

which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (34)(g), of the Instruction, an “Environmental Analysis Check List” and a “Categorical Exclusion Determination” are not required for this rule because it concerns an emergency situation of less than 1 week in duration.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–0173 to read as follows:

#### § 165.T01–0173 Safety Zone: Longwood Events Wedding Fireworks Display, Boston Harbor, Boston, MA.

(a) *Location.* The following area is a safety zone:

All waters of Boston Harbor, from surface to bottom, within a four hundred (400) yard radius of the fireworks launch site located in Boston Harbor at approximate position 42°21'42"N, 071°2'36"W.

(b) *Effective Date.* This rule is effective from 8:45 p.m. through 9:45 p.m. on March 29, 2008.

(c) *Definitions.* (1) Designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the Captain of the Port (COTP).

(2) [Reserved]

(d) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within this zone by any

person or vessel is prohibited unless authorized by the Captain of the Port (COTP), Boston or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's designated representative to obtain permission by calling the Sector Boston Command Center at 617–223–5761. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the COTP's designated representative.

Dated: March 12, 2008.

**Gail P. Kulisch,**

*Captain, U.S. Coast Guard, Captain of the Port, Sector Boston.*

[FR Doc. E8–6149 Filed 3–25–08; 8:45 am]

**BILLING CODE 4910–15–P**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 30, 31, 33, 35, and 40

[Docket ID NO. EPA–HQ–OA–2002–0001; FRL–8545–9]

RIN 2090–AA38

#### Participation by Disadvantaged Business Enterprises in Procurement Under Environmental Protection Agency (EPA) Financial Assistance Agreements

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** This action will harmonize EPA's statutory Disadvantaged Business Enterprise procurement objectives with the United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In that case, the Supreme Court extended strict judicial scrutiny to federal programs that use racial or ethnic criteria as a basis for decision making. Remedying discrimination is recognized as a compelling government interest, and this rule is promulgated on the understanding that the statutory provisions authorizing its adoption were enacted for that remedial purpose. This rule sets forth a narrowly tailored EPA program to serve the compelling government interest of remedying past and current racial discrimination through agency-wide DBE procurement objectives. EPA intends to evaluate the propriety of the Disadvantaged Business

Enterprise program in 7 years through subsequent rulemaking. This rule also revises EPA's Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) program and renames it EPA's Disadvantaged Business Enterprise (DBE) Program. EPA is removing existing MBE/WBE specific provisions in regulations for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations; and uniform administrative requirements for grants and cooperative agreements to state and local governments, state and local assistance, and research and demonstration grants, and is consolidating and adding to these provisions in this new regulation. This rule affects only procurements under EPA financial assistance agreements. This rule does not apply to direct Federal procurement actions. If you are a recipient of an EPA financial assistance agreement or an entity receiving an identified loan under a financial assistance agreement capitalizing a revolving loan fund, this rule may affect you.

**DATES:** This final rule is effective May 27, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OA–2002–0001. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the HQ EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Environmental Information is (202) 566–1752.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Patrick, Attorney Advisor, Office of the Administrator, Office of Small and Disadvantaged Business Utilization (OSDBU) by phone at (202) 566–2605, by e-mail at [patrick.kimberly@epa.gov](mailto:patrick.kimberly@epa.gov), or by fax at (202) 566–0548; or Cassandra Freeman, Deputy Director, Office of the Administrator, OSDBU by phone at

(202) 566-1968, by e-mail at [freeman.cassandra@epa.gov](mailto:freeman.cassandra@epa.gov), or by fax at (202) 566-0266. Both can be reached by mail to OSDBU, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., mail code 1230T, Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** The contents of this final rule are listed in the following outline:

### Contents of the Final Rule

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  - B. What are the Statutory Authorities for this Final Rule?
- II. Background
- III. Overview of Final Rule
- IV. Summary of Response to Public Comments
- V. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
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  - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
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  - I. National Technology Transfer and Advancement Act of 1995
  - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
  - K. Congressional Review Act

### I. General Information

#### A. Does This Rule Apply to Me?

If you are a recipient of an EPA financial assistance agreement, or an entity receiving an identified loan under a financial assistance agreement capitalizing a revolving loan fund, or a minority-owned, woman-owned, or small business, this rule may affect you. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

#### B. What Are the Statutory Authorities for This Final Rule?

EPA's primary statutory authorities for this final rule are:

1. Public Law 102-389 (42 U.S.C. 4370d), a 1993 appropriations act ("EPA's 8% statute"), which provides:

The Administrator of the Environmental Protection Agency shall, hereafter, to the fullest extent possible, ensure that at least 8 percent of Federal funding for prime and subcontracts awarded in support of

authorized programs, including grants, loans and contracts for wastewater treatment and leaking underground storage tanks grants, be made available to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (within the meaning of section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. 637(a)(5) and (6)), including historically black colleges and universities. For purposes of this section, economically and socially disadvantaged individuals shall be deemed to include women \* \* \*;

2. Public Law 101-549, Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note) ("EPA's 10% statute"), which states:

In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments which use funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of the total Federal funding for such research will be made available to disadvantaged business concerns. Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility \* \* \*

Other legal authorities and Executive Orders regarding this final rule include Public Law 99-499, the Superfund Amendments and Reauthorization Act of 1986; Public Law 100-590, the Small Business Administration Reauthorization and Amendment Act of 1988; Executive Order 12138, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating and Implementing a National Program for Women's Business Enterprise," issued May 18, 1979; Executive Order 11625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," issued October 13, 1971; and Executive Order 12432, "Minority Business Enterprise Development," issued July 14, 1983.

### II. Background

EPA's current Minority Business Enterprise/Woman-owned Business Enterprise ("MBE/WBE") program has three major components designed to ensure that minority and women-owned businesses have the opportunity to participate in procurements funded by EPA financial assistance agreements. Those components are as follows:

1. *Negotiating Fair Share Goals:* The current MBE/WBE program requires all recipients of EPA financial assistance agreements to negotiate goals with the Agency for the utilization of MBEs/WBEs for procurements funded by EPA financial assistance agreements. The goals are based on disparity studies or

availability analyses showing the availability of MBEs or WBEs in the financial assistance recipient's relevant geographic buying market. These goals do not operate as quotas.

2. *Using the "Six Positive Efforts" or "Six Affirmative Steps":* The "Six Positive Efforts" or "Six Affirmative Steps" are measures designed to ensure MBEs and WBEs are considered in a financial assistance recipient's procurement practices, and they contain measures a recipient may undertake to make procurements more open to MBEs and WBEs.

3. *Reporting Accomplishments:* Under the current MBE/WBE program, recipients of EPA financial assistance agreements are required to report on their accomplishments with the program using EPA Form 5700-52A. Reporting is the tool we use to assess whether or not the program is effective and actually translating into increased opportunities for MBEs and WBEs.

EPA's MBE/WBE Program is currently implemented through:

(1) Existing MBE and WBE provisions scattered throughout 40 CFR parts 30, 31, 35 and 40;

(2) Grant conditions; and

(3) The Agency's "Guidance for the Utilization of Small, Minority, and Women's Business Enterprises in Assistance Agreements."

In 1995, the Supreme Court's decision in *Adarand Constructors, Inc. v. Federico Pena*, Secretary of Transportation, 515 U.S. 200 ("Adarand"), extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In other words, such programs must be based on a compelling governmental interest, for example, remedying the effects of discrimination, and must be narrowly tailored to accomplish that interest.

Following the Adarand decision, in 1996, the Department of Justice (DOJ) began a review of affirmative action programs in the Federal Government. In response to this review, the Department of Transportation (DOT), whose DBE program mirrored EPA's MBE/WBE program, revised its program for participation of DBEs in procurements under DOT's financial assistance agreements to comply with the Adarand decision (See 64 FR 5096). This final rule reflects EPA's efforts to similarly comply.

Remedying discrimination is recognized as a compelling government interest, and this rule is promulgated on the understanding that the statutory provisions authorizing its adoption were enacted for that remedial purpose. This

rule sets forth a narrowly tailored EPA program to serve the compelling government interest of remedying past and current racial discrimination through agency-wide DBE procurement objectives. EPA intends to evaluate the propriety of the Disadvantaged Business Enterprise program in 7 years through subsequent rulemaking.

This final rule requires recipients to use race/gender-neutral measures to ensure DBEs have meaningful opportunities to bid on recipient-sponsored procurements. It does not require recipients to use race/gender-conscious measures. However, if a recipient elects to use such measures, the recipient should satisfy itself that the measure meets all applicable legal requirements, including those established in *Adarand*. Because this rule only requires race/gender-neutral measures, it should not be subject to strict judicial scrutiny. Even so, we believe this rule is narrowly tailored to achieve a compelling governmental interest consistent with *Adarand*.

EPA worked collaboratively on this rulemaking with various program offices within the Agency, the EPA Office of General Counsel, and the EPA Regions. We also held discussions with other Federal agencies, including SBA and DOT whose DBE programs are in some ways similar to ours, or have undergone changes similar to the ones we are implementing. EPA has also collaborated with the Civil Rights Division of DOJ throughout the rulemaking process.

### III. Overview of Final Rule

This rulemaking removes all of EPA's current MBE/WBE fair share objectives and good faith efforts regulatory provisions and replaces them with DBE provisions to be codified in the new 40 CFR part 33. In addition, this rule supersedes inconsistent provisions of previous guidance documents for EPA's former MBE and WBE Program, including, but not limited to, EPA's "Guidance for Utilization of Small, Minority, and Women's Business Enterprises in Procurement Under Assistance Agreements" (the 1997 Guidance), 62 FR 45645.

There are six substantive changes this rule will make to the way the program currently operates. Those changes involve: (1) Certification of minority and women-owned businesses; (2) the six good faith efforts; (3) contract administration requirements; (4) negotiation of fair share goals; (5) recordkeeping and reporting requirements; and (6) new requirements for Tribal and insular area fair share

negotiations. The specific changes are summarized as follows:

#### 1. Certification

Under the current MBE/WBE program EPA recognizes Small Business Administration (SBA) certifications, or certifications by a State or other Federal Agency, or self-certifications. EPA currently does not require WBEs to be certified.

Under the new DBE program promulgated today, in order to be counted as an MBE or WBE under an EPA financial assistance agreement, an entity will have to be certified as such. EPA will require an MBE/WBE to first seek certification by a federal agency (e.g., the Small Business Administration (SBA), the Department of Transportation (DOT)), or by a State, locality, Indian Tribe, or independent private organization provided their applicable criteria match those under section 8(a) (5) and (6) of the Small Business Act and SBA's applicable 8(a) Business Development Program regulations. EPA will only consider certifying firms that cannot get certified by one of these entities. Requiring firms to first seek certification from other sources is beneficial for the business entity because an EPA certification is limited in that it would only be accepted by EPA. Certifications from other sources have broader applications. Also, requiring firms to first seek certification from other sources reduces the burden on the Agency associated with processing certifications.

The creation and implementation of an EPA certification program is necessary because the statutory authority for EPA's program includes classifications of businesses that are not currently certified by other sources. Businesses that fall within these classifications would potentially have no other option for certification to participate in EPA's DBE program. EPA anticipates that the following types of entities will have to be considered for certification by EPA:

1. Disabled American-owned firms;
2. Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged;
3. Women-owned and minority owned-businesses who cannot get certified under DOT or SBA size criteria (EPA does not have size criteria) or by a State Government, local Government, Indian Tribal Government or independent private organization;
4. Businesses owned or controlled by socially and economically disadvantaged individuals (note—SBA and DOT require an entity to be owned

and controlled by socially and economically disadvantaged individuals. However, the statutory authority for EPA's DBE program requires ownership or control, Public Law 102-389); and

5. Women-owned business enterprises.

EPA certifications will last for three years as long as the certified entity files an annual affidavit affirming that no changes in circumstances have occurred which affected the entity's status as an MBE or WBE. Appeal procedures are provided for entities denied MBE or WBE certification, or anyone who disagrees with EPA's decision to certify an entity as an MBE or WBE.

#### 2. Six Good Faith Efforts

The good faith efforts are activities by a recipient and its prime contractor to increase DBE awareness of procurement opportunities through race/gender neutral efforts. Race/gender neutral efforts are ones which increase awareness of contracting opportunities in general, including outreach, recruitment and technical assistance. For purposes of simplification, EPA has combined the "Six Positive Efforts" of 40 CFR 30.44 (b) applicable to institutions of higher education, hospitals and other non-profit organizations with the "Six Affirmative Steps" of 40 CFR 31.36(e) applicable to State, Local and Indian Tribal Government recipients and renamed them the six "good faith efforts."

#### 3. Contract Administration Requirements

The rule adds additional contract administration requirements which are intended to prevent any "bait and switch" tactics at the subcontract level by prime contractors which may circumvent the spirit of the DBE Program as well as other related requirements. Some of these requirements include provisions intended to ensure that subcontractors receive prompt payment from prime contractors. In addition, this proposal would require a recipient to be notified in writing before its prime contractor could terminate a DBE subcontractor for convenience and then perform the work itself. Furthermore, when a DBE subcontractor is terminated or fails to complete its work under the subcontract for any reason, the recipient must require the prime contractor to make good faith efforts if the prime contractor chooses to hire another subcontractor. A recipient must also require its prime contractor to continue to make the good faith efforts even if the fair share objectives in subpart D of the rule have

been met. Finally, this rule provides for three new forms which are required if there are DBE subcontractors involved in a procurement.

**4. Negotiation of Fair Share Goals (and \$250,000 Exemptions)**

This rule codifies EPA's procedures for negotiating fair share goals with financial assistance recipients. The process for such negotiations is currently implemented through guidance, as well as through terms and conditions incorporated into EPA financial assistance agreements. This rulemaking keeps the current basic approach, with some fine tuning, including a provision which would exempt a recipient of a financial assistance agreement of \$250,000 or less for any assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in EPA funds in any one year, from the fair share objective negotiation requirement. In addition, eligible program grants which can be included in Performance Partnership Grants to Tribal and Tribal consortia recipients will be exempt from the fair share negotiation requirement due to the nature of these program grants and the

unique nature of eligible recipients. Superfund Technical Assistance Grants (TAG's) would be exempt due to the nature of their funding cycles. A recipient under the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, and the Brownfields Clean-Up Revolving Loan Fund is not required to apply the fair share objective requirements to an entity receiving an identified loan in an amount of \$250,000 or less.

**5. Recordkeeping and Reporting Requirements**

Currently, all financial assistance agreement recipients must report on a quarterly basis, except for recipients of continuing environmental program grants, and institutions of higher education, hospitals and other non-profit organizations receiving financial assistance awards under 40 CFR part 30, who report on an annual basis. This rule will reduce the reporting frequency to semi-annually for all recipients who currently report on a quarterly basis.

This rule also requires all financial assistance recipients, and recipients of loans under CWSRF, DWSRF, or BCRLF Programs to create and maintain a bidders list. There is an exemption from

this requirement for recipients receiving grants or loans of \$250,000 or less for any single assistance agreement or loan, or of more than one financial assistance agreement or loan with a combined total of \$250,000 or less in EPA funds in any one year.

**6. New Requirement for Tribal and Trust Territory Fair Share Negotiations**

EPA does not currently negotiate fair share goals with Indian Tribal Government and Trust Territory recipients. This rule will require such recipients to negotiate fair share goals. Therefore, under the rule such recipients will have a three year phase-in period to adjust to the regulatory change. In the interim, they will still have to comply with the other requirements of this rule.

**IV. Summary of Response to Public Comments**

Excluding changes in wording to increase clarity, there are only four substantive changes reflected in this final rule. Those changes, along with a breakdown of the number and type of comments received, are below:

Number of Comments Received: 126

Primary areas of public concern	Number of comments	Percent of all comments
Certification .....	23	18
General (wording and clarification) .....	16	13
Good Faith Efforts .....	14	11
Subcontracting Provisions .....	12	9
Bidders List .....	11	9

*Major Revisions Based on Public Comment (not including wording or clarification):*

**1. § 33.105—Enforcement Provisions**

There were several comments concerning enforcement of the rule. A number of comments stated that there are no "teeth" in the program and that more policing of the program will be needed to insure compliance with the requirements of the rule. While the text of the rule mentions that EPA can take remedial action for non-compliance, it does not clearly state what those actions are. In an effort to show more "teeth," this section has been revised to include some of the remedial measures EPA can take if a recipient fails to comply with the requirements of the rule.

**2. § 33.302—Subcontractor Provisions**

Public comment requested that EPA specify the number of days within which a prime must pay its subcontractor after payment by the

recipient. In an effort to curtail the practice of excessively late subcontractor payments, the rule establishes maximum of 30 days by which a prime contractor must pay its subcontractor, after payment by the grant recipient.

**3. § 33.501—Bidders List**

Many comments were received requesting clarification about the contents, purpose and duration of the bidders list. The purpose of the Bidders List is to provide the recipient and entities receiving identified loans who conduct competitive bidding with a more accurate database of the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. The bidders list is intended to be a list of all firms that are participating, or attempting to participate, on EPA assisted contracts. The list must include all firms that bid on prime contracts, or bid or quote on subcontracts under EPA assisted projects, including both MBE/WBEs and

non-MBE/WBEs. The bidders list is designed to also aid recipients in their efforts to comply with the "six good faith efforts," by creating a source of MBEs and WBEs that can be relied upon to increase the inclusion of MBEs and WBEs in the recipient's procurement practices. Section 33.501(b) of the rule has been revised to read as follows:

A recipient of a Continuing Environmental Program Grant or other annual grant must create and maintain a bidders list. In addition, a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund also must require entities receiving identified loans to create and maintain a bidders list if the recipient of the loan is subject to, or chooses to follow, competitive bidding requirements. The purpose of a bidders list is to provide the recipient and entities receiving identified loans who conduct competitive bidding with as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. The list must include all firms that bid or quote on prime contracts or bid or quote on subcontracts under EPA assisted projects, including both MBE/WBEs

and non-MBE/WBEs. The bidders list must be kept until the grant project period has expired and the recipient is no longer receiving EPA funding under the grant. For entities receiving identified loans, the bidders list must be kept until the project period for the identified loan has ended. The following information must be obtained from all prime and subcontractors:

- (1) Entity's name with point of contact;
- (2) Entity's mailing address, telephone number, and e-mail address;
- (3) The procurement on which the entity bid or quoted, and when; and
- (4) Entity's status as an MBE/WBE or non-MBE/WBE.

In response to internal concerns regarding the application of the bidders list requirement, we have created an exemption to this provision. The exemption found at § 33.501(c) is as follows:

A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is exempt from the paragraph (b) of this section requirement to create and maintain a bidders list. Also, a recipient under the CWSRF, DWSRF, or BCRLF Program is not required to apply the paragraph (b) of this section bidders list requirement of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less, or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the paragraph (b) of this section bidders list requirements of this subpart.

#### 4. § 33.502—Reporting

In response to internal and external comments, this section of the rule has been revised to require semiannual reporting for all recipients who currently report on a quarterly basis. All recipients who report annually will continue to do so.

A section-by-section analysis of the rule, addressing public comments in detail, can be found on the public docket for this rule making under Docket ID No. EPA-HQ-OA-2002-0001, at [www.regulations.gov](http://www.regulations.gov).

### V. Statutory and Executive Order Reviews

#### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." This rule reflects and raises legal or policy issues arising out of legal mandates. This rule has a direct impact on contracting funded by EPA financial assistance agreements. There is substantial public interest concerning programs to ensure nondiscrimination

in federally assisted contracting, as well as policy concerns. This rule also affects a wide variety of parties, including all EPA financial assistance programs, and the DBE and non-DBE contractors that perform work under them. As a "significant regulatory action," EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Based on currently available information about costs that may be associated with complying with this rule (e.g., costs to obtain MBE or WBE certification), EPA believes that this rule will not have an annual effect on the economy of \$100 million or more. Therefore, EPA did not prepare a regulatory impact statement for this rule.

#### B. Paperwork Reduction Act

The Office of Management and Budget (OMB) 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 2090-0030.

This ICR is for the purpose of ensuring that EPA's statutory DBE procurement goal requirements are implemented in harmony with the United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

The requirements to complete EPA Forms 6100-2—DBE Program Subcontractor Participation Form, 6100-3—DBE Program Subcontractor Performance Form, and 6100-4—DBE Program Subcontractor Utilization Form, are intended to prevent any "bait and switch" tactics at the subcontract level by prime contractors which may circumvent the spirit of the DBE Program.

The requirements to complete the EPA DBE Certification Application (EPA Form 6100-1a) (Sole Proprietorship), the EPA DBE Certification Application (EPA Form 6100-1b) (Limited Liability Company), the EPA DBE Certification Application (EPA 6100-1c) (Partnerships), the EPA DBE Certification Application (EPA Form 6100-1d) (Corporations), the EPA DBE Certification Application (EPA Form 6100-1e) (Alaska Native Corporations), the EPA DBE Certification Application (EPA Form 6100-1f) (Tribally Owned Businesses), the EPA DBE Certification Application (EPA Form 6100-1g) (Private and Voluntary Organizations), the EPA DBE Certification Application

(EPA Form 6100-1h) (Concerns owned by Native Hawaiian Organizations), and the EPA DBE Certification Application (EPA Form 6100-1i) (Concerns Owned by Community Development Corporations), as applicable, would be required to be completed by an entity seeking to be counted as a minority business enterprise (MBE) or women's business enterprise (WBE) under EPA's DBE Program, which cannot get certified as an MBE or WBE by the SBA or DOT under their respective programs or by an Indian Tribal Government or independent private organization consistent with EPA's 8% or 10% statute as applicable.

Responses to the collection of information will be mandatory. EPA's legal authorities for the DBE Program are Public Law 102-389, a 1993 appropriations act (42 U.S.C. 4370d) (EPA's 8% statute), and Public Law 101-549, Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note) (EPA's 10% statute).

Other legal authorities and Executive Orders include Public Law 99-499, the Superfund Amendments and Reauthorization Act of 1986; Public Law 100-590, the Small Business Administration Reauthorization and Amendment Act of 1988; Executive Order 12138, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating and Implementing a National Program for Women's Business Enterprise," issued May 18, 1979; Executive Order 11625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," issued October 13, 1971; and Executive Order 12432, "Minority Business Enterprise Development," issued July 14, 1983.

EPA may make available to the public any information concerning EPA's DBE Program where the release of which is not prohibited by Federal law or regulation, including EPA's Confidential Business Information regulations at 40 CFR part 2, subpart B.

The total labor burden and costs to MBEs and WBEs for certification under State, Tribal and Insular Area funding programs is estimated to total \$8,750,300, with 168,275 burden hours and 6,731 MBE and WBE entities affected for the three-year period of the ICR. The estimated annual burden per response is 25 hours; the number of respondents is estimated at 2,244 at an average annual labor burden and cost per MBE and WBE of \$1300. The average annual burden and costs are estimated by spreading the first year cost over the three-year period of the

ICR, yielding a total annual average burden of 56,092 hours and \$2,916,767 in costs.

The total labor burden and costs to all EPA grant and loan recipients that would have to perform an availability analysis to meet the requirements of the proposed rule and other paperwork requirements are estimated to be \$16,509,500 with 825,475 burden hours and 3,115 entities affected for the three-year period of the ICR. The estimated annual burden hours for all responses is 275,158, and the annual number of respondents is estimated at 1,038.

The annual cost for all respondents would be \$5,503,167. The cost per respondent is estimated at \$5,250 (each respondent is estimated to perform an availability analysis once every three years) and is estimated to take 265 hours at \$20/hour. EPA assumed there were no additional start-up costs or capital expenditures.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

### C. Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements

under the Administrative Procedure Act (APA) or any other statute. As a grants-related rule, this rule is not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(a)(1). Nor is there any other statute which requires EPA to undergo notice and comment for this rulemaking.

It is important to note that EPA's DBE Program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals, among others (e.g., Historically Black Colleges and Universities, etc.). Accordingly, EPA believes that this rule will impact a substantial number of small entities.

### D. 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 to the private sector of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopts the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. 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. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating and advising small governments on compliance with the regulatory requirements.

This rule 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 excluded from the definition of "Federal intergovernmental mandate" duties that arise from conditions of federal assistance. Thus, today's rule is not subject to the requirements of section 202 and 205 of the UMRA.

Pursuant to section 203 of the UMRA, EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. With the exemptions at the \$250,000 level or less from compliance with the fair share objective requirements, EPA believes that there would be minimal impacts on small entities, including small government jurisdictions. Additionally, under this rule, small entity recipients will be able to use appropriate State Agency-negotiated MBE/WBE objectives if such recipients solicit bids/offers from substantially the same relevant geographic market as that State Agency. Therefore, this rule does not meet the threshold test for application of section 203 of UMRA.

### E. Executive Order 13132: Federalism

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

This rule does not have "federalism implications," as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Because this rule conditions the use of federal assistance, it will not impose substantial direct compliance costs on State and local governments. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA

and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. Stakeholders, including representatives from State government agencies, State government organizations and local governments, were given an opportunity to comment on the proposed rule which was published in the **Federal Register** on July 24, 2003, during the 180-day comment period. Public hearings were also held in several states across the country to discuss the proposed rule and to encourage comment.

*F. Executive Order 13175 Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." EPA has concluded that this final rule will have tribal implications. However, it will neither impose substantial direct compliance costs nor preempt tribal law. Those implications are as follows:

Tribes receiving an EPA financial assistance agreement of more than \$250,000 for any single assistance agreement, or of more than one financial assistance agreement with a combined total of more than \$250,000 in any one fiscal year (excluding Performance Partnership Grant eligible grants to tribes and intertribal consortia under 40 CFR part 35, subpart B) will have to negotiate fair share objectives with EPA unless they choose to adopt MBE and WBE objectives of another EPA recipient consistent with the final rule. Those tribes required to negotiate fair share objectives with EPA will have a phase-in period of up to three years in which to do so; their fair share objectives will remain in effect for three fiscal years after they have been approved by EPA, unless there are significant changes to the data supporting the fair share objectives.

Some tribally owned businesses (businesses that a Federally recognized tribal government owns or in which it has a majority share) will not be eligible to be counted towards meeting the MBE/WBE fair share objectives if they do not meet the applicable SBA 8(a) criteria, e.g., see 13 CFR 124.109(b). Of course, tribes may continue to do business with tribally owned or other companies which do not meet the applicable SBA 8(a) criteria, they simply would not count such procurements

toward meeting MBE/WBE objectives. In addition, the rule will have the following impacts on tribes/tribally owned businesses:

First, a business owned by a Federally recognized tribal government would have to file an annual affidavit with EPA certifying no change in its MBE status, pursuant to § 33.210 of this rule.

Second, a business owned by a Federally recognized tribal government will have to be recertified every three years as meeting SBA's applicable 8(a) criteria to be eligible to be counted in the future towards meeting the MBE/WBE fair share objectives, pursuant to § 33.208.

Third, a business owned by a Federally recognized tribal government, if it is not already certified in accordance with SBA's applicable 8(a) criteria, may have to incur costs to be certified if there is no tribal certifier available and the other certifying entity charges for its services.

Fourth, a tribe as a recipient of EPA financial assistance will have to be notified in writing before any termination of a DBE subcontractor for convenience is made by its prime contractor, pursuant to § 33.303(a).

Fifth, consistent with other Federal and tribal laws, a tribe will have to require its prime contractor, after the tribe has unsuccessfully sought to apply Indian preference consistent with the Indian Self-Determination and Education Assistance Act, to employ the good faith efforts described in § 33.301 if a DBE subcontractor fails to complete work under a subcontract for any reason and the prime contractor solicits a replacement subcontractor, pursuant to § 33.303(b).

Sixth, consistent with other Federal and tribal Laws, a tribe will have to require its prime contractor, after it has unsuccessfully sought to apply Indian preference consistent with the Indian Self-Determination and Education Assistance Act, to employ the good faith efforts described in § 33.301 even if it has achieved its fair share objectives under subpart D of the rule, pursuant to § 33.303(c).

Seventh, a tribe will have to require its prime contractors to provide EPA Form 6100-2—DBE Program Subcontractor Participation Form, EPA Form 6100-3—DBE Program Subcontractor Performance Form and EPA Form 6100-4—DBE Program Subcontractor Utilization Form to all of its DBE subcontractors, pursuant to sections 33.303(e), (f) and (g), respectively.

Eighth, a tribal recipient that conducts procurements will have to create and maintain a bidders list in accordance

with § 33.501(b). The purpose of this list is to provide recipients as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors who seek to work on procurements under EPA financial assistance agreements. The following information must be obtained from all such prime and subcontractors: (1) Entity's name with point of contact; (2) entity's mailing address, telephone number, and e-mail address; (3) the procurement on which the entity bid or quoted, and when; and (4) entity's status as an MBE/WBE or non-MBE/WBE.

EPA consulted with tribal officials and/or representatives of tribal governments early in the process of developing this regulation to permit them to have meaningful and timely input into its development. This rule has been under development for the past several years. The meaningful and timely input of Tribal officials and/or representatives into the development of this rule is as follows:

On February 2-4, 1999, EPA invited tribal recipients of EPA grants and cooperative agreements to an EPA/State/Tribal Annual Conference in Albuquerque, New Mexico. During this conference, EPA representatives discussed a number of issues relating to the rule under development with the general audience. In addition, EPA representatives met separately with tribal officials and/or representatives to discuss issues of concern to tribes. EPA posted a staff draft of the proposed rule, dated June 19, 2000, on EPA's Internet Web site to solicit public comment. On June 27-30, 2000, the Agency held its EPA/State/Tribal Annual Conference in Albuquerque, New Mexico. Again, EPA invited tribal recipients of EPA financial assistance agreements to attend. During the June, 2000 conference, agency representatives discussed in detail the June 19, 2000 staff draft of the rule, which had been posted on EPA's Web site. EPA solicited comments on the staff draft of the rule from conference participants. Tribal officials and/or representatives attended that conference as well. As of June 30, 2001, EPA received a total of 17 written comments on the staff draft from Indian tribes.

During the development of this rule EPA representatives made a number of oral presentations to the Tribal Operations Committee (TOC) on the rule's progress and solicited input. The TOC is comprised of 19 national tribal representatives from the nine EPA Regions that have federally recognized tribes and EPA Senior Management; its role is to provide input into EPA decision making affecting Indian Country. On November 29, 2000, EPA

representatives met with the TOC at the EPA Tribal Caucus Regional Joint meeting in Miami, Florida, to discuss the staff draft rule and to obtain further tribal input into the rulemaking process.

Starting in November, 2000, EPA invited tribal recipients of EPA grants and cooperative agreements to participate in outreach sessions held in cities around the country in order to discuss the staff draft rule. EPA further solicited tribal input into the rulemaking at meetings with tribal officials/representatives at the Department of the Interior 2001 Conference on the Environment hosted by the Bureau of Indian Affairs on March 13–15, 2001, in Albuquerque, New Mexico and at the Reservation Economic Summit and American Indian Business Trade Fair (RES 2001) in Anaheim, California, on March 20, 2001. EPA further solicited tribal input in another meeting with the TOC on April 24, 2001, in Miami, Florida.

As part of its ongoing tribal coordination on this rule, EPA held meetings with tribal officials to discuss the staff draft rule in Boston, Massachusetts on April 11, 2001 and in Seattle, Washington on May 23, 2001. EPA held further coordination meetings with tribal officials to discuss a draft of this Rule in Ocean Shores, Washington during the week of January 28, 2002. On July 24, 2003, the proposed rule was published in the **Federal Register**, with a 180-day comment period. After the rule was published in the **Federal Register**, EPA held 10 tribal meetings across the country to solicit comments and suggestions on the final rule.

EPA has considered tribal concerns and written comments in the final rule. A summary of the nature of tribal concerns and EPA's response follows:

#### 1. Applicability of the Rule to Tribes

Awards of Grants and Cooperative Agreements to tribes are currently governed by 40 CFR part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." These are government wide requirements that have been in effect since 1988. Among other entities subject to the regulations are governments. The definition of "Government" in 40 CFR 31.3 includes \* \* \* a federally recognized Indian tribal government." Many requirements contained in this rule are not new but rather are the same requirements contained in 40 CFR part 31, with which many tribes already have been complying. For example, the reporting and recordkeeping requirements are already applicable to Indian tribes. In addition, neither EPA's statutory 10%

MBE/WBE procurement objective requirements for research relating to the requirements of the Clean Air Act, nor EPA's statutory 8% MBE/WBE procurement objective requirements for all other programs, exempt tribes. Therefore, tribes are not exempt from this rule, because it promotes the utilization of all disadvantaged entities in procurement under EPA financial assistance agreements, including tribally owned businesses and businesses owned by a member(s) of a tribe.

#### 2. Trigger for Fair Share Negotiations

The issue of increasing the dollar amount of the trigger requiring compliance with the fair share objective requirements and the corresponding availability analysis was of special concern to tribes awarded General Assistance Program grants. Comments also expressed the view that availability analysis preparation requirements should apply only to tribes spending 90% or more of their grants on outside procurement. Other tribes expressed the view that preparing availability analyses is too costly for them, especially for smaller tribes.

In response to concerns raised by tribes, the trigger requiring compliance with the fair share objective requirements has been increased to \$250,000 from the \$100,000 threshold contained in an earlier draft of the rule. Also because of the nature of eligible program grants which can be included in Performance Partnership Grants (PPGs) to tribes under 40 CFR part 35, subpart B, and the unique nature of eligible recipients, the Agency is exempting PPG eligible program grants to tribes under 40 CFR part 35, subpart B from the fair share negotiation requirements.

Accordingly, only tribes receiving an EPA financial assistance agreement of more than \$250,000 for any single assistance agreement, or of more than one financial assistance agreement with a combined total of more than \$250,000 in any one fiscal year (excluding PPG eligible program grants under 40 CFR part 35, subpart B), will have to comply with the fair share objective requirements.

The Agency believes that this change effectively addresses the concerns by setting a uniform standard applicable to all recipients, including tribes, rather than, for example, setting a standard based on amounts spent by tribes on outside procurement, which could pose implementation difficulties. EPA believes that most tribes will not have to comply with the fair share objective requirements under the final rule because they will fall under the

\$250,000 exemption or the exemption for PPG eligible program grants under 40 CFR part 35, subpart B. Finally, EPA believes that a number of tribes which otherwise would have to negotiate fair share objectives may elect instead to apply the objectives of another recipient in accordance with the requirements of the rule. The rule will also provide tribes with a three-year phase-in period to comply with the fair share negotiation requirement.

#### 3. Reporting and Recordkeeping Requirements

Some tribes expressed concerns that keeping records of and reporting purchases for EPA funded grants would impose a heavy burden on tribal governments. Instead, they suggested basing reporting on the amount of money the tribe received rather than on the amount of money it spent on outside supplies and services.

EPA considered these concerns and concluded that 40 CFR part 31 already requires tribes to comply with part 31's recordkeeping and reporting requirements, which included MBE/WBE recordkeeping and reporting. The Agency believes that basing requirements on amounts received rather than on amounts spent would be an inaccurate measurement of MBE/WBE procurement utilization. EPA currently requires financial assistance recipients to report MBE/WBE accomplishments based on dollars spent on MBE/WBE procurements. Therefore, EPA is not adopting the suggested change. However, because of comments received requesting a reduction in the burden created by quarterly reporting, EPA has reduced the reporting requirement to semi-annually for recipients who currently report on a quarterly basis. Recipients who currently report annually will continue to do so.

#### 4. Compliance With the Good Faith Efforts Requirements

One comment objected to having to advertise in newspapers; a comment was also made that EPA should investigate alternative mechanisms that encourage a tribe to seek out MBEs/WBEs during the procurement process without incurring an unreasonable financial burden.

Section 7(b) of the Indian Self-Determination and Education Assistance Act requires tribal governments to solicit tribally-owned businesses and/or businesses owned by a member(s) of a tribe, before undertaking the six good faith efforts. Tribes are currently subject to 40 CFR part 31, which requires them to make

good faith efforts to ensure that DBEs are used whenever possible. EPA is changing this requirement. EPA does not believe that the good faith effort requirements are unduly burdensome.

#### 5. Phase-In Period

One comment expressed a concern about the timing of the phase-in period and the maximum amount of time needed for the requirement to be implemented.

EPA believes that the three-year phase-in period, which begins after the final rule's effective date, allows tribes sufficient time to prepare for and comply with the requirements of the rule.

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the Executive Order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this rule.

#### *G. Executive Order 13045: (Protection of Children From Environmental Health Risks and Safety Risks)*

*Executive Order 13045:* "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns any 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 Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the

supply, distribution, or use of energy. EPA has concluded that this rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

As noted in the proposed rule, section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

#### *K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a

report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective May 27, 2008.

#### List of Subjects

##### *40 CFR Part 30*

Environmental protection, Administrative practice and procedure, Grant programs—environmental protection, Reporting and recordkeeping requirements.

##### *40 CFR Part 31*

Accounting, Administrative practice and procedure, Grant programs, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

##### *40 CFR Part 33*

Grant programs—environmental protection.

##### *40 CFR Part 35*

Grant programs—environmental protection, Grant programs—Indians, Hazardous waste, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

##### *40 CFR Part 40*

Research and Demonstration Grants—Projects involving construction.

Dated: March 18, 2008.

**Stephen L. Johnson,**  
*Administrator.*

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

#### **PART 30—[AMENDED]**

■ 1. The authority citation for part 30 continues to read as follows:

**Authority:** 7 U.S.C. 135 *et seq.*; 15 U.S.C. 2601 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 241, 242(b), 243, 246, 300f, 300j-1, 300j-2, 300j-3; 1857 *et seq.*; 6901 *et seq.*, 7401 *et seq.*; OMB circular A-110 (64 FR 54926, October 8, 1999).

#### **§ 30.44 [Amended]**

■ 2. Section 30.44 is amended by removing and reserving paragraph (b).

#### **PART 31—[AMENDED]**

■ 3. The authority citation for part 31 continues to read as follows:

**Authority:** 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C.

1251 *et seq.* and 1401 *et seq.*; 42 U.S.C. 300f *et seq.*, 6901 *et seq.*, 7401 *et seq.*, and 9601 *et seq.*

#### § 31.36 [Amended]

■ 4. Section 31.36 is amended by removing and reserving paragraph (e).

#### PART 33—[ADDED]

■ 5. Part 33 is added as follows:

### PART 33—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY PROGRAMS

#### Subpart A—General Provisions

Sec.

- 33.101 What are the objectives of this part?  
 33.102 When do the requirements of this part apply?  
 33.103 What do the terms in this part mean?  
 33.104 May a recipient apply for a waiver from the requirements of this part?  
 33.105 What are the compliance and enforcement provisions of this part?  
 33.106 What assurances must EPA financial assistance recipients obtain from their contractors?  
 33.107 What are the rules governing availability of records, cooperation, and intimidation and retaliation?

#### Subpart B—Certification

- 33.201 What does this subpart require?  
 33.202 How does an entity qualify as an MBE or WBE under EPA's 8% statute?  
 33.203 How does an entity qualify as an MBE or WBE under EPA's 10% statute?  
 33.204 Where does an entity become certified under EPA's 8% and 10% statutes?  
 33.205 How does an entity become certified by EPA?  
 33.206 Is there a list of certified MBEs and WBEs?  
 33.207 Can an entity reapply to EPA for MBE or WBE certification?  
 33.208 How long does an MBE or WBE certification from EPA last?  
 33.209 Can EPA re-evaluate the MBE or WBE status of an entity after EPA certifies it to be an MBE or WBE?  
 33.210 Does an entity certified as an MBE or WBE by EPA need to keep EPA informed of any changes which may affect the entity's certification?  
 33.211 What is the process for appealing or challenging an EPA MBE or WBE certification determination?  
 33.212 What conduct is prohibited by this subpart?

#### Subpart C—Good Faith Efforts

- 33.301 What does this subpart require?  
 33.302 Are there any additional contract administration requirements?  
 33.303 Are there special rules for loans under EPA financial assistance agreements?  
 33.304 Must a Native American (either as an individual, organization, Tribe or

Tribal Government) recipient or prime contractor follow the six good faith efforts?

#### Subpart D—Fair Share Objectives

- 33.401 What does this subpart require?  
 33.402 Are there special rules for loans under EPA financial assistance agreements?  
 33.403 What is a fair share objective?  
 33.404 When must a recipient negotiate fair share objectives with EPA?  
 33.405 How does a recipient determine its fair share objectives?  
 33.406 May a recipient designate a lead agency for fair share objective negotiation purposes?  
 33.407 How long do MBE and WBE fair share objectives remain in effect?  
 33.408 May a recipient use race and/or gender conscious measures as part of this program?  
 33.409 May a recipient use quotas as part of this program?  
 33.410 Can a recipient be penalized for failing to meet its fair share objectives?  
 33.411 Who may be exempted from this subpart?  
 33.412 Must an Insular Area or Indian Tribal Government recipient negotiate fair share objectives?

#### Subpart E—Recordkeeping and Reporting

- 33.501 What are the recordkeeping requirements of this part?  
 33.502 What are the reporting requirements of this part?  
 33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?

#### Appendix A to Part 33—Terms and Conditions

**Authority:** 15 U.S.C. 637 note; 42 U.S.C. 4370d, 7601 note, 9605(f); E.O. 11625, 36 FR 19967, 3 CFR, 1971 Comp., p. 213; E.O. 12138, 49 FR 29637, 3 CFR, 1979 Comp., p. 393; E.O. 12432, 48 FR 32551, 3 CFR, 1983 Comp., p. 198.

#### Subpart A—General Provisions

##### § 33.101 What are the objectives of this part?

The objectives of this part are:  
 (a) To ensure nondiscrimination in the award of contracts under EPA financial assistance agreements. To that end, implementation of this rule with respect to grantees, sub-grantees, loan recipients, prime contractors, or subcontractors in particular States or locales—notably those where there is no apparent history of relevant discrimination—must comply with equal protection standards at that level, apart from the EPA DBE Rule's constitutional compliance as a national matter;  
 (b) To harmonize EPA's DBE Program objectives with the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995);

(c) To help remove barriers to the participation of DBEs in the award of contracts under EPA financial assistance agreements; and

(d) To provide appropriate flexibility to recipients of EPA financial assistance in establishing and providing contracting opportunities for DBEs.

##### § 33.102 When do the requirements of this part apply?

The requirements of this part apply to procurement under EPA financial assistance agreements performed entirely within the United States, whether by a recipient or its prime contractor, for construction, equipment, services and supplies.

##### § 33.103 What do the terms in this part mean?

Terms not defined below shall have the meaning given to them in 40 CFR part 30, part 31 and part 35 as applicable. As used in this part:

*Availability analysis* means documentation of the availability of MBEs and WBEs in the relevant geographic market in relation to the total number of firms available in that area.

*Award official* means the EPA Regional or Headquarters official delegated the authority to execute financial assistance agreements on behalf of EPA.

*Broker* means a firm that does not itself perform, manage or supervise the work of its contract or subcontract in a manner consistent with the normal business practices for contractors or subcontractors in its line of business.

*Business, business concern or business enterprise* means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials or labor.

*Construction* means erection, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other improvements to real property, and activities in response to a release or a threat of a release of a hazardous substance into the environment, or activities to prevent the introduction of a hazardous substance into a water supply.

*Disabled American* means, with respect to an individual, permanent or temporary physical or mental impairment that substantially limits one or more of the major life activities of such an individual; a record of such an impairment; or being regarded as having such an impairment.

*Disadvantaged business enterprise (DBE)* means an entity owned or controlled by a socially and economically disadvantaged individual as described by Public Law 102-389 (42 U.S.C. 4370d) or an entity owned and controlled by a socially and economically disadvantaged individual as described by Title X of the Clean Air Act Amendments of 1990 (42 U.S.C. 7601 note); a Small Business Enterprise (SBE); a Small Business in a Rural Area (SBRA); or a Labor Surplus Area Firm (LSAF), a Historically Underutilized Business (HUB) Zone Small Business Concern, or a concern under a successor program.

*Disparity study* means a comparison within the preceding ten years of the available MBEs and WBEs in a relevant geographic market with their actual usage by entities procuring in the categories of construction, equipment, services and supplies.

*Equipment* means items procured under a financial assistance agreement as defined by applicable regulations (for example 40 CFR 30.2 and 40 CFR 31.3) for the particular type of financial assistance received.

*Fair share objective* means an objective expressing the percentage of MBE or WBE utilization expected absent the effects of discrimination.

*Financial assistance agreement* means grants or cooperative agreements awarded by EPA. The term includes grants or cooperative agreements used to capitalize revolving loan funds, including, but not limited to, the Clean Water State Revolving Loan Fund (CWSRF) Program under Title VI of the Clean Water Act, as amended, 33 U.S.C. 1381 *et seq.*, the Drinking Water State Revolving Fund (DWSRF) Program under section 1452 of the Safe Drinking Water Act, 42 U.S.C. 300j-12, and the Brownfields Cleanup Revolving Loan Fund (BCRLF) Program under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9604.

*Good faith efforts* means the race and/or gender neutral measures described in subpart C of this part.

*Historically black college or university (HBCU)* means an institution determined by the Secretary of Education to meet the requirements of 34 CFR part 608.

*HUBZone* means a historically underutilized business zone, which is an area located within one or more qualified census tracts, qualified metropolitan counties, or lands within the external boundaries of an Indian reservation.

*HUBZone small business concern* means a small business concern that

appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

*Identified loan* means a loan project or set-aside activity receiving assistance from a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, which:

(1) In the case of the CWSRF Program, is a project funded from amounts equal to the capitalization grant;

(2) In the case of the DWSRF Program, is a loan project or set-aside activity funded from amounts up to the amount of the capitalization grant; or

(3) In the case of the BCRLF Program, is a project that has been funded with EPA financial assistance.

*Insular area* means the Commonwealth of Puerto Rico or any territory or possession of the United States.

*Joint venture* means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

*Labor surplus area firm (LSAF)* means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas (as identified by the Department of Labor in accordance with 20 CFR part 654). Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

*Minority business enterprise (MBE)* means a Disadvantaged Business Enterprise (DBE) other than a Small Business Enterprise (SBE), a Labor Surplus Area Firm (LSAF), a Small Business in Rural Areas (SBRA), or a Women's Business Enterprise (WBE).

*Minority institution* means an accredited college or university whose enrollment of a single designated group or a combination of designated groups (as defined by the Small Business Administration regulations at 13 CFR part 124) exceeds 50% of the total enrollment.

*Native American* means any individual who is an American Indian, Eskimo, Aleut, or Native Hawaiian.

*Recipient* means an entity that receives an EPA financial assistance

agreement or is a sub-recipient of such agreement, including loan recipients under the Clean Water State Revolving Fund Program, Drinking Water State Revolving Fund Program, and the Brownfields Cleanup Revolving Loan Fund Program.

*Services* means a contractor's labor, time or efforts provided in a manner consistent with normal business practices which do not involve the delivery of a specific end item, other than documents (*e.g.*, reports, design drawings, specifications).

*Small business, small business concern or small business enterprise (SBE)* means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding, and qualified as a small business under the criteria and size standards in 13 CFR part 121.

*Small business in a rural area (SBRA)* means a small business operating in an area identified as a rural county with a code 6-9 in the Rural-Urban continuum Classification Code developed by the United States Department of Agriculture in 1980.

*Supplies* means items procured under a financial assistance agreement as defined by applicable regulations for the particular type of financial assistance received.

*United States* means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico and any other territories and possessions of the United States.

*Women's business enterprise (WBE)* means a business concern which is at least 51% owned or controlled by women for purposes of EPA's 8% statute or a business concern which is at least 51% owned and controlled by women for purposes for EPA's 10% statute. Determination of ownership by a married woman in a community property jurisdiction will not be affected by her husband's 50 percent interest in her share. Similarly, a business concern which is more than 50 percent owned by a married man will not become a qualified WBE by virtue of his wife's 50 percent interest in his share.

#### **§ 33.104 May recipients apply for a waiver from the requirements of this part?**

(a) A recipient may apply for a waiver from any of the requirements of this part that are not specifically based on a statute or Executive Order, by submitting a written request to the Director of the Office of Small and Disadvantaged Business Utilization.

(b) The request must document special or exceptional circumstances that make compliance with the

requirement impractical, including a specific proposal addressing how the recipient intends to achieve the objectives of this part as described in § 33.101. The request must show that:

(1) There is a reasonable basis to conclude that the recipient could achieve a level of MBE and WBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subparts C or D of this part;

(2) Conditions in the recipient's jurisdiction are appropriate for implementing the request; and

(3) The request is consistent with applicable law.

(c) The OSDDBU Director has the authority to approve a recipient's request. If the OSDDBU Director grants a recipient's request, the recipient may administer its program as provided in the request, subject to the following conditions:

(1) The recipient's level of MBE and WBE participation continues to be consistent with the objectives of this part;

(2) There is a reasonable limitation on the duration of the recipient's modified program; and

(3) Any other conditions the OSDDBU Director makes on the grant of the waiver.

(d) The OSDDBU Director may end a program waiver at any time upon notice to the recipient and require a recipient to comply with the provisions of this part. The OSDDBU Director may also extend the waiver if he or she determines that all requirements of paragraphs (b) and (c) of this section continue to be met. Any such extension shall be for no longer than the period originally set for the duration of the program waiver.

### **§ 33.105 What are the compliance and enforcement provisions of this part?**

If a recipient fails to comply with any of the requirements of this part, EPA may take remedial action under 40 CFR parts 30, 31 or 35, as appropriate, or any other action authorized by law, including, but not limited to, enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*). Examples of the remedial actions under 40 CFR parts 30, 31, and 35 include, but are not limited to:

(a) Temporarily withholding cash payments pending correction of the deficiency by the recipient or more severe enforcement action by EPA;

(b) Disallowing all or part of the cost of the activity or action not in compliance;

(c) Wholly or partly suspending or terminating the current award; or

(d) Withholding further awards for the project or program.

### **§ 33.106 What assurances must EPA financial assistance recipients obtain from their contractors?**

The recipient must ensure that each procurement contract it awards contains the term and condition specified in Appendix A to this part concerning compliance with the requirements of this part. The recipient must also ensure that this term and condition is included in each procurement contract awarded by an entity receiving an identified loan under a financial assistance agreement to capitalize a revolving loan fund.

### **§ 33.107 What are the rules governing availability of records, cooperation, and intimidation and retaliation?**

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of EPA's DBE Program, EPA complies with the provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). EPA may make available to the public any information concerning EPA's DBE Program release of which is not prohibited by Federal law or regulation, including EPA's Confidential Business Information regulations at 40 CFR part 2, subpart B.

(2) EPA recipients shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) *Cooperation.* All participants in EPA's DBE Program are required to cooperate fully and promptly with EPA, EPA Private Certifiers and EPA recipients in reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved in accordance with § 33.105.

(c) *Intimidation and retaliation.* A recipient, contractor, or any other participant in EPA's DBE Program must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part. Violation of this prohibition shall be a ground for appropriate action against the party involved in accordance with § 33.105.

### **Subpart B—Certification**

#### **§ 33.201 What does this subpart require?**

(a) In order to qualify and participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE Program, an entity must be

properly certified as required by this subpart.

(b) EPA's DBE Program is primarily based on two statutes. Public Law 102-389, 42 U.S.C. 4370d, provides for an 8% objective for awarding contracts under EPA financial assistance agreements to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals, including HBCUs and women ("EPA's 8% statute"). Title X of the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note, provides for a 10% objective for awarding contracts under EPA financial assistance agreements for research relating to such amendments to business concerns or other organizations owned and controlled by socially and economically disadvantaged individuals ("EPA's 10% statute").

#### **§ 33.202 How does an entity qualify as an MBE or WBE under EPA's 8% statute?**

To qualify as an MBE or WBE under EPA's 8% statute, an entity must establish that it is owned or controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States. An entity need not demonstrate potential for success.

(a) *Ownership or control.* "Ownership" and "control" shall have the same meanings as set forth in 13 CFR 124.105 and 13 CFR 124.106, respectively. (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(b) *Socially disadvantaged individual.* A socially disadvantaged individual is a person who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to his or her individual qualities and as further defined by the implementing regulations of section 8(a)(5) of the Small Business Act (15 U.S.C. 637(a)(5); 13 CFR 124.103; see also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(c) *Economically disadvantaged individual.* An economically disadvantaged individual is a socially disadvantaged individual whose ability to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged and as further defined by section 8(a)(6) of the

Small Business Act (15 U.S.C. 637(a)(6)) and its implementing regulations (13 CFR 124.104). (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations). Under EPA's DBE Program, an individual claiming disadvantaged status must have an initial and continued personal net worth of less than \$750,000.

(d) *HBCU*. An HBCU automatically qualifies as an entity owned or controlled by socially and economically disadvantaged individuals.

(e) *Women*. Women are deemed to be socially and economically disadvantaged individuals. Ownership or control must be demonstrated pursuant to paragraph (a) of this section, which may be accomplished by certification under § 33.204.

**§ 33.203 How does an entity qualify as an MBE or WBE under EPA's 10% statute?**

To qualify as an MBE or WBE under EPA's 10% statute, an entity must establish that it is owned and controlled by socially and economically disadvantaged individuals who are of good character and citizens of the United States.

(a) *Ownership and control*. An entity must be at least 51% owned by a socially and economically disadvantaged individual, or in the case of a publicly traded company, at least 51% of the stock must be owned by one or more socially and economically disadvantaged individuals, and the management and daily business operations of the business concern must be controlled by such individuals. (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(b) *Socially disadvantaged individual*. A socially disadvantaged individual is a person who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to his or her individual qualities and as further defined by the implementing regulations of section 8(a)(5) of the Small Business Act (15 U.S.C. 637(a)(5); 13 CFR 124.103; see also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations).

(c) *Economically disadvantaged individual*. An economically disadvantaged individual is a socially disadvantaged individual whose ability

to compete in the free enterprise system is impaired due to diminished capital and credit opportunities, as compared to others in the same business area who are not socially disadvantaged and as further defined by section 8(a)(6) of the Small Business Act (15 U.S.C. 637(a)(6)) and its implementing regulations (13 CFR 124.104). (See also 13 CFR 124.109 for special rules applicable to Indian tribes and Alaska Native Corporations; 13 CFR 124.110 for special rules applicable to Native Hawaiian Organizations). Under EPA's DBE Program, an individual claiming disadvantaged status must have an initial and continued personal net worth of less than \$750,000.

(d) *Presumptions*. In accordance with Title X of the Clean Air Act Amendments of 1990, 42 U.S.C. 7601 note, Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are presumed to be socially and economically disadvantaged individuals. In addition, the following institutions are presumed to be entities owned and controlled by socially and economically disadvantaged individuals: HBCUs, Minority Institutions (including Tribal Colleges and Universities and Hispanic-Serving Institutions) and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

(e) *Individuals not members of designated groups*. Nothing in this section shall prohibit any member of a racial or ethnic group that is not designated as socially and economically disadvantaged under paragraph (d) of this section from establishing that they have been impeded in developing a business concern as a result of racial or ethnic discrimination.

(f) *Rebuttal of presumptions*. The presumptions established by paragraph (d) of this section may be rebutted in accordance with § 33.209 with respect to a particular entity if it is reasonably established that the individual at issue is not experiencing impediments to developing such entity as a result of the individual's identification as a member of a specified group.

(g) *Joint ventures*.

(1) A joint venture may be considered owned and controlled by socially and economically disadvantaged individuals, notwithstanding the size of such joint venture, if a party to the joint venture is an entity that is owned and controlled by a socially and economically disadvantaged individual, and that entity owns 51% of the joint venture.

(2) As a party to a joint venture, a person who is not an economically disadvantaged individual, or an entity that is not owned and controlled by a socially and economically disadvantaged individual, may not be a party to more than two awarded contracts in a fiscal year solely by joint venture with a socially and economically disadvantaged individual or entity.

**§ 33.204 Where does an entity become certified under EPA's 8% and 10% statutes?**

(a) In order to participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE Program, an entity must first attempt to be certified by the following:

(1) The United States Small Business Administration (SBA), under its 8(a) Business Development Program (13 CFR part 124, subpart A) or its Small Disadvantaged Business (SDB) Program, (13 CFR part 124, subpart B);

(2) The United States Department of Transportation (DOT), under its regulations for Participation by Disadvantaged Business Enterprises in DOT Programs (49 CFR parts 23 and 26); or

(3) an Indian Tribal Government, State Government, local Government or independent private organization in accordance with EPA's 8% or 10% statute as applicable.

(2) Such certifications shall be considered acceptable for establishing MBE or WBE status, as appropriate, under EPA's DBE Program as long as the certification meets EPA's U.S. citizenship requirement under § 33.202 or § 33.203.

(3) An entity may only apply to EPA for MBE or WBE certification under the procedures set forth in § 33.205 if that entity first is unable to obtain MBE or WBE certification under paragraphs (a) (1) through (3) of this section.

(b) [Reserved].

**§ 33.205 How does an entity become certified by EPA?**

(a) *Filing an application*. In accordance with § 33.204, an entity may apply to EPA's Office of Small and Disadvantaged Business Utilization (EPA OSDBU) for certification as an MBE or WBE. EPA's Regional Offices will provide further information and required application forms to any entity interested in MBE or WBE certification. The applicant must attest to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the

form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The application must include evidence demonstrating that the entity is owned or controlled by one or more individuals claiming disadvantaged status under EPA's 8% statute or owned and controlled by one or more individuals claiming disadvantaged status under EPA's 10% statute, along with certifications or narratives regarding the disadvantaged status of such individuals. In addition, the application must include documentation of a denial of certification by a Federal agency, State government, local government, Indian Tribal government, or independent private organization, if applicable.

(b) *Application processing.* EPA OSDDBU will advise each applicant within 15 days, whenever practicable, after receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. EPA OSDDBU shall make its certification decision within 30 days of receipt of a complete and suitable application package, whenever practicable. The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own or control the entity under EPA's 8% statute or own and control the entity under EPA's 10% statute.

(c) *Ownership and/or control determination.* EPA OSDDBU first will determine whether those individuals claiming disadvantaged status own or control the applicant entity under EPA's 8% statute or own and control the applicant entity under EPA's 10% statute. If EPA OSDDBU determines that the applicant does not meet the ownership and/or control requirements of this subpart, EPA OSDDBU will issue a written decision to the entity rejecting the application and set forth the reasons for disapproval.

(d) *Disadvantaged determination.* Once EPA OSDDBU determines whether an applicant meets the ownership and/or control requirements of this subpart, EPA OSDDBU will determine whether the applicable disadvantaged status requirements under EPA's 8% or 10% statute have been met. If EPA OSDDBU determines that the applicable disadvantaged status requirements have been met, EPA OSDDBU shall notify the applicant that it has been certified and place the MBE or WBE on EPA OSDDBU's list of qualified MBEs and WBEs. If EPA OSDDBU determines that the applicable disadvantaged status requirements have not been met, EPA OSDDBU will reject the entity's

application for certification. EPA OSDDBU will issue a written decision to the entity setting forth EPA OSDDBU's reasons for disapproval.

(e) *Evaluation standards.* (1) An entity's eligibility shall be evaluated on the basis of present circumstances. An entity shall not be denied certification based solely on historical information indicating a lack of ownership and/or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the entity currently meets the ownership and/or control standards of this subpart.

(2) Entities seeking MBE or WBE certification shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial of certification.

(3) In making its certification determination, EPA OSDDBU may consider whether an entity has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program.

(4) EPA OSDDBU shall not consider the issue of whether an entity performs a commercially useful function in making its certification determination. Consideration of whether an entity performs a commercially useful function or is a regular dealer pertains solely to counting toward MBE and WBE objectives as provided in subpart E of this part.

(5) Information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information will be safeguarded from disclosure to unauthorized persons, consistent with applicable Federal, State, and local law.

(6) To assist in making EPA OSDDBU's certification determination, EPA OSDDBU itself may take the following steps:

(i) Perform an on-site visit to the offices of the entity. Interview the principal officers of the entity and review their resumes and/or work histories. Perform an on-site visit to local job sites if there are such sites on which the entity is working at the time of the certification investigation. Already existing site visit reports may be relied upon in making the certification;

(ii) If the entity is a corporation, analyze the ownership of stock in the entity;

(iii) Analyze the bonding and financial capacity of the entity;

(iv) Determine the work history of the entity, including contracts it has received and work it has completed;

(v) Obtain a statement from the entity of the type of work it prefers to perform for EPA recipients under the DBE Program and its preferred locations for performing the work, if any; and

(vi) Obtain or compile a list of the equipment owned by or available to the entity and the licenses the entity and its key personnel possess to perform the work it seeks to do for EPA recipients under the DBE Program.

**§ 33.206 Is there a list of certified MBEs and WBEs?**

EPA OSDDBU will maintain a list of certified MBEs and WBEs on EPA OSDDBU's Home Page on the Internet. Any interested person may also obtain a copy of the list from EPA OSDDBU.

**§ 33.207 Can an entity reapply to EPA for MBE or WBE certification?**

An entity which has been denied MBE or WBE certification may reapply for certification at any time 12 months or more after the date of the most recent determination by EPA OSDDBU to decline the application.

**§ 33.208 How long does an MBE or WBE certification from EPA last?**

Once EPA OSDDBU certifies an entity to be an MBE or WBE by placing it on the EPA OSDDBU list of certified MBEs and WBEs specified in § 33.206, the entity will generally remain on the list for a period of three years from the date of its certification. To remain on the list after three years, an entity must submit a new application and receive a new certification.

**§ 33.209 Can EPA re-evaluate the MBE or WBE status of an entity after EPA certifies it to be an MBE or WBE?**

(a) EPA OSDDBU may initiate a certification determination whenever it receives credible information calling into question an entity's eligibility as an MBE or WBE. Upon its completion of a certification determination, EPA OSDDBU will issue a written determination regarding the MBE or WBE status of the questioned entity.

(b) If EPA OSDDBU finds that the entity does not qualify as an MBE or WBE, EPA OSDDBU will decertify the entity as an MBE or WBE, and immediately remove the entity from the EPA OSDDBU list of certified MBEs and WBEs.

(c) If EPA OSDDBU finds that the entity continues to qualify as an MBE or WBE, the determination remains in effect for three years from the date of the decision under the same conditions as if the entity had been granted MBE or WBE certification under § 33.205.

**§ 33.210 Does an entity certified as an MBE or WBE by EPA need to keep EPA informed of any changes which may affect the entity's certification?**

(a) An entity certified as an MBE or WBE by EPA OSDBU must provide EPA OSDBU, every year on the anniversary of the date of its certification, an affidavit sworn to by the entity's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the entity's circumstances affecting its ability to meet disadvantaged status, ownership, and/or control requirements of this subpart or any material changes in the information provided in its application form. Failure to comply may result in the loss of MBE or WBE certification under EPA's DBE Program.

(b) An entity certified as an MBE or WBE by EPA OSDBU must inform EPA OSDBU in writing of any change in circumstance affecting the MBE's or WBE's ability to meet disadvantaged status, ownership, and/or control requirements of this subpart or any material change in the information provided in its application form. The MBE or WBE must attach supporting documentation describing in detail the nature of such change. The notice from the MBE or WBE must take the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The MBE or WBE must provide the written notification within 30 calendar days of the occurrence of the change.

**§ 33.211 What is the process for appealing or challenging an EPA MBE or WBE certification determination?**

(a) An entity which has been denied MBE or WBE certification by EPA OSDBU under § 33.205 or § 33.209 may appeal that denial. A third party may challenge EPA OSDBU's determination to certify an entity as an MBE or WBE under § 33.205 or § 33.209.

(b) Appeals and challenges must be sent to the Director of OSDBU at Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Mail Code 1230T, Washington, DC 20460.

(c) The appeal or challenge must be sent to the Director of OSDBU (Director) within 90 days of the date of EPA OSDBU's MBE or WBE certification determination. The Director may accept an appeal or challenge filed later than 90 days after the date of EPA OSDBU's MBE or WBE certification determination

if the Director determines that there was good cause, beyond the control of the appellant or challenger, for the late filing of the appeal or challenge.

(d) No specific format is required for an appeal or challenge. However, the appeal or challenge must include information and arguments concerning why EPA OSDBU's MBE or WBE certification determination should be reversed. For challenges in which a third party questions EPA OSDBU's determination to certify an entity as an MBE or WBE under § 33.205 or § 33.209, the third party must also send a copy of the challenge to the entity whose MBE or WBE certification is being questioned. In addition, the Director shall request information and arguments from that entity as to why EPA OSDBU's determination to certify the entity as an MBE or WBE should be upheld.

(e) The Director makes his/her appeal or challenge decision based solely on the administrative record and does not conduct a hearing. The Director may supplement the record by adding relevant information made available by any other source, including the EPA Office of Inspector General; Federal, State, or local law enforcement authorities; an EPA recipient; or a private party.

(f) Consistent with Federal law, the Director shall make available, upon the request of the appellant, challenger or the entity affected by the Director's appeal or challenge decision, any supplementary information the Director receives from any source as described in paragraph (e) of this section.

(g) Pending the Director's appeal or challenge decision, EPA OSDBU's MBE or WBE certification determination remains in effect. The Director does not stay the effect of its MBE or WBE certification determination while he/she is considering an appeal or challenge.

(h) The Director shall reverse EPA OSDBU's MBE or WBE certification determination only if there was a clear and significant error in the processing of the certification or if EPA OSDBU failed to consider a significant material fact contained within the entity's application for MBE or WBE certification.

(i) All decisions under this section are administratively final.

**§ 33.212 What conduct is prohibited by this subpart?**

An entity that does not meet the eligibility criteria of this subpart may not attempt to participate as an MBE or WBE in contracts awarded under EPA financial assistance agreements or be counted as such by an EPA recipient. An entity that submits false, fraudulent,

or deceitful statements or representations, or indicates a serious lack of business integrity or honesty, may be subject to sanctions under § 33.105.

**Subpart C—Good Faith Efforts**

**§ 33.301 What does this subpart require?**

A recipient, including one exempted from applying the fair share objective requirements by § 33.411, is required to make the following good faith efforts whenever procuring construction, equipment, services and supplies under an EPA financial assistance agreement, even if it has achieved its fair share objectives under subpart D of this part:

(a) Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For Indian Tribal, State and Local and Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.

(b) Make information on forthcoming opportunities available to DBEs and arrange time frames for contracts and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.

(c) Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For Indian Tribal, State and local Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.

(d) Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.

(e) Use the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.

(f) If the prime contractor awards subcontracts, require the prime contractor to take the steps in paragraphs (a) through (e) of this section.

**§ 33.302 Are there any additional contract administration requirements?**

(a) A recipient must require its prime contractor to pay its subcontractor for satisfactory performance no more than 30 days from the prime contractor's receipt of payment from the recipient.

(b) A recipient must be notified in writing by its prime contractor prior to any termination of a DBE subcontractor for convenience by the prime contractor.

(c) If a DBE subcontractor fails to complete work under the subcontract for any reason, the recipient must require the prime contractor to employ the six good faith efforts described in § 33.301 if soliciting a replacement subcontractor.

(d) A recipient must require its prime contractor to employ the six good faith efforts described in § 33.301 even if the prime contractor has achieved its fair share objectives under subpart D of this part.

(e) A recipient must require its prime contractor to provide EPA Form 6100-2—DBE Program Subcontractor Participation Form to all of its DBE subcontractors. EPA Form 6100-2 gives a DBE subcontractor the opportunity to describe the work the DBE subcontractor received from the prime contractor, how much the DBE subcontractor was paid and any other concerns the DBE subcontractor might have, for example reasons why the DBE subcontractor believes it was terminated by the prime contractor. DBE subcontractors may send completed copies of EPA Form 6100-2 directly to the appropriate EPA DBE Coordinator.

(f) A recipient must require its prime contractor to have its DBE subcontractors complete EPA Form 6100-3—DBE Program Subcontractor Performance Form. A recipient must then require its prime contractor to include all completed forms as part of the prime contractor's bid or proposal package.

(g) A recipient must require its prime contractor to complete and submit EPA Form 6100-4—DBE Program Subcontractor Utilization Form as part of the prime contractor's bid or proposal package.

(h) Copies of EPA Form 6100-2—DBE Program Subcontractor Participation Form, EPA Form 6100-3—DBE Program Subcontractor Performance Form and EPA Form 6100-4—DBE Program Subcontractor Utilization Form may be obtained from EPA OSDDBU's Home Page on the Internet or directly from EPA OSDDBU.

(i) A recipient must ensure that each procurement contract it awards contains the term and condition specified in the Appendix concerning compliance with the requirements of this part. A recipient must also ensure that this term and condition is included in each procurement contract awarded by an entity receiving an identified loan under a financial assistance agreement to capitalize a revolving loan fund.

**§ 33.303 Are there special rules for loans under EPA financial assistance agreements?**

A recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, such as a State under the CWSRF or DWSRF or an eligible entity under the Brownfields Cleanup Revolving Loan Fund program, must require that borrowers receiving identified loans comply with the good faith efforts described in § 33.301 and the contract administration requirements of § 33.302. This provision does not require that such private and nonprofit borrowers expend identified loan funds in compliance with any other procurement procedures contained in 40 CFR part 30, part 31, or part 35, subpart O, as applicable.

**§ 33.304 Must a Native American (either as an individual, organization, Tribe or Tribal Government) recipient or prime contractor follow the six good faith efforts?**

(a) A Native American (either as an individual, organization, corporation, Tribe or Tribal Government) recipient or prime contractor must follow the six good faith efforts only if doing so would not conflict with existing Tribal or Federal law, including but not limited to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e), which establishes, among other things, that any federal contract, subcontract, grant, or subgrant awarded to Indian organizations or for the benefit of Indians, shall require preference in the award of subcontracts and subgrants to Indian organizations and to Indian-owned economic enterprises.

(b) Tribal organizations awarded an EPA financial assistance agreement have the ability to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. Tribal governments with promulgated tribal laws and regulations concerning the solicitation and recruitment of Native-owned and other minority business enterprises, including women-owned business enterprises, have the discretion to utilize these tribal laws and regulations in lieu of the six good faith efforts. If the effort to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts. All tribal recipients still must retain records documenting compliance in accordance with § 33.501 and must report to EPA on their accomplishments in accordance with § 33.502.

(c) Any recipient, whether or not Native American, of an EPA financial

assistance agreement for the benefit of Native Americans, is required to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. If the efforts to solicit and recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts.

(d) Native Americans are defined in § 33.103 to include American Indians, Eskimos, Aleuts and Native Hawaiians.

**Subpart D—Fair Share Objectives**

**§ 33.401 What does this subpart require?**

A recipient must negotiate with the appropriate EPA award official or his/her designee, fair share objectives for MBE and WBE participation in procurement under the financial assistance agreements.

**§ 33.402 Are there special rules for loans under EPA financial assistance agreements?**

A recipient of an EPA financial assistance agreement to capitalize revolving loan funds must either apply its own fair share objectives negotiated with EPA under § 33.401 to identified loans using a substantially similar relevant geographic market, or negotiate separate fair share objectives with entities receiving identified loans, as long as such separate objectives are based on demonstrable evidence of availability of MBEs and WBEs in accordance with this subpart. If procurements will occur over more than one year, the recipient may choose to apply the fair share objective in place either for the year in which the identified loan is awarded or for the year in which the procurement action occurs. The recipient must specify this choice in the financial assistance agreement, or incorporate it by reference therein.

**§ 33.403 What is a fair share objective?**

A fair share objective is an objective based on the capacity and availability of qualified, certified MBEs and WBEs in the relevant geographic market for the procurement categories of construction, equipment, services and supplies compared to the number of all qualified entities in the same market for the same procurement categories, adjusted, as appropriate, to reflect the level of MBE and WBE participation expected absent the effects of discrimination. A fair share objective is not a quota.

**§ 33.404 When must a recipient negotiate fair share objectives with EPA?**

A recipient must submit its proposed MBE and WBE fair share objectives and supporting documentation to EPA within 120 days after its acceptance of its financial assistance award. EPA must respond in writing to the recipient's submission within 30 days of receipt, either agreeing with the submission or providing initial comments for further negotiation. Failure to respond within this time frame may be considered as agreement by EPA with the fair share objectives submitted by the recipient. MBE and WBE fair share objectives must be agreed upon by the recipient and EPA before funds may be expended for procurement under the recipient's financial assistance agreement.

**§ 33.405 How does a recipient determine its fair share objectives?**

(a) A recipient must determine its fair share objectives based on demonstrable evidence of the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic market for each of the four procurement categories (equipment, construction, services, and supplies). The relevant geographic market is the area of solicitation for the procurement as determined by the recipient. The market may be a geographic region of a State, an entire State, or a multi-State area. Fair share objectives must reflect the recipient's determination of the level of MBE and WBE participation it would expect absent the effects of discrimination. A recipient may combine the four procurement categories into one weighted objective for MBEs and one weighted objective for WBEs.

(b) *Step 1.* A recipient must first determine a base figure for the relative availability of MBEs and WBEs. The following are examples of approaches that a recipient may take. Any percentage figure derived from one of these examples should be considered a basis from which a recipient begins when examining evidence available in its jurisdiction.

(1) *MBE and WBE Directories and Census Bureau Data.* Separately determine the number of certified MBEs and WBEs that are ready, willing, and able to perform in the relevant geographic market for each procurement category from a MBE/WBE directory, such as a bidder's list. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all qualified businesses available in the market that perform work in the same procurement category. Separately divide the number of MBEs and WBEs by the

number of all businesses to derive a base figure for the relative availability of MBEs and WBEs in the market.

(2) *Data from a Disparity Study.* Use a percentage figure derived from data in a valid, applicable disparity study conducted within the preceding ten years comparing the available MBEs and WBEs in the relevant geographic market with their actual usage by entities procuring in the categories of construction, equipment, services, and supplies.

(3) *The Objective of Another EPA Recipient.* A recipient may use, as its base figure, the fair share objectives of another EPA recipient if the recipient demonstrates that it will use the same, or substantially similar, relevant geographic market as the other EPA recipient. (See § 33.411 for exemptions from fair share objective negotiations).

(4) *Alternative Methods.* Subject to EPA approval, other methods may be used to determine a base figure for the overall objective. Any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain an objective that is rationally related to the relative availability of MBEs and WBEs in the relevant geographic market.

(c) *Step 2.* After calculating a base figure, a recipient must examine the evidence available in its jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at the fair share objective.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of MBEs and WBEs to perform contract work under EPA financial assistance agreements, as measured by the volume of work MBEs and WBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within the recipient's jurisdiction, to the extent it is not already accounted for in the base figure; and

(iii) If the base figure is the objective of another EPA recipient, it must be adjusted for differences in the local market and the recipient's contracting program.

(2) A recipient may also consider available evidence from related fields that affect the opportunities for MBEs and WBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of MBEs and WBEs to get the financing, bonding and insurance required to participate; and

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the

extent it can be related to the opportunities for MBEs and WBEs to perform in the program.

(3) If a recipient attempts to make an adjustment to its base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of another ongoing MBE/WBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

**§ 33.406 May a recipient designate a lead agency for fair share objective negotiation purposes?**

If an Indian Tribal, State or local Government has more than one agency that receives EPA financial assistance, the agencies within that Government may designate a lead agency to negotiate MBE and WBE fair share objectives with EPA to be used by each of the agencies. Each agency must otherwise negotiate with EPA separately its own MBE and WBE fair share objectives.

**§ 33.407 How long do MBE and WBE fair share objectives remain in effect?**

Once MBE and WBE fair share objectives have been negotiated, they will remain in effect for three fiscal years unless there are significant changes to the data supporting the fair share objectives. The fact that a disparity study utilized in negotiating fair share objectives has become more than ten years old during the three-year period does not by itself constitute a significant change requiring renegotiation.

**§ 33.408 May a recipient use race and/or gender conscious measures as part of this program?**

(a) Should the good faith efforts described in subpart C of this part or other race and/or gender neutral measures prove to be inadequate to achieve an established fair share objective, race and/or gender conscious action (e.g., apply the subcontracting suggestion in § 33.301(c) to MBEs and WBEs) is available to a recipient and its prime contractor to more closely achieve the fair share objectives, subject to § 33.409. Under no circumstances are race and/or gender conscious actions required by EPA.

(b) Any use of race and/or gender conscious efforts must not result in the selection of an unqualified MBE or WBE.

**§ 33.409 May a recipient use quotas as part of this program?**

A recipient is not permitted to use quotas in procurements under EPA's 8% or 10% statute.

**§ 33.410 Can a recipient be penalized for failing to meet its fair share objectives?**

A recipient cannot be penalized, or treated by EPA as being in noncompliance with this subpart, solely because its MBE or WBE participation does not meet its applicable fair share objective. However, EPA may take remedial action under § 33.105 for a recipient's failure to comply with other provisions of this part, including, but not limited to, the good faith efforts requirements described in subpart C of this part.

**§ 33.411 Who may be exempted from this subpart?**

(a) *General.* A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is not required to apply the fair share objective requirements of this subpart. This exemption is limited to the fair share objective requirements of this subpart.

(b) *Clean Water State Revolving Fund (CWSRF) Program, Drinking Water State Revolving Fund (DWSRF) Program, and Brownfields Cleanup Revolving Loan Fund (BCRLF) Program Identified Loan Recipients.* A recipient under the CWSRF, DWSRF, or BCRLF Program is not required to apply the fair share objective requirements of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the fair share objective requirements of this subpart.

(c) *Tribal and Intertribal Consortia recipients of program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR Part 35, Subpart B.* Tribal and Intertribal consortia recipients of PPG eligible grants are not required to apply the fair share objective requirements of this subpart to those grants. This exemption is limited to the fair share objective requirements of this subpart.

(d) *Technical Assistance Grant (TAG) Program Recipients.* A recipient of a TAG is not required to apply the fair share objective requirements of this subpart to that grant. This exemption is limited to the fair share objective requirements of this subpart.

**§ 33.412 Must an Insular Area or Indian Tribal Government recipient negotiate fair share objectives?**

The requirements in this subpart regarding the negotiation of fair share

objectives will not apply to an Insular Area or Indian Tribal Government recipient until three calendar years after the effective date of this part.

Furthermore, in accordance with § 33.411(c), tribal and intertribal consortia recipients of program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR part 35, subpart B are not required to apply the fair share objective requirements of this subpart to such grants.

**Subpart E—Recordkeeping and Reporting****§ 33.501 What are the recordkeeping requirements of this part?**

(a) A recipient, including those recipients exempted under § 33.411 from the requirement to apply the fair share objectives, must maintain all records documenting its compliance with the requirements of this part, including documentation of its, and its prime contractors', good faith efforts and data relied upon in formulating its fair share objectives. Such records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement.

(b) A recipient of a Continuing Environmental Program Grant or other annual grant must create and maintain a bidders list. In addition, a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund also must require entities receiving identified loans to create and maintain a bidders list if the recipient of the loan is subject to, or chooses to follow, competitive bidding requirements. (See *e.g.*, § 33.303). The purpose of a bidders list is to provide the recipient and entities receiving identified loans who conduct competitive bidding with as accurate a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. The list must include all firms that bid or quote on prime contracts, or bid or quote subcontracts on EPA assisted projects, including both MBE/WBEs and non-MBE/WBEs. The bidders list must only be kept until the grant project period has expired and the recipient is no longer receiving EPA funding under the grant. For entities receiving identified loans, the bidders list must only be kept until the project period for the identified loan has ended. The following information must be obtained from all prime and subcontractors:

- (1) Entity's name with point of contact;
- (2) Entity's mailing address, telephone number, and e-mail address;

(3) The procurement on which the entity bid or quoted, and when; and

(4) Entity's status as an MBE/WBE or non-MBE/WBE.

(c) *Exemptions.* A recipient of an EPA financial assistance agreement in the amount of \$250,000 or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of \$250,000 or less in any one fiscal year, is exempt from the paragraph (b) of this section requirement to create and maintain a bidders list. Also, a recipient under the CWSRF, DWSRF, or BCRLF Program is not required to apply the paragraph (b) of this section bidders list requirement of this subpart to an entity receiving an identified loan in an amount of \$250,000 or less, or to an entity receiving more than one identified loan with a combined total of \$250,000 or less in any one fiscal year. This exemption is limited to the paragraph (b) of this section bidders list requirements of this subpart.

**§ 33.502 What are the reporting requirements of this part?**

MBE and WBE participation must be reported by all recipients, including those recipients exempted under § 33.411 from the requirement to apply the fair share objectives, on EPA Form 5700-52A. Recipients of Continuing Environmental Program Grants under 40 CFR part 35, subpart A; recipients of Performance Partnership Grants (PPGs) under 40 CFR part 35, subpart B; General Assistance Program (GAP) grants for tribal governments and intertribal consortia; and institutions of higher education, hospitals and other non-profit organizations receiving financial assistance agreements under 40 CFR part 30, will report on MBE and WBE participation on an annual basis. All other financial assistance agreement recipients, including recipients of financial assistance agreements capitalizing revolving loan funds, will report on MBE and WBE participation semiannually. Recipients of financial assistance agreements that capitalize revolving loan programs must require entities receiving identified loans to submit their MBE and WBE participation reports on a semiannual basis to the financial assistance agreement recipient, rather than to EPA.

**§ 33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?**

(a) *General.* Only certified MBEs and WBEs are to be counted towards MBE/WBE participation. Amounts of MBE and WBE participation are calculated as a percentage of total financial assistance

agreement project procurement costs, which include the match portion of the project costs, if any. For recipients of financial assistance agreements that capitalize revolving loan programs, the total amount is the total procurement dollars in the amount of identified loans equal to the capitalization grant amount.

(b) *Ineligible project costs.* If all project costs attributable to MBE and WBE participation are not eligible for funding under the EPA financial assistance agreement, the recipient may choose to report the percentage of MBE and WBE participation based on the total eligible and non-eligible costs of the project.

(c) *Joint ventures.* For joint ventures, MBE and WBE participation consists of the portion of the dollar amount of the joint venture attributable to the MBE or WBE. If an MBE's or WBE's risk of loss, control or management responsibilities is not commensurate with its share of the profit, the Agency may direct an adjustment in the percentage of MBE or WBE participation.

(d) *Central Purchasing or Procurement Centers.* A recipient must report MBE and WBE participation from its central purchasing or procurement centers.

(e) *Brokers.* A recipient may not count expenditures to a MBE or WBE that acts merely as a broker or passive conduit of funds, without performing, managing, or supervising the work of its contract or subcontract in a manner consistent with normal business practices.

(1) *Presumption.* If 50% or more of the total dollar amount of a MBE or WBE's prime contract is subcontracted to a non-DBE, the MBE or WBE prime contractor will be presumed to be a broker, and no MBE or WBE participation may be reported.

(2) *Rebuttal.* The MBE or WBE prime contractor may rebut this presumption by demonstrating that its actions are consistent with normal practices for prime contractors in its business and that it will actively perform, manage and supervise the work under the contract.

(f) *MBE or WBE Truckers/Haulers.* A recipient may count expenditures to an MBE or WBE trucker/hauler only if the MBE or WBE trucker/hauler is performing a commercially useful function. The following factors should be used in determining whether an MBE or WBE trucker/hauler is performing a commercially useful function:

(1) The MBE or WBE must be responsible for the management and supervision of the entire trucking/hauling operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement

for the purpose of meeting MBE or WBE objectives.

(2) The MBE or WBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

#### Appendix A to Part 33—Term and Condition

Each procurement contract signed by an EPA financial assistance agreement recipient, including those for an identified loan under an EPA financial assistance agreement capitalizing a revolving loan fund, must include the following term and condition:

The contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies.

#### PART 35—[AMENDED]

##### Subpart E—[Amended]

■ 6. The authority citation for part 35, subpart E, continues to read as follows:

**Authority:** Secs. 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 217, 304(d)(3), 313, 501, 511, and 516(b) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

##### § 35.936–7 [Removed]

■ 7. Section 35.936–7 is removed.

##### § 35.938–9 [Amended]

■ 8. Section 35.938–9 is amended by removing and reserving paragraph (b)(2).

##### Subpart K—[Amended]

■ 9. The authority citation for part 35, subpart K, continues to read as follows:

**Authority:** Secs. 205(m), 501(a) and title VI of the Clean Water Act, as amended, 42 U.S.C. 1285(m), 33 U.S.C. 1361(a), 33 U.S.C. 1381–1387.

##### § 35.3145 [Amended]

■ 10. Section 35.3145 is amended by removing paragraphs (d) and (e).

##### Subpart L—[Amended]

■ 11. The authority citation for part 35, subpart L, continues to read as follows:

**Authority:** Section 1452 of the Safe Drinking Water Act, as amended, 42 U.S.C. 300j-12.

##### § 35.3575 [Amended]

■ 12. Section 35.3575(d) is removed and reserved.

##### Subpart M—[Amended]

■ 13. The authority citation for part 35, subpart M, continues to read as follows:

**Authority:** 42 U.S.C. 9617(e); sec. 9(g), E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

##### § 35.4170 [Amended]

■ 14. Section 35.4170(b) is removed and reserved.

##### § 35.4205 [Amended]

■ 15. Section 35.4205(g) is removed.

##### § 35.4240 [Amended]

■ 16. Section 35.4240(e) is removed and reserved.

##### Subpart O—[Amended]

■ 17. The authority citation for part 35, subpart O, continues to read as follows:

**Authority:** 42 U.S.C. 9601 *et seq.*

##### § 35.6015 [Amended]

■ 18. Section 35.6015(a) is amended by removing the definitions for “Minority Business Enterprise (MBE)” and “Women’s Business Enterprise (WBE)”.

##### § 35.6550 [Amended]

■ 19. Section 35.6550(a)(8) is removed and reserved.

##### § 35.6580 [Amended]

■ 20. Section 35.6580 is removed.

##### § 35.6610 [Amended]

■ 21. Section 35.6610(c) is removed and reserved.

##### § 35.6665 [Removed]

■ 22. Section 35.6665 is removed.

#### PART 40—[Amended]

■ 21. The authority citation for part 40 is revised to read as follows:

**Authority:** 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2609 *et seq.*; 33 U.S.C. 1254 *et seq.* and 1443; 42 U.S.C. 241 *et seq.*, 300f *et seq.*, 1857 *et seq.*, 1891 *et seq.*, and 6901 *et seq.*

##### § 40.145–3 [Amended]

■ 22. Section 40.145–3(c) is removed and reserved.

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