

(d) *Compensation procedures.* If, under either a cost reimbursement or fixed price contract, the grantee desires to use a multiplier type of compensation, all of the following must apply:

(1) The multiplier and the portions of the multiplier allocable to overhead and allocable to profit have been specifically negotiated;

(2) The portion of the multiplier allocable to overhead includes only allowable items of cost under the cost principles of 41 CFR 1–15.2 and 1–15.4;

(3) The portions of the multiplier allocable to profit and allocable to overhead have been separately identified in the contract; and

(4) The fixed price contract includes a guaranteed maximum price for completion of the specifically defined scope of work; the cost reimbursement contract includes a fixed dollar profit which may not be increased except in case of a contract amendment which increases the scope of work.

(e) *Per diem contracts.* A per diem agreement expected to exceed $10,000 may be utilized only after a determination that a fixed price or cost reimbursement type contract is not appropriate. Per diem agreements should be used only to a limited extent, e.g., where the first task under a step 1 grant involves establishing the scope and cost of succeeding step 1 tasks, or for incidental services such as expert testimony or intermittent professional or testing services. (Resident engineer and resident inspection services should generally be compensated under paragraph (b) or (c) of this section.) Cost and profit included in the per diem rate must be specifically negotiated and displayed separately in the engineer's proposal. The contract must clearly establish a price ceiling which may not be exceeded without formally amending the contract.

§ 35.937–2 Public notice.

(a) *Requirement.* Adequate public notice as paragraph (a)(1) or (2) of this section provide, must be given of the requirement for architectural or engineering services for all subagreements with an anticipated price in excess of $25,000 except as paragraph (b) of this section provides. In providing public notice under paragraphs (a)(1) and (2) of this section, grantees must comply with the policies in §§ 35.936–2(c), 35.936–3, and 35.936–7.

(1) *Public announcement.* A notice of request for qualifications should be published in professional journals, newspapers, or publications of general circulation over a reasonable area and, in addition, if desired, through posted public notices or written notification directed to interested person, firms, or

professional organizations inviting the submission of statements of qualifications. The announcement must clearly state the deadline and place for submission of qualification statements.

(2) *Prequalified list.* As an alternative to publishing public notice as in paragraph (b) of this section, the grantee may secure or maintain a list of qualified candidates. The list must:

(i) Be developed with public notice procedures as in paragraph (a)(1) of this section;

(ii) Provide for continuous updating; and

(iii) Be maintained by the grantee or secured from the State or from a nearby political subdivision.

(b) *Exceptions.* The public notice requirement of this section and the related requirements of §§ 35.937–3 and 35.937–4 are not applicable, but may be followed, in the cases described in paragraphs (b) (1) through (3) of this section. All other appropriate provisions of this section, including cost review and negotiation of price, apply.

(1) Where the population of the grantee municipality is 25,000 or less according to the latest U.S. census.

(2) For step 2 or step 3 of a grant, if:

(i) The grantee is satisfied with the qualifications and performance of an engineer who performed all or any part of the step 1 or step 2 work;

(ii) The engineer has the capacity to perform the subsequent steps; and

(iii) The grantee desires the same engineer to provide architectural or engineering services for the subsequent steps.

(3) For subsequent segments of design work under one grant if:

(i) A single treatment works is segmented into two or more step 3 projects;

(ii) The step 2 work is accordingly segmented so that the initial contract for preparation of construction drawings and specifications does not cover the entire treatment works to be built under one grant; and

(iii) The grantee desires to use the same engineering firm that was selected for the initial segment of step 2 work for subsequent segments.

§ 35.937–3 Evaluation of qualifications.

(a) The grantee shall review the qualifications of firms which responded to the announcement or were on the prequalified list and shall uniformly evaluate the firms.

(b) Qualifications shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills).

(c) Criteria which should be considered in the evaluation of candidates for submission of proposals should include:

(1) Specialized experience and technical competence of the candidate or firm and its personnel (including a joint venture, association or professional subcontract), considering the type of services required and the complexity of the project;

(2) Past record of performance on contracts with the grantee, other government agencies or public bodies, and with private industry, including such factors as control of costs, quality of work, and ability to meet schedules;

(3) The candidate's capacity to perform the work (including any specialized services) within the time limitations, considering the firm's current and planned workload;

(4) The candidate's familiarity with types of problems applicable to the project; and

(5) Avoidance of personal and organizational conflicts of interest prohibited under State and local law and § 35.936–16.

§ 35.937–4 Solicitation and evaluation of proposals.

(a) Requests for professional services proposals must be sent to no fewer than three candidates who either responded to the announcement or who were selected from the prequalified list. If, after good faith effort to solicit qualifications in accordance with § 35.937–2, fewer than three qualified candidates respond, all qualified candidates must be provided requests for proposals.

(b) Requests for professional services proposals must be in writing and must contain the information necessary to enable a prospective offeror to prepare a proposal properly. The request for

proposals must include the solicitation statement in § 35.937–9(a) and must inform offerors of the evaluation criteria, including all those in paragraph (c) of this section, and of the relative importance attached to each criterion (a numerical weighted formula need not be utilized).

(c) All proposals submitted in response to the request for professional services proposals must be uniformly evaluated. Evaluation criteria shall include, as a minimum, all criteria stated in § 35.937–3(c) of this subpart. The grantee shall also evaluate the candidate's proposed method to accomplish the work required, including, where appropriate, demonstrated capability to explore and develop innovative or advanced techniques and designs. The grantee's evaluation shall comply with § 35.936–7.

(d) Proposals shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills. Oral (including telephone) or written interviews should be conducted with top rated proposers, and information derived therefrom shall be treated on a confidential basis, except as required to be disclosed under State or local law or to EPA under § 35.937–6.

(e) At no point during the procurement process shall information be conveyed to any candidate which would provide an unfair competitive advantage.

§ 35.937–5 Negotiation.

(a) Grantees are responsible for negotiation of their contracts for architectural or engineering services. Contract procurement including negotiation may be performed by the grantee directly or by another non-Federal governmental body, person or firm retained for the purpose. Contract negotiations may include the services of technical, legal, audit, or other specialists to the extent appropriate.

(b) Negotiations may be conducted in accordance with State or local requirements, as long as they meet the minimum requirements as set forth in this section. In the absence of State or local statutory or code requirements, negotiations may be conducted by the grantee under procedures it adopts based upon Public Law 92–582, 40 U.S.C. 541–544 (commonly known as the "Brooks Bill") or upon the negotiation procedures of 40 CFR 33.510–2.

(c) The object of negotiations with any candidate shall be to reach agreement on the provisions of the proposed contract. The grantee and the candidate shall discuss, as a minimum:

(1) The scope and extent of work and other essential requirements;

(2) Identification of the personnel and facilities necessary to accomplish the work within the required time, including where needed, employment of additional personnel, subcontracting, joint ventures, etc.;

(3) Provision of the required technical services in accordance with regulations and criteria established for the project; and

(4) A fair and reasonable price for the required work, to be determined in accordance with the cost and profit considerations set forth in §§ 35.937–6 and 35.937–7, and payment provisions.

§ 35.937–6 Cost and price considerations.

(a) *General.* EPA policy is that the cost or price of all subagreements and amendments to them must be considered. For each subagreement in excess of $10,000 but not greater than $100,000, grantees shall use the procedures described in paragraph (c) of this section, or an equivalent process.

(b) *Subagreements over $100,000.* For each subagreement expected to exceed $100,000, or for two subagreements which aggregate more than $100,000 awarded to an engineer for work on one step, or where renegotiation or amendment of a subagreement will result in a contract price in excess of $100,000, or where the amendment itself is in excess of $100,000, the provisions of this paragraph (b) shall apply.

(1) The candidate(s) selected for negotiation shall submit to the grantee for review sufficient cost and pricing data as described in paragraph (c) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(2) The grantee shall submit to the EPA Project Officer for review (i) documentation of the public notice of need for architectural or engineering services, and selection procedures used, in those cases where §§ 35.937–2, 35.937–3 and 35.937–4 are applicable; (ii) the cost and pricing data the selected engineer submitted; (iii) a certification of review and acceptance of the selected engineer's cost or price; and (iv) a copy of the proposed subagreement. The EPA Project Officer will review the complete subagreement action and approve the grantee's compliance with appropriate procedures before the grantee awards the subagreement. The grantee shall be notified upon completion of review.

(c) *Cost review.* (1) The grantee shall review proposed subagreement costs.

(2) As a minimum, proposed subagreement costs shall be presented on EPA form 5700–41 on which the selected engineer shall certify that the proposed costs reflect complete, current, and accurate cost and pricing data applicable to the date of anticipated subagreement award.

(3) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price contracts and a maximum total dollar amount of profit shall be set forth separately in the cost summary for cost reimbursement contracts.

(4) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed subagreement costs. EPA normally requires more detailed documentation only when the selected engineer is unable to certify that the cost and pricing data used are complete, current, and accurate. EPA may, on a selected basis, perform a preaward cost analysis on any subagreement. Normally, a provisional overhead rate will be agreed upon before contract award.

(5) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used to determine the allowability of costs under grants. The engineer's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the subagreement, this subpart and the cost principles included in 41 CFR 1–15.2 and 1–15.4. Examples of cost which are not allowable under those cost principles include entertainment, interest on borrowed capital and bad debts.

(6) The engineer shall have an accounting system which accounts for costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation, and segregation of allowable and unallowable project costs among projects. Allowable project costs shall be determined in accordance with paragraph (c)(5) of this section. The engineer must propose and account for costs in a manner consistent with his normal accounting procedures.

(7) Subagreements awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where the Regional Administrator determines that such certification was not based on complete, current, and accurate cost and pricing data or not based on costs allowable under the appropriate FPR cost principles (41 CFR 1–15.2 and 1–15.4) at the time of award.

§ 35.937–7 Profit.

The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the firm's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of subagreements under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on Federal procurement principles, it may vary from the firm's definition of profit for other purposes.) Profit on a subagreement and each amendment to a subagreement under a grant should be sufficient to attract engineers who possess talents and skills necessary to the accomplishment of project objectives,

and to stimulate efficient and expeditious completion of the project. Where cost review is performed, the grantee should review the estimate of profit as he reviews all other elements of price.

§ 35.937–8 Award of subagreement.

After the close of negotiations and after review and approval by the EPA Project Officer if required under § 35.937–6(b), the grantee may award the contract. Unsuccessful candidates should be notified promptly.

§ 35.937–9 Required solicitation and subagreement provisions.

(a) *Required solicitation statement.* Requests for qualifications or proposals must include the following statement, as well as the proposed terms of the subagreement.

Any contract awarded under this request for (qualifications/professional proposals) is expected to be funded in part by a grant from the United States Environmental Protection Agency. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939. Neither the United States nor the United States Environmental Protection Agency is nor will be a party to this request for (qualifications/professional proposals) or any resulting contract.

(b) *Content of subagreement.* Each subagreement must adequately define:

(1) The scope and extent of project work;

(2) The time for performance and completion of the contract work, including where appropriate, dates for completion of significant project tasks;

(3) Personnel and facilities necessary to accomplish the work within the required time;

(4) The extent of subcontracting and consultant agreements; and

(5) Payment provisions in accordance with § 35.937–10.

If any of these elements cannot be defined adequately for later tasks or steps at the time of contract execution, the contract should not include the subsequent tasks or steps at that time.

(c) *Required subagreement provisions.* Each consulting engineering contract must include the provisions set forth in appendix C–1 to this subpart.

§ 35.937–10 Subagreement payments—architectural or engineering services.

The grantee shall make payment to the engineer in accordance with the payment schedule incorporated in the engineering agreement or in accordance with paragraph 7b of appendix C–1 to this subpart. Any retainage is at the option of the grantee. No payment request made by the Engineer under the agreement may exceed the estimated amount and value of the work and services performed.

§ 35.937–11 Applicability to existing contracts.

Some negotiated engineering subagreements already in existence may not comply with the requirements of §§ 35.936 and 35.937. Appendix D to this subpart contains EPA policy with respect to these subagreements and must be implemented before the grant award action for the next step under the grant.

§ 35.937–12 Subcontracts under subagreements for architectural or engineering services.

(a) Neither award and execution of subcontracts under a prime contract for architectural or engineering services, nor the procurement and negotiation procedures used by the engineer in awarding such subcontracts are required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.937 except as provided in paragraphs (b), (c), and (d) of this section.

(b) The award or execution of subcontracts in excess of $10,000 under a prime contract for architectural or engineering services and the procurement procedures used by the engineer in awarding such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) Section 35.936–7 (Small and minority business);

(3) Section 35.936–15 (Limitations on subagreement award);

(4) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(5) Section 35.937–6 (Cost and price considerations);

(6) Section 35.937–7 (Profit);

(7) Prohibition of percentage-of-construction-cost and cost-plus-percentage-of-cost contracts (see § 35.937–1); and

(8) Applicable subagreement clauses (see appendix C–1, clauses 9, 17, 18; note clause 10).

(c) The applicable provisions of this subpart shall apply to lower tier subagreements where an engineer acts as an agent for the grantee under a management subagreement (see § 35.936–5(b)).

(d) If an engineer procures items or services (other than architectural or engineering services) which are more appropriately procured by formal advertising or competitive negotiation procedures, the applicable procedures of § 35.938 or of part 33 shall be observed.

§ 35.938 Construction contracts (subagreements) of grantees.

§ 35.938–1 Applicability.

This section applies to construction contracts (subagreements) in excess of $10,000 awarded by grantees for any step 3 project.

§ 35.938–2 Performance by contract.

The project work shall be performed under one or more contracts awarded by the grantee to private firms, except for force account work authorized by § 35.936–14.

§ 35.938–3 Type of contract.

Each contract shall be a fixed price (lump sum or unit price or a combination of the two) contract, unless the Regional Administrator gives advance written approval for the grantee to use some other acceptable type of contract. The cost-plus-percentage-of-cost contract shall not be used in any event.

§ 35.938–4 Formal advertising.

Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with § 35.936–18. Formal advertising shall be in accordance with the following:

(a) *Adequate public notice.* The grantee will cause adequate notice to be given of the solicitation by publication in newspapers or journals of general circulation beyond the grantee's locality (statewide, generally), inviting bids on the project work, and stating the method by which bidding documents may be obtained or examined. Where the estimated cost of step 3 construction is $10 million or more, the grantee must generally publish the notice in trade journals of nationwide distribution. The grantee should, in addition, solicit bids directly from bidders if it maintains a bidders list.

(b) *Adequate time for preparing bids.* Adequate time, generally not less than 30 days, must be allowed between the date when public notice under paragraph (a) of this section is first published and the date by which bids must be submitted. Bidding documents (including specifications and drawings) shall be available to prospective bidders from the date when such notice is first published.

(c) *Adequate bidding documents.* The grantee shall prepare a reasonable number of bidding documents (invitations for bids) and shall furnish them upon request on a first-come, first-served basis. The grantee shall maintain a complete set of bidding documents and shall make them available for inspection and copying by any party. The bidding documents shall include:

(1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule. (Drawings and specifications may be made available for inspection and purchase, instead of being furnished.);

(2) The terms and conditions of the contract to be awarded;

(3) A clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract;

(4) Responsibility requirements or criteria which will be employed in evaluating bidders;

(5) The following statement:

Any contract or contracts awarded under this invitation for bids are expected to be funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is or will be a party to this invitation for bids or any resulting contract. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939.;

and

(6) A copy of §§ 35.936, 35.938, and 35.939.

(d) *Sealed bids.* The grantee shall provide for bidding by sealed bid and for the safeguarding of bids received until public opening.

(e) *Addenda to bidding documents.* If a grantee desires to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the addenda shall be communicated in writing to all firms which have obtained bidding documents in time to be considered before the bid opening time.

(f) *Bid modifications.* A firm which has submitted a bid shall be allowed to modify or withdraw its bid before the time of bid opening.

(g) *Public opening of bids.* The grantee shall provide for a public opening of bids at the place, date and time announced in the bidding documents.

(h) *Award to the low, responsive, responsible bidder.* (1) After bids are opened, the grantee shall evaluate them in accordance with the methods and criteria set forth in the bidding documents.

(2) The grantee may reserve the right to reject all bids. Unless all bids are rejected for good cause, award shall be made to the low, responsive, responsible bidder.

(3) If the grantee intends to make the award to a firm which did not submit the lowest bid, he shall prepare a written statement before any award, explaining why each lower bidder was deemed nonresponsible or nonresponsive, and shall retain it in his files.

(4) State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids.

(5) If an unresolved procurement review issue or a protest relates only to award of a subcontract or procurement of a subitem under the prime contract, and resolution of that issue or protest is unduly delaying performance of the prime contract, the Regional Administrator may authorize award and performance of the prime contract before resolution of the issue or protest, if the Regional Administrator determines that:

(i) Resolution of the protest—

(A) Will not affect the placement of the prime contract bidders; and

(B) Will not materially affect initial performance of the prime contract; and that

(ii) Award of the prime contract—

(A) Is in the Government's best interest;

(B) Will not materially affect resolution of the protest; and

(C) Is not barred by State law.

(6) The grantee shall not reject a bid as nonresponsive for failure to list or otherwise indicate the selection of a subcontractor(s) or equipment, unless the grantee has unambiguously stated in the solicitation documents that such failure to list shall render a bid nonresponsive and shall cause rejection of a bid.

§ 35.938–5 Negotiation of contract amendments (change orders).

(a) *Grantee responsibility.* Grantees are responsible for negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by his engineer. During negotiations with the contractor the grantee shall:

(1) Make certain that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

(2) Assure that the contractor demonstrates that he will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

(3) Assure a fair and reasonable price for the required work.

(b) *Changes in contract price or time.* The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with paragraph (c) or (d) of this section, as appropriate. The value of any work covered by a change order or of any claim for increase or decrease in the contract price shall be determined by the method set forth in paragraphs (b) (1) through (3) of this section which is most advantageous to the grantee.

(1) *Unit prices*—(i) *Original bid items.* Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15 percent of the original bid quantity and the total dollar change of that bid item is significant, the grantee shall review the unit price to determine if a new unit price should be negotiated.

(ii) *New items.* Unit prices of new items shall be negotiated.

(2) A lump sum to be negotiated.

(3) *Cost reimbursement*—the actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

(c) For each change order not in excess of $100,000 the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(d) For each change order in excess of $100,000, the contractor shall submit to the grantee for review sufficient cost and pricing data as described in paragraphs (d) (1) through (6) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(1) As a minimum, proposed change order costs shall be presented on EPA Form 5700–41 on which the contractor shall certify that proposed costs reflect complete, current, and accurate cost and pricing data applicable to the date of the change order.

(2) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price change orders and a specific total dollar amount of profit will be set forth separately in the cost summary for cost reimbursement change orders.

(3) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed change order costs. EPA normally requires more detailed documentation only when the contractor is unable to certify that proposed change order cost data are complete, current, and accurate. EPA may, on a selected basis, perform a detailed cost analysis on any change order.

(4) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used for the determination and allowability of costs under grants. The contractor's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the contract, this subpart and the cost principles included in 41 CFR 1–15.2 and 1–15.4. Examples of costs which are not allowable under those cost principles include, but are not limited to, entertainment, interest on borrowed capital and bad debts.

(5) For costs under cost reimbursement change orders, the contractor shall have an accounting system which accounts for such costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation and segregation of allowable and unallowable change orders. Allowable change order costs shall be determined in accordance with paragraph (d)(4) of this section. The contractor must propose and account for such costs in a manner consistent with his normal accounting procedures.

(6) Change orders awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where subsequent audit substantiates that such certification was not based on complete, current and accurate cost and pricing data and on costs allowable under the appropriate FPR cost principles (41 CFR 1–15.2 and 1–15.4) at the time of change order execution.

(e) *EPA review.* In addition to the requirements of §§ 35.935–10 (copies of contract documents) and 35.935–11 (project changes), the grantee shall submit, before the execution of any change order in excess of $100,000, to the EPA Project Officer for review:

(1) The cost and pricing data the contractor submitted;

(2) A certification of review and acceptance of the contractor's cost or price; and

(3) A copy of the proposed change order.

(f) *Profit.* The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the contractor's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of negotiated change orders to construction contracts under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. The grantee should review the estimate or profit as he reviews all other elements of price.

(g) *Related work.* Related work shall not be split into two amendments or change orders merely to keep it under $100,000 and thereby avoid the requirements of paragraph (d) of this section. For change orders which include both additive and deductive items:

(1) If any single item (additive or deductive) exceeds $100,000, the requirements of paragraph (d) of this section shall be applicable.

(2) If no single additive or deductive item has a value of $100,000, but the total price of the change order is over $100,000, the requirements of paragraph (d) of this section shall be applicable.

(3) If the total of additive items of work in the change order exceeds $100,000, or the total of deductive items of work in the change order exceeds $100,000, and the net price of the change order is less than $100,000, the requirements of paragraph (d) of this section shall apply.

§ 35.938–6 Progress payments to contractors.

(a) *Policy.* EPA policy is that, except as State law otherwise provides, grantees should make prompt progress payments to prime contractors and prime contractors should make prompt progress payment to subcontractors and suppliers for eligible construction, material, and equipment costs, including those of undelivered specifically manufactured equipment, incurred under a contract under an EPA construction grant.

(b) *Conditions of progress payments.* For purposes of this section, progress payments are defined as follows:

(1) Payments for work in place.

(2) Payments for materials or equipment which have been delivered to the construction site, or which are stockpiled in the vicinity of the construction site, in accordance with the terms of the contract, when conditional or final acceptance is made by or for the grantee. The grantee shall assure that items for which progress payments have been made are adequately insured and are protected through appropriate security measures. Costs of such insurance and security are allowable costs in accordance with § 35.940.

(3) Payments for undelivered specifically manufactured items or equipment (excluding off-the-shelf or catalog items), as work on them progresses. Such payments must be made if provisions therefor are included in the bid and contract documents. Such provisions may be included at the option of the grantee only when all of the following conditions exist:

(i) The equipment is so designated in the project specifications;

(ii) The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and

(iii) A fabrication period of more than 6 months is anticipated.

(c) *Protection of progress payments made for specifically manufactured equipment.* The grantee will assure protection of the Federal interest in progress payments made for items or equipment referred to in paragraph (b)(3) of this section. This protection must be acceptable to the grantee and must take the form of:

(1) Securities negotiable without recourse, condition or restrictions, a progress payment bond, or an irrevocable letter of credit provided to the grantee through the prime contractor by the subcontractor or supplier; and,

(2) For items or equipment in excess of $200,000 in value which are manufactured in a jurisdiction in which the Uniform Commercial Code is applicable, the creation and perfection of a security interest under the Uniform

Commercial Code reasonably adequate to protect the interests of the grantee.

(d) *Limitations on progress payments for specifically manufactured equipment.* (1) Progress payments made for specifically manufactured equipment or items shall be limited to the following:

(i) A first payment upon submission by the prime contractor of shop drawings for the equipment or items in an amount not exceeding 15 percent of the contract or item price plus appropriate and allowable higher tier costs; and

(ii) Subsequent to the grantee's release or approval for manufacture, additional payments not more frequently than monthly thereafter up to 75 percent of the contract or item price plus appropriate and allowable higher tier costs. However, payment may also be made in accordance with the contract and grant terms and conditions for ancillary onsite work before delivery of the specifically manufactured equipment or items.

(2) In no case may progress payments for undelivered equipment or items under paragraph (d)(1)(i) or (d)(1)(ii) of this section be made in an amount greater than 75 percent of the cumulative incurred costs allocable to contract performance with respect to the equipment or items. Submission of a request for any such progress payments must be accompanied by a certification furnished by the fabricator of the equipment or item that the amount of progress payment claimed constitutes not more than 75 percent of cumulative incurred costs allocable to contract performance, and in addition, in the case of the first progress payment request, a certification that the amount claimed does not exceed 15 percent of the contract or item price quoted by the fabricator.

(3) As used in this section, the term *costs allocable to contract performance* with respect to undelivered equipment or items includes all expenses of contract performance which are reasonable, allocable to the contract, consistent with sound and generally accepted accounting principles and practices consistently applied, and which are not excluded by the contract.

(e) *Enforcement.* A subcontractor or supplier which is determined by the Regional Administrator to have frustrated the intent of the provisions regarding progress payments for major equipment or specifically manufactured equipment through intentional forfeiture of its bond or failure to deliver the equipment may be determined nonresponsible and ineligible for further work under EPA grants.

(f) *Contract provisions.* Where applicable, appropriate provisions regarding progress payments must be included in each contract and subcontract. Grantees must use clauses acceptable to the EPA Regional Administrator.

(g) *Implementation.* The foregoing progress payments policy should be implemented in invitations for bids under step 3 grants. If provision for progress payments is made after contract award, it must be for consideration that the grantee deems adequate.

§ 35.938–7 Retention from progress payments.

(a) The grantee may retain a portion of the amount otherwise due the contractor. Except as State law otherwise provides, the amount the grantee retains shall be limited to the following:

(1) Withholding of not more than 10 percent of the payment claimed until work is 50 percent complete;

(2) When work is 50 percent complete, reduction of the withholding to 5 percent of the dollar value of all work satisfactorily completed to date, provided that the contractor is making satisfactory progress and there is no specific cause for greater withholding;

(3) When the work is substantially complete (operational or beneficial occupancy), the withheld amount shall be further reduced below 5 percent to only that amount necessary to assure completion.

(4) The grantee may reinstate up to 10 percent withholding if the grantee determines, at its discretion, that the contractor is not making satisfactory progress or there is other specific cause for such withholding.

(5) The grantee may accept securities negotiable without recourse, condition or restrictions, a release of retainage bond, or an irrevocable letter of credit provided by the contractor instead of all or part of the cash retainage.

(b) The foregoing retention policy shall be implemented with respect to

all step 3 projects for which plans and specifications are approved after March 1, 1976. Appropriate provision to assure compliance with this policy must be included in the bid documents for such projects initially or by addendum before the bid submission date, and as a special condition in the grant agreement or in a grant amendment. For all previous active projects, the grantee may implement the foregoing policy through contract amendment upon written request to the grantee by the contractor upon consideration that the grantee deems adequate.

(c) Under § 30.620–3 of this subchapter, a grantee who delays disbursement of grant funds will be required to credit to the United States all interest earned on those funds.

§ 35.938–8 Required construction contract provisions.

Each construction contract must include the "Supplemental General Conditions" set forth in appendix C–2 to this subpart.

§ 35.938–9 Subcontracts under construction contracts.

(a) The award or execution of subcontracts by a prime contractor under a construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by prime contractors in awarding or executing subcontracts are not required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.938 except those specifically stated in this section. In addition, the bid protest procedures of § 35.939 are not available to parties executing subcontracts with prime contractors except as specifically provided in that section.

(b) The award or execution of subcontracts by a prime contractor under a formally advertised, competitively bid, fixed price construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by such prime contractors in awarding or executing such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) Section 35.936–7 (Small and minority business);

(3) Section 35.936–13 (Specifications);

(4) Section 35.936–15 (Limitations on subagreement award);

(5) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(6) Section 35.938–5(d) (Negotiation of contract amendments); and

(7) Applicable subagreement clauses (see appendix C–2, clauses 8, 10, 14, 15, 16; note clause 11).

(c) The award of subcontracts under construction contracts not described above in paragraph (b) of this section and the procurement and negotiation procedures of prime contractors on contracts not meeting that description must comply with paragraphs (b)(1) through (4) of this section as well as the principles of § 35.938–5.

§ 35.939 Protests.

(a) *General.* A protest based upon an alleged violation of the procurement requirements of §§ 35.936 through 35.938–9 of this subpart may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest. Any such protest must be received by the grantee within the time period in paragraph (b)(1) of this section. The grantee is responsible for resolution of the protest before the taking of the protested action, in accordance with paragraph (d) of this section, except as otherwise provided by paragraph (j) or (k) or § 35.938–4(h)(5). The Regional Administrator will review grantee protest determinations in accordance with paragraph (e) of this section, if a timely request for such review is filed under paragraph (b)(2) of this section. In the case of protests which he determines are untimely, frivolous, or without merit, the Regional Administrator may take such actions as are described in paragraphs (f)(7), (i)(2), and (k) of this section.

(b) *Time limitations.* (1) A protest under paragraph (d) of this section should be made as early as possible during the procurement process (for example, immediately after issuance of a solicitation for bids) to avoid disruption of or unnecessary delay to the procurement process. A protest authorized by paragraph (d) of this section must be received by the grantee within 1

week after the basis for the protest is known or should have been known, whichever is earlier (generally, for formally advertised procurement, after bid opening, within 1 week after the basis for the protest is, or should have been, known).

(i) However, in the case of an alleged violation of the specification requirements of § 35.936–13 (e.g., that a product fails to qualify as an "or equal") or other specification requirements of this subpart, a protest need not be filed prior to the opening of bids. But the grantee may resolve the issue before receipt of bids or proposals through a written or other formal determination, after notice and opportunity to comment is afforded to any party with a direct financial interest.

(ii) In addition, where an alleged violation of the specification requirements of § 35.936–13 or other requirements of this subpart first arises subsequent to the receipt of bids or proposals, the grantee must decide the protest if the protest was received by the grantee within 1 week of the time that the grantee's written or other formal notice is first received.

(2) A protest appeal authorized by paragraph (e) of this section must be received by the Regional Administrator within 1 week after the complainant has received the grantee's determination.

(3) If a protest is mailed, the complaining party bears the risk of nondelivery within the required time period. It is suggested that all documents transmitted in accordance with this section be mailed by certified mail (return receipt requested) or otherwise delivered in a manner which will objectively establish the date of receipt. Initiation of protest actions under paragraph (d) or (e) of this section may be made by brief telegraphic notice accompanied by prompt mailing or other delivery of a more detailed statement of the basis for the protest. Telephonic protests will not be considered.

(c) *Other initial requirements.* (1) The initial protest document must briefly state the basis for the protest, and should—

(i) Refer to the specific section(s) of this subpart which allegedly prohibit the procurement action;

(ii) Specifically request a determination pursuant to this section;

(iii) Identify the specific procurement document(s) or portion(s) of them in issue; and

(iv) Include the name, telephone number, and address of the person representing the protesting party.

(2) The party filing the protest must concurrently transmit a copy of the initial protest document and any attached documentation to all other parties with a direct financial interest which may be adversely affected by the determination of the protest (generally, all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied or sustained) and to the appropriate EPA Regional Administrator.

(d) *Grantee determination.* (1) The grantee is responsible for the initial resolution of protests based upon alleged violations of the procurement requirements of this subpart.

(2) When the grantee receives a timely written protest, he must defer the protested procurement action (see paragraph (h) of this section) and:

(i) Afford the complaining party and interested parties an opportunity to present arguments in support of their views in writing or at a conference or other suitable meeting (such as a city council meeting),

(ii) Inform the complainant and other interested parties of the procedures which the grantee will observe for resolution of the protest;

(iii) Obtain an appropriate extension of the period for acceptance of the bid and bid bond(s) of each interested party, where applicable; failure to agree to a suitable extension of such bid and bid bond(s) by the party which initiated the protest shall be cause for summary dismissal of the protest by the grantee or the Regional Administrator; and

(iv) Promptly deliver (preferably by certified mail, return receipt requested, or by personal delivery) its written determination of the protest to the complaining party and to each other participating party.

(3) The grantee's determination must be accompanied by a legal opinion addressing issues arising under State,

territorial, or local law (if any) and, where step 3 construction is involved, by an engineering report, if appropriate.

(4) The grantee should decide the protest as promptly as possible—generally within 3 weeks after receipt of a protest, unless extenuating circumstances require a longer period of time for proper resolution of the protest.

(e) *Regional Administrator review.* (1) A party with a direct financial interest adversely affected by a grantee determination made under paragraph (d) with respect to a procurement requirement of this subpart may submit a written request to the Regional Administrator for his review of such determination. Any such request must be in writing, must adequately state the basis for the protest (including reference to the specific section(s) of this subpart alleged to prohibit the procurement action), and must be received by the Regional Administrator within 1 week after the complaining party has received the grantee's determination of the protest. A copy of the grantee's determination and other documentation in support of the request for review shall be transmitted with the request.

(2) The Regional Counsel or his delegee will afford both the grantee and the complaining party, as well as any other party with a financial interest which may be adversely affected by determination of the protest, an opportunity to present arguments in support of their views in writing or at a conference at a time and place convenient to the parties as determined by the Regional Counsel or his delegee, and he shall thereafter promptly submit in writing his report and recommendations (or recommended determination) concerning the protest to the Regional Administrator.

(3) Any such conference should be held within not more than 10 days after receipt of the request for review and the report should be transmitted to the Regional Administrator within 10 days after the date set for receipt of the participants' written materials or for the conference. The Regional Administrator should transmit his determination of the protest with an adequate explanation thereof to the grantee and simultaneously to each participating party within 1 week after receipt of the report and recommendations. His determination shall constitute final agency action, from which there shall be no further administrative appeal. The Regional Counsel may extend these time limitations, where appropriate.

(4) The Regional Administrator may review the record considered by the grantee, and any other documents or arguments presented by the parties, to determine whether the grantee has complied with this subpart and has a rational basis for its determination.

(5) If a determination is made by the Regional Administrator which is favorable to the complainant, the grantee's procurement action (for example, contract award) must be taken in accordance with such determination.

(f) *Procedures.* (1) Where resolution of an issue properly raised with respect to a procurement requirement of this subpart requires prior or collateral resolution of a legal issue arising under State or local law, and such law is not clearly established in published legal decisions of the State or other relevant jurisdiction, the grantee or Regional Administrator may rely upon:

(i) An opinion of the grantee's legal counsel adequately addressing the issue (see § 35.936–2(b));

(ii) The established or consistent practice of the grantee, to the extent appropriate; or

(iii) The law of other States or local jurisdictions as established in published legal decisions; or

(iv) If none of the foregoing adequately resolve the issue, published decisions of the Comptroller General of the United States (U.S. General Accounting Office) or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(2) For the determination of Federal issues presented by the protest, the Regional Administrator may rely upon:

(i) Determinations of other protests decided under this section, unless such protests have been reversed; and

(ii) Decisions of the Comptroller General of the United States or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(3) The Regional Counsel may establish additional procedural requirements or deadlines for the submission of materials by parties or for the accomplishment of other procedures. Where time limitations are established by this section or by the Regional Counsel, participants must seek to accomplish the required action as promptly as possible in the interest of expediting the procurement action.

(4) A party who submits a document subsequent to initiation of a protest proceeding under paragraph (d) or (e) of this section must simultaneously furnish each other party with a copy of such document.

(5) The procedures established by this section are not intended to preclude informal resolution or voluntary withdrawal of protests. A complainant may withdraw its appeal at any time, and the protest proceeding shall thereupon be terminated.

(6) The Regional Administrator may utilize appropriate provisions of this section in the discharge of his responsibility to review grantee procurement under 40 CFR 35.935–2.

(7) A protest may be dismissed for failure to comply with procedural requirements of this section.

(g) *Burden of proof.* (1) In proceedings under paragraphs (d) and (e) of this section, if the grantee proposes to award a formally advertised, competitively bid, fixed price contract to a party who has submitted the apparent lowest price, the party initiating the protest will bear the burden of proof in the protest proceedings.

(2) In the proceedings under paragraph (e) of this section—

(i) If the grantee proposes to award a formally advertised, competitively bid, fixed-price contract to a bidder other than the bidder which submitted the apparent lowest price, the grantee will bear the burden of proving that its determination concerning responsiveness is in accordance with this subchapter; and

(ii) If the basis for the grantee's determination is a finding of nonresponsibility, the grantee must establish and substantiate the basis for its determination and must adequately establish that such determination has been made in good faith.coverage) as is required by State or local law or the grantee or as is customary and appropriate. Under the Flood Disaster Protection Act of 1973, a contractor must purchase flood insurance to cover his risk of loss if the grantee has not purchased the insurance (see § 30.405–10 of this subchapter).

§ 35.940 Determination of allowable costs.

The grantee will be paid, upon request in accordance with § 35.945, for the Federal share of all necessary costs within the scope of the approved project and determined to be allowable in accordance with § 30.705 of this chapter, this subpart, and the grant agreement.

§ 35.940–1 Allowable project costs.

Allowable costs include:

(a) Costs of salaries, benefits, and expendable material the grantee incurs for the project, except as provided in § 35.940–2(g);

(b) Costs under construction contracts;

(c) Professional and consultant services;

(d) Facilities planning directly related to the treatment works;

(e) Sewer system evaluation (§ 35.927);

(f) Project feasibility and engineering reports;

(g) Costs required under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4621 *et seq.*, 4651 *et seq.*), and part 4 of this chapter;

(h) Costs of complying with the National Environmental Policy Act, including costs of public notices and hearings;

(i) Preparation of construction drawings, specifications, estimates, and construction contract documents;

(j) Landscaping;

(k) Removal and relocation or replacement of utilities, for which the grantee is legally obligated to pay;

(l) Materials acquired, consumed, or expended specifically for the project;

(m) A reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operations;

(n) Development and preparation of an operation and maintenance manual;

(o) A plan of operation, in accordance with guidance issued by the Administrator;

(p) Start-up services for new treatment works, in accordance with guidance issued by the Administrator;

(q) Project identification signs (§ 30.625–3 of this chapter);

(r) Development of a municipal pretreatment program approvable under part 403 of this chapter, and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program;

(s) Costs of complying with the procurement requirements of these regulations (see § 35.936–20).

(t) Reasonable costs of public participation incurred by grantees which are identified in a public participation work plan, or which are otherwise approved by EPA, shall be allowable.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§ 35.940–2 Unallowable costs.

Costs which are not necessary for the construction of a treatment works project are unallowable. Such costs include, but are not limited to:

(a) Basin or areawide planning not directly related to the project;

(b) Bonus payments not legally required for completion of construction before a contractual completion date;

(c) Personal injury compensation or damages arising out of the project, whether determined by adjudication, arbitration, negotiation, or otherwise;

(d) Fines and penalties due to violations of, or failure to comply with, Federal, State, or local laws;

(e) Costs outside the scope of the approved project;

(f) Interest on bonds or any other form of indebtedness required to finance the project costs;

(g) Ordinary operating expenses of local government, such as salaries and expenses of a mayor, city council members, or city attorney, except as provided in § 35.940–4;

(h) Site acquisition (for example, sewer rights-of-way, sewage treatment plantsite, sanitary landfills and sludge disposal areas) except as otherwise provided in § 35.940–3(a);

(i) Costs for which payment has been or will be received under another Federal assistance program;

(j) Costs of equipment or material procured in violation of § 35.938–4(h);

(k) Costs of studies under § 35.907 (d)(6) and (7) when performed solely for the purpose of seeking an allowance for removal of pollutants under part 403 of this chapter;

(l) Costs of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works;

(m) Construction of privately-owned treatment works, including pretreatment facilities, except as authorized by section 201(h) of the Act and § 35.918;

(n) Preparation of a grant application, including a plan of study.

§ 35.940–3 Costs allowable, if approved.

Certain direct costs are sometimes necessary for the construction of a treatment works. The following costs are allowable if reasonable and if the Regional Administrator approves them in the grant agreement.

(a) Land acquired after October 17, 1972, that will be an integral part of the treatment process, or that will be used for ultimate disposal of residues resulting from such treatment (for example, land for spray irrigation of sewage effluent).

(b) Land acquired after December 26, 1977, that will be used for storage of treated wastewater in land treatment systems before land application.

(c) Land acquired after December 26, 1977, that will be used for composting or temporary storage of compost residues which result from wastewater treatment, if EPA has approved a program for use of the compost.

(d) Acquisition of an operable portion of a treatment works. This type of acquisition is generally not allowable except when determined by the Regional Administrator in accordance with guidance issued by the Administrator.

(e) Rate determination studies required under § 35.925–11.

(f) A limited amount of end-of-pipe sampling and associated analysis of industrial discharges to municipal treatment works as provided in § 35.907(f).

§ 35.940–4 Indirect costs.

Indirect costs shall be allowable in accordance with an indirect cost agreement negotiated and incorporated in the grant agreement. An indirect cost agreement must identify those cost elements allowable under § 35.940–1. Where the benefits derived from indirect services cannot be readily determined, a lump sum for overhead may be negotiated if EPA determines that this amount will be approximately the same as the actual indirect costs.

§ 35.940–5 Disputes concerning allowable costs.

The grantee should seek to resolve any questions relating to cost allowability or allocation at its earliest opportunity (if possible, before execution of the grant agreement). Final determinations concerning the allowability of costs shall be conclusive unless appealed within 30 days in accordance with the "Disputes" provisions of part 30, subpart J, of this subchapter.

§ 35.945 Grant payments.

The grantee shall be paid the Federal share of allowable project costs incurred within the scope of an approved project and which are currently due and payable from the grantee (i.e., not including withheld or deferred amounts), subject to the limitations of §§ 35.925–18, 35.930–5, 35.930–6, and 35.965 (b) and (c), up to the grant amount set forth in the grant agreement and any amendments thereto. Payments for engineering services for step 1, 2 or 3 shall be made in accordance with § 35.937–10 and payments for step 3 construction contracts shall be made in accordance with §§ 35.938–6 and 35.938–7. All allowable costs incurred before initiation of construction of the project must be claimed in the application for grant assistance for that project before the award of the assistance or no subsequent payment will be made for the costs.

(a) *Initial request for payment.* Upon award of grant assistance, the grantee may request payment for the unpaid Federal share of actual or estimated allowable project costs incurred before grant award subject to the limitations of § 35.925–18. Payment for such costs shall be made in accordance with the negotiated payment schedule included in the grant agreement.

(b) *Interim requests for payment.* The grantee may submit requests for payments for allowable costs in accordance with the negotiated payment schedule included in the grant agreement. Upon receipt of a request for payment, subject to the limitations set forth in § 30.615–3 of this subchapter and §§ 35.935–12, 35.935–13, and 35.935–16, the Regional Administrator shall cause to be disbursed from available appropriated funds such amounts as are necessary so that the total amount of Federal payments to the grantee for the project is equal to the Federal share of the actual or estimated allowable project costs incurred to date, as certified by the grantee in its most recent request for payment. Generally, payments will be made within 20 days after receipt of a request for payment.

(c) *Adjustment.* At any time before final payment under the grant, the Regional Administrator may cause any request(s) for payment to be reviewed or audited. Based on such review or audit, any payment may be reduced for prior overpayment or increased for prior underpayment.

(d) *Refunds, rebates, credits, etc.* The Federal share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be credited to the current State allotment or paid to the United States. Reasonable expenses incurred by the grantee for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable under the grant when approved by the Regional Administrator.

(e) *Final payment.* After completion of final inspection under § 35.935–14, approval of the request for payment which the grantee designates as the "final payment request," and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the Regional Administrator shall pay to the grantee any

balance of the Federal share of allowable project costs which has not already been paid. The grantee must submit the final payment request promptly after final inspection.

(f) *Assignment and release.* By its acceptance of final payment, the grantee agrees to assign to the United States the Federal share of refunds, rebates, credits or other amounts (including any interest) properly allocable to costs for which the grantee has been paid by the Government under the grant. The grantee thereby also releases and discharges the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to exceptions previously specified in writing between the Regional Administrator and the grantee.

(g) *Payment of costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.* Notwithstanding the provisions of paragraph (a) of this section, if the Regional Administrator determines it is necessary for the expeditious completion of a project, he may make advance payment after grant award under § 4.502(c) of this subchapter for the EPA share of the cost of any payment of relocation assistance by the grantee. The requirements in § 30.615–1 (b) and (d) of this subchapter apply to any advances of funds for assistance payments.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.950 Suspension, termination or annulment of grants.

Grants may be suspended under § 30.915, or terminated or annulled under § 30.920. The State agency shall be concurrently notified in writing of any such action.

§ 35.955 Grant amendments to increase grant amounts.

Grant agreements may be amended under § 30.900–1 of this chapter for project changes which have been approved under §§ 30.900 and 35.935–11 of this subchapter. However, no grant agreement may be amended to increase the amount of a grant unless the State agency has approved the grant increase from available State allotments and reallotments under § 35.915.

§ 35.960 Disputes.

(a) The Regional Administrator's final determination on the ineligibility of a project (see § 35.915(h)) or a grant applicant (see § 35.920–1), on the Federal share (see § 35.930–5(b)), or on any dispute arising under a grant shall be final and conclusive unless the applicant or grantee appeals within 30 days from the date of receipt of the final determination. (See subpart J of part 30 of this subchapter.)

(b) The EPA General Counsel will publish periodically as a Notice document in the FEDERAL REGISTER a digest of grant appeals decisions.

§ 35.965 Enforcement.

If the Regional Administrator determines that the grantee has failed to comply with any provision of this subpart, he may impose any of the following sanctions:

(a) The grant may be terminated or annulled under § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to 10 percent may be withheld (see § 30.615–3 of this chapter);

(d) Project work may be suspended under § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted if it is legally available and appropriate.

§ 35.970 Contract enforcement.

(a) *Regional Administrator authority.* At the request of a grantee, the Regional Administrator is authorized to provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was

made and to intervene in any civil action involving the enforcement of such contracts, including contract disputes which are the subject of either arbitration or court action. Any assistance is to be provided at the discretion of the Regional Administrator and in a manner determined to best serve the public interest. Factors which the Regional Administrator may consider in determining whether to provide assistance are:

(1) Available agency resources.

(2) Planned or ongoing enforcement action.

(3) The grantee's demonstration of good faith to resolve contract matters at issue.

(4) The grantee's adequate documentation.

(5) The Federal interest in the contract matters at issue.

(b) *Grantee request.* The grantee's request for technical or legal assistance should be submitted in writing and be accompained by documentation adequate to inform the Regional Administrator of the nature and necessity of the requested assistance. A grantee may orally request assistance from the Regional Administrator on an emergency basis.

(c) *Privity of contract.* The Regional Administrator's technical or legal involvement in any contract dispute will not make EPA a party to any contract entered into by the grantee. (See §35.936–8.)

(d) *Delegation to States.* The authority to provide technical and legal assistance in the administration of contract matters described in this section may be delegated to a State agency under subpart F of this part if the State agency can demonstrate that it has the appropriate legal authority to undertake such functions.

APPENDIX A TO SUBPART E OF PART 35—COST-EFFECTIVENESS ANALYSIS GUIDELINES

1. *Purpose.* These guidelines represent Agency policies and procedures for determining the most cost-effective waste treatment management system or component part.

2. *Authority.* These guidelines are provided under sections 212(2)(C) and 217 of the Clean Water Act.

3. *Applicability.* These guidelines, except as otherwise noted, apply to all facilities planning under step 1 grant assistance awarded after September 30, 1978. The guidelines also apply to State or locally financed facilities planning on which subsequent step 2 or step 3 Federal grant assistance is based.

4. *Definitions.* Terms used in these guidelines are defined as follows:

a. *Waste treatment management system.* Used synonymously with "complete waste treatment system" as defined in §35.905 of this subpart.

b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

c. *Planning period.* The period over which a waste treatment management system is evaluated for cost-effectiveness. The planning period begins with the system's initial operation.

d. *Useful life.* The estimated period of time during which a treatment works or a component of a waste treatment management system will be operated.

e. *Disaggregation.* The process or result of breaking down a sum total of population or economic activity for a State or other jurisdiction (i.e., designated 208 area or SMSA) into smaller areas or jurisdictions.

5. *Identification, selection, and screening of alternatives.* a. *Identification of alternatives.* All feasible alternative waste management systems shall be initially identified. These alternatives should include systems discharging to receiving waters, land application systems, on-site and other non-centralized systems, including revenue generating applications, and systems employing the reuse of wastewater and recycyling of pollutants. In identifying alternatives, the applicant shall consider the possibility of no action and staged development of the system.

b. *Screening of alternatives.* The identified alternatives shall be systematically screened to determine those capable of meeting the applicable Federal, State and local criteria.

c. *Selection of alternatives.* The identified alternatives shall be initially analyzed to determine which systems have cost-effective potential and which should be fully evaluated according to the cost-effectiveness analysis procedures established in the guidelines.

d. *Extent of effort.* The extent of effort and the level of sophistication used in the cost-effectiveness analysis should reflect the project's size and importance. Where processes or techniques are claimed to be innovative technology on the basis of the cost reduction criterion contained in paragraph 6e(1) of appendix E to this subpart, a sufficiently detailed cost analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

6. *Cost-effectiveness analysis procedures.*

a. *Method of analysis.* The resources costs shall be determined by evaluating opportunity costs. For resources that can be expressed in monetary terms, the analysis will use the interest (discount) rate established in paragraph 6e. Monetary costs shall be calculated in terms of present worth values or equivalent annual values over the planning period defined in section 6b. The analysis shall descriptively present nonmonetary factors (e.g., social and environmental) in order to determine their significance and impact. Nonmonetary factors include primary and secondary environmental effects, implementation capability, operability, performance reliability and flexibility. Although such factors as use and recovery of energy and scarce resources and recycling of nutrients are to be included in the monetary cost analysis, the non-monetary evaluation shall also include them. The most cost-effective alternative shall be the waste treatment management system which the analysis determines to have the lowest present worth or equivalent annual value unless nonmonetary costs are overriding. The most cost-effective alternative must also meet the minimum requirements of applicable effluent limitations, groundwater protection, or other applicable standards established under the Act.

b. *Planning period.* The planning period for the cost-effectiveness analysis shall be 20 years.

c. *Elements of monetary costs.* The monetary costs to be considered shall include the total value of the resources which are attributable to the waste treatment management system or to one of its component parts. To determine these values, all monies necessary for capital construction costs and operation and maintenance costs shall be identified.

(1) Capital construction costs used in a cost-effective analysis shall include all contractors' costs of construction including overhead and profit, costs of land, relocation, and right-of-way and easement acquisition; costs of design engineering, field exploration and engineering services during construction; costs of administrative and legal services including costs of bond sales; start-up costs such as operator training; and interest during construction. Capital construction costs shall also include contingency allowances consistent with the cost estimate's level of precision and detail.

(2) The cost-effectiveness analysis shall include annual costs for operation and maintenance (including routine replacement of equipment and equipment parts). These costs shall be adequate to ensure effective and dependable operation during the system's planning period. Annual costs shall be divided between fixed annual costs and costs which would depend on the annual quantity of waste water collected and treated. Annual revenues generated by the waste treatment management system through energy recovery, crop production, or other outputs shall be deducted from the annual costs for operation and maintenance in accordance with guidance issued by the Administrator.

d. *Prices.* The applicant shall calculate the various components of costs on the basis of market prices prevailing at the time of the cost-effectiveness analysis. The analysis shall not allow for inflation of wages and prices, except those for land, as described in paragraph 6h(1) and for natural gas. This stipulation is based on the implied assumption that prices, other than the exceptions, for resources involved in treatment works construction and operation, will tend to change over time by approximately the same percentage. Changes in the general level of prices will not affect the results of the cost-effectiveness analysis. Natural gas prices shall be escalated at a compound rate of 4 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified use of a greater or lesser percentage based upon regional differentials between historical natural gas price escalation and construction cost escalation. Land prices shall be appreciated as provided in paragraph 6h(1). Both historical data and future projections support the gas and land price escalations relative to those for other goods and services related to waste water treatment. Price escalation rates may be updated periodically in accordance with Agency guidelines.

e. *Interest (discount) rate.* The rate which the Water Resources Council establishes annually for evaluation of water resource projects shall be used.

f. *Interest during construction.* (1) Where capital expenditures can be expected to be fairly uniform during the construction period, interest during construction may be calculated at $I=1/2PCi$ where:

I=the interest accrued during the construction period,
P=the construction period in years,
C=the total capital expenditures,
i=the interest rate (discount rate in section 6e).

(2) Where expenditures will not be uniform, or when the construction period will be greater than 4 years, interest during construction shall be calculated on a year-by-year basis.

g. *Useful life.* (1) The treatment works' useful life for a cost-effectiveness analysis shall be as follows:

Land—permanent.
Waste water conveyance structures (includes collection systems, outfall pipes, interceptors, force mains, tunnels, etc.)—50 years.
Other structures (includes plant building, concrete process tankage, basins, lift stations structures, etc.)—30–50 years.

Process equipment—15–20 years.
Auxiliary equipment—10–15 years.

(2) Other useful life periods will be acceptable when sufficient justification can be provided. Where a system or a component is for interim service, the anticipated useful life shall be reduced to the period for interim service.

h. *Salvage value.* (1) Land purchased for treatment works, including land used as part of the treatment process or for ultimate disposal of residues, may be assumed to have a salvage value at the end of the planning period at least equal to its prevailing market value at the time of the analysis. In calculating the salvage value of land, the land value shall be appreciated at a compound rate of 3 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified the use of a greater or lesser percentage based upon historical differences between local land cost escalation and construction cost escalation. The land cost escalation rate may be updated periodically in accordance with Agency guidelines. Right-of-way easements shall be considered to have a salvage value not greater than the prevailing market value at the time of the analysis.

(2) Structures will be assumed to have a salvage value if there is a use for them at the end of the planning period. In this case, salvage value shall be estimated using straight line depreciation during the useful life of the treatment works.

(3) The method used in paragraph 6h(2) may be used to estimate salvage value at the end of the planning period for phased additions of process equipment and auxiliary equipment.

(4) When the anticipated useful life of a facility is less than 20 years (for analysis of interim facilities), salvage value can be claimed for equipment if it can be clearly demonstrated that a specific market or reuse opportunity will exist.

7. *Innovative and alternative wastewater treatment processes and techniques.*

a. Beginning October 1, 1978, the capital costs of publicly owned treatment works which use processes and techniques meeting the criteria of appendix E to this subpart and which have only a water pollution control function, may be eligible if the present worth cost of the treatment works is not more than 115 percent of the present worth cost of the most cost-effective pollution control system, exclusive of collection sewers and interceptors common to the two systems being compared, by 115 percent, except for the following situation.

b. Where innovative or alternative unit processes would serve in lieu of conventional unit processes in a conventional waste water treatment plant, and the present worth costs of the nonconventional unit processes are less than 50 percent of the present worth costs of the treatment plant, multiply the present worth costs of the replaced conventional processes by 115 percent, and add the cost of nonreplaced unit processes.

c. The eligibility of multipurpose projects which combine a water pollution control function with another function, and which use processes and techniques meeting the criteria of appendix E to this subpart, shall be determined in accordance with guidance issued by the Administrator.

d. The above provisions exclude individual systems under §35.918. The regional Administrator may allow a grantee to apply the 15-percent preference authorized by this section to facility plans prepared under step 1 grant assistance awarded before October 1, 1978.

8. *Cost-effective staging and sizing of treatment works.*

a. *Population projections.* (1) The disaggregation of State projections of population shall be the basis for the population forecasts presented in individual facility plans, except as noted. These State projections shall be those developed in 1977 by the Bureau of Economic Analysis (BEA), Department of Commerce, unless, as of June 26, 1978, the State has already prepared projections. These State projections may be used instead of the BEA projections if the year 2000 State population does not exceed that of the BEA projection by more than 5 percent. If the difference exceeds this amount, the State must either justify or lower its projection. Justification must be based on the historical and current trends (e.g., energy and industrial development, military base openings) not taken into account in the BEA projections. The State must submit for approval to the Administrator the request and justification for use of State projections higher than the BEA projections. By that time, the State shall issue a public notice of the request. Before the Administrator's approval of the State projection, the Regional Administrator shall solicit public comments and hold a public hearing if important issues are raised about the State projection's validity. State projections and disaggregations may be updated periodically in accordance with Agency guidelines.

(2) Each State, working with designated 208 planning agencies, organizations certified by the Governor under section 174(a) of the Clean Air Act, as amended, and other regional planning agencies in the State's nondesignated areas, shall disaggregate the State population projection among its designated 208 areas, other standard metropolitan statistical areas (SMSA's) not included in the 208 area, and non-SMSA counties or other appropriate jurisdictions. States that had enacted laws, as of June 26, 1978, mandating disaggregation of State population totals to each county for areawide 208 planning may retain this requirement. When

disaggregating the State population total, the State shall take into account the projected population and economic activities identified in facility plans, areawide 208 plans and municipal master plans. The sum of the disaggregated projections shall not exceed the State projection. Where a designated 208 area has, as of June 26, 1978, already prepared a population projection, it may be used if the year 2000 population does not exceed that of the disaggregated projection by more than 10 percent. The State may then increase its population projection to include all such variances rather than lower the population projection totals for the other areas. If the 208 area population forecast exceeds the 10 percent allowance, the 208 agency must lower its projection within the allowance and submit the revised projection for approval to the State and the Regional Administrator.

(3) The State projection totals and the disaggregations will be submitted as an output of the statewide water quality management process. The submission shall include a list of designated 208 areas, all SMSA's, and counties or other units outside the 208 areas. For each unit the disaggregated population shall be shown for the years 1980, 1990, and 2000. Each State will submit its projection totals and disaggregations for the Regional Administrator's approval before October 1, 1979. Before this submission, the State shall hold a public meeting on the disaggregations and shall provide public notice of the meeting consistent with part 25 of this chapter. (See §35.917(e).)

(4) When the State projection totals and disaggregations are approved they shall be used thereafter for areawide water quality management planning as well as for facility planning and the needs surveys under section 516(b) of the Act. Within areawide 208 planning areas, the designated agencies, in consultation with the States, shall disaggregate the 208 area projections among the SMSA and non-SMSA areas and then disaggregate these SMSA and non-SMSA projections among the facility planning areas and the remaining areas. For those SMSA's not included within designated 208 planning areas, each State, with assistance from appropriate regional planning agencies, shall disaggregate the SMSA projection among the facility planning areas and the remaining areas within the SMSA. The State shall check the facility planning area forecasts to ensure reasonableness and consistency with the SMSA projections.

(5) For non-SMSA facility planning areas not included in designated areawide 208 areas, the State may disaggregate population projections for non-SMSA counties among facility planning areas and remaining areas. Otherwise, the grantee is to forecast future population growth for the facility planning area by linear extrapolation of the recent past (1960 to present) population trends for the planning area, use of correlations of planning area growth with population growth for the township, county or other larger parent area population, or another appropriate method. A population forecast may be raised above that indicated by the extension of past trends where likely impacts (e.g., significant new energy developments, large new industries, Federal installations, or institutions) justify the difference. The facilities plan must document the justification. These population forecasts should be based on estimates of new employment to be generated. The State shall check individual population forecasts to insure consistency with overall projections for non-SMSA counties and justification for any difference from past trends.

(6) Facilities plans prepared under step 1 grant assistance awarded later than 6 months after Agency approval of the State disaggregations shall follow population forecasts developed in accordance with these guidelines.

b. *Wastewater flow estimates.* (1) In determining total average daily flow for the design of treatment works, the flows to be considered include the average daily base flows (ADBF) expected from residential sources, commercial sources, institutional sources, and industries the works will serve plus allowances for future industries and nonexcessive infiltration/inflow. The amount of nonexcessive infiltration/inflow not included in the base flow estimates presented herein, is to be determined according to the Agency guidance for sewer system evaluation or Agency policy on treatment and control of combined sewer overflows (PRM 75–34).

(2) The estimation of existing and future ADBF, exclusive of flow reduction from combined residential, commercial and institutional sources, shall be based upon one of the following methods:

(a) *Preferred method.* Existing ADBF is estimated based upon a fully documented analysis of water use records adjusted for consumption and losses or on records of wastewater flows for extended dry periods less estimated dry weather infiltration. Future flows for the treatment works design should be estimated by determining the existing per capita flows based on existing sewered resident population and multiplying this figure by the future projected population to be served. Seasonal population can be converted to equivalent full time residents using the following multipliers:

Day-use visitor 0.1–0.2
Seasonal visitor 0.5–0.8

The preferred method shall be used wherever water supply records or wastewater flow data exist. Allowances for future increases of per capita flow over time will not be approved.

(b) *Optional method.* Where water supply and wastewater flow data are lacking, existing and future ADBF shall be estimated by multiplying a gallon per capita per day (gpcd) allowance not exceeding those in the following table, except as noted below, by the estimated total of the existing and future resident populations to be served. The tabulated ADBF allowances, based upon several studies of municipal water use, include estimates for commercial and institutional sources as well as residential sources. The Regional Administrator may approve exceptions to the tabulated allowances where large (more than 25 percent of total estimated ADBF) commercial and institutional flows are documented.

Description	Gallons per capita per day
Non-SMSA cities and towns with projected total 10-year populations of 5,000 or less	60–70
Other cities and towns	65–80

c. *Flow reduction.* The cost-effectiveness analysis for each facility planning area shall include an evaluation of the costs, cost savings, and effects of flow reduction measures unless the existing ADBF from the area is less than 70 gpcd, or the current population of the applicant municipality is under 10,000, or the Regional Administrator exempts the area for having an effective existing flow reduction program. Flow reduction measures include public education, pricing and regulatory approaches or a combination of these. In preparing the facilities plan and included cost effectiveness analysis, the grantee shall, as a minimum:

(1) Estimate the flow reductions implementable and cost effective when the treatment works become operational and after 10 and 20 years of operation. The measures to be evaluated shall include a public information program; pricing and regulatory approaches; installation of water meters, and retrofit of toilet dams and low-flow showerheads for existing homes and other habitations; and specific changes in local ordinances, building codes or plumbing codes requiring installations of water saving devices such as water meters, water conserving toilets, showerheads, lavatory faucets, and appliances in new homes, motels, hotels, institutions, and other establishments.

(2) Estimate the costs of the proposed flow reduction measures over the 20-year planning period, including costs of public information, administration, retrofit of existing buildings and the incremental costs, if any, of installing water conserving devices in new homes and establishments.

(3) Estimate the energy reductions; total cost savings for wastewater treatment, water supply and energy use; and the net cost savings (total savings minus total costs) attributable to the proposed flow reduction measures over the planning period. The estimated cost savings shall reflect reduced sizes of proposed wastewater treatment works plus reduced costs of future water supply facility expansions.

(4) Develop and provide for implementing a recommended flow reduction program. This shall include a public information program highlighting effective flow reduction measures, their costs, and the savings of water and costs for a typical household and for the community. In addition, the recommended program shall comprise those flow reduction measures which are cost effective, supported by the public and within the implementation authority of the grantee or another entity willing to cooperate with the grantee.

(5) Take into account in the design of the treatment works the flow reduction estimated for the recommended program.

d. *Industrial flows.* (1) The treatment works' total design flow capacity may include allowances for industrial flows. The allowances may include capacity needed for industrial flows which the existing treatment works presently serves. However, these flows shall be carefully reviewed and means of reducing them shall be considered. Letters of intent to the grantee are required to document capacity needs for existing flows from significant industrial users and for future flows from all industries intending to increase their flows or relocate in the area. Requirements for letters of intent from significant industrial dischargers are set forth in §35.925–11(c).

(2) While many uncertainties accompany forecasting future industrial flows, there is still a need to allow for some unplanned future industrial growth. Thus, the cost-effective (grant eligible) design capacity and flow of the treatment works may include (in addition to the existing industrial flows and future industrial flows documented by letters of intent) a nominal flow allowance for future nonidentifiable industries or for unplanned industrial expansions, provided that 208 plans, land use plans and zoning provide for such industrial growth. This additional allowance for future unplanned industrial flow shall not exceed 5 percent (or 10 percent for towns with less than 10,000 population) of the total design flow of the treatment works exclusive of the allowance or 25 percent of the total industrial flow (existing plus documented future), whichever is greater.

e. *Staging of treatment plants.* (1) The capacity of treatment plants (i.e., new plants, upgraded plants, or expanded plants) to be funded under the construction grants program shall not exceed that necessary for wastewater flows projected during an initial staging period determined by one of the following methods:

(a) *First method.* The grantee shall analyze at least three alternative staging periods (10

years, 15 years, and 20 years). He shall select the least costly (i.e., total present worth or average annual cost) staging period.

(b) *Second method.* The staging period shall not exceed the period which is appropriate according to the following table.

STAGING PERIODS FOR TREATMENT PLANTS

Flow growth factors (20 years) [1]	Staging period [2] (years)
Less than 1.3	20
1.3 to 1.8	15
Greater than 1.8	10

[1] Ratio of wastewater flow expected at end of 20 year planning period to initial flow at the time the plant is expected to become operational.
[2] Maximum initial staging period.

(2) A municipality may stage the construction of a treatment plant for a shorter period than the maximum allowed under this policy. A shorter staging period might be based upon environmental factors (secondary impacts, compliance with other environmental laws under §35.925–14, energy conservation, water supply), an objective concerning planned modular construction, the utilization of temporary treatment plants, or attainment of consistency with locally adopted plans including comprehensive and capital improvement plans. However, the staging period in no case may be less than 10 years, because of associated cost penalties and the time necessary to plan, apply for and receive funding, and construct later stages.

(3) The facilities plan shall present the design parameters for the proposed treatment plant. Whenever the proposed treatment plant components' size or capacity would exceed the minimum reliability requirements suggested in the EPA technical bulletin, "Design Criteria for Mechanical, Electric, and Fluid System and Component Reliability," a complete justification, including supporting data, shall be provided to the Regional Administrator for his approval.

f. *Staging of interceptors.* Since the location and length of interceptors will influence growth, interceptor routes and staging of construction shall be planned carefully. They shall be consistent with approved 208 plans, growth management plans and other environmental laws under §35.925–14 and shall also be consistent with Executive orders for flood plains and wetlands.

(1) Interceptors may be allowable for construction grant funding if they eliminate existing point source discharges and accommodate flows from existing habitations that violate an enforceable requirement of the Act. Unless necessary to meet those objectives, interceptors should not be extended into environmentally sensitive areas, prime agricultural lands and other undeveloped areas (density less than one household per 2 acres). Where extension of an interceptor through such areas would be necessary to interconnect two or more communities, the grantee shall reassess the need for the interceptor by further consideration of alternative wastewater treatment systems. If the reassessment demonstrates a need for the interceptor, the grantee shall evaluate the interceptor's primary and secondary environmental impacts, and provide for appropriate mitigating measures such as rerouting the pipe to minimize adverse impacts or restricting future connections to the pipe. Appropriate and effective grant conditions (e.g., restricting sewer hookups) should be used where necessary to protect environmentally sensitive areas or prime agricultural lands from new development. NPDES permits shall include the conditions to insure implementation of the mitigating measures when new permits are issued to the affected treatment facilities in those cases where the measures are required to protect the treatment facilities against overloading.

(2) Interceptor pipe sizes (diameters for cylindrical pipes) allowable for construction grant funding shall be based on a staging period of 20 years. A larger pipe size corresponding to a longer staging period not to exceed 40 years may be allowed if the grantee can demonstrate, wherever water quality management plans or other plans developed for compliance with laws under §35.925–14 have been approved, that the larger pipe would be consistent with projected land use patterns in such plans and that the larger pipe would reduce overall (primary plus secondary) environmental impacts. These environmental impacts include:

(a) *Primary impacts.* (i) Short-term disruption of traffic, business and other daily activities.

(ii) Destruction of flora and fauna, noise, erosion, and sedimentation.

(b) *Secondary impacts.* (i) Pressure to rezone or otherwise facilitate unplanned development.

(ii) Pressure to accelerate growth for quicker recovery of the non-Federal share of the interceptor investments.

(iii) Effects on air quality and environmentally sensitive areas by cultural changes.

(3) The estimation of peak flows in interceptors shall be based upon the following considerations:

(a) Daily and seasonal variations of pipe flows, the timing of flows from the various parts of the tributary area, and pipe storage effects.

(b) The feasibility of off-pipe storage to reduce peak flows.

(c) The use of an appropriate peak flow factor that decreases as the average daily flow to be conveyed increases.

9. *State guidelines.* If a State has developed or chooses to develop comprehensive guidelines on cost-effective sizing and staging of

treatment works, the Regional Administrator may approve all or portions of the State guidance for application to step 1 facility plans. Approved State guidance may be used instead of corresponding portions of these guidelines, if the following conditions are met:

a. The State guidance must be at least as stringent as the provisions of these guidelines.

b. The State must have held at least one public hearing on proposed State guidance, under regulations in part 25 of this chapter, before submitting the guidance for Agency approval.

10. *Additional capacity beyond the cost-effective capacity.* Treatment works which propose to include additional capacity beyond the cost-effective capacity determined in accordance with these guidelines may receive Federal grant assistance if the following requirements are met:

a. The facilities plan shall determine the most cost-effective treatment works and its associated capacity in accordance with these guidelines. The facilities plan shall also determine the actual characteristics and total capacity of the treatment works to be built.

b. Only a portion of the cost of the entire proposed treatment works including the additional capacity shall be eligible for Federal funding. The portion of the cost of construction which shall be eligible for Federal funding under sections 203(a) and 202(a) of the Act shall be equivalent to the estimated construction costs of the most cost-effective treatment works. For the eligibility determination, the costs of construction of the actual treatment works and the most cost-effective treatment works must be estimated on a consistent basis. Up-to-date cost curves published by EPA's Office of Water Program Operations or other cost estimating guidance shall be used to determine the cost ratios between cost-effective project components and those of the actual project. These cost ratios shall be multiplied by the step 2 cost and step 3 contract costs of actual components to determine the eligible step 2 and step 3 costs.

c. The actual treatment works to be built shall be assessed. It must be determined that the actual treatment works meets the requirements of the National Environmental Policy Act and all applicable laws, regulations, and guidance, as required of all treatment works by §§35.925–8 and 35.925–14. Particular attention should be given to assessing the project's potential secondary environmental effects and to ensuring that air quality standards will not be violated. The actual treatment works' discharge must not cause violations of water quality standards.

d. The Regional Administrator shall approve the plans, specifications, and estimates for the actual treatment works under section 203(a) of the Act, even though EPA will be funding only a portion of its designed capacity.

e. The grantee shall satisfactorily assure the Agency that the funds for the construction costs due to the addtional capacity beyond the cost-effective treatment works' capacity as determined by EPA (i.e., the ineligible portion of the treatment works), as well as the local share of the grant eligible portion of the construction costs will be available.

f. The grantee shall execute appropriate grant conditions or releases providing that the Federal Government is protected from any further claim by the grantee, the State, or any other party for any of the costs of construction due to the additional capacity.

g. Industrial cost recovery shall be based upon the portion of the Federal grant allocable to the treatment of industrial wastes.

h. The grantee must implement a user charge system which applies to the entire service area of the grantee, including any area served by the additional capacity.

APPENDIX B TO SUBPART E OF PART 35—FEDERAL GUIDELINES—USER CHARGES FOR OPERATION AND MAINTENANCE OF PUBLICLY OWNED TREATMENT WORKS

(a) *Purpose.* To set forth advisory information concerning user charges based on actual use pursuant to section 204 of the Clean Water Act, hereinafter referred to as the Act. Applicable requirements are set forth in subpart E (40 CFR part 35).

(b) *Authority.* The authority for establishment of the user charge guidelines is contained in section 204(b)(2) of the Act.

(c) *Background.* Section 204(b)(1) of the Act provides that after March 1, 1973, Federal grant applicants shall be awarded grants only after the Regional Administrator has determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services will pay its proportionate share of the costs of operation and maintenance, including replacement. The intent of the Act with respect to user charges is to distribute the cost of operation and maintenance of publicly owned treatment works to the pollutant source and to promote self-sufficiency of treatment works with respect to operation and maintenance costs. The 1977 Amendments amended section 204(b) to allow grantees to establish user charge systems based on ad valorem taxes. This appendix does not apply to ad valorem user charge systems.

(d) *Definitions*—(1) *Replacement.* Expenditures for obtaining and installing equipment,

accessories, or appurtenances which are necessary to maintain the capacity and performance during the service life of the treatment works for which such works were designed and constructed. The term "operation and maintenance" includes replacement.

(2) *User charge.* A charge levied on users of treatment works for the cost of operation and maintenance of such works.

(e) *Classes of users.* At least two basic types of user charge systems are common. The first is to charge each user a share of the treatment works operation and maintenance costs based on his estimate of measured proportional contribution to the total treatment works loading. The second system establishes classes for users having similar flows and waste water characteristics; i.e., levels of biochemical oxygen demand, suspended solids, etc. Each class is then assigned its share of the waste treatment works operation and maintenance costs based on the proportional contribution of the class to the total treatment works loading. Either system is in compliance with these guidelines.

(f) *Criteria against which to determine the adequacy of user charges.* The user charge system shall be approved by the Regional Administrator and shall be maintained by the grantee in accordance with the following requirements:

(1) The user charge system must result in the distribution of the cost of operation and maintenance of treatment works within the grantee's jurisdiction to each user (or user class) in proportion to such user's contribution to the total wastewater loading of the treatment works. Factors such as strength, volume, and delivery flow rate characteristics shall be considered and included as the basis for the user's contribution to ensure a proportional distribution of operation and maintenance costs to each user (or user class).

(2) For the first year of operation, operation and maintenance costs shall be based upon past experience for existing treatment works or some other rational method that can be demonstrated to be applicable.

(3) The grantee shall review user charges annually and revise them periodically to reflect actual treatment works operation and maintenance costs.

(4) The user charge system must generate sufficient revenue to offset the cost of all treatment works operation and maintenance provided by the grantee.

(5) The user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works accepting wastewaters from treatment works owned by others, then the subscribers receiving waste treatment services from the grantee shall have adopted user charge systems in accordance with these guidelines. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority.

(g) *Model user charge systems.* The user charge system adopted by the applicant must result in the distribution of treatment works operation and maintenance costs to each user (or user class) in approximate proportion to his contribution to the total wastewater loading of the treatment works. The following user charge models can be used for this purpose; however, the applicant is not limited to their use. The symbols used in the models are as defined below:

C_T = Total operation and maintenance (O. & M.) costs per unit of time.
C_u = A user's charge for O. & M. per unit of time.
C_s = A surcharge for wastewaters of excessive strength.
V_c = O&M cost for transportation and treatment of a unit of wastewater volume.
V_u = Volume contribution from a user per unit of time.
V_T = Total volume contribution from all users per unit of time.
B_c = O&M cost for treatment of a unit of biochemical oxygen demand (BOD).
B_u = Total BOD contribution from a user per unit of time.
B_T = Total BOD contribution from all users per unit of time.
B = Concentration of BOD from a user above a base level.
S_c = O&M cost for treatment of a unit of suspended solids.
S_u = Total suspended solids contribution from a user per unit of time.
S = Concentration of SS from a user above a base level.
P_c = O&M cost for treatment of a unit of any pollutant.
P_u = Total contribution of any pollutant from a user per unit of time.
P_T = Total contribution of any pollutant from all users per unit of time.
P = Concentration of any pollutant from a user above a base level.

(1) *Model No. 1.* If the treatment works is primarily flow dependent or if the BOD, suspended solids, and other pollutant concentrations discharged by all users are approximately equal, then user charges can be developed on a volume basis in accordance with the model below:

$$C_u = C_T/V_T(V_u)$$

(2) *Model No. 2.*—When BOD, suspended solids, or other pollutant concentrations from a user exceed the range of concentration of these pollutants in normal domestic sewage, a surcharge added to a base charge, calculated by means of Model No. 1, can be levied. The surcharge can be computed by the model below:

$$C_s = [B_c(B)=S_c(S)=P_c(P)]V_u$$

(3) *Model No. 3.*—This model is commonly called the "quantity/quality formula":

$$C_u = V_c\ V_u=B_c\ B_u=S_c\ S_u=P_c\ P_u$$

(h) *Other considerations.*—(1) Quantity discounts to large volume users will not be acceptable. Savings resulting from economies of scale should be apportioned to all users or user classes.

(2) User charges may be established based on a percentage of the charge for water usage only in cases where the water charge is based on a constant cost per unit of consumption.

[39 FR 5270, Feb. 11, 1974]

APPENDIX C–1 TO SUBPART E OF PART 35—REQUIRED PROVISIONS—CONSULTING ENGINEERING AGREEMENTS

1. General
2. Responsibility of the Engineer
3. Scope of Work
4. Changes
5. Termination
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10. Price Reduction for Defective Cost or Pricing Data
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18. Copyrights and Rights in Data

1. GENERAL

(a) The owner and the engineer agree that the following provisions apply to the EPA grant-eligible work to be performed under this agreement and that such provisions supersede any conflicting provisions of this agreement.

(b) The work under this agreement is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor the U.S. Environmental Protection Agency (hereinafter, "EPA") is a party to this agreement. This agreement which covers grant-eligible work is subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939 in effect on the date of execution of this agreement. As used in these clauses, the words "the date of execution of this agreement" mean the date of execution of this agreement and any subsequent modification of the terms, compensation or scope of services pertinent to unperformed work.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or this agreement.

2. RESPONSIBILITY OF THE ENGINEER

(a) The engineer shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by the engineer under this agreement. The engineer shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in his designs, drawings, specifications, reports, and other services.

(b) The engineer shall perform such professional services as may be necessary to accomplish the work required to be performed under this agreement, in accordance with this agreement and applicable EPA requirements in effect on the date of execution of this agreement.

(c) The owner's or EPA's approval of drawings, designs, specifications, reports, and incidental engineering work or materials furnished hereunder shall not in any way relieve the engineer of responsibility for the technical adequacy of his work. Neither the owner's nor EPA's review, approval or acceptance of, nor payment for, any of the services shall be construed to operate as a waiver of any rights under this agreement or of any cause of action arising out of the performance of this agreement.

(d) The engineer shall be and shall remain liable, in accordance with applicable law, for all damages to the owner or EPA caused by the engineer's negligent performance of any of the services furnished under this agreement, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The engineer shall not be responsible for any time delays in the project caused by circumstances beyond the engineeer's control. Where innovative processes or techniques (see 40 CFR 35.908) are recommended by the engineer and are used, the engineer shall be liable only for gross negligence to the extent of such use.

3. SCOPE OF WORK

The services to be performed by the engineer shall include all services required to complete the task or Step in accordance with applicable EPA regulations (40 CFR part 35, subpart E in effect on the date of execution of this agreement) to the extent of the scope of work as defined and set out in the engineering services agreement to which these provisions are attached.

4. CHANGES

(a) The owner may, at any time, by written order, make changes within the general scope of this agreement in the services or work to be performed. If such changes cause

an increase or decrease in the engineer's cost of, or time required for, performance of any services under this agreement, whether or not changed by any order, an equitable adjustment shall be made and this agreement shall be modified in writing accordingly. The engineer must assert any claim for adjustment under this clause in writing within 30 days from the date of receipt by the engineer of the notification of change, unless the owner grants a further period of time before the date of final payment under this agreement.

(b) No services for which an additional compensation will be charged by the engineer shall be furnished without the written authorization of the owner.

(c) In the event that there is a modification of EPA requirements relating to the services to be performed under this agreement after the date of execution of this agreement, the increased or decreased cost of performance of the services provided for in this agreement shall be reflected in an appropriate modification of this agreement.

5. TERMINATION

(a) Either party may terminate this agreement, in whole or in part, in writing, if the other party substantially fails to fulfill its obligations under this agreement through no fault of the terminating party. However, no such termination may be affected unless the other party is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate and (2) an opportunity for consultation with the terminating party before termination.

(b) The owner may terminate this agreement, in whole or in part, in writing, for its convenience, if the termination is for good cause (such as for legal or financial reasons, major changes in the work or program requirements, initiation of a new step) and the engineer is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party before termination.

(c) If the owner terminates for default, an equitable adjustment in the price provided for in this agreement shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the engineer at the time of termination may be adjusted to the extent of any additional costs the owner incurs because of the engineer's default. If the engineer terminates for default or if the owner terminates for convenience, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the engineer for services rendered and expenses incurred before the termination, in addition to termination settlement costs the engineer reasonably incurs relating to commitments which had become firm before the termination.

(d) Upon receipt of a termination action under paragraph (a) or (b) of this section 5., the engineer shall (1) promptly discontinue all services affected (unless the notice directs otherwise), and (2) deliver or otherwise make available to the owner all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as the engineer may have accumulated in performing this agreement, whether completed or in process.

(e) Upon termination under paragraph (a) or (b) of this section 5., the owner may take over the work and prosecute the same to completion by agreement with another party or otherwise. Any work the owner takes over for completion will be completed at the owner's risk, and the owner will hold harmless the engineer from all claims and damages arising out of improper use of the engineer's work.

(f) If, after termination for failure of the engineer to fulfill contractual obligations, it is determined that the engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the owner. In such event, adjustment of the price provided for in this agreement shall be made as paragraph (c) of this clause provides.

6. REMEDIES

Except as this agreement otherwise provides, all claims, counter-claims, disputes, and other matters in question between the owner and the engineer arising out of or relating to this agreement or the breach of it will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

7. PAYMENT

(a) Payment shall be made in accordance with the payment schedule incorporated in this agreement as soon as practicable upon submission of statements requesting payment by the engineer to the owner. If no such payment schedule is incorporated in this agreement, the payment provisions of paragraph (b) of this clause shall apply.

(b) The engineer may request monthly progress payments and the owner shall make them as soon as practicable upon submission of statements requesting payment by the engineer to the owner. When such progress payments are made, the owner may withhold up to ten (10) percent of the vouchered amount until satisfactory completion by the engineer of work and services within a step called for under this agreement. When the owner determines that the work under this

agreement or any specified task hereunder is substantially complete and that the amount of retained percentages is in excess of the amount considered by him to be adequate for his protection, he shall release to the engineer such excess amount.

(c) No payment request made under paragraph (a) or (b) of this clause shall exceed the estimated amount and value of the work and services performed by the engineer under this agreement. The engineer shall prepare the estimates of work performed and shall supplement them with such supporting data as the owner may require.

(d) Upon satisfactory completion of the work performed under this agreement, as a condition precedent to final payment under this agreement or to settlement upon termination of the agreement, the engineer shall execute and deliver to the owner a release of all claims against the owner arising under or by virtue of this agreement, other than such claims, if any, as may be specifically exempted by the engineer from the operation of the release in stated amounts to be set forth therein.

8. PROJECT DESIGN

(a) In the performance of this agreement, the engineer shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, consistent with 40 CFR 35.936–3 and 35.936–13 in effect on the date of execution of this agreement, except to the extent to which innovative technology may be used under 40 CFR 35.908 in effect on the date of execution of this agreement.

(b) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which would require the use of structures, machines, products, materials, construction methods, equipment, or processes which the engineer knows to be available only from a sole source, unless the engineer has adequately justified the use of a sole source in writing.

(c) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which would be restrictive in violation of section 204(a)(6) of the Clean Water Act. This statute requires that no specification for bids or statement of work shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing, or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words "or equal." With regard to materials, if a single material is specified, the engineer must be prepared to substantiate the basis for the selection of the material.

(d) The engineer shall report to the owner any sole-source or restrictive design or specification giving the reason or reasons why it is necessary to restrict the design or specification.

(e) The engineer shall not knowingly specify or approve the performance of work at a facility which is in violation of clean air or water standards and which is listed by the Director of the EPA Office of Federal Activities under 40 CFR part 15.

9. AUDIT; ACCESS TO RECORDS

(a) The engineer shall maintain books, records, documents, and other evidence directly pertinent to performance on EPA grant work under this agreement in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this agreement. The engineer shall also maintain the financial information and data used by the engineer in the preparation or support of the cost submission required under 40 CFR 35.937–6(b) in effect on the date of execution of this agreement and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, owner, and [the State water pollution control agency] or any of their duly authorized representatives shall have access to such books, records, documents, and other evidence for inspection, audit, and copying. The engineer will provide proper facilities for such access and inspection.

(b) The engineer agrees to include paragraphs (a) through (e) of this clause in all his contracts and all tier subcontracts directly related to project performance that are in excess of $10,000.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The engineer agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a), provided that the engineer is afforded the opportunity for an audit exit conference and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final audit report will include written comments of reasonable length, if any, of the engineer.

(e) The engineer shall maintain and make available records under paragraphs (a) and

(b) of this clause during performance on EPA grant work under this agreement and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any "Dispute" appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until 3 years after the date of resolution of such appeal, litigation, claim, or exception.

10. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(This clause is applicable if the amount of this agreement exceeds $100,000.)

(a) If the owner or EPA determines that any price, including profit, negotiated in connection with this agreement or any cost reimbursable under this agreement was increased by any significant sums because the engineer or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700–41), then such price, cost, or profit shall be reduced accordingly and the agreement shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the remedies clause of this agreement.

(Note: Since the agreement is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the engineer may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the engineer. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.)

11. SUBCONTRACTS

(a) Any subcontractors and outside associates or consultants required by the engineer in connection with services under this agreement will be limited to such individuals or firms as were specifically identified and agreed to during negotiations, or as the owner specifically authorizes during the performance of this agreement. The owner must give prior approval for any substitutions in or additions to such subcontractors, associates, or consultants.

(b) The engineer may not subcontract services in excess of thirty (30) percent (or _____ percent, if the owner and the engineer hereby agree) of the contract price to subcontractors or consultants without the owner's prior written approval.

12. LABOR STANDARDS

To the extent that this agreement involves "construction" (as defined by the Secretary of Labor), the engineer agrees that such construction work shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a—276a–7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (Equal Employment Opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or EPA. The engineer further agrees that this agreement shall include and be subject to the "Labor Standards Provisions for Federally Assisted Construction Contracts" (EPA form 5720–4) in effect at the time of execution of this agreement.

13. EQUAL EMPLOYMENT OPPORTUNITY

In accordance with EPA policy as expressed in 40 CFR 30.420–5, the engineer agrees that he will not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, or national origin.

14. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936–7, the engineer agrees that qualified small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

15. COVENANT AGAINST CONTINGENT FEES

The engineer warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty the owner shall have the right to annul this agreement without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

16. GRATUITIES

(a) If it is found, after notice and hearing, by the owner that the engineer, or any of the engineer's agents or representatives, offered or gave gratuities (in the form of entertainment, gifts, or otherwise), to any official, employee, or agent of the owner, of the State, or of EPA in an attempt to secure a

contract or favorable treatment in awarding, amending, or making any determinations related to the performance of this agreement, the owner may, by written notice to the engineer, terminate the right of the engineer to proceed under this agreement. The owner may also pursue other rights and remedies that the law or this agreement provides. However, the existence of the facts upon which the owner bases such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this agreement.

(b) In the event this agreement is terminated as provided in paragraph (a) hereof, the owner shall be entitled: (1) To pursue the same remedies against the engineer as it could pursue in the event of a breach of the contract by the engineer, and (2) as a penalty, in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the costs the engineer incurs in providing any such gratuities to any such officer or employee.

17. PATENTS

If this agreement involves research, developmental, experimental, or demonstration work and any discovery or invention arises or is developed in the course of or under this agreement, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30, in effect on the date of execution of this agreement, including appendix B of part 30. In such case, the engineer shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The engineer agrees that the disposition of rights to inventions made under this agreement shall be in accordance with the terms and conditions of appendix B. The engineer shall include appropriate patent provisions to achieve the purpose of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

18. COPYRIGHTS AND RIGHTS IN DATA

(a) The engineer agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with EPA grant funds), technical reports, operating manuals, and other work submitted with a step 1 facilities plan or with a step 2 or step 3 grant application or which are specified to be delivered under this agreement or which are developed or produced and paid for under this agreement (referred to in this clause as "Subject Data") are subject to the rights in the United States, as set forth in subpart D of 40 CFR part 30 and in appendix C to 40 CFR part 30, in effect on the date of execution of this agreement. These rights include the right to use, duplicate, and disclose such subject data, in whole or in part, in any manner for any purpose whatsoever, and to have others do so. For purposes of this clause, "grantee" as used in appendix C refers to the engineer. If the material is copyrightable, the engineer may copyright it, as appendix C permits, subject to the rights in the Government in appendix C, but the owner and the Federal Government reserve a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such materials, in whole or in part, and to authorize others to do so. The engineer shall include appropriate provisions to achieve the purpose of this condition in all subcontracts expected to produce copyrightable subject data.

(b) All such subject data furnished by the engineer pursuant to this agreement are instruments of his services in respect of the project. It is understood that the engineer does not represent such subject data to be suitable for reuse on any other project or for any other purpose. If the owner reuses the subject data without the engineer's specific written verification or adaptation, such reuse will be at the risk of the owner, without liability to the engineer. Any such verification or adaptation will entitle the engineer to further compensation at rates agreed upon by the owner and the engineer.

APPENDIX C–2 TO SUBPART E OF PART 35—REQUIRED PROVISIONS—CONSTRUCTION CONTRACTS

SUPPLEMENTAL GENERAL CONDITIONS

1. General
2. Changes
3. Differing Site Conditions
4. Suspension of Work
5. Termination for Default; Damages for Delay; Time Extensions
6. Termination for Convenience
7. Remedies
8. Labor Standards
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11. Price Reduction for Defective Cost or Pricing Data
12. Covenant Against Contingent Fees
13. Gratuities
14. Patents
15. Copyrights and Rights in Data
16. Prohibition Against Listed Violating Facilities
17. Buy American

1. GENERAL

(a) The owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.

(b) This contract is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is a party to this contract. This contract is subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939 in effect on the date of execution of this contract.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or under this contract.

2. CHANGES

(a) The owner may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the owner-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the owner, which causes any such change, shall be treated as a change order under this clause, if the contractor gives the owner written notice stating the date, circumstances, and source of the order and if the contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the owner shall be treated as a change under this clause or shall entitle the contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. However, except for claims based on defective specifications, no claim for any change under paragraph (b) of this section 2., shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as there required. Also, in the case of defective specifications for which the owner is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under paragraph (b) of this section 2., submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period. The statement of claim hereunder may be included in the notice under paragraph (b) of this section 2.

(f) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

3. DIFFERING SITE CONDITIONS

(a) The contractor shall promptly, and before such conditions are disturbed, notify the owner in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The owner shall promptly investigate the conditions. If he finds that such conditions do materially differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in paragraph (a) of this clause, except that the owner may extend the prescribed time.

(c) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

4. SUSPENSION OF WORK

(a) The owner may order the contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the owner.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the owner in administration of this contract, or by his failure to act within the time specfied in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other

cause, including the fault or negligence of the contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the contractor shall have notified the owner in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

5. TERMINATION FOR DEFAULT; DAMAGES FOR DELAY; TIME EXTENSIONS

(a) If the contractor refuses or fails to prosecute the work, or any separable part of the work, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the owner may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the owner may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and use in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the owner resulting from his refusal or failure to complete the work within the specified time.

(b) If the contract provides for liquidated damages, and if the owner terminates the contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs the owner incurs in completing the work.

(c) If the contract provides for liquidated damages and if the owner does not terminate the contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The contractor's right to proceed shall not be terminated nor the contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the owner in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers; and

(2) The contractor, within 10 days from the beginning of any such delay (unless the owner grants a further period of time before the date of final payment under the contract), notifies the owner in writing of the causes of delay. The owner shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension. His findings of fact shall be final and conclusive on the parties, subject only to appeal as the remedies clause of this contract provides.

(e) If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under this clause, or that the delay was excusable under this clause, the rights and obligations of the parties shall be the same as if the notice of termination has been issued under the clause providing for termination for convenience of the owner.

(f) The rights and remedies of the owner provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in paragraph (d)(1) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

6. TERMINATION FOR CONVENIENCE

(a) The owner may terminate the performance of work under this contract in accordance with this clause in whole, or from time to time in part, whenever the owner shall determine that such termination is in the best interest of the owner. Any such termination shall be effected by delivery to the contractor of a notice of termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a notice of termination, and except as otherwise directed by the owner, the contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the notice of termination;

(2) Place no further orders or subcontracts for materials, services, or facilities except as necessary to complete the portion of the work under the contract which is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination;

(4) Assign to the owner, in the manner, at the times, and to the extent directed by the owner, all of the right, title, and interest of the contractor under the orders and subcontracts so terminated. The owner shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the owner to the extent he may require. His approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title to the owner, and deliver in the manner, at the times, and to the extent, if any, directed by the owner, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the notice of termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the owner;

(7) Use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices that the owner directs or authorizes, any property of the types referred to in paragraph (b)(6) of this clause, but the contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed and at a price or prices approved by the owner. The proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the owner to the contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the owner may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the notice of termination; and

(9) Take such action as may be necessary, or as the owner may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the owner has or may acquire an interest.

(c) After receipt of a notice of termination, the contractor shall submit to the owner his termination claim, in the form and with the certification the owner prescribes. Such claim shall be submitted promptly but in no event later than 1 year from the effective date of termination, unless one or more extensions in writing are granted by the owner upon request of the contractor made in writing within such 1-year period or authorized extension. However, if the owner determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such 1-year period or extension. If the contractor fails to submit his termination claim within the time allowed, the owner may determine, on the basis of information available to him, the amount, if any, due to the contractor because of the termination. The owner shall then pay to the contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the contractor and the owner may agree upon the whole or any part of the amount or amounts to be paid to the contractor because of the total or partial termination of work under this clause. The amount or amounts may include a reasonable allowance for profit on work done. However, such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the contractor in the event of failure of the contractor and the owner to agree upon the whole amount to be paid to the contractor because of the termination of work under this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (d).

(e) If the contractor and the owner fail to agree, as paragraph (d) of this section 6., provides, on the whole amount to be paid to the contractor because of the termination of work under this clause, the owner shall determine, on the basis of information available to him, the amount, if any, due to the contractor by reason of the termination and shall pay to the contractor the amounts determined as follows:

(1) For all contract work performed before the effective date of the notice of termination, the total (without duplication of any items) of—

(i) The cost of such work;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as paragraph (b)(5) of this clause provides. This cost is exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor before the effective date of the notice of termination. These amounts shall be included in the cost on account of which payment is made under paragraph (1)(i) of this section 6.; and

(iii) A sum, as profit on paragraph (1)(i) of this section 6., that the owner determines to be fair and reasonable. But, if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this paragraph (1)(iii) of this section 6., and

an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(2) The reasonable cost of the preservation and protection of property incurred under paragraph (b)(9) of this clause; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract. The total sum to be paid to the contractor under paragraph (e)(1) of this clause shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the owner shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor under paragraph (1) of this clause 6., the fair value, as determined by the owner of property which is destroyed, lost, stolen, or damaged, to the extent that it is un-deliverable to the owner, or to a buyer under paragraph (b)(7) of this clause.

(f) The contractor shall have the right to dispute under the clause of this contract entitled "Remedies," from any determination the owner makes under paragraph (c) or (e) of this clause. But, if the contractor has failed to submit his claim within the time provided in paragraph (c) of this clause and has failed to request extension of such time, he shall have no such right of appeal. In any case where the owner has determined the amount due under paragraph (c) or (e) of this clause, the owner shall pay to the contractor the following: (1) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the owner or (2) if a "Remedies" proceeding is initiated, the amount finally determined in such "Remedies" proceeding.

(g) In arriving at the amount due the contractor under this clause there shall be deducted (1) all unliquidated advance or other payments on account theretofore made to the contractor, applicable to the terminated portion of this contract, (2) any claim which the owner may have against the contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things kept by the contractor or sold, under the provisions of this clause, and not otherwise recovered by or credited to the owner.

(h) If the termination hereunder be partial, before the settlement of the terminated portion of this contract, the contractor may file with the owner a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the notice of termination). Such equitable adjustment as may be agreed upon shall be made in the price or prices. Nothing contained herein shall limit the right of the owner and the contractor to agree upon the amount or amounts to be paid to the contractor for the completion of the continued portion of the contract when the contract does not contain an established contract price for the continued portion.

7. REMEDIES

Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the owner and the contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

8. LABOR STANDARDS

The contractor agrees that "construction" work (as defined by the Secretary of Labor) shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a—276a–7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327–33);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (equal employment opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or EPA. The contractor further agrees that this contract shall include and be subject to the "Labor Standards Provisions for Federally assisted Construction Contracts" (EPA form 5720–4) in effect at the time of execution of this agreement.

9. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936–7, the contractor agrees that small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

10. AUDIT; ACCESS TO RECORDS

(a) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on EPA grant work under this contract in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this contract. The contractor shall also maintain the financial information and data used by the contractor in the preparation or support of the cost submission required under 40 CFR 35.938–5 in effect on the date of execution of this contract for any negotiated contract or

change order and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, owner, and (the State water pollution control agency) or any of their authorized representatives shall have access to such books, records, documents and other evidence for the purpose of inspection, audit and copying. The contractor will provide proper facilities for such access and inspection.

(b) If this contract is a formally advertised, competitively awarded, fixed price contract, the contractor agrees to make paragraphs (a) through (f) of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to include paragraphs (a) through (f) of this clause in all his contracts in excess of $10,000 and all tier subcontracts in excess of $10,000 and to make paragraphs (a) through (f) of this clause applicable to all change orders directly related to project performance.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The contractor agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a) of this clause 10., provided that the contractor is afforded the opportunity for an audit exit conference, and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final EPA audit report will include written comments of reasonable length, if any, of the contractor.

(e) Records under paragraphs (a) and (b) of this clause 10., shall be maintained and made available during performance on EPA grant work under this contract and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any "Dispute" appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until three years after the date of resolution of such appeal, litigation, claim or exception.

(f) The right of access which this clause confers will generally be exercised (with respect to financial records) under (1) negotiated prime contracts, (2) negotiated change orders or contract amendments in excess of $10,000 affecting the price of any formally advertised, competitively awarded, fixed price contract, and (3) subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract. However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, such right of access may be exercised under any type of contract or subcontract (1) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor, (2) if there is any indication that fraud, gross abuse, or corrupt practices may be involved or (3) if the contract is terminated for default or for convenience.

11. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(This clause is applicable to (1) any negotiated prime contract in excess of $100,000; (2) negotiated contract amendments or change orders in excess of $100,000 affecting the price of a formally advertised, competitively awarded, fixed price contract; or (3) any subcontract or purchase order in excess of $100,000 under a prime contract other than a formally advertised, competitively awarded, fixed price contract. Change orders shall be determined to be in excess of $100,000 in accordance with 40 CFR 35.938–5(g). However, this clause is not applicable for contracts or subcontracts to the extent that they are awarded on the basis of effective price competition.)

(a) If the owner or EPA determines that any price (including profit) negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant sums because the contractor, or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700–41), then such price or cost or profit shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the Remedies clause of this contract.

(Note: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.)

12. COVENANT AGAINST CONTINGENT FEES

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an

agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the owner shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

13. GRATUITIES

(a) If the owner finds, after notice and hearing, that the contractor or any of the contractor's agents or representatives offered or gave gratuities (in the form of entertainment, gifts, or otherwise) to any official, employee or agent of the owner, of the State, or of EPA in an attempt to secure a contract or favorable treatment in the awarding, amending, or making any determinations related to the performance of this contract, the owner may, by written notice to the contractor, terminate the right of the contractor to proceed under this contract. The owner may also pursue other rights and remedies that the law or this contract provides. However, the existence of the facts upon which the owner makes such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this contract.

(b) In the event this contract is terminated as provided in paragraph (a) of this clause, the owner shall be entitled (1) to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the costs the contractor incurs in providing any such gratuities to any such officer or employee.

14. PATENTS

If this contract involves research, developmental, experimental, or demonstration work, and any discovery or invention arises or is developed in the course of or under this contract, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30, in effect on the date of execution of this contract, including appendix B of part 30. In such case, the contractor shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The contractor agrees that the disposition of rights to inventions made under this contract shall be in accordance with the terms and conditions of appendix B. The contractor shall include appropriate patent provisions to achieve the intent of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

15. COPYRIGHTS AND RIGHTS IN DATA

The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with EPA grant funds), technical reports, operating manuals, and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as "Subject Data") are subject to the rights in the United States, as set forth in subpart D of 40 CFR part 30 and in appendix C to 40 CFR part 30, in effect on the date of execution of this contract. These rights include the right to use, duplicate and disclose such Subject Data, in whole or in part, in any manner for any purpose whatsoever, and to have others do so. For purposes of this clause, "grantee" as used in appendix C refers to the contractor. If the material is copyrightable, the contractor may copyright it, as appendix C permits, subject to the rights in the Government as set forth in appendix C, but the owner and the Federal Government reserve a royalty-free, nonexclusive, and irrevocable license to reproduce, publish and use such materials, in whole or in part, and to authorize others to do so. The contractor shall include provisions appropriate to achieve the intent of this condition in all subcontracts expected to produce copyrightable Subject Data.

16. PROHIBITION AGAINST LISTED VIOLATING FACILITIES

(Applicable only to a contract in excess of $100,000 and when otherwise applicable under 40 CFR part 15.)

(a) The contractor agrees as follows:

(1) To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, *et seq.*, as amended by Pub. L. 92–604) and section 308 of the Clean Water Act (33 U.S.C. 1251, as amended), respectively, which relate to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the award of this contract.

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency list of violating facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from the listing.

(3) To use his best efforts to comply with clean air and clean water standards at the facilities in which the contract is being performed.

(4) To insert the substance of the provisions of this clause, including this paragraph (4), in any nonexempt subcontract.

(b) The terms used in this clause have the following meanings:

(1) The term *Air Act* means the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(2) The term *Water Act* means the Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*).

(3) The term *Clean Air Standards* means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Air Act (42 U.S.C. 1857c–5(d)), an approved implementation procedure or plan under section 111(c) or section 111(d), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c–7(d)).

(4) The term *Clean Water Standards* means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term *Compliance* means compliance with clean air or water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Envrionmental Protection Agency or an Air or Water Pollution Control Agency in accordance with the requirements of the Air Act or Water Act and regulations.

(6) The term *Facility* means any building, plant, installation, structure, mine, vessel, or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be used in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are located in one geographical area.

17. BUY AMERICAN

In accordance with section 215 of the Clean Water Act, and implementing EPA regulations and guidelines, the contractor agrees that preference will be given to domestic construction material by the contractor, subcontractors, materialmen, and suppliers in the performance of this contract.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

APPENDIX D TO SUBPART E OF PART 35—EPA TRANSITION POLICY—EXISTING CONSULTING ENGINEERING AGREEMENTS

A. ACCESS TO RECORDS—AUDIT

1. *Access clause.* After June 30, 1975, a construction grant for Steps 1, 2 or 3 will not be awarded nor will initiation of Step 1 work be approved under 40 CFR 35.917(e) or 35.925–18(a)(3), unless an acceptable records and access clause is included in the consulting engineering subagreement. The clause contained in appendix C–1 shall be used on or after March 1, 1976. The clause required by former PG–53 or approved as an alternate thereto may be used for all contracts under grants awarded before March 1, 1976.

2. *EPA exercise of right of access to records.* Under applicable statutory and regulatory provisions, EPA has a broad right of access to grantees' consulting engineers' records pertinent to performance of EPA project work. The extent to which EPA will exercise this right of access will depend upon the nature of the records and upon the type of agreement.

a. In order to determine where EPA shall exercise its right of access, engineers' project-related records have been divided into three categories:

(1) *Category A:* Records that pertain directly to the professional, technical and other services performed, excluding any type of financial records of the consulting engineer.

(2) *Category B:* Financial records of the consulting engineer pertaining to the direct costs of professional, technical and other services performed, excluding financial records pertaining to profit and overhead or other indirect costs.

(3) *Category C:* Financial records of the consulting engineer excluded from category B.

b. In all cases, EPA will exercise its right of access to Category A records. Also, where there is an indication that fraud, gross abuse, or corrupt practices may be involved, EPA will exercise its right of access to records in all categories. Otherwise, access to consulting engineers' financial records (categories B and C) will depend principally upon the method(s) of compensation stipulated in the agreement:

(1) *Agreements based upon a percentage of construction cost.* Category B and C records will not be audited. However, terms of the

agreement, including the total amount of compensation, will be evaluated for fairness, reasonableness, and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties relied on or used in negotiation of the agreement. Such evaluation shall also consider comparable contracts for which EPA grants have been awarded.

(2) *Agreements based upon salary cost times a multiplier including profit.* Category B records will be audited. Category C records will not be audited. However, terms of the agreement, including the total amount of compensation and the multiplier, will be evaluated for fairness and reasonableness and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties relied on or used in negotiation of the agreement. Such evaluation shall also consider comparable contracts for which EPA grants have been awarded. Items of overhead or other indirect costs will only be audited to the extent necessary to assure that types of costs found both in overhead and reimbursable direct costs, if any, are properly charged.

(3) *Per diem agreements.* Category B records will be audited. Category C records will not be audited. Audit will be performed to the extent necessary to determine that hours claimed and classes of personnel used were properly supported. The per diem rates will be evaluated according to the appropriate portions of paragraphs A.2.b. (1) and (2) of this appendix.

(4) *Cost plus a fixed fee (profit).* All direct costs, overhead, and other indirect costs claimed will be audited to determine that they are reasonable, allowable, and properly supported by the consulting engineer's records. The amount of fixed fee will not be questioned unless the total compensation appears unreasonable when evaluated according to paragraphs A.2.b. (1) and (2) of this appendix.

(5) *Fixed price lump sum contracts.* Category B and C records will not be audited. The contract amount will not be questioned unless the total compensation appears unreasonable when evaluated in accordance with appropriate portions of paragraphs A.2.b. (1) and (2) of this appendix.

c. If an agreement covers both grant-eligible and ineligible work, access to records will be exercised to the extent necessary to allocate contract work or costs between work grant-eligible for title II construction grant assistance and ineligible work or costs.

d. Under agreements that use two or more methods of compensation, each part of the agreement will be separately audited according to the appropriate paragraph of paragraph (b)(2) of this section.

e. Any audited firm and the grantee will be afforded opportunity for an audit exit conference and an opportunity to receive and comment upon the pertinent portions of each draft audit report. The final audit report will include the written comments, if any, of the audited parties in addition to those of the appropriate State and/or Federal agency(ies).

B. TYPE OF CONTRACT

1. The percentage-of-construction-cost type of contract, and the multiplier contract, where the multiplier includes profit, may not be used for step 1 or step 2 work initiated after June 30, 1975, when the step 1 or step 2 grant is awarded after June 30, 1975. (A multiplier type of compensation may be used only under acceptable types of contracts; see 40 CFR 35.937–1(d).)

2. Step 1 and step 2 work performed under the percentage-of-construction-cost type of contract and the multiplier contract, where the multiplier includes profit, will be reimbursed and such contracts will not be questioned where such costs are reimbursed in conjunction with a step 3 grant award within the scope of step 2 work contracted for prior to July 1, 1975. However, the current step 2 work will not be continued indefinitely for multiple, subsequent step 3 projects in order to avoid modifying the consultant agreement.

3. Where step 2 work is initiated after June 30, 1975, under contracts prohibited by paragraphs B.1. and B.2. of this appendix, EPA approval may not be given nor grant assistance awarded until the contract's terms of compensation have been renegotiated.

4. Establishing an "upset" figure (an upper limit which cannot be exceeded without a formal amendment to the agreement) under a multiplier contract, where the multiplier includes profit, is not acceptable where renegotiation of such contracts is required. In such renegotiation, the amount of profit must be specifically identified.

5. Total allowable contract costs for grant payment for a contract based on a percentage-of-construction-cost will be based on the following:

a. Where work for the design step is essentially continuous from start of design to bidding, and bid opening for step 3 construction occurs within 1 year after substantial completion of step 2 design work, the total allowable contract costs for grant payment may not exceed an amount based upon the low, responsive, responsible bid for construction.

b. Where work for the design step is not essentially continuous from start of design to bidding, or 1 year or more elapses between substantial completion of step 2 design work and bid opening for step 3 construction, the

total allowable contract costs for grant payment may not exceed an amount based upon the lower of:

(1) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus an escalation of this construction cost estimate of up to 5 percent, but not to exceed the consulting engineer's total compensation based on the low, responsive, responsible bid for construction, or

(2) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus a consulting engineer's compensation esclation not to exceed $50,000, but not to exceed the consulting engineer's total compensation based upon the low, responsive, responsible bid for construction.

c. Where the low, responsive, responsible bid for construction would have resulted in a higher consulting engineer's total compensation than paragraph b. of this clause, provides, the Regional Administrator may also consider a reasonable additional compensation for updating the plans and specifications, revising cost estimates, or similar services.

d. The limitations of paragraph B5 apply to all grants awarded under subpart E except that—

(1) If the Regional Administrator had made final payment on a project before December 17, 1975, the limitations do not apply; and

(2) For other projects on which construction for the building and erection of a treatment works was initiated prior to December 17, 1975, the limitations do not apply to any request for engineering fee increases attributable to construction contract awards or change orders approved by the grantee prior to December 17, 1975.

6. Where renegotiation is required under this appendix D, such renegotiation is subject to 40 CFR 35.937–1, 35.937–6, 35.937–7, 35.937–9, and 35.937–10.

C. ANNOUNCEMENT AND SELECTION

The requirements of 40 CFR 35.937–2 through 35.937–4 shall not apply to step 1 work where the step 1 grant was awarded or the initiation of step 1 work was approved by EPA (under 40 CFR 35.917(e)) before March 1, 1976, nor to subsequent step 2 and step 3 work in accordance with 40 CFR 35.937–2(d), if the grantee is satisfied with the qualifications and performance of the engineer employed.

D. REQUIRED CONSULTING ENGINEERING PROVISIONS

Effective March 1, 1976, the subagreement clauses required under appendix C–1 must be included in the consulting engineering subagreement before grant assistance for step 1, 2 or 3 will be awarded and before initiation of step 1 work will be approved under 40 CFR 35.917(e) or 35.925–18(a) 3.

E. ENFORCEMENT

1. Refusal by a consulting engineer to insert the required access clause, or to allow access to its records, or to renegotiate a consulting engineering contract according to the foregoing requirements, will render costs incurred under such contract unallowable. Accordingly, all such costs will be questioned and disallowed pending compliance with this appendix.

2. Where the Regional Administrator determines that the time required to comply with the access to records and type of contract provisions of this appendix will unduly delay award of grant assistance, he may award the grant assistance conditioned upon compliance with this appendix within a specified period of time. In such event, no grant payments for the affected engineering work may be made until such compliance has been obtained.

APPENDIX E TO SUBPART E OF PART 35—INNOVATIVE AND ALTERNATIVE TECHNOLOGY GUIDELINES

1. *Purpose.* These guidelines provide the criteria for identifying and evaluating innovative and alternative waste water treatment processes and techniques. The Administrator may publish additional information.

2. *Authority.* These guidelines are provided under section 304(d)(3) of the Clean Water Act.

3. *Applicability.* These guidelines apply to:

a. The analysis of innovative and alternative treatment processes and techniques under §35.917–1(d)(8);

b. Increased grants for eligible treatment works under §§35.930–5 (b) and (c) and 35.908(b)(1);

c. The funding available for innovative and alternative processes and techniques under §35.915–1(b);

d. The funding available for alternatives to conventional treatment works for small communities under §35.915–1(e);

e. The cost-effectiveness preference given innovative and alternative processes and techniques in section 7 of appendix A to this subpart;

f. The treatment works that may be given higher priority on State project priority lists under §35.915(a)(1)(iii);

g. Alternative and innovative treatment systems in connection with Federal facilities;

h. Individual systems authorized by §35.918, as modified in that section to include unconventional or innovative sewers;

i. The access and reports conditions in §35.935–20.

4. *Alternative processes and techniques.* Alternative waste water treatment processes

and techniques are proven methods which provide for the reclaiming and reuse of water, productively recycle waste water constituents or otherwise eliminate the discharge of pollutants, or recover energy.

a. In the case of processes and techniques for the treatment of effluents, these include land treatment, aquifer recharge, aquaculture, silviculture, and direct reuse for industrial and other nonpotable purposes, horticulture and revegetation of disturbed land. Total containment ponds and ponds for the treatment and storage of waste water prior to land application and other processes necessary to provide minimum levels of preapplication treatment are considered to be part of alternative technology systems for the purpose of this section.

b. For sludges, these include land application for horticultural, silvicultural, or agricultural purposes (including supplemental processing by means such as composting or drying), and revegetation of disturbed lands.

c. Energy recovery facilities include codisposal measures for sludge and refuse which produce energy; anaerobic digestion facilities *(Provided,* That more than 90 percent of the methane gas is recovered and used as fuel); and equipment which provides for the use of digester gas within the treatment works. Self-sustaining incineration may also be included provided that the energy recovered and productively used is greater than the energy consumed to dewater the sludge to an autogenous state.

d. Also included are individual and other onsite treatment systems with subsurface or other means of effluent disposal and facilities constructed for the specific purpose of septage treatment.

e. The term "alternative" as used in these guidelines includes the terms "unconventional" and "alternative to conventional" as used in the Act.

f. The term "alternative" does not include collector sewers, interceptors, storm or sanitary sewers or the separation thereof; or major sewer rehabilitation, except insofar as they are alternatives to conventional treatment works for small communities under §35.915–1(e) or part of individual systems under §35.918.

5. *Innovative processes and techniques.* Innovative waste water treatment processes and techniques are developed methods which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of meeting the national goals of cost reduction, increased energy conservation or recovery, greater recycling and conservation of water resources (including preventing the mixing of pollutants with water), reclamation or reuse of effluents and resources (including increased productivity of arid lands), improved efficiency and/or reliability, the beneficial use of sludges or effluent constituents, better management of toxic materials or increased environmental benefits. For the purpose of these guidelines, innovative waste water treatment processes and techniques are generally limited to new and improved applications of those alternative processes and techniques identified in accordance with paragraph 4 of these guidelines, including both treatment at centralized facilities and individual and other onsite treatment. Treatment processes based on the conventional concept of treatment (by means of biological or physical/chemical unit processes) and discharge to surface waters shall not be considered innovative waste water treatment processes and techniques except where it is demonstrated that these processes and techniques, as a minimum, meet either the cost-reduction or energy-reduction criterion described in section 6 of these guidelines. Treatment and discharge systems include primary treatment, suspended-growth or fixed-growth biological systems for secondary or advance waste water treatment, physical/chemical treatment, disinfection, and sludge processing. The term "innovative" does not include collector sewers, interceptors, storm or sanitary sewers or the separation of them, or major sewer rehabilitation, except insofar as they meet the criteria in paragraph 6 of these guidelines and are alternatives to conventional treatment works for small communities under §35.915–1(e) or part of individual systems under §35.918.

6. *Criteria for determining innovative processes and techniques.* a. The Regional Administrator will use the following criteria in determining whether a waste water treatment process or technique is innovative. The criteria should be read in the context of paragraph 5. These criteria do not necessarily preclude a determination by the Regional Administrator that a treatment system is innovative because of local variations in geographic or climatic conditions which affect treatment plant design and operation or because it achieves significant public benefits through the advancement of technology which would otherwise not be possible. The Regional Administrator should consult with EPA headquarters about determinations made in other EPA regions on similar processes and techniques.

b. New or improved applications of alternative waste water treatment processes and techniques may be innovative for the purposes of this regulation if they meet one or more of the criteria in paragraphs e(1) through e(6) of this paragraph. Treatment and discharge systems (i.e., systems which are not new or improved applications of alternative waste water treatment processes and techniques in accordance with paragraph 4 of these guidelines) must meet the criteria

of either paragraph 6e(1) or 6e(2), as a minimum, in order to be innovative for the purposes of these guidelines.

c. These six criteria are essentially the same as those used to evaluate any project proposed for grant assistance. The principal difference is that some newly developed processes and techniques may have the potential to provide significant advancements in the state of the art with respect to one or more of these criteria. Inherent in the concept of advancement of technology is a degree of risk which is necessary to initially demonstrate a method on a full, operational scale under the circumstances of its contemplated use. This risk, while recognized to be a necessary element in the implementation of innovative technology, must be minimized by limiting the projects funded to those which have been fully developed and shown to be feasible through operation on a smaller scale. The risk must also be commensurate with the potential benefits (i.e., greater potential benefits must be possible in the case of innovative technology projects where greater risk is involved).

d. Increased Federal funding under § 35.908(b) may be made only from the reserve in § 35.915–1(b). The Regional Administrator may fund a number of projects using the same type of innovative technology if he desires to encourage certain innovative processes and techniques because the potential benefits are great in comparison to the risks, or if operation under differing conditions of climatic, geology, etc., is desirable to demonstrate the technology.

e. The Regional Administrator will use the following criteria to determine whether waste water treatment processes and techniques are innovative:

(1) The life cycle cost of the eligible portion of the treatment works excluding conventional sewer lines is at least 15 percent less than that for the most cost-effective alternative which does not incorporate innovative waste water treatment processes and techniques (i.e., is no more than 85 percent of the life cycle cost of the most cost-effective noninnovative alternative).

(2) The net primary energy requirements for the operation of the eligible portion of the treatment works excluding conventional sewer lines are at least 20 percent less than the net energy requirements of the least net energy alternative which does not incorporate innovative waste water treatment processes and techniques (i.e., the net energy requirements are no more than 80 percent of those for the least net energy noninnovative alternative). The least net energy noninnovative alternative must be one of the alternatives selected for analysis under section 5 of appendix A.

(3) The operational reliability of the treatment works is improved in terms of decreased susceptibility to upsets or interference, reduced occurrence of inadequately treated discharges and decreased levels of operator attention and skills required.

(4) The treatment works provides for better management of toxic materials which would otherwise result in greater environmental hazards.

(5) The treatment works results in increased environmental benefits such as water conservation, more effective land use, improved air quality, improved ground water quality, and reduced resource requirements for the construction and operation of the works.

(6) The treatment works provide for new or improved methods of joint treatment and management of municipal and industrial wastes that are discharged into municipal systems.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

Subparts F–G [Reserved]

Subpart H—Cooperative Agreements for Protecting and Restoring Publicly Owned Freshwater Lakes

AUTHORITY: Sections 314, 501 and 518, Clean Water Act (86 Stat. 816, 33 U.S.C. 1251 *et seq.*).

SOURCE: 45 FR 7792, Feb. 5, 1980, unless otherwise noted.

§ 35.1600 Purpose.

This subpart supplements the EPA general grant regulations and procedures (part 31 of this chapter) and establishes policies and procedures for cooperative agreements to assist States and Indian tribes treated as States in carrying out approved methods and procedures for restoration (including protection against degradation) of publicly owned freshwater lakes.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1603 Summary of clean lakes assistance program.

(a) Under section 314 of the Clean Water Act, EPA may provide financial assistance to States to implement methods and procedures to protect and restore publicly owned freshwater lakes. Although cooperative agreements may be awarded only to States, these regulations allow States, through

substate agreements, to delegate some or all of the required work to substate agencies.

(b) Only projects that deal with publicly owned freshwater lakes are eligible for assistance. The State must have assigned a priority to restore the lake, and the State must certify that the lake project is consistent with the State Water Quality Management Plan (§ 35.1521) developed under the State/EPA Agreement. The State/EPA Agreement is a mechanism for EPA Regional Administrators and States to coordinate a variety of programs under the Clean Water Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act and other laws administered by EPA.

(c) These regulations provide for Phase 1 and 2 cooperative agreements. The purpose of a Phase 1 cooperative agreement is to allow a State to conduct a diagnostic-feasibility study to determine a lake's quality, evaluate possible solutions to existing pollution problems, and recommend a feasible program to restore or preserve the quality of the lake. A Phase 2 cooperative agreement is to be used for implementing recommended methods and procedures for controlling pollution entering the lake and restoring the lake. EPA award of Phase 1 assistance does not obligate EPA to award Phase 2 assistance for that project. Additionally, a Phase 1 award is not a prerequisite for receiving a Phase 2 award. However, a Phase 2 application for a proposed project that was not evaluated under a Phase 1 project shall contain the information required by appendix A.

(d) EPA will evaluate all applications in accordance with the application review criteria of § 35.1640–1. The review criteria include technical feasibility, public benefit, reasonableness of proposed costs, environmental impact, and the State's priority ranking of the lake project.

(e) Before awarding funding assistance, the Regional Administrator shall determine that pollution control measures in the lake watershed authorized by section 201, included in an approved 208 plan, or required by section 402 of the Act are completed or are being implemented according to a schedule that is included in an approved plan or discharge permit. Clean lakes funds may not be used to control the discharge of pollutants from a point source where the cause of pollution can be alleviated through a municipal or industrial permit under section 402 of the Act or through the planning and construction of wastewater treatment facilities under section 201 of the Act.

§ 35.1605 Definitions.

The terms used in this subpart have the meanings defined in sections 502 and 518(h) of the Act. In addition, the following terms shall have the meaning set forth below.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1605–1 The Act.

The Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*).

§ 35.1605–2 Freshwater lake.

Any inland pond, reservoir, impoundment, or other similar body of water that has recreational value, that exhibits no oceanic and tidal influences, and that has a total dissolved solids concentration of less than 1 percent.

§ 35.1605–3 Publicly owned freshwater lake.

A freshwater lake that offers public access to the lake through publicly owned contiguous land so that any person has the same opportunity to enjoy nonconsumptive privileges and benefits of the lake as any other person. If user fees are charged for public use and access through State or substate operated facilities, the fees must be used for maintaining the public access and recreational facilities of this lake or other publicly owned freshwater lakes in the State, or for improving the quality of these lakes.

§ 35.1605–4 Nonpoint source.

Pollution sources which generally are not controlled by establishing effluent limitations under sections 301, 302, and 402 of the Act. Nonpoint source pollutants are not traceable to a discrete identifiable origin, but generally result from land runoff, precipitation, drainage, or seepage.

§ 35.1605–5 Eutrophic lake.

A lake that exhibits any of the following characteristics:

(a) Excessive biomass accumulations of primary producers;

(b) Rapid organic and/or inorganic sedimentation and shallowing; or

(c) Seasonal and/or diurnal dissolved oxygen deficiencies that may cause obnoxious odors, fish kills, or a shift in the composition of aquatic fauna to less desirable forms.

§ 35.1605–6 Trophic condition.

A relative description of a lake's biological productivity based on the availability of plant nutrients. The range of trophic conditions is characterized by the terms of oligotrophic for the least biologically productive, to eutrophic for the most biologically productive.

§ 35.1605–7 Desalinization.

Any mechanical procedure or process where some or all of the salt is removed from lake water and the freshwater portion is returned to the lake.

§ 35.1605–8 Diagnostic-feasibility study.

A two-part study to determine a lake's current condition and to develop possible methods for lake restoration and protection.

(a) The diagnostic portion of the study includes gathering information and data to determine the limnological, morphological, demographic, socio-economic, and other pertinent characteristics of the lake and its watershed. This information will provide recipients an understanding of the quality of the lake, specifying the location and loading characteristics of significant sources polluting the lake.

(b) The feasibility portion of the study includes:

(1) Analyzing the diagnostic information to define methods and procedures for controlling the sources of pollution;

(2) Determining the most energy and cost efficient procedures to improve the quality of the lake for maximum public benefit;

(3) Developing a technical plan and milestone schedule for implementing pollution control measures and in-lake restoration procedures; and

(4) If necessary, conducting pilot scale evaluations.

§ 35.1605–9 Indian Tribe set forth at 40 CFR 130.6(d).

A Tribe meeting the requirements set forth at 40 CFR 130.6(d).

[54 FR 14359, Apr. 11, 1989, as amended at 56 FR 13817, Mar. 23, 1994]

§ 35.1610 Eligibility.

EPA shall award cooperative agreements for restoring publicly owned freshwater lakes only to the State agency designated by the State's Chief Executive. The award will be for projects which meet the requirements of this subchapter.

§ 35.1613 Distribution of funds.

(a) For each fiscal year EPA will notify each Regional Administrator of the amount of funds targeted for each Region through annual clean lakes program guidance. To assure an equitable distribution of funds the targeted amounts will be based on the clean lakes program which States identify in their State WQM work programs.

(b) EPA may set aside up to twenty percent of the annual appropriations for Phase 1 projects.

§ 35.1615 Substate agreements.

States may make financial assistance available to substate agencies by means of a written interagency agreement transferring project funds from the State to those agencies. The agreement shall be developed, administered and approved in accordance with the provisions of 40 CFR 33.240 (Intergovernmental agreements). A State may enter into an agreement with a substate agency to perform all or a portion of the work under a clean lakes cooperative agreement. Recipients shall submit copies of all interagency agreements to the Regional Administrator. If the sum involved exceeds $100,000, the agreement shall be approved by the Regional Administrator before funds are released by the State to the substate agency. The agreement shall incorporate by reference the provisions of this subchapter. The agreement shall specify outputs, milestone schedule, and the budget required to perform the associated work in the

same manner as the cooperative agreement between the State and EPA.

§ 35.1620 Application requirements.

(a) EPA will process applications in accordance with subpart B of part 30 of this subchapter. Applicants for assistance under the clean lakes program shall submit EPA form 5700–33 (original with signature and two copies) to the appropriate EPA Regional Office (see 40 CFR 30.130).

(b) Before applying for assistance, applicants should contact the appropriate Regional Administrator to determine EPA's current funding capability.

§ 35.1620–1 Types of assistance.

EPA will provide assistance in two phases in the clean lakes program.

(a) *Phase 1—Diagnostic-feasibility studies.* Phase 1 awards of up to $100,000 per award (requiring a 30 percent non-Federal share) are available to support diagnostic-feasibility studies (see appendix A).

(b) *Phase 2—Implementation.* Phase 2 awards (requiring a 50 percent non-Federal share) are available to support the implementation of pollution control and/or in-lake restoration methods and procedures including final engineering design.

(c) *Indian Tribes, eligible Indian Tribe.* In either phase, the Regional Administrator may increase the 50 and 70 percent maximum Federal share for an eligible Indian Tribe based upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes, tribal funds or in-kind contributions to meet the required match). In no case shall the Federal share be greater than 90 percent.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989; 59 FR 13817, Mar. 23, 1994]

§ 35.1620–2 Contents of applications.

(a) All applications shall contain a written State certification that the project is consistent with State Water Quality Management work program (see § 35.1513 of this subchapter) and the State Comprehensive Outdoor Recreation Plan (if completed). Additionally, the State shall indicate the priority ranking for the particular project (see § 35.1620–5).

(b) Phase 1 applications shall contain:

(1) A narrative statement describing the specific procedures that will be used by the recipient to conduct the diagnostic-feasibility study including a description of the public participation to be involved (see § 25.11 of this chapter);

(2) A milestone schedule;

(3) An itemized cost estimate including a justification for these costs;

(4) A written certification from the appropriate areawide or State 208 planning agency that the proposed work will not duplicate work completed under any 208 planning grant, and that the applicant is proposing to use any applicable approved 208 planning in the clean lakes project design; and

(5) For each lake being investigated, the information under paragraph (5)(i) of this paragraph (b) and, when available, the information under paragraph (5)(ii) of this paragraph (b).

(i) Mandatory information.

(A) The legal name of the lake, reservoir, or pond.

(B) The location of the lake within the State, including the latitude and longitude, in degrees, minutes, and seconds of the approximate center of the lake.

(C) A description of the physical characteristics of the lake, including its maximum depth (in meters); its mean depth (in meters); its surface area (in hectares); its volume (in cubic meters); the presence or absence of stratified conditions; and major hydrologic inflows and outflows.

(D) A summary of available chemical and biological data demonstrating the past trends and current water quality of the lake.

(E) A description of the type and amount of public access to the lake, and the public benefits that would be derived by implementing pollution control and lake restoration procedures.

(F) A description of any recreational uses of the lake that are impaired due to degraded water quality. Indicate the cause of the impairment, such as algae, vascular aquatic plants, sediments, or other pollutants.

(G) A description of the local interests and fiscal resources committed to restoring the lake.

(H) A description of the proposed monitoring program to provide the information required in appendix A paragraph (a)(10) of this section.

(ii) Discretionary information. States should submit this information when available to assist EPA in reviewing the application.

(A) A description of the lake watershed in terms of size, land use (list each major land use classification as a percentage of the whole), and the general topography, including major soil types.

(B) An identification of the major point source pollution discharges in the watershed. If the sources are currently controlled under the National Pollutant Discharge Elimination System (NPDES), include the permit numbers.

(C) An estimate of the percent contribution of total nutrient and sediment loading to the lake by the identified point sources.

(D) An indication of the major nonpoint sources in the watershed. If the sources are being controlled describe the control practice(s), including best land management practices.

(E) An indication of the lake restoration measures anticipated, including watershed management, and a projection of the net improvement in water quality.

(F) A statement of known or anticipated adverse environmental impacts resulting from lake restoration.

(c) Phase 2 applications shall include:

(1) The information specified in appendix A in a diagnostic/feasibility study or its equivalent;

(2) Certification by the appropriate areawide or State 208 planning agencies that the proposed Phase 2 lake restoration proposal is consistent with any approved 208 planning; and

(3) Copies of all issued permits or permit applications (including a summary of the status of applications) that are required for the discharge of dredged or fill material under section 404 of the Act.

§ 35.1620–3 Environmental evaluation.

Phase 2 applicants shall submit an evaluation of the environmental impacts of the proposed project in accordance with the requirements in appendix A of this regulation.

§ 35.1620–4 Public participation.

(a) *General.* (1) In accordance with this part and part 25 of this chapter, the applicant shall provide for, encourage, and assist public participation in developing a proposed lake restoration project.

(2) Public consultation may be coordinated with related activities to enhance the economy, the effectiveness, and the timeliness of the effort, or to enhance the clarity of the issue. This procedure shall not discourage the widest possible participation by the public.

(b) *Phase 1.* (1) Phase 1 recipients shall solicit public comment in developing, evaluating, and selecting alternatives; in assessing potential adverse environmental impacts; and in identifying measures to mitigate any adverse impacts that were identified. The recipient shall provide information relevant to these decisions, in fact sheet or summary form, and distribute them to the public at least 30 days before selecting a proposed method of lake restoration. Recipients shall hold a formal or informal meeting with the public after all pertinent information is distributed, but before a lake restoration method is selected. If there is significant public interest in the cooperative agreement activity, an advisory group to study the process shall be formed in accordance with the requirements of § 25.3(d)(4) of this chapter.

(2) A formal public hearing shall be held if the Phase 1 recipient selects a lake restoration method that involves major construction, dredging, or significant modifications to the environment, or if the recipient or the Regional Administrator determines that a hearing would be beneficial.

(c) *Phase 2.* (1) A summary of the recipient's response to all public comments, along with copies of any written comments, shall be prepared and submitted to EPA with a Phase 2 application.

(2) Where a proposed project has not been studied under a Phase 1 cooperative agreement, the applicant for Phase 2 assistance shall provide an opportunity for public consultation with adequate and timely notices before submitting an application to EPA. The public shall be given the opportunity to discuss the proposed project, the alternatives, and any potentially adverse environmental impacts. A public hearing shall be held where the proposed project involves major construction, dredging or other significant modification of the environment. The applicant shall provide a summary of his responses to all public comments and submit the summary, along with copies of any written comments, with the application.

§ 35.1620–5 State work programs and lake priority lists.

(a)(1) A State shall submit to the Regional Administrator as part of its annual work program (§ 35.1513 of this subchapter) a description of the activities it will conduct during the Federal fiscal year to classify its lakes according to trophic condition (§ 35.1630) and to set priorities for implementing clean lakes projects within the State. The work plan must list in priority order the cooperative agreement applications that will be submitted by the State for Phase 1 and Phase 2 projects during the upcoming fiscal year, along with the rationale used to establish project priorities. Each State must also list the cooperative agreement applications, with necessary funding, which it expects to submit in the following fiscal year. This information will assist EPA in targeting resources under § 35.1613.

(2) A State may petition the Regional Administrator by letter to modify the EPA approved priority list established under paragraph (a)(1) of this section. This may be done at any time if the State believes there is sufficient justification to alter the priority list contained in its annual work program, e.g., if a community with a lower priority project has sufficient resources available to provide the required matching funding while a higher priority project does not, or if new data indicates that a lower priority lake will have greater public benefit than a higher priority lake.

(b) Clean lakes restoration priorities should be consistent with the Statewide water quality management strategy (see § 35.1511–2 of this subchapter). In establishing priorities on particular lake restoration projects, States should use as criteria the application review criteria (§ 35.1640–1) that EPA will use in preparing funding recommendations for specific projects. If a State chooses to use different criteria, the State should indicate this to the Regional Administrator as part of the annual work program.

§ 35.1620–6 Intergovernmental review.

EPA will not award funds under this subpart without review and consultation in accordance with the requirements of Executive Order 12372, as implemented in 40 CFR part 29 of this chapter.

[48 FR 29302, June 24, 1983]

§ 35.1630 State lake classification surveys.

States that wish to participate in the clean lakes program shall establish and submit to EPA by January 1, 1982, a classification, according to trophic condition, of their publicly owned freshwater lakes that are in need of restoration or protection. After December 31, 1981, States that have not complied with this requirement will not be eligible for Federal financial assistance under this subpart until they complete their survey.

§ 35.1640 Application review and evaluation.

EPA will review applications as they are received. EPA may request outside review by appropriate experts to assist with technical evaluation. Funding decisions will be based on the merit of each application in accordance with the application review criteria under § 35.1640–1. EPA will consider Phase 1 applications separately from Phase 2 applications.

§ 35.1640–1 Application review criteria.

(a) When evaluating applications, EPA will consider information supplied by the applicant which address the following criteria:

(1) The technical feasibility of the project, and where appropriate, the estimated improvement in lake water quality.

(2) The anticipated positive changes that the project would produce in the overall lake ecosystem, including the watershed, such as the net reduction in sediment, nutrient, and other pollutant loadings.

(3) The estimated improvement in fish and wildlife habitat and associated beneficial effects on specific fish populations of sport and commercial species.

(4) The extent of anticipated benefits to the public. EPA will consider such factors as

(i) The degree, nature and sufficiency of public access to the lake;

(ii) The size and economic structure of the population residing near the lake which would use the improved lake for recreational and other purposes;

(iii) The amount and kind of public transportation available for transport of the public to and from the public access points;

(iv) Whether other relatively clean publicly owned freshwater lakes within 80 kilometer radius already adequately serve the population; and

(v) Whether the restoration would benefit primarily the owners of private land adjacent to the lake.

(5) The degree to which the project considers the "open space" policies contained in sections 201(f), 201(g), and 208(b)(2)(A) of the Act.

(6) The reasonableness of the proposed costs relative to the proposed work, the likelihood that the project will succeed, and the potential public benefits.

(7) The means for controlling adverse environmental impacts which would result from the proposed restoration of the lake. EPA will give specific attention to the environmental concerns listed in section (c) of appendix A.

(8) The State priority ranking for a particular project.

(9) The State's operation and maintenance program to ensure that the pollution control measures and/or in-lake restorative techniques supported under the project will be continued after the project is completed.

(b) For Phase 1 applications, the review criteria presented in paragraph (a) of this section will be modified in relation to the smaller amount of technical information and analysis that is available in the application. Specifically, under criterion (a)(1), EPA will consider a technical assessment of the proposed project approach to meet the requirements stated in appendix A to this regulation. Under criterion (a)(4), EPA will consider the degree of public access to the lake and the public benefit. Under criterion (a)(7), EPA will consider known or anticipated adverse environmental impacts identified in the application or that EPA can presume will occur. Criterion (a)(9) will not be considered.

§ 35.1650 Award.

(a) Under 40 CFR 30.345, generally 90 days after EPA has received a complete application, the application will either be: (1) Approved for funding in an amount determined to be appropriate for the project; (2) returned to the applicant due to lack of funding; or (3) disapproved. The applicant shall be promptly notified in writing by the EPA Regional Administrator of any funding decisions.

(b) Applications that are disapproved can be submitted as new applications to EPA if the State resolves the issues identified during EPA review.

§ 35.1650–1 Project period.

(a) The project period for Phase 1 projects shall not exceed three years.

(b) The project period for Phase 2 projects shall not exceed four years. Implementation of complex projects and projects incorporating major construction may have longer project periods if approved by the Regional Administrator.

§ 35.1650–2 Limitations on awards.

(a) Before awarding assistance, the Regional Administrator shall determine that:

(1) The applicant has met all of the applicable requirements of § 35.1620 and § 35.1630; and

(2) State programs under section 314 of the Act are part of a State/EPA Agreement which shall be completed before the project is awarded.

(b) Before awarding Phase 2 projects, the Regional Administrator shall further determine that:

(1) When a Phase 1 project was awarded, the final report prepared under Phase 1 is used by the applicant to apply for Phase 2 assistance. The lake restoration plan selected under the Phase 1 project must be implemented under a Phase 2 cooperative agreement.

(2) Pollution control measures in the lake watershed authorized by section 201, included in an approved 208 plan, or required by section 402 of the Act have been completed or are being implemented according to a schedule that is included in an approved plan or discharge permit.

(3) The project does not include costs for controlling point source discharges of pollutants where those sources can be alleviated by permits issued under section 402 of the Act, or by the planning and construction of wastewater treatment facilities under section 201 of the Act.

(4) The State has appropriately considered the "open space" policy presented in sections 201(f), 201(g)(6), and 208(b)(2)(A) of the Act in any wastewater management activities being implemented by them in the lake watershed.

(5)(i) The project does not include costs for harvesting aquatic vegetation, or for chemical treatment to alleviate temporarily the symptoms of eutrophication, or for operating and maintaining lake aeration devices, or for providing similar palliative methods and procedures, unless these procedures are the most energy efficient or cost effective lake restorative method.

(ii) Palliative approaches can be supported only where pollution in the lake watershed has been controlled to the greatest practicable extent, and where such methods and procedures are a necessary part of a project during the project period. EPA will determine the eligibility of such a project, based on the applicant's justification for the proposed restoration, the estimated time period for improved lake water quality, and public benefits associated with the restoration.

(6) The project does not include costs for desalinization procedures for naturally saline lakes.

(7) The project does not include costs for purchasing or long term leasing of land used solely to provide public access to a lake.

(8) The project does not include costs resulting from litigation against the recipient by EPA.

(9) The project does not include costs for measures to mitigate adverse environmental impacts that are not identified in the approved project scope of work. (EPA may allow additional costs for mitigation after it has reevaluated the cost-effectiveness of the selected alternative and has approved a request for an increase from the recipient.)

§ 35.1650–3 Conditions on award.

(a) *All awards.* (1) All assistance awarded under the Clean Lakes program is subject to the EPA General Grant conditions (subpart C and appendix A of part 30 of this chapter).

(2) For each clean lakes project the State agrees to pay or arrange the payment of the non-Federal share of the project costs.

(b) *Phase 1.* Phase 1 projects are subject to the following conditions:

(1) The recipient must receive EPA project officer approval on any changes to satisfy the requirements of paragraph (a)(10) of appendix A before undertaking any other work under the grant.

(2)(i) Before selecting the best alternative for controlling pollution and improving the lake, as required in paragraph (b)(1) of appendix A of this regulation, and before undertaking any other work stated under paragraph (b) of appendix A, the recipient shall submit an interim report to the project officer. The interim report must include a discussion of the various available alternatives and a technical justification for the alternative that the recipient will probably choose. The report must include a summary of the public involvement and the comments that occurred during the development of the alternatives.

(ii) The recipient must obtain EPA project officer approval of the selected alternative before conducting additional work under the project.

(c) *Phase 2.* Phase 2 projects are subject to the following conditions:

(1)(i) The State shall monitor the project to provide data necessary to evaluate the efficiency of the project as jointly agreed to and approved by the EPA project officer. The monitoring program described in paragraph (b)(3) of appendix A of this regulation as well as any specific measurements that would be necessary to assess specific aspects of the project, must be considered during the development of a monitoring program and schedule. The project recipient shall receive the approval of the EPA project officer for a monitoring program and schedule to satisfy the requirements of appendix A paragraph (b)(3) before undertaking any other work under the project.

(ii) Phase 2 projects shall be monitored for at least one year after construction or pollution control practices are completed.

(2) The State shall manage and maintain the project so that all pollution control measures supported under the project will be continued during the project period at the same level of efficiency as when they were implemented. The State will provide reports regarding project maintenance as required in the cooperative agreement.

(3) The State shall upgrade its water quality standards to reflect a higher water quality use classification if the higher water quality use was achieved as a result of the project (see 40 CFR 35.1550(c)(2)).

(4) If an approved project allows purchases of equipment for lake maintenance, such as weed harvesters, aeration equipment, and laboratory equipment, the State shall maintain and operate the equipment according to an approved lake maintenance plan for a period specified in the cooperative agreement. In no case shall that period be for less than the time it takes to completely amortize the equipment.

(5) If primary adverse environmental impacts result from implementing approved lake restoration or protection procedures, the State shall include measures to mitigate these adverse impacts at part of the work under the project.

(6) If adverse impacts could result to unrecorded archeological sites, the State shall stop work or modify work plans to protect these sites in accordance with the National Historic Preservation Act. (EPA may allow additional costs for ensuring proper protection of unrecorded archeological sites in the project area after reevaluating the cost effectiveness of the procedures and approving a request for a cost increase from the recipient.)

(7) If a project involves construction or dredging that requires a section 404 permit for the discharge of dredged or fill material, the recipient shall obtain the necessary section 404 permits before performing any dredge or fill work.

§ 35.1650–4 Payment.

(a) Under § 30.615 of this chapter, EPA generally will make payments through letter of credit. However, the Regional Administrator may place any recipient on advance payment or on cost reimbursement, as necessary.

(b) Phase 2 projects involving construction of facilities or dredging and filling activities shall be paid by reimbursement.

§ 35.1650–5 Allowable costs.

(a) The State will be paid under § 35.1650–4 for the Federal share of all necessary costs within the scope of the approved project and determined to be allowable under 40 CFR 30.705, the provisions of this subpart, and the cooperative agreement.

(b) Costs for restoring lakes used solely for drinking water supplies are not allowable under the Clean Lakes Program.

§ 35.1650–6 Reports.

(a) States with Phase 1 projects shall submit semi-annual progress reports (original and one copy) to the EPA project officer within 30 days after the end of every other standard quarter. Standard quarters end on March 31, June 30, September 30, and December 31. These reports shall include the following:

(1) Work progress relative to the milestone schedule, and difficulties encountered during the previous six months.

(2) A brief discussion of the project findings appropriate to the work conducted during the previous six months.

(3) A report of expenditures in the past six months and those anticipated in the next six months.

(b) *Phase 2.* States with Phase 2 projects shall submit progress reports (original and one copy) according to the schedule established in the cooperative agreement. The frequency of Phase 2 project progress reports shall be determined by the size and complexity of the project, and shall be required no more frequently than quarterly. The Phase 2 progress report shall contain all of the information required for Phase 1 progress reports indicated in paragraph (a) of this section. This report also must include water quality monitoring data and a discussion of the changes in water quality which appear to have resulted from the lake restoration activities implemented during the reporting period.

(c) *Final Report.* States shall prepare a final report for all grants in accordance with §30.635–2 of this subchapter. Phase 1 reports shall be organized according to the outline of information requirements stated in appendix A. All water quality data obtained under the grant shall be submitted in the final report. Phase 2 reports shall conform to the format presented in the EPA manual on "Scientific and Technical Publications," May 14, 1974, as revised or updated. The States shall submit the report within 90 days after the project is completed.

(d) *Financial Status Report.* Within 90 days after the end of each budget period, the grantee shall submit to the Regional Administrator an annual report of all expenditures (Federal and non–Federal) which accrued during the budget period. Beginning in the second quarter of any succeeding budget period, payments may be withheld under §30.615–3 of this chapter until this report is received.

APPENDIX A TO SUBPART H OF PART 35—REQUIREMENTS FOR DIAGNOSTIC-FEASIBILITY STUDIES AND ENVIRONMENTAL EVALUATIONS

Phase 1 clean lakes projects shall include in their scope of work at least the following requirements, preferably in the order presented and under appropriate subheadings. The information required by paragraph (a)(10) and the monitoring procedures stated in paragraph (b)(3) of this appendix may be modified to conform to specific project requirements to reduce project costs without jeopardizing adequacy of technical information or the integrity of the project. All modifications must be approved by the EPA project officer as specified in §§35.1650–3(b)(1) and 35.1650–3(c)(1).

(a) A diagnostic study consisting of:

(1) An identification of the lake to be restored or studied, including the name, the State in which it is located, the location within the State, the general hydrologic relationship to associated upstream and downstream waters and the approved State water quality standards for the lake.

(2) A geological description of the drainage basin including soil types and soil loss to stream courses that are tributary to the lake.

(3) A description of the public access to the lake including the amount and type of public transportation to the access points.

(4) A description of the size and economic structure of the population residing near the lake which would use the improved lake for recreation and other purposes.

(5) A summary of historical lake uses, including recreational uses up to the present time, and how these uses may have changed because of water quality degradation.

(6) An explanation, if a particular segment of the lake user population is or will be more adversely impacted by lake degradation.

(7) A statement regarding the water use of the lake compared to other lakes within a 80 kilometer radius.

(8) An itemized inventory of known point source pollution discharges affecting or which have affected lake water quality over the past 5 years, and the abatement actions for these discharges that have been taken, or are in progress. If corrective action for the pollution sources is contemplated in the future, the time period should be specified.

(9) A description of the land uses in the lake watershed, listing each land use classification as a percentage of the whole and discussing the amount of nonpoint pollutant loading produced by each category.

(10) A discussion and analysis of historical baseline limnological data and one year of current limnological data. The monitoring schedule presented in paragraph (b)(3) of appendix A must be followed in obtaining the one year of current limnological data. This presentation shall include the present trophic condition of the lake as well as its surface area (hectares), maximum depth (meters), average depth (meters), hydraulic residence time, the area of the watershed draining to the lake (hectares), and the physical, chemical, and biological quality of the lake and

important lake tributary waters. Bathymetric maps should be provided. If dredging is expected to be included in the restoration activities, representative bottom sediment core samples shall be collected and analyzed using methods approved by the EPA project officer for phosphorus, nitrogen, heavy metals, other chemicals appropriate to State water quality standards, and persistent synthetic organic chemicals where appropriate. Further, the elutriate must be subjected to test procedures developed by the U.S. Army Corps of Engineers and analyzed for the same constituents. An assessment of the phosphorus (and nitrogen when it is the limiting lake nutrient) inflows and outflows associated with the lake and a hydraulic budget including ground water flow must be included. Vertical temperature and dissolved oxygen data must be included for the lake to determine if the hypolimnion becomes anaerobic and, if so, for how long and over what extent of the bottom. Total and soluble reactive phosphorus (P); and nitrite, nitrate, ammonia and organic nitrogen (N) concentrations must be determined for the lake. Chlorophyll *a* values should be measured for the upper mixing zone. Representative alkalinities should be determined. Algal assay bottle test data or total N to total P ratios should be used to define the growth limiting nutrient. The extent of algal blooms, and the predominant algal genera must be discussed. Algal biomass should be determined through algal genera identification, cell density counts (numbers of cells per milliliter) and converted to cell volume based on factors derived from direct measurements; and reported in biomass of each major genus identified. Secchi disk depth and suspended solids should be measured and reported. The portion of the shoreline and bottom that is impacted by vascular plants (submersed, floating, or emersed higher aquatic vegetation) must be estimated, specifically the lake surface area between 0 and the 10 meter depth contour or twice the Secchi disk transparency depth, whichever is less, and that estimate should include an identification of the predominant species. Where a lake is subject to significant public contact use or is fished for consumptive purposes, monitoring for public health reasons should be part of the monitoring program. Standard bacteriological analyses and fish flesh analyses for organic and heavy metal contamination should be included.

(11) An identification and discussion of the biological resources in the lake, such as fish population, and a discussion of the major known ecological relationships.

(b) A feasibility study consisting of:

(1) An identification and discussion of the alternatives considered for pollution control or lake restoration and an identification and justification of the selected alternative. This should include a discussion of expected water quality improvement, technical feasibility, and estimated costs of each alternative. The discussion of each feasible alternative and the selected lake restoration procedure must include detailed descriptions specifying exactly what activities would be undertaken under each, showing how and where these procedures would be implemented, illustrating the engineering specifications that would be followed including preliminary engineering drawings to show in detail the construction aspects of the project, and presenting a quantitative analysis of the pollution control effectiveness and the lake water quality improvement that is anticipated.

(2) A discussion of the particular benefits expected to result from implementing the project, including new public water uses that may result from the enhanced water quality.

(3) A Phase 2 monitoring program indicating the water quality sampling schedule. A limited monitoring program must be maintained during project implementation, particularly during construction phases or in-lake treatment, to provide sufficient data that will allow the State and the EPA project officer to redirect the project if necessary, to ensure desired objectives are achieved. During pre-project, implementation, and post-project monitoring activities, a single in-lake site should be sampled monthly during the months of September through April and biweekly during May through August. This site must be located in an area that best represents the limnological properties of the lake, preferably the deepest point in the lake. Additional sampling sites may be warranted in cases where lake basin morphometry creates distinctly different hydrologic and limnologic sub-basins; or where major lake tributaries adversely affect lake water quality. The sampling schedule may be shifted according to seasonal differences at various latitudes. The biweekly samples must be scheduled to coincide with the period of elevated biological activity. If possible, a set of samples should be collected immediately following spring turnover of the lake. Samples must be collected between 0800 and 1600 hours of each sampling day unless diel studies are part of the monitoring program. Samples must be collected between one-half meter below the surface and one-half meter off the bottom, and must be collected at intervals of every one and one-half meters, or at six equal depth intervals, whichever number of samples is less. Collection and analyses of all samples must be conducted according to EPA approved methods. All of the samples collected must be analyzed for total and soluble reactive phosphorus; nitrite, nitrate, ammonia, and organic nitrogen; pH; temperature; and dissolved oxygen. Representative alkalinities should be determined. Samples collected in the upper mixing zone must be analyzed for chlorophyll *a*. Algal biomass in the upper

mixing zone should be determined through algal genera identification, cell density counts (number of cells per milliliter) and converted to cell volume based on factors derived from direct measurements; and reported in terms of biomass of each major genera identified. Secchi disk depth and suspended solids must be measured at each sampling period. The surface area of the lake covered by macrophytes between 0 and the 10 meter depth contour or twice the Secchi disk transparency depth, whichever is less, must be reported. The monitoring program for each clean lakes project must include all the required information mentioned above, in addition to any specific measurements that are found to be necessary to assess certain aspects of the project. Based on the information supplied by the Phase 2 project applicant and the technical evaluation of the proposal, a detailed monitoring program for Phase 2 will be established for each approved project and will be a condition of the cooperative agreement. Phase 2 projects will be monitored for at least one year after construction or pollution control practices are completed to evaluate project effectiveness.

(4) A proposed milestone work schedule for completing the project with a proposed budget and a payment schedule that is related to the milestone.

(5) A detailed description of how non-Federal funds will be obtained for the proposed project.

(6) A description of the relationship of the proposed project to pollution control programs such as the section 201 construction grants program, the section 208 areawide wastewater management program, the Department of Agriculture Soil Conservation Service and Agriculture Stabilization and Conservation Service programs, the Department of Housing and Urban Development block grant program, the Department of Interior Heritage Conservation and Recreation Service programs and any other local, State, regional and Federal programs that may be related to the proposed project. Copies of any pertinent correspondence, contracts, grant applications and permits associated with these programs should be provided to the EPA project officer.

(7) A summary of public participation in developing and assessing the proposed project which is in compliance with part 25 of this chapter. The summary shall describe the matters brought before the public, the measures taken by the reporting agency to meet its responsibilities under part 25 and related provisions elsewhere in this chapter, the public response, and the agency's response to significant comments. Section 25.8 responsiveness summaries may be used to meet appropriate portions of these requirements to avoid duplication.

(8) A description of the operation and maintenance plan that the State will follow, including the time frame over which this plan will be operated, to ensure that the pollution controls implemented during the project are continued after the project is completed.

(9) Copies of all permits or pending permit applications (including the status of such applications) necessary to satisfy the requirements of section 404 of the Act. If the approved project includes dredging activities or other activities requiring permits, the State must obtain from the U.S. Army Corps of Engineers or other agencies the permits required for the discharge of dredged or fill material under section 404 of the Act or other Federal, State or local requirements. Should additional information be required to obtain these permits, the State shall provide it. Copies of section 404 permit applications and any associated correspondence must be provide to the EPA project officer at the time they are submitted to the U.S. Army Corps of Engineers. After reviewing the 404 permit application, the project officer may provide recommendations for appropriate controls and treatment of supernatant derived from dredged material disposal sites to ensure the maximum effectiveness of lake restoration procedures.

(c) States shall complete and submit an environmental evaluation which considers the questions listed below. In many cases the questions cannot be satisfactorily answered with a mere "Yes" or "No". States are encouraged to address other considerations which they believe apply to their project.

(1) Will the proposed project displace any people?

(2) Will the proposed project deface existing residences or residential areas? What mitigative actions such as landscaping, screening, or buffer zones have been considered? Are they included?

(3) Will the proposed project be likely to lead to a change in established land use patterns, such as increased development pressure near the lake? To what extent and how will this change be controlled through land use planning, zoning, or through other methods?

(4) Will the proposed project adversly affect a significant amount of prime agricultural land or agricultural operations on such land?

(5) Will the proposed project result in a significant adverse effect on parkland, other public land, or lands of recognized scenic value?

(6) Has the State Historical Society or State Historical Preservation Officer been contacted? Has he responded, and if so, what was the nature of that response? Will the proposed project result in a significant adversely effect on lands or structures of historic, architectural, archaeological or cultural value?

(7) Will the proposed project lead to a significant long-range increase in energy demands?

(8) Will the proposed project result in significant and long range adverse changes in ambient air quality or noise levels? Short term?

(9) If the proposed project involves the use of in-lake chemical treatment, what long and short term adverse effects can be expected from that treatment? How will the project recipient mitigate these effects?

(10) Does the proposal contain all the information that EPA requires in order to determine whether the project complies with Executive Order 11988 on floodplains? Is the proposed project located in a floodplain? If so, will the project involve construction of structures in the floodplain? What steps will be taken to reduce the possible effects of flood damage to the project?

(11) If the project involves physically modifying the lake shore or its bed or its watershed, by dredging, for example, what steps will be taken to minimize any immediate and long term adverse effects of such activities? When dredging is employed, where will the dredged material be deposited, what can be expected and what measures will the recipient employ to minimize any significant adverse impacts from its deposition?

(12) Does the project proposal contain all information that EPA requires in order to determine whether the project complies with Executive Order 11990 on wetlands? Will the proposed project have a significant adverse effect on fish and wildlife, or on wetlands or any other wildife habitat, especially those of endangered species? How significant is this impact in relation to the local or regional critical habitat needs? Have actions to mitigate habitat destruction been incorporated into the project? Has the recipient properly consulted with appropriate State and Federal fish, game and wildlife agencies and with the U.S. Fish and Wildlife Service? What were their replies?

(13) Describe any feasible alternatives to the proposed project in terms of environmental impacts, commitment of resources, public interest and costs and why they were not proposed.

(14) Describe other measures not discussed previously that are necessary to mitigate adverse environmental impacts resulting from the implementation of the proposed project.

Subpart I—Grants for Construction of Treatment Works

AUTHORITY: Secs. 101(e), 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 219, 304(d)(3), 313, 501, 502, 511 and 516(b) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

SOURCE: 49 FR 6234, Feb. 17, 1984, unless otherwise noted.

§ 35.2000 Purpose and policy.

(a) The primary purpose of Federal grant assistance available under this subpart is to assist municipalities in meeting enforceable requirements of the Clean Water Act, particularly, applicable National Pollutant Discharge Elimination System (NPDES) permit requirements.

(b) This subpart supplements EPA's Uniform Relocation and Real Property Acquisition Policies Act regulation (part 4 of this chapter), its National Environmental Policy Act (NEPA) regulation (part 6 of this chapter), its public participation regulation (part 25 of this chapter), its intergovernmental review regulation (part 29 of this chapter), its general grant regulation (part 30 of this chapter), its debarment regulation (part 32 of this chapter), and its procurement under assistance regulation (part 33 of this chapter), and establishes requirements for Federal grant assistance for the building of wastewater treatment works. EPA may also find it necessary to publish other requirements applicable to the construction grants program in response to Congressional action and executive orders.

(c) EPA's policy is to delegate administration of the construction grants program on individual projects to State agencies to the maximum extent possible (see subpart F). Throughout this subpart we have used the term Regional Administrator. To the extent that the Regional Administrator delegates review of projects for compliance with the requirements of this subpart to a State agency under a delegation agreement (§ 35.1030), the term Regional Administrator may be read State agency. This paragraph does not affect the rights of citizens, applicants or grantees provided in subpart F.

(d) In accordance with the Federal Grant and Cooperative Agreement Act (Pub. L. 95–224) EPA will, when substantial Federal involvement is anticipated, award assistance under cooperative agreements. Throughout this subpart we have used the terms grant and grantee but those terms may be read

cooperative agreement and recipient if appropriate.

(e) From time to time EPA publishes technical and guidance materials on various topics relevant to the construction grants program. Grantees may find this information useful in meeting requirements in this subpart. These publications, including the MCD and FRD series, may be ordered from: EPA, 1200 Pennsylvania Ave., NW., room 1115 ET, WH 547, Washington, DC 20460. In order to expedite processing of requests, persons wishing to obtain these publications should request a copy of EPA form 7500–21 (the order form listing all available publications), from EPA Headquarters, Municipal Construction Division (WH–547) or from any EPA Regional Office.

§ 35.2005 Definitions.

(a) Words and terms not defined below shall have the meaning given to them in 40 CFR parts 30 and 33.

(b) As used in this subpart, the following words and terms mean:

(1) *Act.* The Clean Water Act (33 U.S.C. 1251 *et seq.*, as amended).

(2) *Ad valorem tax.* A tax based upon the value of real property.

(3) *Allowance.* An amount based on a percentage of the project's allowable building cost, computed in accordance with appendix B.

(4) *Alternative technology.* Proven wastewater treatment processes and techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constitutuents or otherwise eliminate the discharge of pollutants, or recover energy. Specifically, alternative technolgy includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse (non-potable); horticulture; revegetation of disturbed land; containment ponds; sludge composting and drying prior to land application; self-sustaining incineration; and methane recovery.

(5) *Alternative to conventional treatment works for a small community.* For purposes of §§ 35.2020 and 35.2032, alternative technology used by treatment works in small communities include alternative technologies defined in paragraph (b)(4), as well as, individual and onsite systems; small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

(6) *Architectural or engineering services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the grantee is located.

(7) *Best Practicable Waste Treatment Technology (BPWTT).* The cost-effective technology that can treat wastewater, combined sewer overflows and non-excessive infiltration and inflow in publicly owned or individual wastewater treatment works, to meet the applicable provisions of:

(i) 40 CFR part 133—secondary treatment of wastewater;

(ii) 40 CFR part 125, subpart G—marine discharge waivers;

(iii) 40 CFR 122.44(d)—more stringent water quality standards and State standards; or

(iv) 41 FR 6190 (February 11, 1976)—Alternative Waste Management Techniques for Best Practicable Waste Treatment (treatment and discharge, land application techniques and utilization practices, and reuse).

(8) *Building.* The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

(9) *Building completion.* The date when all but minor components of a project have been built, all equipment is operational and the project is capable of functioning as designed.

(10) *Collector sewer.* The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewaters directly from facilities which convey wastewater from individual systems, or from private property, and which include service "Y" connections designed for connection with those facilities including:

(i) Crossover sewers connecting more than one property on one side of a major street, road, or highway to a lateral sewer on the other side when more cost effective than parallel sewers; and

(ii) Except as provided in paragraph (b)(10)(iii) of this section, pumping units and pressurized lines serving individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

(iii) This definition excludes other facilities which convey wastewater from individual structures, from private property to the public lateral sewer, or its equivalent and also excludes facilities associated with alternatives to conventional treatment works in small communities.

(11) *Combined sewer.* A sewer that is designed as a sanitary sewer and a storm sewer.

(12) *Complete waste treatment system.* A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involving: (i) The transport of wastewater from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished; (ii) the treatment of the wastewater to remove pollutants; and (iii) the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process.

(13) *Construction.* Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative wastewater treatment processes and techniques (excluding operation and maintenance) meeting guidelines promulgated under section 304(d)(3) of the Act, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items.

(14) *Conventional technology.* Wastewater treatment processes and techniques involving the treatment of wastewater at a centralized treatment plant by means of biological or physical/chemical unit processes followed by direct point source discharge to surface waters.

(15) *Enforceable requirements of the Act.* Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act or applicable State laws. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary for the best practicable waste treatment technology to meet applicable criteria.

(16) *Excessive infiltration/inflow.* The quantities of infiltration/inflow which can be economically eliminated from a sewer system as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow. (See §§ 35.2005(b) (28) and (29) and 35.2120.)

(17) *Field testing.* Practical and generally small-scale testing of innovative or alternative technologies directed to verifying performance and/or refining design parameters not sufficiently tested to resolve technical uncertainties which prevent the funding of a promising improvement in innovative or alternative treatment technology.

(18) *Individual systems.* Privately owned alternative wastewater treatment works (including dual waterless/gray water systems) serving one or more principal residences, or small commercial establishments. Normally these are onsite systems with localized treatment and disposal of wastewater, but may be systems utilizing small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

(19) *Industrial user.* Any nongovernmental, nonresidential user of a publicly owned treatment works which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented, under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing
Division B. Mining
Division D. Manufacturing
Division E. Transportation, Communications, Electric, Gas, and Sanitary Services
Division I. Services

(20) *Infiltration.* Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

(21) *Inflow.* Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

(22) *Initiation of operation.* The date specified by the grantee on which use of the project begins for the purpose for which it was planned, designed, and built.

(23) *Innovative technology.* Developed wastewater treatment processes and techniques which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of significant reduction in life cycle cost or significant environmental benefits through the reclaiming and reuse of water, otherwise eliminating the discharge of pollutants, utilizing recycling techniques such as land treatment, more efficient use of energy and resources, improved or new methods of waste treatment management for combined municipal and industrial systems, or the confined disposal of pollutants so that they will not migrate to cause water or other environmental pollution.

(24) *Interceptor sewer.* A sewer which is designed for one or more of the following purposes:

(i) To intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor.

(ii) To replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant.

(iii) To transport wastewater from one or more municipal collector sewers to another municipality or to a regional plant for treatment.

(iv) To intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

(25) *Interstate agency.* An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

(26) *Marine bays and estuaries.* Semi-enclosed coastal waters which have a free connection to the territorial sea.

(27) *Municipality.* A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

(i) This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of domestic wastewater in a particular geographic area.

(ii) This definition excludes the following:

(A) Any revenue producing entity which has as its principal responsibility an activity other than providing wastewater treatment services to the general public, such as an airport, turnpike, port facility or other municipal utility.

(B) Any special district (such as school district or a park district) which has the responsibility to provide wastewater treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under State law to provide wastewater treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

(28) *Nonexcessive infiltration.* The quantity of flow which is less than 120 gallons per capita per day (domestic base flow and infiltration) or the quantity of infiltration which cannot be economically and effectively eliminated from a sewer system as determined in a cost-effectiveness analysis. (See §§ 35.2005(b)(16) and 35.2120.)

(29) *Nonexcessive inflow.* The maximum total flow rate during storm events which does not result in chronic operational problems related to hydraulic overloading of the treatment works or which does not result in a total flow of more than 275 gallons per capita per day (domestic base flow plus infiltration plus inflow). Chronic operational problems may include surcharging, backups, bypasses, and overflows. (See §§ 35.2005(b)(16) and 35.2120).

(30) *Operation and Maintenance.* Activities required to assure the dependable and economical function of treatment works.

(i) *Maintenance:* Preservation of functional integrity and efficiency of equipment and structures. This includes preventive maintenance, corrective maintenance and replacement of equipment (See § 35.2005(b)(36)) as needed.)

(ii) *Operation:* Control of the unit processes and equipment which make up the treatment works. This includes financial and personnel management; records, laboratory control, process control, safety and emergency operation planning.

(31) *Principal residence.* For the purposes of § 35.2034, the habitation of a family or household for at least 51 percent of the year. Second homes, vacation or recreation residences are not included in this definition.

(32) *Project.* The activities or tasks the Regional Administrator identifies in the grant agreement for which the grantee may expend, obligate or commit funds.

(33) *Project performance standards.* The performance and operations requirements applicable to a project including the enforceable requirements of the Act and the specifications, including the quantity of excessive infiltration and inflow proposed to be eliminated, which the project is planned and designed to meet.

(34) *Priority water quality areas.* For the purposes of § 35.2015, specific stream segments or bodies of water, as determined by the State, where municipal discharges have resulted in the impairment of a designated use or significant public health risks, and where the reduction of pollution from such discharges will substantially restore surface or groundwater uses.

(35) *Project schedule.* A timetable specifying the dates of key project events including public notices of proposed procurement actions, subagreement awards, issuance of notice to proceed with building, key milestones in the building schedule, completion of building, initiation of operation and certification of the project.

(36) *Replacement.* Obtaining and installing equipment, accessories, or appurtenances which are necessary during the design or useful life, whichever is longer, of the treatment works to maintain the capacity and performance for which such works were designed and constructed.

(37) *Sanitary sewer.* A conduit intended to carry liquid and water-carried wastes from residences, commercial buildings, industrial plants and institutions together with minor quantities of ground, storm and surface waters that are not admitted intentionally.

(38) *Services.* A contractor's labor, time or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

(39) *Small commercial establishments.* For purposes of § 35.2034 private establishments such as restaurants, hotels, stores, filling stations, or recreational facilities and private, nonprofit entities such as churches, schools, hospitals, or charitable organizations with dry weather wastewater flows less than 25,000 gallons per day.

(40) *Small Community.* For purposes of §§ 35.2020(b) and 35.2032, any municipality with a population of 3,500 or less or highly dispersed sections of larger municipalities, as determined by the Regional Administrator.

(41) *State.* A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas. For the purposes of applying for a grant under section 201(g)(1) of the act, a State (including its agencies) is subject to the limitations on revenue producing entities and special districts contained in § 35.2005(b)(27)(ii).

(42) *State agency.* The State agency designated by the Governor having responsibility for administration of the construction grants program under section 205(g) of the Act.

(43) *Step 1.* Facilities planning.

(44) *Step 2.* Preparation of design drawings and specifications.

(45) *Step 3.* Building of a treatment works and related services and supplies.

(46) *Step 2+3.* Design and building of a treatment works and building related services and supplies.

(47) *Step 7.* Design/building of treatment works wherein a grantee awards a single contract for designing and building certain treatment works.

(48) *Storm sewer.* A sewer designed to carry only storm waters, surface runoff, street wash waters, and drainage.

(49) *Treatment works.* Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the design life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost and land used for the storage of treated wastewater in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in combined storm water and sanitary sewer systems.

(50) *Treatment works phase or segment.* A treatment works phase or segment may be any substantial portion of a facility and its interceptors described in a facilities plan under § 35.2030, which can be identified as a subagreement or discrete subitem. Multiple subagreements under a project shall not be considered to be segments or phases. Completion of building of a treatment works phase or segment may, but need not in and of itself, result in an operable treatment works.

(51) *Useful life.* The period during which a treatment works operates. (Not "design life" which is the period during which a treatment works is planned and designed to be operated.)

(52) *User charge.* A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

(53) *Value engineering.* A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45894, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2010 Allotment; reallotment.

(a) Allotments are made on a formula or other basis which Congress specifies for each fiscal year (FY). The allotment for each State and the availability period shall be announced each fiscal year in the FEDERAL REGISTER. This section applies only to funds allotted under section 205 of the Act.

(b) Unless otherwise provided by Congress, all sums allotted to a State under section 205 of the Act shall remain available for obligation until the end of the one year after the close of the fiscal year for which the sums were appropriated. Except as provided in § 35.2020(a), sums not obligated at the end of that period shall be subject to reallotment on the basis of the same ratio as applicable to the then-current fiscal year, adjusted for the States which failed to obligate any of the fiscal year funds being reallotted, but none of the funds reallotted shall be made available to any State which failed to obligate any of the fiscal year funds being reallotted. Any sum made available to a State by reallotment under this section shall be in addition to any funds otherwise allotted to such State for grants under this subpart during any fiscal year and the reallotted funds shall remain available for obligation until the last day of the fiscal year following the fiscal year in which the reallotted funds are issued by the Comptroller to the Regional Administrator.

(c) Except for funds appropriated for FY 72 and fiscal years prior to 1972, sums which are deobligated and reissued by the Comptroller to the Regional Administrator before their reallotment date shall be available for obligation in the same State and treated in the same manner as the allotment from which such funds were derived.

(d) Except for funds appropriated for FY 72 and fiscal years prior to 1972, deobligated sums which are reissued by the Comptroller to the Regional Administrator after their reallotment date shall be available for obligation in the same State until the last day of the fiscal year following the fiscal year in which the reissuance occurs.

(e) Deobligated FY 72 and prior to 1972 fiscal year funds, except 1964, 1965 and 1966 funds, will be credited to the allowances of the same Region from which such funds are recovered, and the Regional Administrator may determine how these recoveries are credited to the States within the Region.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2012 Capitalization grants.

Amounts allotted to a State under title II may be deposited in that State's water pollution control revolving fund as a capitalization grant in accordance with 40 CFR 35.5020 (f) and (g).

[55 FR 27095, June 29, 1990]

§ 35.2015 State priority system and project priority list.

(a) *General.* The Regional Administrator will award grant assistance from annual allotments to projects on a State project priority list developed in accordance with an approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act. All projects for building treatment works to be funded by EPA must be included on a State project list, except training facilities funded under section 109(b) of the Act and marine CSO projects funded under section 201(n)(2) of the Act.

(b) *State priority system.* The State priority system describes the methodology used to rank projects that are considered eligible for assistance. The priority system should give high priority to projects in priority water quality areas. The priority system may also include the administrative, management, and public participation procedures required to develop and revise the State project priority list. The priority system includes at least the following elements:

(1) *Criteria.* (i) The priority system shall include at least the following criteria for ranking projects:

(A) The impairment of classified water uses resulting from existing municipal pollutant discharges; and

(B) The extent of surface or ground water use restoration or public health improvement resulting from the reduction in pollution.

(ii) The State may also include other criteria in its priority system for ranking projects, such as the use of innovative or alternative technology, the need to complete a waste treatment system for which a grant for a phase or segment was previously awarded; and the category of need and the existing population affected.

(iii) In ranking phased and segmented projects States must comply with § 35.2108.

(2) *Categories of need.* All projects must fit into at least one of the categories of need described in this paragraph to be eligible for funding, except as provided in paragraphs (b)(2) (iii) and (iv) of this section. States will have sole authority to determine the priority for each category of need.

(i) Before October 1, 1984, these categories of need shall include at least the following:

(A) Secondary treatment (category I);

(B) Treatment more stringent than secondary (category II);

(C) Infiltration/inflow correction (category IIIA);

(D) Major sewer system rehabilitation (category IIIB);

(E) New collector sewers and appurtenances (category IVA);

(F) New interceptors and appurtenances (category IVB);

(G) Correction of combined sewer overflows (category V).

(ii) After September 30, 1984, except as provided in paragraphs (b)(2) (iii) and (iv) of this section, these categories of need shall include only the following:

(A) Secondary treatment or any cost-effective alternative;

(B) Treatment more stringent than secondary or any cost-effective alternative;

(C) New interceptors and appurtenances; and

(D) Infiltration/inflow correction.

(iii) After September 30, 1984, up to 20 percent (as determined by the Governor) of a State's annual allotment may be used for categories of need other than those listed in paragraph (b)(2)(ii) of this section and for any purpose for which grants may be made under sections 319 (h) and (i) of the Act (including any innovative and alternative approaches for the control of nonpoint sources of pollution).

(iv) After September 30, 1984, the Governor may include in the priority system a category for projects needed to correct combined sewer overflows which result in impaired uses in priority water quality areas. Only projects which comply with the requirements of § 35.2024(a) may be included in this category.

(c) *Project priority list.* The State's annual project priority list is an ordered listing of projects for which the State expects Federal financial assistance. The priority list contains two portions: the fundable portion, consisting of those projects anticipated to be funded from funds available for obligation; and the planning portion, consisting of projects anticipated to be funded from future authorized allotments.

(1) The State shall develop the project priority list consistent with the criteria established in the approved priority system. In ranking projects, the State must also consider total funds available, needs and priorities set forth in areawide water quality management plans, and any other factors contained in the State priority system.

(2) The list shall include an estimate of the eligible cost of each project.

(d) *Public participation.* (1) In addition to any requirements in 40 CFR part 25, the State shall hold public hearings as follows:

(i) Before submitting its priority system to the Regional Administrator for approval and before adopting any significant change to an approved priority system; and

(ii) Before submitting its annual project priority list to the Regional Administrator for acceptance and before revising its priority list unless the State agency and the Regional Administrator determine that the revision is not significant.

(iii) If the approved State priority system contains procedures for bypassing projects on the fundable portion of the priority list, such bypasses will not be significant revisions for purposes of this section.

(2) Public hearings may be conducted as directed in the State's continuing planning process document or may be

held in conjunction with any regular public meeting of the State agency.

(e) *Regional Administrator review.* The State must submit its priority system, project priority list and revisions of the priority system or priority list to the Regional Administrator for review. The State must also submit each year, by August 31, a new priority list for use in the next fiscal year.

(1) After submission and approval of the initial priority system and submission and acceptance of the project priority lists under paragraph (c) of this section, the State may revise its priority system and list as necessary.

(2) The Regional Administrator shall review the State priority system and any revisions to insure that they are designed to obtain compliance with the criteria established in accordance with paragraphs (b) and (d) of this section and the enforceable requirements of the Act as defined in § 35.2005(b)(15). The Regional Administrator shall complete review of the priority system within 30 days of receipt of the system from the State and will notify the State in writing of approval or disapproval of the priority system, stating any reasons for disapproval.

(3) The Regional Administrator will review the project priority list and any revisions to insure compliance with the State's approved priority system and the requirements of paragraph (c) of this section. The Regional Administrator will complete review of the project priority list within 30 days of receipt from the State and will notify the State in writing of acceptance or rejection, stating the reasons for the rejection. Any project which is not contained on an accepted current priority list will not receive funding.

(f) *Compliance with the enforceable requirements of the Act.* (1) Except as limited under paragraph (f)(2) of this section, the Regional Administrator, after a public hearing, shall require the removal of a specific project or portion thereof from the State project priority list if the Regional Administrator determines it will not contribute to compliance with the enforceable requirements of the Act.

(2) The Regional Administrator shall not require removal of projects in categories under paragraphs (b)(2)(i) (D) through (G) of this section which do not meet the enforceable requirements of the Act unless the total Federal share of such projects would exceed 25 percent of the State's annual allotment.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27095, June 29, 1990]

§ 35.2020 Reserves.

In developing its priority list the State shall establish the reserves required or authorized under this section. The amount of each mandatory reserve shall be based on the allotment to each State from the annual appropriation under § 35.2010. The State may also establish other reserves which it determines appropriate.

(a) *Reserve for State management assistance grants.* Each State may request that the Regional Administrator reserve, from the State's annual allotment, up to 4 percent of the State's allotment based on the amount authorized to be appropriated, or $400,000, whichever is greater, for State management assistance grants under subpart A of this part. Grants may be made from these funds to cover the costs of administering activities delegated or scheduled to be delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for alternative systems for small communities.* Each State with 25 percent or more rural population (as determined by the population estimates of the Bureau of Census) shall reserve not less than 4 percent nor more than 7½ percent of the State's annual allotment for alternatives to conventional treatment works for small communities. The Governor of any non-rural State may reserve up to 7½ percent of the State's allotment for the same purpose.

(c) *Reserve for innovative and alternative technologies.* Each State shall reserve not less than 4 percent nor more than 7½ percent from its annual allotment to increase the Federal share of grant awards under § 35.2032 for projects

which use innovative or alternative wastewater treatment processes and techniques. Of this amount not less than one-half of one percent of the State's allotment shall be set aside to increase the Federal share for projects using innovative processes and techniques.

(d) *Reserve for water quality management.* Each State shall reserve not less than $100,000 nor more than 1 percent from its annual allotments, to carry out water quality management planning under § 35.2023, except that in the case of Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands and the Commonwealth of the Northern Marianas, a reasonable amount shall be reserved for this purpose.

(e) *Reserve for Advances of Allowance.* Each State shall reserve a reasonable portion of its annual allotment not to exceed 10 percent for advances of allowance under § 35.2025. The Regional Administrator may waive this reserve requirement where a State can demonstrate that such a reserve is not necessary because no new facilities planning or design work requiring an advance and resulting in Step 3 grant awards is expected to begin during the period of availability of the annual allotment.

(f) *Nonpoint source reserve.* Each State shall reserve 1 percent of its annual allotment or $100,000, whichever is greater, for development and implementation of a nonpoint source management program under section 319 of the Act. Sums reserved by the State under this paragraph that are in excess of $100,000 and that are not used for these purposes, may be used by the State for any other purpose under title II of the Act.

(g) *Marine estuary reserve.* The Administrator shall reserve, before allotment of funds to the States, 1 percent of the funds appropriated under section 207 in fiscal years 1987 and 1988, and 1½ percent of the funds appropriated under section 207 in fiscal years 1989 and 1990, to carry out section 205(l) of the Act.

(h) *Indian program reserve.* The Administrator shall reserve, before allotment of funds to the States, one-half of 1 percent of the funds appropriated under section 207 in fiscal years 1987, 1988, 1989 and 1990, for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2021 Reallotment of reserves.

(a) Mandatory portions of reserves under § 35.2020(b) through (g) shall be reallotted if not obligated during the allotment period (§ 35.2010(b) and (d)). Such reallotted sums are not subject to reserves. The State management assistance reserve under § 35.2020(a) is not subject to reallotment.

(b) States may request the Regional Administrator to release funds in optional reserves or optional portions of required reserves under § 35.2020(b) through (e) for funding projects at any time before the reallotment date. If these optional reserves are not obligated or released and obligated for other purposes before the reallotment date, they shall be subject to reallotment under § 35.2010(b).

(c) Sums deobligated from the mandatory portion of reserves under paragraphs (b) through (e) of § 35.2020 which are reissued by the Comptroller to the Regional Administrator before the initial reallotment date for those funds shall be returned to the same reserve. (See § 35.2010(c)).

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2023 Water quality management planning.

(a) From funds reserved under § 35.2020(d) the Regional Administrator shall make grants to the States to carry out water quality management planning including but not limited to:

(1) Identifying the most cost-effective and locally acceptable facility and non-point measures to meet and maintain water quality standards;

(2) Developing an implementation plan to obtain State and local financial and regulatory commitments to implement measures developed under paragraph (a)(1) of this section;

(3) Determining the nature, extent and causes of water quality problems

in various areas of the State and interstate region, and reporting on these annually; and

(4) Determining which publicly owned treatment works should be constructed, in which areas and in what sequence, taking into account the relative degree of effluent reduction attained, the relative contributions to water quality of other point or nonpoint sources, and the consideration of alternatives to such construction, and implementing section 303(e) of the Act.

(b) In carrying out planning with grants made under paragraph (a) of this section, a State shall develop jointly with local, regional and interstate entities, a plan for carrying out the program and give funding priority to such entities and designated or undesignated public comprehensive planning organizations to carry out the purposes of this section.

§ 35.2024 Combined sewer overflows.

(a) *Grant assistance from State allotment.* As provided in § 35.2015(b)(2)(iv), after September 30, 1984, upon request from a State, the Administrator may award a grant under section 201(n)(1) of the Act from the State allotment for correction of combined sewer overflows provided that the project is on the project priority list, it addresses impaired uses in priority water quality areas which are due to the impacts of the combined sewer overflows and otherwise meets the requirements of this subpart. The State must demonstrate to the Administrator that the water quality goals of the Act will not be achieved without correcting the combined sewer overflows. The demonstration shall as a minimum prove that significant usage of the water for fishing and swimming will not be possible without the proposed project, and that the project will result in substantial restoration of an existing impaired use.

(b) *Separate fund for combined sewer overflows in marine waters.* (1) After September 30, 1982, the Administrator may award grants under section 201(n)(2) of the Act for addressing impaired uses or public health risks in priority water quality areas in marine bays and estuaries due to the impacts of combined sewer overflows. The Administrator may award such grants provided that the water quality benefits of the proposed project have been demonstrated by the State. The demonstration shall as a minimum prove that significant usage of the water for shellfishing and swimming will not be possible without the proposed project for correction of combined sewer overflows, and the proposed project will result in substantial restoration of an existing impaired use.

(2) The Administrator shall establish priorities for projects with demonstrated water quality benefits based upon the following criteria:

(i) Extent of water use benefits that would result, including swimming and shellfishing;

(ii) Relationship of water quality improvements to project costs; and

(iii) National and regional significance.

(3) If the project is a phase or segment of the proposed treatment works described in the facilities plan, the criteria in paragraph (b)(2) of this section must be applied to the treatment works described in the facilities plan and each segment proposed for funding.

(4) All requirements of this subpart apply to grants awarded under section 201(n)(2) of the Act except §§ 35.2010, 35.2015, 35.2020, 35.2021, 35.2025(b), 35.2042, 35.2103, 35.2109, and 35.2202.

§ 35.2025 Allowance and advance of allowance.

(a) *Allowance.* Step 2+3 and Step 3 grant agreements will include an allowance for facilities planning and design of the project and Step 7 agreements will include an allowance for facility planning in accordance with appendix B of this subpart.

(b) *Advance of allowance to potential grant applicants.* (1) After application by the State (see § 35.2040(d)), the Regional Administrator will award a grant to the State in the amount of the reserve under § 35.2020(e) to advance allowances to potential grant applicants for facilities planning and project design.

(2) The State may request that the right to receive payments under the grant be assigned to specified potential grant applicants.

(3) The State may provide advances of allowance only to small communities, as defined by the State, which would otherwise be unable to complete an application for a grant under § 35.2040 in the judgment of the State.

(4) The advance shall not exceed the Federal share of the estimate of the allowance for such costs which a grantee would receive under paragraph (a) of this section.

(5) In the event a Step 2+3, Step 3 or Step 7 grant is not awarded to a recipient of an advance, the State may seek repayment of the advance on such terms and conditions as it may determine. When the State recovers such advances they shall be added to its most recent grant for advances of allowance.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27095, June 29, 1990]

§ 35.2030 Facilities planning.

(a) *General.* (1) Facilities planning consists of those necessary plans and studies which directly relate to treatment works needed to comply with enforceable requirements of the Act. Facilities planning will investigate the need for proposed facilities. Through a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic and institutional characteristics of the area, it will demonstrate that, except for innovative and alternative technology under § 35.2032, the selected alternative is cost effective (i.e., is the most economical means of meeting the applicable effluent, water quality and public health requirements over the design life of the facility while recognizing environmental and other non-monetary considerations). For sewered communities with a population of 10,000 or less, consideration must be given to appropriate low cost technologies such as facultative ponds, trickling filters, oxidation ditches, or overland-flow land treatment; and for unsewered portions of communities of 10,000 or less, consideration must be given to onsite systems. The facilities plan will also demonstrate that the selected alternative is implementable from legal, institutional, financial and management standpoints.

(2) Grant assistance may be awarded before certification of the completed facilities plan if:

(i) The Regional Administrator determines that applicable statutory and regulatory requirements (including part 6) have been met; that the facilities planning related to the project has been substantially completed; and that the project for which grant assistance is awarded will not be significantly affected by the completion of the facilities plan and will be a component part of the complete waste treatment system; and

(ii) The applicant agrees to complete the facilities plan on a schedule the State accepts and such schedule is inserted as a special condition of the grant agreement.

(b) *Facilities plan contents.* A completed facilities plan must include:

(1) A description of both the proposed treatment works, and the complete waste treatment system of which it is a part.

(2) A description of the Best Practicable Wastewater Treatment Technology. (See § 35.2005(b)(7).)

(3) A cost-effectiveness analysis of the feasible conventional, innovative and alternative wastewater treatment works, processes and techniques capable of meeting the applicable effluent, water quality and public health requirements over the design life of the facility while recognizing environmental and other non-monetary considerations. The planning period for the cost-effectiveness analysis shall be 20 years. The monetary costs to be considered must include the present worth or equivalent annual value of all capital costs and operation and maintenance costs. The discount rate established by EPA for the construction grants program shall be used in the cost-effectiveness analysis. The population forecasting in the analysis shall be consistent with the current Needs Survey. A cost-effectiveness analysis must include:

(i) An evaluation of alternative flow reduction methods. (If the grant applicant demonstrates that the existing average daily base flow (ADBF) from the area is less than 70 gallons per capita per day (gpcd), or if the Regional Administrator determines the area has

an effective existing flow reduction program, additional flow reduction evaluation is not required.)

(ii) A description of the relationship between the capacity of alternatives and the needs to be served, including capacity for future growth expected after the treatment works become operational. This includes letters of intent from significant industrial users and all industries intending to increase their flows or relocate in the area documenting capacity needs and characteristics for existing or projected flows;

(iii) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to construction of new facilities;

(iv) An evaluation of the alternative methods for the reuse or ultimate disposal of treated wastewater and sludge material resulting from the treatment process;

(v) A consideration of systems with revenue generating applications;

(vi) An evaluation of opportunities to reduce use of, or recover energy;

(vii) Cost information on total capital costs, and annual operation and maintenance costs, as well as estimated annual or monthly costs to residential and industrial users.

(4) A demonstration of the non-existence or possible existence of excessive inflitration/inflow in the sewer system. See § 35.2120.

(5) An analysis of the potential open space and recreation opportunities associated with the project.

(6) An adequate evaluation of the environmental impacts of alternatives under part 6 of this chapter.

(7) An evaluation of the water supply implications of the project.

(8) For the selected alternative, a concise description at an appropriate level of detail, of at least the following:

(i) Relevant design parameters;

(ii) Estimated capital construction and operation and maintenance costs, (identifying the Federal, State and local shares), and a description of the manner in which local costs will be financed;

(iii) Estimated cost of future expansion and long-term needs for reconstruction of facilities following their design life;

(iv) Cost impacts on wastewater system users; and

(v) Institutional and management arrangements necessary for successful implementation.

(c) *Submission and review of facilities plan.* Each facilities plan must be submitted to the State for review. EPA recommends that potential grant applicants confer with State reviewers early in the facilities planning process. In addition, a potential grant applicant may request in writing from the State and EPA an early determination under part 6 of this chapter of the appropriateness of a categorical exclusion from NEPA requirements, the scope of the environmental information document or the early preparation of an environmental impact statement.

§ 35.2032 Innovative and alternative technologies.

(a) *Funding for innovative and alternative technologies.* Projects or portions of projects using unit processes or techniques which the Regional Administrator determines to be innovative or alternative technology shall receive increased grants under § 35.2152.

(1) Only funds from the reserve in § 35.2020(c) shall be used to increase these grants.

(2) If the project is an alternative to conventional treatment works for a small community, funds from the reserve in § 35.2020(b) may be used for the 75 percent portion, or any lower Federal share of the grant as determined under § 35.2152.

(b) *Cost-effectiveness preference.* The Regional Administrator may award grant assistance for a treatment works or portion of a treatment works using innovative or alternative technologies if the total present worth cost of the treatment works for which the grant is to be made does not exceed the total present worth cost of the most cost-effective alternative by more than 15 percent.

(1) Privately-owned individual systems (§ 35.2034) are not eligible for this preference.

(2) If the present worth costs of the innovative or alternative unit processes are 50 percent or less of the

present worth cost of the treatment works, the cost-effectiveness preference applies only to the innovative or alternative components.

(c) *Modification or replacement of innovative and alternative projects.* The Regional Administrator may award grant assistance to fund 100 percent of the allowable costs of the modification or replacement of any project funded with increased grant funding in accordance with paragraph (a) of this section if he determines that:

(1) The innovative or alternative elements of the project have caused the project or significant elements of the complete waste treatment system of which the project is a part to fail to meet project performance standards;

(2) The failure has significantly increased operation and maintenance expenditures for the project or the complete waste treatment system of which the project is a part; or requires significant additional capital expenditures for corrective action;

(3) The failure has occurred prior to two years after initiation of operation of the project; and

(4) The failure is not attributable to negligence on the part of any person.

§ 35.2034 Privately owned individual systems.

(a) An eligible applicant may apply for a grant to build privately owned treatment works serving one or more principal residences or small commercial establishments.

(b) In addition to those applicable limitations set forth in §§ 35.2100 through 35.2127 the grant applicant shall:

(1) Demonstrate that the total cost and environmental impact of building the individual system will be less than the cost of a conventional system;

(2) Certify that the principal residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date;

(3) Apply on behalf of a number of individual units to be served in the facilities planning area;

(4) Certify that public ownership of such works is not feasible and list the reasons; and

(5) Certify that such treatment works will be properly operated and maintained and will comply with all other requirements of section 204 of the Act.

§ 35.2035 Rotating biological contractor (RBC) replacement grants.

The Regional Administrator may award a grant for 100 percent of the cost, including planning and design costs, of modification or replacement of RBCs which have failed to meet design performance specifications, provided:

(a) The applicant for a modification/replacement grant demonstrates to the Regional Administrator's satisfaction, by a preponderance of the evidence, that the RBC failure is not due to the negligence of any person, including the treatment works owner, the applicant, its engineers, contractors, equipment manufacturers or suppliers;

(b) The RBC failure has significantly increased the project's capital or operation and maintenance costs;

(c) The modification/replacement project meets all requirements of EPA's construction grant and other applicable regulations, including 40 CFR parts 31, 32 and 35;

(d) The modification/replacement project is included within the fundable range of the State's annual project priority list; and

(e) The State certifies the project for funding from its regular (i.e. non-reserve) allotments and from funds appropriated or otherwise available after February 4, 1987.

[55 FR 27095, June 29, 1990]

§ 35.2036 Design/build project grants.

(a) *Terms and conditions.* The Regional Administrator may award a design/build (Step 7) project grant provided that:

(1) The proposed treatment works has an estimated total cost of $8 million or less;

(2) The proposed treatment works is an aerated lagoon, trickling filter, waste stabilization pond, land application system (wastewater or sludge), slow rate (intermittent) sand filter or subsurface disposal system;

(3) The proposed treatment works will be an operable unit, will meet all requirements of title II of the Act, and

will be operated to meet the requirements of any applicable permit;

(4) The grantee obtains bonds from the contractor in an amount the Regional Administrator determines adequate to protect the Federal interest in the treatment works (see 40 CFR 31.36(h));

(5) The grantee will not allow any engineer, engineering firm or contractor which provided facilities planning or pre-bid services to bid or carry out any part of the design/build work;

(6) Contracts will be firm, fixed price contracts;

(7) The grantee agrees that the grant amount, as amended to reflect the lowest responsive/responsible bid (see paragraph (e) of this section), will not be increased;

(8) The grantee will establish reasonable building start and completion dates;

(9) The grantee agrees that EPA will not pay more than 95 percent of the grant amount until after completion of building and the Regional Administrator's final project approval, based on initiation of operation and acceptance of the facility by the grantee;

(10) The grantee agrees that a recipient of a Step 7 grant is not eligible for any other grant for the project under title II of the Act; and

(11) The grantee accepts other terms and conditions deemed necessary by the Regional Administrator.

(b) *Procurement.* (1) Grantee procurement for developing or supplementing the facilities plan to prepare the pre-bid package, as well as for designing and building the project and performing construction management and contract administration, will be in accordance with EPA procurement requirements at 40 CFR part 31.

(2) The grantee will use the sealed bid (formal advertising) method of procurement to select the design/build contractor.

(3) The grantee may use the same architect or engineer that prepared the facilities plan to provide any or all of the pre-bid, construction management, and contract and/or project administration services provided the initial procurement met EPA requirements (see 40 CFR 31.36(k)).

(c) *Pre-bid package.* Each design/build project grant will provide for the preparation of a pre-bid package that is sufficiently detailed to insure that the bids received for the design/build work are complete, accurate and comparable and will result in a cost-effective, operable facility.

(d) *Grant amount.* The grant amount will be based on an estimate of the design/build project's final cost, including:

(1) An allowance for facilities planning if the grantee did not receive a Step 1 grant (the amount of the allowance is established as a percentage of the estimated design/build cost in accordance with appendix B of this subpart);

(2) An estimated cost of supplementing the facilities plan and other costs necessary to prepare the pre-bid package (see appendix A.I.1(a) of this subpart); and

(3) The estimated cost of the design/build contract.

(e) *Amended grant amount.* (1) After bids are accepted for the design/build contract, and the price of the lowest responsive, responsible bidder is determined, EPA will amend the design/build project grant based on:

(i) The amount of the lowest responsive, responsible bid;

(ii) A lump sum for construction management, contract and project administration services and contingencies;

(iii) Any adjustments to the final allowance for facilities planning if included as required by paragraph (c)(1) of this section (the amount of the final allowance is established as a percentage of the actual building cost in accordance with appendix B of this subpart);

(iv) The actual reasonable and necessary cost of supplementing the facilities plan to prepare the pre-bid package (see paragraph (c)(1) of this section); and

(v) The submission of approvable items required by § 35.2203 of this part.

(2) Changes to Step 7 projects cannot increase the amount of EPA assistance established at the time of the grant amendment.

(f) *Allotment limit for design/build grants.* The Governor may use up to 20

percent of the State's annual allotment for design/build project grants.

[55 FR 27096, June 29, 1990]

§ 35.2040 Grant application.

Applicants for Step 2+3 or Step 3 assistance shall submit applications to the State. In addition to the information required in parts 30 and 33 of this subchapter, applicants shall provide the following information:

(a) *Step 2+3: Combined design and building of a treatment works and building related services and supplies.* An application (EPA form 5700–32) for Step 2+3 grant assistance shall include:

(1) A facilities plan prepared in accordance with subpart E or I as appropriate;

(2) Certification from the State that there has been adequate public participation based on State and local statutes;

(3) Notification of any advance received under § 35.2025(b);

(4) Evidence of compliance with all application limitations on award (§§ 35.2100 through 35.2127); and

(5) The project schedule.

(b) *Step 3: Building of a treatment works and related services and supplies.* An application (EPA form 5700–32) for Step 3 grant assistance shall include:

(1) A facilities plan prepared in accordance with subpart E or I as appropriate;

(2) Certification from the State that there has been adequate public participation based on State and local statutes;

(3) Notification of any advance received under § 35.2025(b);

(4) Evidence of compliance with all applicable limitations on award (§§ 35.2100 through 35.2127);

(5) Final design drawings and specifications;

(6) The project schedule; and

(7) In the case of an application for Step 3 assistance that is solely for the acquisition of eligible real property, a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the real property (see 40 CFR part 4).

(c) *Training facility project.* An application (EPA form 5700–32) for a grant for construction and support of a training facility, facilities or training programs under section 109(b) of the Act shall include:

(1) A written commitment from the State agency to carry out at such facility a program of training; and

(2) If a facility is to be built, an engineering report including facility design data and cost estimates for design and building.

(d) *Advances of allowance.* State applications for advances of allowance to small communities shall be on EPA form 5700–31, Application for Federal Assistance (short form). The application shall include:

(1) A list of communities that received an advance of allowance and the amount received by each under the previous State grant; and

(2) The basis for the amount requested.

(e) *Field Testing of Innovative and Alternative Technology.* An application (EPA Form 5700–32) for field testing of I/A projects shall include a field testing plan containing:

(1) Identification; including size, of all principal components to be tested;

(2) Location of testing facilities in relationship to full scale design;

(3) Identification of critical design parameters and performance variables that are to be verified as the basis for I/A determinations:

(4) Schedule for construction of field testing facilities and duration of proposed testing;

(5) Capital and O&M cost estimate of field testing facilities with documentation of cost effectiveness of field testing approach; and

(6) Design drawing, process flow diagram, equipment specification and related engineering data and information sufficient to describe the overall design and proposed performance of the field testing facility.

(f) *Marine CSO Fund Project.* An application (EPA Form 5700–32) for marine CSO grant assistance under § 35.2024(b) shall include:

(1) All information required under paragraphs (b) (1), (2), (4), (6), and (7), of this section;

(2) Final design drawings and specifications or a commitment to provide

them by a date set by the Regional Administrator; and

(3) The water quality benefits demonstration required under § 35.2024(b)(1).

(g) *Design/build project grant (Step 7).* An application (EPA Form 5700–20) for a design/build project grant shall include:

(1) All the information required in paragraphs (b) (1), (2) and (4) of this section; and

(2) The estimated building start and completion dates and Federal payment schedule (the start and completion dates may be revised when the design/build bids are accepted and included in the amended grant).

(Approved by the Office of Management and Budget under control number 2040–0027)

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27096, June 29, 1990]

§ 35.2042 Review of grant applications.

(a) All States shall review grant applications to ensure that they are complete. When the State determines the proposed project is entitled to priority it shall forward the State priority certification and, except where application review is delegated, the complete application to the regional Administrator for review.

(b)(1) All States delegated authority to manage the construction grants program under section 205(g) of the Act and subpart F of this part shall furnish a written certification to the Regional Administrator, on a project-by-project basis, stating that the applicable Federal requirements within the scope of authority delegated to the State under the delegation agreement have been met. The certification must be supported by documentation specified in the delegation agreement which will be made available to the Regional Administrator upon request. The Regional Administrator shall accept the certification unless he determines the State has failed to establish adequate grounds for the certification or that an applicable requirement has not been met.

(2)(i) When EPA receives a certification covering all delegable preaward requirements, the Regional Administrator shall approve or disapprove the grant within 45 calendar days of receipt of the certification. The Regional Administrator shall state in writing the reasons for any disapproval, and he shall have an additional 45 days to review any subsequent revised submissions. If the Regional Administrator fails to approve or disapprove the grant within 45 days of receipt of the application, the grant shall be deemed approved and the Regional Adminstrator shall issue the grant agreement.

(ii) Grant increase requests are subject to the 45 day provision of this section if the State has been delegated authority over the subject matter of the request.

(c) Applications for assistance for training facilities funded under section 109(b) and for State advances of allowance under section 201(l)(1) of the Act and § 35.2025 will be reviewed in accordance with part 30 of this subchapter.

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§ 35.2050 Effect of approval or certification of documents.

Review or approval of facilities plans, design drawings and specifications or other documents by or for EPA is for administrative purposes only and does not relieve the grantee of its responsibility to properly plan, design, build and effectively operate and maintain the treatment works described in the grant agreement as required under law, regulations, permits, and good management practices. EPA is not responsible for increased costs resulting from defects in the plans, design drawings and specifications or other subagreement documents.

§ 35.2100 Limitations on award.

(a) *Facilities plan approval.* Before awarding grant assistance for any project the Regional Administrator shall approve the facilities plan and final design drawings and specifications and determine that the applicant and the applicant's project have met all the applicable requirements of §§ 35.2040 and 35.2100 through § 35.2127 except as provided in § 35.2202 for Step 2+3 projects and § 35.2203 for Step 7 projects.

(b) *Agreement on eligible costs.* (1) Concurrent with the approval of a Step 3, Step 2+3 or Step 7 grant, the Regional

Administrator and the grant applicant will enter into a written agreement which will specify the items in the proposed project that are eligible for Federal payments and which shall be incorporated as a special grant condition in the grant award.

(2) Notwithstanding such agreement, the Regional Administrator may:

(i) Modify eligibility determinations that are found to violate applicable Federal statutes and regulations;

(ii) Conduct an audit of the project;

(iii) Withhold or recover Federal funds for costs that are found to be unreasonable, unsupported by adequate documentation or otherwise unallowable under applicable Federal cost principles;

(iv) Withhold or recover Federal funds for costs that are incurred on a project that fails to meet the design specifications or effluent limitations contained in the grant agreement and NPDES permit issued under section 402 of the Act.

[55 FR 27096, June 29, 1990]

§ 35.2101 Advanced treatment.

Projects proposing advanced treatment shall be awarded grant assistance only after the project has been reviewed under EPA's advanced treatment review policy. This review must be completed before submission of any application. EPA recommends that potential grant applicants obtain this review before initiation of design.

§ 35.2102 Water quality management planning.

Before grant assistance can be awarded for any treatment works project, the Regional Administrator shall first determine that the project is:

(a) Included in any water quality management plan being implemented for the area under section 208 of the Act or will be included in any water quality management plan that is being developed for the area and reasonable progress is being made toward the implementation of that plan; and

(b) In conformity with any plan or report implemented or being developed by the State under sections 303(e) and 305(b) of the Act.

[55 FR 27097, June 29, 1990]

§ 35.2103 Priority determination.

The project shall be entitled to priority in accordance with § 35.2015, and the award of grant assistance for the project shall not jeopardize the funding of any project of higher priority under the approved priority system.

§ 35.2104 Funding and other considerations.

(a) The applicant shall;

(1) Agree to pay the non-Federal project costs;

(2) Demonstrate the legal, institutional, managerial, and financial capability to ensure adequate building and operation and maintenance of the treatment works throughout the applicant's jurisdiction including the ability to comply with part 30 of this subchapter. This demonstration must include: An explanation of the roles and responsibilities of the local governments involved; how construction and operation and maintenance of the facilities will be financed; a current estimate of the cost of the facilities; and a calculation of the annual costs per household. It must also include a written certification signed by the applicant that the applicant has analyzed the costs and financial impacts of the proposed facilities, and that it has the capability to finance and manage their building and operation and maintenance in accordance with this regulation;

(3) Certify that it has not violated any Federal, State or local law pertaining to fraud, bribery, graft, kickbacks, collusion, conflict of interest or other unlawful or corrupt practice relating to or in connection with facilities planning or design work on a wastewater treatment works project.

(4) Indicate the level of participation for minority and women's business enterprises during facilities planning and design of the project.

(b) Federal assistance made available by the Farmers Home Administration may be used to provide the non-Federal share of the project's cost.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2105 Debarment and suspension.

The applicant shall indicate whether it used the services of any individual, organization, or unit of government for facilities planning or design work whose name appears on the master list of debarments, suspensions, and voluntary exclusions. See 40 CFR 32.400. If the applicant indicates it has used the services of a debarred individual or firm, EPA will closely examine the facilities plan, design drawings and specifications to determine whether to award a grant. EPA will also determine whether the applicant should be found non-responsible under part 30 of this subchapter or be the subject of possible debarment or suspension under part 32 of this subchapter.

§ 35.2106 Plan of operation.

The applicant shall submit a draft plan of operation that addresses development of: An operation and maintenance manual; an emergency operating program; personnel training; an adequate budget consistent with the user charge system approved under § 35.2140; operational reports; laboratory testing needs; and an operation and maintenance program for the complete waste treatment system.

§ 35.2107 Intermunicipal service agreements.

If the project will serve two or more municipalities, the applicant shall submit the executed intermunicipal agreements, contracts or other legally binding instruments necessary for the financing, building and operation of the proposed treatment works. At a minimum they must include the basis upon which costs are allocated, the formula by which costs are allocated, and the manner in which the cost allocation system will be administered. The Regional Administrator may waive this requirement provided the applicant can demonstrate:

(a) That such an agreement is already in place; or

(b) Evidence of historic service relationships for water supply, wastewater or other services between the affected communities regardless of the existence of formal agreements, and

(c) That the financial strength of the supplier agency is adequate to continue the project, even if one of the proposed customer agencies fails to participate.

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§ 35.2108 Phased or segmented treatment works.

Grant funding may be awarded for a phase or segment of a treatment works, subject to the limitations of § 35.2123, although that phase or segment does not result in compliance with the enforceable requirements of the Act, provided:

(a) The grant agreement requires the recipient to make the treatment works of which the phase or segment is a part operational and comply with the enforceable requirements of the Act according to a schedule specified in the grant agreement regardless of whether grant funding is available for the remaining phases and segments; and

(b) Except in the case of a grant solely for the acquisition of eligible real property, one or more of the following conditions exist:

(1) The Federal share of the cost of building the treatment works would require a disproportionate share of the State's annual allotment relative to other needs or would require a major portion of the State's annual allotment;

(2) The period to complete the building of the treatment works will cover three years or more;

(3) The treatment works must be phased or segmented to meet the requirements of a Federal or State court order; or

(4) The treatment works is being phased or segmented to build only the less-than-secondary facility pending a final decision on the applicant's request for a secondary treatment requirement waiver under section 301(h) of the Act.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2109 Step 2+3.

The Regional Administrator may award a Step 2+3 grant which will provide the Federal share of an allowance under appendix B and the estimated allowable cost of the project only if:

(a) The population of the applicant municipality is 25,000 or less according to the most recent U.S. Census;

(b) The total Step 3 building cost is estimated to be $8 million or less; and

(c) The project is not for a treatment works phase or segment.

§ 35.2110 Access to individual systems.

Applicants for privately owned individual systems shall provide assurance of access to the systems at all reasonable times for such purposes as inspection, monitoring, building, operation, rehabilitation and replacement.

§ 35.2111 Revised water quality standards.

After December 29, 1984, no grant can be awarded for projects that discharge into stream segments which have not, at least once since December 29, 1981, had their water quality standards reviewed and revised or new standards adopted, as appropriate, under section 303(c) of the Act, unless:

(a) The State has in good faith submitted such water quality standards and the Regional Administrator has failed to act on them within 120 days of receipt;

(b) The grant assistance is for the construction of non-discharging land treatment or containment ponds; or

(c) The grant assistance is a State program grant awarded under section 205(g) or 205(j) of the Act.

[50 FR 45895, Nov. 4, 1985]

§ 35.2112 Marine discharge waiver applicants.

If the applicant is also an applicant for a secondary treatment requirement waiver under section 301(h) of the Act, a plan must be submitted which contains a modified scope of work, a schedule for completion of the less-than-secondary facility and an estimate of costs providing for building the proposed less-than-secondary facilities, including provisions for possible future additions of treatment processes or techniques to meet secondary treatment requirements.

§ 35.2113 Environmental review.

(a) The environmental review required by part 6 of this chapter must be completed before submission of any application. The potential applicant should work with the State and EPA as early as possible in the facilities planning process to determine if the project qualifies for a categorical exclusion from part 6 requirements, or whether a finding of no significant impact or an environmental impact statement is required.

(b) In conjunction with the facilities planning process as described in § 35.2030(c), a potential applicant may request, in writing, that EPA make a formal determination under part 6 of this chapter.

§ 35.2114 Value engineering.

(a) If the project has not received Step 2 grant assistance the applicant shall conduct value engineering if the total estimated cost of building the treatment works is more than $10 million.

(b) The value engineering recommendations shall be implemented to the maximum extent feasible.

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§ 35.2116 Collection system.

Except as provided in § 35.2032(c), if the project involves collection system work, such work:

(a) Shall be for the replacement or major rehabilitation of an existing collection system which was not build with Federal funds awarded on or after October 18, 1972, and shall be necessary to the integrity and performance of the complete waste treatment system; or

(b) Shall be for a new cost-effective collection system in a community in existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected wastewater and where the bulk (generally two-thirds) of the expected flow (flow from existing plus future residential users) will be from the resident population on October 18, 1972. The expected flow will be subject to the limitations for interceptors contained in § 35.2123. If assistance is awarded, the grantee shall provide assurances that the existing population will connect to the collection system within a reasonable time after project completion.

§ 35.2118 Preaward costs.

(a) EPA will not award grant assistance for Step 2+3 and Step 3 work performed before award of grant assistance for that project, except:

(1) In emergencies or instances where delay could result in significant cost increases, the Regional Administrator may approve preliminary building work (such as procurement of major equipment requiring long lead times, field testing of innovative and alternative technologies, minor sewer rehabilitation, acquisition of eligible land or an option for the purchase of eligible land or advance building on minor portions of treatment works) after completion of the environmental review as required by § 35.2113.

(2) If the Regional Administrator approves preliminary Step 3 work, such approval is not an actual or implied commitment of grant assistance and the applicant proceeds at its own risk.

(b) Any procurement is subject to the requirements of 40 CFR part 33, and in the case of acquisition of eligible real property, 40 CFR part 4.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2120 Infiltration/Inflow.

(a) *General.* The applicant shall demonstrate to the Regional Administrator's satisfaction that each sewer system discharging into the proposed treatment works project is not or will not be subject to excessive infiltration/inflow. For combined sewers, inflow is not considered excessive in any event.

(b) *Inflow.* If the rainfall induced peak inflow rate results or will result in chronic operational problems during storm events, or the rainfall-induced total flow rate exceeds 275 gpcd during storm events, the applicant shall perform a study of the sewer system to determine the quantity of excessive inflow and to propose a rehabilitation program to eliminate the excessive inflow. All cases in which facilities are planned for the specific storage and/or treatment of inflow shall be subject to a cost-effectiveness analysis.

(c) *Infiltration.* (1) If the flow rate at the existing treatment facility is 120 gallons per capita per day or less during periods of high groundwater, the applicant shall build the project including sufficient capacity to transport and treat any existing infiltration. However, if the applicant believes any specific portion of its sewer system is subject to excessive infiltration, the applicant may confirm its belief in a cost-effectiveness analysis and propose a sewer rehabilitation program to eliminate that specific excessive infiltration.

(2) If the flow rate at the existing treatment facility is more than 120 gallons per capita per day during periods of high groundwater, the applicant shall either:

(i) Perform a study of the sewer system to determine the quantity of excessive infiltration and to propose a sewer rehabilitation program to eliminate the excessive infiltration; or

(ii) If the flow rate is not significantly more than 120 gallons per capita per day, request the Regional Administrator to determine that he may proceed without further study, in which case the allowable project cost will be limited to the cost of a project with a capacity of 120 gallons per capita per day under appendix A.G.2.a.

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[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2122 Approval of user charge system and proposed sewer use ordinance.

If the project is for Step 3 grant assistance, unless it is solely for acquisition of eligible land, the applicant must obtain the Regional Administrator's approval of its user charge system (§ 35.2140) and proposed (or existing) sewer use ordinance § 35.2130). If the applicant has a sewer use ordinance or user charge system in affect, the applicant shall demonstrate to the Regional Administrator's satisfaction that they meet the requirements of this part and are being enforced.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2123 Reserve capacity.

EPA will limit grant assistance for reserve capacity as follows:

(a) If EPA awarded a grant for a Step 3 interceptor segment before December 29, 1981, EPA may award grants for remaining interceptor segments included in the facilities plan with reserve capacity as planned, up to 40 years.

(b) Except as provided in paragraph (a) of this section, if EPA awards a grant for a Step 3 or Step 3 segment of a primary, secondary, or advanced treatment facility or its interceptors included in the facilities plan before October 1, 1984, the grant for that Step 3 or Step 3 segment, and any remaining segments, may include 20 years reserve capacity.

(c) Except as provided in paragraph (b) of this section, after September 30, 1984, no grant shall be made to provide reserve capacity for a project for secondary treatment or more stringent treatment or new interceptors and appurtenances. Grants for such projects shall be based on capacity necessary to serve existing needs (including existing needs of residential, commercial, industrial, and other users) as determined on the date of the approval of the Step 3 grant. Grant assistance awarded after September 30, 1990 shall be limited to the needs existing on September 30, 1990.

(d) For any application with capacity in excess of that provided by this section:

(1) All incremental costs shall be paid by the applicant. Incremental costs include all costs which would not have been incurred but for the additional excess capacity, i.e., any cost in addition to the most cost-effective alternative with eligible reserve capacity described under paragraphs (a) and (b) of this section.

(2) It must be determined that the actual treatment works to be built meets the requirements of the National Environmental Policy Act and all applicable laws and regulations.

(3) The Regional Administrator shall approve the plans, specifications and estimates for the actual treatment works.

(4) The grantee shall assure the Regional Administrator satisfactorily that it has assessed the costs and financial impacts of the actual treatment works and has the capability to finance and manage their construction and operation.

(5) The grantee must implement a user charge system which applies to the entire service area of the grantee.

(6) The grantee shall execute appropriate grant conditions or releases protecting the Federal Government from any claim for any of the costs of construction due to the additional capacity.

§ 35.2125 Treatment of wastewater from industrial users.

(a) Grant assistance shall not be provided for a project unless the project is included in a complete waste treatment system and the principal purpose of both the project and the system is for the treatment of domestic wastewater of the entire community, area, region or district concerned.

(b) Allowable project costs do not include:

(1) Costs of interceptor or collector sewers constructed exclusively, or almost exclusively, to serve industrial users; or

(2) Costs for control or removal of pollutants in wastewater introduced into the treatment works by industrial users, unless the applicant is required to remove such pollutants introduced from nonindustrial users.

§ 35.2127 Federal facilities.

Grant assistance shall not be provided for costs to transport or treat wastewater produced by a facility that is owned and operated by the Federal Government which contributes more than 250,000 gallons per day or 5 percent of the design flow of the complete waste treatment system, whichever is less.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2130 Sewer use ordinance.

The sewer use ordinance (see also §§ 35.2122 and 35.2208) or other legally binding document shall prohibit any new connections from inflow sources into the treatment works and require that new sewers and connections to the treatment works are properly designed and constructed. The ordinance or

other legally binding document shall also require that all wastewater introduced into the treatment works not contain toxics or other pollutants in amounts or concentrations that endanger public safety and physical integrity of the treatment works; cause violation of effluent or water quality limitations; or preclude the selection of the most cost-effective alternative for wastewater treatment and sludge disposal.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2140 User charge system.

The user charge system (see §§ 35.2122 and 35.2208) must be designed to produce adequate revenues required for operation and maintenance (including replacement). It shall provide that each user which discharges pollutants that cause an increase in the cost of managing the effluent or sludge from the treatment works shall pay for such increased cost. The user charge system shall be based on either actual use under paragraph (a) of this section, ad valorem taxes under paragraph (b) of this section, or a combination of the two.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of wastewater treatment services shall provide that each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total wastewater loading from all users (or user classes).

(b) *User charge system based on ad valorem taxes.* A grantee's user charge system which is based on ad valorem taxes may be approved if:

(1) On December 27, 1977, the grantee had in existence a system of dedicated ad valorem taxes which collected revenues to pay the cost of operation and maintenance of wastewater treatment works within the grantee's service area and the grantee has continued to use that system;

(2) The ad valorem user charge system distributes the operation and maintenance (including replacement) costs for all treatment works in the grantee's jurisdiction to the residential and small non-residential user class (including at the grantee's option non-residential, commercial and industrial users that introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works), in proportion to the use of the treatment works by this class; and

(3) Each member of the industrial user and commercial user class which discharges more than 25,000 gallons per day of sanitary waste pays its share of the costs of operation and maintenance (including replacement) of the treatment works based upon charges for actual use.

(c) *Notification.* Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill (or other means acceptable to the Regional Administrator), of the rate and that portion of the user charges or ad valorem taxes which are attributable to wastewater treatment services.

(d) *Financial management system.* Each user charge system must include an adequate financial management system that will accurately account for revenues generated by the system and expenditures for operation and maintenance (including replacement) of the treatment system, based on an adequate budget identifying the basis for determining the annual operation and maintenance costs and the costs of personnel, material, energy and administration.

(e) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users based upon either of the following:

(1) In the same manner that it distributes the costs for their actual use, or

(2) Under a system which uses one or any combination of the following factors on a reasonable basis:

(i) Flow volume of the users;

(ii) Land area of the users;

(iii) Number of hookups or discharges of the users;

(iv) Property valuation of the users, if the grantee has an approved user charge system based on ad valorem taxes.

(f) After completion of building a project, revenue from the project (e.g., sale of a treatment-related by-product; lease of the land; or sale of crops grown on the land purchased under the grant agreement) shall be used to offset the costs of operation and maintenance. The grantee shall proportionately reduce all user charges.

(g) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project accepts wastewater from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with this section. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works.

(h) *Inconsistent agreements.* The user charge system shall take precedence over any terms or conditions of agreements or contracts which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and this section.

(i) *Low income residential user rates.* (1) Grantees may establish lower user charge rates for low income residential users after providing for public notice and hearing. A low income residential user is any residence with a household income below the Federal poverty level as defined in 45 CFR 1060.2 or any residence designated as low income under State law or regulation.

(2) Any lower user charge rate for low income residential users must be defined as a uniform percentage of the user charge rate charged other residential users.

(3) The costs of any user charge reductions afforded a low income residential class must be proportionately absorbed by all other user classes. The total revenue for operation and maintenance (including equipment replacement) of the facilities must not be reduced as a result of establishing a low income residential user class.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2152 Federal share.

(a) *General.* The Federal share for each project shall be based on the sum of the total Step 3 or Step 7 allowable costs and the allowance established in the grant agreement under appendix B. Except as provided elsewhere in this section, the Federal share shall be:

(1) 75 percent for grant assistance awarded before October 1, 1984;

(2) 55 percent for grant assistance awarded after September 30, 1984, except as provided in paragraph (a)(3) of this section; and

(3) Subject to paragraphs (c) and (d) of this section, 75 percent for grant assistance awarded after September 30, 1984 and before October 1, 1990, for sequential phases or segments of a primary, secondary, or advanced treatment facility or its interceptors, or infiltration/inflow correction provided:

(i) The treatment works being phased or segmented is described in a facilities plan approved by the Regional Administrator before October 1, 1984;

(ii) The Step 3 grant for the initial phase or segment of the treatment works described in (a)(3)(i) of this section is awarded prior to October 1, 1984; and

(iii) The phase or segment that receives 75 percent funding is necessary to (A) make a phase or segment previously funded by EPA operational and comply with the enforceable requirements of the Act, or (B) complete the treatment works referenced in (a)(3)(i) of this section provided that all phases or segments previously funded by EPA are operational and comply with the enforceable requirements of the Act.

(b) *Innovative and alternative technology.* In accordance with § 35.2032, the Federal share for eligible treatment works or unit processes and techniques that the Regional Administrator determines meet the definition of innovative or alternative technology shall be 20 percent greater than the Federal share under paragraph (a) or (c) of this section, but in no event shall the total

Federal share be greater than 85 percent. This increased Federal share depends on the availability of funds from the reserve under § 35.2020. The proportional State contribution to the non-Federal share of building costs for I/A projects must be the same as or greater than the proportional State contribution (if any) to the non-Federal share of eligible building costs for all treatment works which receive 75 or 55 percent grants or such other Federal share under paragraph (c) of this section in the State.

(c) A project for which an application for grant assistance has been made before October 1, 1984, but which was under judicial injunction at that time prohibiting its construction, shall be eligible for a grant at 75 percent of the cost of its construction.

(d) *Uniform lower Federal share.* (1) Except as provided in § 35.2032 (c) and (d) of this section, the Governor of a State may request the Regional Administrator's approval to revise uniformly throughout the State the Federal share of grant assistance for all future projects. The revised Federal share must apply to all needs categories (see § 35.2015(b)(2)).

(2) After EPA awards grant assistance for a project, the Federal share shall be the same for any grant increase that is within the scope of the project.

(3) The uniform lower Federal share established by the Governor does not apply to projects funded under § 35.2024(b).

(e) *Training facilities.* The Federal share of treatment works required to train and upgrade waste treatment works operations and maintenance personnel may be up to 100 percent of the allowable cost of the project.

(1) Where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each State. The Federal funds awarded to any State under section 109(b) for all training facilities shall not exceed $500,000.

(2) Any grantee who received a grant under section 109(b) before December 27, 1977, may have the grant increased up to $500,000 by funds made available under the Act, not to exceed 100 percent of the allowable costs.

(Approved by the Office of Management and Budget under control number 2040–0027)

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45896, Nov. 4, 1985; 55 FR 27097, June 29, 1990]

§ 35.2200 Grant conditions.

In addition to the EPA General Grant Conditions (part 30 of this subchapter), each treatment works grant shall be subject to the conditions under §§ 35.2202 through 35.2218.

§ 35.2202 Step 2+3 projects.

(a) Prior to initiating action to acquire eligible real property, a Step 2+3 grantee shall submit for Regional Administrator review and written approval the information required under § 35.2040(b)(7).

(b) Before initiating procurement action for the building of the project, a Step 2+3 grantee shall submit for the Regional Administrator's review and written approval the information required under §§ 35.2040(b) (5) and (6), 35.2106, 35.2107, 35.2130 and 35.2140.

§ 35.2203 Step 7 projects.

(a) Prior to initiating action to acquire real property, a Step 7 grantee shall submit for Regional Administrator review and written approval the information required under § 35.2040(b)(7).

(b) Before approving a Step 7 grant amendment under § 25.2036, the Regional Administrator shall determine that the applicant and its project have met the requirements of §§ 35.2040 (b)(6) and (g), 35.2106, 35.2107, and 35.2122.

[55 FR 27097, June 29, 1990]

§ 35.2204 Project changes.

(a) Minor changes in the project work that are consistent with the objectives of the project and within the scope of the grant agreement do not require the execution of a formal grant amendment before the grantee's implementation of the change. However, the amount of the funding provided by the grant agreement may only be increased by a formal grant amendment.

(b) The grantee must receive from the Regional Administrator a formal

grant amendment before implementing changes which:

(1) Alter the project performance standards;

(2) Alter the type of wastewater treatment provided by the project;

(3) Significantly delay or accelerate the project schedule;

(4) Substantially alter the facilities plan, design drawings and specifications, or the location, size, capacity, or quality of any major part of the project; or

(5) Otherwise require a formal grant amendment under part 30 of this subchapter.

(c) Notwithstanding paragraph (a) of this section, changes to Step 7 projects cannot increase the amount of EPA assistance established at the time of the grant amendment.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2205 Maximum allowable project cost.

(a) *Grants awarded on or after the effective date of this regulation.* Except as provided in paragraph (c) of this section, for Step 2+3 or Step 3 grants awarded on or after the effective date of this regulation, the maximum allowable project cost will be the sum of:

(1) The allowable cost of the following:

(i) The initial award amount of all project subagreements between the grantee and its contractors;

(ii) The initial amounts approved for force account work to be performed on the project;

(iii) The purchase price of eligible real property; and

(iv) The initial amount approved for project costs not included under paragraphs (a)(1)(i) through (a)(1)(iii) of this section, excluding any amounts approved for an allowance under § 35.2025 and for contingencies; and

(2) Five percent of the sum of the amounts included under paragraphs (a)(1)(i) through (a)(1)(iv) of this section.

(b) *Grants awarded before the effective date of the regulation.* Except as provided in paragraph (c) of this section, for Step 2+3 or Step 3 grants awarded before the effective date of this regulation, the maximum allowable increase in the cost for work covered by each subagreement finally advertised or, where there will be no advertisement, each subagreement awarded on or after the effective date of this regulation will be five percent of the initial award amount of the subagreement.

(c) *Differing site conditions.* In determining whether the maximum allowable project cost or increase in subagreement cost will be exceeded, costs of equitable adjustments for differing site conditions will be exempt, provided the requirements of 40 CFR part 35, subpart I, appendix A, paragraph A.1.g. and all other applicable laws and regulations have been met.

[50 FR 46649, Nov. 12, 1985]

§ 35.2206 Operation and maintenance.

(a) The grantee must assure economical and effective operation and maintenance (including replacement) of the treatment works.

(b) Except as provided in paragraphs (c) (1) and (2) of this section, the Regional Administrator shall not pay more than 50 percent of the Federal share of any project unless the grantee has furnished and the Regional Administrator has approved the final plan of operation required by § 35.2106, and shall not pay more than 90 percent of the Federal share of any project unless the grantee has furnished and the Regional Administrator has approved an operation and maintenance manual.

(c)(1) In projects where segmenting of a proposed treatment works has occurred, the Regional Administrator shall not pay more than 90 percent of the Federal share of the total allowable costs of the proposed treatment works until the grantee has furnished and the Regional Administrator has approved an operation and maintenance manual.

(2) In projects where a component is placed in operation before completion of the entire project, the Regional Administrator shall not make any additional payment on that project until a final operation and maintenance manual for the operating component is furnished and approved.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2208 Adoption of sewer use ordinance and user charge system.

The grantee shall adopt its sewer use ordinance and implement its user charge system developed under §§ 35.2130 and 35.2140 before the treatment works is placed in operation. Further, the grantee shall implement the user charge system and sewer use ordinance for the useful life of the treatment works.

§ 35.2210 Land acquisition.

The grantee shall not acquire real property determined allowable for grant assistance until the Regional Administrator has determined that applicable provisions of 40 CFR part 4 have been met.

§ 35.2211 Field testing for Innovative and Alternative Technology Report.

The grantee shall submit a report containing the procedure, cost, results and conclusions of any field testing. The report shall be submitted to the Regional Administrator in accordance with a schedule to be specified in the grant agreement.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2212 Project initiation.

(a) The grantee shall expeditiously initiate and complete the project, in accordance with the project schedule contained in the grant application and agreement. Failure to promptly initiate and complete a project may result in the imposition of sanctions under part 30 of this chapter.

(b) The grantee shall initiate procurement action for building the project promptly after award of a Step 3 grant or, after receiving written approval of the information required under § 35.2202 under a Step 2+3 grant or, for a Step 7 project, after completing the facilities plan and the preparation of a pre-bid package that is sufficiently detailed to insure that the bids received form the design/build work will be complete, accurate, comparable and will result in a cost-effective operable facility. Public notice of proposed procurement action should be made promptly after Step 3 award or after final approvals for a Step 2+3 grant under § 35.2202, or after completing the pre-bid package for the Step 7 award. The grantee shall award the subagreement(s) and issue notice(s) to proceed, where required, for building all significant elements of the project within twelve months of the Step 3 award or final Step 2+3 approvals.

(c) Failure to promptly award all subagreement(s) for building the project will result in a limitation on allowable costs. (See appendixes A, A.2.e.).

(d) The grantee shall notify the Regional Administrator immediately upon award of the subagreement(s) for building all significant elements of the project (see 40 CFR 33.211).

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2214 Grantee responsibilities.

(a) The grantee shall complete the project in accordance with the grant agreement including: The facilities plan that establishes the need for the project; the design drawings and specifications; the plan of operation under § 35.2106 that identifies the basis to determine annual operating costs; the financial management system under § 35.2140(d) that adequately accounts for revenues and expenditures; the user charge system under § 35.2140 that will generate sufficient revenue to operate and maintain the treatment works; the project schedule; and all other applicable regulations. The grantee shall maintain and operate the project to meet project performance standards including the enforceable requirements of the Act for the design life.

(b) The grantee shall provide the architectural and engineering services and other services necessary to fulfill the obligation in paragraph (a) of this section.

§ 35.2216 Notice of building completion and final inspection.

The grantee shall notify the Regional Administrator when the building of the project is complete. Final inspection

shall be made by the Regional Administrator after receipt of the notice of building completion.

(Approved by the Office of Management and Budget under control number 2040–0027)

§ 35.2218 Project performance.

(a) The grantee shall notify the Regional Administrator in writing of the actual date of initiation of operation.

(b) Subject to the provisions of 40 CFR part 33, the grantee shall select the engineer or engineering firm principally responsible for either supervising construction or providing architectural and engineering services during construction as the prime engineer to provide the following services during the first year following the initiation of operation:

(1) Direct the operation of the project and revise the operation and maintenance manual as necessary to accommodate actual operating experience;

(2) Train or provide for training of operating personnel and prepare curricula and training material for operating personnel; and

(3) Advise the grantee whether the project is meeting the project performance standards.

(c) On the date one year after the initiation of operation of the project, the grantee shall certify to the Regional Administrator whether the project meets the project performance standards. If the Regional Administrator or the grantee concludes that the project does not meet the project performance standards, the grantee shall submit the following:

(1) A corrective action report which includes an analysis of the cause of the project's failure to meet the performance standards (including the quantity of infiltration/inflow proposed to be eliminated), and an estimate of the nature, scope and cost of the corrective action necessary to bring the project into compliance;

(2) The schedule for undertaking in a timely manner the corrective action necessary to bring the project into compliance; and

(3) The scheduled date for certifying to the Regional Administrator that the project is meeting the project performance standards.

(d) Except as provided in § 35.2032(c) the grantee shall take corrective action necessary to bring a project into compliance with the project performance standards at its own expense. This limitation on Federal funding for corrective actions does not apply to training funds under section 104(g)(1) of the Act.

(e) Nothing in this section:

(1) Prohibits a grantee from requiring more assurances, guarantees, or indemnity or other contractual requirements from any party performing project work; or

(2) Affects EPA's right to take remedial action, including enforcement, against a grantee that fails to carry out its obligations under § 35.2214.

(Approved by the Office of Management and Budget under control number 2040–0027)

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

§ 35.2250 Determination of allowable costs.

The Regional Administrator will determine the allowable costs of the project based on applicable provisions of laws and regulations, the scope of the approved project, § 30.705 of this subchapter, and appendix A of this subpart.

§ 35.2260 Advance purchase of eligible land.

In the case of grant assistance awarded solely for the acquisition of eligible land, the following provisions are deferred until the award of the ensuing Step 3 assistance for the building of facilities: §§ 35.2105, 35.2130, 35.2140, 35.2206 and 35.2208.

§ 35.2262 Funding of field testing.

In the case of grant assistance for field testing of innovative or alternative wastewater process and techniques, the following provisions are deferred until the award of assistance for building the approved facilities: §§ 35.2105, 35.2106, 35.2122, 35.2130, 35.2140, 35.2206, and 35.2208.

§ 35.2300 Grant payments.

Except as provided in § 35.2206, the Regional Administrator shall pay the Federal share of the allowance under

§ 35.2025 and the allowable project costs incurred to date and currently due and payable by the grantee, as certified in the grantee's most recent payment request.

(a) *Adjustment.* The Regional Administrator may at any time review and audit requests for payment and payments and make appropriate adjustments as provided in part 30 of this chapter.

(b) *Refunds, rebates and credits.* The Federal share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be credited to the current State allotment or paid to the United States. Examples include rebates for prompt payment and sales tax refunds. Reasonable expenses incurred by the grantee securing such refunds, rebates, credits, or other amounts shall be allowable under the grant when approved by the Regional Administrator.

(c) *Release.* By its acceptance of final payment, the grantee releases and discharges the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to exceptions previously specified in writing between the Regional Administrator and the grantee.

(d) *Payment of costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.* Notwithstanding the provisions of the introductory paragraph of this section, if the Regional Administrator determines it is necessary for the expeditious completion of a project, he may make advance payment after grant award for the Federal share of the eligible cost of any payment of relocation assistance under § 4.502(c) of this chapter by the grantee. The requirements in part 30 of this subchapter apply to any advances of funds for assistance payments.

(e) *Payment under grants to States for advances of allowance*—(1) *Advance payment to State.* Notwithstanding the provisions of the introductory paragraph of this section, the Regional Administrator, under a State grant for advances of allowance (see § 35.2025), may make payments on an advance or letter-of-credit payment method in accordance with the requirements under part 30 of this chapter. The State and the Regional Administrator shall agree to the payment terms.

(2) *Assignment.* If the State chooses to assign its payments to a potential grant applicant, it shall execute an agreement with the potential grant applicant authorizing direct payment from EPA and establishing appropriate terms for payment. The State shall provide a copy of the agreement to EPA.

(f) *Design/build projects.* For design/build projects, the Regional Administrator shall not pay more than 95 percent of the grant amount until completion of building and the RA's final project approval (see § 35.2036(a)(6)).

(Approved by the Office of Management and Budget under control number 2040–0027)

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

§ 35.2350 Subagreement enforcement.

(a) *Regional Administrator authority.* At the grantee's request the Regional Administrator may provide technical and legal assistance in the administration and enforcement of any subagreement related to treatment works for which an EPA grant was made and to intervene in any civil action involving the enforcement of such subagreements, including subagreement disputes which are the subject of either arbitration or court action.

(b) *Privity of subagreement.* The Regional Administrator's technical or legal involvement in any subagreement dispute will not make EPA a party to any subagreement entered into by the grantee.

(c) *Grantee responsibilities.* The provision of technical or legal assistance under this section in no way releases the grantee from its obligations under § 35.2214, or affects EPA's right to take remedial action, including enforcement, against a grantee that fails to carry out those obligations.

APPENDIX A TO SUBPART I OF PART 35—DETERMINATION OF ALLOWABLE COSTS

(a) *Purpose.* The information in this appendix represents Agency policies and procedures for determining the allowability of project costs based on the Clean Water Act, EPA policy, appropriate Federal cost principles under part 30 of this subchapter and reasonableness.

(b) *Applicability.* This cost information applies to grant assistance awarded on or after the effective date of this regulation. Project cost determinations under this subpart are not limited to the items listed in this appendix. Additional cost determinations based on applicable law and regulations must of course be made on a project-by-project basis. Those cost items not previously included in program requirements are not mandatory for decisions under grants awarded before the effective date. They are only to be used as guidance in those cases.

A. Costs Related to Subagreements

1. Allowable costs related to sub- agreements include:

a. The costs of subagreements for building the project.

b. The costs of complying with the procurement requirements of part 33 of this subchapter, other than the costs of self-certification under §33.110.

c. The cost of legal and engineering services incurred by grantees in deciding procurement protests and defending their decisions in protest appeals under subpart G of 40 CFR part 33.

d. The costs for establishing or using minority and women's business liaison services.

e. The costs of services incurred during the building of a project to ensure that it is built in conformance with the design drawings and specifications.

f. The costs (including legal, technical, and administrative costs) of assessing the merits of or negotiating the settlement of a claim by or against a grantee under a subagreement provided:

(1) The claim arises from work within the scope of the grant;

(2) A formal grant amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the grantee; and

(4) The Regional Administrator determines that there is a significant Federal interest in the issues involved in the claim.

g. Change orders and the costs of meritorious contractor claims for increased costs under subagreements as follows:

(1) Change orders and the costs of meritorious contractor claims provided the costs are:

(i) Within the scope of the project;

(ii) Not caused by the grantee's mismanagement; and

(iii) Not caused by the grantee's vicarious liability for the improper actions of others.

(2) Provided the requirements of paragraph g(1) are met, the following are examples of allowable change orders and contractor claim costs:

(i) Building costs resulting from defects in the plans, design drawings and specifications, or other subagreement documents only to the extent that the costs would have been incurred if the subagreement documents on which the bids were based had been free of the defects, and excluding the costs of any rework, delay, acceleration, or disruption caused by such defects;

(ii) Costs of equitable adjustments under Clause 4, Differing Site Conditions, of the model subagreement clauses required under §33.1030 of this subchapter.

(3) Settlements, arbitration awards, and court judgments which resolve contractor claims shall be reviewed by the grant award official and shall be allowable only to the extent that they meet the requirements of paragraph g(1), are reasonable, and do not attempt to pass on to EPA the cost of events that were the responsibility of the grantee, the contractor, or others.

h. The costs of the services of the prime engineer required by §35.2218 during the first year following initiation of operation of the project.

i. The cost of development of a plan of operation including an operation and maintenance manual required by §35.2106.

j. Start-up services for onsite training of operating personnel in operation and control of specific treatment processes, laboratory procedures, and maintenance and records management.

k. The specific and unique costs of field testing an innovative or alternative process or technique, which may include equipment leasing costs, personnel costs, and utility costs necessary for constructing, conducting, and reporting the results of the field test.

2. Unallowable costs related to sub- agreements include:

a. The costs of architectural or engineering services incurred in preparing a facilities plan and the design drawings and specifications for a project. This provision does not apply to planning and design costs incurred in the modification or replacement of an innovative or alternative project funded under §35.2032(c).

b. Except as provided in 1.g. above, architectural or engineering services or other services necessary to correct defects in a facilities plan, design drawings and specifications, or other subagreement documents.

c. The costs (including legal, technical and administrative) of defending against a contractor claim for increased costs under a

subagreement or of prosecuting a claim to enforce any subagreement unless:

(1) The claim arises from work within the scope of the grant;

(2) A formal grant amendment is executed specifically covering the costs before they are incurred;

(3) The claim cannot be settled without arbitration or litigation;

(4) The claim does not result from the grantee's mismanagement;

(5) The Regional Administrator determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the grantee's responsibility for the improper action of others.

d. Bonus payments, not legally required, for completion of building before a contractual completion date.

e. All incremental costs due to the award of any subagreements for building significant elements of the project more than 12 months after the Step 3 grant award or final Step 2+3 approvals unless specified in the project schedule approved by the Regional Administrator at the time of grant award.

B. Mitigation

1. Allowable costs include:

a. Costs necessary to mitigate only direct, adverse, physical impacts resulting from building of the treatment works.

b. The costs of site screening necessary to comply with NEPA related studies and facilities plans, or necessary to screen adjacent properties.

c. The cost of groundwater monitoring facilities necessary to determine the possibility of groundwater deterioration, depletion or modification resulting from building the project.

2. Unallowable costs include:

a. The costs of solutions to aesthetic problems, including design details which require expensive building techniques and architectural features and hardware, that are unreasonable or substantially higher in cost than approvable alternatives and that neither enhance the function or appearance of the treatment works nor reflect regional architectural tradition.

b. The cost of land acquired for the mitigation of adverse environmental effects identified pursuant to an environmental review under NEPA.

C. Privately or Publicly Owned Small and Onsite Systems

1. Allowable costs for small and onsite systems serving residences and small commercial establishments inhabited on or before December 27, 1977, include a. through e. below. Alternatively, the two-thirds rule at 40 CFR §35.2116(b) may be used to determine allowable residential flows to be served by publicly owned small and alternative wastewater systems, including a. through e. below:

a. The cost of major rehabilitation, upgrading, enlarging and installing small and onsite systems, but in the case of privately owned systems, only for principal residences.

b. Conveyance pipes from property line to offsite treatment unit which serves a cluster of buildings.

c. Treatment and treatment residue disposal portions of toilets with composting tanks, oil flush mechanisms, or similar inhouse devices.

d. Treatment or pumping units from the incoming flange when located on private property and conveyance pipes, if any, to the collector sewer.

e. The cost of restoring individual system building sites to their original condition.

2. Unallowable costs for small and onsite systems include:

a. Modification to physical structure of homes or commercial establishments.

b. Conveyance pipes from the house to the treatment unit located on user's property or from the house to the property line if the treatment unit is not located on that user's property.

c. Wastewater generating fixtures such as commodes, sinks, tubs, and drains.

D. Real Property

1. Allowable costs for land and rights-of-way include:

a. The cost (including associated legal, administrative and engineering costs) of land acquired in fee simple or by lease or easement under grants awarded after October 17, 1972, that will be an integral part of the treatment process or that will be used for the ultimate disposal of residues resulting from such treatment provided the Regional Administrator approves it in the grant agreement. These costs include:

(1) The cost of a reasonable amount of land, considering irregularities in application patterns, and the need for buffer areas, berms, and dikes;

(2) The cost of land acquired for a soil absorption system for a group of two or more homes;

(3) The cost of land acquired for composting or temporary storage of compost residues which result from wastewater treatment;

(4) The cost of land acquired for storage of treated wastewater in land treatment systems before land application. The total land area for construction of a pond for both treatment and storage of wastewater is allowable if the volume necessary for storage is greater then the volume necessary for treatment. Otherwise, the allowable cost will be determined by the ratio of the storage volume to the total volume of the pond.

b. The cost of complying with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4621 *et seq.*, 4651 *et seq.*), under part 4 of this chapter for land necessary for the building of treatment works.

c. The cost of contracting with another public agency or qualified private contractor for part or all of the required acquisition and/or relocation services.

d. The cost associated with the preparation of the treatment works site before, during and, to the extent agreed on in the grant agreement, after building. These costs include:

(1) The cost of demolition of existing structures on the treatment works site (including rights-of-way) if building cannot be undertaken without such demolition;

(2) The cost (considering such factors as betterment, cost of contracting and useful life) of removal, relocation or replacement of utilities, provided the grantee is legally obligated to pay under state or local law; and

(3) The cost of restoring streets and rights-of-way to their original condition. The need for such restoration must result directly from the construction and is generally limited to repaving the width of trench.

e. The cost of acquiring all or part of an existing publicly or privately owned wastewater treatment works provided all the following criteria are met:

(1) The acquisition, in and of itself, considered apart from any upgrade, expansion or rehabilitation, provides new pollution control benefits;

(2) The acquired treatment works was not built with previous Federal or State financial assistance;

(3) The primary purpose of the acquisition is *not* the reduction, elimination, or redistribution of public or private debt; and

(4) The acquisition does not circumvent the requirements of the Act, these regulations, or other Federal, State or local requirements.

2. Unallowable costs for land and rights-of-way include:

a. The costs of acquisition (including associated legal, administrative and engineering etc.) of sewer rights-of-way, waste treatment plant sites (including small system sites), sanitary landfill sites and sludge disposal areas except as provided in paragraphs 1. a. and b. of this section.

b. Any amount paid by the grantee for eligible land in excess of just compensation, based on the appraised value, the grantee's record of negotiation or any condemnation proceeding, as determined by the Regional Administrator.

c. Removal, relocation or replacement of utilities located on land by privilege, such as franchise.

E. Equipment, Materials and Supplies

1. Allowable costs of equipment, materials and supplies include:

a. The cost of a reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operations and laboratory items necessary to conduct tests required for plant operation.

b. The costs for purchase and/or transportation of biological seeding materials required for expeditiously initiating the treatment process operation.

c. Cost of shop equipment installed at the treatment works necessary to the operation of the works.

d. The costs of necessary safety equipment, provided the equipment meets applicable Federal, State, local or industry safety requirements.

e. A portion of the costs of collection system maintenance equipment. The portion of allowable costs shall be the total equipment cost less the cost attributable to the equipment's anticipated use on existing collection sewers not funded on the grant. This calculation shall be based on: (1) The portion of the total collection system paid for by the grant, (2) a demonstrable frequency of need, and (3) the need for the equipment to preclude the discharge or bypassing of untreated wastewater.

f. The cost of mobile equipment necessary for the operation of the overall wastewater treatment facility, transmission of wastewater or sludge, or for the maintenance of equipment. These items include:

(1) Portable stand-by generators;

(2) Large portable emergency pumps to provide "pump-around" capability in the event of pump station failure or pipeline breaks; and

(3) Sludge or septage tankers, trailers, and other vehicles having as their sole purpose the transportation of liquid or dewatered wastes from the collector point (including individual or on-site systems) to the treatment facility or disposal site.

g. Replacement parts identified and approved in advance by the Regional Administrator as necessary to assure uninterrupted operation of the facility, provided they are critical parts or major systems components which are:

(1) Not immediately available and/or whose procurement involves an extended "lead-time;"

(2) Identified as critical by the equipment supplier(s); or

(3) Critical but not included in the inventory provided by the equipment supplier(s).

2. Unallowable costs of equipment, materials and supplies include:

a. The costs of equipment or material procured in violation of the procurement requirements of 40 CFR part 33.

b. The cost of furnishings including draperies, furniture and office equipment.

c. The cost of ordinary site and building maintenance equipment such as lawnmowers and snowblowers.

d. The cost of vehicles for the transportation of the grantees' employees.

e. Items of routine "programmed" maintenance such as ordinary piping, air filters, couplings, hose, bolts, etc.

F. Industrial and Federal Users

1. Except as provided in paragraph F.2.a., allowable costs for treatment works serving industrial and Federal facilities include development of a municipal pretreatment program approvable under part 403 of this chapter, and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program.

2. Unallowable costs for treatment works serving industrial and Federal facilities include:

a. The cost of developing an approvable municipal pretreatment program when performed solely for the purpose of seeking an allowance for removal of pollutants under part 403 of this chapter.

b. The cost of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works.

c. All incremental costs for sludge management incurred as a result of the grantee providing removal credits to industrial users under 40 CFR 403.7 beyond those sludge management costs that would otherwise be incurred in the absence of such removal credits.

G. Infiltration/Inflow

1. Allowable costs include:

a. The cost of treatment works capacity adequate to transport and treat nonexcessive infiltration/inflow under §35.2120.

b. The costs of sewer system rehabilitation necessary to eliminate excessive infiltration/inflow as determined in a sewer system study under §35.2120.

2. Unallowable costs include:

a. When the Regional Administrator determines that the flow rate is not significantly more than 120 gallons per capita per day under §35.2120(c)(2)(ii), the incremental cost of treatment works capacity which is more than 120 gallons per capita per day.

H. Miscellaneous Costs

1. Allowable costs include:

a. The costs of salaries, benefits and expendable materials the grantee incurs for the project.

b. Unless otherwise specified in this regulation, the costs of meeting specific Federal statutory procedures.

c. Costs for necessary travel directly related to accomplishment of project objectives. Travel not directly related to a specific project, such as travel to professional meetings, symposia, technology transfer seminars, lectures, etc., may be recovered only under an indirect cost agreement.

d. The costs of additions to a treatment works that was assisted under the Federal Water Pollution Control Act of 1956 (Pub. L. 84–660), or its amendments, and that fails to meet its project performance standards provided:

(1) The project is identified on the State priority list as a project for additions to a treatment works that has received previous Federal funds;

(2) The grant application for the additions includes an analysis of why the treatment works cannot meet its project performance standards; and

(3) The additions could have been included in the original grant award and:

(a) Are the result of one of the following:

(i) A change in the project performance standards required by EPA or the State;

(ii) A written understanding between the Regional Administrator and grantee prior to or included in the original grant award;

(iii) A written direction by the Regional Administrator to delay building part of the treatment works; or

(iv) A major change in the treatment works' design criteria that the grantee cannot control; or

(b) Meet all the following conditions:

(i) If the original grant award was made after December 28, 1981, the treatment works has not completed its first full year of operation;

(ii) The additions are not caused by the grantee's mismanagement or the improper actions of others;

(iii) The costs of rework, delay, acceleration or disruption that are a result of building the additions are not included in the grant; and

(iv) The grant does not include an allowance for facilities planning or design of the additions.

(4) This provision applies to failures that occur either before or after the initiation of operation. This provision does not cover a treatment works that fails at the end of its design life.

e. Costs of royalties for the use of or rights in a patented process or product with the prior approval of the Regional Administrator.

f. Costs allocable to the water pollution control purpose of multiple purpose projects as determined by applying the Alternative Justifiable Expenditure (AJE) method described in the *CG* series. Multiple purpose projects that combine wastewater treatment with recreation do not need to use the AJE method, but can be funded at the level of the

most cost-effective single-purpose alternative.

g. Costs of grantee employees attending training workshops/seminars that are necessary to provide instruction in administrative, fiscal or contracting procedures required to complete the construction of the treatment works, if approved in advance by the Regional Administrator.

2. Unallowable costs include:

a. Ordinary operating expenses of the grantee including salaries and expenses of elected and appointed officials and preparation of routine financial reports and studies.

b. Preparation of applications and permits required by Federal, State or local regulations or procedures.

c. Administrative, engineering and legal activities associated with the establishment of special departments, agencies, commissions, regions, districts or other units of government.

d. Approval, preparation, issuance and sale of bonds or other forms of indebtedness required to finance the project and the interest on them.

e. The costs of replacing, through reconstruction or substitution, a treatment works that was assisted under the Federal Water Pollution Control Act of 1956 (Pub. L. 84–660), or its amendments, and that fails to meet its project performance standards. This provision applies to failures that occur either before or after the initiation of operation. This provision does not apply to an innovative and alternative treatment works eligible for funding under §35.2032(c) or a treatment works that fails at the end of its design life or to a failed rotating biological contactor eligible for funding under §35.2035.

f. Personal injury compensation or damages arising out of the project.

g. Fines and penalties due to violations of, or failure to comply with, Federal, State or local laws, regulations or procedures.

h. Costs outside the scope of the approved project.

i. Costs for which grant payment has been or will be received from another Federal agency.

j. Costs of treatment works for control of pollutant discharges from a separate storm sewer system.

k. The cost of treatment works that would provide capacity for new habitation or other establishments to be located on environmentally sensitive land such as wetlands or floodplains.

l. The costs of preparing a corrective action report required by §35.2218(c).

I. Design/Build Project Grants

1. Allowable costs include:

a. The costs of supplementing the facilities plan to prepare the pre-bid package including the cost of preliminary boring and site plans, concept and layout drawings, schematic, general material and major equipment lists and specifications, instructions to builders, general and special conditions, project performance standards and permit limits, applicable State or other design standards, any requirements to go into bid analyses, and other contract documents, schedules, forms and certificates.

b. The costs for building the project, including:

(1) Project costs based on the lowest responsive, responsible competitive design/build project bid.

(2) Construction management services including detailed plans and specifications review and approval, change order review and approval, resident inspection, shop drawing approval and preparation of an O & M manual and of user charge and sewer use ordinance systems.

(3) Any adjustments to reflect the actual reasonable and necessary costs for preparing the pre-bid package.

(4) Post-construction activities required by project performance certification requirements.

(5) Contract and project administration activities including the review of contractor vouchers and payment requests, preparation of monitoring reports, grant administration and accounting services, routine legal costs, cost of eligible real property.

(6) Contingencies.

2. Unallowable costs include:

a. All costs in excess of the maximum agreed Federal share.

b. Costs of facilities planning where the grantee has received a Step 1 grant.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45896, Nov. 4, 1985; 55 FR 27098, June 29, 1990]

APPENDIX B TO SUBPART I OF PART 35—ALLOWANCE FOR FACILITIES PLANNING AND DESIGN

1. This appendix provides the method EPA will use to determine both the estimated and the final allowance under §35.2025 for facilities planning and design. The Step 2+3, Step 3 and Step 7 grant agreements will include an estimate of the allowance.

2. The Federal share of the allowance is determined by applying the applicable grant percentage in §35.2152 to the allowance.

3. The allowance is not intended to reimburse the grantee for costs actually incurred for facilities planning or design. Rather, the allowance is intended to assist in defraying those costs. Under this procedure, questions of equity (i.e., reimbursement on a dollar-for-dollar basis) will not be appropriate.

4. The estimated and final allowance will be determined in accordance with this appendix and tables 1, 2 and 3. Table 2 is to be used in the event the grantee received a

grant for facilities planning. Table 3 is to be used to determine the facilities planning allowance for a Step 7 grant if the grantee did not receive a Step 1 grant. The amount of the allowance is computed by applying the resulting allowance percentage to the initial allowable building cost.

5. The initial allowable building cost is the initial allowable cost of erecting, altering, remodeling, improving, or extending a treatment works, whether accomplished through subagreement or force account. Specifically, the initial allowable building cost is the allowable cost of the following:

a. The initial award amount of all prime subagreements for building the project.

b. The initial amounts approved for force account work performed in lieu of awarding a subagreement for building the project.

c. The purchase price of eligible real property.

6. The estimated allowance is to be based on the estimate of the initial allowable building cost.

7. The final allowance will be determined one time only for each project, based on the initial allowable building cost, and will not be adjusted for subsequent cost increases or decreases.

8. For a Step 3 or Step 7 project, the grantee may request payment of 50 percent of the Federal share of the estimated allowance immediately after grant award. Final payment of the Federal share of the allowance may be requested in the first payment after the grantee has awarded all prime subagreements for building the project, received the Regional Administrator's approval for force account work, and completed the acquisition of all eligible real property.

9. For a Step 2+3 project, if the grantee has not received a grant for facilities planning, the grantee may request payment of 30 percent of the Federal share of the estimated allowance immediately after the grant award. Half of the remaining estimated allowance may be requested when design of the project is 50 percent complete. If the grantee has received a grant for facilities planning, the grantee may request half of the Federal share of the estimated allowance when design of the project is 50 percent complete. Final payment of the Federal share of the allowance may be requested in the first payment after the grantee has awarded all prime subagreements for building the project, received the Regional Administrator's approval for force account work, and completed the acquisition of all eligible real property.

10. The allowance does not include architect or engineering services provided during the building of the project, e.g., reviewing bids, checking shop drawings, reviewing change orders, making periodic visits to job sites, etc. Architect or engineering services during the building of the project are allowable costs subject to this regulation and 40 CFR part 33.

11. The State will determine the amount and conditions of any advance under §35.2025(b), not to exceed the Federal share of the estimated allowance.

12. EPA will reduce the Federal share of the allowance by the amount of any advances the grantee received under §35.2025(b).

TABLE 1—ALLOWANCE FOR FACILITIES PLANNING AND DESIGN

Building cost	Allowance as a percentage of building cost*
$100,000 or less	14.4945
120,000	14.1146
150,000	13.6631
175,000	13.3597
200,000	13.1023
250,000	12.6832
300,000	12.3507
350,000	12.0764
400,000	11.8438
500,000	11.4649
600,000	11.1644
700,000	10.9165
800,000	10.7062
900,000	10.5240
1,000,000	10.3637
1,200,000	10.0920
1,500,000	9.7692
1,750,000	9.5523
2,000,000	9.3682
2,500,000	9.0686
3,000,000	8.8309
3,500,000	8.6348
4,000,000	8.4684
5,000,000	8.1975
6,000,000	7.9827
7,000,000	7.8054
8,000,000	7.6550
9,000,000	7.5248
10,000,000	7.4101
12,000,000	7.2159
15,000,000	6.9851
17,500,000	6.8300
20,000,000	6.6984
25,000,000	6.4841
30,000,000	6.3142
35,000,000	6.1739
40,000,000	6.0550
50,000,000	5.8613
60,000,000	5.7077
70,000,000	5.5809
80,000,000	5.4734
90,000,000	5.3803
100,000,000	5.2983
120,000,000	5.1594
150,000,000	4.9944
175,000,000	4.8835
200,000,000	4.7894

NOTE: The allowance does not reimburse for costs incurred. Accordingly, the allowance tables shall not be used to determine the compensation for facilities planning or design services. The compensation for facilities planning or design services should be based upon the nature, scope and complexity of the services required by the community.

*Interpolate between values.

TABLE 2—ALLOWANCE FOR DESIGN ONLY

Building cost	Allowance as a percentage of building cost*
$100,000 or less	8.5683
120,000	8.3808
150,000	8.1570
175,000	8.0059
200,000	7.8772
250,000	7.6668
300,000	7.4991
350,000	7.3602
400,000	7.2419
500,000	7.0485
600,000	6.8943
700,000	6.7666
800,000	6.6578
900,000	6.5634
1,000,000	6.4300
1,200,000	6.3383
1,500,000	6.1690
1,750,000	6.0547
2,000,000	5.9574
2,500,000	5.7983
3,000,000	5.6714
3,500,000	5.5664
4,000,000	5.4769
5,000,000	5.3306
6,000,000	5.2140
7,000,000	5.1174
8,000,000	5.0352
9,000,000	4.9637
10,000,000	4.9007
12,000,000	4.7935
15,000,000	4.6655
17,500,000	4.5790
20,000,000	4.5054
25,000,000	4.3851
30,000,000	4.2892
35,000,000	4.2097
40,000,000	4.1421
50,000,000	4.0314
60,000,000	3.9432
70,000,000	3.8702
80,000,000	3.8080
90,000,000	3.7540
100,000,000	3.7063
120,000,000	3.6252
150,000,000	3.5284
175,000,000	3.4630
200,000,000	3.4074

NOTE: The allowance does not reimburse for costs incurred. Accordingly, the allowance tables shall not be used to determine the compensation for facilities planning or design services. The compensation for facilities planning or design services should be based upon the nature, scope and complexity of the services required by the community.
*Interpolate between values.

TABLE 3—ALLOWANCE FOR FACILITIES PLANNING FOR DESIGN/BUILD PROJECTS

Building cost (dollars)	Allowance as a percentage of building cost*
100,000 or less	5.9262
120,000	5.7337
150,000	5.5061
175,000	5.3538
200,000	5.2250
250,000	5.0163
300,000	4.8516
350,000	4.7162

TABLE 3—ALLOWANCE FOR FACILITIES PLANNING FOR DESIGN/BUILD PROJECTS—Continued

Building cost (dollars)	Allowance as a percentage of building cost*
400,000	4.6019
500,000	4.4164
600,000	4.2701
700,000	4.1499
800,000	4.0483
900,000	3.9606
1,000,000	3.8837
1,200,000	3.7538
1,500,000	3.6003
1,750,000	3.4976
2,000,000	3.4109
2,500,000	3.2703
3,000,000	3.1595
3,500,000	3.0684
4,000,000	2.9915
5,000,000	2.8669
6,000,000	2.7686
7,000,000	2.6880
8,000,000	2.6198

NOTE: Building cost is the sum of the allowable cost of (1) the initial award amount of the prime subagreement for building and designing the project; and (2) the purchase price of eligible real property.
*Interpolate between values.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

Subpart J—Construction Grants Program Delegation to States

AUTHORITY: Sections 205(g) and 518(e) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et. seq.*

SOURCE: 48 FR 37818, Aug. 19, 1983, unless otherwise noted.

§ 35.3000 Purpose.

(a) This regulation establishes policies and procedures for the development, management, and EPA overview of State administration of the wastewater treatment works construction grants program under section 205(g) of the Clean Water Act, as amended. The delegation agreement between EPA and the State is a precondition for construction management assistance under section 205(g). Program requirements for other assistance agreements authorized by section 205(g) for activities under sections 402 and 404 and section 208(b)(4) are provided in part 130. Administration of all section 205(g) assistance agreements follows the procedures established in subpart A of this part.

(b) A State, for purposes of receiving delegation of construction grant program responsibilities under this subpart, shall include a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territories of the Pacific Islands (Palau), the Commonwealth of the Northern Marianas, and any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation, provided that the Tribe satisfies the following criteria:

(1) The Indian Tribe has a governing body carrying out substantial governmental duties and powers. The Tribe must submit a narrative statement to the Regional Administrator describing the form of the Tribal government, describing the types of essential governmental functions currently performed and identifying the source of the authority to perform these functions.

(2) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation. Assertions by the Indian Tribe with respect to this criterion will be provided by EPA to adjacent governmental entities in accordance with 40 CFR 130.15.

(3) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.

(c) Where a Tribe has previously qualified for treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which had not been submitted in a previous treatment as a State application.

[48 FR 37818, Aug. 19, 1983, as amended at 55 FR 27098, June 29, 1990]

§ 35.3005 Policy.

(a) EPA's policy is to delegate management of the wastewater treatment works construction grant program to the maximum extent possible consistent with the objectives of the Act, prudent fiscal management, and EPA's overall national responsibility for the program. The policy is premised on an on-going partnership between EPA and the States that includes consultation with the States in formulation of policy and guidance by EPA. EPA expects States to undertake full delegation of all project level activities, including preliminary determinations of non-delegable requirements. The objective of delegation is to eliminate duplication of Federal and State effort in the management of the construction grant program, to increase State participation in the construction grant program, and to improve operating efficiency.

(b) Program delegation is to be accomplished through a formal delegation agreement between the Regional Administrator and the State. The delegation agreement will specify the functions which the State will perform and procedures for State certification to EPA.

(c) EPA will overview the performance of the program under delegation to ensure that progress is being made toward meeting the construction grant program objectives and that the State is continuing to employ administrative, fiscal, and program controls to guard against fraud, misuse, and mismanagement of public funds. Overview will also include review of the State management process to ensure it is efficient, effective and assures timely State reviews.

§ 35.3010 Delegation agreement.

(a) Before execution of the delegation agreement, the Regional Administrator must determine that the unit of the State agency designated to implement the agreement is capable of carrying out the delegated functions. The Regional Administrator will evaluate those aspects of the unit which directly affect the State's capability to implement the agreement.

(b) In the delegation agreement, the State agency will assure the Regional Administrator that it will execute its responsibilities under the delegation

agreement in conformance with all applicable Federal laws, regulations, orders, and policies.

(c) The delegation agreement will:

(1) Designate the organizational unit within the State responsible for the implementation of the delegation agreement;

(2) List the functions delegated and functions to be delegated, with a schedule for their assumption by the State;

(3) Identify procedures to be followed and records to be kept by the State and EPA in carrying out each delegated function;

(4) Identify the staffing, hiring, training, and funding necessary to carry out the delegated functions;

(5) Estimate program costs by year for the term of the delegation agreement;

(6) Identify an accounting system, acceptable to the Regional Administrator, which will properly identify and relate State costs to the conduct of delegated functions; and

(7) Identify the form and content of the system for EPA overview of State performance consistent with the requirements in § 35.3025 of this subpart, including the frequency, method, and extent of monitoring, evaluation, and reporting.

(d) The term of the delegation agreement shall generally be five years. As subsequent construction management assistance is awarded, the delegation agreement may be amended to maintain a five-year period.

(e) The delegation agreement will be revised, as necessary, to reflect substantial program or procedural changes, as determined by the Regional Administrator.

(Approved by the Office of Management and Budget under control number 2000–0417)

§ 35.3015 Extent of State responsibilities.

(a) Except as provided in paragraph (c) of this section, the Regional Administrator may delegate to the State agency authority to review and certify all construction grant documents required before and after grant award and to perform all construction grant review and management activities necessary to administer the construction grants program.

(b) The State may also act as the manager of waste treatment construction grant projects for small communities. The State, with the approval of the community, may serve as the community contracting agent and undertake responsibilities such as negotiating subagreements, providing technical assistance, and assisting the community in exercising its resident engineering responsibility. In this capacity, the State is in the same position as a private entity and cannot require a small community to hold the State harmless from negligent acts or omissions. The State may also execute an agreement with any organization within the State government, other than the State agency, which is capable of performing these services. The terms of the agreement to provide these services to small communities must be approved by the Regional Administrator before execution of the agreement.

(c) The Regional Administrator shall retain overall responsibility for the construction grant program and exercise direct authority for the following:

(1) Construction grant assistance awards, grant amendments, payments, and terminations;

(2) Projects where an overriding Federal interest requires greater Federal involvement;

(3) Final determinations under Federal statutes and Executive Orders (e.g., the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*), except for sections 201, 203, 204, and 212 of the Clean Water Act;

(4) Final resolution of construction grant audit exceptions; and

(5) Procurement determinations listed under 40 CFR 33.001(g).

§ 35.3020 Certification procedures.

(a) The State will furnish a written certification to the Regional Administrator for each construction grant project application submitted to EPA for award. The certification must state that all Federal requirements, within the scope of authority delegated to the State under the delegation agreement, have been met. This certification must be supported by documentation specified in the delegation agreement. The

documentation must be made available to the Regional Administrator upon request.

(b) Certification that a construction grant project application complies with all delegable pre-award requirements consists of certification of compliance with the following sections of subpart I of this part: § 35.2030 (Facilities planning); § 35.2040 (a) and (b) (Grant application); § 35.2042 (Review of grant applications); and §§ 35.2100 (Limitations on award) through and including 35.2125, except for § 35.2101 (Advanced treatment reviews for projects with incremental capital advanced treatment costs of over $3 million), § 35.2112 (Marine waiver discharge applicants), and § 35.2113 (final decisions under the National Environmental Policy Act).

§ 35.3025 Overview of State performance under delegation.

The Regional Administrator will review the performance of a delegated State through an annual overview program, developed in accordance with procedures agreed to in the delegation agreement (§ 35.3010(c)(7)). The purpose of the overview program is to ensure that both the delegated State and EPA efficiently and effectively execute the fiscal and program responsiblilities under the Clean Water Act and related legislation. The overview program is comprised of three steps:

(a) *Developing a plan for overview*. The plan for overview specifies priority objectives, key measures of performance, and monitoring and evaluation activities (including State reporting to EPA) for the upcoming year. EPA and the State should agree to a plan for overview in advance of the upcoming year.

(1) Priority objectives will include both program and management objectives. In developing the State priority objectives, the national priorities identified by the Administrator on an annual basis must, at a minimum, be addressed and applied as appropriate to each State. In addition, the Regional Administrator and the State may identify other objectives unique to the situation in the State.

(2) For each priority objective, the plan for overview will specify key measures of performance (both quantitative and qualitative), identify which measures will require the negotiation of outputs, and enumerate the specific monitoring and evaluation activities and methods planned for the upcoming year.

(b) *Negotiating annual outputs.* Annually, the Region and delegated State will negotiate and agree upon outputs, where required by the plan for overview, to cover priority objectives for the upcoming year. This negotiation should also result in development of the work program required for the section 205(g) assistance application, pursuant to subpart A, § 35.130 of this part. Where the assistance application covers a budget period beyond the annual overview program period, the assistance award may be made for the full budget period, contingent on future negotiation of annual outputs under this paragraph for subsequent years of the budget period.

(c) *Monitoring and evaluating program performance.* Monitoring and evaluation of program performance (including State reporting) is based on the plan for overview agreed to in advance, and should be appropriate to the delegation situation existing between the Region and State. It should take into account past performance of the State and the extent of State experience in administering the delegated functions. An on-site evaluation will occur at least annually and will cover, at a minimum, negotiated annual outputs, performance expected in the delegation agreement and, where applicable, evaluation of performance under the assistance agreement as provided in 40 CFR 35.150. The evaluation will cover performance of both the Region and the State. Upon completion of the evaluation, the delegation agreement may be revised, if necessary, to reflect changes resulting from the evaluation. The Regional Administrator may terminate or annul any section 205(g) financial assistance for cause in accordance with the procedures in subpart A, § 35.150, and part 30.

(Approved by the Office of Management and Budget under control number 2000–0417)

§ 35.3030 Right of review of State decision.

(a) Any construction grant application or grantee who has been adversely

affected by a State's action or omission may request Regional review of such action or omission, but must first submit a petition for review to the State agency that made the initial decision. The State agency will make a final decision in accordance with procedures set forth in the delegation agreement. The State must provide, in writing, normally within 45 days of the date it receives the petition, the basis for its decision regarding the disputed action or omission. The final State decision must be labeled as such and, if adverse to the applicant or grantee, must include notice of the right to request Regional review of the State decision under this section. A State's failure to address the disputed action or omission in a timely fashion, or in writing, will not preclude Regional review.

(b) Requests for Regional review must include:

(1) A copy of any written State decision.

(2) A statement of the amount in dispute,

(3) A description of the issues involved, and

(4) A concise statement of the objections to the State decision.

The request must be filed by registered mail, return receipt requested, within thirty days of the date of the State decision or within a reasonable time if the State fails to respond in writing to the request for review.

(c) The Region shall determine whether the State's review is comparable to a dispute decision official's (DDO) review pursuant to 40 CFR part 30, subpart L. If the State's review is comparable, Regional review of the State's decision will be conducted by the Regional Administrator. If the State's review is not comparable, the DDO will review the State's decision and issue a written decision. Review of either a Regional Administrator or DDO decision may be requested pursuant to subpart L.

(Approved by the Office of Management and Budget under control number 2040–0095)

[50 FR 45896, Nov. 4, 1985]

§ 35.3035 Public participation.

(a) Public participation during the development, review, approval, and substantial revision of the delegation agreement will be in accordance with the requirements of section 101(e) of the Act, part 25 of this chapter, and this subpart.

(b) The Regional Administrator or the State, as mutually agreed, will make the draft delegation agreement, any proposed substantial amendment to the delegation agreement, and the proposed annual overview program, available to the public for comment, and provide notice of availability, sufficiently in advance of execution to allow for timely comment.

(c) If, based on comments received, the Regional Administrator or State determines that significant interest exists, the State and EPA will consult with interested and affected groups and citizens prior to execution of the delegation agreement, substantial amendment, or annual overview program. If the Regional Administrator or State determines that significant interest and desire for a public meeting exist, the Region or State will hold one or more public meetings at least 30 days prior to execution.

Subpart K—State Water Pollution Control Revolving Funds

AUTHORITY: Sections 205(m), 501(a) and title VI of the Clean Water Act, as amended, 33 U.S.C. 1285(m), 33 U.S.C. 1361(a), 33 U.S.C. 1381–1387.

SOURCE: 55 FR 10178, Mar. 19, 1990, unless otherwise noted.

§ 35.3100 Policy and purpose.

(a) The Agency intends to implement the State water pollution control revolving fund program in a manner that preserves for States a high degree of flexibility for operating their revolving funds in accordance with each State's unique needs and circumstances. The purpose of these regulations is to advance the general intent of title VI of the Clean Water Act, which is to ensure that each State's program is designed and operated to continue providing assistance for water pollution control activities in perpetuity.

(b) These regulations reflect statutory and program requirements that have been previously published in the Initial Guidance for State Revolving

Funds, which was signed by the Assistant Administrator for Water on January 28, 1988, and the supplementary memorandum to the Initial Guidance for State Revolving Funds, which was signed by the Assistant Administrator for Water on September 30, 1988. Copies of both documents can be obtained by writing the Office of Municipal Pollution Control (WH–546), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(c) These regulations supplement title VI by codifying all major program requirements, applicable to the SRF program. EPA will not impose additional major program requirements without an opportunity for affected parties to comment. The process for amending this regulation to incorporate these requirements will begin within three months of their issuance.

§ 35.3105 Definitions.

Words and terms that are not defined below and that are used in this rule shall have the same meaning they are given in 40 CFR part 31 and 40 CFR part 35, subpart I.

(a) *Act.* The Federal Water Pollution Control Act, more commonly known as the Clean Water Act (Pub. L. 92–500), as amended by the Water Quality Act of 1987 (Pub. L. 100–4). 33 U.S.C. 1251 *et seq.*

(b) *Binding Commitment.* A legal obligation by the State to a local recipient that defines the terms for assistance under the SRF.

(c) *Capitalization Grant.* The assistance agreement by which the EPA obligates and awards funds allotted to a State for purposes of capitalizing that State's revolving fund.

(d) *Cash draw.* The transfer of cash under a letter of credit (LOC) from the Federal Treasury into the State's SRF.

(e) *Disbursement.* The transfer of cash from an SRF to an assistance recipient.

(f) *Equivalency projects.* Those section 212 wastewater treatment projects constructed in whole or in part before October 1, 1994, with funds "directly made available by" the capitalization grant. These projects must comply with the requirements of section 602(b)(6) of the Act.

(g) *Funds "directly made available by" capitalization grants.* Funds equaling the amount of the grant.

(h) *Payment.* An action by the EPA to increase the amount of capitalization grant funds available for cash draw from an LOC.

(i) *SRF.* State water pollution control revolving fund.

§ 35.3110 Fund establishment.

(a) *Generally.* Before the Regional Administrator (RA) may award a capitalization grant, the State must establish an SRF that complies with section 603 of the Act and this rule.

(b) *SRF accounts.* The SRF can be established within a multiple-purpose State financing program. However, the SRF must be a separate account or series of accounts that is dedicated solely to providing loans and other forms of financial assistance, but not grants.

(c) *SRF administration.* The SRF must be administered by an instrumentality of the State that is empowered to manage the Fund in accordance with the requirements of the Act. Where more than one agency of the State is involved in administering the activities of the State's program, the functions and the relationships of those agencies must be established to the satisfaction of the RA.

(d) *Documentation of the establishment of an SRF program.* (1) As part of its initial application for the capitalization grant, the State must furnish the RA with documentation of the establishment of an SRF and designation of the State instrumentality that will administer the SRF in accordance with the Act.

(2) With each capitalization grant application, the State's Attorney General (AG), or someone designated by the AG, must sign or concur in a certification that the State legislation establishing the SRF and the powers it confers are consistent with State law, and that the State may legally bind itself to the terms of the capitalization grant agreement.

(3) Where waiting for the AG's signature or concurrence would by itself significantly delay awarding the first grant (i.e., there are no other issues holding up the award), the head or chief legal officer of the State agency

which has direct responsibility for administering the SRF program may sign the certification at the time of the capitalization grant award, provided the capitalization grant agreement contains a special condition requiring the State to submit the AG/designee's concurrence to EPA within a reasonable time, not to exceed 120 days, after the grant is awarded.

(e) *Allotment.* (1) Appropriations for fiscal years 1987 through 1990 under both title II and title VI programs will be allotted in accordance with the formula contained in section 205(c)(3) of the Act.

(2) Title VI funds are available for the Agency to obligate to the State during the fiscal year in which they are allotted and during the following fiscal year. The amount of any title VI allotment not obligated to the State at the end of this period of availability will be reallotted for title VI purposes in accordance with 40 CFR 35.2010.

(3) A State that does not receive grants that obligate all the funds allotted to it under title VI in the first year of its availability will not receive reallotted funds from that appropriation.

(4) Notwithstanding 40 CFR 35.910 and 40 CFR 35.2010(a), deobligations and reallotments of title II funds may be transferred to a title VI capitalization grant regardless of either the year in which the title II funds were originally allotted or the year in which they are deobligated or reallotted.

(f) *Transfer of title II allotments.* A State may exercise the option to transfer a portion of its title II allotment for deposit, through a capitalization grant, into an established water pollution control revolving fund, under section 205(m) of the Act.

(1) If the State elects this option, the Governor of the State must submit a Notice of Intent to the RA specifying the amount of the title II allotment the State intends to use for title VI purposes during the fiscal year for which it is submitted. The Notice may also identify anticipated, unobligated title II funds from the prior fiscal year, and request transfer of those funds as well.

(2) Each Notice of Intent must be submitted on or before July 3 of the year preceding the Federal fiscal year in which those funds are available. If a State fails to file a Notice of Intent on or before the prescribed date, then the State may not transfer title II allotments into an SRF in the upcoming fiscal year. A timely Notice of Intent may be later withdrawn or amended.

(3) When the capitalization grant is awarded, funds requested under section 205(m) of the Act will be obligated under title VI for the activities of the SRF. If a Notice of Intent anticipates transfer of funds under the authority of section 205(m), but those funds are not so obligated by the end of the two year period of availability, they will be subject to reallotment as construction grant funds.

(g) *Reserves and transferred allotments.* (1) Funds reserved under section 205(g) of the Act can be used to develop SRF programs. However, before any of these funds may be used for purposes of the SRF, the State must establish to the satisfaction of the RA that adequate funds, up to the section 205(g) maximum, will be available from any source to administer the construction grants program.

(2) Funds reserved under sections 205(j)(1) and 205(j)(5) of the Act must be calculated based on the State's full title II allotment, and cannot be transferred to the SRF.

(3) Funds reserved under sections 201(l)(2), 205(h), and 205(i) of the Act must also be calculated based upon the State's full title II allotment. However, these reserves may be transferred into an SRF.

(4) The State must reserve from each fiscal year's title VI allotment the greater of one percent of its allotment or $100,000 to carry out planning under sections 205(j) and 303(e) of the Act.

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§ 35.3115 Eligible activities of the SRF.

Funds in the SRF shall not be used to provide grants. SRF balances must be available in perpetuity and must be used solely to provide loans and other authorized forms of financial assistance:

(a) To municipalities, inter-municipal, interstate, or State agencies for the construction of publicly owned wastewater treatment works as these

are defined in section 212 of the Act and that appear on the State's priority list developed pursuant to section 216 of the Act; and

(b) For implementation of a nonpoint source pollution control management program under section 319 of the Act; and

(c) For development and implementation of an estuary conservation and management plan under section 320 of the Act.

§ 35.3120 Authorized types of assistance.

The SRF may provide seven general types of financial assistance.

(a) *Loans.* The SRF may award loans at or below market interest rates, or for zero interest.

(1) Loans may be awarded only if:

(i) All principal and interest payments on loans are credited directly to the SRF;

(ii) The annual repayment of principal and payment of interest begins not later than one year after project completion;

(iii) The loan is fully amortized not later than twenty years after project completion; and

(iv) Each loan recipient establishes one or more dedicated sources of revenue for repayment of the loan.

(2) Where construction of a treatment works has been phased or segmented, loan repayment requirements apply to the completion of individual phases or segments.

(b) *Refinancing existing debt obligations.* The SRF may buy or refinance local debt obligations at or below market rates, where the initial debt was incurred after March 7, 1985, and building began after that date.

(1) Projects otherwise eligible for refinancing under this section on which building began:

(i) Before January 28, 1988 (the effective date of the Initial Guidance for State Revolving Funds) must meet the requirements of title VI to be fully eligible.

(ii) After January 28, 1988, but before the effective date of this rule, must meet the requirements of title VI and of the Initial Guidance for State Revolving Funds to be fully eligible.

(iii) After March 19, 1990 must meet the requirements of this rule to be fully eligible.

(2) Where the original debt for a project was in the form of a multi-purpose bond incurred for purposes in addition to wastewater treatment facility construction, an SRF may provide refinancing only for eligible purposes, and not for the entire debt.

(c) *Guarantee or purchase insurance for local debt obligations.* The SRF may guarantee local debt obligations where such action would improve credit market access or reduce interest rates. The SRF may also purchase or provide bond insurance to guarantee debt service payment.

(d) *Guarantee SRF debt obligations.* The SRF may be used as security or as a source of revenue for the payment of principal and interest on revenue or general obligation bonds issued by the State provided that the net proceeds of the sale of such bonds are deposited in the SRF.

(e) *Loan guarantees for "sub-State revolving funds."* The SRF may provide loan guarantees for similar revolving funds established by municipal or intermunicipal agencies, to finance activities eligible under title VI.

(f) *Earn interest on fund accounts.* The SRF may earn interest on Fund accounts.

(g) *SRF administrative expenses.* (1) Money in the SRF may be used for the reasonable costs of administering the SRF, provided that the amount does not exceed 4 percent of all grant awards received by the SRF. Expenses of the SRF in excess of the amount permitted under this section must be paid for from sources outside the SRF.

(2) Allowable administrative costs include all reasonable costs incurred for management of the SRF program and for management of projects receiving financial assistance from the SRF. Reasonable costs unique to the SRF, such as costs of servicing loans and issuing debt, SRF program start-up costs, financial management, and legal consulting fees, and reimbursement costs for support services from other State agencies are also allowable.

(3) Unallowable administrative costs include the costs of administering the

construction grant program under section 205(g), permit programs under sections 402 and 404 and Statewide wastewater management planning programs under section 208(b)(4).

(4) Expenses incurred issuing bonds guaranteed by the SRF, including the costs of insuring the issue, may be absorbed by the proceeds of the bonds, and need not be charged against the 4 percent administrative costs ceiling. The net proceeds of those issues must be deposited in the Fund.

§ 35.3125 Limitations on SRF assistance.

(a) *Prevention of double benefit.* If the SRF makes a loan in part to finance the cost of facility planning and preparation of plans, specifications, and estimates for the building of treatment works and the recipient subsequently receives a grant under section 201(g) for the building of treatment works and an allowance under section 201(1)(1), the SRF shall ensure that the recipient will promptly repay the loan to the extent of the allowance.

(b) *Assistance for the non-Federal share.* (1) The SRF shall not provide a loan for the non-Federal share of the cost of a treatment works project for which the recipient is receiving assistance from the EPA under any other authority.

(2) The SRF may provide authorized financial assistance other than a loan for the non-Federal share of a treatment works project receiving EPA assistance if the Governor or the Governor's designee determines that such assistance is necessary to allow the project to proceed.

(3) The SRF may provide loans for subsequent phases, segments, or stages of wastewater treatment works that previously received grant assistance for earlier phases, segments, or stages of the same treatment works.

(4) A community that receives a title II construction grant after the community has begun building with its own financing, may receive SRF assistance to refinance the pre-grant work, in accordance with the requirements for refinancing set forth under § 35.3120(b) of this part.

(c) *Publicly owned portions.* The SRF may provide assistance for only the publicly owned portion of the treatment works.

(d) *Private operation.* Contractual arrangements for the private operation of a publicly owned treatment works will not affect the eligibility of the treatment works for SRF financing.

(e) *Water quality management planning.* The SRF may provide assistance only to projects that are consistent with any plans developed under sections 205(j), 208, 303(e), 319 and 320 of the Act.

§ 35.3130 The capitalization grant agreement.

(a) *Contents.* The capitalization grant agreement must contain or incorporate by reference the State's application, Intended Use Plan, agreed upon payment schedule, State environmental review process and certifications or demonstrations of other agreement requirements and, where used, the SRF Operating Agreement.

(b) *Operating agreement.* At the option of the State, the organizational and administrative framework and those procedures of the SRF program that are not expected to change annually may be described in an Operating Agreement (OA). The OA must be incorporated by reference in the grant agreement.

(c) *Application requirements.* The State must certify in its application that it has the legal, managerial, technical, and operational capabilities to administer the program.

(Approved by the Office of Management and Budget under control number 2040–0118)

§ 35.3135 Specific capitalization grant agreement requirements.

(a) *Agreement to accept payments.* The State must agree to accept grant payments in accordance with the negotiated payment schedule.

(b) *Provide a State match.* The State must agree to deposit into its SRF an amount equaling at least 20 percent of the amount of each grant payment.

(1) The State match must be deposited on or before the date on which the State receives each payment from the grant award. The State may maintain its match in an LOC or other financial arrangement similar to the Federal

LOC, provided that the State's proportional share is converted to cash when the Federal LOC is drawn upon.

(2) Bonds issued by the State for the match may be retired from the interest earned by the SRF (including interest on SRF loans) if the net proceeds from the State issued bonds are deposited in the fund. Loan principal must be repaid to the SRF and cannot be used to retire State issued bonds.

(3) The State must identify the source of the matching amount in the capitalization grant application and must establish to the RA's satisfaction that the source is not Federal money, unless specifically authorized to be used for such purposes under the statute making the funds available.

(4) If the State provides a match in excess of the required amount, the excess balance may be banked toward subsequent match requirements.

(5) If the State has deposited State monies in a dedicated revolving fund after March 7, 1985 and prior to receiving a capitalization grant, the State may credit these monies toward the match requirement:

(i) If the monies were deposited in an SRF that subsequently received a capitalization grant and, if the deposit was expended, it was expended in accordance with title VI;

(ii) If the monies were deposited in a separate fund that has not received a capitalization grant, they were expended in accordance with title VI and an amount equal to all repayments of principal and payments of interest from these loans will be deposited in the Federally capitalized fund; or

(iii) If the monies were deposited in a separate fund and used as a reserve consistent with title VI, and an amount equal to the reserve is transferred to the Federally capitalized fund as its function is satisfied.

(c) *Binding commitments.* The State must make binding commitments in an amount equal to 120 percent of each quarterly grant payment within one year after the receipt of each quarterly grant payment.

(1) Binding commitments may be for any of the types of assistance provided for in sections 40 CFR 35.3120(a), (b), (c), (e) or (f) and for Fund administration under 40 CFR 35.3120(g).

(2) If the State commits more than the required 120 percent, EPA will recognize the cumulative value of the binding commitments, and the excess balance may be banked towards the binding commitment requirements of subsequent quarters.

(3) If the State does not make binding commitments equaling 120 percent of the quarterly grant payment within one year after it receives the payment, the RA may withhold future quarterly grant payments, and require adjustments to the payment schedule before releasing further payments.

(d) *Expeditious and timely expenditure.* The State must agree to expend all funds in the SRF in an expenditious and timely manner.

(e) *First use of funds.* (1) The State must agree to first use funds in the SRF equaling the amount of the grant, all repayments of principal and payments of interest on the initial loans from the grant, and the State match to address any major and minor publicly owned treatment works (POTW) that the Region and the State have previously identified as part of the National Municipal Policy list for the State.

(2) These funds may be used to fund the cost-effective reserve capacity of these projects.

(3) In order for a State to use these funds for other section 212 POTWs or for nonpoint source (section 319) or estuary (section 320) activities, the State must certify that the POTWs identified in § 35.3135(e)(1) are either:

(i) In compliance; or

(ii) On an enforceable schedule; or

(iii) Have an enforcement action filed; or

(iv) Have a funding commitment during or prior to the first year covered by the Intended Use Plan.

(4) Other funds in the SRF may be used at any time for the construction of any treatment works on the State's priority list or for activities under sections 319 and 320 of the Act.

(f) *Compliance with title II requirements.* (1) The State must agree that equivalency projects will comply with sections 201(b), 201(g)(1), 201(g)(2), 201(g)(3), 201(g)(5), 201(g)(6), 201(n)(1), 201(o), 204(a)(1), 204(a)(2), 204(b)(1),

204(d)(2), 211, 218, 511(c)(1), and 513 of the Act.

(2) The State must comply only with the statutory requirements. The State may develop its own procedures for implementing the statutory provisions. The RA will accept State procedures provided that the procedures will adequately assure compliance with the statutory requirements, considered in the context of the SRF program.

(3) Where the State funds equivalency projects for more than the capitalization grant amount, EPA will recognize the cumulative value of the eligible costs of the equivalency projects, and the excess balance may be banked toward subsequent year equivalency requirements.

(4) Only those eligible costs actually funded with loans or other authorized assistance from the SRF may be credited toward satisfaction of the equivalency requirement, and only in the amount of that assistance.

(g) *State laws and procedures.* The State must agree to commit or expend each quarterly capitalization grant payment in accordance with the State's own laws and procedures regarding the commitment or expenditure of revenues.

(h) *State accounting and auditing procedures.* (1) The State must agree to establish fiscal controls and accounting procedures that are sufficient to assure proper accounting for payments received by the SRF, disbursements made by the SRF, and SRF balances at the beginning and end of the accounting period.

(2) The State must also agree to use accounting, audit, and fiscal procedures conforming to generally accepted government accounting standards as these are promulgated by the Governmental Accounting Standards Board. Generally accepted government auditing standards are usually defined as, but not limited to, those contained in the U.S. General Accounting Office (GAO) publication "Government Auditing Standards" (1988 revision).

(i) *Recipient accounting and auditing procedures.* The State must agree to require recipients of SRF assistance to maintain project accounts in accordance with generally accepted government accounting standards as these are promulgated by the Government Accounting Standards Board. These accounts must be maintained as separate accounts.

(j) *Annual report.* The State must agree to make an Annual Report to the RA on the actual use of the funds, in accordance with section 606(d) of the Act.

§ 35.3140 Environmental review requirements.

(a) *Generally.* The State must agree to conduct reviews of the potential environmental impacts of all section 212 construction projects receiving assistance from the SRF, including nonpoint source pollution control (section 319) and estuary protection (section 320) projects that are also section 212 projects.

(b) *NEPA-like State environmental review process.* Equivalency projects must undergo a State environmental review process (SERP) that conforms generally to the National Environmental Policy Act (NEPA). The State may elect to apply the procedures at 40 CFR part 6, subpart E and related subparts, or apply its own "NEPA-like" SERP for conducting environmental reviews, provided that the following elements are met.

(1) *Legal foundation.* The State must have the legal authority to conduct environmental reviews of section 212 construction projects receiving SRF assistance. Such authority and supporting documentation must specify:

(i) The mechanisms to implement mitigation measures to ensure that a project is environmentally sound;

(ii) The legal remedies available to the public to challenge environmental review determinations and enforcement actions;

(iii) The State agency primarily responsible for conducting environmental reviews;

(iv) The extent to which environmental review responsibilities will be delegated to local recipients and will be subject to oversight by the primary State agency.

(2) *Interdisciplinary approach.* The State must employ an interdisciplinary approach for identifying and mitigating adverse environmental effects

including, but not limited to, those associated with other applicable Federal environmental authorities.

(3) *Decision documentation.* The State must fully document the information, processes and premises that influence decisions to:

(i) Proceed with a project contained in a finding of no significant impact (FNSI) following documentation in an environmental assessment (EA);

(ii) Proceed or not proceed with a project contained in a record of decision (ROD) following preparation of a full environmental impact statement (EIS);

(iii) Reaffirm or modify a decision contained in a previously issued categorical exclusion (CE), EA/FNSI or EIS/ROD following a mandatory 5 year environmental reevaluation of a proposed project; and

(iv) If a State elects to implement processes for either partitioning an environmental review or CE from environmental review, the State must similarly document these processes in its proposed SERP.

(4) *Public notice and participation.* (i) The State must provide public notice when a CE is issued or rescinded, a FNSI is issued but before it becomes effective, a decision issued 5 years earlier is reaffirmed or revised, and prior to initiating an EIS.

(ii) Except with respect to a public notice of a categorical exclusion or reaffirmation of a previous decision, a formal public comment period must be provided during which no action on a project will be allowed.

(iii) A public hearing or meeting must be held for all projects except for those having little or no environmental effect.

(5) *Alternatives Consideration.* The State must have evaluation criteria and processes which allow for:

(i) Comparative evaluation among alternatives including the beneficial and adverse consequences on the existing environment, the future environment and individual sensitive environmental issues that are identified by project management or through public participation; and

(ii) Devising appropriate near-term and long-range measures to avoid, minimize or mitigate adverse impacts.

(c) *Alternative State environmental review process.* The State may elect to apply an alternative SERP to non-equivalency section 212 construction projects assisted by the SRF, provided that such process:

(1) Is supported by a legal foundation which establishes the State's authority to review section 212 construction projects;

(2) Responds to other environmental objectives of the State;

(3) Provides for comparative evaluations among alternatives and account for beneficial and adverse consequences to the existing and future environment;

(4) Adequately documents the information, processes and premises that influence an environmental determination; and

(5) Provides for notice to the public of proposed projects and for the opportunity to comment on alternatives and to examine environmental review documents. For projects determined by the State to be controversial, a public hearing must be held.

(d) *EPA approval process.* The RA must review and approve any State "NEPA-like" and alternative procedures to ensure that the requirements for both have been met. The RA will conduct these reviews on the basis of the criteria for evaluating NEPA-like reviews contained in appendix A to this part.

(e) *Modifications to approved SERPs.* Significant changes to State environmental review procedures must be approved by the RA.

§ 35.3145 Application of other Federal authorities.

(a) *Generally.* The State must agree to comply and to require all recipients of funds "directly made available by" capitalization grants to comply with applicable Federal authorities.

(b) *Informing EPA.* The State must inform EPA when consultation or coordination by EPA with other Federal agencies is necessary to resolve issues regarding compliance with those requirements.

(c) *Civil Rights laws.* All programs, projects and activities of the State capitalization grant recipient must be in compliance with the Civil Rights Act

of 1964, as amended, 42 U.S.C. 2000d *et seq.,* section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 and section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500.

(d) *MBE/WBE requirements.* Requirements for the participation of minority and women owned businesses (MBE/WBEs) will apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the RA will negotiate an overall "fair share" objective with the State for MBE/WBE participation on these SRF funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals. The State may accomplish its fair share objective by requiring certain equivalency projects to undertake affirmative steps that will include the following:

(1) Including small, minority and women's businesses on solicitation lists;

(2) Assuring that small, minority and women's businesses are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation by small, minority and women's businesses;

(4) Establishing delivery schedules, when the requirements of the work permit, which will encourage participation by small, minority and women's businesses;

(5) Using the services of the Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce, as appropriate; and

(6) If the contractor awards subagreements, requiring the contractor to take the affirmative steps in paragraphs (d)(1) through (d)(5) of this section.

(e) *MBE/WBE Reporting requirements.* The State must submit an MBE/WBE Utilization Report (EPA Form SF 334) within 30 days after the end of each Federal fiscal quarter during which the State or its subrecipients award any subagreements.

§ 35.3150 Intended Use Plan (IUP).

(a) *Purpose.* The State must prepare a plan identifying the intended uses of the funds in the SRF and describing how those uses support the goals of the SRF. This Intended Use Plan (IUP) must be prepared annually and must be subjected to public comment and review before being submitted to EPA. EPA must receive the IUP prior to the award of the capitalization grant.

(b) *Contents*—(1) *List of projects.* (i) The IUP must contain a list of publicly owned treatment works projects on the State's project priority list developed pursuant to section 216 of the Act, to be constructed with SRF assistance. This list must include: the name of the community; permit number or other applicable enforceable requirement, if available; the type of financial assistance; and the projected amount of eligible assistance.

(ii) The IUP must also contain a list of the nonpoint source and national estuary protection activities under sections 319 and 320 of the Act that the State expects to fund from its SRF.

(iii) The IUP must provide information in a format and manner that is consistent with the needs of the Regional Offices.

(2) Short and long term goals. The IUP must describe the long and short term goals and objectives of the State's water pollution control revolving fund.

(3) Information on the SRF activities to be supported. The IUP must include information on the types of activities including eligible categories of costs to receive assistance, types of assistance to be provided, and SRF policies on setting the terms for the various types of assistance provided by the fund.

(4) Assurances and specific proposals. The IUP must provide assurances and specific proposals on the manner by which the State intends to meet the requirements of the following sections of this part: §§ 35.3135(c); 35.3135(d); 35.3135(e); 35.3135(f); and 35.3140.

(5) Criteria and method for distribution of funds.

(i) The IUP must describe the criteria and method established for the distribution of the SRF funds and the distribution of the funds available to the SRF among the various types of assistance the State will offer.

(ii) The IUP must describe the criteria and method the State will use to select section 212 treatment work project priority list and projects or programs to be funded as eligible activities for nonpoint sources and estuary protection management programs.

(c) *Amending the IUP.* The IUP project list may be changed during the year under provisions established in the IUP as long as the projects have been previously identified through the public participation process.

(Approved by the Office of Management and Budget under control number 2040–0118)

§ 35.3155 Payments.

(a) *Payment schedule.* The State must include with each application for a capitalization grant a draft payment schedule based on the State's projection of binding commitments in its IUP. The payment schedule and the specific criteria establishing the conditions under which the State may draw cash from its LOC shall be jointly established by the Agency and the State and included in the capitalization grant agreement. Changes to the payment schedule, which may be negotiated during the year, will be effected through an amendment to the grant agreement.

(b) *Estimated disbursements.* With the first application for a capitalization grant, the State shall submit a schedule that reflects, by quarters, the estimated disbursements from that grant for the year following the grant award date. At the end of the third quarter of each Federal fiscal year thereafter, the State must provide the Agency with a schedule of estimated disbursements for the following Federal fiscal year. The State must advise the Agency when significant changes from the schedule of estimated disbursements are anticipated. This schedule must be developed in conformity with the procedures applicable to cash draws in § 35.3160 and must be at a level of detail sufficient to allow the Agency and the State to jointly develop and maintain a forecast of cash draws.

(c) *Timing of payments.* Payments to the LOC from a particular grant will begin in the quarter in which the grant is awarded and will end no later than the earlier of eight quarters after the capitalization grant is awarded or twelve quarters after advices of allowances are issued to the Regions.

(d) *General payment and cash draw rules.* (1) Except as described in §§ 35.3160(e) and 35.3160(g), payments will be based on the State's schedule of binding commitments.

(2) The SRF or assistance recipient must first incur a cost, but not necessarily disburse funds for that cost, on an activity for which the State has entered into a binding commitment, in order to draw cash.

(3) Cash draws will be available only up to the amount of payments made.

(4) For loans or for refinancing or purchasing of municipal debt, planning, design and associated pre-building costs that are within the scope of a project built after March 7, 1985, may be included in the assistance agreement regardless of when they were incurred, provided these costs are in conformity with title VI of the Act. The State may draw cash for these incurred pre-building costs immediately upon executing an assistance agreement.

(5) A State may draw cash from the LOC equal to the proportional Federal share at which time the State will provide its proportional share. The Federal proportional share will be 83⅓ percent of incurred costs and the State's proportional share will be 16⅔ percent of the incurred costs, except as described below.

(i) Where the State provides funds in excess of the required 20 percent match, the proportional Federal share drawn from the LOC will be the ratio of Federal funds in the capitalization grant to the sum of the capitalization grant and the State funds. Alternatively, the State may identify a group of activities approximately equal to 120 percent of the grant amount, and draw cash from the LOC for 83⅓ percent of the incurred costs of the identified activities.

(ii) The Federal proportional share may exceed 83⅓ percent where a State is given credit for its match amount as a result of funding activities in prior years (but after March 7, 1985), or for banking excess match in the SRF in prior years and disbursing these amounts prior to drawing cash. If the entire amount of the State's required

match has been disbursed in advance, the Federal proportional share would be 100 percent.

§ 35.3160 Cash draw rules.

(a) *Loans.* The State may draw cash from the LOC when the SRF receives a request from a loan recipient, based on incurred costs, including prebuilding and building costs.

(b) *Refinance or purchase of municipal debt.* (1) Cash draw for completed construction. Except as indicated in paragraph (b)(2) of this section, cash draws shall be made at a rate no greater than equal amounts over the maximum number of quarters that payments can be made, pursuant to § 35.3155(c), and up to the portion of the LOC committed to the refinancing or purchase of the local debt. Cash draws for incurred building costs will generally be treated as refinanced costs.

(2) The State may immediately draw cash for up to five percent of each fiscal year's capitalization grant or two million dollars, whichever is greater, to refinance or purchase local debt.

(3) Projects or portions of projects not constructed. The State may draw cash based on incurred construction costs, as set forth in § 35.3160(a).

(4) Incremental disbursement bonds. For the purchase of incremental disbursement bonds from local governments, cash draws will be based on a schedule that coincides with the rate at which construction related costs are expected to be incurred for the project.

(c) *Purchase of insurance.* The State may draw cash to purchase insurance as premiums are due.

(d) *Guarantees and security for bonds.* (1) Cash draw in the event of default. In the event of an imminent default in debt service payments on the guaranteed/secured debt, the State can draw cash immediately up to the total amount of the LOC committed to the guarantee/security. If a balance remains in the guarantee portion of the LOC reserve after the default is covered, the State must negotiate a revised schedule for the remaining amount of the guarantee/security.

(2) Cash draw in the absence of default. (i) The State can draw cash up to the amount of the LOC dedicated for the guarantee or security in accordance with a schedule based on the national title II annual outlay rate (Yr 1: 7%; Yr 2: 35%; Yr 3: 26%; Yr 4: 20%; Yr 5: 12%), or actual construction cost. In the latter case, the amount of the cash draw would be the actual construction costs multiplied by the Federal share of the reserve multiplied by the ratio of the reserve to either the amount guaranteed or the proceeds of the bond issue.

(ii) In addition, in the case of a security the State can identify a group of projects whose value equals approximately the total of that portion of the LOC and the State match dedicated as a security. The State can then draw cash based on the incurred construction costs of the selected projects only, multiplied by the ratio of the Federal portion of the security to the entire security.

(3) *Aggressive leveraging exception.* Where the cash draw rules discussed in § 35.3160(d) would significantly frustrate a State's program, the Agency may permit an exception to these cash draw rules and provide for a more accelerated cash draw, where the State can demonstrate that:

(i) There are eligible projects ready to proceed in the immediate future with enough costs to justify the amount of the secured bond issue;

(ii) The absence of cash on an accelerated basis will substantially delay these projects;

(iii) If accelerated cash draws are allowed, the SRF will provide substantially more assistance; and

(iv) The long term viability of the State program to meet water quality needs will be protected.

(4) *Cash draw limitation.* When the LOC is used for securing State issued bonds, cash draws cannot be made at a rate greater than equal amounts over the maximum number of quarters that payments can be made, pursuant to § 35.3155(c). Exceptions to this limitation are in cases of default (see § 35.3160(d)(1)) and where cash draws are based on construction costs for all projects, as in § 35.3160(d)(2)(i).

(e) *Administrative expenses*—(1) *Payments.* One payment will be made at the time of the grant, based on the portion of the LOC estimated to be used for administrative expenses.

(2) *Cash draw.* The State can draw cash based on a schedule that coincides with the rate at which administrative expenses will be incurred, up to that portion of the LOC dedicated to administrative expenses.

(f) *Withholding payments.* If a State fails to take corrective action in accordance with section 605 of the Act, the Agency shall withhold payments to the SRF. Once a payment has been made by the Agency, that payment and cash draws from that payment will not be subject to withholding because of a State's failure to take corrective action.

§ 35.3165 Reports and audits.

(a) *Annual report.* The State must provide an Annual Report to the RA beginning the first fiscal year after it receives payments under title VI. The State should submit this report to the RA according to the schedule established in the grant agreement.

(b) *Matters to establish in the annual report.* In addition to the requirements in section 606(d) of the Act, in its annual report the State must establish that it has:

(1) Reviewed all SRF funded section 212 projects in accordance with the approved environmental review procedures;

(2) Deposited its match on or before the date on which each quarterly grant payment was made;

(3) Assured compliance with the requirements of § 35.3135(f);

(4) Made binding commitments to provide assistance equal to 120 percent of the amount of each grant payment within one year after receiving the grant payment pursuant to § 35.3135(c);

(5) Expended all funds in an expeditious and timely manner pursuant to § 35.3135(d); and

(6) First used all funds as a result of capitalization grants to assure maintenance of progress toward compliance with the enforceable requirements of the Act pursuant to § 35.3135(e).

(c) *Annual review*—(1) *Purpose.* The purpose of the annual review is to assess the success of the State's performance of activities identified in the IUP and Annual Report, and to determine compliance with the terms of the capitalization grant agreement. The RA will complete the annual review according to the schedule established in the grant agreement.

(2) *Records access.* After reasonable notice by the RA, the State or assistance recipient must make available to the EPA such records as the RA reasonably requires to review and determine State compliance with the requirements of title VI. The RA may conduct onsite visits as needed to provide adequate programmatic review.

(d) *Annual audit.* (1) At least once a year the RA (through the Office of the Inspector General) will conduct, or require the State to have independently conducted, a financial and compliance audit of the SRF and the operations of the SRF. If the State is required to have an independently conducted audit performed, the State may designate an independent auditor of the State to carry out the audit or may contractually procure the service.

(2) The auditor can be a certified public accountant, a public accountant licensed on or before December 31, 1970, or a governmental auditor who meets the qualification standards (Government Auditing Standards). In addition, the auditor must meet the independence standard as enumerated by the General Accounting Office and American Institute of Certified Public Accountants. The Office of the Inspector General may arrange for an EPA audit if the State fails to conduct the audit or if the State's review is otherwise unsatisfactory.

(3) The audit report required under section 606(b) must contain an opinion on the financial statements of the SRF and its internal controls, and a report on compliance with title VI.

(4) The audit report must be completed within one year of the end of the appropriate accounting period and submitted to the Office of the Inspector General within 30 days of completion. In cases of State conducted audits, the State will be notified within 90 days as to the acceptability of the audit report and its findings. Audits may be done in conjunction with the Single Audit Act.

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§ 35.3170 Corrective action.

(a) *Causes.* If the RA determines that the State has not complied with requirements under title VI, the RA will notify the State of such noncompliance and prescribe the necessary corrective action. Failure to satisfy the terms of the capitalization grant agreement, including unmet conditions or assurances or invalid certifications, is grounds for a finding of noncompliance. In addition, if the State does not manage the SRF in a financially sound manner (e.g. allows consistent and substantial failures of loan repayments), the RA may take corrective action as provided under this section.

(b) *RA's course of action.* In making a determination of noncompliance with the capitalization grant agreement and devising the corrective action, the RA will identify the nature and cause of the problems. The State's corrective action must remedy the specific instance of noncompliance and adjust program management to avoid noncompliance in the future.

(c) *Consequences for failure to take corrective action.* If within 60 days of receipt of the noncompliance notice, a State fails to take the necessary actions to obtain the results required by the RA, or to provide an acceptable plan to achieve the results required, the RA shall withhold payments to the SRF until the State has taken acceptable actions. If the State fails to take the necessary corrective action deemed adequate by the RA within twelve months of receipt of the original notice, any withheld payments shall be deobligated and reallotted to other States.

(d) *Releasing payments.* Once the State has taken the corrective action deemed necessary and adequate by the RA, the withheld payments will be released and scheduled payments will recommence.

APPENDIX A TO SUBPART K OF PART 35—CRITERIA FOR EVALUATING A STATE'S PROPOSED NEPA-LIKE PROCESS

The following criteria will be used by the RA to evaluate a proposed SERP.

(A) *Legal foundation.* Adequate documentation of the legal authority, including legislation, regulations or executive orders and/or Attorney General certification that authority exists.

(B) *Interdisciplinary approach.* The availability of expertise either in-house or otherwise accessible to the State Agency.

(C) *Decision documentation.* A description of a documentation process adequate to explain the basis for decisions to the public.

(D) *Public notice and participation.* A description of the process, including routes of publication (e.g., local newspapers and project mailing list), and use of established State legal notification systems for notices of intent, and criteria for determining whether a public hearing is required. The adequacy of a rationale where the comment period differs from that under NEPA and is inconsistent with other State review periods.

(E) *Consider alternatives.* The extent to which the SERP will adequately consider:

(1) Designation of a study area comparable to the final system;

(2) A range of feasible alternatives, including the no action alternative;

(3) Direct and indirect impacts;

(4) Present and future conditions;

(5) Land use and other social parameters including recreation and open-space considerations;

(6) Consistency with population projections used to develop State implementation plans under the Clean Air Act;

(7) Cumulative impacts including anticipated community growth (residential, commercial, institutional and industrial) within the project study area; and

(8) Other anticipated public works projects including coordination with such projects.

Subpart L—Drinking Water State Revolving Funds

AUTHORITY: Section 1452 of the Safe Drinking Water Act, as amended, 42 U.S.C. 300j–12.

SOURCE: 65 FR 48299, Aug. 7, 2000, unless otherwise noted.

§ 35.3500 Purpose, policy, and applicability.

(a) This subpart codifies and implements requirements for the national Drinking Water State Revolving Fund program under section 1452 of the Safe Drinking Water Act, as amended in 1996. It applies to States (*i.e.*, each of the 50 States and the Commonwealth of Puerto Rico) which receive capitalization grants and are authorized to establish a Fund under section 1452. The purpose of this subpart is to ensure that each State's program is designed and operated in such a manner as to

further the public health protection objectives of the Safe Drinking Water Act, promote the efficient use of all funds, and ensure that the Fund corpus is available in perpetuity for providing financial assistance to public water systems.

(b) This subpart supplements section 1452 of the Safe Drinking Water Act by codifying statutory and program requirements that were published in the Final Guidelines for the Drinking Water State Revolving Fund program (EPA 816–R–97–005) signed by the Assistant Administrator for Water on February 28, 1997, as well as in subsequent policies. This subpart also supplements general grant regulations at 40 CFR part 31 which contain administrative requirements that apply to governmental recipients of Environmental Protection Agency (EPA) grants and subgrants. EPA will not impose additional major program requirements without providing an opportunity for affected parties to comment.

(c) EPA intends to implement the national Drinking Water State Revolving Fund program in a manner that preserves for States a high degree of flexibility to operate their programs in accordance with each State's unique needs and circumstances. To the maximum extent practicable, EPA also intends to administer the financial aspects of the national Drinking Water State Revolving Fund program in a manner that is consistent with the policies and procedures of the national Clean Water State Revolving Fund program established under Title VI of the Clean Water Act, as amended, 33 U.S.C. 1381–1387.

§ 35.3505 Definitions.

The following definitions apply to terms used in this subpart:

Act. The Safe Drinking Water Act (Public Law 93–523), as amended in 1996 (Public Law 104–182). 42 U.S.C. 300f *et seq.*

Administrator. The Administrator of the EPA or an authorized representative.

Allotment. Amount available to a State from funds appropriated by Congress to carry out section 1452 of the Act.

Automated Clearing House (ACH). A Federal payment mechanism that transfers cash to recipients of Federal assistance using electronic transfers from the Treasury through the Federal Reserve System.

Binding commitment. A legal obligation by the State to an assistance recipient that defines the terms for assistance from the Fund.

Capitalization grant. An award by EPA of funds to a State for purposes of capitalizing that State's Fund and for other purposes authorized in section 1452 of the Act.

Cash draw. The transfer of cash from the Treasury through the ACH to the DWSRF program. Upon a State's request for a cash draw, the Treasury will transfer funds to the DWSRF program account established in the State's bank.

CWSRF program. Each State's clean water state revolving fund program authorized under Title VI of the Clean Water Act, as amended, 33 U.S.C. 1381–1387.

Disadvantaged community. The entire service area of a public water system that meets affordability criteria established by the State after public review and comment.

Disbursement. The transfer of cash from the DWSRF program account established in the State's bank to an assistance recipient.

DWSRF program. Each State's drinking water state revolving fund program authorized under section 1452 of the Act, as amended, 42 U.S.C. 300j–12. This term includes the Fund and set-asides.

Fund. A revolving account into which a State deposits DWSRF program funds (e.g., capitalization grants, State match, repayments, net bond proceeds, interest earnings, *etc.*) for the purposes of providing loans and other types of assistance for drinking water infrastructure projects.

Intended Use Plan (IUP). A document prepared annually by a State, after public review and comment, which identifies intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

Net bond proceeds. The funds raised from the sale of the bonds minus issuance costs (e.g., the underwriting

discount, underwriter's legal counsel fees, bond counsel fee, and other costs incidental to the bond issuance).

Payment. An action taken by EPA to increase the amount of funds available for cash draw through the ACH. A payment is not a transfer of cash to the State, but an authorization by EPA to make capitalization grant funds available for transfer to a State after the State submits a cash draw request.

Public water system. A system as defined in 40 CFR 141.2. A public water system is either a "community water system" or a "noncommunity water system" as defined in 40 CFR 141.2.

Regional Administrator (RA). The Administrator of the appropriate Regional Office of the EPA or an authorized representative of the Regional Administrator.

Set-asides. State and local activities identified in sections 1452(g)(2) and (k) of the Act for which a portion of a capitalization grant may be used.

Small system. A public water system that regularly serves 10,000 or fewer persons.

State. Each of the 50 States and the Commonwealth of Puerto Rico, which receive capitalization grants and are authorized to establish a Fund under section 1452 of the Act.

§ 35.3510 Establishment of the DWSRF program.

(a) *General.* To be eligible to receive a capitalization grant, a State must establish a Fund and comply with the other requirements of section 1452 of the Act and this subpart.

(b) *Administration.* Capitalization grants must be awarded to an agency of the State that is authorized to enter into capitalization grant agreements with EPA, accept capitalization grant awards made under section 1452 of the Act, and otherwise manage the Fund in accordance with the requirements and objectives of the Act and this subpart. The State agency that is awarded the capitalization grant (*i.e.,* grantee) is accountable for the use of the funds provided in the capitalization grant agreement under general grant regulations at 40 CFR part 31.

(1) The authority to establish assistance priorities and to carry out oversight and related activities of the DWSRF program, other than financial administration of the Fund, must reside with the State agency having primary responsibility for administration of the State's public water system supervision (PWSS) program (*i.e.,* primacy) after consultation with other appropriate State agencies.

(2) If a State is eligible to receive a capitalization grant but does not have primacy, the Governor will determine which State agency will have the authority to establish priorities for financial assistance from the Fund. Evidence of the Governor's determination must be included with the capitalization grant application.

(3) If more than one State agency participates in implementation of the DWSRF program, the roles and responsibilities of each agency must be described in a Memorandum of Understanding or interagency agreement.

(c) *Combined financial administration.* A State may combine the financial administration of the Fund with the financial administration of any other revolving fund established by the State if otherwise not prohibited by State law under which the Fund was established. A State must assure that all monies in the Fund, including capitalization grants, State match, net bond proceeds, loan repayments, and interest are separately accounted for and used solely for the purposes specified in section 1452 of the Act and this subpart. Funds available from the administration and technical assistance set-aside may not be used for combined financial administration of any other revolving fund.

(d) *Use of funds.* (1) Assistance provided to a public water system from the DWSRF program may be used only for expenditures that will facilitate compliance with national primary drinking water regulations applicable under section 1412 or otherwise significantly further the public health protection objectives of the Act.

(2) The inability or failure of any public water system to receive assistance from the DWSRF program, or any delay in obtaining assistance, does not alter the obligation of the system to comply in a timely manner with all applicable drinking water standards and requirements of section 1452 of the Act.

§ 35.3515 Allotment and withholdings of funds.

(a) *Allotment*—(1) *General.* Each State will receive a minimum of one percent of the funds available for allotment to all of the States.

(2) *Allotment formula.* Funds available to States from fiscal year 1998 appropriations and subsequent appropriations are allotted according to a formula that reflects the infrastructure needs of public water systems identified in the most recent Needs Survey submitted in accordance with section 1452(h) of the Act.

(3) *Period of availability.* Funds are available for obligation to States during the fiscal year in which they are authorized and during the following fiscal year. The amount of any allotment not obligated to a State by EPA at the end of this period of availability will be reallotted to eligible States based on the formula originally used to allot these funds, except that the Administrator may reserve up to 10 percent of any funds available for reallotment to provide additional assistance to Indian Tribes. In order to be eligible to receive reallotted funds, a State must have been obligated all funds it is eligible to receive from EPA during the period of availability.

(4) *Loss of primacy.* The following provisions do not apply to any State that did not have primacy as of August 6, 1996:

(i) A State may not receive a capitalization grant from allotments that have been made if the State had primacy and subsequently loses primacy.

(ii) For a State that loses primacy, the Administrator may reserve funds from the State's allotment for use by EPA to administer primacy in that State. The balance of the funds not used by EPA to administer primacy will be reallotted to the other States.

(iii) A State will be eligible for future allotments from funds appropriated in the next fiscal year after primacy is restored.

(b) *Withholdings*—(1) *General.* EPA will withhold funds under each of the following provisions:

(i) *Capacity development authority.* EPA will withhold 20 percent of a State's allotment from any State that has not obtained the legal authority or other means to ensure that all new community water systems and new nontransient, noncommunity water systems commencing operations after October 1, 1999, demonstrate technical, financial, and managerial capacity with respect to each national primary drinking water regulation in effect, or likely to be in effect, on the date of commencement of operations. The determination of withholding will be based on an assessment of the status of the State program as of October 1 of the fiscal year for which the funds were allotted.

(ii) *Capacity development strategy.* EPA will withhold funds from any State unless the State is developing and implementing a strategy to assist public water systems in acquiring and maintaining technical, financial, and managerial capacity. The amount of a State's allotment that will be withheld is 10 percent for fiscal year 2001, 15 percent for fiscal year 2002, and 20 percent for each subsequent fiscal year. The determination of withholding will be based on an assessment of the status of the State strategy as of October 1 of the fiscal year for which the funds were allotted. Decisions of a State regarding any particular public water system as part of a capacity development strategy are not subject to review by EPA and may not serve as a basis for withholding funds.

(iii) *Operator certification program.* Beginning on February 5, 2001, EPA will withhold 20 percent of a State's allotment unless the State has adopted and is implementing a program for certifying operators of community and nontransient, noncommunity public water systems that meets the requirements of section 1419 of the Act. The determination of withholding will be based on an assessment of the status of the State program for each fiscal year.

(2) *Maximum withholdings.* The maximum amount of funds that will be withheld if a State fails to meet the requirements of both the capacity development authority and the capacity development strategy provisions is 20 percent of the allotment in any fiscal year. The maximum amount of funds that will be withheld if a State fails to meet the requirements of the operator

certification program provision and either the capacity development authority provision or the capacity development strategy provision is 40 percent of the allotment in any fiscal year.

(3) *Reallotment of withheld funds.* The Administrator will reallot withheld funds to eligible States based on the formula originally used to allot these funds. In order to be eligible to receive reallotted funds under the withholding provisions, a State must have been obligated all funds it is eligible to receive from EPA during the period of availability. A State that has funds withheld under any one of the withholding provisions in paragraphs (b)(1)(i) through (b)(1)(iii) of this section is not eligible to receive reallotted funds made available by that provision.

(4) *Termination of withholdings.* A withholding will cease to apply to funds appropriated in the next fiscal year after a State complies with the specific provision under which funds were withheld.

§ 35.3520 Systems, projects, and project-related costs eligible for assistance from the Fund.

(a) *Eligible systems.* Assistance from the Fund may only be provided to:

(1) Privately-owned and publicly-owned community water systems and non-profit noncommunity water systems.

(2) Projects that will result in the creation of a community water system in accordance with paragraph (b)(2)(vi) of this section.

(3) Systems referred to in section 1401(4)(B) of the Act for the purposes of point of entry or central treatment under section 1401(4)(B)(i)(III).

(b) *Eligible projects*—(1) *General.* Projects that address present or prevent future violations of health-based drinking water standards are eligible for assistance. These include projects needed to maintain compliance with existing national primary drinking water regulations for contaminants with acute and chronic health effects. Projects to replace aging infrastructure are eligible for assistance if they are needed to maintain compliance or further the public health protection objectives of the Act.

(2) Only the following project categories are eligible for assistance from the Fund:

(i) *Treatment.* Examples of projects include installation or upgrade of facilities to improve the quality of drinking water to comply with primary or secondary standards and point of entry or central treatment under section 1401(4)(B)(i)(III) of the Act.

(ii) *Transmission and distribution.* Examples of projects include installation or replacement of transmission and distribution pipes to improve water pressure to safe levels or to prevent contamination caused by leaks or breaks in the pipes.

(iii) *Source.* Examples of projects include rehabilitation of wells or development of eligible sources to replace contaminated sources.

(iv) *Storage.* Examples of projects include installation or upgrade of eligible storage facilities, including finished water reservoirs, to prevent microbiological contaminants from entering a public water system.

(v) *Consolidation.* Eligible projects are those needed to consolidate water supplies where, for example, a supply has become contaminated or a system is unable to maintain compliance for technical, financial, or managerial reasons.

(vi) *Creation of new systems.* Eligible projects are those that, upon completion, will create a community water system to address existing public health problems with serious risks caused by unsafe drinking water provided by individual wells or surface water sources. Eligible projects are also those that create a new regional community water system by consolidating existing systems that have technical, financial, or managerial difficulties. Projects to address existing public health problems associated with individual wells or surface water sources must be limited in scope to the specific geographic area affected by contamination. Projects that create new regional community water systems by consolidating existing systems must be limited in scope to the service area of the systems being consolidated. A project

must be a cost-effective solution to addressing the problem. A State must ensure that the applicant has given sufficient public notice to potentially affected parties and has considered alternative solutions to addressing the problem. Capacity to serve future population growth cannot be a substantial portion of a project.

(c) *Eligible project-related costs.* In addition to costs needed for the project itself, the following project-related costs are eligible for assistance from the Fund:

(1) Costs for planning and design and associated pre-project costs. A State that makes a loan for only planning and design is not required to provide assistance for completion of the project.

(2) Costs for the acquisition of land only if needed for the purposes of locating eligible project components. The land must be acquired from a willing seller.

(3) Costs for restructuring systems that are in significant noncompliance with any national primary drinking water regulation or variance or that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the systems are ineligible under paragraph (d)(2) or (d)(3) of this section.

(d) *Ineligible systems.* Assistance from the Fund may not be provided to:

(1) Federally-owned public water systems and for-profit noncommunity water systems.

(2) Systems that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the assistance will ensure compliance and the owners or operators of the systems agree to undertake feasible and appropriate changes in operations to ensure compliance over the long-term.

(3) Systems that are in significant noncompliance with any national primary drinking water regulation or variance, unless:

(i) The purpose of the assistance is to address the cause of the significant noncompliance and will ensure that the systems return to compliance; or

(ii) The purpose of the assistance is unrelated to the cause of the significant noncompliance and the systems are on enforcement schedules (for maximum contaminant level and treatment technique violations) or have compliance plans (for monitoring and reporting violations) to return to compliance.

(e) *Ineligible projects.* The following projects are ineligible for assistance from the Fund:

(1) Dams or rehabilitation of dams.

(2) Water rights, except if the water rights are owned by a system that is being purchased through consolidation as part of a capacity development strategy.

(3) Reservoirs or rehabilitation of reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are on the property where the treatment facility is located.

(4) Projects needed primarily for fire protection.

(5) Projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility.

(6) Projects that have received assistance from the national set-aside for Indian Tribes and Alaska Native Villages under section 1452(i) of the Act.

(f) *Ineligible project-related costs.* The following project-related costs are ineligible for assistance from the Fund:

(1) Laboratory fees for routine compliance monitoring.

(2) Operation and maintenance expenses.

§ 35.3525 Authorized types of assistance from the Fund.

A State may only provide the following types of assistance from the Fund:

(a) *Loans.* (1) A State may make loans at or below the market interest rate, including zero interest rate loans. Loans may be awarded only if:

(i) An assistance recipient begins annual repayment of principal and interest no later than one year after project completion. A project is completed when operations are initiated or are capable of being initiated.

(ii) A recipient completes loan repayment no later than 20 years after

project completion except as provided in paragraph (b)(3) of this section.

(iii) A recipient establishes a dedicated source of revenue for repayment of the loan which is consistent with local ordinances and State laws or, for privately-owned systems, a recipient demonstrates that there is adequate security to assure repayment of the loan.

(2) A State may include eligible project reimbursement costs within loans if:

(i) A system received approval, authorization to proceed, or any similar action by a State prior to initiation of project construction and the construction costs were incurred after such State action; and

(ii) The project met all of the requirements of this subpart and was on the State's fundable list, developed using a priority system approved by EPA. A project on the comprehensive list which is funded when a project on the fundable list is bypassed using the State's bypass procedures in accordance with § 35.3555(c)(2)(ii) may be eligible for reimbursement of costs incurred after the system has been informed that it will receive funding.

(3) A State may include eligible planning and design and other associated pre-project costs within loans regardless of when the costs were incurred.

(4) All payments of principal and interest on each loan must be credited to the Fund.

(5) Of the total amount available for assistance from the Fund each year, a State must make at least 15 percent available solely for providing loan assistance to small systems, to the extent such funds can be obligated for eligible projects. A State that provides assistance in an amount that is greater than 15 percent of the available funds in one year may credit the excess toward the 15 percent requirement in future years.

(6) A State may provide incremental assistance for a project (e.g., for a particularly large, expensive project) over a period of years.

(b) *Assistance to disadvantaged communities.* (1) A State may provide loan subsidies (e.g., loans which include principal forgiveness, negative interest rate loans) to benefit communities meeting the State's definition of "disadvantaged" or which the State expects to become "disadvantaged" as a result of the project. Loan subsidies in the form of reduced interest rate loans that are at or above zero percent do not fall under the 30 percent allowance described in paragraph (b)(2) of this section.

(2) A State may take an amount equal to no more than 30 percent of the amount of a particular fiscal year's capitalization grant to provide loan subsidies to disadvantaged communities. If a State does not take the entire 30 percent allowance associated with a particular fiscal year's capitalization grant, it cannot reserve the authority to take the remaining balance of the allowance from future capitalization grants. In addition, a State must:

(i) Indicate in the Intended Use Plan (IUP) the amount of the allowance it is taking for loan subsidies;

(ii) Commit capitalization grant and required State match dollars taken for loan subsidies in accordance with the binding commitment requirements in § 35.3550(e); and

(iii) Commit any other dollars (e.g., principal and interest repayments, investment earnings) taken for loan subsidies to projects over the same time period during which binding commitments are made for the capitalization grant from which the allowance was taken.

(3) A State may extend the term for a loan to a disadvantaged community, provided that a recipient completes loan repayment no later than 30 years after project completion and the term of the loan does not exceed the expected design life of the project.

(c) *Refinance or purchase of local debt obligations*—(1) *General.* A State may buy or refinance local debt obligations of municipal, intermunicipal, or interstate agencies where the debt obligation was incurred and the project was initiated after July 1, 1993. Projects must have met the eligibility requirements under section 1452 of the Act and this subpart to be eligible for refinancing. Privately-owned systems are not eligible for refinancing.

(2) *Multi-purpose debt.* If the original debt for a project was in the form of a

multi-purpose bond incurred for purposes in addition to eligible purposes under section 1452 of the Act and this subpart, a State may provide refinancing only for the eligible portion of the debt, not the entire debt.

(3) *Refinancing and State match.* If a State has credited repayments of loans made under a pre-existing State loan program as part of its State match, the State cannot also refinance the projects under the DWSRF program. If the State has already counted certain projects toward its State match which it now wants to refinance, the State must provide replacement funds for the amounts previously credited as match.

(d) *Purchase insurance or guarantee for local debt obligations.* A State may provide assistance by purchasing insurance or guaranteeing a local debt obligation to improve credit market access or to reduce interest rates. Assistance of this type is limited to local debt obligations that are undertaken to finance projects eligible for assistance under section 1452 of the Act and this subpart.

(e) *Revenue or security for Fund debt obligations (leveraging).* A State may use Fund assets as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the State in order to increase the total amount of funds available for providing assistance. The net proceeds of the sale of the bonds must be deposited into the Fund and must be used for providing loans and other assistance to finance projects eligible under section 1452 of the Act and this subpart.

§ 35.3530 Limitations on uses of the Fund.

(a) *Earn interest.* A State may earn interest on monies deposited into the Fund prior to disbursement of assistance (e.g., on reserve accounts used as security or guarantees). Monies deposited must not remain in the Fund primarily to earn interest. Amounts not required for current obligation or expenditure must be invested in interest bearing obligations.

(b) *Program administration.* A State may not use monies deposited into the Fund to cover its program administration costs. In addition to using the funds available from the administration and technical assistance set-aside under § 35.3535(b), a State may use the following methods to cover its program administration and other program costs.

(1) A State may use the proceeds of bonds guaranteed by the Fund to absorb expenses incurred issuing the bonds. The net proceeds of the bonds must be deposited into the Fund.

(2) A State may assess fees on an assistance recipient which are paid directly by the recipient and are not included as principal in a loan as allowed in paragraph (b)(3) of this section. These fees, which include interest earned on fees, must be deposited into the Fund or into an account outside of the Fund. If the fees are deposited into the Fund, they are subject to the authorized uses of the Fund. If the fees are deposited into an account outside of the Fund, they must be used for program administration, other purposes for which capitalization grants can be awarded under section 1452, State match under sections 1452(e) and (g)(2) of the Act, or combined financial administration of the DWSRF program and CWSRF program Funds where the programs are administered by the same State agency.

(3) A State may assess fees on an assistance recipient which are included as principal in a loan. These fees, which include interest earned on fees, must be deposited into the Fund or into an account outside of the Fund. If the fees are deposited into the Fund, they are subject to the authorized uses of the Fund. If the fees are deposited into an account outside of the Fund, they must be used for program administration or other purposes for which capitalization grants can be awarded under section 1452. Fees included as principal in a loan cannot be used for State match under sections 1452(e) and (g)(2) of the Act or combined financial administration of the DWSRF program and CWSRF program Funds. Additionally, fees included as principal in a loan:

(i) Cannot be assessed on a disadvantaged community which receives a loan subsidy provided from the 30 percent allowance in § 35.3525(b)(2);

(ii) Cannot cause the effective rate of a loan (which includes both interest and fees) to exceed the market rate; and

(iii) Cannot be assessed if the effective rate of a loan could reasonably be expected to cause a system to fail to meet the technical, financial, and managerial capability requirements under section 1452 of the Act.

(c) *Transfers.* The Governor of a State, or a State official acting pursuant to authorization from the Governor, may transfer an amount equal to 33 percent of a fiscal year's DWSRF program capitalization grant to the CWSRF program or an equivalent amount from the CWSRF program to the DWSRF program. The following conditions apply:

(1) When a State initially decides to transfer funds:

(i) The State's Attorney General, or someone designated by the Attorney General, must sign or concur in a certification for the DWSRF program and the CWSRF program that State law permits the State to transfer funds; and

(ii) The Operating Agreements or other parts of the capitalization grant agreements for the DWSRF program and the CWSRF program must be amended to detail the method the State will use to transfer funds.

(2) A State may not use the transfer provision to acquire State match for either program or use transferred funds to secure or repay State match bonds.

(3) Funds may be transferred after one year has elapsed since a State established its Fund (*i.e.,* one year after the State has received its first DWSRF program capitalization grant for projects), and may include an amount equal to the allowance associated with its fiscal year 1997 capitalization grant.

(4) A State may reserve the authority to transfer funds in future years.

(5) Funds may be transferred on a net basis between the DWSRF program and CWSRF program, provided that the 33 percent transfer allowance associated with DWSRF program capitalization grants received is not exceeded.

(6) Funds may not be transferred or reserved after September 30, 2001.

(d) *Cross-collateralization.* A State may combine the Fund assets of the DWSRF program and CWSRF program as security for bond issues to enhance the lending capacity of one or both of the programs. The following conditions apply:

(1) When a State initially decides to cross-collateralize:

(i) The State's Attorney General, or someone designated by the Attorney General, must sign or concur in a certification for the DWSRF program and the CWSRF program that State law permits the State to cross-collateralize the Fund assets of the DWSRF program and CWSRF program; and

(ii) The Operating Agreements or other parts of the capitalization grant agreements for the DWSRF program and the CWSRF program must be amended to detail the method the State will use to cross-collateralize.

(2) The proceeds generated by the issuance of bonds must be allocated to the purposes of the DWSRF program and CWSRF program in the same proportion as the assets from the Funds that are used as security for the bonds. A State must demonstrate at the time of bond issuance that the proportionality requirements have been or will be met. If a default should occur, and the Fund assets from one program are used for debt service in the other program to cure the default, the security would no longer need to be proportional.

(3) A State may not combine the Fund assets of the DWSRF program and the CWSRF program as security for bond issues to acquire State match for either program or use the assets of one program to secure match bonds for the other program.

(4) The debt service reserves for the DWSRF program and the CWSRF program must be accounted for separately.

(5) Loan repayments must be made to the respective program from which the loan was made.

§ 35.3535 Authorized set-aside activities.

(a) *General.* (1) A State may use a portion of its capitalization grants for the set-aside categories described in paragraphs (b) through (e) of this section, provided that the amount of set-aside funding does not exceed the ceilings specified in this section.

(2) A State may not use set-aside funds for those projects or project-related costs listed in § 35.3520(b), (c), (e), and (f), with the following exceptions:

(i) Project planning and design costs for small systems; and

(ii) Costs for restructuring a system as part of a capacity development strategy.

(b) *Administration and technical assistance.* A State may use up to 4 percent of its allotment to cover the reasonable costs of administering the DWSRF program and to provide technical assistance to public water systems.

(c) *Small systems technical assistance.* A State may use up to 2 percent of its allotment to provide technical assistance to small systems. A State may use these funds for activities such as supporting a State technical assistance team or contracting with outside organizations or other parties to provide technical assistance to small systems.

(d) *State program management.* A State may use up to 10 percent of its allotment for State program management activities.

(1) This set-aside may only be used for the following activities:

(i) To administer the State PWSS program;

(ii) To administer or provide technical assistance through source water protection programs (including a Class V Underground Injection Control Program), except for enforcement actions;

(iii) To develop and implement a capacity development strategy; and

(iv) To develop and implement an operator certification program.

(2) Match requirement. A State must provide a dollar for dollar match for expenditures made under this set-aside.

(i) The match must be provided at the time of the capitalization grant award or in the same year that funds for this set-aside are expected to be expended in accordance with a workplan approved by EPA.

(ii) A State is authorized to use the amount of State funds it expended on its PWSS program in fiscal year 1993 (including PWSS match) as a credit toward meeting its match requirement. The value of this credit can be up to, but not greater than, 50 percent of the amount of match that is required. After determining the value of the credit that it is eligible to receive, a State must provide the additional funds necessary to meet the remainder of the match requirement. The source of these additional funds can be State funds (excluding PWSS match) or documented in-kind services.

(e) *Local assistance and other State programs.* A State may use up to 15 percent of its capitalization grant to assist in the development and implementation of local drinking water protection initiatives and other State programs. No more than 10 percent of the capitalization grant amount can be used for any one authorized activity.

(1) This set-aside may only be used for the following activities:

(i) A State may provide assistance only in the form of loans to community water systems and non-profit non-community water systems to acquire land or conservation easements from willing sellers or grantors. A system must demonstrate how the purchase of land or easements will protect the source water of the system from contamination and ensure compliance with national primary drinking water regulations. A State must develop a priority setting process for determining what parcels of land or easements to purchase or use an established priority setting process that meets the same goals. A State must seek public review and comment on its priority setting process and must identify the systems that received loans and include a description of the specific parcels of land or easements purchased in the Biennial Report.

(ii) A State may provide assistance only in the form of loans to community water systems to assist in implementing voluntary, incentive-based source water protection measures in areas delineated under a source water assessment program under section 1453 of the Act and for source water petitions under section 1454 of the Act. A State must develop a list of systems that may receive loans, giving priority to activities that facilitate compliance with national primary drinking water regulations applicable to the systems or otherwise significantly further the health protection objectives of the Act. A State must seek public review and

comment on its priority setting process and its list of systems that may receive loans.

(iii) A State may make expenditures to establish and implement wellhead protection programs under section 1428 of the Act.

(iv) A State may provide assistance, including technical and financial assistance, to public water systems as part of a capacity development strategy under section 1420(c) of the Act.

(v) A State may make expenditures from its fiscal year 1997 capitalization grant to delineate and assess source water protection areas for public water systems under section 1453 of the Act. Assessments include the identification of potential sources of contamination within the delineated areas. These assessment activities are limited to the identification of contaminants regulated under the Act or unregulated contaminants that a State determines may pose a threat to public health. A State must obligate funds within 4 years of receiving its fiscal year 1997 capitalization grant.

(2) A State may make loans under this set-aside only if an assistance recipient begins annual repayment of principal and interest no later than one year after completion of the activity and completes loan repayment no later than 20 years after completion of the activity. A State must deposit repayments into the Fund or into a separate account dedicated for this set-aside. The separate account is subject to the same management oversight requirements as the Fund. Amounts deposited into the Fund are subject to the authorized uses of the Fund.

§ 35.3540 Requirements for funding set-aside activities.

(a) *General.* If a State makes a grant or enters into a cooperative agreement with an assistance recipient to conduct set-aside activities, the recipient must comply with general grant regulations at 40 CFR part 30 or part 31, as appropriate.

(b) *Set-aside accounts.* A State must maintain separate and identifiable accounts for the portion of its capitalization grant to be used for set-aside activities.

(c) *Workplans*—(1) *General.* A State must submit detailed annual or multi-year workplans to EPA for approval describing how set-aside funds will be expended. For the administration and technical assistance set-aside under § 35.3535(b), the State is only required to submit a workplan describing how it will expend funds needed to provide technical assistance to public water systems. In order to ensure that funds are expended efficiently, multi-year workplan terms negotiated with EPA must be less than four years, unless a longer term is approved by EPA.

(2) *Submitting workplans.* A State must submit workplans in accordance with a schedule negotiated with EPA. If a schedule has not been negotiated, the State must submit workplans no later than 90 days after the capitalization grant award. If a State does not meet the deadline for submitting its workplans, the set-aside funds that were required to be described in the workplans must be transferred to the Fund to be used for projects.

(3) *Content.* Workplans must at a minimum include:

(i) The annual funding amount in dollars and as a percentage of the State allotment or capitalization grant;

(ii) The projected number of work years needed for implementing each set-aside activity;

(iii) The goals and objectives, outputs, and deliverables for each set-aside activity;

(iv) A schedule for completing activities under each set-aside activity;

(v) Identification and responsibilities of the agencies involved in implementing each set-aside activity, including activities proposed to be conducted by a third party; and

(vi) A description of the evaluation process to assess the success of work funded under each set-aside activity.

(4) *Amending workplans.* If a State changes the scope of work from what was originally described in its workplans, it must amend the workplans and submit them to EPA for approval.

(d) *Reserving set-aside funds.* (1) A State may reserve set-aside funds from a capitalization grant and expend them over a period of time, provided that the

State identifies the amount of funds reserved in the IUP and describes the use of the funds in workplans approved by EPA. For the administration and technical assistance set-aside under § 35.3535(b), the State is only required to submit a workplan to reserve funds needed to provide technical assistance to public water systems.

(2) With the exception of the local assistance and other State programs set-aside under § 35.3535(e), a State may reserve the authority to take from future capitalization grants those set-aside funds that it has not included in workplans. The State must identify in the IUP the amount of authority reserved from a capitalization grant for future use.

(e) *Fund and set-aside account transfers.* (1) A State may transfer funds among set-aside categories described in § 35.3535(b) through (e) and among activities within these categories, provided that set-aside ceilings are not exceeded.

(2) A State may transfer funds between the Fund and set-asides, provided that set-aside ceilings are not exceeded. Set-aside funds may be transferred at any time to the Fund. If a State has taken payment for the set-aside funds to be transferred to the Fund, it must make binding commitments for these funds within one year of the transfer. Monies intended for the Fund may be transferred to set-asides only if the State has not yet taken a payment that includes those funds to be transferred in accordance with the payment schedule negotiated with EPA.

(3) The capitalization grant agreement must be amended prior to any transfer among the set-aside categories or any transfer between the Fund and set-asides.

§ 35.3545 Capitalization grant agreement.

(a) *General.* A State must submit a capitalization grant application to EPA in order to receive a capitalization grant award. Approval of an application results in EPA and the State entering into a capitalization grant agreement which is the principal instrument by which the State commits to manage the DWSRF program in accordance with the requirements of section 1452 of the Act and this subpart.

(b) *Content.* In addition to the items listed in paragraphs (c) through (f) of this section, the capitalization grant agreement must contain or incorporate by reference the Application for Federal Assistance (EPA Form 424) and other related forms, IUP, negotiated payment schedule, State environmental review process (SERP), demonstrations of the specific capitalization grant agreement requirements listed in § 35.3550, and other documentation required by the Regional Administrator (RA). The capitalization grant agreement must also define the types of performance measures, reporting requirements, and oversight responsibilities that will be required to determine compliance with section 1452 of the Act.

(c) *Operating agreement.* At the option of a State, the framework and procedures of the DWSRF program that are not expected to change annually may be described in an Operating Agreement. The Operating Agreement may be amended if the State negotiates the changes with EPA.

(d) *Attorney General certification.* With the capitalization grant application, the State's Attorney General, or someone designated by the Attorney General, must sign or concur in a certification that:

(1) The authority establishing the DWSRF program and the powers it confers are consistent with State law;

(2) The State may legally bind itself to the proposed terms of the capitalization grant agreement; and

(3) An agency of the State is authorized to enter into capitalization grant agreements with EPA, accept capitalization grant awards made under section 1452 of the Act, and otherwise manage the Fund in accordance with the requirements and objectives of the Act and this subpart.

(e) *Roles and responsibilities of agencies.* If more than one State agency participates in the implementation of the DWSRF program, the State must describe the roles and responsibilities of each agency in the capitalization grant application and include a Memorandum

of Understanding or interagency agreement describing these roles and responsibilities.

(f) *Process for evaluating capability and compliance.* A State must include in the capitalization grant application a description of the following:

(1) The process it will use to assess the technical, financial, and managerial capability of all systems requesting assistance to ensure that the systems are in compliance with the requirements of the Act.

(2) If a State provides assistance to systems that lack technical, financial, and managerial capability, the process it will use to ensure that the systems undertake feasible and appropriate changes in operations to comply with the requirements of the Act over the long-term.

(3) If a State provides assistance to systems in significant noncompliance with any national primary drinking water regulation or variance, the process it will use to ensure that the systems return to compliance.

§ 35.3550 Specific capitalization grant agreement requirements.

(a) *General.* A State must agree to comply with this subpart, the general grant regulations at 40 CFR part 31, and specific conditions of the grant. A State must also agree to the following requirements and, in some cases, provide documentation as part of the capitalization grant application.

(b) *Comply with State statutes and regulations.* A State must agree to comply with all State statutes and regulations that are applicable to DWSRF program funds including capitalization grant funds, State match, interest earnings, net bond proceeds, repayments, and funds used for set-aside activities.

(c) *Demonstrate technical capability.* A State must agree to provide documentation demonstrating that it has adequate personnel and resources to establish and manage the DWSRF program.

(d) *Accept payments.* A State must agree to accept capitalization grant payments in accordance with a payment schedule negotiated between EPA and the State.

(e) *Make binding commitments.* A State must agree to enter into binding commitments with assistance recipients to provide assistance from the Fund.

(1) Binding commitments must be made in an amount equal to the amount of each capitalization grant payment and accompanying State match that is deposited into the Fund and must be made within one year after the receipt of each grant payment.

(2) A State may make binding commitments for more than the required amount and credit the excess towards the binding commitment requirements of subsequent grant payments.

(3) If a State is concerned about its ability to comply with the binding commitment requirement, it must notify the RA and propose a revised payment schedule for future grant payments.

(f) *Deposit of funds.* A State must agree to promptly deposit DWSRF program funds into appropriate accounts.

(1) A State must agree to deposit the portion of the capitalization grant to be used for projects into the Fund.

(2) A State must agree to maintain separate and identifiable accounts for the portion of the capitalization grant to be used for set-aside activities.

(3) A State must agree to deposit net bond proceeds, interest earnings, and repayments into the Fund.

(4) A State must agree to deposit any fees, which include interest earned on fees, into the Fund or into separate and identifiable accounts.

(g) *Provide State match.* A State must agree to deposit into the Fund an amount from State monies that equals at least 20 percent of each capitalization grant payment.

(1) A State must identify the source of State match in the capitalization grant application.

(2) A State must deposit the match into the Fund on or before the date that a State receives each payment for the capitalization grant, except when a State chooses to use a letter of credit (LOC) mechanism or similar financial arrangement for the State match. Under this mechanism, payments to this LOC account must be made proportionally on the same schedule as the payments for the capitalization grant. Cash from this State match LOC account must be drawn into the Fund

as cash is drawn into the Fund through the Automated Clearing House (ACH).

(3) A State may issue general obligation or revenue bonds to derive the State match. The net proceeds from the bonds issued by a State to derive the match must be deposited into the Fund and the bonds may only be retired using the interest portion of loan repayments and interest earnings of the Fund. Loan principal must not be used to retire State match bonds.

(4) If the State deposited State monies in a dedicated revolving fund after July 1, 1993, and prior to receiving a capitalization grant, the State may credit these monies toward the match requirement if:

(i) The monies were deposited in a separate revolving fund that subsequently became the Fund after receiving a capitalization grant and they were expended in accordance with section 1452 of the Act;

(ii) The monies were deposited in a separate revolving fund that has not received a capitalization grant, they were expended in accordance with section 1452 of the Act, and an amount equal to all repayments of principal and payments of interest from loans will be deposited into the Fund; or

(iii) The monies were deposited in a separate revolving fund and used as a reserve for a leveraged program consistent with section 1452 of the Act and an amount equal to the reserve is transferred to the Fund as the reserve's function is satisfied.

(5) If a State provides a match in excess of the required amount, the excess balance may be credited towards match requirements associated with subsequent capitalization grants.

(h) *Provide match for State program management set-aside.* A State must agree to provide a dollar for dollar match for expenditures made under the State program management set-aside in accordance with § 35.3535(d)(2). This match is separate from the 20 percent State match requirement for the capitalization grant in paragraph (g) of this section and must be identified as an eligible credit, deposited into set-aside accounts, or documented as in-kind services.

(i) *Use generally accepted accounting principles.* A State must agree to ensure that the State and public water systems receiving assistance will use accounting, audit, and fiscal procedures conforming to Generally Accepted Accounting Principles (GAAP) as promulgated by the Governmental Accounting Standards Board or, in the case of privately-owned systems, the Financial Accounting Standards Board. The accounting system used for the DWSRF program must allow for proper measurement of:

(1) Revenues earned and other receipts, including but not limited to, loan repayments, capitalization grants, interest earnings, State match deposits, and net bond proceeds;

(2) Expenses incurred and other disbursements, including but not limited to, loan disbursements, repayment of bonds, and other expenditures allowed under section 1452 of the Act; and

(3) Assets, liabilities, capital contributions, and retained earnings.

(j) *Conduct audits.* In accordance with § 35.3570(b), a State must agree to comply with the provisions of the Single Audit Act Amendments of 1996. A State may voluntarily agree to conduct annual independent audits.

(k) *Dedicated repayment source.* A State must agree to adopt policies and procedures to assure that assistance recipients have a dedicated source of revenue for repayment of loans, or in the case of privately-owned systems, assure that recipients demonstrate that there is adequate security to assure repayment of loans.

(l) *Efficient expenditure.* A State must agree to commit and expend all funds as efficiently as possible and in an expeditious and timely manner.

(m) *Use funds in accordance with IUP.* A State must agree to use all funds in accordance with an IUP that was prepared after providing for public review and comment.

(n) *Biennial report.* A State must agree to complete and submit a Biennial Report that describes how it has met the goals and objectives of the previous two fiscal years as stated in the IUPs and capitalization grant agreements. The State must submit this report to the RA according to the schedule established in the capitalization grant agreement.

(o) *Comply with cross-cutters.* A State must agree to comply with all applicable Federal cross-cutting authorities.

(p) *Comply with provisions to avoid withholdings.* A State must agree to demonstrate how it is complying with the requirements of capacity development authority, capacity development strategy, and operator certification program provisions in order to avoid withholdings of funds under § 35.3515(b)(1)(i) through (b)(1)(iii).

§ 35.3555 Intended Use Plan (IUP).

(a) *General.* A State must prepare an annual IUP which describes how it intends to use DWSRF program funds to support the overall goals of the DWSRF program and contains the information outlined in paragraph (c) of this section. In those years in which a State submits a capitalization grant application, EPA must receive an IUP prior to the award of the capitalization grant. A State must prepare an annual IUP as long as the Fund or set-aside accounts remain in operation. The IUP must conform to the fiscal year adopted by the State for the DWSRF program (e.g., the State's fiscal year or the Federal fiscal year).

(b) *Public review requirements.* A State must seek meaningful public review and comment during the development of the IUP. A State must include a description of the public review process and an explanation of how it responded to major comments and concerns. If a State prepares separate IUPs (one for Fund monies and one for set-aside monies), the State must seek public review and comment during the development of each IUP.

(c) *Content.* Information in the IUP must be provided in a format and manner that is consistent with the needs of the RA.

(1) *Priority system.* The IUP must include a priority system for ranking individual projects for funding that provides sufficient detail for the public and EPA to readily understand the criteria used for ranking. The priority system must provide, to the maximum extent practicable, that priority for the use of funds will be given to projects that: address the most serious risk to human health; are necessary to ensure compliance with the requirements of the Act (including requirements for filtration); and assist systems most in need, on a per household basis, according to State affordability criteria. A State that does not adhere to the three criteria must demonstrate why it is unable to do so.

(2) *Priority lists of projects.* All projects, with the exception of projects funded on an emergency basis, must be ranked using a State's priority system and go through a public review process prior to receiving assistance.

(i) The IUP must contain a fundable list of projects that are expected to receive assistance from available funds designated for use in the current IUP and a comprehensive list of projects that are expected to receive assistance in the future. The fundable list of projects must include: the name of the public water system; the priority assigned to the project; a description of the project; the expected terms of financial assistance based on the best information available at the time the IUP is developed; and the population of the system's service area at the time of the loan application. The comprehensive list must include, at a minimum, the priority assigned to each project and, to the extent known, the expected funding schedule for each project. A State may combine the fundable and comprehensive lists into one list, provided that projects which are expected to receive assistance from available funds designated for use in the current IUP are identified.

(ii) The IUP may include procedures which would allow a State to bypass projects on the fundable list. The procedures must clearly identify the conditions which would allow a project to be bypassed and the method for identifying which projects would receive funding. If a bypass occurs, a State must fund the highest ranked project on the comprehensive list that is ready to proceed. If a State elects to bypass a project for reasons other than readiness to proceed, the State must explain why the project was bypassed in the Biennial Report and during the annual review. To the maximum extent practicable, a State must work with bypassed projects to ensure that they will be prepared to receive funding in future years.

(iii) The IUP may allow for the funding of projects which require immediate attention to protect public health on an emergency basis, provided that a State defines what conditions constitute an emergency and identifies the projects in the Biennial Report and during the annual review.

(iv) The IUP must demonstrate how a State will meet the requirement of providing loan assistance to small systems as described in § 35.3525(a)(5). A State that is unable to comply with this requirement must describe the steps it is taking to ensure that a sufficient number of projects are identified to meet this requirement in future years.

(3) *Distribution of funds.* The IUP must describe the criteria and methods that a State will use to distribute all funds including:

(i) The process and rationale for distribution of funds between the Fund and set-aside accounts;

(ii) The process for selection of systems to receive assistance;

(iii) The rationale for providing different types of assistance and terms, including the method used to determine the market rate and the interest rate;

(iv) The types, rates, and uses of fees assessed on assistance recipients; and

(v) A description of the financial planning process undertaken for the Fund and the impact of funding decisions on the long-term financial health of the Fund.

(4) *Financial status.* The IUP must describe the sources and uses of DWSRF program funds including: the total dollar amount in the Fund; the total dollar amount available for loans, including loans to small systems; the amount of loan subsidies that may be made available to disadvantaged communities from the 30 percent allowance in § 35.3525(b)(2); the total dollar amount in set-aside accounts, including the amount of funds or authority reserved; and the total dollar amount in fee accounts.

(5) *Short- and long-term goals.* The IUP must describe the short-term and long-term goals it has developed to support the overall goals of the DWSRF program of ensuring public health protection, complying with the Act, ensuring affordable drinking water, and maintaining the long-term financial health of the Fund.

(6) *Set-aside activities.* (i) The IUP must identify the amount of funds a State is electing to use for set-aside activities. A State must also describe how it intends to use these funds, provide a general schedule for their use, and describe the expected accomplishments that will result from their use.

(ii) For loans made in accordance with the local assistance and other State programs set-aside under § 35.3535(e)(1)(i) and (e)(1)(ii), the IUP must, at a minimum, describe the process by which recipients will be selected and how funds will be distributed among them.

(7) *Disadvantaged community assistance.* The IUP must describe how a State's disadvantaged community program will operate including:

(i) The State's definition of what constitutes a disadvantaged community;

(ii) A description of affordability criteria used to determine the amount of disadvantaged assistance;

(iii) The amount and type of loan subsidies that may be made available to disadvantaged communities from the 30 percent allowance in § 35.3525(b)(2); and

(iv) To the maximum extent practicable, an identification of projects that will receive disadvantaged assistance and the respective amounts.

(8) *Transfer process.* If a State decides to transfer funds between the DWSRF program and CWSRF program, the IUPs for the DWSRF program and the CWSRF program must describe the process including:

(i) The total amount and type of funds being transferred during the period covered by the IUP;

(ii) The total amount of authority being reserved for future transfer, including the authority reserved from previous years; and

(iii) The impact of the transfer on the amount of funds available to finance projects and set-asides and the long-term impact on the Fund.

(9) *Cross-collateralization process.* If a State decides to cross-collateralize Fund assets of the DWSRF program and CWSRF program, the IUPs for the

DWSRF program and the CWSRF program must describe the process including:

(i) The type of monies which will be used as security;

(ii) How monies will be used in the event of a default; and

(iii) Whether or not monies used for a default in the other program will be repaid, and if they will not be repaid, what will be the cumulative impact on the Funds.

(d) *Amending the IUP.* The priority lists of projects may be amended during the year under provisions established in the IUP as long as additions or other substantive changes to the lists, except projects funded on an emergency basis, go through a public review process. A State may change the use of funds from what was originally described in the IUP as long as substantive changes go through a public review process.

§ 35.3560 General payment and cash draw rules.

(a) *Payment schedule.* A State will receive each capitalization grant payment in the form of an increase to the ceiling of funds available through the ACH, made in accordance with a payment schedule negotiated between EPA and the State. A payment schedule that is based on a State's projection of binding commitments and use of set-aside funds as stated in the IUP must be included in the capitalization grant agreement. Changes to the payment schedule must be made through an amendment to the grant agreement.

(b) *Timing of payments.* All payments to a State will be made by the earlier of 8 quarters after the capitalization grant is awarded or 12 quarters after funds are allotted to a State.

(c) *Funds available for cash draw.* Cash draws will be available only up to the amount of payments that have been made to a State.

(d) *Estimated cash draw schedule.* On a schedule negotiated with EPA, a State must provide EPA with a quarterly schedule of estimated cash draws for the Federal fiscal year. The State must notify EPA when significant changes from the estimated cash draw schedule are anticipated. This schedule must be developed to conform with the procedures applicable to cash draws and must have sufficient detail to allow EPA and the State to jointly develop and maintain a forecast of cash draws.

(e) *Cash draw for set-asides.* A State may draw cash through the ACH for the full amount of costs incurred for set-aside expenditures based on EPA approved workplans. A State may draw cash in advance to ensure funds are available to meet State payroll expenses. However, cash should be drawn no sooner than necessary to meet immediate payroll disbursement needs.

(f) *Cash draw for Fund.* A State may draw cash through the ACH for the proportionate Federal share of eligible incurred project costs. A State need not have disbursed funds for incurred project costs prior to drawing cash. A State may not draw cash for a particular project until the State has executed a loan agreement for that project.

(g) *Calculation of proportionate Federal share*—(1) *General.* The proportionate Federal share is equal to the Federal monies intended for the Fund (capitalization grant minus set-asides) divided by the total amount of monies intended for the Fund (capitalization grant minus set-asides plus required State match). A State may calculate the proportionate Federal share on a rolling average basis or on a grant by grant basis.

(2) *State overmatch.* (i) The proportionate Federal share does not change if a State is providing funds in excess of the required State match.

(ii) Federal monies may be drawn at a rate that is greater than that determined by the proportionate Federal share calculation when a State is given credit toward its match amount as a result of funding projects in prior years (but after July 1, 1993), or for crediting excess match in the Fund in prior years and disbursing these amounts prior to drawing cash. If the entire amount of a State's required match has been disbursed in advance, the proportionate Federal share of cash draws would be 100 percent.

§ 35.3565 Specific cash draw rules for authorized types of assistance from the Fund.

A State may draw cash for the authorized types of assistance from the Fund described in § 35.3525 according to the following rules:

(a) *Loans*—(1) *Eligible project costs.* A State may draw cash based on the proportionate Federal share of incurred project costs. In the case of incurred planning and design and associated preproject costs, cash may be drawn immediately upon execution of the loan agreement.

(2) *Eligible project reimbursement costs.* A State may draw cash to reimburse assistance recipients for eligible project costs at a rate no greater than equal amounts over the maximum number of quarters that capitalization grant payments are made. A State may immediately draw cash for up to 5 percent of each fiscal year's capitalization grant or 2 million dollars, whichever is greater, to reimburse project costs.

(b) *Refinance or purchase of local debt obligations*—(1) *Completed projects.* A State may draw cash up to the portion of the capitalization grant committed to the refinancing or purchase of local debt obligations of municipal, intermunicipal, or interstate agencies at a rate no greater than equal amounts over the maximum number of quarters that capitalization grant payments are made. A State may immediately draw cash for up to 5 percent of each fiscal year's capitalization grant or 2 million dollars, whichever is greater, to refinance or purchase local debt.

(2) *Portions of projects not completed.* A State may draw cash based on the proportionate Federal share of incurred project costs according to the rule for loans in paragraph (a)(1) of this section.

(3) *Purchase of incremental disbursement bonds from local governments.* A State may draw cash based on a schedule that coincides with the rate at which costs are expected to be incurred for the project.

(c) *Purchase insurance for local debt obligations.* A State may draw cash for the proportionate Federal share of insurance premiums as they are due.

(d) *Guarantee for local debt obligations*—(1) *In the event of default.* In the event of imminent default in debt service payments on a guaranteed local debt, a State may draw cash immediately up to the total amount of the capitalization grant that is dedicated for the guarantee. If a balance remains after the default is satisfied, the State must negotiate a revised cash draw schedule for the remaining amount dedicated for the guarantee.

(2) *In the absence of default.* A State may draw cash up to the amount of the capitalization grant dedicated for the guarantee based on actual incurred project costs. The amount of the cash draw would be based on the proportionate Federal share of incurred project costs multiplied by the ratio of the guarantee reserve to the amount guaranteed.

(e) *Revenue or security for Fund debt obligations (leveraging)*—(1) *In the event of default.* In the event of imminent default in debt service payments on a secured debt, a State may draw cash immediately up to the total amount of the capitalization grant that is dedicated for the security. If a balance remains after the default is satisfied, the State must negotiate a revised schedule for the remaining amount dedicated for the security.

(2) *In the absence of default.* A State may draw cash up to the amount of the capitalization grant dedicated for the security using either of the following methods:

(i) *All projects method.* A State may draw cash based on the incurred project costs multiplied by the ratio of the Federal portion of the reserve to the total reserve multiplied by the ratio of the total reserve to the net bond proceeds.

(ii) *Group of projects method.* A State may identify a group of projects whose cost is approximately equal to the total of that portion of the capitalization grant and the State match dedicated as a security. The State may then draw cash based on the incurred costs of the selected projects only, multiplied by the ratio of the Federal portion of the security to the entire security.

(3) *Aggressive leveraging.* Where the cash draw rules in paragraphs (e)(1) and (e)(2) of this section would significantly frustrate a State's leveraged

program, EPA may permit an exception to these cash draw rules and provide for a more accelerated cash draw. A State must demonstrate that:

(i) There are eligible projects ready to proceed in the immediate future with enough costs to justify the amount of the secured bond issue;

(ii) The absence of cash on an accelerated basis will substantially delay these projects;

(iii) The Fund will provide substantially more assistance if accelerated cash draws are allowed; and

(iv) The long-term viability of the State program to meet drinking water needs will be protected.

(f) *Loans to privately-owned systems.* In cases where State monies cannot be used to provide loans to privately-owned systems, a State may draw 100 percent Federal monies for costs incurred by privately-owned systems. When Federal monies are drawn for incurred costs, the State must deposit or have previously deposited into the Fund the required match associated with the amount of cash drawn. Every 18 months, the State must submit documentation showing that it has met its proportionate Federal share within the last 6 months. If a State is unable to document that it has met its proportionate Federal share, State match deposited into the Fund must be expended before Federal monies are drawn for costs incurred by publicly-owned systems until the State meets its proportionate Federal share.

§ 35.3570 Reports and audits.

(a) *Biennial report*—(1) *General.* A State must submit a Biennial Report to the RA describing how it has met the goals and objectives of the previous two fiscal years as stated in the IUPs and capitalization grant agreements, including the most recent audit of the Fund and the entire State allotment. The State must submit this report to the RA according to the schedule established in the capitalization grant agreement. Information provided in the Biennial Report on other EPA programs eligible for assistance from the DWSRF program may not replace the reporting requirements for those other programs.

(2) *Financial report.* As part of the Biennial Report, a State must present the financial status of the DWSRF program, including the total dollar amount in fee accounts. This report must, at a minimum, include the financial statements and footnotes required under GAAP to present fairly the financial condition and results of operations.

(3) *Matters to establish in the biennial report.* A State must establish in the Biennial Report that it has complied with section 1452 of the Act and this subpart. In particular, the Biennial Report must demonstrate that a State has:

(i) Managed the DWSRF program in a fiscally prudent manner and adopted policies and processes which promote the long-term financial health of the Fund;

(ii) Deposited its match (cash or State LOC) into the Fund in accordance with the requirements of § 35.3550(g);

(iii) Made binding commitments with assistance recipients to provide assistance from the Fund consistent with the requirements of § 35.3550(e);

(iv) Funded only the highest priority projects listed in the IUP and documented why priority projects were bypassed in accordance with § 35.3555(c)(2);

(v) Provided assistance only to eligible public water systems and for eligible projects and project-related costs under § 35.3520;

(vi) Provided assistance only for eligible set-aside activities under § 35.3535 and conducted activities consistent with workplans and other requirements of § 35.3535 and § 35.3540;

(vii) Provided loan assistance to small systems consistent with the requirements of § 35.3525(a)(5) and § 35.3555(c)(2)(iv);

(viii) Provided assistance to disadvantaged communities consistent with the requirements of § 35.3525(b) and § 35.3555(c)(7);

(ix) Used fees for eligible purposes under § 35.3530(b)(2) and (b)(3) and assessed fees included as principal in a loan in accordance with the limitations in § 35.3530(b)(3)(i) through (b)(3)(iii);

(x) Adopted and implemented procedures consistent with the requirements of § 35.3530(c) and § 35.3555(c)(8) if funds

were transferred between the DWSRF program and CWSRF program;

(xi) Adopted and implemented procedures consistent with the requirements of § 35.3530(d) and § 35.3555(c)(9) if Fund assets of the DWSRF program and CWSRF program were cross-collateralized;

(xii) Reviewed all DWSRF program funded projects and activities for compliance with Federal cross-cutting authorities that apply to the State as a grant recipient and those which apply to assistance recipients in accordance with § 35.3575;

(xiii) Reviewed all DWSRF program funded projects and activities in accordance with approved State environmental review procedures under § 35.3580; and

(xiv) Complied with general grant regulations at 40 CFR part 31 and specific conditions of the grant.

(4) *Joint report.* A State which jointly administers the DWSRF program and the CWSRF program may submit a report that addresses both programs. However, programmatic and financial information for each program must be identified separately.

(b) *Audit.* (1) A State must comply with the provisions of the Single Audit Act Amendments of 1996, 31 U.S.C. 7501–7, and Office of Management and Budget's Circular A–133 and Compliance Supplement.

(2) A State may voluntarily agree to conduct annual independent audits which provide an auditor's opinion on the DWSRF program financial statements, reports on internal controls, and reports on compliance with section 1452 of the Act, applicable regulations, and general grant requirements. The agreement to conduct voluntary independent audits should be documented in the Operating Agreement or in another part of the capitalization grant agreement.

(3) Those States that do not conduct independent audits will be subject to periodic audits by the EPA Office of Inspector General.

(c) *Annual review*—(1) *Purpose.* The purpose of the annual review is to assess the success of the State's performance of activities identified in the IUP, Biennial Report (in years when it is submitted), and Operating Agreement (if used) and to determine compliance with the capitalization grant agreement, requirements of section 1452 of the Act, and this subpart. The RA will complete the annual review according to the schedule established in the capitalization grant agreement.

(2) *Records access.* After reasonable notice by the RA, the State or assistance recipient must make available such records as the RA reasonably considers pertinent to review and determine State compliance with the capitalization grant agreement and requirements of section 1452 of the Act and this subpart. The RA may conduct on-site visits as deemed necessary to perform the annual review.

(d) *Information management system*—(1) *Purpose.* The purpose of the information management system is to assess the DWSRF programs, to monitor State progress in years in which Biennial Reports are not submitted, and to assist in conducting annual reviews.

(2) *Reporting.* A State must annually submit information to EPA on the amount of funds available and assistance provided by the DWSRF program.

§ 35.3575 Application of Federal cross-cutting authorities (cross-cutters).

(a) *General.* A number of Federal laws, executive orders, and government-wide policies apply by their own terms to projects and activities receiving Federal financial assistance, regardless of whether the statute authorizing the assistance makes them applicable. A few cross-cutters apply by their own terms only to the State as the grant recipient because the authorities explicitly limit their application to grant recipients.

(b) *Application of cross-cutter requirements.* Except as provided in paragraphs (c) and (d) of this section and in § 35.3580, cross-cutter requirements apply in the following manner:

(1) All projects for which a State provides assistance in amounts up to the amount of the capitalization grant deposited into the Fund must comply with the requirements of the cross-cutters. Activities for which a State provides assistance from capitalization

grant funds deposited into set-aside accounts must comply with the requirements of the cross-cutters, to the extent that the requirements of the cross-cutters are applicable.

(2) Projects and activities for which a State provides assistance in amounts that are greater than the amount of the capitalization grant deposited into the Fund or set-aside accounts are not subject to the requirements of the cross-cutters.

(3) A State that elects to impose the requirements of the cross-cutters on projects and activities for which it provides assistance in amounts that are greater than the amount of the capitalization grant deposited into the Fund or set-aside accounts may credit this excess to meet future cross-cutter requirements on assistance provided from the respective accounts.

(c) *Federal anti-discrimination law requirements.* All programs, projects, and activities for which a State provides assistance are subject to the following Federal anti-discrimination laws: Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*; section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794; and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6102.

(d) *Minority and Women's Business Enterprise (MBE/WBE) procurement requirements.* A State must negotiate a fair share goal with the RA for the participation of MBE/WBEs. The fair share goal must be based on the availability of MBE/WBEs in the relevant market area to do the work under the DWSRF program. Each capitalization grant agreement must describe how a State will comply with MBE/WBE procurement requirements, including how it will apply the fair share goal to assistance recipients to which the requirements apply and how it will assure that assistance recipients take the following six affirmative steps:

(1) Include small, minority and women's businesses on solicitation lists;

(2) Assure that small, minority and women's businesses are solicited whenever they are potential sources;

(3) Divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small, minority and women's businesses;

(4) Establish delivery schedules, when the requirements of the work permits, which will encourage participation by small, minority and women's businesses;

(5) Use the services of the Small Business Administration and the Minority Business Development Agency of the U.S. Department of Commerce, as appropriate; and

(6) Require the contractor to take the affirmative steps in paragraphs (d)(1) through (d)(5) of this section if the contractor awards subagreements.

(e) *Complying with cross-cutters.* A State is responsible for ensuring that assistance recipients comply with the requirements of cross-cutters, including initiating any required consultations with State or Federal agencies responsible for individual cross-cutters. A State must inform EPA when consultation or coordination with other Federal agencies is necessary to resolve issues regarding compliance with cross-cutter requirements.

§ 35.3580 Environmental review requirements.

(a) *General.* With the exception of activities identified in paragraph (b) of this section, a State must conduct environmental reviews of the potential environmental impacts of projects and activities receiving assistance.

(b) *Activities excluded from environmental reviews.* A State must conduct environmental reviews of source water protection activities under § 35.3535, unless the activities solely involve administration (e.g., personnel, equipment, travel) or technical assistance. A State is not required to conduct environmental reviews of all the other eligible set-aside activities under § 35.3535 because EPA has determined that, due to their nature, they do not individually, cumulatively over time, or in conjunction with other actions have a significant effect on the quality of the human environment. A State does not need to include provisions in its SERP for excluding these activities. Activities excluded from environmental reviews remain subject to other applicable Federal cross-cutting authorities under § 35.3575.

(c) *Tier I environmental reviews.* All projects that are assisted by the State in amounts up to the amount of the capitalization grant deposited into the Fund must be reviewed in accordance with a SERP that is functionally equivalent to the review undertaken by EPA under the National Environmental Policy Act (NEPA). With the exception of activities excluded from environmental reviews in paragraph (b) of this section, activities for which a State provides assistance from capitalization grant funds deposited into set-aside accounts must also be reviewed in accordance with a SERP that is functionally equivalent to the review undertaken by EPA under the NEPA. A State may elect to apply the procedures at 40 CFR part 6 and related subparts or apply its own "NEPA-like" SERP for conducting environmental reviews, provided that the following elements are met:

(1) *Legal foundation.* A State must have the legal authority to conduct environmental reviews of projects and activities receiving assistance. The legal authority and supporting documentation must specify:

(i) The mechanisms to implement mitigation measures to ensure that a project or activity is environmentally sound;

(ii) The legal remedies available to the public to challenge environmental review determinations and enforcement actions;

(iii) The State agency that is primarily responsible for conducting environmental reviews; and

(iv) The extent to which environmental review responsibilities will be delegated to local recipients and will be subject to oversight by the primary State agency.

(2) *Interdisciplinary approach.* A State must employ an interdisciplinary approach for identifying and mitigating adverse environmental effects including, but not limited to, those associated with other cross-cutting Federal environmental authorities.

(3) *Decision documentation.* A State must fully document the information, processes, and premises that influence its decisions to:

(i) Proceed with a project or activity contained in a finding of no significant impact (FNSI) following documentation in an environmental assessment (EA);

(ii) Proceed or not proceed with a project or activity contained in a record of decision (ROD) following preparation of a full environmental impact statement (EIS);

(iii) Reaffirm or modify a decision contained in a previously issued categorical exclusion (CE), EA/FNSI or EIS/ROD following a mandatory 5 year environmental reevaluation of a proposed project or activity; and

(iv) If a State elects to implement processes for either partitioning an environmental review or categorically excluding projects or activities from environmental review, the State must similarly document these processes in its proposed SERP.

(4) *Public notice and participation.* A State must provide public notice when: a CE is issued or rescinded; a FNSI is issued but before it becomes effective; a decision that is issued 5 years earlier is reaffirmed or revised; and prior to initiating an EIS. Except with respect to a public notice of a CE or reaffirmation of a previous decision, a formal public comment period must be provided during which no action on a project or activity will be allowed. A public hearing or meeting must be held for all projects and activities except for those having little or no environmental effect.

(5) *Alternatives consideration.* A State must have evaluation criteria and processes which allow for:

(i) Comparative evaluation among alternatives, including the beneficial and adverse consequences on the existing environment, the future environment, and individual sensitive environmental issues that are identified by project management or through public participation; and

(ii) Devising appropriate near-term and long-range measures to avoid, minimize, or mitigate adverse impacts.

(d) *Tier II environmental reviews.* A State may elect to apply an alternative SERP to all projects and activities (except those activities excluded from environmental reviews in paragraph (b) of this section) for which a State provides assistance in amounts that are greater than the amount of the capitalization

grant deposited into the Fund or set-aside accounts, provided that the process:

(1) Is supported by a legal foundation which establishes the State's authority to review projects and activities;

(2) Responds to other environmental objectives of the State;

(3) Provides for comparative evaluations among alternatives and accounts for beneficial and adverse consequences to the existing and future environment;

(4) Adequately documents the information, processes, and premises that influence an environmental determination; and

(5) Provides for notice to the public of proposed projects and activities and for the opportunity to comment on alternatives and to examine environmental review documents. For projects or activities determined by the State to be controversial, a public hearing must be held.

(e) *Categorical exclusions (CEs).* A State may identify categories of actions which do not individually, cumulatively over time, or in conjunction with other actions have a significant effect on the quality of the human environment and which the State will exclude from the substantive environmental review requirements of its SERP. Any procedures under this paragraph must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

(f) *Environmental reviews for refinanced projects or reimbursed project costs.* A State must conduct an environmental review which considers the impacts of a project based on conditions of the site prior to initiation of the project. Failure to comply with the environmental review requirements cannot be justified on the grounds that costs have already been incurred, impacts have already been caused, or contractual obligations have been made prior to the binding commitment.

(g) *EPA approval process.* The RA must review and approve any State "NEPA-like" and alternative procedures to ensure that the requirements for Tier I and Tier II environmental reviews have been met. The RA will conduct these reviews on the basis of the criteria for evaluating NEPA-like reviews contained in Appendix A to this subpart.

(h) *Modifications to approved SERPs.* Significant changes to State environmental review procedures must be approved by the RA.

§ 35.3585 Compliance assurance procedures.

(a) *Causes.* The RA may take action under this section and the enforcement provisions of the general grant regulations at 40 CFR 31.43 if a determination is made that a State has not complied with its capitalization grant agreement, other requirements under section 1452 of the Act, this subpart, or 40 CFR part 31 or has not managed the DWSRF program in a financially sound manner (e.g., allows consistent and substantial failures of loan repayments).

(b) *RA's course of action.* For cause under paragraph (a) of this section, the RA will issue a notice of non-compliance and may prescribe appropriate corrective action. A State's corrective action must remedy the specific instance of non-compliance and adjust program management to avoid non-compliance in the future.

(c) *Consequences for failure to comply.* (1) If within 60 days of receipt of the non-compliance notice a State fails to take the necessary actions to obtain the results required by the RA or fails to provide an acceptable plan to achieve the results required, the RA may suspend payments until the State has taken acceptable actions. Once a State has taken the corrective action deemed necessary and adequate by the RA, the suspended payments will be released and scheduled payments will recommence.

(2) If a State fails to take the necessary corrective action deemed adequate by the RA within 12 months of receipt of the original notice, any suspended payments will be deobligated and reallotted to eligible States. Once a payment has been made for the Fund, that payment and cash draws from that payment will not be subject to withholding. All future payments will be withheld from a State and reallotted

until such time that adequate corrective action is taken and the RA determines that the State is back in compliance.

(d) *Dispute resolution.* A State or an assistance recipient that has been adversely affected by an action or omission by EPA may request a review of the action or omission under general grant regulations at 40 CFR part 31, subpart F.

APPENDIX A TO SUBPART L—CRITERIA FOR EVALUATING A STATE'S PROPOSED NEPA-LIKE PROCESS

The following criteria will be used by the RA to evaluate a proposed SERP:

(A) *Legal foundation.* Adequate documentation of the legal authority, including legislation, regulations or executive orders and/or Attorney General certification that authority exists.

(B) *Interdisciplinary approach.* The availability of expertise, either in-house or otherwise, accessible to the State agency.

(C) *Decision documentation.* A description of a documentation process adequate to explain the basis for decisions to the public.

(D) *Public notice and participation.* A description of the process, including routes of publication (e.g., local newspapers and project mailing list), and use of established State legal notification systems for notices of intent, and criteria for determining whether a public hearing is required. The adequacy of a rationale where the comment period differs from that under NEPA and is inconsistent with other State review periods.

(E) *Alternatives consideration.* The extent to which the SERP will adequately consider:

(1) Designation of a study area comparable to the final system;

(2) A range of feasible alternatives, including the no action alternative;

(3) Direct and indirect impacts;

(4) Present and future conditions;

(5) Land use and other social parameters including relevant recreation and open-space considerations;

(6) Consistency with population projections used to develop State implementation plans under the Clean Air Act;

(7) Cumulative impacts including anticipated community growth (residential, commercial, institutional, and industrial) within the project study area; and

(8) Other anticipated public works projects including coordination with such projects.

Subpart M—Grants for Technical Assistance

AUTHORITY: 42 U.S.C. 9617(e); sec. 9(g), E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

SOURCE: 65 FR 58858, Oct. 2, 2000, unless otherwise noted.

GENERAL

§ 35.4000 Authority.

The Environmental Protection Agency ("EPA") issues this subpart under section 117(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9617(e).

§ 35.4005 What is a Technical Assistance Grant?

A Technical Assistance Grant (TAG) provides money for your group to obtain technical assistance in interpreting information with regard to a Superfund site. EPA awards TAGs to promote public participation in decision making at eligible sites. A TAG allows your group to procure independent technical advisors to help you interpret and comment on site-related information and decisions. Examples of how a technical advisor can help your group include, but are not limited to:

(a) Reviewing preliminary site assessment/site investigation data;

(b) Participating in public meetings to help interpret information about site conditions, proposed remedies, and the implementation of a remedy;

(c) Visiting the site vicinity periodically during cleanup, if possible, to observe progress and provide technical updates to your group; and

(d) Evaluate future land use options based on land use assumptions found in the "remedial investigation/feasibility study."

§ 35.4010 What does this subpart do?

This subpart establishes the program-specific regulations for TAGs awarded by EPA.

§ 35.4011 Do the general grant regulations for nonprofit organizations apply to TAGs?

Yes, the regulations at 40 CFR part 30 also apply to TAGs. 40 CFR part 30 establishes uniform administrative requirements for Federal grants and agreements to institutions of higher education, hospitals, and other nonprofit organizations. Because EPA awards TAGs to nonprofit organizations, 40 CFR part 30 applies to all TAGs.

§ 35.4012 If there appears to be a difference between the requirements in 40 CFR part 30 and this subpart, which regulations should my group follow?

You should follow the regulations in 40 CFR part 30, except for the following provisions from which this subpart deviates:

(a) 40 CFR 30.11, Pre-Award Policies;

(b) 40 CFR 30.22 (b) and (c), Payment;

(c) 40 CFR 30.44 (e) (2), Procurement Procedures;

(d) 40 CFR 30.53 (b), Retention and Access Requirements for Records; and

(e) 40 CFR 31.70 (c) and 31.70 (i) as referenced by 40 CFR 30.63, Disputes.

§ 35.4015 Do certain words in this subpart have specific meaning?

Yes, some words in this subpart have specific meanings that are described in § 35.4270, Definitions. The first time these words are used they are marked with quotation marks, for example, "EPA."

WHO IS ELIGIBLE?

§ 35.4020 Is my community group eligible for a TAG?

(a) Yes, your community group is eligible for a TAG if:

(1) You are a group of people who may be "affected" by a release or a threatened release at any facility listed on the National Priorities List ("NPL") or proposed for listing under the National Contingency Plan (NCP) where a "response action" under CERCLA has begun;

(2) Your group meets the minimum administrative and management capability requirements found in 40 CFR 30.21 by demonstrating you have or will have reliable procedures for record keeping and financial accountability related to managing your TAG (you must have these procedures in place before your group incurs any expenses); and

(3) Your group is not ineligible according to paragraph (b) of this section.

(b) No, your community group is not eligible for a TAG if your group is:

(1) A "potentially responsible party" (PRP), receives money or services from a PRP, or represents a PRP;

(2) Not incorporated as a nonprofit organization for the specific purpose of representing affected people except as provided in § 35.4045;

(3) "Affiliated" with a national organization;

(4) An academic institution;

(5) A political subdivision (for example, township or municipality); or

(6) Established or presently sustained by ineligible entities that paragraphs (b) (1) through (5) of this section describe, or if any of these ineligible entities are represented in your group.

§ 35.4025 Is there any way my group can get a TAG if it is currently ineligible?

You can make your group eligible by establishing an identity separate from that of the PRP or other ineligible entity by making a reasonable demonstration of independence from the ineligible entity. Such a demonstration requires, at a minimum, a showing that your group has a separate and distinct:

(a) Formal legal identity (for example, your group has different officers); and

(b) Substantive existence (meaning, is not affiliated with an ineligible entity), including its own finances.

(1) In determining whether your group has a different substantive existence from the ineligible entity, you must establish for us that your group:

(i) Is not controlled either directly or indirectly, by the ineligible entity; and

(ii) Does not control, either directly or indirectly, an ineligible entity.

(2) You must also establish for EPA that a third group does not have the power to control both your group and an ineligible entity.

§ 35.4030 Can I be part of a TAG group if I belong to an ineligible group?

You may participate in your capacity as an individual in a group receiving a TAG, but you may not represent the interests of an ineligible entity. However, we may prohibit you from participating in a TAG group if the "award official" determines you have a significant financial involvement in a PRP.

§ 35.4035 Does EPA use the same eligibility criteria for TAGs at "Federal facility" sites?

Yes, EPA uses the same criteria found in § 35.4020 in evaluating the eligibility of your group or any group of individuals who may be affected by a release or a threatened release at a Federal facility for a TAG under this subpart.

§ 35.4040 How many groups can receive a TAG at one Superfund site?

(a) Only one TAG may be awarded for a site at any one time. However, the recipient of the grant can be changed when:

(1) EPA and the recipient mutually agree to terminate the current TAG or the recipient or EPA unilaterally terminates the TAG; or

(2) The recipient elects not to renew its grant even though it is eligible for additional funding.

(b) In each of the situations described in paragraph (a) of this section the following information applies:

(1) If you are a subsequent recipient of a TAG, you are not responsible for actions taken by the first recipient, nor are you responsible for how the first recipient expended the funds received from EPA; and

(2) The process for changing recipients begins when an interested applicant submits a Letter of Intent ("LOI") to the Agency expressing interest in a TAG as described in § 35.4105. We will then follow the application procedure set forth at §§ 35.4105 through 35.4165.

YOUR RESPONSIBILITIES AS A TAG RECIPIENT

§ 35.4045 What requirements must my group meet as a TAG recipient?

Your group, including those groups which form out of a coalition agreement, must incorporate as a nonprofit corporation for the purpose of participating in decision making at the Superfund site for which we provide a TAG. However, a group that was previously incorporated as a nonprofit organization and includes all individuals and groups who joined in applying for the TAG is not required to reincorporate for the specific purpose of representing affected individuals at the site, if in EPA's discretionary judgment, the group has a history of involvement at the site. You must also:

(a) At the time of award, demonstrate that your group has incorporated as a nonprofit organization or filed the necessary documents for incorporation with the appropriate State agency; and

(b) At the time of your first request for reimbursement or advance payment, submit proof that the State has incorporated your group as a nonprofit organization.

§ 35.4050 Must my group contribute toward the cost of a TAG?

(a) Yes, your group must contribute 20 percent of the total cost of the TAG project unless EPA waives the match under § 35.4055.

(b) Under 40 CFR 30.23, your group may use "cash" and/or "in-kind contributions" (for example, your board members can count their time toward your matching share) to meet the matching funds requirement. Without specific statutory authority, you may not use Federal funds to meet the required match.

§ 35.4055 What if my group can't come up with the "matching funds?"

(a) EPA may waive all or part of your matching funds requirement if we:

(1) Have not issued the "Record of Decision" ("ROD") at the last "operable unit" for the site (in other words, if EPA has not already made decisions on the final cleanup actions at the site); and

(2) Determine, based on evidence in the form of documentation provided by your group, that:

(i) Your group needs a waiver because providing the match would be a financial hardship to your group (for example, your local economy is depressed

and coming up with in-kind contributions would be difficult); and

(ii) The waiver is necessary to help your community participate in selecting a remedial action at the site.

(b) If your group receives a waiver of the matching funds after your initial award, your grant agreement must be amended.

HOW MUCH MONEY TAGS PROVIDE

§ 35.4060 How much money can my group receive through a TAG?

The following table shows how much money your group can receive through a TAG:

If your group is . . .	Then your initial award will . . .
(a) the first recipient of a TAG at a site or a subsequent recipient at a site where the initial recipient spent the entire award amount.	not exceed $50,000 per site.
(b) a subsequent recipient at a site with remaining funds from an initial $50,000 award.	be the unspent amount remaining from an initial from the initial award (for example, if the Agency awarded the first recipient $50,000 but that recipient only spent $27,000, then your group's initial award would be $23,000).

§ 35.4065 How can my group get more than $50,000?

(a) The EPA regional office award official for your grant may waive your group's $50,000 limit if your group demonstrates that:

(1) If it received previous TAG funds, you managed those funds effectively; and

(2) Site(s) characteristics indicate additional funds are necessary due to the nature or volume of site-related information. In this case, three of the ten factors below must occur:

(i) A Remedial Investigation/Feasibility Study ("RI/FS") costing more than $2 million is performed;

(ii) Treatability studies or evaluation of new and innovative technologies are required as specified in the Record of Decision;

(iii) EPA reopens the Record of Decision;

(iv) The site public health assessment (or related activities) indicates the need for further health investigations and/or health promotion activities;

(v) EPA designates one or more additional operable units after awarding the TAG;

(vi) The agency leading the cleanup issues an "Explanation of Significant Differences" (ESD);

(vii) A legislative or regulatory change results in new site information after EPA awards the TAG;

(viii) EPA expects a cleanup lasting more than eight years from the beginning of the RI/FS through construction completion;

(ix) Significant public concern exists, where large groups of people in the community require many meetings, copies, etc.; and

(x) Any other factor that, in EPA's judgment, indicates that the site is unusually complex.

(b) Your group can also receive more than $50,000 if you are geographically close to more than one eligible site (for example, two or more sites × $50,000 = grant of $100,000) and your group wishes to receive funding for technical assistance to address multiple eligible sites.

WHAT TAGS CAN PAY FOR

§ 35.4070 How can my group spend TAG money?

(a) Your group must use all or most of your funds to procure a technical advisor(s) to help you understand the nature of the environmental and public

health hazards at the site, the various stages of health and environmental investigations and activities, cleanup, and "operation and maintenance" of a site, including exposure investigation, health study, surveillance program, health promotion activities (for example, medical monitoring and pediatric health units), remedial investigation, and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, and removal action. This technical assistance should contribute to the public's ability to participate in the decision making process by improving the public's understanding of overall conditions and activities at the site.

(b) Your group may use a portion of your funds to:

(1) Undertake activities that communicate site information to the public through newsletters, public meetings or other similar activities;

(2) Procure a grant administrator to manage your group's grant; and/or

(3) Provide one-time health and safety training for your technical advisor to gain site access to your local Superfund site. To provide this training, you must:

(i) Obtain written approval from the EPA regional office; and

(ii) Not spend more than $1,000.00 for this training, including travel, lodging and other related costs.

§ 35.4075 Are there things my group can't spend TAG money for?

Your TAG funds cannot be used for the following activities:

(a) Lawsuits or other legal actions;

(b) Attorney fees for services:

(1) Connected to any kind of legal action; or

(2) That could, if such a relationship were allowable, be interpreted as resulting in an attorney/client relationship to which the attorney/client privilege would apply;

(c) The time of your technical advisor to assist an attorney in preparing a legal action or preparing and serving as an expert witness at any legal proceeding;

(d) Political activity and lobbying that is unallowable under Office of Management and Budget (OMB) Circular A–122, Cost Principles for Non-Profit Organizations (this restriction includes activities such as attempting to influence the outcomes of any Federal, State or local election, referendum, initiative, or similar procedure through in-kind or cash contributions, endorsements, or publicity, or attempting to influence the introduction or passage of Federal or state legislation; your EPA regional office can supply you with a copy of this circular);

(e) Other activities that are unallowable under the cost principles stated in OMB Circular A–122 (such as costs of amusement, diversion, social activities, fund raising and ceremonials);

(f) Tuition or other training expenses for your group's members or your technical advisor except as § 35.4070(b)(3) allows;

(g) Any activities or expenditures for your group's members' travel;

(h) Generation of new primary data such as well drilling and testing, including split sampling;

(i) Reopening or challenging final EPA decisions such as:

(1) Records of Decision; and/or

(2) Disputes with EPA under its dispute resolution procedures set forth in 40 CFR 30.63 (see § 35.4245); and

(j) Generation of new health data through biomedical testing (for example, blood or urine testing), clinical evaluations, health studies, surveillance, registries, and/or public health interventions.

HOW YOU GET THE MONEY

§ 35.4080 Does my group get a lump sum up front, or does EPA reimburse us for costs we incur?

(a) EPA pays your group by reimbursing you for "allowable" costs, which are costs that are:

(1) Grant related;

(2) "Allocable";

(3) "Reasonable"; and

(4) Necessary for the operation of the organization or the performance of the award.

(b) You will be reimbursed for the allowable costs up to the amount of the TAG if your group incurred the costs during the approved "project period" of the grant (except for allowable costs of incorporation which may be incurred

prior to the project period), and your group is legally required to pay those costs.

§ 35.4085 Can my group get an "advance payment" to help us get started?

Yes, a maximum of $5,000.00 in the form of an advance payment is available to new recipients.

§ 35.4090 If my group is eligible for an advance payment, how do we get our funds?

(a) Your group must submit in writing a request for an advance payment and identify what activities, goods or services your group requires.

(b) Your EPA regional office project officer identified in your award document must approve the items for which your group seeks advance funding.

(c) Upon approval of your request, EPA will advance cash (in the form of a check or electronic funds transfer) to your group, up to $5,000, to cover its estimated need to spend funds for an initial period generally geared to your group's cycle of spending funds.

(d) After the initial advance, EPA reimburses your group for its actual cash disbursements.

§ 35.4095 What can my group pay for with an advance payment?

(a) Advance payments may be used only for the purchase of supplies, postage, the payment of the first deposit to open a bank account, the rental of equipment, the first month's rent of office space, advertisements for technical advisors and other items associated with the start up of your organization specifically requested in your advance payment request and approved by your EPA project officer.

(b) Advance payments must not be used for contracts for technical advisors or other contractors.

(c) Advance payments are not available for the costs of incorporation.

§ 35.4100 Can my group incur any costs prior to the award of our grant?

(a) The only costs you may incur prior to the award of a grant from EPA are costs associated with incorporation but you do so at your own risk.

(b) If you are awarded a TAG, EPA may reimburse you for preaward incorporation costs or allow you to count the costs toward your matching funds requirement if the costs are:

(1) Necessary and reasonable for incorporation; and

(2) Incurred for the sole purpose of complying with this subpart's requirement that your group be incorporated as a nonprofit corporation.

HOW TO APPLY FOR A TAG

§ 35.4105 What is the first step for getting a TAG?

To let EPA know of your group's interest in obtaining a TAG, your group should first submit to its EPA regional office a Letter of Intent. (The addresses of EPA's regional offices' TAG Coordinators are listed in § 35.4275.)

§ 35.4106 What information should an LOI include?

The LOI should clearly state that your group intends to apply for a TAG, and should identify:

(a) The name of your group;

(b) The Superfund site(s) for which your group intends to submit an application; and

(c) Provide the name of a contact person in the group and his or her mailing address and telephone number.

§ 35.4110 What does EPA do once it receives the first LOI from a group?

The following table shows what EPA does when it receives the first LOI from a group:

If your site . . .	Then EPA . . .
(a) Is not proposed for listing on the NPL or is proposed but no response is underway or scheduled to begin.	will advise you in writing that we are not yet accepting TAG "applications" for your site. EPA may informally notify other interested groups that it has received an LOI.
(b) Is listed on the NPL or is proposed for listing on the NPL and a response action is underway.	will publish a notice in your local newspaper to formally notify other interested parties that they may contact the first group that sent the LOI to form a coalition or they may submit a separate LOI.

§ 35.4115 After the public notice that EPA has received an LOI, how much time does my group have to form a coalition or submit a separate LOI?

Your group has 30 days (from the date the public notice appears in your local newspaper) to submit documentation that you have formed a coalition with the first group and any other groups, or to submit a separate LOI. This 30-day period is the first 30 days with which your group must be concerned.

§ 35.4120 What does my group do next?

(a) After you submit an LOI, one of the first steps in applying for your TAG is determining whether your state requires review of your grant application. This review allows your governor to stay informed about the variety of grants awarded within your state. This process is called intergovernmental review. Your EPA regional office can provide you with the contact for your state's intergovernmental review process.

(b) You should call that state contact as early as possible in the application process so that you can allow time for this review process which may take up to 60 days.

(c) EPA cannot process your application package without evidence that you have submitted it to the state for review, if your state requires it.

(d) EPA cannot award a TAG until the state has completed its intergovernmental review.

§ 35.4125 What else does my group need to do?

Once you've determined your state's intergovernmental review requirements, you must prepare a TAG application on EPA SF–424, Application for Federal Assistance, or those forms and instructions provided by EPA that include:

(a) A "budget';

(b) A scope of work;

(c) Assurances, certifications and other preaward paperwork as 40 CFR part 30 requires. Your EPA regional office will provide you with the required forms.

§ 35.4130 What must be included in my group's budget?

Your budget must clearly show how:

(a) You will spend the money and how the spending meets the objectives of the TAG project;

(b) Your group will provide the required cash and/or in-kind contributions; and

(c) Your group derived the figures included in the budget.

§ 35.4135 What period of time should my group's budget cover?

The period of time your group's budget covers (the "funding period" of your grant) will be:

(a) One which best accommodates your needs;

(b) Negotiated between your group and EPA; and

(c) Stated in the "award document."

§ 35.4140 What must be included in my group's work plan?

(a) Your scope of work must clearly explain how your group:

(1) Will organize;

(2) Intends to use personnel you will procure for management/coordination and technical advice; and

(3) Will share and disseminate information to the rest of the affected community.

(b) Your scope of work must also clearly explain your project's milestones and the schedule for meeting those milestones.

(c) Finally, your scope of work must explain how your board of directors, technical advisor(s) and "project manager" will interact with each other.

§ 35.4145 How much time do my group or other interested groups have to submit a TAG application to EPA?

(a) Your group must file your application with your EPA regional office within the second 30 days after the date the public notice appears in your local newspaper announcing that EPA has received an LOI. This second 30-day period begins on the day after the first 30-day period § 35.4115 describes ends. EPA will only accept applications from groups that submitted an LOI within 30 days from the date of that public notice.

(b) If your group requires more time to file a TAG application, you may submit a written request asking for an extension. If EPA decides to extend the time period for applications in response to your request, it will notify, in writing, all groups that submitted an LOI of the new deadline for submitting TAG applications.

(c) EPA will not accept other applications or requests for extensions after the final application deadline has passed.

§ 35.4150 What happens after my group submits its application to EPA?

(a) EPA will review your application and send you a letter containing written comments telling you what changes need to be made to the application to make it complete.

(b) Your group has 90 days from the date on the EPA letter to make the changes to your application and resubmit it to EPA.

(c) Once the 90-day period ends, EPA will begin the process to select a TAG recipient, or, in the case of a single applicant, if, EPA does not receive a complete application (meaning, an application that does not have the changes provided in the letter described in paragraph (b) of this section), then EPA will readvertise the fact that a TAG is available and the award process will begin again.

§ 35.4155 How does EPA decide whether to award a TAG to our group?

Once EPA determines your group meets the eligibility requirements in § 35.4020 the Agency considers whether and how successfully your group meets these criteria, each of which are of equal weight:

(a) Representation of groups and individuals affected by the site;

(b) Your group's plans to use the services of a technical advisor throughout the Superfund response action; and

(c) Your group's ability and plan to inform others in the community of the information provided by the technical advisor.

§ 35.4160 What does EPA do if more than one group applies for a TAG at the same site?

When multiple groups apply, EPA will rank each applicant relative to other applicants using the criteria in § 35.4155.

§ 35.4161 Does the TAG application process affect the schedule for work at my site?

No, the schedule for response activities at your site is not affected by the TAG process.

§ 35.4165 When does EPA award a TAG?

(a) EPA may award TAGs throughout the Superfund process, including during operation and maintenance, but we will not award a TAG before the start of your site's response action if the site is proposed for listing on the NPL.

(b) Based on the availability of funds, EPA may delay awards of grants to qualified applicants.

MANAGING YOUR TAG

§ 35.4170 What kinds of reporting does EPA require?

There are several types of reports you need to complete at various points during the life of your group's grant; the number varies based on whether you receive an advance payment:

Type of report	Required information	Timing and frequency
(a) Federal Cash Transactions Report.	The amount of funds advanced to you or electronically transferred to your bank account and how you spent those funds.	Semiannually within 15 working days following the end of the semiannual period which ends June 30 and December 31 of each year.
(b) Minority-Owned Business Enterprise/Women-Owned Business Enterprise (MBE/WBE) Utilization.	Whether your group contracted with a MBE/WBE in the past Federal fiscal year, the value of the contract, if any, and the percentage of total project dollars on MBE/WBEs.	Annually, even if no contracts have been signed.
(c) Progress Report	Full description in chart or narrative format of the progress your group made in relation to your approved schedule, budget and the TAG project milestones, including an explanation of special problems your group encountered.	Quarterly, within 45 days after the end of each calendar quarter.
(d) Financial Status Report.	Status of project's funds through identification of project transactions and within 90 days after the end of your TAG's funding period.	Annually, within 90 days after the anniversary date of the start of your TAG project.
(e) Final Report	Description of project goals and objectives, activities undertaken to achieve goals and objectives, difficulties encountered, technical advisors' work products and funds spent.	Within 90 days after the end of your project.

§ 35.4175 What other reporting and record keeping requirements are there?

In addition to the report requirements § 35.4170 describes, EPA requires your group to:

(a) Comply with any reporting requirements in the terms and conditions of the "grant agreement";

(b) Keep complete financial records accurately showing how you used the Federal funds and the match, whether it is in the form of cash or in-kind assistance; and

(c) Comply with any reporting and record keeping requirements in OMB Circular A–122 and 40 CFR part 30.

§ 35.4180 Must my group keep financial records after we finish our TAG?

(a) You must keep TAG financial records for ten years from the date of the final Financial Status Report, or until any audit, litigation, cost recovery, and/or disputes initiated before the end of the ten-year retention period are settled, whichever, is longer.

(b) At the ten-year mark, you may dispose of your TAG financial records if you first get written approval from EPA.

(c) If you prefer, you may submit the financial records to EPA for safekeeping when you give us the final Financial Status Report.

§ 35.4185 What does my group do with reports our technical advisor prepares for us?

You must send to EPA a copy of each final written product your advisor prepares for you as part of your TAG. We will send them to the local Superfund site information repository(ies) where all site-related documents are available to the public.

PROCURING A TECHNICAL ADVISOR OR OTHER CONTRACTOR WITH TAG FUNDS

§ 35.4190 How does my group identify a qualified technical advisor?

(a) Your group must select a technical advisor who possesses the following credentials:

(1) Demonstrated knowledge of hazardous or toxic waste issues, relocation issues, redevelopment issues or public health issues as those issues relate to hazardous substance/toxic waste issues, as appropriate;

(2) Academic training in a relevant discipline (for example, biochemistry, toxicology, public health, environmental sciences, engineering, environmental law and planning); and

(3) Ability to translate technical information into terms your community can understand.

(b) Your technical advisor for public health issues must have received his or her public health or related training at accredited schools of medicine, public health or accredited academic institutions of other allied disciplines (for example, toxicology).

(c) Your group should select a technical advisor who has experience working on hazardous or toxic waste problems, relocation, redevelopment or public health issues, and communicating those problems and issues to the public.

§ 35.4195 Are there certain people my group cannot select to be our technical advisor, grant administrator, or other contractor under the grant?

Your group may not hire the following:

(a) The person(s) who wrote the specifications for the "contract" and/or who helped screen or select the contractor;

(b) In the case of a technical advisor, a person or entity doing work for the Federal or State government or any other entity at the same NPL site for which your group is seeking a technical advisor; and

(c) Any person who is on the List of Parties Excluded from Federal Procurement or NonProcurement Programs.

§ 35.4200 What restrictions apply to contractors my group procures for our TAG?

When procuring contractors your group:

(a) Cannot award cost-plus-percentage-of-cost contracts; and

(b) Must award only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed contract.

§ 35.4205 How does my group procure a technical advisor or any other contractor?

When procuring contractors your group must also:

(a) Provide opportunity for all qualified contractors to compete for your work (see § 35.4210);

(b) Keep written records of the reasons for all your contracting decisions;

(c) Make sure that all costs are reasonable in a proposed contract;

(d) Inform EPA of any proposed contract over $1,000.00;

(e) Provide EPA the opportunity to review a contract before your group awards or amends it;

(f) Perform a "cost analysis" to evaluate each element of a contractor's cost to determine if it is reasonable, allocable and allowable for all contracts over $25,000; and

(g) Comply with the small business enterprises (SBE), minority-owned business enterprises, women-owned business enterprise requirements in 40 CFR 30.44(b) which outlines steps your group must take to make positive efforts to use small businesses, minority-owned firms and women's business enterprises. These steps generally say:

(1) Make sure to use small businesses, minority-owned firms, and women's businesses as often as possible.

(2) Make information on upcoming opportunities available and plan time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) When procuring firms for larger contracts, consider whether those firms intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of those to handle on its own.

(5) Use the services and help, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(6) If your contractor awards a contract, require the contractor to take the steps in 40 CFR 30.44(b) as summarized in paragraphs (g)(1) through (5) of this section.

§ 35.4210 Must my group solicit and document bids for our procurements?

(a) The steps needed to be taken to procure goods and/or services depends on the amount of the proposed procurement:

If the aggregate amount of the	Then your group
(1) purchase is $1,000 or less	may make the purchase as long as you make sure the price is reasonable; no oral or written bids are necessary.
(2) proposed contract is over $1,000 but less than $25,000.	must obtain and document oral or written bids from two or more qualified sources.
(3) proposed contract is $25,000 to $100,000.	must:
	(i) Solicit written bids from three or more sources who are willing and able to do the work;
	(ii) Provide potential sources in the scope of work to be performed and the criteria your group will use to evaluate the bids;
	(iii) Objectively evaluate all bids; and

If the aggregate amount of the	Then your group
	(iv) Notify all unsuccessful bidders.
(4) proposed contract is greater than $100,000.	must follow the procurement regulations in 40 CFR part 30 (these regulations outline the standards for your group to use when contracting for services with Federal funds; they also contain provisions on: codes of conduct for the award and administration of contracts; competition; procurement procedures; cost and price analysis; procurement records; contract administration; and contracts generally).

(b) Your group must not divide any procurements into smaller parts to get under any of the dollar limits in paragraph (a) of this section.

§ 35.4215 What if my group can't find an adequate number of potential sources for a technical advisor or other contractor?

In situations where only one adequate bidder can be found, your group may request written authority from the EPA award official to contract with the sole bidder.

§ 35.4220 How does my group ensure a prospective contractor does not have a conflict of interest?

Your group must require any prospective contractor on any contract to provide, with its bid or proposal:

(a) Information on its financial and business relationship with all PRPs at the site, with PRP parent companies, subsidiaries, affiliates, subcontractors, contractors, and current clients or attorneys and agents. This disclosure requirement includes past and anticipated financial and business relationships, and services provided to or on behalf of such parties in connection with any proposed or pending litigation;

(b) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(c) A statement that it will disclose to you immediately any such information discovered after submission of its bid or after award.

§ 35.4225 What if my group decides a prospective contractor has a conflict of interest?

If, after evaluating the information in § 35.4220, your group decides a prospective contractor has a significant conflict of interest that cannot be avoided or otherwise resolved, you must exclude him or her from consideration.

§ 35.4230 What are my group's contractual responsibilities once we procure a contractor?

For contractual responsibilities, your group, not EPA:

(a) Is responsible for resolving all contractual and administrative issues arising out of contracts you enter into under a TAG; you must establish a procedure for resolving such issues with your contractor which complies with the provisions of 40 CFR 30.41. These provisions say your group, not EPA, is responsible for settling all issues related to decisions you make in procuring advisors or other contractors with TAG funds; and

(b) Must ensure your contractor(s) perform(s) in accordance with the terms and conditions of the contract.

§ 35.4235 Are there specific provisions my group's contract(s) must contain?

Your group must include the following provisions in each of its contracts:

(a) Statement of work;

(b) Schedule for performance;

(c) Due dates for deliverables;

(d) Total cost of the contract;

(e) Payment provisions;

(f) The following clauses from 40 CFR part 30, appendix A, which your EPA regional office can provide to you:

(1) Equal Employment Opportunity; and

(2) Suspension and Debarment;

(g) The following clauses from 40 CFR 30.48:

(1) Remedies for breaches of contract (40 CFR 30.48(a));

(2) Termination by the recipient (40 CFR 30.48(b)); and

(3) Access to records (40 CFR 30.48(d)); and

(h) Provisions that require your contractor(s) to keep the following detailed records as § 35.4180 requires for ten years after the end of the contract:

(1) Acquisitions;

(2) Work progress reports;

(3) Expenditures; and

(4) Commitments indicating their relationship to established costs and schedules.

REQUIREMENTS FOR TAG CONTRACTORS

§ 35.4240 What provisions must my group's TAG contractor comply with if it subcontracts?

A TAG contractor must comply with the following provisions when awarding subcontracts:

(a) Section 35.4205 (b) pertaining to documentation;

(b) Section 35.4205 (c) and (f) pertaining to cost;

(c) Section 35.4195 (c) pertaining to suspension and debarment;

(d) Section 35.4200 (b) pertaining to responsible contractors;

(e) Section 35.4205 (g) pertaining to disadvantaged business enterprises;

(f) Section 35.4200 (a) pertaining to unallowable contracts;

(g) Section 35.4235 pertaining to contract provisions; and

(h) Cost principles in 48 CFR part 31, the Federal Acquisition Regulation, if the contractor and subcontractors are profit-making organizations.

GRANT DISPUTES, TERMINATION, AND ENFORCEMENT

§ 35.4245 How does my group resolve a disagreement with EPA regarding our TAG?

The regulations at 40 CFR 30.63 and 31.70 will govern disputes except that, before you may obtain judicial review of the dispute, you must have requested the Regional Administrator to review the dispute decision official's determination under 40 CFR 31.70(c), and, if you still have a dispute, you must have requested the Assistant Administrator for the Office of Solid Waste and Emergency Response to review the Regional Administrator's decision under 40 CFR 31.70(h).

§ 35.4250 Under what circumstances would EPA terminate my group's TAG?

(a) EPA may terminate your grant if your group materially fails to comply with the terms and conditions of the TAG and the requirements of this subpart.

(b) EPA may also terminate your grant with your group's consent in which case you and EPA must agree upon the termination conditions, including the effective date as 40 CFR 30.61 describes.

§ 35.4255 Can my group terminate our TAG?

Yes, your group may terminate your TAG by sending EPA written notification explaining the reasons for the termination and the effective date.

§ 35.4260 What other steps might EPA take if my group fails to comply with the terms and conditions of our award?

EPA may take one or more of the following actions, under 40 CFR 30.62, depending on the circumstances:

(a) Temporarily withhold advance payments until you correct the deficiency;

(b) Not allow your group to receive reimbursement for all or part of the activity or action not in compliance;

(c) Wholly or partly "suspend" your group's award;

(d) Withhold further awards (meaning, funding) for the project or program;

(e) Take enforcement action;

(f) Place special conditions in your grant agreement; and

(g) Take other remedies that may be legally available.

CLOSING OUT A TAG

§ 35.4265 How does my group close out our TAG?

(a) Within 90 calendar days after the end of the approved project period of the TAG, your group must submit all financial, performance and other reports as required by § 35.4180. Upon request from your group, EPA may approve an extension of this time period.

(b) Unless EPA authorizes an extension, your group must pay all your bills related to the TAG by no later than 90 calendar days after the end of the funding period.

(c) Your group must promptly return any unused cash that EPA advanced or paid; OMB Circular A–129, Policies for Federal Credit Programs and Non-Tax Receivables, governs unreturned amounts that become delinquent debts.

OTHER THINGS YOU NEED TO KNOW

§ 35.4270 Definitions.

The following definitions apply to this subpart:

Advance payment means a payment made to a recipient before "outlays" are made by the recipient.

Affected means subject to an actual or potential health, economic or environmental threat. Examples of affected parties include people:

(1) Who live in areas near NPL facilities, whose health may be endangered by releases of hazardous substances at the facility; or

(2) Whose economic interests are threatened or harmed.

Affiliated means a relationship between persons or groups where one group, directly or indirectly, controls or has the power to control the other, or, a third group controls or has the power to control both. Factors indicating control include, but are not limited to:

(1) Interlocking management or ownership (e.g., centralized decision-making and control);

(2) Shared facilities and equipment; and

(3) Common use of employees.

Allocable cost means a cost which is attributable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. A cost is allocable to a Government award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

(1) Is incurred specifically for the award;

(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received; or

(3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

Allowable cost means those project costs that are: eligible, reasonable, allocable to the project, and necessary to the operation of the organization or the performance of the award as provided in the appropriate Federal cost principles, in most cases OMB Circular A–122 (see 40 CFR 30.27), and approved by EPA in the assistance agreement.

Applicant means any group of people that files an application for a TAG.

Application means a completed formal written request for a TAG that you submit to a State or the EPA on EPA form SF–424, Application for Federal Assistance (Non-construction Programs).

Award document or grant agreement is the legal document that transfers money or anything of value to your group to accomplish the purpose of the TAG project. It specifies funding and project periods, EPA's and your group's budget share of "eligible costs," a description of the work to be accomplished, and any additional terms and conditions that may apply to the grant.

Award Official means the EPA official who has the authority to sign grant agreements.

Budget means the financial plan for spending all Federal funds and your

group's matching share funds (including in-kind contributions) for a TAG project that your group proposes and EPA approves.

Cash contribution means actual non-Federal dollars, or Federal dollars if expressly authorized by Federal statute, that your group spends for goods, services, or personal property (such as office supplies or professional services) used to satisfy the matching funds requirement.

Contract means a written agreement between your group and another party (other than a public agency) for services or supplies necessary to complete the TAG project. Contracts include contracts and subcontracts for personal and professional services or supplies necessary to complete the TAG project.

Contractor means any party (for example, a technical advisor) to whom your group awards a contract.

Cost analysis is the evaluation of each element of cost to determine whether it is reasonable, allocable, and allowable.

Eligible cost is a cost permitted by statute, program guidance or regulations.

EPA means the Environmental Protection Agency.

Explanation of Significant Differences (ESD) means the document issued by the agency leading a cleanup that describes to the public significant changes made to a Record of Decision after the ROD has been signed. The ESD must also summarize the information that led to the changes and affirm that the revised remedy complies with the "National Contingency Plan" (NCP) and the statutory requirements of CERCLA.

Federal facility means a facility that is owned or operated by a department, agency, or instrumentality of the United States.

Funding period (previously called a "budget period") means the length of time specified in a grant agreement during which your group may spend Federal funds. A TAG project period may be comprised of several funding periods.

Grant agreement or award document is the legal document that transfers money or anything of value to your group to accomplish the purpose of the TAG project. It specifies funding and project periods, EPA's and your group's budget share of eligible costs, a description of the work to be accomplished, and any additional terms and conditions that may apply to the grant.

In-kind contribution means the value of a non-cash contribution used to meet your group's matching funds requirement in accordance with 40 CFR 30.23. An in-kind contribution may consist of charges for equipment or the value of goods and services necessary to the EPA-funded project.

Letter of intent (LOI) means a letter addressed to your EPA regional office which clearly states your group's intention to apply for a TAG. The letter tells EPA the name of your group, the Superfund site(s) for which your group intends to submit an application, and the name of a contact person in the group including a mailing address and telephone number.

Matching funds means the portion of allowable project cost contributed toward completing the TAG project using non-Federal funds or Federal funds if expressly authorized by Federal statutes. The match may include in-kind as well as cash contributions.

National Contingency Plan (NCP) means the federal government's blueprint for responding to both oil spills and hazardous substance releases. It lays out the country's national response capability and promotes overall coordination among the hierarchy of responders and contingency plans.

National Priorities List (NPL) means the Federal list of priority hazardous substance sites, nationwide. Sites on the NPL are eligible for long-term cleanup actions financed through the Superfund program.

Operable unit means a discrete action defined by EPA that comprises an incremental step toward completing site cleanup.

Operation and maintenance means the steps taken after site actions are complete to make certain that all actions are effective and working properly.

Outlay means a charge made to the project or program that is an allowable cost in terms of costs incurred or in-kind contributions used.

Potentially responsible party (PRP) means any individual(s) or company(ies) (such as owners, operators, transporters or generators) potentially responsible under sections 106 or 107 of CERCLA (42 U.S.C. 9606 or 42 U.S.C. 9607) for the contamination problems at a Superfund site.

Project manager means the person legally authorized to obligate your group to the terms and conditions of EPA's regulations and the grant agreement, and designated by your group to serve as its principal contact with EPA.

Project period means the period established in the TAG award document during which TAG money may be used. The project period may be comprised of more than one funding period.

Reasonable cost means a cost that, in its nature or amount, does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs.

Recipient means any group that has been awarded a TAG.

Record of decision (ROD) means a public document that explains the cleanup method that will be used at a Superfund site; it is based on technical data gathered and analyses performed during the remedial investigation and feasibility study, as well as public comments and community concerns.

Remedial investigation/feasibility study (RI/FS) means the phase during which EPA conducts risk assessments and numerous studies into the nature and extent of the contamination on site, and analyzes alternative methods for cleaning up a site.

Response action means all activities undertaken by EPA, other Federal agencies, States, or PRPs to address the problems created by hazardous substances at an NPL site.

Start of response action means the point in time when funding is set-aside by either EPA, other Federal agencies, States, or PRPs to begin response activities at a site.

Suspend means an action by EPA that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing Executive Orders 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), Debarment and Suspension.

§ 35.4275 Where can my group get the documents this subpart references (for example, OMB circulars, other subparts, forms)?

EPA Headquarters and the regional offices that follow have the documents this subpart references available if you need them:

(a) TAG Coordinator or Grants Office, U.S. EPA Region I, John F. Kennedy Federal Building, Boston, MA 02203.

(b) TAG Coordinator or Grants Office, U.S. EPA Region II, 290 Broadway, New York, NY 10007–1866.

(c) TAG Coordinator or Grants Office, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19106.

(d) TAG Coordinator or Grants Office, U.S. EPA Region IV, Atlanta Federal Center, 61 Forsyth Street, Atlanta, GA 30303.

(e) TAG Coordinator or Grants Office, U.S. EPA Region V, Metcalfe Federal Building, 77 W. Jackson Blvd., Chicago, IL 60604.

(f) TAG Coordinator or Grants Office, U.S. EPA Region VI, Wells Fargo Bank, Tower at Fountain Place, 1445 Ross Avenue, Suite 1200, Dallas, TX 752020–2733.

(g) TAG Coordinator or Grants Office, U.S. EPA Region VII, 901 N. 5th Street, Kansas City, KS 66101.

(h) TAG Coordinator or Grants Office, U.S. EPA Region VIII, 999 18th Street, Suite #500, Denver, CO 80202–2466.

(i) TAG Coordinator or Grants Office, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

(j) TAG Coordinator or Grants Office, U.S. EPA Region X, 1200 6th Avenue, Seattle, WA 98101.

(k) National TAG Coordinator, U.S. EPA Mail Code: 5204–G, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.

Subpart N [Reserved]

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AUTHORITY: 42 U.S.C. 9601 *et seq.*

SOURCE: 55 FR 23007, June 5, 1990, unless otherwise noted.

GENERAL

§ 35.6000 Authority.

This regulation is issued under section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*, Pub. L. 96–510, December 11, 1980, otherwise referred to as "CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499, October 17, 1986; 100 Stat. 1613, otherwise referred to as "SARA").

All references to CERCLA within this regulation are meant to indicate CERCLA, as amended by SARA.

§ 35.6005 Purpose and scope.

(a) This regulation codifies recipient requirements for administering CERCLA-funded Cooperative Agreements. This regulation also codifies requirements for administering Superfund State Contracts (SSCs) for non-State-lead remedial responses undertaken pursuant to section 104 of CERCLA.

(b) The requirements in this regulation do not apply to Technical Assistance Grants (TAGs) or to CERCLA research and development grants, including the Superfund Innovative Technology Evaluation (SITE) Demonstration Program.

(c) 40 CFR part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," establishes consistency and uniformity among Federal agencies in the administration of grants and Cooperative Agreements to State, local, and Indian Tribal governments. For CERCLA-funded Cooperative Agreements, this subpart supplements the requirements contained in part 31 for States, political subdivisions thereof, and Indian Tribes. This regulation references those sections of part 31 that are applicable to CERCLA-funded Cooperative Agreements.

(d) Superfund monies for remedial actions cannot be used by recipients for Federal facility cleanup activities. When a cleanup is undertaken by another Federal entity, the State, political subdivision or Indian Tribe can pursue funding for its involvement in response activities from the appropriate Federal entity.

§ 35.6010 Eligibility.

This regulation applies to States, political subdivisions and Indian Tribes. Indian Tribes are only eligible to receive Superfund Cooperative Agreements or Superfund State Contracts when they are Federally recognized, and when they meet the criteria set forth in § 300.515(b) of the NCP. Although section 126 of CERCLA provides that the governing body of an Indian Tribe shall be afforded substantially the same treatment as a State, in this subpart Indian Tribes are not included in the definition of State in order to clarify those requirements with which Indian Tribes must comply and those with which they need not comply.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the meanings set forth below:

(1) *Activity.* A set of CERCLA-funded tasks that makes up a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include Core Program, pre-remedial (i.e. preliminary assessments and site inspections), support agency, remedial investigation/feasibility studies, remedial design, remedial action, removal, and enforcement activities.

(2) *Allowable costs.* Those project costs that are: Eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the Cooperative Agreement and/or Superfund State Contract.

(3) *Architectural or engineering (A/E) services.* Consultation, investigations, reports, or services for design-type

projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

(4) *Award official.* The EPA official with the authority to execute Cooperative Agreements and Superfund State Contracts (SSCs) and to take other actions authorized by EPA Orders.

(5) *Budget period.* The length of time EPA specifies in a Cooperative Agreement during which the recipient may expend or obligate Federal funds.

(6) *CERCLA.* The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601–9657, Pub. L. 96–510, Dec. 11, 1980), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499, Oct. l7, 1986; 100 Stat. 1613).

(7) *Change order.* A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from, or revision of, a contract, usually initiated at the contractor's request.

(8) *Claim.* A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

(9) *Closeout.* The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the Cooperative Agreement and/or Superfund State Contract.

(10) *Community Relations Plan (CRP).* A management and planning tool outlining the specific community relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

(11) *Construction.* Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

(12) *Contract.* A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

(13) *Contractor.* Any party to whom a recipient awards a contract.

(14) *Cooperative Agreement.* A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

(15) *Core Program Cooperative Agreement.* A Cooperative Agreement that provides funds to a State or Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to support a State's ability to participate in the CERCLA response program.

(16) *Cost analysis.* The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

(17) *Cost share.* The portion of allowable project costs that a recipient contributes toward completing its project (i.e., non-Federal share, matching share).

(18) *Equipment.* Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(19) *Excess property.* Any property under the control of a Federal agency that is not required for immediate or foreseeable needs and thus is a candidate for disposal.

(20) *Fair market value.* The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

(21) *Health and safety plan.* A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological

hazards of the site. The health and safety plan outlines:

(i) Site hazards;

(ii) Work areas and site control procedures;

(iii) Air surveillance procedures;

(iv) Levels of protection;

(v) Decontamination and site emergency plans;

(vi) Arrangements for weather-related problems; and

(vii) Responsibilities for implementing the health and safety plan.

(22) *In-kind contribution.* The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

(23) *Indian Tribe.* As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(24) *Intergovernmental Agreement.* Any written agreement between units of government under which one public agency performs duties for or in concert with another public agency using EPA assistance. This includes substate and interagency agreements.

(25) *Lead agency.* The Federal agency, State agency, political subdivision, or Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

(26) *Minority Business Enterprise (MBE).* A business which is:

(i) Certified as socially and economically disadvantaged by the Small Business Administration;

(ii) Certified as a minority business enterprise by a State or Federal agency; or

(iii) An independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(A) Black American;

(B) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(C) Native American (American Indian, Eskimo, Aleut, native Hawaiian); or

(D) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(27) *National Priorities List (NPL).* EPA's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under Superfund. A site must be on the NPL to receive money from the Trust Fund for remedial action. The list is based primarily on the score a site receives from the Hazard Ranking System.

(28) *Operable unit.* A discrete action, as described in the Cooperative Agreement or SSC, that comprises an incremental step toward comprehensively addressing site problems. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

(29) *Operation and maintenance (O&M).* Measures required to maintain the effectiveness of response actions.

(30) *Personal property.* Property other than real property. It includes both supplies and equipment.

(31) *Political subdivision.* The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

(32) *Potentially Responsible Party (PRP).* Any individual(s), or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazardous Substance sites. PRPs may include individual(s), or company(ies) identified as having owned, operated, or in some other manner contributed wastes to Hazardous Substance sites.

(33) *Price analysis.* The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

(34) *Profit.* The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

(35) *Project.* The activities or tasks EPA identifies in the Cooperative Agreement and/or Superfund State Contract.

(36) *Project manager.* The recipient official designated in the Cooperative Agreement or SSC as the program contact with EPA.

(37) *Project officer.* The EPA official designated in the Cooperative Agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

(38) *Project period.* The length of time EPA specifies in the Cooperative Agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

(39) *Quality Assurance Project Plan.* A written document, associated with remedial site sampling, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities and procedures designed to achieve the data quality objectives of a specific project(s) or continuing operation(s).

(40) *Real property.* Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

(41) *Recipient.* Any State, political subdivision thereof, or Indian Tribe which has been awarded and has accepted an EPA Cooperative Agreement.

(42) *Services.* A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

(43) *Small business.* A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

(44) *State.* The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

(45) *Statement of Work (SOW).* The portion of the Cooperative Agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

(46) *Subcontractor.* Any first tier party that has a contract with the recipient's prime contractor.

(47) *Superfund State Contract (SSC).* A joint, legally binding agreement between EPA and another party(s) to obtain the necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f).

(48) *Supplies.* All tangible personal property other than equipment as defined in this subpart.

(49) *Support agency.* The agency that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance to the lead agency.

(50) *Task.* An element of a Superfund response activity identified in the Statement of Work of a Superfund Cooperative Agreement or a Superfund State Contract.

(51) *Title.* The valid claim to property which denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

(52) *Unit acquisition cost.* The net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the

cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(53) *Value engineering.* A systematic and creative analysis of each contract term or task to ensure that its essential function is provided at the overall lowest cost.

(54) *Women's Business Enterprise (WBE).* A business which is certified as a Women's Business Enterprise by a State or Federal agency, or which meets the following definition. A Women's Business Enterprise is an independent business concern which is at least 51 percent owned by a woman or women who also control and operate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws.

(b) Those terms not defined in this section shall have the meanings set forth in section 101 of CERCLA, 40 CFR part 31 and 40 CFR part 300 (the National Contingency Plan).

§ 35.6020 Other statutory provisions.

The recipient must comply with the Federal laws described in 40 CFR 31.13, Principal Environmental Statutory Provisions; Public Law 98–473, as implemented in the Department of Interior, Bureau of Indian Affairs, regulation at 25 CFR part 20; 25 CFR part 20 and with other applicable statutory provisions.

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for an official deviation from the non-statutory provisions of this regulation. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

PRE-REMEDIAL RESPONSE COOPERATIVE AGREEMENTS

§ 35.6050 Eligibility for pre-remedial Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for pre-remedial response Cooperative Agreements.

§ 35.6055 State-lead pre-remedial Cooperative Agreements.

(a) To receive a State-lead pre-remedial Cooperative Agreement, the applicant must submit an "Application for Federal Assistance" (SF–424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(1) *Budget sheets* (SF–424A);

(2) *A Project narrative statement,* including the following:

(i) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the project officer has approved the site;

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA;

(iii) *A schedule of deliverables.*

(3) *Drug-Free Workplace Certification.* The applicant must certify (40 CFR part 32, subpart F) that it is in compliance with the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D), which requires applicants to certify in writing that they will provide a drug-free workplace. The applicant must follow the requirements contained in the OMB notice entitled "Government-wide Implementation of the Drug-Free Workplace Act of 1988" published January 31, 1989.

(4) *Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700–49).* The applicant must certify that it is in compliance with Executive Order 12549 and 40 CFR part 32.

(5) *Procurement Certification.* The applicant must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(6) *Anti-Lobbying Certification.* The applicant must certify (40 CFR part 34,

appendix A) that no appropriated funds will be expended to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with any Federal award in excess of $100,000, in accordance with section 319 of Public Law 101–121. The applicant must follow the requirements in the Interim Final Rule entitled, "New Restrictions on Lobbying" published on February 26, 1990.

(b) *Pre-remedial Cooperative Agreement requirements.* The recipient must comply with all terms and conditions in the Cooperative Agreement, and with the following requirements:

(1) *Health and safety plan.* (i) Before beginning field work, the recipient must have a health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is an Indian Tribe which is exempt from OSHA requirements.

(2) *Quality assurance.* (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Political subdivision-lead pre-remedial Cooperative Agreements.

(a) If the Award Official determines that a political subdivision's lead involvement in pre-remedial activities would be more efficient, economical and appropriate than that of a State, based on the number of sites to be addressed and the political subdivision's history of program involvement, a pre-remedial Cooperative Agreement may be awarded under this section.

(b) The political subdivision must comply with all of the requirements described in § 35.6055 of this subpart.

(c) The Award Official may require a three-party Superfund State Contract for pre-remedial activities.

(d) If the preliminary assessment/site investigation (PA/SI) shows that listing the site on the NPL is necessary, the political subdivision must enter into a three-party Superfund State Contract before any remedial activities begin.

§ 35.6070 Indian Tribe-lead pre-remedial Cooperative Agreements.

The Indian Tribe must comply with all of the requirements described in § 35.6055 of this subpart, except for the intergovernmental review requirements included in the "Application for Federal Assistance" (SF–424).

REMEDIAL RESPONSE COOPERATIVE AGREEMENTS

§ 35.6100 Eligibility for remedial Cooperative Agreements.

States, Indian Tribes, and political subdivisions may apply for remedial response Cooperative Agreements.

§ 35.6105 State-lead remedial Cooperative Agreements.

To receive a State-lead remedial Cooperative Agreement, the applicant must submit the following items to EPA:

(a) *Application form,* as described in § 35.6055(a) of this subpart, accompanied by the following:

(1) *Budget sheets* (SF–424A) displaying costs by site, activity and operable unit, as applicable;

(2) *A Project narrative statement,* including the following:

(i) *A site description,* including a discussion of the location of each site, the physical characteristics of each site (site geology and proximity to drinking water supplies), the nature of the release (contaminant type and affected media), past response actions at each

site, and response actions still required at each site;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task, and a standard task to ensure that a sign is posted at the site providing the appropriate contacts for obtaining information on activities being conducted at the site, and for reporting suspected criminal activities;

(iii) *A statement designating a lead site project manager* among appropriate State offices. This statement must demonstrate that the lead State agency has conducted coordinated planning of response activities with other State agencies. The statement must identify the name and position of those individuals who will be responsible for coordinating the State offices;

(iv) *A site-specific Community Relations Plan* or an assurance that field work will not begin until one is in place. The Regional community relations coordinator must approve the Community Relations Plan before the recipient begins field work. The recipient must comply with the community relations requirements described in EPA policy and guidance, and in the National Contingency Plan (NCP);

(v) *A site-specific health and safety plan,* or an assurance that the applicant will have a final plan before starting field work. Unless specifically waived by the award official, the applicant must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. The site-specific health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is an Indian Tribe exempt from OSHA requirements;

(vi) *Quality assurance*—(A) *General.* If the project involves environmentally related measurements or data generation, the recipient must comply with the requirements regarding quality assurance described in 40 CFR 31.45.

(B) *Quality assurance plan.* The applicant must have a separate quality assurance project plan and/or sampling plan for each site to be covered by the Cooperative Agreement. The applicant must submit the quality assurance project plan and sampling plan, which incorporates results of any site investigation performed at that site, to EPA with its Cooperative Agreement application. However, at the option of the EPA award official with program concurrence, the applicant may submit with its application a schedule for developing the detailed site-specific quality assurance plan (generally 45 days before beginning field work). Field work may not begin until EPA approves the site-specific quality assurance plan.

(C) *Split sampling.* The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

(vii) *A schedule of deliverables* to be prepared during response activities.

(3) *Drug-Free Workplace Certification.* The applicant must certify (40 CFR part 32, subpart F) that it is in compliance with the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D), which requires applicants to certify in writing that they will provide a drug-free workplace.

(4) *Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700–49).* The applicant must certify that it is in compliance with Executive Order 12549 and 40 CFR part 32.

(5) *Procurement Certification.* The applicant must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(6) *Anti-Lobbying Certification.* The applicant must certify (40 CFR part 34, appendix A) that no appropriated funds will be expended to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with any Federal award in excess of $100,000, in accordance with section 319 of Public Law 101–121. The applicant

must follow the requirements in the Interim Final Rule entitled, "New Restrictions on Lobbying" published on February 26, 1990.

(b) *CERCLA Assurances.* Before a Cooperative Agreement for remedial action can be awarded, the State must provide EPA with written assurances as specified below.

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance (O&M) of implemented CERCLA-funded remedial actions for the expected life of each such action. In addition, even if a political subdivision is designated as being responsible for O&M, the State must guarantee that it will assume any or all O&M activities in the event of default by the political subdivision.

(2) *Cost sharing.* The State must provide assurances for cost sharing as follows:

(i) *Ten percent.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(ii) *Fifty percent.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Twenty-year waste capacity.* The State must assure EPA of the availability of hazardous waste treatment or disposal facilities within and/or outside the State that comply with subtitle C of the Solid Waste Disposal Act and that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of the response agreement. A remedial response action cannot be funded unless this assurance is provided consistent with §300.510 of the NCP. EPA will determine whether the State's assurance is adequate.

(4) *Off-site storage, treatment, or disposal.* If off-site storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with subtitle C of the Solid Waste Disposal Act and is acceptable to EPA. The lead agency of the State must provide the notification required at §35.6120, if applicable.

(5) *Real property acquisition.* If EPA determines in the remedy selection process that an interest in real property must be acquired in order to conduct a response action, such acquisition may be funded under a Cooperative Agreement. EPA may acquire an interest in real estate for the purpose of conducting a remedial action only if the State provides assurance that it will accept transfer of such interest in accordance with 40 CFR 300.510(f). The State must provide this assurance even if it intends to transfer this interest to a third party. (See §35.6400 of this subpart for additional information on real property acquisition requirements.)

[55 FR 23007, June 5, 1990, as amended at 59 FR 35853, July 14, 1994]

§35.6110 Indian Tribe-lead remedial Cooperative Agreements.

(a) *Application requirements.* The Indian Tribe must comply with all of the requirements described in §35.6105(a) and, if appropriate, §35.6105(b)(5) of this subpart. Indian tribes are not required to comply with the intergovernmental review requirements included in the "Application for Federal Assistance" (SF–424). Consistent with the NCP (§300.510(e)(2)), this rule does not address whether Indian tribes are States for the purpose of CERCLA section 104(c)(9).

(b) *Cooperative Agreement requirements.* (1) The Indian tribe must comply with all terms and conditions in the Cooperative Agreement.

(2) If EPA determines as part of the remedy selection process that an interest in real property must be acquired in order to conduct the site-specific response action, the Indian tribe will be required, to the extent of its legal authority, to assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds, including any interest in property that is acquired to ensure the reliability of institutional controls restricting the use

of that property. (See § 35.6400 of this subpart regarding information on property title and interest requirements.)

(3) If it is designated the lead for remedial action, the Indian Tribe must provide the notification required at § 35.6120, substituting the term Indian Tribe for the term State in that section, and out-of-jurisdiction for out-of-State.

§ 35.6115 Political subdivision-lead remedial Cooperative Agreements.

(a) *General.* If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume the lead responsibility for the remedial activity, or a portion thereof, at a site. The State and political subdivision must enter into a three-party Superfund State Contract (SSC) with EPA before a political subdivision can enter into a Cooperative Agreement.

(b) *Three-party Superfund State Contract requirements.* The three-party SSC must specify the responsibilities of the signatories. By signing the SSC, the State and the political subdivision agree to follow the appropriate administrative requirements regarding SSCs described in §§ 35.6805, 35.6815, and 35.6820 of this subpart. Furthermore, EPA, the State, and the political subdivision agree that the SSC:

(1) Specifies the substantial and meaningful involvement of the State as required by section 121(f)(1) of CERCLA, as amended; and

(2) Includes the State's CERCLA section 104 assurances, if the political subdivision is designated the lead for remedial action.

(c) *Political subdivision Cooperative Agreement requirements*—(1) *Application requirements.* To receive a remedial Cooperative Agreement, the political subdivision must prepare an application which includes the documentation described in § 35.6105 (a)(1) through (a)(6).

(2) *Cooperative Agreement requirements.* The political subdivision must comply with all terms and conditions in the Cooperative Agreement. If it is designated the lead for remedial action, the political subdivision must provide the notification required at § 35.6120, substituting the term "political subdivision" for the term "State" in that section.

§ 35.6120 Notification of the out-of-State or out-of-Indian Tribal jurisdiction transfer of CERCLA waste.

(a) The recipient must provide written notification of off-site shipments of CERCLA waste from a site to an out-of-State or out-of-Indian Tribal jurisdiction waste management facility to:

(1) The appropriate State environmental official for the State in which the waste management facility is located; and/or

(2) The appropriate Indian Tribal official who has jurisdictional authority in the area where the waste management facility is located; and

(3) The EPA Award Official.

(b) The notification of off-site shipments does not apply when the total volume of all such shipments from the site does not exceed 10 cubic yards.

(c) The notification must be in writing and must provide the following information, where available:

(1) The name and location of the facility to which the CERCLA waste is to be shipped;

(2) The type and quantity of CERCLA waste to be shipped;

(3) The expected schedule for the shipments of the CERCLA waste; and

(4) The method of transportation of the CERCLA waste.

(d) The recipient must notify the State or Indian Tribal government in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the CERCLA waste to another facility within the same receiving State, or to a facility in another State.

(e) The recipient must provide relevant information on the off-site shipments, including the information in paragraph (c) above, as soon as possible after the award of the contract and, where practicable, before the CERCLA waste is actually shipped.

ENFORCEMENT COOPERATIVE AGREEMENTS

§ 35.6145 Eligibility for enforcement Cooperative Agreements.

Pursuant to CERCLA section 104(d), States, political subdivisions thereof,

and Indian Tribes may apply for enforcement Cooperative Agreements. To be eligible for an enforcement Cooperative Agreement, the State, political subdivision or Indian Tribe must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site, or recovery of the cleanup costs. To accomplish this, the State, political subdivision or Indian Tribe, respectively, must submit the following for EPA approval:

(a) A letter from the State Attorney General, or comparable local official (of a political subdivision) or comparable Indian Tribal official, certifying that it has the authority, jurisdiction, and administrative capabilities that provide a basis for pursuing enforcement actions against a PRP to secure the necessary response;

(b) A copy of the applicable State, local (political subdivision) or Indian Tribal statute(s) and a description of how it is implemented;

(c) Any other documentation required by EPA to demonstrate that the State, local (political subdivision) or Indian Tribal government has the statutory authority, jurisdiction, and administrative capabilities to perform the enforcement activity(ies) to be funded under the Cooperative Agreement.

§35.6150 Activities eligible for funding under enforcement Cooperative Agreements.

An enforcement Cooperative Agreement application from a State, political subdivision or Indian Tribe may request funding for the following enforcement activities:

(a) PRP searches;

(b) Issuance of notice letters and negotiation activities;

(c) Administrative and judicial enforcement actions taken under State or Indian Tribal law;

(d) Management assistance and oversight of PRPs during Federal enforcement response;

(e) Oversight of PRPs during a State, political subdivision or Indian Tribe enforcement response contingent on the applicant having taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities. If the State, political subdivision, Indian Tribe or EPA cannot obtain PRP commitment to fund such oversight activities, then these activities will be considered eligible for CERCLA funding under an enforcement Cooperative Agreement.

§35.6155 State, political subdivision or Indian Tribe-lead enforcement Cooperative Agreements.

(a) The State, political subdivision or Indian Tribe must comply with the requirements described in §35.6105 (a)(1) through (a)(6) of this subpart, as appropriate.

(b) The CERCLA section 104 assurances described in §35.6105(b) are not applicable for enforcement Cooperative Agreements.

(c) Before an enforcement Cooperative Agreement is awarded, the State, political subdivision or Indian Tribe must:

(1) Assure EPA that it will notify and consult with EPA promptly if the recipient determines that its laws or other restrictions prevent the recipient from acting consistently with CERCLA; and

(2) If the applicant is seeking funds for oversight of PRP cleanup, the applicant must:

(i) Demonstrate that the proposed Statement of Work or cleanup plan prepared by the PRP satisfies the recipient's enforcement goals for those instances in which the recipient is seeking funding for oversight of PRP cleanup activities negotiated under the recipient's own enforcement authorities; and

(ii) Demonstrate that the PRP has the capability to attain the goals set forth in the plan;

(iii) Demonstrate that it has taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities.

REMOVAL RESPONSE COOPERATIVE AGREEMENTS

§ 35.6200 Eligibility for removal Cooperative Agreements.

When a planning period of more than six months is available, States, political subdivisions and Indian Tribes may apply for removal Cooperative Agreements.

§ 35.6205 Removal Cooperative Agreements.

(a) The State must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, the State must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves out-of-State shipment of CERCLA wastes, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(b) Pursuant to CERCLA section 104(c)(3), the State is not required to share in the cost of a CERCLA-funded removal action, unless the removal is conducted at a site that was publicly operated by a State or political subdivision at the time of disposal of hazardous substances and a CERCLA-funded remedial action is ultimately undertaken at the site. In this situation, the State must share at least 50 percent in the cost of all removal, remedial planning, and remedial action costs at the time of the remedial action as stated in § 35.6105(b)(2)(ii) of this subpart.

(c) If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume the lead responsibility for all, or a portion, of the removal activity at a site. Political subdivisions must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, political subdivisions also must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the State's jurisdiction, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(d) The State must provide the cost share assurance discussed in § 35.6205(b) above on behalf of a political subdivision that is given the lead for a removal action.

(e) Indian Tribes must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, Indian Tribes also must comply with the notification requirement at §35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the Indian Tribe's jurisdiction, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(f) Indian Tribes are not required to share in the cost of a CERCLA-funded removal action.

CORE PROGRAM COOPERATIVE AGREEMENTS

§ 35.6215 Eligibility for Core Program Cooperative Agreements.

(a) States and Indian Tribes may apply for Core Program Cooperative Agreements in order to conduct CERCLA implementation activities that are not directly assignable to specific sites, but are intended to support a State's or Indian Tribe's ability to participate in the CERCLA; response program.

(b) Only the State or Indian Tribal government agency designated as the single point of contact with EPA for CERCLA implementation is eligible to receive a Core Program Cooperative Agreement.

(c) When it is more economical for a government entity other than the recipient (such as a political subdivision or State Attorney General) to implement tasks funded through a Core Program Cooperative Agreement, benefits to such entities must be provided for in an intergovernmental agreement.

§ 35.6220 General.

The recipient of a Core Program Cooperative Agreement must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting

(§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790) described in this subpart. Recipients may not incur site-specific costs. Where these sections entail site-specific requirements, the recipient is not required to comply on a site-specific basis.

§ 35.6225 Activities eligible for funding under Core Program Cooperative Agreements.

To be eligible for funding under a Core Program Cooperative Agreement, activities must support a recipient's abilities to implement CERCLA. Once the recipient has in place program functions described in § 35.6225 (a) through (d) below, EPA will evaluate the recipient's program needs to sustain interaction with EPA in CERCLA implementation as described in § 35.6225(e). The amount of funding provided under the Core Program will be determined by EPA based on the availability of funds and the recipient's program needs in the areas described in (a) through (d) below:

(a) Procedures for emergency response actions and longer-term remediation of environmental and health risks at hazardous waste sites (including but not limited to the development of generic health and safety plans, quality assurance project plans, and community relation plans);

(b) Provisions for satisfying all requirements and assurances (including the development of a fund or other financing mechanism(s) to pay for studies and remediation activities);

(c) Legal authorities and enforcement support associated with proper administration of the recipient's program and with efforts to compel potentially responsible parties to conduct or pay for studies and/or remediation (including but not limited to the development of statutory authorities; access to legal assistance in identifying applicable or relevant and appropriate requirements of other laws; and development and maintenance of the administrative, financial and recordkeeping systems necessary for cost recovery actions under CERCLA);

(d) Efforts necessary to hire and train staff to manage publicly-funded cleanups, oversee responsible party-lead cleanups, and provide clerical support; and

(e) Other activities deemed necessary by EPA to support sustained EPA/recipient interaction in CERCLA implementation (including but not limited to general program management and supervision necessary for a recipient to implement CERCLA activities, and interagency coordination on all phases of CERCLA response).

Continued funding of tasks in subsequent years will be based on an evaluation of demonstrated progress towards the goals in the existing Core Program Cooperative Agreement Statement of Work.

§ 35.6230 Application requirements.

To receive a Core Program Cooperative Agreement, the applicant must submit an application form ("Application for Federal Assistance," SF–424, for non-construction programs) to EPA. Applications for additional funding need include only the revised pages. The application must include the following:

(a) *A project narrative statement,* including the following:

(1) *A Statement of Work (SOW)* which must include a detailed description of the CERCLA-funded activities and tasks to be conducted, the projected costs associated with each task, the number of products to be completed, and a schedule for implementation. Eligible activities under Core Program Cooperative Agreements are discussed in § 35.6225 of this subpart;

(2) *A background statement,* describing the current abilities and authorities of the recipient's program for implementing CERCLA, the program's needs to sustain and increase recipient involvement in CERCLA implementation, and the impact of Core Program Cooperative Agreement funds on the recipient's involvement in site-specific CERCLA response.

(b) *Budget sheets* (SF–424A);

(c) *Proposed project and budget periods* for CERCLA-funded activities. The project and budget periods may be one

or more years and may be extended incrementally, up to 12 months at a time, with EPA approval;

(d) *Certifications* for a drug-free workplace; debarment, suspensions, and other responsibility matters; procurement; and lobbying, pursuant to § 35.6105(a) (3) through (6) of this subpart.

§ 35.6235 Cost sharing.

The recipient of a Core Program Cooperative Agreement must provide at least ten percent of the direct and indirect costs of all activities covered by the Core Program Cooperative Agreement. The recipient must provide its cost share with non-Federal funds or with Federal funds authorized by statute to be used for matching purposes. Funds used for matching purposes under any other Federal grant or Cooperative Agreement cannot be used for matching purposes under a Core Program Cooperative Agreement. The recipient may provide its share using in-kind contributions if such contributions are provided for in the Cooperative Agreement. The recipient may not use CERCLA State credits to offset any part of the recipient's required match for Core Program Cooperative Agreements. See § 35.6285 (c), (d), and (f) regarding credit, over match, and advance match, respectively.

SUPPORT AGENCY COOPERATIVE AGREEMENTS

§ 35.6240 Eligibility for support agency Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for support agency Cooperative Agreements to ensure their meaningful and substantial involvement in response activities, as specified in sections 104 and 121(f)(1) of CERCLA and the NCP. (See § 35.6800 (a) and (b).)

§ 35.6245 Allowable activities.

Support agency activities are those activities conducted by the recipient to ensure its meaningful and substantial involvement. The activities described in section 121(f)(1) of CERCLA, as amended, and in subpart F of the NCP, are eligible for funding under a support agency Cooperative Agreement.

§ 35.6250 Support agency Cooperative Agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a) (1), (4), (5) and (6), and other requirements as negotiated with EPA. (Indian Tribes are exempt from the requirement of Intergovernmental Review in part 29 of this chapter.) An applicant may submit a non-site-specific budget for support agency activities, with the exception of remedial action support agency activities, which require cost share and must be applied for within a site-specific budget. All support agency activities are subject to the applicable sections of this subpart.

(b) *Cooperative Agreement requirements.* The recipient must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790) described in this subpart.

§ 35.6255 Cost sharing.

The requirements for cost sharing under a support agency Cooperative Agreement are the same as the cost sharing requirements of § 35.6105(b)(2) of this subpart. The State may use in-kind services as part of its cost share. (See § 35.6815(b) for SSC payment requirements.)

FINANCIAL ADMINISTRATION REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6270 Standards for financial management systems.

(a) *Accounting system standards.* (1) *General.* The recipient's system must track expenses by site, activity, and, operable unit, as applicable, according to object class. The system must also provide control, accountability, and an assurance that funds, property, and other assets are used only for their authorized purposes. The recipient must allow an EPA review of the adequacy of

the financial management system as described in 40 CFR 31.20(c).

(2) *Allowable costs.* The recipient's systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The system need not track expenses by site. However, all pre-remedial costs must be documented under a single Superfund account number designated specifically for the preremedial activity.

(4) *Core Program.* Since all costs associated with Core Program Cooperative Agreements are non-site-specific, the systems need not track expenses by site. However, all Core Program costs must be documented under the Superfund account number(s) designated specifically for Core Program activity.

(5) *Support Agency.* Unless otherwise specified in the Cooperative Agreement, all support agency costs, with the exception of remedial action support agency costs, may be documented under a single Superfund account number designated specifically for support agency activities. Remedial action support agency activities must be documented site-specifically.

(6) *Accounting system control procedures.* Except as provided for in paragraph (a)(3) of this section, accounting system control procedures must ensure that accounting information is:

(i) Accurate, charging only costs attributable to the site, activity, and operable unit, as applicable; and

(ii) Complete, recording and charging to individual sites, activities, and operable units, as applicable, all costs attributable to the recipient's CERCLA effort.

(7) *Financial reporting.* The recipient's accounting system must use actual costs as the basis for all reports of direct site charges. The recipient must comply with the requirements for financial reporting contained in § 35.6670 of this subpart.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that enables site-specific costs to be tracked by site, activity, and operable unit, as applicable, and provides sufficient documentation for cost recovery purposes.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office within 30 working days of a request, unless another time frame is specified in the Cooperative Agreement.

(3) In addition, the recipient must comply with the requirements regarding records described in §§ 35.6700, 35.6705, and 35.6710 of this subpart. The recipient must comply with the requirements regarding source documentation described in 40 CFR 31.20(b)(6).

(4) For pre-remedial and Core Program activities, the recordkeeping system must comply with the requirements described in paragraphs (a)(3) and (a)(4), respectively, of this section.

§ 35.6275 Period of availability of funds.

(a) The recipient must comply with the requirements regarding the availability of funds described in 40 CFR 31.23.

(b) Except as permitted in § 35.6285, the Award Official must sign the assistance agreement before costs are incurred. The recipient may incur costs between the date the Award Official signs the assistance agreement and the date the recipient signs the agreement, if the costs are identified in the agreement and the recipient does not change the agreement.

§ 35.6280 Payments.

(a) *General.* In addition to the following requirements, the recipient must comply with the requirements regarding payment described in 40 CFR 31.21 (f) through (h).

(1) *Assignment of payment.* The recipient cannot assign the right to receive payments under the recipient's Cooperative Agreement. EPA will make payments only to the payee identified in the Cooperative Agreement.

(2) *Interest.* If the recipient earns interest on an advance of EPA funds, the recipient must return the interest unless the recipient is a State or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, or a Tribal organization as defined under section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93–638).

(b) *Payment method*—(1) *Letter of credit.* In order to receive payment by the letter of credit method, the recipient must comply with the requirements regarding letter of credit described in 40 CFR 31.20 (b)(7) and 31.21(b). The recipient must identify and charge costs to specific sites, activities, and operable units, as applicable, for drawdown purposes as specified in the Cooperative Agreement.

(2) *Reimbursement.* If the recipient is unable to meet letter of credit requirements, EPA will pay the recipient by reimbursement. The recipient must comply with the requirements regarding reimbursement described in 40 CFR 31.21(d).

(3) *Working capital advances.* If the recipient is unable to meet the criteria for payment by either letter of credit or reimbursement, EPA may provide cash on a working capital advance basis. Under this procedure EPA shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, EPA shall reimburse the recipient for its actual cash disbursements. In such cases, the recipient must comply with the requirements regarding working capital advances described in 40 CFR 31.21(e).

§ 35.6285 Recipient payment of response costs.

The recipient may pay for its share of response costs using cash, services, credits or any combination of these, as follows:

(a) *Cash.* The recipient may pay for its share of response costs in the form of cash.

(b) *Services.* The recipient may provide equipment and services to satisfy its cost share requirements under Cooperative Agreements. The recipient must comply with the requirements regarding in-kind and donated services described in 40 CFR 31.24.

(c) *Credit*—(1) *General credit requirements.* Credits are limited to State site-specific expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity obligations or expenditures incurred by the State or political subdivision between January 1, 1978 and December 11, 1980.

(ii) The State may claim credit for remedial action expenditures incurred by the State after October 17, 1986.

(iii) The State may not claim credit for removal actions taken after December 11, 1980.

(2) *Credit submission requirements.* (i) *Expenditures incurred before a site is listed on the NPL.* Although EPA may require additional documentation, the State must submit the following before EPA will approve the use of the credit:

(A) Specific amounts claimed for credit, by site (estimated amounts are unacceptable), based on supporting cost documentation;

(B) Units of government (State agency, county, local) that incurred the costs, by site;

(C) Description of the specific function performed by each unit of government at each site;

(D) Certification (signed by the State's fiscal manager or the financial director for each unit of government) that credit costs have not been previously reimbursed by the Federal Government or any other party, and have not been used for matching purposes under any other Federal program or grant; and

(E) Documentation, if requested by EPA, to ensure the actions undertaken at the site are cost eligible and consistent with CERCLA, as amended, and the NCP requirements. This requirement does not apply for costs incurred before December 11, 1980.

(ii) *Expenditures incurred after a site is listed on the NPL.* A State may receive credit for remedial action expenditures after October 17, 1986, only if the State entered into a Cooperative Agreement before incurring costs at the site.

(3) *Use of credit.* The State must first apply credit at the site at which it was earned. With the approval of EPA, the State may use excess credit earned at one site for its cost share at another site (See CERCLA section 104(c)(5)). Credits must be applied on a site-specific basis, and, therefore, may not be used to meet State cost-share requirements for Core Program Cooperative

Agreements. EPA will not reimburse excess credit.

(4) *Credit verification.* Credits are subject to verification by audit and technical review of actions performed at sites.

(d) *Over match.* The recipient may not use contributions in excess of the required cost-share at one site to meet the cost-share obligation at another site or the Core Program cost-share obligation. Overmatch is not "credit" pursuant to § 35.6285(c)(3).

(e) *Cost sharing.* The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24. Finally, the recipient cannot use costs incurred under the Core Program to offset cost-share requirements at a site.

(f) *Advance match.* (1) A Cooperative Agreement for a site-specific response entered into after October 17, 1986 cannot authorize a State to contribute funds during remedial planning and then apply those contributions to the remedial action cost share (advance match).

(2) A State may seek reimbursement for costs incurred under Cooperative Agreements which authorize advance match.

(3) Reimbursements are subject to the availability of appropriated funds.

(4) If the State does not seek reimbursement, EPA will apply the advance match to off-set the State's required cost share for remedial action at the site. The State may not use advance match for credit at any other site, nor may the State receive reimbursement until the conclusion of CERCLA-funded remedial response activities. Also, the State may not use advance match for credit against cost-share obligations for Core Program Cooperative Agreements.

(5) Claims for advance match are subject to verification by audit.

[55 FR 23007, June 5, 1990, as amended at 55 FR 24343, June 15, 1990]

§ 35.6290 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR part 31.25.

PERSONAL PROPERTY REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6300 General personal property acquisition and use requirements.

(a) *General.* (1) Property may be acquired only when authorized in the Cooperative Agreement.

(2) The recipient must acquire the property during the approved project period.

(3) The recipient must:

(i) Charge property costs by site, activity, and operable unit, as applicable;

(ii) Document the use of the property by site, activity, and. operable unit, as applicable; and

(iii) Solicit and follow EPA's instructions on the disposal of any property purchased with CERCLA funds as specified in § 35.6340 and § 35.6345 of this subpart.

(b) *Exception.* The recipient is not required to charge property costs by site under a pre-remedial or Core Program Cooperative Agreement.

§ 35.6305 Obtaining supplies.

To obtain supplies, the recipient must agree to comply with the requirements in §§ 35.6300, 35.6315(b), 35.6325 through 35.6340, and 35.6350 of this subpart. Supplies obtained with Core Program funds must be for non-site-specific purposes. All purchases of supplies under the Core Program must comply with the requirements in the above listed sections, except where these requirements are site-specific.

§ 35.6310 Obtaining equipment.

To obtain equipment, the recipient must agree to comply with the requirements in § 35.6300 and §§ 35.6315 through 35.6350 of this subpart.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase equipment with recipient funds.* The recipient may purchase equipment with the recipient's own funds and may charge EPA a fee for using equipment on a CERCLA-funded project. The fee must be based on a usage rate, subject to the usage rate requirements in § 35.6320 of this subpart.

(b) *Borrow federally owned property.* The recipient may borrow federally

owned property, with the exception of motor vehicles, for use on CERCLA-funded projects. The loan of the federally owned property may only extend through the project period. At the end of the project period, or when the federally owned property is no longer needed for the project, the recipient must return the property to the Federal Government.

(c) *Lease, use contractor services, or purchase with CERCLA funds.* To acquire equipment through lease, use of contractor services, or purchase with CERCLA funds, the recipient must conduct and document a cost comparison analysis to determine which of these methods of obtaining equipment is the most cost effective. In order to obtain the equipment, the recipient must submit documentation of the cost comparison analysis to EPA for approval. The recipient must obtain the equipment through the most cost effective method, subject to the requirements listed below:

(1) *Lease or rent equipment.* If it is the most cost effective method of acquisition, the recipient may lease or rent equipment, subject only to the requirements in § 35.6300 of this subpart.

(2) *Use contractor services.* (i) If it is the most cost effective method of acquisition, the recipient may hire the services of a contractor.

(ii) The recipient must obtain award official approval before authorizing the contractor to purchase equipment with CERCLA funds. (See § 35.6325 of this subpart regarding the title and vested interest of equipment purchased with CERCLA funds.) This does not apply for recipients who have used the sealed bids method of procurement.

(iii) The recipient must require the contractor to allocate the cost of the contractor services by site, activity, and operable unit, as applicable.

(3) *Purchase equipment with CERCLA funds.* If equipment purchase is the most cost-effective method of obtaining the equipment, the recipient may purchase the equipment with CERCLA funds. To purchase equipment with CERCLA funds, the recipient must comply with the following requirements:

(i) The recipient must include in the Cooperative Agreement application a list of all items of equipment to be purchased with CERCLA funds, with the price of each item.

(ii) If the equipment is to be used on sites, the recipient must allocate the cost of the equipment by site, activity, and operable unit, as applicable, by applying a usage rate subject to the usage rate requirements in § 35.6320 of this subpart.

(iii) The recipient may not use CERCLA funds to purchase a transportable or mobile treatment system.

(iv) Equipment obtained with Core Program funds must be for non-site-specific purposes. All purchases of equipment must comply with the requirements in § 35.6300, and §§ 35.6310 through 35.6350 of this subpart, except where these requirements are site-specific.

§ 35.6320 Usage rate.

(a) *Usage rate approval.* To charge EPA a fee for use of equipment purchased with recipient funds or to allocate the cost of equipment by site, activity, and operable unit, as applicable, the recipient must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. The EPA-approved usage rate must be included in the Cooperative Agreement before the recipient incurs these equipment costs.

(b) *Usage rate application.* The recipient must record the use of the equipment by site, activity, and operable unit, as applicable, and must apply the usage rate to calculate equipment charges by site, activity, and operable unit, as applicable. For Core Program and pre-remedial activities, the recipient is not required to apply a usage rate.

§ 35.6325 Title and EPA interest in CERCLA-funded property.

(a) *EPA's interest in CERCLA-funded property.* EPA has an interest (the percentage of EPA's participation in the total award) in both equipment and supplies purchased with CERCLA funds.

(b) *Title in CERCLA-funded property.* Title in both equipment and supplies purchased with CERCLA funds vests in the recipient.

(1) *Right to transfer title.* EPA retains the right to transfer title of all property purchased with CERCLA funds to the Federal Government or a third party within 120 calendar days after project completion or at the time of disposal.

(2) *Equipment used as all or part of the remedy.* The following requirements apply to equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA no longer has an interest in fixed in-place equipment once the equipment is installed.

(ii) *Equipment that is an integral part of services to individuals.* EPA no longer has an interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, once EPA certifies that the remedy is operational and functional.

§ 35.6330 Title to federally owned property.

Title to all federally owned property vests in the Federal Government.

§ 35.6335 Property management standards.

The recipient must comply with the following property management standards for property purchased with CERCLA funds. The recipient may use its own property management system if it meets the following standards.

(a) *Control.* The recipient must maintain:

(1) *Property records* for CERCLA-funded property which include the contents specified in § 35.6700(c) of this subpart;

(2) *A control system* which ensures adequate safeguards for prevention of loss, damage, or theft of the property. The recipient must make provisions for the thorough investigation and documentation of any loss, damage, or theft;

(3) *Procedures* to ensure maintenance of the property in good condition and periodic calibration of the instruments used for precision measurements;

(4) *Sales procedures* to ensure the highest possible return, if the recipient is authorized to sell the property;

(5) *Provisions for financial control and accounting* in the financial management system of all equipment; and

(6) *Identification* of all federally owned property.

(b) *Inventory and reporting for CERCLA-funded equipment.*

(1) *Physical inventory.* The recipient must conduct a physical inventory at least once every two years for all equipment except that which is part of the in-place remedy. The recipient must reconcile physical inventory results with the equipment records.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports set forth in § 35.6660 of this subpart.

(c) *Inventory and reporting for federally owned property.*

(1) *Physical inventory.* The recipient must conduct a physical inventory:

(i) Annually;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports in § 35.6660 of this subpart.

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment which is no longer needed, or at the end of the project period, whichever is earlier, the recipient must:

(1) Analyze two alternatives: the cost of leaving the equipment in place, and the cost of removing the equipment and disposing of it in another manner;

(2) Document the analysis of the two alternatives in the inventory report. See § 35.6660 of this subpart regarding requirements for the inventory report.

(i) If it is most cost-effective to remove the equipment and dispose of it in another manner:

(A) If the equipment has a residual fair market value of $5,000 or more, the recipient must request disposition instructions from EPA in the inventory report. See § 35.6345 of this subpart for equipment disposal options.

(B) If the equipment has a residual fair market value of less than $5,000, the recipient may retain the equipment for the recipient's use on another

CERCLA site. If, however, there is any remaining residual value at the time of final disposition, the recipient must reimburse the Hazardous Substance Superfund for EPA's vested interest in the current fair market value of the equipment at the time of disposition.

(ii) If it is most cost-effective to leave the equipment in place, recommend in the inventory report that the equipment be left in place.

(3) Submit the inventory report to EPA, even if EPA has stopped supporting the project.

(b) *Supplies.* (1) If supplies have an aggregate fair market value of $5,000 or more at the end of the project period, the recipient must take one of the following actions at the direction of EPA:

(i) Use the supplies on another CERCLA project and reimburse the original project for the fair market value of the supplies;

(ii) If both the recipient and EPA concur, keep the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies; or

(iii) Sell the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies, less any reasonable selling expenses.

(2) If the supplies remaining at the end of the project period have an aggregate fair market value of less than $5,000, the recipient may keep the supplies to use on another CERCLA project. If the recipient cannot use the supplies on another CERCLA project, then the recipient may keep or sell the supplies without reimbursing the Hazardous Substance Superfund.

§ 35.6345 Equipment disposal options.

The following disposal options are available:

(a) Use the equipment on another CERCLA project and reimburse the original project for the fair market value of the equipment;

(b) If both the recipient and EPA concur, keep the equipment and reimburse the Hazardous Substance Superfund, for EPA's interest in the current fair market value of the equipment;

(c) Sell the equipment and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the equipment, less any reasonable selling expenses; or

(d) Return the equipment to EPA and, if applicable, EPA will reimburse the recipient for the recipient's proportionate share in the current fair market value of the equipment.

§ 35.6350 Disposal of federally owned property.

When federally owned property is no longer needed, or at the end of the project, the recipient must inform EPA that the property is available for return to the Federal Government. EPA will send disposition instructions to the recipient.

REAL PROPERTY REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6400 Acquisition and transfer of interest.

(a) An interest in real property may be acquired only with prior approval of EPA.

(1) If the recipient acquires real property in order to conduct the response, the recipient with jurisdiction over the property must agree to hold the necessary property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real estate to permit conduct of a remedial action, the acquisition may be made only if the State, or Indian Tribe to the extent of its legal authority, provides assurance that it will accept transfer of the acquired interest in accordance with 40 CFR 300.510(f). States and Indian Tribes must follow the requirements in §§35.6105(b)(5) and 35.6110(b)(2) respectively, of this subpart.

(b) The recipient must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs."

[55 FR 23007, June 5, 1990, as amended at 59 FR 35854, July 14, 1994]

§ 35.6405 Use.

The recipient must comply with the requirements regarding real property described in 40 CFR 31.31.

COPYRIGHT REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6450 General requirements.

The recipient must comply with the requirements regarding copyrights described in 40 CFR 31.34. The recipient must comply with the requirements regarding contract copyright provisions described in § 35.6595(b)(3) of this subpart.

USE OF RECIPIENT EMPLOYEES ("FORCE ACCOUNT") UNDER A COOPERATIVE AGREEMENT

§ 35.6500 General requirements.

(a) Force Account work is the use of the recipient's own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility. When using Force Account work, the recipient must demonstrate that the employees can complete the work as competently as, and more economically than, contractors, or that an emergency necessitates the use of the Force Account.

(b) Where the value of Force Account services exceeds $25,000, the recipient must receive written authorization for use from the award official.

PROCUREMENT REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6550 Procurement system standards.

(a) *Recipient standards*—(1) *Procurement system evaluation.* (i) An applicant or recipient must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(ii) The certification will be valid for two years or for the length of the project period specified in the Cooperative Agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part. (See subparagraph (a)(4) of this section regarding EPA right to review.) If the recipient substantially revises its procurement system, the recipient must reevaluate its system and submit a revised EPA Form 5700–48.

(2) *Certified procurement system.* Even if the applicant or recipient has certified that its procurement system meets the intent of the requirements of this subpart, the EPA award official retains the authority as stated in:

(i) Section 35.6565(d)(1)(iii), "Noncompetitive proposals," regarding award official authorization of noncompetitive proposals;

(ii) Section 35.6565(b), "Sealed bids (formal advertising)," regarding award official approval for the use of a procurement method other than sealed bidding for a remedial action award contract, except for Architectural/Engineering services and post-removal site control;

(iii) Section 35.6550(a)(9), "Protests," regarding EPA review of protests; and

(iv) 40 CFR 31.36(g)(2)(iv), "Awarding Agency Review," regarding the review of proposed awards over $25,000 which are to be awarded to other than the apparent low bidder under a sealed bid procurement.

(3) *Noncertified procurement system.* If the applicant or recipient has not certified that its procurement system meets the intent of the requirements of this subpart, then the recipient must follow the requirements of this subpart and allow EPA preaward review of proposed procurement actions that will use EPA funds. In addition, the recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700–41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700–41. This specific requirement is an addition to the requirements regarding cost and price analysis described in § 35.6585 of this subpart.

(4) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a Cooperative Agreement.

(5) *Code of conduct.* The recipient must comply with the requirements of 40 CFR 31.36(b)(3), which describes

standards of conduct for employees, officers, and agents of the recipient.

(6) *Completion of contractual and administrative issues.* (i) The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgement and good administrative practice of all contractual and administrative issues arising out of procurements under the Cooperative Agreement.

(ii) EPA will not substitute its judgement for that of the recipient unless the matter is primarily a Federal concern.

(iii) Violations of law will be referred to the local, State, Tribal, or Federal authority having proper jurisdiction.

(7) *Selection procedures.* The recipient must have written selection procedures for procurement transactions.

(i) EPA may not participate in a recipient's selection panel except to provide technical assistance. EPA staff providing such technical assistance:

(A) Shall constitute a minority of the selection panel (limited to making recommendations on qualified offers and acceptable proposals based on published evaluation criteria) for the contractor selection process; and

(B) Are not permitted to participate in the negotiation and award of contracts.

(ii) When selecting a contractor, recipients:

(A) May not use EPA contractors to provide any support related to procuring a State contractor.

(B) May use the Corps of Engineers for review of State bidding documents, requests for proposals and bids and proposals received.

(8) *Award.* The recipient may award a contract only to a responsible contractor, as described in 40 CFR 31.36(b)(8), and must ensure that each contractor performs in accordance with all the provisions of the contract. (See also 35.6560 of this subpart regarding debarred and suspended contracts.)

(9) *Protest procedures.* The recipient must comply with the requirements described in 40 CFR 31.36(b)(12) regarding protest procedures.

(10) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665 of this subpart.

(11) *Intergovernmental agreements.* (i) To foster greater economy and efficiency, recipients are encouraged to enter into intergovernmental agreements for procurement or use of common goods and services.

(ii) Although intergovernmental agreements are not subject to the requirements set forth at §§ 35.6550 through 35.6610, all procurements under intergovernmental agreements are subject to these requirements except for procurements that are:

(A) Incidental to the purpose of the assistance agreement; and

(B) Made through a central public procurement unit.

(12) *Value engineering.* The recipient is encouraged to include value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

(b) *Contractor standards*—(1) *Disclosure requirements regarding Potentially Responsible Party relationships.* The recipient must require each prospective contractor to provide with its bid or proposal:

(i) Information on its financial and business relationship with all PRPs at the site and with the contractor's parent companies, subsidiaries, affiliates, subcontractors, or current clients at the site. Prospective contractors under a Core Program Cooperative Agreement must provide comparable information for all sites within the recipient's jurisdiction. (This disclosure requirement encompasses past financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the best interests of the recipient, the prospective contractor may be declared nonresponsible and the contract awarded to the next eligible bidder or offeror.

(2) *Conflict of interest*—(i) *Conflict of interest notification.* The recipient must require the contractor to notify the recipient of any actual, apparent, or potential conflict of interest regarding any individual working on a contract assignment or having access to information regarding the contract. This notification shall include both organizational conflicts of interest and personal conflicts of interest. If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict of interest situation.

(ii) *Contract provisions.* The recipient must incorporate the following provisions or their equivalents into all contracts, except those for well-drilling, fence erecting, plumbing, utility hookups, security guard services, or electrical services:

(A) *Contractor data.* The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, EPA, or its authorized agents for the life of the contract, and for a period of five years after completion of the contract.

(B) *Employment.* The contractor shall not accept employment from any party other than the recipient or Federal agencies for work directly related to the site(s) covered under the contract for five years after the contract has terminated. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(3) *Certification of independent price determination.* The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation.

(4) *Recipient's Contractors.* The recipient must require its contractor to comply with the requirements in §§ 35.6270(a) (1) and (2); 35.6320 (a) and (b); 35.6335; 35.6700; and 35.6705. For additional contractor requirements, see also §§ 35.6710(c); 35.6590(c); and 35.6610.

§ 35.6555 Competition.

The recipient must conduct all procurement transactions in a manner providing maximum full and open competition.

(a) *Restrictions on competition.* Inappropriate restrictions on competition include the following:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product, instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) *Geographic and Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or administratively imposed in-State or local geographical preferences in evaluating bids or proposals. However, nothing in this section preempts State licensing laws. In addition, when contracting for architectural and engineering (A/E) services, the recipient may use geographic location as a selection criterion, provided that when geographic location is used, its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(2) *Indian Tribe.* If the project benefits Indians, the recipient must comply with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93–638).

(c) *Written specifications.* The recipient's written specifications must include a clear and accurate description of the technical requirements and the qualitative nature of the material, product or service to be procured.

(1) This description must not contain features which unduly restrict competition, unless the features are necessary to:

(i) Test or demonstrate a specific thing;

(ii) Provide for necessary interchangeability of parts and equipment; or

(iii) Promote innovative technologies.

(2) The recipient must avoid the use of detailed product specifications if at all possible.

(d) *Public notice.* When soliciting bids or proposals, the recipient must allow sufficient time (generally 30 calendar days) between public notice of the proposed project and the deadline for receipt of bids or proposals. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

(e) *Prequalified lists.* Recipients may use prequalified lists of persons, firms, or products to acquire goods and services. The list must be current and include enough qualified sources to ensure maximum open and free competition. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 35.6560 Master list of debarred, suspended, and voluntarily excluded persons.

While evaluating bids or proposals, the recipient must consult the most current "List of Parties Excluded from Federal Procurement or Non-procurement Programs" to ensure that the firms submitting proposals are not prohibited from participation in assistance programs. The recipient must comply with the requirements regarding subawards to debarred and suspended parties described in 40 CFR 31.35.

§ 35.6565 Procurement methods.

The recipient must comply with the requirements for payment to consultants described in 40 CFR 31.36(j). In addition, the recipient must comply with the following requirements:

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, the recipient must obtain and document price or rate quotations from an adequate number of qualified sources.

(b) *Sealed bids (formal advertising).* (For a remedial action award contract, except for Architectural/Engineering services and post-removal site control, the recipient must obtain the award official's approval to use a procurement method other than the sealed bid method.) Bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for the recipient to use the sealed bid method, the following conditions must be met:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If the recipient uses the sealed bid method, the recipient must comply with the following requirements:

(i) Publicly advertise the invitation for bids and solicit bids from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) Publicly open all bids at the time and place prescribed in the invitation for bids;

(iv) Award the fixed-price contract in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, the recipient shall consider factors such as discounts, transportation cost, and life cycle

costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor. is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of response.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement requirements of this subpart, the recipient of a CERCLA remedial response Cooperative Agreement may use the engineer procured to conduct any or all of the follow-on engineering activities without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using CERCLA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any CERCLA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of response under a Cooperative Agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal Cooperative Agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services. Tasks to encourage small, minority, and women's business utilization in the Superfund program are eligible for funding under Core Program Cooperative Agreements.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) "*Fair share*" *objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy requires that fair share objectives for minority and women-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one Cooperative Agreement during the year, the recipient may negotiate an annual fair share for all Cooperative Agreements for that year. It is not necessary to have a fair share for each Cooperative Agreement. When a Cooperative Agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the Cooperative Agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over $25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of

the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Indemnification.* When adequate pollution liability insurance is not available to the contractor, EPA may indemnify response contractors for liability related to damage from releases arising out of the contractor's negligent performance. The recipient must comply with the requirements regarding indemnification described in section 119 of CERCLA.

(c) *Accidents and catastrophic loss.* The recipient must require the contractor to provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

(1) Nature, scope, and extent of work to be performed;

(2) Time frame for performance;

(3) Total cost of the contract; and

(4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan which is issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

(2) *Violating facilities.* Contracts in excess of $100,000 must contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR part 15) which prohibit the use of facilities included on the EPA List of Violating Facilities under nonexempt Federal contracts, grants or loans.

(3) *Patents, inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(4) *Labor standards.* The recipient must include a copy of EPA Form 5720–4 ("Labor Standards Provisions for Federally Assisted Construction Contracts") in each contract for construction (as defined by the Secretary of Labor in 29 CFR part 5). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a–276a–7), the Copeland Regulations (29 CFR part 3), the Contract Work Hours and Safety Standards Act Overtime Compensation (940 U.S.C. 327–333), and the nondiscrimination provisions in Executive Order 11246, as amended.

(5) *Conflict of interest.* The recipient must include provisions pertaining to conflict of interest as described in § 35.6550(b)(2)(ii) of this subpart.

(c) *Model clauses.* The recipient must comply with the requirements regarding model contract clauses described in 40 CFR 33.1030 (1987).

§ 35.6600 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;

(5) The award official determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the recipient's responsibility for the improper action of others.

§ 35.6605 Privity of contract.

Neither EPA nor the United States shall be a party to any contract nor to any solicitation or request for proposals.

§ 35.6610 Contracts awarded by a contractor.

The recipient must require its contractor to comply with the following provisions in the award of contracts (i.e. subcontracts). (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) The requirements regarding debarred, suspended, and voluntarily excluded persons in § 35.6560 of this subpart.

(b) The limitations on contract award in § 35.6550(a)(8) of this subpart.

(c) The requirements regarding minority and women's business enterprises, and small business in § 35.6580 of this subpart.

(d) The requirements regarding specifications in § 35.6555 (a)(6) and (c) of this subpart.

(e) The Federal cost principles in 40 CFR 31.22.

(f) The prohibited types of contracts in § 35.6575(a) of this subpart.

(g) The cost, price analysis, and profit analysis requirements in § 35.6585 of this subpart.

(h) The applicable provisions in § 35.6595 (b) and (c) of this subpart.

(i) The applicable provisions in § 35.6555(b)(2).

REPORTS REQUIRED UNDER A COOPERATIVE AGREEMENT

§ 35.6650 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly on the activities delineated in the Statement of Work. EPA may not require submission of progress reports more often than quarterly. The reports must be submitted within 30 days of the end of each Federal Fiscal quarter.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, delays, or other problems, if any, and a description of the corrective measures that are planned. For pre-remedial Cooperative Agreements, the report must include a list of the site-specific products completed and the estimated number of technical hours spent to complete each product.

(2) A comparison of the percentage of the project completed to the project schedule, and an explanation of significant discrepancies.

(3) A comparison of the estimated funds spent to date to planned expenditures and an explanation of significant

discrepancies. For remedial, enforcement, and removal reports, the comparison must be on a per task basis.

(4) An estimate of the time and funds needed to complete the work required in the Cooperative Agreement, a comparison of that estimate to the time and funds remaining, and a justification for any increase.

§ 35.6655 Notification of significant developments.

Events may occur between the scheduled performance reporting dates which have significant impact upon the Cooperative Agreement-supported activity. In such cases, the recipient must inform the EPA project officer as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

§ 35.6660 Property inventory reports.

(a) *CERCLA-funded property*—(1) *Content.* The report must contain the following information:

(i) Classification and value of remaining supplies;

(ii) Description of all equipment purchased with CERCLA funds, including its current condition;

(iii) Verification of the current use and continued need for the equipment by site, activity, and operable unit, as applicable;

(iv) Notification of any property which has been stolen or vandalized; and

(v) A request for disposition instructions for any equipment no longer needed on the project.

(2) *Reporting frequency.* The recipient must submit an inventory report to EPA at the following times:

(i) Within 90 days after completing any CERCLA-funded project or any response activity at a site; and

(ii) When the equipment is no longer needed for any CERCLA-funded project or any response activity at a site.

(b) *Federally owned property*—(1) *Content.* The recipient must include the following information for each federally owned item in the inventory report:

(i) Description;

(ii) Decal number;

(iii) Current condition; and

(iv) Request for disposition instructions.

(2) *Reporting frequency.* The recipient must submit an inventory report to the appropriate EPA property accountable officer at the following times:

(i) Annually, due to EPA on the anniversary date of the award;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

§ 35.6665 Procurement reports.

(a) *Department of Labor (DOL) Reports*—(1) *Content.* The recipient must notify the DOL Regional Office of Compliance, in writing, of each construction contract which has or is expected to have an aggregate value of over $10,000 within a 12-month period. The report must include the following:

(i) Construction contractor's name, address, telephone number, and employee identification number;

(ii) Award amount;

(iii) Estimated start and completion dates; and

(iv) Project number, name, and site location.

(2) *Reporting frequency.* The recipient must notify the DOL Office of Compliance within 10 calendar days after the award of each such construction contract. The recipient must submit a copy of the report to the EPA project officer.

(b) *Minority and women's business enterprise (MBE/WBE) Reports.* (1) The recipient must report on its use of MBE and WBE firms by submitting a completed Minority and Women's Business Utilization Report (SF–334) to the award official. Reporting commences with the recipient's award of its first contract and continues until it and its contractors have awarded their last contract for the activities or tasks

identified in the Cooperative Agreement. The recipient must submit the MBE/WBE Utilization Report within 30 days after the end of each Federal fiscal quarter, regardless of whether the recipient awards a contract to an MBE or WBE during that quarter.

(2) The recipient must also report on its efforts to encourage MBE participation in the Superfund program pursuant to CERCLA §105(f). Information on the recipient's efforts to encourage MBE participation in the Superfund program may be included in each SF–334 submitted quarterly, but is required in the SF–334 submitted for the fourth quarter, due November 1 of each year.

§ 35.6670 Financial reports.

(a) *General.* The recipient must comply with the requirements regarding financial reporting described in 40 CFR 31.41.

(b) *Financial Status Report*—(1) *Content.* (i) The Financial Status Report (SF–269) must include financial information by site, activity, and operable unit, as applicable.

(ii) A final Financial Status Report (FSR) must have no unliquidated obligations. If any obligations remain unliquidated, the FSR is considered an interim report and the recipient must submit a final FSR to EPA after liquidating all obligations.

(2) *Reporting frequency.* The recipient must file a Financial Status Report as follows:

(i) Annually due 90 days after the end of the Federal fiscal year or as specified in the Cooperative Agreement; or if quarterly or semiannual reports are required in accordance with 40 CFR 31.41(b)(3), due 30 days after the reporting period;

(ii) Within 90 calendar days after completing each CERCLA-funded response activity at a site (submit the FSR only for each completed activity); and

(iii) Within 90 calendar days after termination or closeout of the Cooperative Agreement.

RECORDS REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6700 Project records.

The lead agency for the response action must compile and maintain an administrative record consistent with section 113 of CERCLA, the National Contingency Plan, and relevant EPA policy and guidance. In addition, recipients of assistance (whether lead or support agency) are responsible for maintaining project files as described below.

(a) *General.* The recipient must maintain project records by site, activity, and operable unit, as applicable.

(b) *Financial records.* The recipient must maintain records which support the following items:

(1) Amount of funds received and expended; and

(2) Direct and indirect project cost.

(c) *Property records.* The recipient must maintain records which support the following items:

(1) Description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including the assistance identification number;

(4) Information regarding whether the title is vested in the recipient or EPA;

(5) Unit acquisition date and cost;

(6) Percentage of EPA's interest;

(7) Location, use and condition (by site, activity, and operable unit, as applicable) and the date this information was recorded; and

(8) Ultimate disposition data, including the sales price or the method used to determine the price, or the method used to determine the value of EPA's interest for which the recipient compensates EPA in accordance with §§ 35.6340, 35.6345, and 35.6350 of this subpart.

(d) *Procurement records*—(1) *General.* The recipient must maintain records which support the following items, and must make them available to the public:

(i) The reasons for rejecting any or all bids; and

(ii) The justification for a procurement made on a noncompetitively negotiated basis.

(2) *Procurements in excess of $25,000.* The recipient's records and files for procurements in excess of $25,000 must include the following information, in addition to the information required in paragraph (d)(1) of this section:

(i) The basis for contractor selection;

(ii) A written justification for selecting the procurement method;

(iii) A written justification for use of any specification which does not provide for maximum free and open competition;

(iv) A written justification for the choice of contract type; and

(v) The basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 35.6585 of this subpart and documentation of negotiations.

(e) *Other records.* The recipient must maintain records which support the following items:

(1) Time and attendance records and supporting documentation;

(2) Documentation of compliance with statutes and regulations that apply to the project; and

(3) The number of site-specific technical hours spent to complete each preremedial product.

§ 35.6705 Records retention.

(a) *Applicability.* This requirement applies to all financial and programmatic records, supporting documents, statistical records, and other records which are required to be maintained by the terms of this subpart, program regulations, or the Cooperative Agreement, or are otherwise reasonably considered as pertinent to program regulations or the Cooperative Agreement.

(b) *Length of retention period.* The recipient must maintain all records for 10 years following submission of the final Financial Status Report unless otherwise directed by the EPA award official, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

(c) *Substitution of microform.* Microform copies may be substituted for the original records. The recipient must have written EPA approval before destroying original records. The microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR part 1230) and EPA records management procedures (EPA Order 2160).

(d) *Starting date of retention period.* The recipient must comply with the requirements regarding the starting dates for records retention described in 40 CFR 31.42(c) (1) and (2).

§ 35.6710 Records access.

(a) *Recipient requirements.* The recipient must comply with the requirements regarding records access described in 40 CFR 31.42(e).

(b) *Availability of records.* The recipient must, with the exception of certain policy, deliberative, and enforcement documents which may be held confidential, ensure that all files are available to the public.

(c) *Contractor requirements.* The recipient must require its contractor to comply with the requirements regarding records access described in 40 CFR 31.36(i)(10).

OTHER ADMINISTRATIVE REQUIREMENTS FOR COOPERATIVE AGREEMENTS

§ 35.6750 Modifications.

The recipient must comply with the requirements regarding changes to the Cooperative Agreement described in 40 CFR 31.30.

§ 35.6755 Monitoring program performance.

The recipient must comply with the requirements regarding program performance monitoring described in 40 CFR 31.40 (a) and (e).

§ 35.6760 Enforcement and termination for convenience.

The recipient must comply with all terms and conditions in the Cooperative Agreement, and is subject to the requirements regarding enforcement of the terms of an award and termination

for convenience described in 40 CFR 31.43 and 31.44.

§ 35.6765 Non-Federal audit.

The recipient must comply with the requirements regarding non-Federal audits described in 40 CFR 31.26.

§ 35.6770 Disputes.

The recipient must comply with the requirements regarding dispute resolution procedures described in 40 CFR 31.70.

§ 35.6775 Exclusion of third-party benefits.

The Cooperative Agreement benefits only the signatories to the Cooperative Agreement.

§ 35.6780 Closeout.

(a) Closeout of a Cooperative Agreement, or an activity under a Cooperative Agreement, can take place in the following situations:

(1) After the completion of all work for a response activity at a site; or

(2) After all activities under a Cooperative Agreement have been completed; or

(3) Upon termination of the Cooperative Agreement.

(b) The recipient must comply with the closeout requirements described in 40 CFR 31.50 and 31.51.

§ 35.6785 Collection of amounts due.

The recipient must comply with the requirements described in 40 CFR 31.52 regarding collection of amounts due.

§ 35.6790 High risk recipients.

If EPA determines that a recipient is not responsible, EPA may impose restrictions on the award as described in 40 CFR 31.12.

REQUIREMENTS FOR ADMINISTERING A SUPERFUND STATE CONTRACT (SSC)

§ 35.6800 General.

An SSC is required when either EPA or a political subdivision is the lead agency for a CERCLA response. This rule does not address whether Indian Tribes are subject to the requirements in § 35.6805(i)(2) (See § 35.610(a)).

(a) *EPA-lead SSC (Two-party SSC).* (1) An SSC with a State or Indian Tribe is required before EPA can obligate or transfer funds for an EPA-lead remedial action.

(2) The State must comply with the requirements described in §§ 35.6805 and 35.6815 of this subpart. The Indian Tribe must comply with the requirements described in § 35.6805 (a) through (h), (i)(4), (l) through (v); § 35.6815(b); and, if appropriate, § 35.6815 (c) and (d).

(b) *Political subdivision-lead SSC (Three-party SSC).* (1) To ensure State involvement as required under section 121(f) of CERCLA and subpart F of the National Contingency Plan, an SSC is required between EPA, the State and a political subdivision before a political subdivision may take the lead for any phase of remedial response. The SSC must contain, or must be amended to include, the State's assurances pursuant to § 35.6805(i) of this subpart before EPA obligates funds for remedial action set forth in the Statement of Work of the SSC.

(2) Both the State and the political subdivision must comply with the requirements described in §§ 35.6805, 35.6815, and 35.6820 of this subpart.

§ 35.6805 Contents of an SSC.

The SSC must include the following provisions:

(a) *General authorities,* which documents the relevant statutes and regulations (of each government entity that is a party to the contract) governing the contract;

(b) *Purpose of the SSC,* which describes the response activities to be conducted and the benefits to be derived;

(c) *Negation of agency relationship* between the signatories, which states that no signatory of the SSC can represent or act on the behalf of any other signatory in any matter associated with the SSC;

(d) *A site description,* pursuant to § 35.6105(a)(2)(i) of this subpart;

(e) *A site-specific Statement of Work,* pursuant to § 35.6105(a)(2)(ii) of this subpart and a statement of whether the contract constitutes an initial SSC or an amendment to an existing contract;

(f) *A statement of intention to follow EPA policy and guidance;*

(g) *A project schedule* to be prepared during response activities;

(h) *A statement desinating a primary contact* for each party to the contract, which designates representatives to act on behalf of each signatory in the implementation of the contract. This statement must document the authority of each project manager to approve modifications to the project so long as such changes are within the scope of the contract and do not significantly impact the SSC;

(i) *The CERCLA assurances,* as appropriate, as described below:

(1) *Operation and maintenance.* The State must provide an assurance pursuant to §35.6105(b)(1) of this subpart.

(2) *Twenty-year waste capacity.* The State must provide an assurance pursuant to §35.6105(b)(3) of this subpart.

(3) *Off-site storage, treatment, or disposal.* If off-site storage, destruction, treatment, or disposal is required, the State must provide an assurance pursuant to §35.6105(b)(4) of this subpart; the political subdivision may not provide this assurance.

(4) *Real Property Acquisition.* When real property must be acquired, the State must provide an assurance pursuant to §35.6105(b)(5) of this subpart. An Indian Tribe must provide an assurance pursuant to §35.6110(b)(2).

(5) *Provision of State cost share.* The State must provide assurances for cost sharing pursuant to §35.6105(b)(2). Even if the political subdivision is providing the actual cost share, the State must guarantee payment of the cost share in the event of default by the political subdivision.

(j) *Cost-share conditions,* which include:

(1) An estimate of the response action cost (excluding EPA's indirect costs) that requires cost share;

(2) The basis for arriving at this figure (See §35.6285(c) for credit provisions); and

(3) The payment schedule as negotiated by the signatories, and consistent with either a lump-sum or incremental-payment option. Final payment must be made by completion of all activities in the site-specific Statement of Work with the exception of any change orders and claims handled during reconciliation of the SSC;

(k) *Reconciliation provision,* which states that the SSC remains in effect until the financial settlement of project costs and final reconciliation of response costs (including all change orders, claims, overpayments, reimbursements, etc.) ensure that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. Overpayments in an SSC may not be used to meet the cost-sharing obligation at another site. Reimbursements for any overpayment will be made to the payer identified in the SSC.

(l) *Amendability of the SSC,* which provides that:

(1) Formal amendments are required when alterations to CERCLA-funded activities are necessary or when alterations impact the State's assurances pursuant to the National Contingency Plan and CERCLA, as amended. Such amendments must include a Statement of Work for the amendment as described in §35.6805(e) above;

(2) Any change(s) in the SSC must be agreed to, in writing, by the signatories, except as provided elsewhere in the SSC, and must be reflected in all response agreements affected by the change(s);

(m) *List of Support Agency Cooperative Agreements* that are also in place for the site;

(n) *Litigation,* which describes EPA's right to bring an action against any party under section 106 of CERCLA to compel cleanup, or for cost recovery under section 107 of CERCLA.

(o) *Sanctions for failure to comply with SSC terms,* which states that if the signatories fail to comply with the terms of the SSC, EPA may proceed under the provisions of section 104(d)(2) of CERCLA and may seek in the appropriate court of competent jurisdiction to enforce the SSC or to recover any funds advanced or any costs incurred due to a breach of the SSC. Other signatories to the SSC may seek remedies in the appropriate court of competent jurisdiction.

(p) *Site access.* The State or political subdivision or Indian Tribe is expected to use its own authority to secure access to the site and adjacent properties, as well as all rights-of-way and easements necessary to complete the response actions undertaken pursuant to the SSC;

(q) *Joint inspection of the remedy.* Following completion of the remedial action, the State and EPA will jointly inspect the project. The SSC must include a statement indicating the State's approval of the final remedial action report submitted by EPA.

(r) *Exclusion of third-party benefits,* which states that the SSC is intended to benefit only the signatories of the SSC, and extends no benefit or right to any third party not a signatory to the SSC; and

(s) *Any other provision* deemed necessary by all parties to facilitate the response activities covered by the SSC.

(t) *State review.* The State or Indian Tribe must review and comment on the response actions pursuant to the SSC. Unless otherwise stated in the SSC, all time frames for review must follow those prescribed in the NCP.

(u) *Responsible party activities,* which states that if a Responsible Party takes over any activities at the site, the SSC will be modified or terminated, as appropriate.

(v) *Out-of-State or out-of-Indian Tribal jurisdiction transfers of CERCLA waste,* which states that, unless otherwise provided for by EPA or a political subdivision, the State or Indian Tribe must provide the notification requirements described in § 35.6120.

§ 35.6815 Administrative requirements.

In addition to the requirements specified in § 35.6805, the State and/or political subdivision must comply with the following:

(a) *Financial administration.* The State and/or political subdivision must comply with the following requirements regarding financial administration:

(1) *Payment.* The State may pay for its share of the costs of the response activities in cash or credit. As appropriate, specific credit provisions should be included in the SSC consistent with the requirements described in § 35.6285(c) of this subpart. The State may not pay for its cost share using in-kind services, unless the State has entered into a support agency Cooperative Agreement with EPA. The use of the support agency Cooperative Agreement as a vehicle for providing cost share must be documented in the SSC. If the political subdivision agrees to provide all or part of the State's cost share pursuant to a political subdivision-lead Cooperative Agreement, the political subdivision may pay for those costs in cash or in-kind services under that agreement. The use of a political subdivision-lead Cooperative Agreement as a vehicle for providing cost share must also be documented in the SSC. The State or political subdivision must make payments during the course of the site-specific project and must complete payments by completion of activities in the site-specific Statement of Work. (See § 35.6255 of this subpart for requirements concerning cost sharing under a support agency Cooperative Agreement.) The specific payment terms must be documented in the SSC pursuant to § 35.6805 of this subpart.

(2) *Collection of amounts due.* The State and/or political subdivision must comply with the requirements described in 40 CFR 31.52(a) regarding collection of amounts due.

(3) *Failure to comply with negotiated payment terms.* Failure to comply with negotiated payment terms may be construed as default by the State on its required assurances, even if the political subdivision is responsible for providing all or part of the cost share. (See § 35.6805(i)(5) of this subpart.)

(b) *Personal Property.* The State, Indian Tribe, or political subdivision is required to accept title. The following requirements apply to equipment used as all or part of the remedy:

(1) *Fixed in-place equipment.* EPA no longer has an interest in fixed in-place equipment once the equipment is installed.

(2) *Equipment that is an integral part of services to individuals.* EPA no longer has an interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, once EPA certifies that the remedy is operational and functional.

(c) *Reports.* The State and/or political subdivision or Indian Tribe must comply with the following requirements regarding reports:

(1) *EPA-lead.* The nature and frequency of reports between EPA and the

State or Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of all reports which the political subdivision is required to submit to EPA in accordance with the requirements of its Cooperative Agreement. (See § 35.6650 for requirements regarding quarterly progress reports.)

(d) *Records.* The State and political subdivision or Indian Tribe must maintain records on a site-specific basis. The State and political subdivision or Indian Tribe must comply with the requirements regarding record retention described in § 35.6705 and the requirements regarding record access described in § 35.6710.

§ 35.6820 Conclusion of the SSC.

In order to conclude the SSC, the signatories must:

(a) Satisfactorily complete the response activities at the site and make all payments based upon project costs determined in § 35.6805(j);

(b) Produce a final accounting of all project costs, including change orders and outstanding contractor claims; and

(c) Submit all State cost-share payments to EPA (see § 35.6805(i)(5)), undertake responsibility for O&M, and, if applicable, accept interest in real property (see § 35.6805(i)(4)).

Subpart P—Financial Assistance for the National Estuary Program

AUTHORITY: Sec. 320 of the Clean Water Act, as amended (33 U.S.C. 1330).

SOURCE: 54 FR 40804, Oct. 3, 1989 (interim), unless otherwise noted.

§ 35.9000 Applicability.

This subpart codifies policies and procedures for financial assistance awarded by the EPA to State, interstate, and regional water pollution control agencies and entities and other eligible agencies, institutions, organizations, and individuals for pollution abatement and control programs under the National Estuary Program (NEP). These provisions supplement the EPA general assistance regulations in 40 CFR parts 30 and 31.

§ 35.9005 Purpose.

Section 320(g) of the Clean Water Act (CWA) authorizes assistance to eligible States, agencies, entities, institutions, organizations, and individuals for developing a comprehensive conservation and management plan (CCMP) for an estuary.

§ 35.9010 Definitions.

Aggregate costs. The total cost of all research, surveys, studies, modeling, and other technical work completed by a Management Conference during a fiscal year to develop a Comprehensive Conservation and Management Plan for the estuary.

Annual work plan. The plan, developed by the Management Conference each year, which documents projects to be undertaken during the upcoming year. The Annual Work Plan is developed within budgetary targets provided by EPA.

Five-Year State/EPA Conference Agreement. Agreement negotiated among the States represented in a Management Conference and the EPA shortly after the Management Conference is convened. The agreement identifies milestones to be achieved during the term of the Management Conference.

Management Conference. A Management Conference convened by the Administrator under Section 320 of the CWA for an estuary in the NEP.

National Program Assistance Agreements. Assistance Agreements approved by the EPA Assistant Administrator for Water for work undertaken to accomplish broad NEP goals and objectives.

Work Program. The Scope of Work of an assistance application, which identifies how and when the applicant will use funds to produce specific outputs.

§ 35.9015 Summary of annual process.

(a) EPA considers various factors to allocate among the Management Conferences the funds requested in the President's budget for the NEP. Each year, the Director of the Office of Marine and Estuarine Protection issues budgetary targets for the NEP for each Management Conference. These targets are based upon negotiated Five-Year State/EPA Conference Agreements.

(b) Using the budgetary targets provided by EPA, each Management Conference develops Annual Work Plans describing the work to be completed during the year and identifies individual projects to be funded for the completion of such work. Each applicant having a scope of work approved by the Management Conference completes a standard EPA application, including a proposed work program. After the applicant submits an application, the Regional Administrator reviews it and, if it meets applicable requirements, approves the application and agrees to make an award when funds are available. The Regional Administrator awards assistance from funds appropriated by Congress for that purpose.

(c) The recipient conducts activities according to the approved application and assistance award. The Regional Administrator evaluates recipient performance to ensure compliance with all conditions of the assistance award.

(d) The Regional Administrator may use funds not awarded to an applicant to supplement awards to other recipients who submit a score of work approved by the management conference for NEP funds.

(e) The EPA Assistant Administrator for Water may approve National Program awards as provided in § 35.9070.

§ 35.9020 Planning targets.

The EPA Assistant Administrator for Water develops planning targets each year to help each Management Conference develop an Annual Work Plan. These targets are broad budgetary goals for total expenditures by each estuary program and are directly related to the activities that are to be carried out by each Management Conference in that year as specified in the Five-Year State/EPA Conference Agreement. The planning targets also are based on the Director's evaluation of the ability of each Management Conference to use appropriated funds effectively.

§ 35.9030 Work program.

The work program is part of the application for financial assistance and becomes part of the award document. It is part of the basis for an award decision and the basis for management and evaluation of performance under an assistance award. The work program must specify the level of effort and amount and source of funding estimated to be needed for each identified activity, the outputs committed for each activity, and the schedule for delivery of outputs.

§ 35.9035 Budget period.

An applicant may choose its budget period in consultation with and subject to the approval of the Regional Administrator.

§ 35.9040 Application for assistance.

Each applicant should submit a complete application at least 60 days before the beginning of the budget period. In addition to meeting applicable requirements contained in 40 CFR part 30 or 31, a complete application must contain a discussion of performance to date under an existing award, the proposed work program, and a list of all applicable EPA-approved State strategies and program plans, with a statement certifying that the proposed work program is consistent with these elements. The annual workplan developed and approved by the management conference each fiscal year must demonstrate that non-Federal sources provide at least 25 percent of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a CCMP for the estuary. Each application must contain a copy of the Annual Work Plan as specified in § 35.9065(c) (2) and (3) for the current Federal fiscal year. The funding table in the workplan must demonstrate that the 25 percent match requirements is being met, and the workplan table of project status must show the sources of funds supporting each project.

§ 35.9045 EPA action on application.

The Regional Administrator will review each completed application and should approve, conditionally approve, or disapprove the application within 60 days of receipt. When funds are available, the Regional Administrator will award assistance based on an approved or conditionally approved application. For a continuation award made after the beginning of the approved budget

period, EPA will reimburse the applicant for allowable costs incurred from the beginning of the budget period, provided that such costs are contained in the approved application and that the application was submitted before the expiration of the prior budget period.

(a) *Approval.* The Regional Administrator will approve the application only if it satisfies the requirements of CWA section 320; the terms, conditions, and limitations of this subpart; and the applicable provisions of 40 CFR parts 30, 31, and other EPA assistance regulations. The Regional Administrator must also determine that the proposed outputs are consistent with EPA guidance or otherwise demonstrated to be necessary and appropriate; and that achievement of the proposed outputs is feasible, considering the applicant's past performance, program authority, organization, resources, and procedures.

(b) *Conditional approval.* The Regional Administrator may conditionally approve the application after consulting with the applicant if only minor changes are required. The award will include the conditions the applicant must meet to secure final approval and the date by which those conditions must be met.

(c) *Disapproval.* If the application cannot be approved or conditionally approved, the Regional Administrator will negotiate with the applicant to change the output commitments, reduce the assistance amount, or make any other changes necessary for approval. If negotiation fails, the Regional Administrator will disapprove the application in writing.

§ 35.9050 Assistance amount.

(a) *Determining the assistant amount.* In determining the amount of assistance to an applicant, the Regional Administrator will consider the Management Conference planning target, the extent to which the applicant's Work Program is consistent with EPA guidance, and the anticipated cost of the applicant's program relative to the proposed outputs.

(b) *Reduction of assistance amount.* If the Regional Administrator determines that the proposed outputs do not justify the level of funding requested, he will reduce the assistance amount. If the evaluation indicates that the proposed outputs are not consistent with the priorities contained in EPA guidance, the Regional Administrator may reduce the assistance amount.

§ 35.9055 Evaluation of recipient performance.

The Regional Administrator will oversee each recipient's performance under an assistance agreement. In consultation with the applicant, the Regional Administrator will develop a process for evaluating the recipient's performance. The Regional Administrator will include the schedule for evaluation in the assistance agreement and will evaluate recipient performance and progress toward completing the outputs in the approved work program according to the schedule. The Regional Administrator will provide the evaluation findings to the recipient and will include these findings in the official assistance file. If the evaluation reveals that the recipient is not achieving one or more of the conditions of the assistance agreement, the Regional Administrator will attempt to resolve the situation through negotiation. If agreement is not reached, the Regional Administrator may impose sanctions under the applicable provisions of 40 CFR part 30 or 31.

§ 35.9060 Maximum Federal share.

The Regional Administrator may provide up to 100 percent of the approved work program costs for a particular application provided that non-Federal sources provide at least 25 percent of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a comprehensive conservation and management plan for the estuary as specified in the estuary Annual Work Plan for each fiscal year.

§ 35.9065 Limitations.

(a) *Management conferences.* The Regional Administrator will not award funds pursuant to CWA section 320(g) to any applicant unless and until the scope of work and overall budget have been approved by the Management Conference of the estuary for which the work is proposed.

(b) *Elements of annual workplans.* Annual Work Plans to be prepared by estuary Management Conferences must be reviewed by the Regional Administrator before final ratification by the Management Conference and must include the following elements:

(1) *Introduction.* A discussion of achievements in the estuary, a summary of activities undertaken in the past year to further each of the seven purposes of a Management Conference specified in section 320(b) of the CWA, the major emphases for activity in the upcoming year, and a schedule of milestones to be reached during the year.

(2) *Funding sources.* A table of fund sources for activities in the new year, including a description of the sources and types (e.g., in-kind contributions to be performed by the applicant) of funds comprising the contribution by applicants or third parties, and the source and type of any other non-Federal funds or contributions.

(3) *Projects.* A description of each project to be undertaken, a summary table of project status listing all activities, the responsible organization or individual, the products expected from each project, approximate schedules, budgets, and the source and type of the non-Federal 25 percent minimum cost share of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a comprehensive conservation and management plan for an estuary.

[54 FR 40804, Oct. 3, 1989, as amended at 59 FR 61126, Nov. 29, 1994]

§ 35.9070 National program assistance agreements.

The Assistant Administrator for Water may approve the award of NEP funds for work that has broad applicability to estuaries of national significance. These awards shall be deemed to be consistent with Annual Work Plans and Five-Year State/EPA Conference Agreements approved by individual management conferences. The amount of a national program award shall not exceed 75 percent of the approved work program costs provided the non-Federal share of such costs is provided from non-Federal sources.

PART 36—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

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AUTHORITY: 41 U.S.C. 701 *et seq.*

SOURCE: 68 FR 66557, 66625, 66626, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 36.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 36.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the EPA; or

(2) A(n) EPA awarding official. (See definitions of award and recipient in §§ 36.605 and 36.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A(n) EPA awarding official	A, D and E.

§ 36.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the EPA Administrator or designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 36.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 36.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 36.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 36.205 through 36.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 36.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 36.230).

§ 36.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 36.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 36.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 36.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 36.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 36.205 and an ongoing awareness program as described in § 36.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more ...	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the EPA awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 36.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 36.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must__

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either__

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the

requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 36.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each EPA award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces__

(1) To the EPA official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by EPA officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the EPA awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the EPA awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 36.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) EPA award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the EPA awarding official or other designee for each award that you currently have, unless § 36.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

§ 36.301 [Reserved]

Subpart D—Responsibilities of EPA Awarding Officials

§ 36.400 What are my responsibilities as a(n) EPA awarding official?

As a(n) EPA awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 36.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the EPA Administrator or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 36.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the EPA Administrator or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 36.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 36.500 or § 36.505, the EPA may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 40 CFR Part 32, for a period not to exceed five years.

§ 36.515 Are there any exceptions to those actions?

The EPA Administrator may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the EPA Administrator determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 36.605 Award.

Award means an award of financial assistance by the EPA or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 40 CFR Part 31 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

§ 36.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 36.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 36.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 36.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 36.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 36.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 36.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 36.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 36.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 36.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 36.655 Individual.

Individual means a natural person.

§ 36.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 36.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 36.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order

12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PART 40—RESEARCH AND DEMONSTRATION GRANTS

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AUTHORITY: Cited in §40.110.

SOURCE: 38 FR 12784, May 15, 1973, unless otherwise noted.

§40.100 Purpose of regulation.

These provisions establish and codify policies and procedures governing the award of research and demonstration grants by the Environmental Protection Agency.

§40.105 Applicability and scope.

This part establishes mandatory policies and procedures for all EPA research and demonstration grants. The provisions of this part supplement the EPA general grant regulations and procedures (40 CFR part 30). Accordingly, all EPA research and demonstration grants are awarded subject to the EPA interim general grant regulations and procedures (40 CFR part 30) and to the applicable provisions of this part 40.

§40.110 Authority.

EPA research and demonstration grants are authorized under the following statutes:

(a) The Clean Air Act, as amended, 42 U.S.C. 1857 *et seq.*

(1) Section 103 (42 U.S.C. 1857b) authorizes grants for research and demonstration projects relating to the causes, effects, extent, prevention, and control of air pollution.

(2) Section 104 (42 U.S.C. 1857b–1) authorizes grants for research and development of new and improved methods for the prevention and control of air pollution resulting from the combustion of fuels.

(b) The Federal Water Pollution Control Act, as amended, Public Law 92–500.

(1) Section 104(b) (33 U.S.C. 1254(b)) authorizes grants for research and demonstration projects relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution.

(2) Section 104(h) (33 U.S.C. 1254(h)) authorizes grants for research and development of new and improved methods for the prevention, removal, reduction, and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation, and for construction of publicly owned research facilities for such purpose.

(3) Section 104(i) (33 U.S.C. 1254(i)) authorizes grants for research, studies, experiments, and demonstrations relative to the removal of oil from any waters and for the prevention, control, and elimination of oil and hazardous substances pollution.

(4) Section 104(r) (33 U.S.C. 1254(r)) authorized grants for the conduct of basic research into the structure and function of freshwater aquatic ecosystems, and to improve understanding

of the ecological characteristics necessary to the maintenance of the chemical, physical, and biological integrity of freshwater aquatic ecosystems.

(5) Section 104(s) (33 U.S.C. (s)) authorizes grants to conduct and report on interdisciplinary studies on river systems, including hydrology, biology, ecology, economics, the relationship between river uses and land uses, and the effects of development within river basins on river systems and on the value of water resources and water-related activities.

(6) Section 105(a) (33 U.S.C. 1255(a)) authorizes grants for research and demonstration of new or improved methods for preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants; and for the demonstration of advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvement to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes.

(7) Section 105(b) (33 U.S.C. 1255(b)) authorizes grants for demonstrating, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control pollution from all sources, within such basin or portions thereof, including nonpoint sources, together with instream water quality improvement techniques.

(8) Section 105(c) (33 U.S.C. 1255(c)) authorizes grants for research and demonstration projects for prevention of pollution of any waters by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants.

(9) Section 105(e)(1) (33 U.S.C. 1255(e)(1)) authorizes grants for research and demonstration projects with respect to new and improved methods of preventing, reducing, and eliminating pollution from agriculture.

(10) Section 105(e)(2) (33 U.S.C. 1255(e)(2)) authorizes grants for demonstration projects with respect to new and improved methods of preventing, reducing, storing, collecting, treating, or otherwise eliminating pollution from sewage in rural and other areas where collection of sewage in conventional, communitywide sewage collection systems is impractical, uneconomical, or otherwise infeasible, or where soil conditions or other factors preclude the use of septic tank and drainage field systems.

(11) Section 107 (33 U.S.C. 1257) authorizes grants for projects to demonstrate comprehensive approaches to the elimination or control of acid or other mine water pollution resulting from active or abandoned mining operations and other environmental pollution affecting water quality within all or part of a watershed or river basin, including siltation from surface mining.

(12) Section 108 (33 U.S.C. 1258) authorizes grants for projects to demonstrate new methods and techniques, and to develop preliminary plans for the elimination or control of pollution within all or any part of the watersheds of the Great Lakes.

(13) Section 113 (33 U.S.C. 1263) authorizes grants for projects to demonstrate methods to provide for central community facilities for safe water and elimination or control of pollution in those native villages of Alaska without such facilities.

(c) The Public Health Service Act, as amended, 42 U.S.C. 241 *et seq.*

(1) Section 301 (42 U.S.C. 241, 242b, and 246) authorizes grants for research relating to the human and environmental effects of radiation.

(2) [Reserved]

(d) The Solid Waste Disposal Act, as amended, by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 *et seq.*).

(1) Section 8001 (42 U.S.C. 6981) authorizes grants for research and demonstration projects relating to solid waste.

(2) Section 8004 (42 U.S.C. 6984) authorizes grants for demonstration of new or improved technologies for resource recovery.

(3) Section 8005 (42 U.S.C. 6985) authorizes grants to conduct special studies and demonstration projects on recovery of useful energy and materials.

(4) Section 8006 (42 U.S.C. 6986) authorizes grants for the demonstration

of resource recovery system or for the construction of new or improved solid waste disposal facilities.

(e) The Federal Insecticide, Fungicide, and Rodenticide Act, as amended, Public Law 92–516.

(1) Section 20 authorizes grants for research in the pesticides areas with priority given to the development of biologically integrated alternatives for pest control.

(2) [Reserved]

(f) The Grant Act, 42 U.S.C. 1891 *et seq.*, authorizes grants for basic scientific research.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115 Definitions.

The statutes identified in § 40.110 contain definitions which are not all repeated here. The following terms shall have the meaning set forth below:

[42 FR 56056, Oct. 20, 1977]

§ 40.115–1 Construction.

May include the preliminary planning to determine the economic and engineering feasibility of a facility, the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary to the construction of a facility, the erection, acquisition, alteration, remodeling, improvement, or extension of a facility, and the inspection and supervision of the construction of a facility.

§ 40.115–2 Intermunicipal agency.

(a) Under the Clean Air Act, an agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(b) Under the Resource Conservation and Recovery Act, an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(c) In all other cases, an agency of two or more municipalities having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–3 Interstate agency.

(a) Under the Clean Air Act, an agency established by two or more States, or by two or more municipalities located in different States, having substantial powers or duties pertaining to the prevention and control of air pollution.

(b) Under the Federal Water Pollution Control Act, an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution of waters.

(c) Under the Resource Conservation and Recovery Act, an agency of two or more municipalities in different States or an agency established by two or more States, with authority to provide for the disposal of solid wastes and serving two or more municipalities located in different States.

(d) In all other cases, an agency of two or more States having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–4 Municipality.

(a) Under the Federal Water Pollution Control Act, a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law, or an Indian tribe or an authorized Indian tribal organization, with jurisdiction over disposal of sewage, industrial wastes, or other wastes; or a designated and approved management agency under section 208 of the act.

(b) Under the Resource Conservation and Recovery Act, a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(c) In all other cases, a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, or an Indian tribe or an authorized Indian tribal organization, having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–5 Person.

(a) Under the Federal Water Pollution Control Act, an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(b) Under the Resource Conservation and Recovery Act, an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56057, Oct. 20, 1977]

§ 40.115–6 State.

(a) Under the Federal Water Pollution Control Act, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(b) Under the Resource Conservation and Recovery Act, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(c) In all other cases, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa.

[42 FR 56057, Oct. 20, 1977]

§ 40.120 Publication of EPA research objectives.

The Office of Research and Development of EPA publishes a statement of research objectives and priorities annually in a document entitled "Office of Research and Development—Program Guide." This document may be obtained from either the Office of Research and Development, RD–674, or the Grants Administration Division, PM–216, U.S. Environmental Protection Agency, Washington, DC 20460.

[42 FR 56057, Oct. 20, 1977]

§ 40.125 Grant limitations.

§ 40.125–1 Limitations on duration.

(a) No research or demonstration grant shall be approved for a budget period in excess of 2 years except demonstration grants involving construction.

(b) No research or demonstration grant shall be approved for a project period in excess of 5 years.

(c) The grant award official may extend the budget and project periods for up to an additional 12 months without additional grant funds, when such extensions are in the best interest of the Government.

[42 FR 56057, Oct. 20, 1977]

§ 40.125–2 Limitations on assistance.

In addition to the cost-sharing requirements pursuant to 40 CFR 30.720, research and demonstration grants shall be governed by the specific assistance limitations listed below:

(a) *Federal Water Pollution Control Act.* (1) Section 104(s)—no grant in any fiscal year may exceed $1 million.

(2) Sections 105 (a), (c) and 108—no grant may exceed 75 percent of the allowable actual project costs.

(b) *Clean Air Act.* (1) Section 104—no grant may exceed $1,500,000.

(2) [Reserved]

(c) *Resource Conservation and Recovery Act.* (1) Sections 8001, 8004, and 8005. The maximum practicable cost sharing is required.

(2) Section 8006. The Federal share for any grant for the demonstration of resource recovery systems shall not exceed 75 percent and is subject to the conditions contained in section 8006(b) of the Act. The Federal share for any grant for the construction of new or improved solid waste disposal facilities shall not exceed 50 percent in the case of a project serving an area which includes only one municipality and 75 percent in any other case, and is subject to the limitations contained in section 8006(c) of the Act. Not more

than 15 percent of the total funds authorized to be appropriated for any fiscal year to carry out this section shall be awarded for projects in any one State.

[38 FR 12784, May 15, 1973, as amended at 42 FR 20083, May 8, 1977; 42 FR 56057, Oct. 20, 1977]

§ 40.130 Eligibility.

Except as otherwise provided below, grants for research and demonstration projects may be awarded to any responsible applicant in accordance with 40 CFR 30.340:

(a) The Clean Air Act, as amended—public or nonprofit private agencies, institutions, organizations, and to individuals.

(b) Resource Conservation and Recovery Act.

(1) Section 8001, public authorities, agencies, and institutions; private agencies and institutions; and individuals.

(2) Sections 8004 and 8005, public agencies and authorities or private persons.

(3) Section 8006, State, municipal, interstate or intermunicipal agencies.

(4) No grant may be made under this Act to any private profit-making organization.

(c) The Federal Insecticide, Fungicide, and Rodenticide Act, as amended—other Federal agencies, universities, or others as may be necessary to carry out the purposes of the act.

(d) The Federal Water Pollution Control Act, as amended:

(1) Section 104(b)—State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and to individuals.

(2) Sections 104 (h) and (i)—public or private agencies and organizations and to individuals.

(3) Section 104(r)—colleges and universities.

(4) Section 104(s)—institutions of higher education.

(5) Sections 105 (a), (e)(2), and 107—State, municipal, interstate, and intermunicipal agencies.

(6) Section 195(b)—State or States or interstate agency.

(7) Sections 105 (c) and (e)(1)—persons.

(8) Section 108—State, political subdivision, interstate agency, or other public agency, or combination thereof.

(9) Section 113—only to the State of Alaska.

(e) The Public Health Service Act, as amended—only to nonprofit agencies, institutions, organizations, and to individuals.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 42 FR 56057, Oct. 20, 1977]

§ 40.135 Application.

§ 40.135–1 Preapplication coordination.

(a) *All applicants.* (1) Applicants for research and demonstration grants are encouraged to contact EPA for further information and assistance prior to submitting a formal application. The EPA regional office or the laboratory nearest the applicant will be able to provide such assistance or to refer the applicant to an appropriate EPA representative.

(2) Applicants shall prepare an environmental assessment of the proposed project where applicable, outlining the anticipated impact on the environment pursuant to 40 CFR part 6.

(b) Applications for grants for demonstration projects funded by the Office of Solid Waste will be solicited through the Department of Commerce Business Daily, and selections will be made on a competitive basis.

[38 FR 12784, May 15, 1973, as amended at 41 FR 20659, May 20, 1976; 42 FR 56057, Oct. 20, 1977; 48 FR 29302, June 24, 1983]

§ 40.135–2 Application requirements.

All applications for research and demonstration grants shall be submitted in an original and 8 copies to the Environmental Protection Agency, Grants Administration Division, Washington, DC 20460, in accordance with §§ 30.315 through 30.315–3.

(a) *Applications involving human subjects.* (1) Safeguarding the rights and welfare of human subjects involved in projects supported by EPA grants is the responsibility of the institution which receives or is accountable to EPA for the funds awarded for the support of the project.

(2) Institutions must submit to EPA, for review, approval, and official acceptance, a written assurance of its compliance with guidelines established by Department of Health, Education, and Welfare concerning protection of human subjects. However, institutions which have submitted and have had accepted, general assurance to DHEW under these guidelines will be considered as being in compliance with this requirement. These guidelines are provided in DHEW Publication No. (NIH) 72–102, the "Institutional Guide to DHEW Policy on Protection of Human Subjects." Copies of this publication are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20420.

(3) Applicants must provide with each proposal involving human subjects a certification that it has been or will be reviewed in accordance with the institution's assurance. This certification must be renewed annually on the basis of continuing review of the supported project.

(b) *Applications involving laboratory animals.* Each application for a project involving the use of warmblooded animals shall include a written assurance that the applicant has registered with the Department of Agriculture and is in compliance with the rules, regulations, and standards enunciated in the Animal Welfare Act, Public Law 89–554, as amended.

(c) *Notice of research project* (*NRP*). Each application for research must include a summary (NRP) of proposed work (200 words or less) incorporating objectives, approach and current plans and/or progress. Upon approval of an application, summaries are forwarded to the Smithsonian Science Information Exchange. Summaries of work in progress are exchanged with government and private agencies supporting research and are forwarded to investigators who request such information.

(d) *Federal Water Pollution Control Act.* (1) All applications for grants under section 105(a) must have been approved by the appropriate State water pollution control agency or agencies.

(2) All applications for grants under section 107, where the proposed project will be located in the Appalachian region, shall have been coordinated with the Appalachian Regional Commission for determination that such demonstration project is consistent with the objectives of the Appalachian Regional Development Act of 1965, as amended.

(e) *Intergovernmental review.* EPA will not award funds under this subpart without review and consultation, if applicable, in accordance with the requirements of Executive Order 12372, as implemented in 40 CFR part 29 of this chapter.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 42 FR 56057, Oct. 20, 1977; 48 FR 29302, June 24, 1983]

§40.140 Criteria for award.

In determining the desirability and extent of funding for a project and the relative merit of an application, consideration will be given to the following criteria:

§40.140–1 All applications.

(a) The relevancy of the proposed project to the objectives of the EPA research and demonstration program;

(b) The availability of funds within EPA;

(c) The technical feasibility of the project;

(d) The seriousness, extent, and urgency of the environmental problems toward which the project is directed;

(e) The anticipated public benefits to be derived from the project in relation to the costs of the project;

(f) The competency of the applicant's staff and the adequacy of the applicant's facilities and available resources;

(g) The degree to which the project can be expected to produce results that will have general application to pollution control problems nationwide;

(h) Whether the project is consistent with existing plans or ongoing planning for the project area at the State, regional, and local levels;

(i) The existence and extent of local public support for the project;

(j) Whether the proposed project is environmentally sound;

(k) Proposed cost sharing.

§ 40.140–2 [Reserved]

§ 40.140–3 Federal Water Pollution Control Act.

(a) All applications for grants under section 105(c) must provide evidence that the proposed project will contribute to the development or demonstration of a new or improved method of treating industrial wastes or otherwise preventing pollution by industry, which method shall have industry-wide application;

(b) All applications for grants under section 113 must include provisions for community safe water supply systems, toilets, bathing and laundry facilities, sewage disposal facilities and programs relating to health and hygiene. Such projects must also be for the further purpose of developing preliminary plans for providing such safe water and such elimination or control of water pollution for all native villages in the State of Alaska.

§ 40.145 Supplemental grant conditions.

In addition to the EPA general grant conditions (40 CFR part 30, subpart C), all grants are awarded subject to the following requirements:

(a) The project will be conducted in an environmentally sound manner.

(b) In addition to the notification of project changes required pursuant to 40 CFR 30.900, prior written approval by the grants officer is required for project changes which may (1) alter the approved scope of the project, (2) substantially alter the design of the project, or (3) increase the amount of Federal funds needed to complete the project. No approval or disapproval of a project change pursuant to 40 CFR 30.900 or this section shall commit or obligate the United States to an increase in the amount of the grant or payments thereunder, but shall not preclude submission or consideration of a request for a grant amendment pursuant to 40 CFR 30.900–1.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.145–1 Resource Conservation and Recovery Act.

Programs for which a Federal grant is awarded by the Environmental Protection Agency to a State, municipal, interstate or intermunicipal agency, or to any public authority, agency or institution, under the Resource Conservation and Recovery Act, shall be the subject of public participation consistent with part 249 of this chapter.

[42 FR 56057, Oct. 20, 1977]

§ 40.145–2 Federal Water Pollution Control Act.

(a) No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving assistance under the Act.

(b) Grants under section 107 are awarded subject to the conditions—

(1) That the State shall acquire any land or interests therein necessary for such project to assure the elimination or control of acid or other mine water pollution; and

(2) That the State shall provide legal and practical protection to the project area to insure against any activities which will cause future acid or other mine water pollution.

§ 40.145–3 Projects involving construction.

Research and demonstration grants for projects involving construction shall be subject to the following conditions:

(a) The applicant will demonstrate to the satisfaction of the grants officer that he has or will have a fee simple or such other estate or interest in the site of the project, and rights of access, as the grants officer finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project; and in the case of projects serving more than one municipality, that the participating communities have such interests or rights as the grants officer finds sufficient to assure their undisturbed utilization of the project for the estimated life of the project.

(b) Invitations for bids or requests for proposals shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured.

Such description shall not, in competitive procurements, contain features which unduly restrict competition. "Brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by offerors should be clearly specified.

(c) Positive efforts shall be made by the grantees to utilize small business and minority-owned business sources of supplies and services.

(d) Subagreements for construction work may be negotiated when advertising for competitive bids is not feasible; however, the grantee must adequately demonstrate its need to contract with a single or sole source. All such subagreements are subject to prior approval by the grants officer.

(e) Construction work will be performed by the fixed-price (lump sum) or fixed-rate (unit price) method, or a combination of these two methods, unless the grants officer gives advance written approval to use some other method of contracting. The cost-plus-a-percentage-of-cost method of contracting shall not be used. Adequate methods of advertising for and obtaining competitive sealed bids will be employed prior to award of the construction contract. The award of the contract will be made to the responsible bidder submitting the lowest responsive bid, which shall be determined without regard to State or local law whereby preference is given on factors other than the specification requirements and the amount of bid. The grantee must promptly transmit to the grants officer copies of bid protests, decisions on such protests, and related correspondence. The grants officer will cause appropriate review of grantee procurement methods to be made.

(f) On construction contracts exceeding $100,000, each bidder must furnish a bid guarantee equivalent to 5 percent of the bid price. In addition, the contractor awarded the contract must furnish performance and payment bonds, each of which shall be in an amount not less than 100 percent of the contract price. Construction contracts less than $100,000 shall follow the State or local requirements relating to bid guarantees, performance bonds, and payment bonds.

(g) The construction of the project, including the letting of contracts in connection therewith, shall conform to the applicable requirements of State, territorial, and local laws and ordinances to the extent that such requirements do not conflict with Federal laws.

(h) The grantee will provide and maintain competent and adequate engineering supervision and inspection for the project to insure that the construction conforms with the approved plans and specifications.

(i) Any construction contract must provide that representatives of the Environmental Protection Agency and the State, as appropriate, will have access to the work whenever it is in preparation or progress and that the contractor will provide proper facilities for such access and inspection. The contract must also provide that the grants officer, the Comptroller General of the United States, or any authorized representative shall have access to any books, documents, papers, and records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, and transcriptions thereof.

(j) The grantee agrees to construct the project or cause it to be constructed in accordance with the application, plans and specifications, and subagreements approved by EPA in the grant agreement or amendments.

(k) In addition to the notification of project changes pursuant to 40 CFR 30.900, a copy of any construction contract or modifications thereof, and of revisions to plans and specifications must be submitted to the grants officer.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.150 Evaluation of applications.

Every application for a research or demonstration grant will be evaluated by appropriate EPA staff in terms of relevancy and the applicable criteria set forth in § 40.140. Only applications considered relevant to EPA research and demonstration objectives will receive further consideration and be subjected to additional review. Relevancy

will be measured by program needs and priorities as defined in the Agency's current planned objectives. Relevancy, coupled with the results of technical review, will provide the basis for funding recommendations.

(a) *New applications.* Applications considered relevant to EPA research and demonstration objectives will be reviewed for technical merit by at least one reviewer within EPA and at least two reviewers outside EPA. Review by a National Advisory Council is statutorily required for radiation grants.

(b) *Continuation applications.* Continuation applications will be reviewed by appropriate EPA staff only. Recommendations for continuation of funding will be based on progress toward the accomplishment of the goals set forth for the project and continued Agency needs and priorities.

§ 40.155 Availability of information.

(a) The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by part 2 of this chapter.

(b) An assertion of entitlement to confidential treatment of part or all of the information in an application may be made using the procedure described in § 30.235(b). See also §§ 2.203 and 2.204 of this chapter.

(c) All information and data contained in the grant application will be subject to external review unless deviation is approved for good cause pursuant to 40 CFR 30.1000.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 41 FR 36918, Sept. 1, 1976]

§ 40.160 Reports.

§ 40.160–1 Progress reports.

The grant agreement will normally require the submission of a brief progress report after the end of each quarter of the budget period. A monthly progress report may be required for some demonstration projects, if set forth in the grant agreement. Progress reports should fully describe in chart or narrative format the progress achieved in relation to the approved schedule and project milestones. Special problems or delays encountered must be explained. A summary progress report covering all work on the project to date is required to be included with applications for continuation grants (see § 40.165b). This report may be submitted one quarter prior to the end of the budget period.

§ 40.160–2 Financial status report.

A financial status report must be prepared and submitted within 90 days after completion of the budget and project periods in accordance with § 30.635–3.

[42 FR 56057, Oct. 20, 1977]

§ 40.160–3 Reporting of inventions.

As provided in appendix B of 40 CFR part 30, immediate and full reporting of all inventions to the Environmental Protection Agency is required. In addition:

(a) An annual invention statement is required with each continuation application.

(b) A final invention report is required within 90 days after completion of the project period.

(c) When a principal investigator changes institutions or ceases to direct a project, an invention statement must be promptly submitted with a listing of all inventions during his administration of the grant.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.160–4 Equipment report.

At the completion or termination of a project, the grantee will submit a listing of all items of equipment acquired with grant funds with an acquisition cost of $300 or more and having a useful life of more than 1 year.

§ 40.160–5 Final report.

The grantee shall submit a draft of the final report for review no later than 90 days prior to the end of the approved project period. The report shall document project activities over the entire period of grant support and shall describe the grantee's achievements with respect to stated project purposes and objectives. The report shall set forth in complete detail all technical aspects of the projects, both negative

and positive, grantee's findings, conclusions, and results, including, as applicable, an evaluation of the technical effectiveness and economic feasibility of the methods or techniques investigated or demonstrated. The final report shall include EPA comment when required by the grants officer. Prior to the end of the project period, one reproducible copy suitable for printing and such other copies as may be stipulated in the grant agreement shall be transmitted to the grants officer.

§40.165 Continuation grants.

To be eligible for a continuation grant within the approved project period, the grantee must:

(a) Have demonstrated satisfactory performance during all previous budget periods; and

(b) Submit no later than 90 days prior to the end of the budget period a continuation application which includes a detailed summary progress report, an estimated financial statement for the current budget period, a budget for the new budget period; and an updated work plan revised to account for actual progress accomplished during the current budget period.

PART 45—TRAINING ASSISTANCE

Sec.

45.100 Purpose and scope.
45.105 Authority.
45.110 Objectives.
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45.135 Supplemental conditions.
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45.150 Reports.
45.155 Continuation assistance.
APPENDIX A TO PART 45—ENVIRONMENTAL PROTECTION AGENCY TRAINING PROGRAMS

AUTHORITY: Sec. 103 of the Clean Air Act, as amended (42 U.S.C. 7403), secs. 104(g), 109, and 111 of the Clean Water Act, as amended (33 U.S.C. 1254(g), 1259, and 1261), secs. 7007 and 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6977 and 6981); sec. 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j–1).

SOURCE: 49 FR 41004, Oct. 18, 1984, unless otherwise noted.

§45.100 Purpose and scope.

This part establishes the policies and procedures for the award of training assistance by the Environmental Protection Agency (EPA). The provisions of this part supplement EPA's "General Regulation for Assistance Programs," 40 CFR part 30.

§45.105 Authority.

The EPA is authorized to award training assistance under the following statutes:

(a) Section 103 of the Clean Air Act, as amended (42 U.S.C. 7403);

(b) Sections 104(g), 109, and 111 of the Clean Water Act, as amended (33 U.S.C. 1254(g), 1259, and 1261);

(c) Sections 7007 and 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6977 and 6981);

(d) Section 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j–1).

§45.110 Objectives.

Assistance agreements are awarded under this part to support students through traineeships for occupational and professional training, and to develop career-oriented personnel qualified to work in occupations involving environmental protection and pollution abatement and control. Training assistance is available to:

(a) Assist in developing, expanding, planning, implementing, and improving environmental training;

(b) Increase the number of trained pollution control and abatement personnel;

(c) Upgrade the level of occupational and professional training among State and local environmental control personnel;

(d) Train people to train others in occupations involving pollution abatement and control; and

(e) Bring new people into the environmental control field.

§45.115 Definitions.

The following definitions supplement the definitions in 40 CFR 30.200.

Stipend. Supplemental financial assistance, other than tuition and fees, paid directly to the trainee by the recipient organization.

Trainee. A student selected by the recipient organization who receives support to meet the objectives in § 45.110.

§ 45.120 Applicant eligibility.

Institutions, organizations, and individuals are eligible for EPA training awards as follows:

(a) *Clean Air Act.* Section 103(b)—Air pollution control agencies, public and nonprofit private agencies, institutions, organizations, and individuals. No award may be made under this Act to any private, profitmaking organization.

(b) *Clean Water Act.* (1) Section 104(b)(3)—State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and individuals. No award may be made to any private, profitmaking organization.

(2) Section 104(g)(3)(A)—Public or private agencies and institutions, and individuals.

(3) Sections 104(g)(1) and 104(g)(3)(C)—State and interstate agencies, municipalities, educational institutions and other organizations and individuals.

(4) Sections 109, 110, and 111—Institutions of higher education, or combinations of such institutions.

(c) *Solid Waste Disposal Act.* (1) Section 8001(a)—Public or private authorities, agencies, and institutions and individuals. No award may be made to any private, profitmaking organization.

(2) Section 7007(a)—State or interstate agencies, municipalities, educational institutions, and other organizations.

(d) *Safe Drinking Water Act.* Sections 1442(b) and 1442(d)—Public agencies, educational institutions, and other organizations. No awards may be made to profitmaking agencies or institutions.

§ 45.125 Application requirements.

Applicants must submit their requests for assistance on EPA Form 5700–12, "Application for Federal Assistance." Applicants must submit the original and two copies of the application to EPA. If the assistance agreement is to be awarded by EPA Headquarters, the applicant must send the application to the Environmental Protection Agency, Grants Administration Division, (3903R), 1200 Pennsylvania Ave., NW., Washington, DC 20460. If the assistance agreement is to be awarded by an EPA Regional Office, the applicant must send the application to the appropriate Regional Office.

(Approved by the Office of Management and Budget under control number 2010–0004)

§ 45.130 Evaluation of applications.

(a) Consistent with 40 CFR 30.301, the appropriate EPA program office staff will review training applications in accordance with the following criteria:

(1) Relevance of proposal to Agency objectives, priorities, achievement of national goals and technical merit;

(2) Competency of the proposed staff in relation to the type of project proposed;

(3) Feasibility of the proposal;

(4) Adequacy of the applicant's resources available for the project;

(5) Amount of funds necessary for the completion of the project;

(b) In addition, awards under section 104(g)(1) of the Clean Water Act, are subject to the following criteria:

(1) Assessment of need for training in a State or municipality based on problems with existing wastewater treatment plants, such as violation of discharge permit conditions, and faulty or improper operation or maintenance.

(2) Need for operating training based on the number of wastewater treatment construction grants in the State.

§ 45.135 Supplemental conditions.

Training awards are subject to the following conditions:

(a) Trainees must be citizens of the United States, its territories, or possessions, or lawfully admitted to the United States for permanent residence.

(b) Recipients shall not require the performance of personal services by individuals receiving training as a condition for assistance.

(c) Trainees are entitled to the normal student holidays observed by an academic institution, or the holiday and vacation schedule applicable to all trainees at a nonacademic institution.

(d) Training awards may include a provision to pay stipends to trainees. Stipends must be paid under section 111 of the Clean Water Act consistent with

prevailing practices under comparable federally supported programs.

(e) Training awards under section 111 of the Clean Water Act are subject to the following conditions:

(1) Recipients must obtain the following agreement in writing from persons awarded scholarships for undergraduate study of the operation and maintenance of treatment works:

> I agree to enter and remain in an occupation involving the design, operation, or maintenance of wastewater treatment works for a period of two years after the satisfactory completion of my studies under this program. I understand that if I fail to perform this obligation I may be required to repay the amount of my scholarship.

(2) Recipients must take such action as may be reasonably required to enforce the condition in paragraph (e)(1) of this section. Recipients shall credit or pay EPA for any repayments.

§ 45.140 Budget and project period.

The budget and project periods for training awards may not exceed three years.

§ 45.145 Allocability and allowability of costs.

(a) Allocability and allowability of costs will be determined in accordance with 40 CFR 30.410.

(b) Costs incurred for the purchase of land or the construction of buildings are not allowable.

§ 45.150 Reports.

(a) Recipients must submit the reports required in 40 CFR 30.505.

(b) A draft of the final project report is required 90 days before the end of the project period. The recipient shall prepare the final projects report in accordance with the project officer's instructions, and submit the final project report within 30 days after the end of the project period.

§ 45.155 Continuation assistance.

To be eligible for continuation assistance, the recipient must:

(a) Demonstrate satisfactory performance during all previous budget periods;

(b) Include in the application a detailed progress report showing the progress achieved and explain special problems or delays, a budget for the new budget period, and a detailed work plan for the new budget period; and

(c) Submit a preliminary financial statement for the current budget period that includes estimates of the amount the recipient expects to spend by the end of the current budget period and the amount of any uncommitted funds which the recipient proposes to carry over beyond the term of the current budget period.

APPENDIX A TO PART 45—ENVIRONMENTAL PROTECTION AGENCY TRAINING PROGRAMS

	Administering office	
	Headquarters	Regional
Office of Air, Noise, and Radiation:		
Air Pollution Control Manpower Training Grants.	X	
Air Pollution Control—Technical Training.	X	
Office of Water:		
Water Pollution Control—Professional Training Grants.	X	X
Safe Drinking Water Professional Training Grants.	X	
Safe Drinking Water—Occupational Training.	X	
Office of Solid Waste and Emergency Response: Hazardous Waste Training.	X	

PART 46—FELLOWSHIPS

Subpart A—General

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46.120 Definition.
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Subpart E—After the Fellowship

46.225 Equipment.
46.230 Closeout procedures.

AUTHORITY: Section 103(b)(5) of the Clean Air Act, as amended (42 U.S.C. 7403(b)(5)); sections 104(b)(5) and (g)(3)(B) of the Clean Water Act, as amended (33 U.S.C. 1254(b)(5) and (g)(3)(B)); section 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j–1); section 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6981); section 10 of the Toxic Substances Control Act, as amended (15 U.S.C. 2609); section 20 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136r); sections 104(k)(6)and 311 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9604(k)(6) and 42 U.S.C. 9660).

SOURCE: 68 FR 16710, Apr. 4, 2003, unless otherwise noted. Subparts B—L were added at 65 FR 51433, Aug. 23, 2000.

Subpart A—General

§ 46.100 Purpose.

This part establishes the requirements for all Environmental Protection Agency (EPA) fellowship awards.

§ 46.105 Authority.

EPA is authorized to award fellowships under the statutes listed in this section. EPA is not required to award fellowships under all of the listed authorities, but does so at its discretion.

(a) Section 103(b)(5) of the Clean Air Act, as amended (42 U.S.C. 7403(b)(5));

(b) Section 104(b)(5) and (g)(3)(B) of the Clean Water Act, as amended (33 U.S.C. 1254(b)(5) and (g)(3)(B));

(c) Section 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j–1);

(d) Section 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6981);

(e) Section 10 of the Toxic Substances Control Act, as amended (15 U.S.C. 2609);

(f) Section 20 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136r); and

(g) Sections 104(k)(6) and 311 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9604(k)(6) and 42 U.S.C. 9660).

§ 46.110 Objectives.

EPA awards fellowships to help individuals participate in academic and professional educational opportunities in fields related to pollution control and environmental protection. Fellowships provide support for undergraduate and graduate students, including staff of state, local or Tribal agencies responsible for environmental pollution control and environmental protection.

§ 46.115 Types of fellowships.

In general, EPA may award you one of two kinds of fellowships.

(a) The first are fellowships to students who are selected on the basis of EPA requests for applications and program announcements. These fellowships may assist you with the costs of academic and professional career studies in pollution control and environmental protection in fields such as science, engineering, technology, social science, and specialty areas supporting environmental protection efforts.

(b) The second are fellowships awarded to current or prospective employees of state, local and Tribal environmental pollution control or regulatory agencies who are nominated to receive fellowships by their agency. These fellowships may assist you with the costs of academic and professional career studies in pollution control and environmental protection in fields such as science, engineering, technology, social science, and specialty areas supporting environmental protection efforts.

§ 46.120 Definition.

Fellow: You are a fellow if you receive an EPA fellowship award.

§ 46.125 Exceptions.

The Director, Grants Administration Division, may approve exceptions from this part on a case-by-case or class basis.

§46.130 Debarment and suspension.

EPA will not award you a fellowship if you are debarred, suspended or otherwise excluded from participation in federal programs. Names of individuals who are excluded are included on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained and distributed by the General Services Administration.

Subpart B—Applying for Fellowships

§46.135 Eligibility.

If you wish to apply for an EPA fellowship, you must be:

(a) A citizen of the United States, its territories, or possessions, or lawfully admitted to the United States for permanent residence;

(b) Accepted by or an applicant to an accredited educational institution for academic credit in an educational program directly related to pollution control or environmental protection; and

(c) If you are applying for a fellowship offered specifically to employees or prospective employees of state, local and Tribal organizations, you must be nominated by the head of the state, local or Tribal agency, or designee, based on the need for academic and professional career study to enhance your skills related to the needs of the organization.

§46.140 Benefits.

EPA fellowships may include funds to help you pay such things as:

(a) A part, or all, of your tuition and fees, as determined appropriate by EPA.

(b) An expense allowance for books, supplies, and equipment (equipment is an item with a unit acquisition cost of more than $5,000) as determined appropriate by EPA. You may use this allowance for expenses that are necessary for your education, such as the cost of health insurance, supplies, and travel to conduct research and attend technical meetings relating to the fellowship. You may acquire equipment only with EPA's written approval and there will be very few instances where the purchase of equipment is authorized (see §46.225.)

(c) A stipend determined by the EPA program office based on EPA's resources and your course load.

§46.145 International travel and work.

(a) You may use fellowship funds for travel to or work in a foreign country only if the travel or work is approved by the EPA Office of International Activities (OIA). You will be notified of OIA approval in the fellowship award or in a letter from the EPA project officer or the award official.

(b) If you travel to or from a foreign country and the travel cost is paid under the fellowship agreement, you must comply with the Fly America Act. In accordance with that Act, you must travel on U.S. air carriers certificated under 49 U.S.C. 1371, to the extent that such carriers provide service, even if the foreign air carrier costs less than the American air carrier.

§46.150 Request for applications.

EPA generally requests fellowship applications through electronic and printed announcements or other means designed to inform potential applicants.

§46.155 Submission of applications.

The request for applications or program announcement will advise you how to file an application and what information you must include. You must submit applications for fellowships on EPA's "Fellowship Application" (EPA Form 5770–2) or in any other form EPA designates. EPA will provide instructions for completing the application. You must submit the original and two copies of the application unless the instructions require otherwise. Alternatively, EPA may allow you to submit applications electronically. It is also likely that EPA will require you to submit undergraduate and graduate transcripts to the office identified in the request for applications or program announcement.

§46.160 Evaluation of applications.

EPA will evaluate your application based on criteria identified in the request for applications or program announcement. Evaluation criteria may include:

(a) The relevance of your proposed studies to EPA's mission.

(b) Your potential for success, as reflected by your academic record, letters of reference, and any other available information.

(c) The availability of EPA funds.

§ 46.165 Notification.

If EPA does not select you to receive a fellowship, we generally will notify you within 60 days after final selections are made. If you are a successful applicant, EPA will send you a fellowship agreement in accordance with § 46.170.

Subpart C—Award

§ 46.170 Fellowship agreement.

(a) The "Fellowship Agreement" (EPA Form 5770–8) is the written agreement, including amendments, between EPA and you. The fellowship agreement will state the amount of Federal funds awarded and the terms and conditions governing the fellowship.

(b) The EPA award official may approve any pre-award costs you incurred, if determined appropriate by the award official. You incur pre-award costs at your own risk (see also § 46.195).

§ 46.175 Terms and conditions.

(a) If EPA awards you a fellowship on the basis of a nomination by your current or prospective state, local or Tribal government employer, by accepting the fellowship agreement you agree to remain in the employment of the state, local, or Tribal employer for twice the period of the fellowship. If you fail to meet this obligation, EPA may, after consultation with your employer or prospective employer, require you to repay the amount of the fellowship.

(b) You must submit a copy of your transcript to the EPA project officer after the completion of each year of the fellowship, if required by the fellowship agreement. You must also submit copies of any publications and other products from the research, if required.

(c) EPA may require you to provide various performance reports under your fellowship, but we will not require reports more frequently than quarterly. At the end of the fellowship, you must submit a final report and other documentation, if required in the fellowship agreement.

§ 46.180 Acceptance of fellowship award.

You must accept your fellowship by signing and returning the EPA award form (EPA Form 5770–8) to the EPA award official within three weeks after receipt, or within an extension of time approved by the award official. If you do not sign and return the Fellowship agreement to the award official or request an extension of the acceptance time within three calendar weeks after receiving the agreement, the award official may void the agreement. EPA will not pay for costs incurred under voided agreements.

Subpart D—During the Fellowship

§ 46.185 Activation notice.

(a) Each fellowship includes a "Fellowship Activation Notice" (EPA Form 5770–7). You must complete, sign, and obtain other appropriate signatures on the Activation Notice when the program supported by the fellowship agreement begins. In certain instances, *e.g.*, if your program of study is at an EPA facility, the EPA project officer may sign as sponsor on the Activation Notice. You must submit the Activation Notice to the award official.

(b) If you do not submit the Activation Notice (EPA Form 5770–7) within 90 days after the date of the award, the award official may initiate action to terminate the fellowship agreement in accordance with § 46.210.

§ 46.190 Fellowship agreement amendments.

(a) If you need to make any of the changes listed in paragraphs (a)(1) thorough (3) of this section, you must notify the project officer and receive a formal amendment (EPA Form 5770–8) approving the changes. You must sign and return one copy of each amendment to the award official. If you make the change before you receive the amendment, you do so at your own risk. Changes that require formal amendments are:

(1) A change in the amount of the fellowship;

(2) A change in the academic institution you attend; or

(3) A change in the duration of your fellowship.

(b) You must obtain the EPA project officer's written approval of changes in the field of study or approved research project.

(c) You do not need EPA approval of minor changes that are consistent with the objective of the fellowship agreement. Minor changes do not, however, obligate EPA to provide additional funds for any costs you incur in excess of the fellowship agreement amount.

§46.195 Project period.

Based on the "Date Fellow Will Enter on Duty" which you enter on the Activation Notice (see §46.185(a)), EPA will establish the project period for the fellowship. If you incur costs before the date of the fellowship award, the date on the Activation Notice must reflect that fact (see also §46.170(b)).

§46.200 Payment.

EPA will not make payments under a fellowship agreement until the award official receives the signed "Fellowship Activation Notice" (EPA Form 5770–7) as required by §46.185. Unless the fellowship provides another payment process, EPA makes payments as follows:

(a) EPA pays tuition and fees directly to the educational institution.

(b) EPA pays any stipend directly to you on a monthly or other basis approved by the project officer and included in the fellowship agreement.

(c) EPA pays any book or other expense allowance to you or to the educational institution, as specified in the fellowship agreement. If EPA pays your expense allowance to the educational institution, the institution may deduct not more than two percent of the expense allowance as a handling fee.

§46.205 Intangible property.

In general, if you develop intangible property under a fellowship agreement (*e.g.,* copyrighted software), EPA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so. EPA's requirements for dealing with such intangible property are found at 40 CFR 30.36 of EPA's Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.

§46.210 Termination.

(a) EPA may terminate your fellowship agreement in whole or in part in accordance with the following:

(1) If you fail to submit the "Fellowship Activation Notice" as required by §46.185.

(2) If you fail to comply with the terms and conditions of the fellowship agreement.

(b) You may voluntarily terminate your fellowship by sending the award official written notification setting forth the reasons for termination and the effective date. In that case, the EPA project officer may discuss the terms of the termination with you, and EPA may send you a letter or other document which states any termination conditions.

(c) Costs resulting from obligations you incur after termination of an award are not allowable unless EPA expressly authorizes them in the notice of termination or subsequently approves them. Costs after termination which are necessary and not reasonably avoidable are allowable if:

(1) The cost results from obligations which you properly incurred before the effective date of termination, were not in anticipation of the termination, and are noncancellable; and

(2) The cost would be allowable if the award expired normally.

§46.215 Enforcement.

(a) You must use fellowship funds for the purposes stated in the fellowship agreement. If you fail to comply with the terms and conditions of an award, EPA may take one or more of the following actions, as appropriate:

(1) Temporarily withhold or suspend payments pending your correction of the deficiency or pending other enforcement by EPA;

(2) Disallow all or part of the cost of the activity or action not in compliance;

(3) Wholly or partly terminate the fellowship agreement in accordance with § 46.210(a);

(4) Withhold the award of additional funds under the fellowship; or

(5) Take other remedies that may be legally available.

(b) In taking an enforcement action, EPA will provide you an opportunity for hearing, appeal, or other administrative proceeding to which you are entitled under any statute or regulation applicable to the action involved, including § 46.220.

(c) The enforcement remedies identified in this section, including withholding of payment and termination, do not preclude debarment and suspension action under Executive Orders 12549 and 12689 and EPA's implementing regulations (40 CFR part 32).

§ 46.220 Disputes.

(a) If you and the EPA award official or project officer have a disagreement, you should make reasonable efforts to resolve it at that level.

(b) If you cannot reach agreement, an EPA disputes decision official will provide a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning assistance agreements. The dispute procedures outlined at 40 CFR part 31, subpart F, will apply.

Subpart E—After the Fellowship

§ 46.225 Equipment.

(a) If EPA authorizes you to purchase equipment (see § 46.140(b)) and the equipment retains a fair market value of more than $5,000, you must request disposition instructions from the EPA project officer when you no longer need it for the work under the fellowship.

(b) If you purchase an item with an acquisition cost of $5,000 or less, the item belongs to you.

§ 46.230 Closeout procedures.

(a) You must submit the "EPA Fellowship Completion of Studies Notice" (EPA Form 5770–9) signed by your sponsor or department head of the educational institution when the project period ends. In certain instances, *e.g.*, your program of study is at an EPA facility, the EPA project officer may sign as sponsor on the Completion of Studies Notice. You may request an extension to submit the form if you need it.

(b) You must retain all records related to your fellowship agreement for three years after the completion date you insert on the "Completion of Studies Notice" (EPA Form 5770–9).

(c) EPA, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, has the right of timely and unrestricted access to your documents, papers, or other records related to your fellowship, in order to make audits, examinations, excerpts, transcripts and copies of such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

PART 47—NATIONAL ENVIRONMENTAL EDUCATION ACT GRANTS

Sec.

47.100 Purpose and scope.
47.105 Definitions.
47.110 Eligible applicants.
47.115 Award amount and matching requirements.
47.120 Solicitation notice and proposal procedures.
47.125 Eligible and priority projects and activities.
47.130 Performance of grant.
47.135 Disputes.

AUTHORITY: 20 U.S.C. 5505.

SOURCE: 57 FR 8390, Mar. 9, 1992, unless otherwise noted.

§ 47.100 Purpose and scope.

This regulation codifies policy and procedures for the award of grants or cooperative agreements under section 6 of the NEEA. Specifically, this regulation defines eligible applicants, eligible activities, EPA priorities for selecting recipients, funding limits, and matching requirements. Projects funded under this regulation are also subject to the Code of Federal Regulations (40 CFR) part 31 for State and local recipients, and part 30 for other than State

and local recipients. Those regulations contain Federal audit and other general administrative requirements. This regulation does not apply to the programs implemented under sections 5 and 7 of the NEEA.

§47.105 Definitions.

(a) *Environmental education* and *environmental education and training* mean educational activities and training activities involving elementary, secondary, and postsecondary students, as such terms are defined in the State in which they reside, and environmental education personnel, but does not include technical training activities directed toward environmental management professionals or activities primarily directed toward the support of noneducational research and development;

(b) *Federal agency* or *agency of the United States* means any department, agency or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation;

(c) *Local education agency* means any education agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381) and shall include any tribal education agency, as defined in §47.105(f);

(d) *Not-for-profit* organization means an organization, association, or institution described in section 501(c)(3) of the Internal Revenue Code of 1986, which is exempt from taxation pursuant to the provisions of section 501(a) of such Code;

(e) *Noncommercial education broadcasting entities* means any noncommercial educational broadcasting station (and/or its legal nonprofit affiliates) as defined and licensed by the Federal Communications Commission;

(f) *Tribal education agency* means a school or community college which is controlled by an Indian tribe, band, or nation, including any Alaska Native village, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians and which is not administered by the Bureau of Indian Affairs;

(g) Refer to 40 CFR parts 30 and 31 for definitions for budget period, project period, continuation award, cooperative agreement, grant agreement, and other Federal assistance terms.

§47.110 Eligible applicants.

Any local education agency (including any tribal education agency), college or university, State education agency or environmental agency, not-for-profit organization, or noncommercial educational broadcasting entity may submit an application to the Administrator in response to the solicitations described in §47.120.

§47.115 Award amount and matching requirements.

(a) Individual awards shall not exceed $250,000, and 25 percent of all funds obligated under this section in a fiscal year shall be for individual awards of not more than $5,000.

(b) The Federal share shall not exceed 75 percent of the total project costs. The non-Federal share of project costs may be provided by in-kind contributions and other noncash support. In cases where the EPA determines that a proposed project merits support and cannot be undertaken without a higher rate of Federal support, the EPA may approve awards with a matching requirement other than that specified in this paragraph, including full Federal funding.

§47.120 Solicitation notice and proposal procedures.

Each fiscal year the Administrator shall publish a solicitation for environmental education grant proposals. The solicitation notice shall prescribe the information to be included in the proposal and other information sufficient to permit EPA to assess the project.

§47.125 Eligible and priority projects and activities.

(a) Activities eligible for funding shall include, but not be limited to, environmental education and training programs for:

(1) Design, demonstration, or dissemination of environmental curricula, including development of educational tools and materials;

(2) Design and demonstration of field methods, practices, and techniques, including assessment of environmental and ecological conditions and analysis of environmental pollution problems;

(3) Projects to understand and assess a specific environmental issue or a specific environmental problem;

(4) Provision of training or related education for teachers, faculty, or related personnel in a specific geographic area or region; and

(5) Design and demonstration of projects to foster international cooperation in addressing environmental issues and problems involving the United States and Canada or Mexico.

(b) EPA shall give priority to those proposals which will develop:

(1) A new or significantly improved environmental education practice, method, or technique;

(2) An environmental education practice, method, or technique which may have wide application;

(3) An environmental education practice, method, or technique which addresses a skill or scientific field identified as a priority in the report which will be developed within two years of enactment pursuant to section 9(d) of the Act; and

(4) An environmental education practice, method, or technique which addresses an environmental issue which, in the judgment of EPA, is of a high priority.

§ 47.130 Performance of grant.

(a) Each project shall be performed by the recipient, or by a person satisfactory to the recipient and to the EPA. Workplans shall accompany all applications, shall identify who will be performing activities, and shall be approved by EPA prior to funding.

(b) Budget periods normally will not exceed one year. Project periods may be longer, and additional funding may be awarded for continuations.

(c) Procurement procedures, which are found in 40 CFR part 33 for all recipients other than State and local governments. Procurement procedures for State and local governments are described in 40 CFR part 31. These procedures include provisions for small purchase procedures.

§ 47.135 Disputes.

Disputes arising under these grants shall be governed by 40 CFR 30.1200 for recipients other than State and local governments and 40 CFR 31.70 for State and local governments.

PART 49—TRIBAL CLEAN AIR ACT AUTHORITY

Subpart A—Tribal Authority

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49.1 Program overview.
49.2 Definitions.
49.3 General Tribal Clean Air Act authority.
49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.
49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.
49.6 Tribal eligibility requirements.
49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.
49.8 Provisions for tribal criminal enforcement authority.
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49.11 Actions under section 301(d)(4) authority.
49.12–49.21 [Reserved]
49.22 Federal implementation plan for Tricities landfill, Salt River Pima-Maricopa Indian Community.
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Subpart B—General Provisions

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Subpart D—Implementation Plans for Tribes—Region I

49.201–49.470 [Reserved]

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49.471–49.680 [Reserved]

Subpart F—Implementation Plans for Tribes—Region III

49.681–49.710 [Reserved]

Subpart G—Implementation Plans for Tribes—Region IV

49.711–49.920 [Reserved]

Subpart H—Implementation Plans for Tribes—Region V

49.921–49.1970 [Reserved]

Subpart I—Implementation Plans for Tribes—Region VI

49.1971–49.3920 [Reserved]

Subpart J—Implementation Plans for Tribes—Region VII

49.3921–49.4160 [Reserved]

Subpart K—Implementation Plans for Tribes—Region VIII

49.4161–49.5510 [Reserved]

Subpart L—Implementation Plans for Tribes—Region IX

49.5511–49.9860 [Reserved]

Subpart M—Implementation Plans for Tribes—Region X

49.9861–49.10700 [Reserved]

IMPLEMENTATION PLAN FOR THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION

49.10701 Identification of plan.
49.10702 Approval status.
49.10703 Legal authority. [Reserved]
49.10704 Source surveillance. [Reserved]
49.10705 Classification of regions for episode plans.
49.10706 Contents of implementation plan.
49.10707 EPA-approved tribal rules and plans. [Reserved]
49.10708 Permits to construct.
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49.10710 Federally-promulgated regulations and federal implementation plans.
49.10711 Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.
49.10712–49.17810 [Reserved]

APPENDIX TO SUBPART M—ALPHABETICAL LISTING OF TRIBES AND CORRESPONDING SECTIONS

AUTHORITY: 42 U.S.C. 7401, *et seq.*

SOURCE: 63 FR 7271, Feb. 12, 1998, unless otherwise noted.

Subpart A—Tribal Authority

§49.1 Program overview.

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as States. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as States under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

§49.2 Definitions.

(a) *Clean Air Act* or *Act* means those statutory provisions in the United States Code at 42 U.S.C. 7401, *et seq.*

(b) *Federal Indian Reservation, Indian Reservation* or *Reservation* means 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.

(c) *Indian tribe* or *tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) *Indian Tribe Consortium* or *Tribal Consortium* means a group of two or more Indian tribes.

(e) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§49.3 General Tribal Clean Air Act authority.

Tribes meeting the eligibility criteria of §49.6 shall be treated in the same manner as States with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in §49.4 and

the regulations that implement those provisions.

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Tribes will not be treated as States with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) and (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for Federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The "2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the Federal district courts against States in their capacity as States.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be "judicial" and "in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be "judicial" and "in State court."

(q) The provision of section 105(a)(1) that limits the maximum Federal share for grants to pollution control agencies to three-fifths of the cost of

implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

§49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as States.

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as States. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as States with respect to such provisions.

§49.6 Tribal eligibility requirements.

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian tribe in the same manner as a State for the Clean Air Act provisions identified in §49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

§49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of §49.6 for Clean Air Act program approval. The application shall concisely describe how the Indian tribe will meet each of the requirements of §49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable

provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in demonstrating under paragraph (a)(4) of this section that the tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with § 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of § 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

§ 49.8 Provisions for tribal criminal enforcement authority.

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the Federal Government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate Federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in § 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

§ 49.9 EPA review of tribal Clean Air Act applications.

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under § 49.7 in a timely

manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-reservation areas, appropriate governmental entities may request a single 30-day extension to the general 30-day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of §49.6 for purposes of a Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a State with respect to that provision, to the extent that the provision is identified in §49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in §49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar State submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

§49.10 EPA review of State Clean Air Act programs.

A State Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

§49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, appendix V, or does

not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum Federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum Federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

§§ 49.12–49.21 [Reserved]

§ 49.22 Federal implementation plan for Tri-Cities landfill, Salt River Pima-Maricopa Indian Community.

(a) *Applicability*. This section applies to the owner or operator of the project located on the Reservation of the Salt River Pima Maricopa Indian Community (SRPMIC) in Arizona, including any new owner or operator in the event of a change in ownership of the project.

(b) *Definitions.* The following definitions apply to this section. Except as specifically defined herein, terms used in this section retain the meaning accorded them under the Clean Air Act.

Actual emissions means the actual rate of emissions of a pollutant from an emissions unit as determined in paragraphs (1)–(3) of this definition:

(1) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. EPA shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(2) EPA may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(3) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (*i.e.,* which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0065 and 003–005–00176–0, respectively).

Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has: (1) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(2) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual

construction of the source to be completed within a reasonable time.

Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

EPA means United States Environmental Protection Agency, Region 9.

Fugitive emissions means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

Lowest achievable emission rate means the more stringent rate of emissions based on the following:

(1) The most stringent emissions limitation which is contained in any State, Tribal, or federal implementation plan for such class or category of stationary source, unless the owner or operator of the project demonstrates that such limitations are not achievable; or

(2) The most stringent emissions limitation which is achieved in practice by such class or category of stationary sources. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within a stationary source. In no event shall the application of the term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

Major stationary source means a stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this project whether it is a major stationary source.

Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

Project means the construction of electricity-generating engines owned and operated by the Salt River Project at the Tri-Cities landfill, which are fueled by collected landfill gas.

Secondary emissions means emissions which would occur as a result of the construction or operation of a major stationary source, but do not come from the major stationary source itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction of operation of the major stationary source. Secondary emissions do not include any emissions which come directly from a mobile source such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

Stationary source means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Clean Air Act.

(c) *Requirement to submit an application.* The owner or operator of the project shall submit an application for a permit to construct to EPA which contains all information necessary to perform any analysis or make any determination as required by this Federal Implementation Plan.

(d) *Source obligations.* (1) The owner or operator of the project shall not begin actual construction on the project without obtaining a nonattainment New Source Review permit regulating emissions of air pollutants. The EPA Region 9 Regional Administrator has the authority to issue such a permit. Any permit issued by EPA shall ensure that the project meets the following requirements:

(i) By the time the project is to commence operation, the owner or operator

of the project must have obtained sufficient reductions in actual emissions from existing facilities within the same nonattainment area which satisfy the requirements of section 173 of the Clean Air Act, to offset the potential to emit of the project;

(ii) The owner or operator of the project must comply with the lowest achievable emissions rate;

(iii) The owner or operator of the project must demonstrate that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) located on the reservation of the SRPMIC are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the Act; and

(iv) The owner or operator of the project has provided an analysis of alternative sites, sizes, production processes, and environmental control techniques for the proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location or construction.

(2) If the owner or operator constructs or operates the project not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or if the owner or operator subject to this section commences construction after January 24 , 2000 without applying for and receiving approval under this section, then the owner or operator shall be subject to appropriate enforcement action.

(3) Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified.

(4) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the Federal implementation plan and any other requirements under Tribal or Federal law.

(e) *Public participation*. (1) When issuing a permit for the project, the EPA Region 9 Regional Administrator shall follow the procedures for decision making for PSD permits contained in 40 CFR part 124, including the requirements for public notice, consideration of and response to public comment, and the opportunity for public hearing.

(2) Within 30 days after the EPA Region 9 Regional Administrator has issued a final permit decision, any person who filed comments on the draft permit or participated in the public hearing, if one has been held, may petition the Environmental Appeals Board to review any condition of the permit. Review of the permit decision will be governed by the regulations for review of PSD permits contained in 40 CFR part 124.

[64 FR 65663, Nov. 23, 1999]

§§ 49.23–49.50 [Reserved]

Subpart B—General Provisions

§§ 49.51–49.100 [Reserved]

Subpart C—General Federal Implementation Plan Provisions

§§ 49.101–49.200 [Reserved]

Subpart D—Implementation Plans for Tribes—Region I

§§ 49.201–49.470 [Reserved]

Subpart E—Implementation Plans for Tribes—Region II

§§ 49.471–49.680 [Reserved]

Subpart F—Implementation Plans for Tribes—Region III

§§ 49.681–49.710 [Reserved]

Subpart G—Implementation Plans for Tribes—Region IV

§§ 49.711–49.920 [Reserved]

Subpart H—Implementation Plans for Tribes—Region V

§§ 49.921–49.1970 [Reserved]

Subpart I—Implementation Plans for Tribes—Region VI

§§ 49.1971–49.3920 [Reserved]

Subpart J—Implementation Plans for Tribes—Region VII

§§ 49.3921–49.4160 [Reserved]

Subpart K—Implementation Plans for Tribes—Region VIII

§§ 49.4161–49.5510 [Reserved]

Subpart L—Implementation Plans for Tribes—Region IX

§§ 49.5511–49.9860 [Reserved]

Subpart M—Implementation Plans for Tribes—Region X

SOURCE: 65 FR 51433, Aug. 23, 2000, unless otherwise noted.

§§ 49.9861–49.10700 [Reserved]

IMPLEMENTATION PLAN FOR THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION

§ 49.10701 Identification of plan.

Sections 49.10701 through 49.10730 contain the implementation plan for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation. This plan consists of a combination of Tribal rules and measures and federal regulations and measures which apply for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation.

§ 49.10702 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation.

§ 49.10703 Legal authority. [Reserved]

§ 49.10704 Source surveillance. [Reserved]

§ 49.10705 Classification of regions for episode plans.

The air quality control region which encompasses the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM–10)	I
Sulfur dioxide	II

§ 49.10706 Contents of implementation plan.

The implementation plan for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation consists of the following rules, regulations, and measures:

(a) Section 49.10711. Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.

(b) 40 CFR 52.21. Prevention of Significant Deterioration Permits

§ 49.10707 EPA-approved tribal rules and plans. [Reserved]

§ 49.10708 Permits to construct.

Permits to construct are required for new major stationary sources and major modifications to existing major stationary sources pursuant to 40 CFR 52.21.

§ 49.10709 Permits to operate. [Reserved]

§ 49.10710 Federally-promulgated regulations and federal implementation plans.

The following regulations are incorporated and made part of the implementation plan for the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation:

(a) Section 49.10711. Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.

(b) 40 CFR 52.21. Prevention of Significant Deterioration Permits.

§ 49.10711 Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.

(a) *Applicability*. This section applies to the owner(s) or operator(s) of the Astaris-Idaho LLC's elemental phosphorus facility located on the Fort Hall Indian Reservation in Idaho, including any new owner(s) or operator(s) in the event of a change in ownership or operation of the Astaris-Idaho facility.

(b) *Definitions.* The terms used in this section retain the meaning accorded them under the Clean Air Act, except as follows:

Astaris-Idaho or Astaris-Idaho facility means all of the pollutant-emitting activities that comprise the elemental phosphorus plant owned by or under the common control of Astaris-Idaho LLC in Township 6 south, Range 33 east, Sections 12, 13, and 14, and that lie within the exterior boundaries of the Fort Hall Indian Reservation, in Idaho, including, without limitation, all buildings, structures, facilities, installations, material handling areas, storage piles, roads, staging areas, parking lots, mechanical processes and related areas, and other processes and related areas. For purposes of this section, the term "Astaris-Idaho" or "Astaris-Idaho facility" shall not include pollutant emitting activities located on lands outside the exterior boundaries of the Fort Hall Indian Reservation.

Bag leak detection guidance means Office of Air Quality Planning and Standards (OAQPS): Fabric Filter Bag Leak Detection Guidance, EPA 454/R–98–015 (Sept. 1997).

Begin actual construction means, in general, initiation of physical on-site construction activities on a source which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in the method of operating, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

Certified observer means a visual emissions observer who has been properly certified using the initial certification and periodic semi-annual recertification procedures of 40 CFR part 60, appendix A, Method 9.

Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of a source) which would result in a change in actual emissions.

Emergency means any situation arising from sudden and reasonably unforeseeable events beyond the control of the owner or operator of the Astaris-Idaho facility, including acts of God, which requires immediate corrective action to restore normal operation. An emergency shall not include events caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

Emission limitation or emission standard means a requirement which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operations or maintenance procedures to assure continuous emission reduction.

EPA means United States Environmental Protection Agency, Region 10.

Excess emissions means emissions of an air pollutant in excess of an emission limitation.

Excursion means a departure from a parameter range approved under paragraphs (e)(3) or (g)(1) of this section, consistent with any averaging period specified for averaging the results of monitoring.

Fugitive emissions means those emissions that do not actually pass through a stack, chimney, vent, or other functionally equivalent opening.

Malfunction means any sudden and unavoidable breakdown of process or control equipment. A sudden breakdown which could have been avoided by better operation and maintenance is not a malfunction.

Method 5 is the reference test method described in 40 CFR part 60, appendix A, conducted in accordance with the requirements of this section.

Method 9 is the reference test method described in 40 CFR part 60, appendix A.

Methods 201, 201A, and *202* are the reference test methods described in 40 CFR part 51, appendix M, conducted in accordance with the requirements of this section.

Mini-flush means the process of flushing elemental phosphorus, which has solidified in the secondary condenser, to the elevated secondary condenser flare or to the ground flare, and thus into the atmosphere.

Modification means any physical change in or a change in the method of operation of, an existing source which increases the amount of particulate matter emitted by that source. The following shall not, by themselves, be considered modifications:

(1) Maintenance, repair, and replacement which the Regional Administrator determines to be routine for the particular source;

(2) An increase in production rate of an existing source, if that increase can be accomplished without a physical change to the source or the Astaris-Idaho facility;

(3) An increase in the hours of operation of an existing source, if that increase can be accomplished without a physical change to the source or the Astaris-Idaho facility;

(4) Use of an alternative fuel or raw material, if the existing source is capable of accommodating that alternative without a physical change to the source or the Astaris-Idaho facility; or

(5) The addition, replacement, or use of any system or device whose primary function is the reduction of an air pollutant, except when an emissions control system is removed or replaced by a system which the Regional Administrator determines to be less environmentally beneficial.

Monitoring malfunction means any sudden, infrequent, not reasonably preventable failure of the monitoring to provide valid data. Monitoring failures that are caused in part by poor maintenance or careless operation are not monitoring malfunctions.

O&M plan means an operation and maintenance plan developed by Astaris-Idaho and submitted to EPA in accordance with paragraph (e)(8) of this section.

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

Opacity action level means the level of opacity of emissions from a source requiring the owner or operator of the Astaris-Idaho facility to take prompt corrective action to minimize emissions, including without limitation those actions described in the approved operations and maintenance plan.

Owner or *operator* means any person who owns, leases, operates, controls, or supervises the Astaris-Idaho facility or any portion thereof.

Particulate matter means any airborne finely-divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers.

PM–10 or *PM–10 emissions* means finely divided solid or liquid material, with

an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method such as Method 201, 201A, or 202, of 40 CFR Part 51, appendix M, or an equivalent or alternative method specifically approved by the Regional Administrator.

Regional Administrator means the Regional Administrator, EPA Region 10, or a duly designated representative of the Regional Administrator.

Road means access and haul roads, driveways or established vehicle paths, permanent or temporary, which are graded, constructed, used, reconstructed, improved, or maintained for use in vehicle movement throughout the Astaris-Idaho facility.

Shutdown means the cessation of operation of a source for any purpose.

Slag Pit Area means the area of the Astaris-Idaho facility immediately bordering the south side of the furnace building extending out 100 yards.

Source means any building, structure, facility, installation, material handling area, storage pile, road, staging area, parking lot, mechanical process or related area, or other process or related area which emits or may emit particulate matter.

Startup means the setting in operation of a source for any purpose.

Title V permit means an operating permit issued under 40 CFR part 70 or 71.

Tribes means the Shoshone-Bannock Tribes.

Visible emissions means the emission of pollutants into the atmosphere, excluding uncombined condensed water vapor (steam), that is observable by the naked eye.

Visual observation means the continuous observation of a source for the presence of visible emissions for a period of ten consecutive minutes conducted in accordance with section 5 of EPA Method 22, 40 CFR part 60, appendix A, by a person who meets the training guidelines described in section 1 of Method 22.

(c) *Emission limitations and work practice requirements.* (1)(i) Except as otherwise provided in paragraphs (c)(1)(ii), (c)(1)(iii), and (c)(2) of this section, there shall be no visible emissions from any location at the Astaris-Idaho facility at any time, as determined by a visual observation.

(ii) Emissions from the following equipment, activities, processes, or sources shall not exceed 20% opacity over a six minute average. Method 9, of 40 CFR part 60, appendix A, is the reference test method for this requirement.

(A) Brazing, welding, and welding equipment and oxygen-hydrogen cutting torches;

(B) Plant upkeep, including routine housekeeping, preparation for and painting of structures;

(C) Grinding, sandblasting, and cleaning operations that are not part of a routine operation or a process at the Astaris-Idaho facility;

(D) Cleaning and sweeping of streets and paved surfaces;

(E) Lawn and landscaping activities;

(F) Repair and maintenance activities;

(G) Landfill operations;

(H) Laboratory vent stacks; and

(I) Pond piping discharges.

(iii) Except as otherwise provided in paragraph (c)(1)(ii) of this section, emissions from equipment, activities, processes, or sources not identified in Table 1 to this section shall not exceed 10% opacity over a six minute average provided that Astaris-Idaho has complied with the requirements of paragraph (c)(11) of this section and provided further that a more stringent opacity limit has not been established for the source in this section. Method 9, 40 CFR Part 60, appendix A, is the reference test method for this requirement.

(2) For each source identified in Column II of Table 1 to this section, the owner or operator of the Astaris-Idaho facility shall comply with the emission limitations and work practice requirements for that source established in Column III of Table 1 to this section.

(3) The opacity limits for the following fugitive emission sources, which are also identified in Column II of Table 1 to this section, apply to adding of material to, taking of material from, reforming, or otherwise disturbing the pile: main shale pile (Table 1 of this section, source 2), emergency/contingency raw ore shale pile (Table 1 of this section, source 3), stacker and

reclaimer (Table 1 of this section, source 4), recycle material pile (Table 1 of this section, source 8b), nodule pile (Table 1 of this section, source 11), and screened shale fines pile (Table 1 of this section, source 14).

(4)(i) Except as provided in paragraph (c)(4)(ii) of this section, beginning November 1, 2000, the following activities shall be prohibited:

(A) The discharge of molten slag from furnaces or slag runners onto the ground, pit floors (whether dressed with crushed slag or not), or other nonmobile permanent surface.

(B) The digging of solid slag in the slag pit area or the loading of slag into transport trucks in the slag pit area.

(ii) The prohibition set forth in paragraph (c)(4)(i) of this section shall not apply to the lining of slag pots and the handling (including but not limited to loading, crushing, or digging) of cold slag for purposes of the lining of slag pots.

(5)(i) Beginning January 1, 2001, no furnace gas shall be burned in the existing elevated secondary condenser flare or the existing ground flare (Table 1 of this section, source 26a).

(ii) Until December 31, 2000, the owner or operator of the Astaris-Idaho facility shall take the following measures to reduce PM–10 emissions from mini-flushes and to ensure there is no bias toward conducting mini-flushes during night-time hours.

(A) Mini-flushes shall be limited to no more than 50 minutes per day (based on a monthly average) beginning January 1, 1999. Failure to meet this limit for any given calendar month will be construed as a separate violation for each day during that month that mini-flushes lasted more than 50 minutes. The monthly average for any calendar month shall be calculated by summing the duration (in actual minutes) of each mini-flush during that month and dividing by the number of days in that month.

(B)(*1*) No mini-flush shall be conducted at any time unless one of the following operating parameters is satisfied:

(*i*) The flow rate of recirculated phossy water is equal to or less than 1800 gallons per minute; or

(*ii*) The secondary condenser outlet temperature is equal to or greater than 36 degrees Centigrade.

(*2*) The prohibition set forth in paragraph (c)(5)(ii)(B)(*1*) of this section shall not apply during periods of malfunction or emergency, provided the owner or operator of the Astaris-Idaho facility complies with the requirements of paragraph (c)(9) of this section.

(6) At all times, including periods of startup, shutdown, malfunction, or emergency, the owner or operator of the Astaris-Idaho facility shall, to the extent practicable, maintain and operate each source of PM–10 at the Astaris-Idaho facility, including without limitation those sources identified in Column II of Table 1 to this section and associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(7) Maintaining operation of a source within approved parameter ranges, promptly taking corrective action, and otherwise following the work practice, monitoring, record keeping, and reporting requirements of this section do not relieve the owner or operator of the Astaris-Idaho facility from the obligation to comply with applicable emission limitations and work practice requirements at all times.

(8) An affirmative defense to a penalty action brought for emissions in excess of an emission limitation shall be available if the excess emissions were due to startup or shutdown and all of the following conditions are met:

(i) The owner or operator of the Astaris-Idaho facility notifies EPA and the Tribes in writing of any startup or shutdown that is expected to cause excess emissions. The notification shall be given as soon as possible, but no later than 48 hours prior to the start of the startup or shutdown, unless the owner or operator demonstrates to

EPA's satisfaction that a shorter advanced notice was necessary. The notice shall identify the expected date, time, and duration of the excess emissions event, the source involved in the excess emissions event, and the type of excess emissions event.

(ii) The periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design.

(iii) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

(iv) If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.

(v) At all times, the facility was operated in a manner consistent with good practice for minimizing emissions.

(vi) The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable.

(vii) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality.

(viii) All emission monitoring systems were kept in operation if at all possible.

(ix) The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence.

(x) The owner or operator of the Astaris-Idaho facility submitted notice of the startup or shutdown to EPA and the Tribes within 48 hours of the time when emission limitations were exceeded due to startup or shutdown. This notice fulfills the requirement of paragraph (g)(5) of this section. This notice must contain a description of the startup or shutdown, any steps taken to mitigate emissions, and corrective actions taken.

(xi) No exceedance of the 24-hour PM–10 National Ambient Air Quality Standard, 40 CFR 50.6(a) was recorded on any monitor located within the Fort Hall PM–10 nonattainment area that regularly reports information to the Aerometric Information Retrieval System-Air Quality Subsystem, as defined under 40 CFR 58.1(p), on any day for which the defense of startup or shutdown is asserted.

(xii) In any enforcement proceeding, the owner or operator of the Astaris-Idaho facility has the burden of proof on all requirements of this paragraph (c)(8).

(9) An affirmative defense to a penalty action brought for emissions in excess of an emission limitation shall be available if the excess emissions were due to an emergency or malfunction and all of the following conditions are met:

(i) The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator of the Astaris-Idaho facility.

(ii) The excess emissions;

(A) Did not stem from any activity or event that could have been foreseen and avoided or planned for; and

(B) Could not have been avoided by better operation and maintenance practices.

(iii) To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions.

(iv) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable.

(v) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions.

(vi) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality.

(vii) All emission monitoring systems were kept in operation if at all possible.

(viii) The owner or operator's actions in response to the excess emissions were documented by properly signed,

contemporaneous operating logs, or other relevant evidence.

(ix) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

(x) The owner or operator of the Astaris-Idaho facility submitted notice of the emergency or malfunction to EPA and the Tribes within 48 hours of the time when emission limitations were exceeded due to the emergency or malfunction. This notice fulfills the requirement of paragraph (g)(5) of this section. This notice must contain a description of the emergency or malfunction, any steps taken to mitigate emissions, and corrective actions taken.

(xi) No exceedance of the 24-hour PM–10 National Ambient Air Quality Standard, 40 CFR 50.6(a), was recorded on any monitor located within the Fort Hall PM–10 nonattainment area that regularly reports information to the Aerometric Information Retrieval System-Air Quality Subsystem, as defined under 40 CFR 58.1(p), on any day for which the defense of emergency or malfunction is asserted.

(xii) In any enforcement proceeding, the owner or operator of the Astaris-Idaho facility has the burden of proof on all requirements of this paragraph (c)(9).

(10) For each source identified in Column II of Table 2 to this section, the owner or operator of the Astaris-Idaho facility shall take appropriate actions to reduce visible emissions from the source if opacity exceeds the opacity action level for that source identified in Column III of Table 2 of this section. Such actions shall be commenced as soon as possible but not to exceed 24 hours after an exceedance of the opacity action level is first identified and shall be completed as soon as possible. Such actions shall include, but not be limited to, those actions identified in the O&M plan for the source. Exceedance of an opacity action level does not constitute a violation of this section, but failure to take appropriate corrective action as identified in this paragraph (c)(10) does constitute a violation of this section.

(11) The owner or operator of the Astaris-Idaho facility shall notify EPA prior to the construction of a new source of PM–10 at the Astaris-Idaho facility or the modification of an existing source at the Astaris-Idaho facility in a manner that increases emissions of PM–10 as follows:

(i) Such notification shall be submitted to EPA at least 90 days prior to commencement of the construction or modification.

(ii) Such notification shall include the following information:

(A) A description of the source, including location of the process and associated control equipment, and any modification thereto;

(B) An estimate of potential PM–10 emissions from the source on both a 24-hour and annual basis, without consideration of any proposed air pollution control equipment;

(C) The expected daily hours of operation of the source, including any seasonal variation, and an estimate of actual PM–10 emissions from the source on both a 24-hour and annual basis, considering the effect of any proposed air pollution control equipment; and

(D) A description of any PM–10 control technology to be implemented at the source along with an analysis of alternative control technologies considered but rejected.

(iii) Any source identified in this section shall continue to be subject to the requirements of this section notwithstanding the modification of the source.

(iv) The requirements of this paragraph (c)(11) are in addition to any other requirements to obtain a permit under the Clean Air Act.

(v) This paragraph (c)(11) shall cease to apply if either of the following events occur:

(A) EPA promulgates a minor new source review program for PM–10 that applies to the Astaris-Idaho facility; or

(B) The Tribes promulgate a minor new source review program for PM–10 that applies to the Astaris-Idaho facility and EPA approves the Tribes' program under of this part.

(vi) If, after receipt of the notice referred to in this paragraph (c)(11), EPA notifies Astaris-Idaho in writing that a 90 day delay in the commencement of construction or modification is not required, Astaris-Idaho may proceed with the commencement of the construction

or modification as described in the notice, subject to the other requirements of this section.

(d) *Reference test methods.* (1) For each source identified in Column II of Table 1 to this section, the reference test method for the corresponding emission limitation in Column III of Table 1 to this section for that source is identified in Column IV of Table 1 to this section. For each source identified in Column II of Table 2 to this section, the reference test method for the corresponding opacity action level in Column III of Table 2 to this section for that source is identified in Column IV of Table 2 to this section.

(2) When Method 201/201A or Methods 201/201A and 202 of 40 CFR Part 60, appendix A, are specified as the reference test methods, the testing shall be conducted in accordance with the identified test methods and the following additional requirements:

(i) Each test shall consist of three runs, with each run a minimum of one hour.

(ii) Method 202 shall be run concurrently with Method 201 or Method 201A. Unless Method 202 is specifically designated as part of the reference test method, Method 202 shall be performed on each source for informational purposes only and the results from the Method 202 test shall not be included in determining compliance with the mass emission limit for the source.

(iii) The source shall be operated at a capacity of at least 90% of maximum during all tests unless the Regional Administrator determines in writing that other operating conditions are representative of normal operations.

(iv) Only regular operating staff may adjust the processes or emission control device parameters during a performance test or within two hours prior to the tests. Any operating adjustments made during a performance test, which are a result of consultation during the tests with source testing personnel, equipment vendors, or other consultants may render the source test invalid.

(v) For all reference tests, the sampling site and minimum number of sampling points shall be selected according to EPA Method 1 (40 CFR part 60, appendix A).

(vi) EPA Methods 2, 2C, 2D, 3, 3A, and 4 (40 CFR part 60, appendix A) shall be used, as appropriate, for determining mass emission rates.

(vii) The mass emission rate of PM–10 shall be determined as follows:

(A)(*1*) Where Method 201/201A is identified as the reference test method, the mass emission rate of PM–10 shall be determined by taking the results of the Method 201/201A test and then multiplying by the average hourly volumetric flow rate for the run.

(*2*) Where Methods 201/201A and 202 are identified as the reference test methods, the mass emission rate of PM–10 shall be determined by first adding the PM–10 concentrations from Methods 201/201A and 202, and then multiplying by the average hourly volumetric flow rate for the run.

(B) The average of the three required runs shall be compared to the emission standard for purposes of determining compliance.

(viii) Two of the three runs from a source test of each Medusa-Andersen stack on the furnace building (Table 1 of this section, sources 18d, 18e, 18f, and 18g) shall include at least 20 minutes of slag tapping and a third run shall include at least 20 minutes of metal tapping.

(ix) At least one of the three runs from a source test of the excess CO burner (Table 1 of this section, source 26b) shall be conducted during either a mini-flush or hot-flush that lasts for at least 30 minutes.

(3) Method 5 shall be used in place of Method 201 or 201A for the calciner scrubbers (Table 1 of this section, source 9a) and any other sources with entrained water drops. In such case, all the particulate matter measured by Method 5 must be counted as PM–10, and the testing shall be conducted in accordance with paragraph (d)(2) of this section.

(4) Method 5 may be used as an alternative to Method 201 or 201A for a particular point source, provided that all of the particulate measured by Method 5 is counted as PM–10 and the testing is conducted in accordance with paragraph (d)(2) of this section.

(5)(i) An alternative reference test method or a deviation from a reference

test method identified in this section may be approved as follows:

(A) The owner or operator of the Astaris-Idaho facility must submit a written request to the Regional Administrator at least 60 days before the performance test is scheduled to begin which includes the reasons why the alternative or deviation is needed and the rationale and data to demonstrate that the alternative test method or deviation from the reference test method:

(*1*) Provides equal or improved accuracy and precision as compared to the specified reference test method; and

(*2*) Does not decrease the stringency of the standard as compared to the specified reference test method.

(B) If requested by EPA, the demonstration referred to in paragraph (d)(5)(i)(A) of this section must use Method 301 in 40 CFR part 63, appendix A to validate the alternative test method or deviation.

(C) The Regional Administrator must approve the request in writing.

(ii) Until the Regional Administrator has given written approval to use an alternative test method or to deviate from the reference test method, the owner or operator of the Astaris-Idaho facility is required to use the reference test method when conducting a performance test pursuant to paragraph (e)(1) of this section.

(6) For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any requirement of this section, nothing in this section shall preclude the use, including the exclusive use, of any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or reference test or procedure had been performed.

(e) *Monitoring and additional work practice requirements.* (1) The owner or operator of the Astaris-Idaho facility shall conduct a performance test to measure PM–10 emissions as follows:

(i) The owner or operator of the Astaris-Idaho facility shall conduct a performance test to measure PM–10 emissions from each of the following sources on an annual basis using the specified reference test methods: east shale baghouse (Table 1 of this section, source 5a), middle shale baghouse (Table 1 of this section, source 6a), west shale baghouse (Table 1 of this section, source 7a), calciner cooler vents (Table 1 of this section, source 10), north nodule discharge baghouse (Table 1 of this section, source 12a), south nodule discharge baghouse (Table 1 of this section, source 12b), proportioning building-east nodule baghouse (Table 1 of this section, source 15a), proportioning building-west nodule baghouse (Table 1 of this section, source 15b), nodule stockpile baghouse (Table 1 of this section, source 16a), dust silo baghouse (Table 1 of this section, source 17a), furnace building-east baghouse (Table 1 of this section, source 18a), furnace building-west baghouse (Table 1 of this section, source 18b), furnace #1, #2, #3, and #4—Medusa-Andersen scrubbers (Table 1 of this section, sources 18d, 18e, 18f and 18g), coke handling baghouse (Table 1 of this section, source 20a), and phos dock-Andersen scrubber (Table 1 of this section, source 21a).

(A) The first annual test for each source shall be completed within 16 months of August 23, 2000. Subsequent annual tests shall be completed within 12 months of the most recent previous test.

(B) If, after conducting annual source tests for a particular source for two consecutive years, the emissions from that source are less than 80% of the applicable emission limit, then the frequency of source testing for that source may be reduced to every other year. The frequency of source testing shall revert to annually if the emissions from any source test on the source are greater than or equal to 80% of the applicable emission limit.

(ii) The owner or operator of the Astaris-Idaho facility shall conduct a performance test to measure PM–10 emissions from the calciner scrubbers (Table 1 of this section, source 9a) and the excess CO burner (Table 1 of this section, source 26b) on a semi-annual basis using the specified reference test methods.

(A) The first semi-annual performance test for each source shall be conducted within 90 days after the date on which the PM–10 emission limitations

become applicable to the source. Subsequent semi-annual tests shall be completed within 6 months of the most recent previous test.

(B) If, after conducting semi-annual source tests for the calciners or the excess CO burner for two consecutive years, the emissions from that source during each of the four previous consecutive semi-annual tests are less than 80% of the applicable emission limit, then the frequency of source testing for the source may be reduced to annual testing. The frequency of source testing shall revert to semi-annually if the emissions from any source test on the source are greater than or equal to 80% of the applicable emission limit.

(iii) The owner or operator of the Astaris-Idaho facility shall conduct a performance test to determine the control efficiency of the calciner scrubbers (Table 1 of this section, source 9a) and the excess CO burner (Table 1 of this section, source 26b) using the specified reference test methods as follows:

(A) A performance test for the calciner scrubbers shall be conducted within 90 days after the date on which the PM–10 emission limitations become applicable to the source.

(B) The first performance test for the excess CO burner shall be conducted within 90 days after the date on which the PM–10 emission limitations become applicable to the source. Subsequent semi-annual tests shall be completed within 6 months of the most recent previous test.

(C) If, after conducting semi-annual source tests for the excess CO burner for two consecutive years, the emissions from that source during each of the four previous consecutive semi-annual tests are less than 80% of the mass emission limit, then the frequency of source testing for the control efficiency requirement for the excess CO burner may be reduced to annual testing. The frequency of source testing shall revert to semi-annually if the emissions from any source test on the source are greater than or equal to 80% of the mass emission limit.

(iv) If a source test indicates an exceedence of the emission limit applicable to the source, the owner or operator of the Astaris-Idaho facility shall conduct a performance test of that source within 90 days of the source test showing the exceedence. The schedule for conducting future source tests shall not be affected by this requirement.

(v) The time period for conducting any source test may be extended by a period of up to 90 days provided that:

(A) The owner or operator of the Astaris-Idaho facility submits a written request to the Regional Administrator at least 30 days prior to the expiration of the time period for conducting the test which demonstrates the need for the extension; and

(B) The Regional Administrator approves the request in writing.

(vi) The owner or operator of the Astaris-Idaho facility shall provide the Regional Administrator a proposed test plan at least 30 days in advance of each scheduled source test. If the proposed test plan is unchanged for the next scheduled source test on the source, the owner or operator of the Astaris-Idaho facility shall not be required to resubmit a source test plan. Astaris-Idaho shall submit a new source test plan to EPA in accordance with this paragraph (e)(1) if the proposed test plan will be different from the immediately preceding source test plan that had been submitted to EPA.

(vii) The owner or operator of the Astaris-Idaho facility shall provide the Regional Administrator at least 30 days prior written notice of any performance test required under this section to afford the Regional Administrator the opportunity to have an observer present. If after 30 days notice for an initially scheduled performance test, there is a delay (due to operational problems, etc.) in conducting the scheduled performance test, the owner or operator of the Astaris-Idaho facility shall notify the Regional Administrator as soon as possible of any delay in the original test date, either by providing at least 7 days prior notice of the rescheduled date of the performance test or by arranging a rescheduled date with the Regional Administrator by mutual agreement.

(viii)(A) The owner or operator of the Astaris-Idaho facility shall provide, or cause to be provided, performance testing facilities as follows:

(*1*) Sampling ports adequate for test methods applicable to the source. This includes:

(*i*) Constructing any new or modified air pollution control system such that volumetric flow rates and pollutant emission rates can be accurately determined by the applicable test methods and procedures; and

(*ii*) Except with respect to the calciner scrubber stacks (Table 1 of this section, source 9a), providing a stack or duct free of cyclonic flow during performance tests, as demonstrated by applicable test methods and procedures.

(*2*) Safe sampling platforms.

(*3*) Safe access to sampling platforms.

(*4*) Utilities for sampling and testing equipment.

(B) A modification to these requirements can be approved with respect a particular source provided that:

(*1*) The owner or operator of the Astaris-Idaho facility submits a written request to the Regional Administrator which demonstrates the need for the modification; and

(*2*) The Regional Administrator approves the request in writing.

(ix) During each test run and for at least two hours prior to the test and two hours after the test is completed, the owner or operator of the Astaris-Idaho facility shall monitor and record the parameters specified in paragraphs (e)(2), (e)(3), (e)(4), (e)(5), and (e)(6) of this section, as appropriate, for the source being tested, and shall report the results to EPA as part of the performance test report referred to in paragraph (g)(3)(i)(G) of this section.

(x) The owner or operator of the Astaris-Idaho facility shall conduct a 12 minute visible emission observation using Method 9 of 40 CFR Part 60, appendix A, at least twice during the performance test at an interval of no less than one hour apart, and shall report the results of this observation to EPA as part of the performance test report referred to in paragraph (g)(3)(i)(G) of this section.

(xi) Concurrently with the performance testing, the owner or operator of the Astaris-Idaho facility shall measure the flow rate (throughput to the control device) using Method 2 of 40 CFR Part 60, appendix A, for the calciner scrubbers (Table 1 of this section, source 9a) and the phos dock Andersen scrubber (Table 1 of this section, source 21a) and shall report the results to EPA as part of the performance test report referred to in paragraph (g)(3)(i)(G) of this section.

(2) The owner or operator of the Astaris-Idaho facility shall install, calibrate, maintain, and operate in accordance with the manufacturer's specifications a device to continuously measure and continuously record the pressure drop across the baghouse for each of the following sources identified in Column II of Table I: east shale baghouse (Table 1 of this section, source 5a), middle shale baghouse (Table 1 of this section, source 6a), west shale baghouse (Table 1 of this section, source 7a), north nodule discharge baghouse (Table 1 of this section, source 12a), north reclaim baghouse (Table 1 of this section, source 13), south nodule discharge baghouse (Table 1 of this section, source 12b), proportioning building-east nodule baghouse (Table 1 of this section, source 15a), proportioning building-west nodule baghouse (Table 1 of this section, source 15b), nodule stockpile baghouse (Table 1 of this section, source 16a), dust silo baghouse (Table 1 of this section, source 17a), furnace building-east baghouse (Table 1 of this section, source 18a), furnace building-west baghouse (Table 1 of this section, source 18b), and coke handling baghouse (Table 1 of this section, source 20a).

(i) The devices shall be installed and fully operational no later than 210 days after August 23, 2000.

(ii) Upon EPA approval of the acceptable range of baghouse pressure drop for each source, as provided in paragraph (g)(1) of this section, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the approved range. Until EPA approval of the acceptable range of baghouse pressure drop for each source, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the proposed range for that source, as provided in paragraph (g)(1) of this section.

(iii) If an excursion from an approved range occurs, the owner or operator of the Astaris-Idaho facility shall immediately upon discovery, but no later than within three hours of discovery, initiate corrective action to bring source operation back within the approved range.

(iv) The owner or operator of the Astaris-Idaho facility shall complete the corrective action as expeditiously as possible.

(3) The owner or operator of the Astaris-Idaho facility shall install, calibrate, maintain, and operate in accordance with the manufacture's specifications and the bag leak detection guidance a triboelectric monitor to continuously monitor and record the readout of the instrument response for each of the following sources identified in Column II of Table 1 to this section: east shale baghouse (Table 1 of this section, source 5a), middle shale baghouse (Table 1 of this section, source 6a), west shale baghouse (Table 1 of this section, source 7a), north nodule discharge baghouse (Table 1 of this section, source 12a), south nodule discharge baghouse (Table 1 of this section, source 12b), north reclaim baghouse (Table 1 of this section, source 13), proportioning building-east nodule baghouse (Table 1 of this section, source 15a), proportioning building-west nodule baghouse (Table 1 of this section, source 15b), nodule stockpile baghouse (Table 1 of this section, source 16a), dust silo baghouse (Table 1 of this section, source 17a), furnace building-east baghouse (Table 1 of this section, source 18a), furnace building-west baghouse (Table 1 of this section, source 18b), and coke handling baghouse (Table 1 of this section, source 20a).

(i) The triboelectric monitors shall be installed and fully operational no later than 210 days after August 23, 2000.

(ii) The owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the approved range. For the triboelectric monitors, the "approved range" shall be defined as operating the source so that an "alarm," as defined in and as determined in accordance with the bag leak detection guidance, does not occur.

(iii) If an excursion from an approved range occurs, the owner or operator of the Astaris-Idaho facility shall immediately upon discovery, but no later than within three hours of discovery, initiate corrective action to bring source operation back within the approved range.

(iv) The owner or operator of the Astaris-Idaho facility shall complete the corrective action as expeditiously as possible.

(4) The owner or operator of the Astaris-Idaho facility shall install, calibrate, maintain, and operate in accordance with the manufacturer's specifications, a device to continuously measure and continuously record the pressure drop across the scrubber and the scrubber liquor flowrate for each of the calciner scrubbers (Table 1 of this section, source 9a).

(i) The devices for the calciner scrubbers (Table 1 of this section, source 9a) shall be installed and fully operational on or before December 1, 2000.

(ii) Upon EPA approval of the acceptable range of pressure drop, scrubber liquor flow rate, and scrubber liquor pH for the calciner scrubbers, as provided in paragraph (g)(1) of this section, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the approved range. Until EPA approval of the acceptable ranges for each source, the owner or operator of the Astaris-Idaho facility shall maintain and operate the calciner scrubbers to stay within the proposed range for that source, as provided in paragraph (g)(1) of this section.

(iii) If an excursion from an approved range occurs, Astaris-Idaho shall immediately upon discovery, but no later than within three hours of discovery, initiate corrective action to bring calciner scrubber operation back within the approved range.

(iv) The owner or operator of the Astaris-Idaho facility shall complete the corrective action as expeditiously as possible.

(5) The owner or operator of the Astaris-Idaho facility shall install,

calibrate, maintain, and operate in accordance with the manufacturer's specifications, a device to continuously measure and continuously record the pressure drop across the scrubber for each of the following sources identified in Column II of Table 1 to this section: furnaces #1, #2, #3 and #4—Medusa-Andersen scrubbers (Table 1 of this section, sources 18d, 18e, 18f and 18g), phos dock Andersen scrubber (Table 1 of this section, source 21a), and excess CO burner—Andersen scrubber (Table 1 of this section, source 26b).

(i) The device for furnaces #1, #2, #3 and #4—Medusa-Andersen scrubbers (Table 1 of this section, sources 18d, 18e, 18f and 18g) and the phos dock Andersen scrubber (Table 1 of this section, source 21a) shall be installed and fully operational no later than 210 days after August 23, 2000. The device for the excess CO burner (Table 1 of this section, source 26b) shall be installed and fully operational no later than January 1, 2001.

(ii) Upon EPA approval of the acceptable range of scrubber pressure drop for each source, as provided in paragraph (g)(1) of this section, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the approved range. Until EPA approval of the acceptable ranges of scrubber pressure drop for each source, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the proposed range for that source, as provided in paragraph (g)(1) of this section.

(iii) If an excursion from an approved range occurs, the owner or operator of the Astaris-Idaho facility shall immediately upon discovery, but no later than within three hours of discovery, initiate corrective action to bring source operation back within the approved range.

(iv) The owner or operator of the Astaris-Idaho facility shall complete the corrective action as expeditiously as possible.

(6) The owner or operator of the Astaris-Idaho facility shall develop and implement a written plan for monitoring the scrubber water quality (through a parameter(s) such as total dissolved solids, total suspended solids, conductivity, specific gravity, etc) on a daily basis for the following sources: calciner scrubbers (Table 1 of this section, source 9a) and furnace #1, #2, #3 and #4—Medusa-Andersen scrubbers (Table 1 of this section, sources 18d, 18e, 18f and 18g).

(i) The plan for furnaces #1, #2, #3 and #4—Medusa-Andersen scrubbers (Table 1 of this section, sources 18d, 18e, 18f and 18g) shall be submitted to the Regional Administrator within 180 days after September 22, 2000. The plan for the calciner scrubbers (Table 1 of this section, source 9a) shall submitted to the Regional Administrator no later than December 1, 2000.

(ii) Upon EPA approval of the acceptable parameter range for water quality for each source, as provided in paragraph (g)(1) of this section, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the approved range. Until EPA approval of the acceptable range of water quality for each source, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the proposed range for that source, as provided in paragraph (g)(1) of this section.

(iii) If an excursion from an approved range occurs, the owner or operator of the Astaris-Idaho facility shall immediately upon discovery, but no later than within three hours of discovery, initiate corrective action to bring source operation back within the approved range.

(iv) The owner or operator of the Astaris-Idaho facility shall complete the corrective action as expeditiously as possible.

(7) For each of the pressure relief vents on the furnaces (Table 1 of this section, source 24), Astaris-Idaho shall install, calibrate, maintain, and operate in accordance with the manufacturer's specifications, devices to continuously measure and continuously record the temperature and pressure of gases in the relief vent downstream of the pressure relief valve and the water level of the pressure relief valve.

(i) The devices shall be installed and fully operational no later than 90 days after August 23, 2000.

(ii) A "pressure release" is defined as an excursion of the temperature, pressure, or water level outside of the parameters approved in accordance with paragraph (g)(1) of this section. Until EPA approval of the acceptable range of parameters for the pressure release vents, a "pressure release" is defined as an excursion of the temperature, pressure, or water level outside of the parameters proposed by the owner or operator of the Astaris-Idaho facility for the pressure relief vents, as provided in paragraph (g)(1) of this section.

(iii) The release point on each pressure relief vent shall be maintained at no less than 18 inches of water.

(iv) When a pressure release through a pressure relief vent is detected, the owner or operator of the Astaris-Idaho facility shall, within 30 minutes of the beginning of the pressure release, inspect the pressure relief valve to ensure that it has properly sealed and verify that at least 18 inches of water seal pressure is maintained.

(8) The owner or operator of the Astaris-Idaho facility shall develop and implement a written O&M plan covering all sources of PM–10 at the Astaris-Idaho facility, including without limitation, each source identified in Column II of Table 1 of this section and uncaptured fugitive and general fugitive emissions of PM–10 from each source.

(i) The purpose of the O&M plan is to ensure each source at the Astaris-Idaho facility will be operated and maintained consistent with good air pollution control practices and procedures for maximizing control efficiency and minimizing emissions at all times, including periods of startup, shutdown, emergency, and malfunction, and to establish procedures for assuring continuous compliance with the emission limitations, work practice requirements, and other requirements of this section.

(ii) The O&M plan shall be submitted to the Regional Administrator within 60 days of September 22, 2000 and shall cover all sources and requirements for which compliance is required 90 days after August 23, 2000.

(A) A revision to the O&M plan covering each source or requirement with a compliance date of more than 60 days after September 22, 2000 shall be submitted at least 60 days before the source is required to comply with the requirement.

(B) The owner or operator of the Astaris-Idaho facility shall review and, as appropriate, update the O&M plan at least annually.

(C) The Regional Administrator may require the owner or operator of the Astaris-Idaho facility to modify the plan if, at any time, the Regional Administrator determines that the O&M plan does not:

(*1*) Adequately ensure that each source at the Astaris-Idaho facility will be operated and maintained consistent with good air pollution control practices and procedures for maximizing control efficiency and minimizing emissions at all times;

(*2*) Contain adequate procedures for assuring continuous compliance with the emission limitations, work practice requirements, and other requirements of this section;

(*3*) Adequately address the topics identified in this paragraph (e)(8); or

(*4*) Include sufficient mechanisms for ensuring that the O&M plan is being implemented.

(iii) The O&M plan shall address at least the following topics:

(A) Procedures for minimizing fugitive PM–10 emissions from material handling, storage piles, roads, staging areas, parking lots, mechanical processes, and other processes, including but not limited to:

(*1*) A visual inspection of all material handling, storage piles, roads, staging areas, parking lots, mechanical processes, and other processes at least once each week at a regularly scheduled time. The O&M plan shall include a list of equipment, operations, and storage piles, and what to look for at each source during this regularly scheduled inspection.

(*2*) A requirement to document the time, date, and results of each visual inspection, including any problems identified and any corrective actions taken.

(*3*) A requirement to take corrective action as soon as possible but no later than within 48 hours of identification of operations or maintenance problems identified during the visual inspection

(unless a shorter time frame is specified by this rule or is warranted by the nature of the problem).

(*4*) Procedures for the application of dust suppressants to and the sweeping of material from storage piles, roads, staging areas, parking lots, or any open area as appropriate to maintain compliance with applicable emission limitations or work practice requirements. Such procedures shall include the specification of dust suppressants, the application rate, and application frequency, and the frequency of sweeping. Such procedures shall also include the procedures for application of latex to the main shale pile (source 2) and the emergency/contingency raw ore shale pile (source 3) after each reforming of the pile or portion of the pile.

(B) Specifications for parts or elements of control or process equipment needing replacement after some set interval prior to breakdown or malfunction.

(C) Process conditions that indicate need for repair, maintenance or cleaning of control or process equipment, such as the need to open furnace access ports or holes.

(D) Procedures for the visual inspection of all baghouses, scrubbers, and other control equipment of at least once each week at a regularly scheduled time.

(E) Procedures for the regular maintenance of control equipment, including without limitation, procedures for the rapid identification and replacement of broken or ripped bags for all sources controlled by a baghouse, bag dimensions, bag fabric, air-to-cloth ratio, bag cleaning methods, cleaning type, bag spacing, compartment design, bag replacement schedule, and typical exhaust gas volume.

(F) Procedures that meet or exceed the manufacturer's recommendations for the inspection, maintenance, operation, and calibration of each monitoring device required by this part.

(G) Procedures for the rapid identification and repair of equipment or processes causing a malfunction or emergency and for reducing or minimizing the duration of and emissions resulting from any malfunction or emergency.

(H) Procedures for the training of staff in procedures listed in paragraph (e)(8)(i) of this section.

(I) For each source identified in Column II of Table 2 to this section, additional control measures or other actions to be taken if the emissions from the source exceed the opacity action level identified in Column III of Table 2 to this section.

(9) For each source identified in Column II of Table 1 to this section, the owner or operator of the Astaris-Idaho facility shall conduct a visual observation of each source at least once during each calendar week.

(i) If visible emissions are observed for any period of time during the observation period, the owner or operator of the Astaris-Idaho facility shall immediately, but no later than within 24 hours of discovery, take corrective action to minimize visible emissions from the source. Such actions shall include, but not be limited to, those actions identified in the O&M plan for the source. Immediately upon completion of the corrective action, a certified observer shall conduct a visible emissions observation of the source using the reference test method for the opacity limit with an observation duration of at least six minutes. If opacity exceeds the opacity action level, the owner or operator of the Astaris-Idaho facility shall take prompt corrective action. This process shall be repeated until opacity returns to below the opacity action level.

(ii) In lieu of the periodic visual observation under this paragraph (e)(9), the owner or operator of the Astaris-Idaho facility may conduct a visible emission observation of any source subject to the requirements of this paragraph (e)(9) using the reference test method for the opacity limit, in which case corrective action must be taken only if opacity exceeds the opacity action level.

(iii) Should, for good cause, the visible emissions reading not be conducted on schedule, the owner or operator of the Astaris-Idaho facility shall record the reason observations were not conducted. Visible emissions observations shall be conducted immediately upon the return of conditions suitable for visible emissions observations.

(iv) If, after conducting weekly visible emissions observations for a given source for more than one year and detecting no visible emissions from that source for 52 consecutive weeks, the frequency of observations may be reduced to monthly. The frequency of observations for such source shall revert to weekly if visible emissions are detected from that source during any monthly observation or at any other time.

(v) With respect to slag handling (Table 1 of this section, source 8a):

(A) Visible emission observations shall be made of the slag tapping area as viewed from the exterior of the furnace building and in the general area of the old slag pits;

(B) For the first three months after the effective date of the opacity limit, the owner or operator of the Astaris-Idaho facility shall conduct a visual observation of this source three days each week and shall submit the results of such observations at the end of the three month time frame. Thereafter, such observations shall be conducted weekly or as otherwise provided in this paragraph (e)(9).

(10) Except for, as applicable, monitoring malfunctions, associated repairs, and required quality assurance or control activities (including, as applicable, calibration checks and required zero span adjustments), the owner or operator of the Astaris-Idaho facility shall conduct all monitoring with the monitoring devices required by paragraphs (e)(2), (e)(3), (e)(4), (e)(5), (e)(6), and (e)(7) of this section in continuous operation at all times that the monitored process is in operation. Data recorded during monitoring malfunctions, associated repairs, and required quality assurance or control activities shall not be used for purposes of this section, including data averages and calculations, or fulfilling a minimum data availability requirement. The owner or operator of the Astaris-Idaho facility shall use data collected during all other periods in assessing the operation of the control device and associated control system.

(11) The minimum data availability requirement for monitoring data pursuant to paragraphs (e)(2), (e)(3), (e)(4), (e)(5), (e)(6), and (e)(7) of this section is 90% on a monthly average basis. Data availability is determined by dividing the time (or number of data points) representing valid data by the time (or number of data points) that the monitored process is in operation.

(12) Nothing in this paragraph (e) shall preclude EPA from requiring any other testing or monitoring pursuant to section 114 of the Clean Air Act.

(f) *Record keeping requirements.* (1) The owner or operator of the Astaris-Idaho facility shall keep records of all monitoring required by this section that include, at a minimum, the following information:

(i) The date, place as defined in this section, and time of the sampling or measurement.

(ii) The dates the analyses were performed.

(iii) The company or entity that performed the analyses.

(iv) The analytical techniques or methods used.

(v) The results of the analyses.

(vi) The operating conditions existing at the time of the sampling or measurement.

(2)(i) The owner or operator of the Astaris-Idaho facility shall keep records of all inspections and all visible emissions observations required by this section or conducted pursuant to the O&M plan, which records shall include the following:

(A) The date, place, and time of the inspection or observation.

(B) The name and title of the person conducting the inspection or observation.

(C) In the case of a visible emission observation, the test method (Method 9 or visual observation), the relevant or specified meteorological conditions, and the results of the observation, including raw data and calculations. In the case of visible emission observations of slag handling (Table 1 of this section, source 8a), the owner or operator of the Astaris-Idaho facility shall also document whether visible emissions emanate from fuming of hot slag from pots or other points in the old slag pit area.

(D) For any corrective action required by this section or the O&M plan or taken in response to a problem identified during an inspection or visible

emissions observation required by this section or the O&M plan, the time and date corrective action was initiated and completed and the nature of corrective action taken.

(E) The reason for any monitoring not conducted on schedule.

(ii) With respect to control devices, the requirement of paragraph (f)(2)(i) of this section is satisfied by meeting the requirements of paragraph (f)(11) of this section.

(3) The owner or operator of the Astaris-Idaho facility shall continuously record the parameters specified in paragraphs (e)(2), (e)(3), (e)(4), (e)(5), and (e)(7) of this section, and shall record the parameters specified in paragraphs (e)(6) of this section on the frequency specified in the monitoring plan required under paragraph (e)(6) of this section.

(4) The owner or operator of the Astaris-Idaho facility shall keep records of all excursions from ranges approved under paragraph (e)(3) or (g)(1) of this section, including without limitation, the measured excursion, time and date of the excursion, duration of the excursion, time and date corrective action was initiated and completed, and nature of corrective action taken.

(5) The owner or operator of the Astaris-Idaho facility shall keep records of:

(i) The time, date, and duration of each pressure release from a furnace pressure relief vent (Table 1 of this section, source 24), the method of detecting the release, the results of the inspection required by paragraph (e)(7) of this section, and any actions taken to ensure resealing, including the time and date of such actions; and

(ii) The time, date, and duration of the steaming and draining of the pressure relief vent drop tank.

(6) The owner or operator of the Astaris-Idaho facility shall keep records of the time, date, and duration of each flaring of the emergency CO flares (Table 1 of this section, source 25) due to an emergency, the method of detecting the emergency, and all corrective action taken in response to the emergency.

(7) Until January 1, 2001, the owner or operator of the Astaris-Idaho facility shall keep records of the date and start/stop time of each mini-flush; the phossy water flow rate and outlet temperature immediately preceding the start time; whether the operating parameters for conducting the mini-flush set forth in paragraph (c)(5)(ii) of this section were met; and, if the parameters were not met, whether the failure to comply with the parameters was attributable to a malfunction or emergency.

(8) The owner or operator of the Astaris-Idaho facility shall keep records of the application of dust suppressants to all storage piles, roads, staging areas, parking lots, and any other area, including the purchase of dust suppressants, the identification of the surface covered, type of dust suppressant used, the application rate (gallons per square foot), and date of application.

(9) The owner or operator of the Astaris-Idaho facility shall keep records of the frequency of sweeping of all roads, staging areas, parking lots, and any other area, including the identification of the surface swept and date and duration of sweeping.

(10) The owner or operator of the Astaris-Idaho facility shall keep the following records with respect to the main shale pile (Table 1 of this section, source 2) and emergency/contingency raw ore shale pile (Table 1 of this section, source 3):

(i) The date and time of each reforming of the pile or portion of the pile.

(ii) The date, time, and quantity of latex applied.

(11) The owner or operator of the Astaris-Idaho facility shall keep a log for each control device of all inspections of and maintenance on the control device, including without limitation the following information:

(i) The date, place, and time of the inspection or maintenance activity.

(ii) The name and title of the person conducting the inspection or maintenance activity.

(iii) The condition of the control device at the time.

(iv) For any corrective action required by this section or the O&M plan or taken in response to a problem identified during an inspection required by this section or the O&M plan, the time

and date corrective action was initiated and completed, and the nature of corrective action taken.

(v) A description of, reason for, and the date of all maintenance activities, including without limitation any bag replacements.

(vi) The reason any monitoring was not conducted on schedule, including a description of any monitoring malfunction, and the reason any required data was not collected.

(12) The owner or operator of the Astaris-Idaho facility shall keep the following records:

(i) The Method 9 initial certification and recertification for all individuals conducting visual emissions observations using Method 9 as required by this section.

(ii) Evidence that all individuals conducting visual observations as required by this section meet the training guidelines described in section 1 of Method 22, 40 CFR part 60, appendix A.

(13) The owner or operator of the Astaris-Idaho facility shall keep records on the type and quantity of fuel used in the boilers (Table 1 of this section, source 23), including without limitation the date of any change in the type of fuel used.

(14) The owner or operator of the Astaris-Idaho facility shall keep records of the results of the daily monitoring of the water quality of the scrubber water in the calciner scrubbers (Table 1 of this section, source 9a) and the Medusa-Andersen furnace scrubbers (Table 1 of this section, sources 18d, 18e, 18f, and 18g) as specified in the O&M plan.

(15) The owner or operator of the Astaris-Idaho facility shall keep records of the time, date, and duration of each damper vent opening for the furnace building east and west baghouses (Table 1 of this section, sources 18a and 18b), the reason for the damper vent opening, and all corrective action taken in response to the damper vent opening.

(16) The owner or operator of the Astaris-Idaho facility shall keep a copy of all reports required to be submitted to EPA under paragraph (g) of this section.

(17) All records required to be maintained by this section and records of all required monitoring data and support information shall be maintained on site at the Astaris-Idaho facility in a readily accessible location for a period of at least five years from the date of the monitoring sample, measurement, report, or record.

(i) Such records shall be made available to EPA on request.

(ii) Support information includes all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation.

(g) *Reporting requirements.* (1) The owner or operator of the Astaris-Idaho facility shall submit to EPA, for each of the operating parameters required to be continuously monitored pursuant to paragraphs (e)(2), (e)(4), (e)(5), (e)(6), and (e)(7) of this section, a proposed range of operation, including a proposed averaging period, and documentation demonstrating that operating the source within the proposed range will assure compliance with applicable emission limitations and work practice requirements of this section.

(i) The proposed parameter ranges shall be submitted within 210 days of August 23, 2000, for all sources except as follows:

(A) A proposed parameter range for the pressure relief vents (Table 1 of this section, source 24) shall be submitted within 90 days of August 23, 2000.

(B) Proposed parameter ranges for the calciner scrubbers (Table 1 of this section, source 9a) and the excess CO burner (Table 1 of this section, source 26b) shall be submitted no later than the date by which the emission limitations become applicable to those sources under this section.

(ii) A parameter range for each source shall be approved by EPA through the issuance of a title V operating permit to the Astaris-Idaho facility, or as a modification thereto. Until EPA approval of the acceptable range for a parameter for a source, the owner or operator of the Astaris-Idaho facility shall maintain and operate the source to stay within the proposed range for that source.

(iii) If EPA determines at any time that the proposed or approved range does not adequately assure compliance

with applicable emission limitations and work practice requirements, EPA may request additional information, request that revised parameter ranges and supporting documentation be submitted to EPA for approval, or establish alternative approved parameter ranges through the issuance of a title V operating permit to the Astaris-Idaho facility, or as a modification thereto.

(iv) This requirement to submit proposed parameter ranges is in addition to and separate from any requirement to develop parameter ranges under 40 CFR part 64 (Compliance Assurance Monitoring rule). However, monitoring for any pollutant specific source that meets the design criteria of 40 CFR 64.3 and the submittal requirements of 40 CFR 64.4 may be submitted to meet the requirements of this paragraph (g)(1).

(2) The owner or operator of Astaris-Idaho shall submit to EPA a bi-monthly report covering the preceding two calendar months (e.g., January-February, March-April). Such report shall be submitted 15 days after the end of each two month period, with the last such report covering the period of November and December 2000. The report shall include the following:

(i) The date and start/stop time of each mini-flush; the phossy water flow rate and outlet temperature immediately preceding the start time; and a "Yes/No" column indicating whether the operating parameters for conducting the mini-flush set forth in paragraph (c)(5)(ii) of this section were met.

(ii) For any "No" entry, an indication of whether the failure to comply with the parameters was attributable to a malfunction and, if so, the date and time of notification to EPA of the malfunction and a copy of the contemporaneous record described in paragraph (c)(5)(ii) of this section.

(iii) For each month, the total mini-flush time in minutes, the number of operating days for the secondary condenser, and the average minutes per operating day.

(3) The owner or operator of the Astaris-Idaho facility shall submit to EPA a semi-annual report of all monitoring required by this section covering the six month period from January 1 through June 30 and July 1 through December 31 of each year. Such report shall be submitted 30 days after the end of such six month period.

(i) The semiannual report shall:

(A) Identify each time period (including the date, time, and duration) during which a visible emissions observation or PM–10 emissions measurement exceeded the applicable emission limitation and state what actions were taken to address the exceedence. If no action was taken, the report shall state the reason that no action was taken.

(B) Identify each time period (including the date, time, and duration) during which there was an excursion of a monitored parameter from the approved range and state what actions were taken to address the excursion. If no action was taken, the report shall state the reason that no action was taken.

(C) Identify each time period (including the date, time, and duration) during which there was an excursion above the opacity action level and state what actions were taken to address the excursion. If no action was taken, the report shall state the reason that no action was taken.

(D) Identify each time period (including date, time and duration) of each flaring of the emergency CO flares (Table 1 of this section, source 25) due to an emergency and state what actions were taken to address the emergency. If no action was taken, the report shall state the reason that no action was taken.

(E) Identify each time period (including date, time and duration) of each pressure release from a pressure relief vent (Table 1 of this section, source 24) and state what actions were taken to address the pressure release. If no action was taken, the report shall state the reason that no action was taken.

(F) Include a summary of all monitoring required under this section.

(G) Include a copy of the source test report for each performance test conducted in accordance with paragraph (e)(1) of this section.

(H) Describe the status of compliance with this section for the period covered by the semi-annual report, the methods or other means used for determining the compliance status, and whether

such methods or means provide continuous or intermittent data.

(*1*) Such methods or other means shall include, at a minimum, the monitoring, record keeping, and reporting required by this section.

(*2*) If necessary, the owner or operator of Astaris-Idaho shall also identify any other material information that must be included in the report to comply with section 113(c)(2) of the Clean Air Act, which prohibits making a knowing false certification or omitting material information.

(*3*) The determination of compliance shall also take into account any excursions from the required parameter ranges reported pursuant to paragraph (g)(3)(i)(B) of this section.

(ii) Each semi-annual report submitted pursuant to this paragraph shall contain certification by a responsible official, as defined in 40 CFR 71.2, of truth, accuracy and completeness. Such certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the documents are true, accurate, and complete.

(4) The owner or operator of the Astaris-Idaho facility shall notify EPA by telephone or facsimile within 48 hours of the beginning of each flaring of the emergency CO flares (Table 1 of this section, source 25) due to an emergency.

(5)(i) For emissions that continue for more than two hours in excess of the applicable emissions limitation, the owner or operator of the Astaris-Idaho facility shall notify EPA by telephone or facsimile within 48 hours. A written report containing the following information shall be submitted to EPA within ten working days of the occurrence of the excess emissions:

(A) The identity of the stack and/or other source where excess emissions occurred.

(B) The magnitude of the excess emissions expressed in the units of the applicable emissions limitation and the operating data and calculations used in determining the magnitude of the excess emissions.

(C) The time and duration or expected duration of the excess emissions.

(D) The identity of the equipment causing the excess emissions.

(E) The nature and probable cause of such excess emissions.

(F) Any corrective action or preventative measures taken.

(G) The steps taken or being taken to limit excess emissions.

(ii) Compliance with this paragraph is required even in cases where the owner or operator of the Astaris-Idaho facility does not seek to establish an affirmative defense of startup, shutdown, malfunction, or emergency under paragraphs (c)(8) or (c)(9) of this section.

(6) The owner or operator of Astaris-Idaho shall notify EPA if it uses any fuel other than natural gas in the boilers (Table 1 of this section, source 23) within 24 hours of commencing use of such other fuel.

(7) All reports and notices submitted under this section shall be submitted to EPA at the addresses set forth below: U.S. Environmental Protection Agency, Region 10, State and Tribal Programs Unit, Re: Astaris-Idaho FIP, Office of Air Quality, OAQ 107, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553–1189, Fax: 206–553–0404.

(8) The owner or operator of the Astaris-Idaho facility shall submit a copy of each report, notice, or other document submitted to EPA under this section contemporaneously to the Shoshone-Bannock Tribes at the following address: Shoshone-Bannock Tribes, Air Quality Program, Land Use Department, P.O. Box 306, Fort Hall, Idaho, 83203, telephone (208) 478–3853; fax (208) 237–9736. The owner or operator of the Astaris-Idaho facility shall also provide contemporaneously to the Tribes notice by telephone in the event notice by telephone is provided to EPA under this section.

(h) *Title V Permit.* (1) Additional monitoring, work practice, record keeping, and reporting requirements may be included in the title V permit for the Astaris-Idaho facility to assure compliance with the requirements of this section.

(2)(i) A requirement of paragraph (e), (f), or (g) of this section may be revised through issuance or renewal of a title V operating permit by EPA to the Astaris-Idaho facility under 40 CFR

part 71 or through a significant permit modification thereto, provided that:

(A) Any alternative monitoring, record keeping, or reporting requirements that revise requirements of paragraphs (e), (f), or (g) of this section:

(*1*) Are sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the requirements of paragraph (c) of this section; and

(*2*) Provide no less compliance assurance than the requirements of paragraphs (e), (f), or (g) of this section that the alternative requirements would replace.

(B) In the event the alternative monitoring, record keeping, or reporting requirements are requested by the owner or operator of the Astaris-Idaho facility, Astaris-Idaho's application for its title V operating permit or significant permit modification must include:

(*1*) The proposed alternative monitoring, record keeping, or reporting permit terms or conditions;

(*2*) The specific provisions of paragraphs (e), (f), or (g) of this section the owner or operator of the Astaris-Idaho facility is seeking to revise; and

(*3*) The supporting documentation to establish that the alternative permit terms or conditions meet the requirements of paragraph (h)(2)(i)(A) of this section.

(C) The draft and final title V operating permit or significant permit modification identifies the specific provisions of paragraphs (e), (f), or (g) of this section being revised;

(D) In the event a revision to paragraphs (e), (f), or (g) of this section is accomplished through a significant modification to Astaris-Idaho's title V operating permit, it is accomplished using the significant permit modification procedures of 40 CFR part 71; and

(ii) Upon issuance or renewal of Astaris-Idaho's title V permit or a significant permit modification thereto that revises a requirement of paragraphs (e), (f), or (g) of this section, the revision shall remain in effect as a requirement of this section not withstanding expiration, termination, or revocation of Astaris-Idaho's title V operating permit.

(i) *Compliance schedule.* Except as otherwise provided in this section, the owner or operator of the Astaris-Idaho facility shall comply with the requirements of this section within 90 days of August 23, 2000.

TABLE 1 TO §49.10711

I Source No.	II Source description	III Emission limitations and work practice requirements	IV Reference test method
1	Railcar unloading of shale (ore) into underground hopper.	Opacity shall not exceed 10% over a 6 minute average.	Method 9.
2	Main shale pile (portion located on Fort Hall Indian Reservation).	Opacity shall not exceed 10% over a 6 minute average.	
		Latex shall be applied after each reforming of pile or portion of pile.	Method 9.
3	Emergency/contingency raw ore shale pile.	Opacity shall not exceed 10% over a 6 minute average.	Method 9.
		Latex shall be applied after each reforming of pile or portion of pile.	
4	Stacker and reclaimer	Opacity shall not exceed 10% over a 6 minute average.	Method 9.
5a	East shale baghouse	a. Emissions shall not exceed 0.10 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
5b	East shale baghouse building	b. Opacity shall not exceed 10% over a 6 minute average from any portion of the building.	b. Method 9.
6a	Middle shale baghouse	a. Emissions shall not exceed 0.50 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
6b	Middle shale baghouse building	b. Opacity shall not exceed 10% over a 6 minute average from any portion of the building.	b. Method 9.

TABLE 1 TO § 49.10711—Continued

I Source No.	II Source description	III Emission limitations and work practice requirements	IV Reference test method
6c	Middle shale baghouse outside capture hood—fugitive emissions.	c. Opacity shall not exceed 10% over a 6 minute average.	c. Method 9.
7a	West shale baghouse	a. Emissions shall not exceed 0.50 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
7b	West shale baghouse building	b. Opacity shall not exceed 10% over a 6 minute average from any portion of the building.	b. Method 9.
7c	West shale baghouse outside capture hood—fugitive emissions.	c. Opacity shall not exceed 10% over a 6 minute average.	c. Method 9.
8a	a. Slag handling: slag pit area and pot rooms.	a. Until November 1, 2000, emissions from the slag pit area and the pot rooms shall be exempt from opacity limitations.	
		Effective November 1, 2000, opacity of emissions in the slag pit area and from pot rooms shall not exceed 10% over a 6 minute average. *Exemption:* Fuming of molten slag in transport pots during transport are exempt provided the pots remain in the pot room for at least 3 minutes after the flow of molten slag to the pots has ceased.	Method 9.
		See also 40 CFR 49.10711(c)(4)	
8b	b. Recycle material pile	b. Opacity shall not exceed 10% over a 6 minute average.	b. Method 9.
8c	c. Dump to slag pile	c. Fuming of molten slag during dump to slag pile shall be exempt from opacity limitations.	
9a	Calciner scrubbers	Effective December 1, 2000: The calciner scrubbing chain (air pollution control equipment) shall achieve an overall control efficiency [1] of at least 90% for PM–10 (including condensible PM–10) when inlet loadings equal or exceed 0.150 grains per dry standard cubic foot.	Method 5 (all particulate collected shall be counted as PM–10) and Method 202 at the scrubber outlet. Method 201A and Method 202 at the inlet to the scrubber systems.
		The arithmetic average of the emission concentration from the four stacks associated with each calciner shall not exceed 0.0080 grains per dry standard cubic foot PM–10 (excluding condensible PM–10) [2].	Method 5 (all particulate collected shall be counted as PM–10).
		The arithmetic average of the emission concentration from the four stacks associated with each calciner shall not exceed 0.0180 grains per dry standard cubic foot PM–10 (including condensible PM–10) [2].	Method 5 (all particulate collected shall be counted as PM–10) and Method 202 at the scrubber outlet.
	Calciner scrubbers	Total gas flow rate through any one outlet stack shall not exceed 40,800 dry standard cubic feet per minute.	Method 2.
		The calciner scrubbers shall be exempt from opacity limitations.	
9b	Calciner traveling grate—fugitive emissions.	b. Opacity shall not exceed 10% over a 6 minute average.	Method 9.
10	Calciner cooler vents	Emissions from any one calciner cooler vent shall not exceed 4.40 lb. PM–10/hr (excluding condensible PM–10).	Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
11	Nodule pile	Opacity shall not exceed 20% over a 6 minute average.	Method 9.
12a	North nodule discharge baghouse.	a. Emissions shall not exceed 0.20 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
12b	South nodule discharge baghouse.	b. Emissions shall not exceed 0.20 lb. PM–10/hr (excluding condensible PM–10).	b. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.

TABLE 1 TO §49.10711—Continued

I Source No.	II Source description	III Emission limitations and work practice requirements	IV Reference test method
12c	North and south nodule discharge baghouse outside capture hood—fugitive emissions.	c. Opacity shall not exceed 10% over a 6 minute average.	c. Method 9.
13	Nodule reclaim baghouse	a. Emissions shall not exceed 0.90 lb. PM–10/hr (excluding condensible PM–10).	Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
14	Screened shale fines pile adjacent to the West shale building.	Opacity shall not exceed 20% over a 6 minute average.	Method 9.
	Proportioning building		
15a	a. East nodule baghouse	a. Emissions shall not exceed 0.60 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
15b	b. West nodule baghouse	b. Emissions shall not exceed 0.30 lb. PM–10/hr (excluding condensible PM–10).	b Methods 201/201A .
		Opacity shall not exceed 10% over a 6 minute average.	Method 9
15c	c. Proportioning building—fugitive emissions.	c. Opacity shall not exceed 10% over a 6 minute average from any portion of the building.	c. Method 9.
16a	Nodule stockpile baghouse	a. Emissions shall not exceed 0.30 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
16b	Nodule stockpile baghouse outside capture hood—fugitive emissions.	b. Opacity shall not exceed 10% over a 6 minute average.	b. Method 9.
17a	Dust silo baghouse	a. Emissions shall not exceed 0.150 lb. PM–10/hr(excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
17b	Dust silo fugitive emissions and pneumatic dust handling system.	b. Opacity shall not exceed 10% over a 6 minute average from any portion of the dust silo or pneumatic dust handling system.	b. Method 9.
	Furnace building		
18a	a. East baghouse	a. Emissions shall not exceed 0.80 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
18b	b. West baghouse	b. Emissions shall not exceed 0.80 lb. PM–10/hr (excluding condensible PM–10).	b. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
18c	c. Furnace building; any emission point except 18a, 18b, 18d, 18e, 18f, or 18g.	c. Until April 1, 2002, opacity shall not exceed 20% over a 6 minute average.	c. Method 9.
		Effective April 1, 2002, opacity shall not exceed 10% over a 6 minute average.	Method 9.
18d	d. Furnace #1 Medusa-Andersen	d, e, f, g: Emissions from any one Medusa-Andersen stack shall not exceed 2.0 lb/hr (excluding condensible PM–10).	d, e, f, g: Methods 201/201A.
18e	e. Furnace #2 Medusa-Andersen		
18f	f. Furnace #3 Medusa-Andersen	Opacity from any one Medusa-Andersen shall not exceed 10% over a 6 minute average.	Method 9.
18g	g. Furnace #4 Medusa-Anderson		
19	Briquetting building	Opacity shall not exceed 10% over a 6 minute average from any portion of the building.	Method 9.
20a	a. Coke handling baghouse	a. Emissions shall not exceed 1.70 lb. PM–10/hr (excluding condensible PM–10).	a. Methods 201/201A.
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
20b	b. Coke unloading building	b. Opacity shall not exceed 10% over a 6 minute average from any portion of the coke unloading building.	b. Method 9.
21a	a. Phosphorous loading dock (phos dock), Andersen Scrubber.	Emissions shall not exceed 0.0040 grains per dry standard cubic foot PM–10 (excluding condensible PM–10).	a. Methods 201/201A.
		Flow rate (throughput to the control device) shall not exceed manufacturer's design specification.	Method 2.

TABLE 1 TO § 49.10711—Continued

I Source No.	II Source description	III Emission limitations and work practice requirements	IV Reference test method
		Opacity shall not exceed 10% over a 6 minute average.	Method 9.
21b	b. Phosphorous loading dock—fugitive emissions.	b. Opacity shall not exceed 10% over a 6 minute average.	b. Method 9.
22	All roads	Opacity shall not exceed 20% over a 6 minute average.	Method 9.
23	Boilers	Emissions from any one boiler shall not exceed 0.090 lb. PM–10/hr (excluding condensible PM–10).	Methods 201/201A.
		Opacity from any one boiler shall not exceed 10% over a 6 minute average.	Method 9.
24	Pressure relief vents	Opacity shall not exceed 10% over a 6 minute average except: (i) during a pressure release, as defined in 40 CFR 49.10711(e)(7)(ii), which shall be exempt from opacity limits; and. (ii) during steaming and draining of the pressure relief vent drop tank, which shall occur no more than twice each day, opacity shall not exceed 20% over a 6 minute average.	Method 9.
		Pressure release point shall be maintained at 18 inches of water pressure at all times.	Inspection of pressure relief vent and monitoring device
25	Furnace CO emergency flares	Except during an emergency flaring caused by an emergency as defined in 40 CFR 49.10711(b), opacity shall not exceed 10% over a 6 minute average. Emissions during an emergency flaring caused by an emergency are exempt from opacity limitations.	Method 9.
26a	a. Existing elevated secondary condenser flare and ground flare.	a. *See* 40 CFR 49.10711(c)(5).	
26b	b. Excess CO burner (to be built to replace the existing elevated secondary condenser flare and ground flare).	b. Effective January 1, 2001: i. The control efficiency[1] of the air pollution control equipment shall achieve an overall control efficiency of at least 95% for PM–10 (including condensible PM–10) when inlet loadings equal or exceed 0.50 grains per dry standard cubic foot.	i. Methods 201/201A and Method 202 for the inlet (sampling locations to be determined). Method 201/201A (Method 5 if gas stream contains condensed water vapor) and Method 202 for the outlet.
		ii. Emissions from the excess CO burner shall not exceed 24.0 lbs PM–10/hr (including condensible PM–10).	ii. Method 201/201A (Method 5 if gas stream contains condensed water vapor) and Method 202 for the outlet.
		Effective January 1, 2001, opacity shall not exceed 10% over a 6 minute average.	Method 9.

[1] The control efficiency (as a percentage) of the air pollution control equipment shall be determined by the following equation:
CE (%)=100 {1 − ([Fho+Bho]/[Fhi+Bhi])}
Where CE is the control efficiency
Fhi is the front half emissions for the inlet
Bhi is the back half emissions for the inlet
Fho is the sum of the front half emissions from each stack for the outlet
Bho is the sum of the back half emissions from each stack for the outlet
Inlet and all outlet stacks to be sampled simultaneously for required testing.
The individual source tests for the inlet and outlet to the emission control system shall be conducted simultaneously or within 3 hours of each other with the same operating conditions.

[2] The individual source tests for the four stacks associated with each calciner shall be conducted simultaneously or within 3 hours of each other with the same operating conditions.

TABLE 2 TO §49.10711

I Source No.	II Source description	III V Reference test method	
1	Railcar unloading of shale (ore) into underground hopper.	Any visible emissions	Visual observation.
2	Main shale pile (portion located on Fort Hall Indian Reservation).	Any visible emissions	Visual observation.
3	Emergency/contingency raw ore shale pile.	Any visible emissions	Visual observation.
4	Stacker and reclaimer	Any visible emissions	Visual observation.
5a	East shale baghouse	a. 5% over a 6 minute average	a. Method 9.
5b	East shale baghouse building	b. Any visible emissions	b. Visual observation.
6a	Middle shale baghouse	a. 5% over a 6 minute average	a. Method 9.
6b	Middle shale baghouse building	b. Any visible emissions	b. Visual observation.
6c	Middle shale baghouse outside capture hood—fugitive emissions.	c. 5% over a 6 minute average	c. Method 9.
7a	West shale baghouse	a. 5% over a 6 minute average	a. Method 9.
7b	West shale baghouse building	b. Any visible emissions	b. Visual observation.
7c	West shale baghouse outside capture hood—fugitive emissions.	c. 5% over a 6 minute average	c. Method 9.
8a	a. Slag handling: slag pit area and pot rooms.	a. Until November 1, 2000, emissions from the slag pit area and the pot rooms shall be exempt from opacity limits and opacity action levels. Effective November 1, 2000, the opacity action level for this source shall be 5% over a 6 minute average. *Exemption:* Fuming of molten slag in transport pots during transport are exempt from opacity limits and opacity action levels provided the pots remain in the pot room for at least 3 minutes after the flow of molten slag to the pots has ceased.	Method 9.
8b	b. Recycle material pile	b. Any visible emissions	b. Visual observation.
8c	c. Dump to slag pile	c. Fuming of molten slag during dump to slag pile shall be exempt from opacity limits and opacity action levels.	
9a	Calciner scrubbers	a. The calciner scrubbers shall be exempt from opacity limits and opacity action levels.	
9b	Calciner traveling grate—fugitive emissions.	b. 5% over a 6 minute average.	
10	Calciner cooler vents	5% over a 6 minute average	Method 9.
11	Nodule pile	10% over a 6 minute average	Method 9.
12a	North nodule discharge baghouse.	a. 5% over a 6 minute average	a. Method 9.
12b	South nodule discharge baghouse.	b. 5% over a 6 minute average	b. Method 9.
12c	North and south nodule discharge baghouse outside capture hood—fugitive emissions.	c. 5% over a 6 minute average	c. Method 9.
13	Nodule reclaim baghouse	5% over a 6 minute average	Method 9.
14	Screened shale fines pile adjacent to the West shale building.	10% over a 6 minute average	Method 9.
	Proportioning building.		
15a	a. East nodule baghouse	a. 5% over a 6 minute average.	a. Method 9.
15b	b. West nodule baghouse	b. 5% over a 6 minute average	b. Method 9.
15c	c. Proportioning building—fugitive emissions.	c. Any visible emissions	c. Visual observation.
16a	Nodule stockpile baghouse	a. 5% over a 6 minute average	a. Method 9.
16b	Nodule stockpile baghouse outside capture hood—fugitive emissions.	b. 5% over a 6 minute average	b. Method 9.
17a	Dust silo baghouse	a. 5% over a 6 minute average	a. Method 9.
17b	Dust silo fugitive emissions and pneumatic dust handling system.	b. Any visible emissions	b. Visual observation.
	Furnace building.		
18a	a. East baghouse	a. 5% over a 6 minute average	a. Method 9.
18b	b. West baghouse	b. 5% over a 6 minute average	b. Method 9.
18c	c. Furnace building; any emission point except 18a, 18b, 18d, 18e, 18f, or 18g.	c. Until April 1, 2002, 10% over a 6 minute average.	c. Method 9.

TABLE 2 TO § 49.10711—Continued

I Source No.	II Source description	III V Reference test method	
		Effective April 1, 2002, 5% over a 6 minute average.	Method 9.
18d	d. Furnace #1 Medusa-Andersen	d, e, f, g: 5% over a 6 minute average	d, e, f, g: Method 9.
18e	e. Furnace #2 Medusa-Andersen.		
18f	f. Furnace #3 Medusa-Andersen.		
18g	g. Furnace #4 Medusa-Anderson.		
19	Briquetting building	Any visible emissions	Visual observation.
20a	a. Coke handling baghouse	a. 5% over a 6 minute average	a. Method 9.
20b	b. Coke unloading building	b. Any visible emissions	b.Visual observation.
21a	Phosphorous loading dock (phos dock), Andersen Scrubber.	a. 5% over a 6 minute average	Method 9.
21b	b. Phosphorous loading dock—fugitive emissions.	b. 5% over a 6 minute average	b. Method 9.
22	All roads	10% over a 6 minute average	Method 9.
23	Boilers	5% over a 6 minute average	Method 9.
24	Pressure relief vents	5% over a 6 minute average	Method 9.
25	Furnace CO emergency flares	Any visible emissions except during an emergency flaring caused by an emergency as defined in 40 CFR 49.10711(b). Emissions during an emergency flaring caused by an emergency are exempt from opacity limits and opacity action levels.	Visual observation.
26a	a. Existing elevated secondary condenser flare and ground flare.	a. Exempt from opacity limits and opacity action levels.	
26b	b. Excess CO burner (to be built to replace the elevated secondary condenser flare and ground flare).	5% over a 6 minute average	Method 9.

§§ 49.10712–49.17810 [Reserved]

APPENDIX TO SUBPART M OF PART 49—ALPHABETICAL LISTING OF TRIBES AND CORRESPONDING SECTIONS

Indian tribe	Refer to the following sections in subpart M
Burns Paiute Tribe	§§ 49.9861–49.9890
Chehalis Reservation—Confederated Tribes of the	§§ 49.9891–49.9920
Coeur d'Alene Tribe	§§ 49.9921–49.9950
Colville Reservation—Confederated Tribes of the	§§ 49.9951–49.9980
Coos, Lower Umpqua and Suislaw Indians—Confederated Tribes of the	§§ 49.9981–49.10010
Coquille Tribe	§§ 49.10011–49.10040
Cow Creek Band of Umpqua Indians	§§ 49.10041–49.10100
Grand Ronde Community—Confederated Tribes of the	§§ 49.10101–49.10130
Hoh Indian Tribe	§§ 49.10131–49.10160
Jamestown S'Klallam Tribe	§§ 49.10161–49.10190
Kalispel Indian Community	§§ 49.10191–49.10220
Klamath Indian Tribe	§§ 49.10221–49.10250
Kootenai Tribe	§§ 49.10251–49.10280
Lower Elwah Tribal Community	§§ 49.10281–49.10310
Lummi Tribe	§§ 49.10311–49.10340
Makah Indian Tribe	§§ 49.10341–49.10370
Muckleshoot Indian Tribe	§§ 49.10371–49.10400
Nez Perce Tribe	§§ 49.10401–49.10430
Nisqually Indian Tribe	§§ 49.10431–49.10460
Nooksack Indian Tribe	§§ 49.10461–49.10490
Port Gamble Indian Community	§§ 49.10491–49.10520
Puyallup Tribe	§§ 49.10521–49.10550
Quileute Tribe	§§ 49.10551–49.10580
Quinault Tribe	§§ 49.10581–49.10610
Samish Indian Tribe	§§ 49.10611–49.10640
Sauk–Suiattle Indian Tribe	§§ 49.10641–49.10670
Shoalwater Bay Tribe	§§ 49.10671–49.10700
Shoshone–Bannock Tribes of the Fort Hall Indian Reservation	§§ 49.10701–49.10730

Indian tribe	Refer to the following sections in subpart M
Siletz Reservation—Confederated Tribes of	§§ 49.10731–49.10760
Skokomish Indian Tribe	§§ 49.10761–49.10790
Snoqualmie Indian Tribe	§§ 49.10791–49.10820
Spokane Tribe	§§ 49.10821–49.10850
Squaxin Island Tribe	§§ 49.10851–49.10880
Stillaquamish Tribe	§§ 49.10881–49.10920
Suquamish Indian Tribe	§§ 49.10921–49.10950
Swinomish Indians	§§ 49.10951–49.10980
Tulalip Tribes	§§ 49.10981–49.11010
Umatilla Reservation—Confederated Tribes of the	§§ 49.11011–49.11040
Upper Skagit Indian Tribe	§§ 49.11041–49.11070
Warm Springs Reservation—Confederated Tribes of the	§§ 49.11071–49.11100
Yakama Indian Nation—Confederated Tribes and Bands of the	§§ 49.11101–49.11130