ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[FRL–6419–7]

RIN 2050–AE33

Technical Assistance Grant Program

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is proposing to streamline the Technical Assistance Grant (TAG) program under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The proposed changes simplify application and management procedures, and allow advance payments up to $5,000. The intent of these changes is to make grants for technical assistance more readily available to local community groups and to promote effective public participation in the Superfund cleanup process.

DATES: Please submit comments by October 8, 1999.

ADDRESSES: Written comments should be sent to: Lois Gartner, Office of Emergency and Remedial Response, 5204–G, U.S. Environmental Protection Agency, 401 M Street SW, Washington, D.C. 20460. Inquiries may also be submitted via electronic mail (E-mail) to gartner.lois@epa.gov. The Agency requests that commenters follow the following format: type or print comments in ink, and cite, where possible, the paragraphs in this proposal to which each comment refers. Electronic comments must be submitted as a WP5.1 or WP6.1 file or as an ASCII file avoiding the use of special characters. Comments will also be accepted on disks in the formats above.

FOR FURTHER INFORMATION CONTACT: Lois Gartner, Office of Emergency and Remedial Response, 5204–G, U.S. Environmental Protection Agency, 401 M Street SW, Washington, D.C. 20460 (703) 603–8889 or the RCRA/Superfund Hotline from 8:30am to 7:30pm, Monday through Friday, toll free at (800) 553–7672 or in the Washington area, (703) 412–3323 or TTY (800) 553–7672.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

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I. Introduction

A. Authority

EPA issues this notice of proposed rulemaking under the authority of section 117(e) of the Comprehensive Environmental, Response, Compensation and Liability Act of 1980, as amended 42 U.S.C. 9617(e). Section 117(e) authorizes the President to make available Technical Assistance Grants of up to $50,000 to groups of individuals which may be affected by a release or threatened release at Superfund sites to obtain assistance in interpreting and disseminating information related to site activities. Section 117(e) requires the President to promulgate rules for issuing these grants before processing any grant applications. Executive Order 12580 subsequently delegated to EPA the authority to implement section 117(e).

B. Background of Rulemaking

In 1992, EPA promulgated a final rule to govern the award and administration of TAGs (57 FR 45311 (Oct. 1, 1992)). The Agency based the requirements codified in the final regulation on its early experience with the TAG program and comments generated by the Agency's interim final rule (IFR) (53 FR 9736 (Mar. 24, 1988)), and amendments to interim final rule (54 FR 49848 (Dec. 1, 1989)). The IFR detailed the specific requirements for obtaining TAGs and enabled EPA to issue grants while it received comments for consideration in development of the final rule. Those comments and practical experience led the Agency to develop a final rule which streamlined the program's application and management procedures reflected in the IFR.

The Agency's experience with the TAG program in the years since it published the final rule has led the Agency to recognize the need to further streamline TAG application and management procedures. In addition, the Agency has drafted the proposed rule in a more readable format to increase accessibility to the program. The Agency publishes this NPRM today to solicit comments for the Agency's consideration in promulgating a revised final rule for TAGs.

II. Explanation of Changes to the Current Regulations

A. General Changes

With this proposed rule, EPA is changing the format of the TAG regulations by presenting them in a question and answer structure. The Agency believes this format will make the regulations easier for applicants and recipients to use. As a result of this new format, EPA proposes to move and renumber many of the current sections and, in some instances, to break up sections to organize the information under more precise headings. Additionally, EPA updated references to other applicable regulations to reflect the changes made to those regulations since the Agency promulgated the current final regulation in October 1992. Specifically, this subpart changes 40 CFR part 30 citations and deletes references to 40 CFR part 33 citations. 40 CFR part 30 is the EPA's general regulation for assistance agreements (for example, grants). It establishes the regulations by which EPA awards, administers and closes out grants and cooperative agreements to non-governmental entities.

B. Definitions

Budget period. To be consistent with terms used in the new 40 CFR part 30, EPA proposes to change the term budget period to funding period. In addition, EPA proposes to modify the definition of funding period by eliminating the requirement that funding periods be a maximum of three years. This modification would allow for the length of funding periods to be tailored to site-specific needs.

Affiliate, Allocable cost, Allowable cost, Cost analysis, Eligible cost, Letter of intent (LOI), National Priorities List (NPL), Outlays, Project period

Reasonable cost, Suspend, and *Operation and maintenance.* EPA proposes to add these definitions to increase reader understanding of terms used throughout this proposed rule.

Advance payment. EPA proposes to add this definition because it reflects a new provision not found in the current final rule.

C. Eligibility and Responsibility Requirements

Under eligibility requirements, EPA proposes to deem organizations that are affiliated with national organizations to be ineligible for a TAG. The basis for this change is that the TAG program is meant to assist communities directly affected by Superfund sites. Therefore, the intended recipients of TAGs are local grassroots organizations that form out of affected communities. By deeming groups associated with national organizations ineligible, EPA intends to exclude any groups with agendas that might include national issues and concerns.

EPA proposes to eliminate the responsibility requirement that organizations that were not incorporated specifically for the purpose of representing affected individuals at the site demonstrate a ''substantial'' history of involvement at the site. Such organizations would be required to demonstrate a history of involvement at the site, but it would not need to be substantial. Some ways that a group might demonstrate a history of involvement at the site include: members of the group have attended public meetings regarding the site and/or a group has held its own meeting(s) focusing on issues surrounding the site (and has agenda(s) reflecting such a focus). EPA, however, will retain full discretion in making its determination regarding an applicant's history of involvement at a site.

EPA also proposes to modify the responsibility requirements by prohibiting TAG recipients from restricting access to their group by charging membership fees or by using other means to limit participation in a TAG organization. EPA believes TAG groups should be open to all interested individuals as long as the individuals are not participating in the group as representatives of ineligible entities. (Under both the current and proposed rule, if an individual has a significant financial involvement with a PRP, EPA may decide not to allow that individual to participate in the TAG group even if he or she is not participating in the group as a representative of a PRP.) The purpose of the TAG program is to promote meaningful public participation in decisions at a Superfund site by providing communities the means to obtain independent technical assistance in interpreting information about a site. TAG recipients that restrict access to their group undermine the very purpose of the program.

D. Evaluation Criteria

EPA proposes several changes to the application evaluation criteria. First, EPA proposes to eliminate the distinction between sole and multiple applicants because under the current rule and the proposed rule, whether there are one applicant or multiple applicants, every applicant must meet the same evaluation criteria. Another proposed change would eliminate the points for each criterion in the current final rule and make all proposed criteria be of equal weight. Under both the current and proposed rule, applicants are ranked with respect to all evaluation criteria. EPA will select the highest ranking applicant of the applicants meeting all the criteria.

Finally, EPA proposes to eliminate the current requirement that applicants demonstrate the presence of an actual or potential health, economic or recreational threat posed by the site. Removal of this requirement streamlines the application process. The current rule requires the demonstration of these actual or potential threats because, at the time the final rule was written, EPA thought there would be many groups competing for a TAG at one site. By including this requirement in the application, EPA sought to make certain the group receiving the TAG was the one ''most directly affected by a site.'' However, the Agency's experience since the final rule was written is that there is usually only one applicant per site. Because of this trend and because the very basis for sites being proposed or made final on the National Priorities List (NPL) is that the Agency has determined that a potential or actual human health and/or environmental threat exists, asking applicants to repeat what the Agency has already determined is burdensome and redundant. While actual or potential economic or recreational threats are not part of the basis for NPL proposal or listing, the Agency does not believe it is necessary to ask applicants to demonstrate the presence of these threats. The presence of potential or actual human health and/or environmental threats is sufficient. Finally, by making groups affiliated with national organizations ineligible, EPA believes it is making certain that only local organizations made up of affected individuals surrounding a Superfund site will be eligible for TAGs. As with the current rule, this proposed rule considers ''affected'' to mean ''subject to an actual or potential, health, economic or environmental threat.''

E. Timing of Award

The proposed rule clarifies that TAGs may be awarded throughout the response action at the site, including the operation and maintenance phase. By including this language, EPA hopes to emphasize to communities that TAG funds are available throughout the Superfund process.

F. Ineligible Activities

EPA proposes to clarify, without modifying, what is meant by ''political activity and lobbying'' and what is meant by ''activities inconsistent with the cost principles stated in Office of Management and Budget (OMB) Circular A–122'' by adding examples for each category. TAG recipients frequently require some assistance from EPA in determining whether the federally funded activities they engage in constitute lobbying or are otherwise unallowable under OMB Circular A–122. EPA has decided to include examples of unallowable activities in the TAG regulations to assist recipients in identifying the types of activities that cannot be federally funded rather than merely referring recipients to the OMB circular. EPA, however, does not intend to change in any way the lobbying restrictions or any other provision of OMB Circular A–122.

G. Eligible Activities

EPA has made only editorial changes in the proposed rule regarding eligible activities. First, the proposed rule explicitly states that procuring the services of a grant administrator is an eligible expenditure. While the cost of a grant administrator has always been considered allowable by EPA as a reasonable and necessary expenditure of a TAG grant, the final TAG rule did not specifically identify it as an eligible expenditure. Second, in the proposed rule the provision allowing the use of TAG funds for technical advisor health and safety training is included in the overall discussion of eligible expenses rather than in the section on Ineligible Activities.

H. Technical Advisor's Qualifications

EPA proposes several changes to the provision regarding the technical advisor qualifications. One proposed modification is to detail the type of experience a technical advisor should

have. This experience should include communicating problems and issues associated with hazardous or toxic waste, redevelopment, relocation and health issues to the public. A second proposed modification is to eliminate the other requirements currently contained in § 35.4065(b) that call for a technical advisor to: have experience in making technical presentations and working with affected individual or community groups or other groups of individuals, and demonstrated writing skills. EPA believes these requirements are unnecessary because they are captured in the proposed paragraph § 35.4190(c). Finally, EPA proposes to clarify that the requirements regarding a technical advisor's qualifications do not preclude the hiring of technical advisors with expertise in the fields of relocation, redevelopment and health issues.

Use of TAG funds to hire relocation, redevelopment and health experts are consistent with the statutory intent of the program which is to ''obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action'' at Superfund facilities. When relocation is seriously being considered as a remedy, residents need to understand a multitude of issues associated with the relocation process as prescribed in the Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970 as amended, 42 U.S.C. 460 *et seq.* (otherwise referred to as the Uniform Relocation Act or URA). Similarly, the consideration of future land use and its relationship to Superfund site reuse/redevelopment is now an inherent component to the Superfund process. Community plans and preferences regarding future land use(s) are an important part of the successful return of Superfund sites to beneficial use. Issues associated with the health effects of toxic waste are also a common concern held by communities. While health advisors are not permitted to generate any new health data through biomedical testing (for example, blood or urine testing), clinical evaluations, health studies, surveillance, registries and/or public health interventions, they can interpret the health aspects associated with information found in site-related documents.

While EPA believes the use of TAG funds for technical advisors with expertise in relocation issues is an appropriate use of TAG funds, the Agency also believes access to such technical advisors must be limited. Because EPA's preference is to restore property so people can live in their homes, EPA believes relocation technical advisors can only be procured by communities when the Agency is seriously considering permanent relocation (for example, relocation is one of several remedial alternatives being considered in a feasibility study).

For technical advisors with expertise in relocation issues, EPA believes it is important that such experts have demonstrated knowledge, training and experience in relocations, including knowledge of the URA. Furthermore, EPA believes relocation technical advisors should have experience working with developers, brokers and lenders and demonstrated knowledge of appraisals, title searches, and State and local tax laws. All of these areas of expertise are essential if a technical advisor is going to successfully interpret information regarding relocation as a remedy. TAG funds, however, should not be used to pay for appraisals, title searches, real estate agents' or brokers' services.

For redevelopment technical advisors, EPA believes it is important for such advisors to have knowledge, training, and experience in land use planning with an emphasis on economic development, environmental planning or related fields as appropriate. These qualifications are necessary to ensure redevelopment assistance is meaningful to communities.

Finally, health advisors must have received their public health or related training at accredited schools of medicine, public health, or accredited academic institutions of other related disciplines and be associated with such institutions. These requirements will ensure public health advisors serving communities are appropriately trained and qualified to assist communities on public health issues. Health advisors should possess demonstrated knowledge, training and experience in public health issues as they relate to toxic and hazardous waste.

I. Procurement

The regulations governing procurement under grants at 40 CFR part 33 were repealed since the publication of the last TAG rule. Therefore, references to 40 CFR part 33 have been deleted and replaced by the appropriate provisions in 40 CFR part 30. Additionally, paraphrased versions of the positive efforts required by 40 CFR part 30 with respect to hiring small business enterprises (SBEs), minority business enterprises (MBEs), and women-owned business enterprises (WBEs) have been included. The purpose in including the positive efforts is to heighten the awareness of recipients that they need to make such efforts to contract with SBEs, MBEs and WBEs.

In 1997, in order to ensure consistency with the Supreme Court decision in *Adarand* v. *Pena,* 115 S. Ct. 2097 (1995), EPA issued revised Guidance for the Agency's MBE/WBE program (*see* 62 FR 45645 (Aug. 28, 1997)). This Guidance may be accessed on the Internet at http://www.epa.gov/osdbu. Under this Guidance, ''fair share'' objectives are negotiated with recipients of EPA financial assistance based on the availability of qualified MBEs and WBEs in the relevant procurement market. In the case of the TAG program, for example, the relevant markets would be supplies, services and equipment. Recipients are not required to negotiate their own MBE/WBE goals (unless they wish to do so). Instead, they may accept the goals of the State Agency which would have jurisdiction over Superfund activities in the relevant state. State Agency goals may be found on the Internet at http://Yosemite.epa.gov/ogd/mbe-wbe.nsf and other information on the EPA Grants page at http://www.epa.gov/ogd/grants.

EPA is in the process of initiating a rulemaking for its MBE/WBE program, in which the public will have an opportunity for notice and comment. To the extent that EPA's final MBE/WBE rulemaking differs from the information found here, the MBE/WBE rulemaking will control.

J. Sanctions

This rule includes a detailed list of the sanctions EPA may impose when grant recipients fail to comply with a term of a grant agreement. These sanctions are the same as those set forth in 40 CFR 30.62 and 30.14 and are included in the TAG rule only as a convenience to the reader. EPA does not intend to change the rights or responsibilities of either the recipient or EPA under the provisions for enforcement or special award conditions in 40 CFR part 30.

K. Method of Payment

EPA proposes to provide TAG recipients, under certain circumstances, the opportunity to receive advance payments. EPA proposes this change because it recognizes that some grant recipients are newly formed entities lacking resources to undertake even basic organizational start up activities. Advance payments would provide such groups with the necessary resources to

establish their organization and implement their grant work plan.

While EPA supports advancing funds to TAG recipients for start up purposes, EPA also believes it is important to set appropriate limits on such advances. Therefore, EPA proposes several limits on cash advances. First, only those recipients who lack the resources to incur expenses in advance of reimbursement would be eligible for cash advances. Second, EPA proposes a $5,000 cap on the amount of money it would advance to a recipient. EPA believes this amount is sufficient to cover reasonable and expected start up expenses for a group. Third, the types of expenditures for which recipients could seek advance payments will be limited to expenditures for opening a bank account, supplies and postage, advance on rent or lease for office space, advertising related to procurement, and rental of other equipment. EPA believes expenditures associated with contracts for technical advisors and other contractors are not appropriate and will not be allowed for advance payments because such expenditures are not necessary to a group's start up functions.

In addition, EPA proposes to require recipients to request in writing the specific activities and/or goods/services for which the group needs the funds. This requirement will ensure EPA has an opportunity to review and authorize the specific use(s) of any advance payments. Finally, advance payments will only be provided on a one-time basis; after an initial advance EPA will reimburse recipients for actual expenses they incur.

L. Grant Limitations

With this rule, EPA proposes to set forth its current interpretation of section 117(e) of CERCLA which provides that ''Not more than one grant may be made under this subsection with respect to a single facility, at all stages of remedial action'' (CERCLA 117(e)). In the administration of this program, EPA has interpreted this provision to mean that there can be only one TAG recipient at a site at any one time during the Superfund process. This interpretation means that if a TAG to one recipient is terminated, EPA can make a new grant to a new recipient. Accordingly, while there can be only one TAG at a time there can be more than one recipient of a TAG at a single facility. Occasionally, a grant recipient decides not to complete the work for which it received a $50,000 TAG, or a TAG recipient, although eligible to receive an additional $50,000 as a renewal of its original grant, elects not to do so and decides to end its participation at the site.

If, in instances where a TAG is terminated, EPA were to interpret section 117(e) to preclude another community group from receiving a TAG for the site involved, then the affected community of that site would lose the benefit of technical assistance to promote public participation in all stages of the response action as a result of the original grant recipient's actions. EPA does not believe Congress intended such a punitive result, particularly since it would undermine the purpose of section 117 of CERCLA—to promote public participation at Superfund sites. Rather, EPA believes that section 117(e) is only intended to limit to one the number of TAG recipients at any given time at a single site.

Therefore, under § 35.4040 of the proposed rule, EPA will explicitly allow changes in TAG recipients if the original TAG is terminated. Under § 35.4060, a subsequent recipient can only be funded for the amount left by the first recipient of the grant. In the case of a site with characteristics indicating additional funds are necessary due to the nature or the volume of site-related information, the new recipient can receive the amount for which the original recipient was eligible. In either case, the second recipient is not responsible for actions taken by the first recipient, nor is the second recipient responsible for how the first recipient expended the funds it received from EPA.

Finally, EPA proposes to eliminate the 20 percent limit on a TAG recipient's administrative expenses in order to relieve recipients of the obligation to differentiate between programmatic and administrative costs for purposes of the TAG regulations. This elimination will reduce the information collection burden on TAG recipients. As always, under OMB Circular A–122, administrative costs will only be allowable costs of the TAG to the extent they are reasonable and necessary.

Although it proposes to ease this administrative expense cap, EPA believes that continued scrutiny of all grant costs continues to be necessary, including oversight of a recipient's administrative expenses. EPA believes that the enforcement provisions of § 35.4250 (''Under what circumstances would EPA terminate our TAG?'') in the proposed regulations provide EPA the opportunity to ensure the identification of abuses and to make certain that recipients expend Federal funds in accordance with the mission of the TAG program. This proposed rule would give EPA and grant recipients the flexibility to negotiate grants without having unnecessary limitations on administrative expenses not required by statute.

M. Waivers

CERCLA section 117(e) provides that technical assistance grants may not exceed $50,000 but this limit can be waived when necessary to carry out the purposes of CERCLA section 117. The current TAG rule provides for a waiver from the $50,000 limit if applicants are affected by multiple sites or ''especially complex'' sites. The ''especially complex'' standard is vague and difficult to apply; eliminating it will enlarge the eligible universe of TAG recipients who would benefit from the waiver provision when appropriate. Therefore, under the proposed rule, a waiver will be provided if site characteristics indicate that additional funds are necessary as determined by the presence of any three of nine predetermined criteria. The Agency believes these criteria are the standards by which the Agency can best determine whether a waiver of the $50,000 limit on the amount of the award is necessary to carry out the purposes of the TAG program.

EPA proposes two changes to the section on waivers from this matching share requirement. First, the proposed rule will eliminate the requirement that a group demonstrate an ''unusual'' financial hardship. Instead, a group will be eligible for a waiver if it demonstrates that providing the match would cause financial hardship. EPA proposes this change because it believes that ordinary financial hardship is sufficient to justify a waiver. Moreover, this change is consistent with the statue which requires only that grant recipients demonstrate financial need for EPA to be able to waive the matching share requirement.

Second, this rule will eliminate the requirement that an applicant for a waiver to the matching share requirement show that it has made a good faith effort at raising the match, including in-kind services, and has failed. The good faith requirement to raise a match is not required by statute and EPA believes eliminating it will make TAGs more available to financially disadvantaged groups. Furthermore, EPA believes, based on its experience in implementation of the TAG program, that most applicants will continue to provide in-kind services, whether or not such services are required to obtain the waiver.

N. Disputes

EPA proposes to require TAG disputants to exhaust their administrative remedies before they may obtain judicial review of an Agency action. Currently, disputants are given the opportunity to seek further administrative review of the disputes decision official's decision and the Regional Administrator's decision, but disputants are not *required* by statute or regulation to seek such review before going to court. When the current TAG rule was finalized, generally courts would have imposed the requirement that disputants seek the highest level of administrative review permitted by the Agency providing judicial review of the dispute. Subsequently, the Supreme Court held in *Darby* v. *Cisneros* that the Administrative Procedure Act ''explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule (and therefore,) it would be inconsistent with the plain language of (the APA) to require litigants to exhaust optional appeals as well.'' 509 U.S. 137, 147 (1993).

EPA has decided to require disputants to exhaust their administrative remedies before seeking judicial review so as to promote the resolution of TAG grant disputes in a non-adversarial manner at the Agency level and to assure consistency in the application of the TAG regulations across regions. Specifically, EPA will require disputants to seek review of the dispute decision official's determination by the Regional Administrator and review by the Assistant Administrator of the Office of Solid Waste and Emergency Response before seeking judicial review of the dispute.

O. Record Retention and Audits

Substantively, EPA proposes to eliminate the record retention requirement for those TAG recipients who elect to have EPA preserve their financial records. This change reflects a recommendation provided by the General Accounting Office (GAO). However, those recipients who do not send their financial records to EPA would still be required to keep them, as at present. In addition, EPA proposes to remove the reference to OMB Circular A–133, Audits of Institutions of Higher Education, which requires recipients who spend more than $300,000 in one fiscal year to undertake an audit of their finances. EPA proposes removing this reference because it is highly unlikely that TAG recipients would meet this threshold. Finally, EPA proposes to include language informing recipients they must comply with OMB Circular A–122, Cost Principles for Non-Profit Organizations. This requirement is not new to the TAG program, but previously it was not explicitly included in this subpart.

P. Reports

EPA proposes to restructure the reporting requirements by putting the information in a chart format to make it easier for recipients to understand. In addition, EPA proposes to add reporting requirements necessitated by the inclusion of advance payments. EPA also proposes to add information about the reporting requirements regarding positive efforts the recipient has made to procure from small business enterprises, minority-owned business enterprises, and women-owned business enterprises. This requirement is not new; EPA merely proposes to identify it in the report requirements section of the rule so that applicants and recipients are aware of it.

Substantively, EPA proposes to eliminate the requirement that recipients submit draft final reports. EPA believes only a final report is necessary because Federal review of draft reports contributes minimally to the administration of the program. This proposed reporting change, like the previous two, eases the information collection burden for TAG recipients.

Q. Budget Period (Funding Period)

EPA proposes replacing the term ''budget period'' with the term ''funding period.'' This change in terms makes the TAG rule consistent with those used in 40 CFR part 30. Substantively, EPA proposes eliminating the current three-year funding period and replacing it with a period to be negotiated by the applicant and EPA. The mutually agreed upon period would be documented in the award agreement. EPA makes this proposal because it believes TAG recipients should be allowed flexibility when formulating their budget to synchronize the period of time during which recipients anticipate having a technical advisor involved with the schedule of work at a site.

R. Closing Out Grants

Although 40 CFR 30.70 through 30.73 will continue to govern the close out process and procedures, the proposed regulation includes a summary of those regulations in order to help recipients understand the grant close out process and procedures for TAGs. As with all other instances where EPA summarizes provisions found in other regulations, EPA includes the summary of the grant close out process and procedures only as a convenience to the reader. EPA does not intend to change the rights or responsibilities of either the recipient or EPA under the provisions for closing out grants in 40 CFR part 30.

S. State Administration

EPA proposes to move the regulations governing the administration of the TAG program by States to 40 CFR part 35, subpart O which governs the award of cooperative agreements to States and Indian tribes under section 104(d) of CERCLA. EPA is in the process of revising subpart O at this time. Therefore, this proposed regulation does not include any provisions regarding the State administration of TAGs.

III. Existing Grants

TAG recipients receiving a TAG under previous regulations may request having their grant administered under this regulation once it is final. Groups wishing to do so must seek amendments to their grant from the Award Official. However, any funds spent prior to the finalization of this rule are subject to the previous regulation. Amendments to current grants will apply only to future work.

IV. Regulatory Analysis

A. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This proposed rule would not have a significant impact on a substantial number of small entities because this regulation imposes no new requirements, but rather streamlines and simplifies current requirements. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, and tribal governments, in the aggregate,

or by the private sector, of $100 million or more in any one year. This regulation contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The UMRA excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from conditions of federal assistance.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

C. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), EPA is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. Where available and potentially applicable voluntary consensus standards are not used, the Act requires EPA to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards.

EPA does not believe that this proposed rule addresses any technical standards subject to NTTAA. Commenters who disagree with this conclusion should indicate how the proposed rule is subject to the Act and identify any potentially applicable voluntary consensus standards.

D. Executive Order 13045

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

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

E. Paperwork Reduction Act

The Office of Management and Budget has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2030–0020. This rule does not contain any collection of information requirements beyond those already approved. Since this action imposes no new or additional information collection, reporting or record keeping requirements subject to the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.*, no information request will be submitted to the Office of Management and Budget for review.

F. Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

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

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

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

OMB has determined this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866. As such, this action was not submitted to the Office of Management and Budget (OMB) for review.

G. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

H. Executive Order 13084

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

This proposed rule does not significantly or uniquely affect the communities of Indian Tribal

governments nor does it impose substantial direct compliance costs on those communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply.

I. Executive Order 12898

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' as well as through EPA's April 1995, ''Environmental Justice Strategy, OSWER Environmental Justice Task Force Action Agenda Report,'' and National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities.

No action from the proposed rule will have a disproportionately high and adverse human health and environmental effects on any segment of the population. In addition, the proposed rule does not impose substantial direct compliance costs on those communities. Accordingly, the requirements of the Executive Order do not apply.

List of Subjects in 40 CFR Part 35

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

Dated: August 6, 1999.

Carol M. Browner,

Administrator.

Accordingly, as set forth in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 35 as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for part 35 is revised to read as follows:

Authority: 42 U.S.C. 4368b, unless otherwise noted.

2. Subpart M is revised to read as follows:

Subpart M—Grants for Technical Assistance

Sec.
35.4000 Authority.

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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.

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; and

(c) Visiting the site vicinity periodically during cleanup, if possible, to observe progress and provide technical updates to your group.

§ 35.4010 What does this subpart do?

This subpart establishes the regulations for TAGs awarded by EPA.

§ 35.4011 What other regulations apply to the award of TAGs?

EPA's general grant regulations for nonprofit organizations at 40 CFR part 30 also apply to TAGs.

§ 35.4012 If there appears to be a difference between the requirements in 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 that 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.

§ 30.4040 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;

(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; and

(c) Not restrict access to your group by charging membership fees or by using other means to limit participation in your 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. For example, if your group receives $50,000 in Federal funds, the matching share would be $12,500, which is 20 percent of the total project costs of $62,500 (meaning, $50,000 plus $12,500).

(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 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?

The EPA regional office award official for your grant may waive your group's $50,000 limit and provide up to $100,000 per site under the following circumstances:

(a) Your group is geographically close to more than one eligible site (for example, two or more sites × $50,000 = grant of $100,000) and wishes to receive funding for technical assistance to address multiple eligible sites; or

(b) 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 nine 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) A legislative or regulatory change results in new site information after EPA awards the TAG;

(vii) EPA expects a cleanup lasting more than eight years from the beginning of the RI/FS through construction completion;

(viii) Significant public concern exists, where large groups of people in the community require many meetings, copies, etc.; and

(ix) Any other factor that, in EPA's judgment, indicates that the site is unusually complex.

What TAG 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 do 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 if EPA determines that your group lacks the resources to incur expenditures for necessary start up activities in advance of (or prior to) reimbursement by us.

§ 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 an LOI. (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.

§ 35.4120 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 60 days from the date the public notice appears in your local newspaper announcing that EPA has received an LOI. 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.

§ 35.4125 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.

§ 35.4130 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.

§ 35.4135 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.

§ 35.4140 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.

§ 35.4145 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.''

§ 35.4150 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.

§ 35.4155 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.

§ 35.4165 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..	Annually, within 90 days after the anniversary date of the start of your TAG project, and within 90 days after the end of your TAG's funding period.
(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 (relocation technical advisors may only be hired under certain circumstances, see § 35.4200);

(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) and must be associated with such institutions.

(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 people:

(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, anyone 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) Anyone 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;

(b) Must award only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed contract; and

(c) Can only hire a relocation technical advisor when EPA is seriously considering permanent relocation as part of the site remedy (for example, permanent relocation is one of several remedial alternatives being considered in the feasibility study).

§ 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 (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 related to any proposed or pending litigation, with such parties;

(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 above, 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));

(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.

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;

(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.

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 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)?

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, 726 Minnesota Avenue, 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, 401 M Street SW, Washington, DC 20460.

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