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Part III

Environmental Protection Agency

40 CFR Part 30 et al.

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

ENVIRONMENTAL PROTECTION AGENCY

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

[Docket ID NO. OA–2002–0001; FRL–7528–1]

RIN 2020–AA39

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

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA is proposing to revise its Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) Program and rename it as EPA's Disadvantaged Business Enterprise (DBE) Program. EPA is proposing to delete existing MBE and WBE specific provisions in regulations for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, State and Local Assistance, and Research and Demonstration Grants and is proposing to consolidate and add to these provisions in a new regulation. The new regulation is intended to harmonize EPA's statutory DBE procurement objectives with the United States Supreme Court's decision in *Adarand Constructors, Inc.* v. *Pena,* 115 S. Ct. 2097 (1995). In *Adarand,* the Supreme Court extended strict judicial scrutiny to federal programs that use racial or ethnic criteria as a basis for decision making. This proposed rule reflects EPA's efforts to ensure that the compelling government interest of remedying past and current racial discrimination through the use of agency-wide DBE procurement objectives at EPA is served by a narrowly-tailored program. 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 proposed rule may affect you.

DATES: *Comments:* You must send comments electronically, by mail or through hand delivery/courier on or before January 20, 2004.

ADDRESSES: Send your comments (in triplicate, if possible) to: Office of Environmental Information Docket Environmental Protection Agency, Mailcode 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OA 2002–0001. Please use a font no smaller than 12pt. Comments may also be submitted electronically, or through hand delivery/courier. Follow the detailed instructions as provided in I.B. of the **SUPPLEMENTARY INFORMATION** section.

Public hearings: EPA will hold public hearings on this proposed rule. If you wish to speak, contact the person(s) named under the section entitled ''For Further Information Contact.'' Verbatim transcripts of the hearings will be available for reading and copying at the official public docket for this action under Docket ID NO. OA–2002–0001. See Supplementary Information I.A.1.

FOR FURTHER INFORMATION CONTACT: Mark Gordon, Attorney Advisor at (202) 564–5951, Kimberly Patrick, Attorney Advisor at (202) 564–5386, or David Sutton, Deputy Director at (202) 564–4444, OSDBU, U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. OA–2002–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Office of Environmental Information Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1742, and the telephone number for the Office of Environmental Information is (202) 566–1752.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in I.A.1 above.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA

Dockets online or *see* 67 FR 38102, May 31, 2002.

B. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. However, late comments may be considered if time permits.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and then key in Docket ID No. OA–2002–0001. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to oei.docket @ epamail.epa.gov Attention Docket ID No. OA–2002–0001. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in I.A.1 above. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments (in triplicate, if possible) to: Office of Environmental Information Docket Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. OA 2002–0001. Please use a font size no smaller than 12.

3. *By Hand Delivery or Courier.* Deliver your comments (in triplicate, if possible) to: EPA Docket Center, (EPA/DC) EPA West, Room B 102, 1301 Constitution Avenue, NW., Washington, D.C. Attention Docket ID No. OA 2002–0001. Such deliveries are only accepted during the Docket's normal hours of operation as identified in I.A.1 above. Please use a font size no smaller than 12.

The docket is an organized file of all the information EPA considered in developing this proposed rule. The docketing system allows you to readily identify and locate documents so you can participate in the rulemaking. Along with the proposed and promulgated standards and their preambles, contents of the docket will serve as the record in case of judicial review.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

D. Will EPA Hold Public Hearings and Tribal Consultations on This Proposed Rule?

EPA plans to hold a number of public hearings on this proposed rule during the 180 day comment period. As part of its ongoing consultation with Tribes, EPA also plans to hold a number of meetings with Tribal officials/representatives on this proposed rulemaking during the 180 day comment period. EPA will announce in the **Federal Register** the dates, times and locations of these public hearings and meetings.

In writing the following proposed preamble and rule, EPA has considered all comments received in response to the staff draft of the preamble and rule, dated June 19, 2000, which was posted on EPA's website at *http://www.epa.gov/osdbu* and distributed to various stakeholders. Changes have been made to this proposed preamble and rule in response to some of these comments.

This is a proposed rule. The contents of today's preamble are listed in the following outline:

I. Introduction
II. Section-by-Section Analysis
A. Subpart A—General Provisions
B. Subpart B—Certification
C. Subpart C—Good Faith Efforts
D. Subpart D—Fair Share Objectives
E. Subpart E—Recordkeeping and Reporting
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq.*
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act

I. Introduction

40 CFR Part 33, Procurement under Assistance Agreements, became effective March 28, 1983. These procurement requirements required recipients of EPA financial assistance

agreements to take the six affirmative steps to assure that small, minority and women's businesses were used when possible as sources of construction, services and supplies. As part of a government-wide effort in 1988, EPA promulgated 40 CFR Part 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. In 1996, the Agency promulgated 40 CFR Part 30, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. Parts 30 and 31 superseded the procurement provisions of former Part 33. Parts 30 and 31 contain DBE Program provisions at 40 CFR 30.44(b) and 31.36(e), respectively.

Various EPA programs have their own regulations containing DBE requirements. For example, the EPA Superfund Program promulgated regulations which contain DBE provisions for Grants for Technical Assistance at 40 CFR 35.4066(g) and for Cooperative Agreements and Superfund State Contracts for Superfund Response Actions at 40 CFR 35.6015(a)(26) and (54), 35.6580 and 35.6665 (b). The EPA Clean Water State Revolving Fund (CWSRF) Program promulgated regulations containing DBE provisions at 40 CFR 35.3145(d) and (e). The DWSRF Program has promulgated regulations containing DBE provisions at 40 CFR 35.3575(d). DBE requirements for Research and Demonstration Grants can be found at 40 CFR 40.145–3(c).

EPA's legal authorities for its DBE Program are:

Public Law 102–389, a 1993 appropriations act (42 U.S.C. 4370d) (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 per centum 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
> * * *

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 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.

In 1995, the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097(1995), extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. 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.

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) revised its program for participation of DBEs in procurement under DOT's financial assistance agreements. 64 FR 5096. In direct Federal procurement, the Small Business Administration (SBA) has issued final regulations amending two programs intended to foster small disadvantaged business participation, the 8(a) Business Development and Small Disadvantaged Business Participation Programs. 63 FR 35726; 63 FR 36120.

This proposed rulemaking would affect only procurements pursuant to EPA financial assistance agreements rather than direct Federal procurement actions. All of EPA's current DBE fair share objectives and good faith efforts regulatory provisions would be deleted as part of this rulemaking effort, and the proposed DBE provisions to be codified in the new 40 CFR Part 33 would apply. In addition, this proposal would supersede inconsistent provisions of previous guidance documents for EPA's former MBE and WBE Program, including, but not limited to, OSDBU's ''Guidance for Utilization of Small, Minority, and Women's Business Enterprises in Procurement Under Assistance Agreements' (the 1997 Guidance). 62 FR 45645.

II. Section-by-Section Analysis

Subpart A—General Provisions

Section 33.101 What Are the Objectives of This Part?

This proposed rule is EPA's revision to its current MBE and WBE Program. EPA needs to reconcile its requirements for financial assistance agreements under EPA's 8% statute and EPA's 10% statute with the Supreme Court's decision in *Adarand*. In that case the Supreme Court held that Federal Government programs that use race or national origin as a criterion for decision making are subject to strict judicial scrutiny. Such programs must be based on a compelling government interest, for example, remedying the effects of racial/ethnic discrimination, and must be narrowly tailored to accomplish that interest.

EPA's proposed rulemaking is one part of the Agency's overall effort to review and, where necessary, revise affirmative action programs in light of *Adarand*. This rulemaking proposal tailors EPA's DBE Program more precisely to the objective of remedying the effects of racial/ethnic discrimination.

Section 33.102 When Do the Requirements of This Part Apply?

This Part's requirements apply to procurement under EPA financial assistance agreements, including financial assistance agreements to capitalize revolving loan funds, performed entirely within the United States. The term ''United States'' is later defined in 33.103 to include the Commonwealth of Puerto Rico and any other territories and possessions of the United States.

Section 33.103 What Do the Terms in This Part Mean?

To the extent possible, EPA has referred to definitions contained in 40 CFR Parts 30, 31 and 35, and other agencies' existing regulations, *e.g.*, Historically Black College or University

(HBCU). Other definitions were derived from the 1997 Guidance.

EPA is creating a new term, DBE, for its revised program. The new Part 33 defines DBE as an entity owned or controlled by an individual who is socially and economically disadvantaged under EPA's 8% statute, an entity owned and controlled by an individual who is socially and economically disadvantaged under EPA's 10% statute, as well as a Small Business Enterprise (SBE), a Small Business in a Rural Area (SBRA), a Labor Surplus Area Firm (LSAF), a Historically Underutilized Business (HUB) Zone Small Business Concern, or a concern under a successor program. Unlike EPA's previous program, the terms MBE and WBE no longer describe the entire program. Instead, these terms are now merely subsets of the entities described as DBEs. As a result, the definition of MBE has been modified to include an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes.

In addition, the term ''financial assistance agreement'' has been defined as both grants and cooperative agreements awarded by EPA, including such agreements used to capitalize revolving loan funds including, but not limited to, the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund or the Brownfields Revolving Fund Programs. The term ''identified loan'' is also defined to indicate those projects and activities to which the requirements of this Part apply for recipients of capitalization agreements for revolving loan funds. For Brownfields capitalization grant recipients, the identified loans will be those funded with EPA financial assistance.

The definition of Small Business in Rural Areas has been shortened from the one contained in the 1997 Guidance. No substantive change is intended. The U.S. Department of Agriculture (USDA) Rural-Urban Continuum Classification Code applies to every county in the United States, and classifies counties based on proximity to metropolitan areas. EPA is using Codes 6–9 as rural counties for purposes of identifying small businesses in rural areas.

Section 33.104 May a Recipient Apply for a Waiver From the Requirements of This Part?

A recipient will be able to apply for a waiver in a special or exceptional situation where the recipient believes that compliance with any of the requirements in this Rule would be impractical. The Agency believes that the waiver provision is an important component of narrowly tailoring its DBE Program to unique local circumstances and to ensure non-discrimination. EPA intends to carefully review any waiver applications to ensure that any proposed alternative program is able to meet the objectives of EPA's DBE Program and is in accordance with law. This added flexibility could allow an EPA financial assistance agreement recipient to deal creatively with its specific circumstances.

Section 33.105 What Are the Compliance and Enforcement Provisions of This Part?

This section reserves to EPA the right to take remedial action under existing legal authorities if a recipient fails to comply with any of the requirements of the Rule.

Section 33.106 What Assurances Must EPA Financial Assistance Recipients Obtain From Their Contractors?

An EPA financial assistance recipient must ensure that the contract term and condition in the Appendix to this Rule is included in the procurement contracts it awards under EPA financial assistance agreements. This includes contracts under identified loans pursuant to EPA financial assistance agreements capitalizing revolving loan fund programs. This term and condition ensures that a recipient applies pertinent provisions of this Rule to its prime contractor.

Section 33.107 What Are the Rules Governing Availability of Records, Cooperation, and Intimidation and Retaliation?

Paragraph (a) of this section discusses the availability to the general public of information concerning EPA's DBE Program. Paragraphs (b) and (c) discuss the obligation of all participants in EPA's DBE Program to cooperate and never use intimidation and retaliation with respect to EPA's DBE Program.

Subpart B—Certification

Section 33.201 What Does This Subpart Require?

Currently EPA recognizes an entity which is certified as socially and economically disadvantaged by the Small Business Administration (SBA), certified as an MBE by a State or Federal Agency or self-certifies that it is an independent business concern owned and controlled by a minority group member(s) as an MBE. 40 CFR 35.6015 (26); the 1997 Guidance, pp. 3–2 through 3–6.

EPA is proposing to make four changes to the current certification requirements. The first change is to no longer allow an entity to self-certify as being owned and/or controlled by a socially and economically disadvantaged individual or as a WBE under EPA's 8% or 10% statutes. The second change is to allow recognition of certifications of entities as owned and/or controlled by a socially and economically disadvantaged individual or by a woman under EPA's 8% or 10% statutes by Indian Tribal, State (including Insular Areas) and local Governments or independent private organizations so long as the applicable criteria match those under SBA's applicable 8(a) Business Development Program regulations. The third change is to clarify that EPA will accept DOT DBE certifications of U.S. citizens as valid certifications under this program. The fourth change is that EPA will set up its own certification program with the possible use of EPA Private Certifiers to assist EPA in its certification determinations.

The provisions for certification under EPA's 8% and 10% statutes have been separated from one another since the presumptions under those statutes are different. Because EPA's 8% statute incorporates Section 8(a)(5) of the Small Business Act, this Rule adopts for purposes of the 8% statute SBA's regulatory presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong and Macao), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Phillippines, U.S. Trust Territory of the Pacific Islands, (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA. As is the case under SBA's 8(a) Business Development Program, Brazilian Americans with Portugese surnames and Portugese Americans would be considered Hispanic Americans under this Program. In addition, Congress has by statute established that HBCUs and women also automatically qualify as

socially and economically disadvantaged under EPA's 8% statute. An entity must still be certified by a third party as to ownership or control in order to be eligible to participate as a WBE contractor for an EPA recipient under the DBE Program.

EPA's 10% statute also adopts SBA's regulatory presumption regarding the socially disadvantaged status of the individuals listed above. However, EPA's 10% statute also presumes that Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are socially and economically disadvantaged individuals. Furthermore, Congress provided in EPA's 10% statute that the following institutions are presumed to be entities owned and controlled by socially and economically disadvantaged individuals: HBCUs, colleges and universities having a student body in which 40% of the students are Hispanic, Minority Institutions and private and voluntary organizations controlled by individuals who are socially and economically disadvantaged. EPA's 8% and 10% statutes may be distinguished by their provisions regarding ownership and control. EPA's 8% statute references entities owned *or* controlled by socially and economically disadvantaged individuals while EPA's 10% statute references entities owned *and* controlled by socially and economically disadvantaged individuals.

Section 33.202 How Does an Entity 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. With one exception, definitions of ''ownership,'' ''control'' and ''socially and economically disadvantaged individuals'' are the same as under the Small Business Act and its implementing regulations at 13 CFR 124.105, 124.106, 124.103 and 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). Generally, these regulations provide that ownership must be real, substantial and continuing, going beyond pro forma ownership of the business concern as reflected in ownership documents. Owners must share in the risks and profits of the business concern commensurate with their ownership interests. Control is demonstrated in most cases by the power to direct or cause the direction of the management and policies of the business concern and to make day-to-day as well as long-term decisions on matters of management, policy and operations. The one exception from the regulation regarding economic disadvantage worth noting is the exclusion of individuals with a net worth greater than or equal to $250,000 from initial eligibility and individuals with a net worth greater than or equal to $750,000 from continued eligibility. Similar to DOT, EPA is proposing to make $750,000 the cut off point for both initial and continued eligibility under the DBE Program.

HBCUs do not need to go through the certification process contained in Subpart B of this Rule since EPA's 8% statute automatically deems an HBCU to be owned or controlled by socially and economically disadvantaged individuals. While women are also deemed to be socially and economically disadvantaged under EPA's 8% statute, entities must still evidence ownership or control in accordance with paragraph (a) of this section, which may be accomplished by certification, pursuant to § 33.204.

Section 33.203 How Does an Entity 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. Again with the same notable exception discussed above regarding the $750,000 personal net worth threshold, definitions of ''ownership,'' ''control'' and ''socially and economically disadvantaged individuals'' are the same as under the Small Business Act and its implementing regulations at 13 CFR 124.105, 124.106, 124.103 and 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).

With one exception, the provisions contained within subparagraphs (d)–(g) of this section are derived from EPA's 10% statute. EPA's 10% statute contains a presumption that colleges and universities having a student body in which 40% of the students are Hispanic should be considered entities owned and controlled by socially and economically disadvantaged individuals. In order to eliminate the burden of additional certification by such colleges and universities, EPA is proposing instead to apply the presumption to colleges and universities which have qualified as Hispanic-Serving Institutions under the Department of Education regulations at 34 CFR Part 606 or as Minority Institutions as defined by § 33.103 of this proposed Rule. Among other things, Hispanic-Serving Institutions and Minority Institutions require a student body in which 50% of the students are Hispanic. Because EPA's 10% statute only requires the Agency to implement the statute's requirements to the ''extent practicable,'' the Agency, for administrative reasons, may propose regulatory provisions which vary from the exact wording of the statute.

Section 33.204 Where Does an Entity Become Certified Under EPA's 8% and 10% Statutes?

This proposed rule discontinues acceptance of an individual's self-certification regarding his or her racial/ethnic status in order to ensure consistency with the approach taken by other Federal agencies. For example, SBA under its Small Disadvantaged Business Program no longer permits self-certification of social and economic disadvantaged status. Similarly, DOT does not allow self-certification under its DBE Program. EPA is also proposing to discontinue self-certification by WBEs.

In addition, EPA would require that an entity first attempt to become certified as an MBE or WBE by the SBA or DOT under their respective programs or by an Indian Tribal Government, State Government, local Government, or independent private organization consistent with EPA's 8% or 10% statute as applicable. An entity may only attempt to become certified by EPA as an MBE or WBE under the procedures described in § 33.205 if that entity is unable to obtain certification from the other certifying entities described above. However, as part of the certification process, EPA will make the determination as to whether an entity's current certification by DOT, an Indian Tribal Government, State Government, local Government, or independent private organization constitutes acceptable certification under EPA's 8% statute, EPA's 10% statute or both. Acceptance of certifications from these other certifying entities is EPA's attempt at easing the burden created by discontinuation of the self-certification option. EPA currently envisions five categories of individuals or groups who would qualify for MBE or WBE certification under EPA's DBE Program but would be unable to obtain MBE or WBE certification from SBA or DOT due to differences in those Agencies' respective programs. These categories are women-owned and minority-owned

concerns that do not meet the SBA/DOT size standards (EPA's 8% and 10% statutes), Disabled Americans (EPA's 10% statute), private and voluntary organizations controlled by individuals who are socially and economically disadvantaged (EPA's 10% statute), entities which are certified under criteria which are inconsistent with EPA's DBE Program criteria (EPA's 8% and 10% statutes) and any entity claiming that it is owned *or* controlled by socially and economically disadvantaged individuals under EPA's 8% statute. SBA and DOT currently do not certify the first three categories and, as to the fifth category, requires a showing of ownership *and* control. Accordingly, these categories of individuals or groups may initially come to EPA for MBE or WBE certification if that individual or group is also unable to obtain MBE or WBE certification from an Indian Tribal, State, or local Government or an independent private organization in accordance with EPA's 8% or 10% statute as applicable. Finally, in implementing its own certification program, the Agency may use EPA Private Certifiers to assist the Agency in its certification determinations.

EPA has had a longstanding policy of requiring U.S. citizenship for eligibility as an MBE or WBE. See ''EPA Guidance for Utilization of S/M/WBE in Procurement under Assistance Agreements' dated 05/22/86. This policy was continued in the Agency's 1997 Guidance. Currently, the Agency's regulatory definition of an MBE requires U.S. citizenship for a minority group member. See 40 CFR 35.6015(a)(26)(iii). EPA believes that its requirement for U.S. citizenship is consistent with SBA's 8(a) Business Development Program regulations at 13 CFR 124.101, and its Small Disadvantaged Business Programs regulations at 13 CFR 124.1002(d). While the Agency recognizes that DOT allows lawfully admitted permanent residents to qualify for certification under its DBE Program (49 CFR 26.67), the Agency believes that given its close association with SBA requirements, it is appropriate for U.S. citizenship to be a requirement for certification by EPA as well. In addition, at this time, EPA lacks data regarding how many additional entities EPA would have to certify if the Agency were to change its longstanding policy on this issue and the possible resource implications of such a policy change; the Agency believes that changing its policy on this issue could result in a substantial increase to the number of entities EPA would have to certify.

EPA welcomes public comment on these proposed changes, especially from large businesses and members of the DBE community since they are most likely to be directly affected if these proposed changes become part of the final rule. In addition, because EPA continues to explore opportunities to standardize DBE certification with other Federal agencies, the Agency encourages specific comments on the requirement for U.S. citizenship under this program, and the resource implications for the Agency if it were to change its policy of requiring U.S. citizenship for certification by EPA.

Section 33.205 How Does an Entity Become Certified by EPA?

This section describes the EPA certification application process, including procedures regarding the filing of an application, application processing, EPA's ownership and/or control determination, EPA's disadvantaged determination and evaluation standards.

Section 33.206 Is There a List of Certified MBEs and WBEs?

This provision provides two ways someone can obtain a list of certified MBEs and WBEs under EPA's DBE Program, via internet or mail.

Section 33.207 Can an Entity Reapply to EPA for MBE or WBE Certification?

This section describes how long an entity must wait before reapplying to EPA for MBE or WBE certification.

Section 33.208 How Long Does an MBE or WBE Certification From EPA Last?

This provision states that MBE or WBE certifications from EPA generally last for three years.

Section 33.209 Can EPA Re-Evaluate the MBE or WBE Status of an Entity After EPA Certifies It To Be an MBE or WBE?

This section explains procedures for removal of an entity from the EPA list of certified MBEs and WBEs. Credible information calling into question an entity's eligibility as an MBE or WBE may come from any source.

Section 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?

This provision requires an annual affidavit from EPA certified MBEs or WBEs affirming that no changes in circumstance have occurred that affect the entity's status as an MBE or WBE. In addition to this annual affidavit, MBEs and WBEs certified by EPA are under a constant requirement throughout the year to keep EPA informed of any changes in circumstance which might affect that entity's status as an MBE or WBE.

Section 33.211 What Is an EPA Private Certifier?

This provision generally describes the role of an EPA Private Certifier. In all cases, EPA shall make the determination as to whether a particular entity should be certified as an MBE or WBE. EPA Private Certifiers are used by EPA merely to assist in the Agency's certification determination.

Section 33.212 Can an EPA Private Certifier Charge a Fee to an Entity To Process the Entity's Application for MBE or WBE Certification?

A reasonable fee, not contingent on whether the entity is eventually certified as an MBE or WBE by EPA, may be charged with the permission of the Agency.

Section 33.213 How Does an Organization or Business Concern Become an EPA Private Certifier?

This provision establishes the means by which an organization or business concern may become an EPA Private Certifier. In addition, this provision describes some of the requirements an organization or business concern must meet in order to be an EPA Private Certifier.

Section 33.214 How Long May an Organization or Business Concern Be an EPA Private Certifier?

The length of time an organization or business concern may be an EPA Private Certifier will be negotiated between EPA and that organization or business concern.

Section 33.215 Is There a List of EPA Private Certifiers?

This provision provides two ways someone can obtain a list of EPA Private Certifiers under EPA's DBE Program, via internet or mail.

Section 33.216 What Is the Process for Appealing or Challenging an EPA MBE or WBE Certification Determination?

This section describes the way in which an entity who has been denied MBE or WBE certification by EPA or a third party who disagrees with EPA's decision to certify an entity as an MBE or WBE can submit an appeal or challenge to the Agency. Included in these procedures are filing deadlines, appeal or challenge content

requirements and the Agency's standard of review.

Section 33.217 What Conduct Is Prohibited by This Subpart?

This provision prohibits false, fraudulent or deceitful conduct on the part of entities attempting to participate in the DBE Program. It has been placed in the Rule in order to protect the integrity of the DBE Program.

Subpart C—Good Faith Efforts

Section 33.301 What Does This Subpart Require?

The good faith efforts required by this section are activities by a recipient or 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. The good faith efforts must be made by a recipient and its prime contractor toward all DBEs, including SBEs, LSAFs and SBRAs and not just MBEs and WBEs, even if the fair share objective requirements of Subpart D have been met.

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 Indian Tribal, State, and local Government recipients and renamed them the six ''good faith efforts.''is not the intention of the Agency to change the substance of the positive efforts or the affirmative steps.

The six good faith efforts required by this section must be performed by all recipients (including recipients who have been exempted under § 33.411 from the requirements of applying fair share objectives) and their prime contractors, if they award subcontracts, for the procurement categories of construction, equipment, services (including consulting services) and supplies. EPA offers the following examples to assist recipients and prime contractors in carrying out the good faith efforts.

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

(a) Maintain and update a listing of qualified DBEs that can be solicited for construction, equipment, services and/or supplies.

(b) Provide listings to all interested parties who request copies of the bidding or proposing documents.

(c) Contact appropriate sources within your geographic area and State to identify qualified DBEs for placement on your DBE business listings.

(d) Utilize other DBE listings such as those of the State's Minority Business Office, the Small Business Administration, Minority Business Development Agency (MBDA) of the Department of Commerce, EPA OSDBU, and DOT.

(e) Have State environmental agency personnel review solicitation lists.

(2) Make information of 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.

(a) Develop realistic delivery schedules which may provide for greater DBE participation.

(b) Advertise through the minority media in order to facilitate DBE utilization. Such advertisements may include, but are not limited to, contracting and subcontracting opportunities, hiring and employment, or any other matter related to the project.

(c) Advertise in general circulation publications, trade publications, State agency publications and minority and women's business focused media concerning contracting opportunities on your projects. Maintain a list of minority and/or women's business-focused publications that may be utilized to solicit DBEs.

(3) 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 in order to increase opportunities for participation by DBEs in the competitive process.

(a) Perform an analysis to identify portions of work that can be divided and performed by qualified DBEs.

(b) Scrutinize the elements of the total project to develop economical units of work that are within the bonding range of DBEs.

(c) Conduct meetings, conferences, and follow-ups with DBE associations and minority media to inform these groups of opportunities to provide construction, equipment, services and supplies.

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

(a) Notify DBEs of future procurement opportunities so they may establish bidding solicitations and procurement plans.

(b) Provide DBE trade organizations with succinct summaries of solicitations.

(c) Provide interested DBEs with adequate information about plans, specifications, timing and other requirements of the proposed projects.

(5) Use the services and assistance of the SBA and the MBDA.

(a) Use the services of outreach programs sponsored by the MBDA and/or the SBA to recruit bona fide firms for placement on DBE bidders lists to assist these firms in the development of bid packaging.

(b) Seek out Minority Business Development Centers (MBDCs) to assist recipients and prime contractors in identifying DBEs for potential work opportunities on projects.

Appropriate use of the services and assistance of the SBA and the MBDA depends on the circumstances. It may involve using the services of outreach programs sponsored by the MBDA and/or the SBA to recruit bona fide firms for placement on DBE bidder's lists to assist the firms in the development of bid packages. Recipients and prime contractors may use SBA's Pro-Net Procurement Marketing and Access Network services to identify available DBEs to do the work. Recipients and prime contractors may utilize MBDCs for assistance in identifying DBEs for potential work opportunities on contracts under EPA financial assistance agreements, as well as using MBDA's Phoenix dBASE System to identify available DBEs to do the work.

(6) If the prime contractor awards subcontracts, require the prime contractor to take the steps in subparagraphs (1)–(5) of this section.

Section 33.302 Are There Any Additional Contract Administration Requirements?

The first provision of this section is intended to ensure that subcontractors receive prompt payment from prime contractors. The other provisions of this section, including the requirement to complete the forms mentioned below, 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. 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 this Rule have been met. Finally, this proposed rule mentions three new forms which are required if there are DBE subcontractors involved in a procurement. First, 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—DBE Program Subcontractor Participation Form will allow DBE subcontractors the option of describing to EPA 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. Second, a recipient must require its prime contractor to have any anticipated DBE subcontractors complete EPA Form 6100–3—DBE Program Subcontractor Performance Form. The prime contractor would then submit this form as part of its bid or proposal package when competing for a procurement. Third, a recipient must have its prime contractor complete EPA Form 6100–4—DBE Program Subcontractor Utilization Form whenever applicable and submit the form as part of the prime contractor's bid or proposal package when competing for a procurement.

Section 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 or non profit borrowers expend identified loan funds in compliance with any other procurement procedures contained in 40 CFR Part 30, 40 CFR Part 31, or 40 CFR Part 35, Subpart O, as applicable.

Section 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?

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

Indian 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 American-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. Such tribal governments still must retain records documenting compliance in accordance with § 33.501 of the Rule and must report to EPA on their accomplishments in accordance with § 33.502 of the Rule.

Any recipient, whether Native American or not, 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 recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts.

Subpart D—Fair Share Objectives

Section 33.401 What Does This Subpart Require?

EPA's previous fair share policy has required that fair share objectives for MBEs and WBEs be negotiated with EPA financial assistance recipients, but has not required that fair share objectives be established for other types of DBEs. While good faith efforts have been required with respect to all DBEs, including LSAFs, SBEs and SBRAs, numerical fair share objectives need only be negotiated for MBEs and WBEs in accordance with EPA's 8% and 10% statutes. This proposed rule would continue this policy.

EPA's position reflects the requirement of its 8% and 10% statutes and is consistent with Executive Order 12138 (May 18, 1979), which requires all Federal agencies to take ''appropriate affirmative action in support of [WBEs].'' Further, OMB Circular A–102 (March 3, 1988) provides that ''[i]t is national policy to award a fair share of contracts to small and minority business firms: and that ''[g]rantees shall take similar appropriate affirmative action * * * [in] support of women's enterprises * * *''

Prior to FY 1998, EPA applied its 8% and 10% MBE and WBE objectives directly to each of its financial assistance agreements. Thus, each EPA financial assistance agreement for research relating to the requirements of the Clean Air Act Amendments of 1990 had a minimum of 10% as MBE and WBE fair share objectives. All other EPA financial assistance agreements had a minimum of 8% as MBE and WBE fair share objectives. EPA changed this policy beginning with its FY 1998 financial assistance agreements so that the minimum 8% and 10% MBE and WBE fair share objectives became agency-wide objectives rather than fair share objectives for each EPA financial assistance agreement. Notwithstanding these national objectives, fair share objectives for each financial assistance agreement recipient are negotiated based on an assessment of the availability of qualified MBEs and WBEs in the relevant procurement market for construction, equipment, services and supplies; thus, the overall national objectives may vary from the specific fair share objectives of an individual financial assistance agreement recipient.

The 8% and 10% objectives are national objectives which EPA uses to evaluate and monitor MBE and WBE opportunities to participate in contracts under EPA financial assistance agreements. They do not serve as quotas or set-asides. These national objectives

do not authorize or require a recipient to automatically establish MBE or WBE fair share objectives at the 8% or 10% levels. The fair share objectives apply only to procurement dollars and not, for example, to salaries or other overhead costs.

Section 33.402 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 will apply its fair share objective (if the entity receiving the identified loan uses a relevant geographic area that is substantially similar to the recipient's) or a separately negotiated fair share objective to entities receiving identified loans. For the CWSRF and DWSRF Programs, identified loans are those projects or activities funded from amounts equal to the capitalization grant. For the Brownfields Cleanup Revolving Loan Fund (BCRLF) Program, identified loans are those projects funded with federal financial assistance. 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.

Section 33.403 What Is a Fair Share Objective?

A fair share objective is a percentage based on the capacity and availability of qualified 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, if possible, to reflect the level of MBE and WBE participation absent the effects of past discrimination in the marketplace.

A fair share objective is not a quota. A recipient and its prime contractor must make the good faith efforts described in Subpart C of this Rule in attempting to achieve its fair share objectives.

Section 33.404 When Must a Recipient Negotiate Fair Share Objectives With EPA?

This Rule requires a recipient to submit its proposed fair share objectives and supporting documentation to the Agency within 90 days after its acceptance of a financial assistance agreement for more than $250,000. In situations where a recipient receives several EPA financial assistance agreements that are $250,000 or less in one fiscal year, the recipient must submit its proposed fair share objectives and supporting documentation to the Agency within 90 days after its acceptance of the financial assistance agreement that takes the recipient over the $250,000 threshold (*see* § 33.411). In recent years EPA has included time frames for submission of proposed fair share objectives in special grant conditions for each financial assistance agreement. EPA is now incorporating a general time frame into this Rule. A recipient may not spend any of its financial assistance award for procurement until the fair share objective negotiation process has been completed.

Section 33.405 How Does a Recipient Determine Its Fair Share Objectives?

Starting in FY 1998, EPA, through the 1997 Guidance and implementing terms and conditions, has required that fair share objectives for MBEs and WBEs be based on the availability of qualified MBEs and WBEs in the relevant market for the four procurement categories of construction, equipment, services and supplies. In this proposed regulation, EPA is also offering recipients the option of combining the four proposed procurement category objectives for MBEs into a single weighted objective. The same option would be available for WBEs. In this proposed regulation, EPA is continuing to allow recipients to establish separate MBE and WBE fair share objectives for different EPA financial assistance programs and to establish separate MBE and WBE fair share objectives by geographic area.

Beginning with MBE and WBE objectives for FY 1999, the Agency required that fair share negotiations be supported by an availability analysis, or at the recipient's option, a disparity study conducted within the past ten years. In this rulemaking, EPA is proposing to keep this basic approach, with some fine tuning. The recipient would have to consider whether an adjustment from the availability analysis or disparity study percentage is needed based on past MBE or WBE achievements, other disparity studies done within the recipient's jurisdiction or other types of relevant available data (*e.g.*, statistical disparities in the ability of MBEs and WBEs to obtain financing, bonding and insurance required to participate in the DBE Program). This process is needed to ensure that objectives accurately reflect the MBE and WBE participation expected absent the effects of discrimination.

Recognizing that EPA makes many different types of financial assistance awards (*e.g.*, Superfund awards for Hazardous Waste Cleanup, CWSRF capitalization grants) to a wide variety of recipients, EPA is also soliciting comments to help us determine how best to achieve a ''level playing field'' for MBEs and WBEs. EPA is specifically asking for comments on whether recipients should be able to choose from a variety of methods in calculating MBE and WBE fair share objectives with the Agency.

This process is intended to provide maximum flexibility for recipients while ensuring that objectives are based, at a minimum, on the capacity and availability of qualified MBEs and WBEs in the recipient's relevant market.

A recipient may negotiate separate MBE and WBE fair share objectives applicable to different geographic markets, and must use the fair share objectives for the geographic markets in which the contract work for its project is being performed.

(1) Step 1: Determining a Base Figure for the MBE and WBE Objectives

A recipient may determine a base figure by preparing an availability analysis. An availability analysis represents an actual measurement by the recipient of the availability of MBEs and WBEs in the relevant geographic market in the four procurement categories compared to the number of all businesses in the same market that perform work in the same procurement categories. From these data the recipient would derive a base figure that is as accurate a representation as possible of the percentage of qualified MBEs and WBEs available versus the total number of available businesses.

EPA is not specifying a methodology or formula for a recipient to use in preparing its availability analysis. Instead, the Agency is proposing to place primary emphasis on the principles underlying the measurement, requiring only that a measurement of the availability be made on the basis of demonstrable evidence of relevant market conditions.

EPA is providing a number of examples which recipients may adopt or use as guidelines for deriving their own availability analysis.

(A) MBE/WBE Directories and Census Bureau Data

The first example is setting an MBE base figure using a recipient's own MBE directories, including the bidders list required by § 33.501. For each procurement category, the recipient would first tabulate the number of

qualified MBEs, with the resulting number becoming the numerator of the base figure. The denominator could then be derived from the Census Bureau's County Business Pattern (CBP) Database. The CBP Database contains all available businesses in the recipient's relevant geographic market organized by Standard Industrial Code (SIC code). SIC codes have been converted to North American Industrial Classification System (NAICS) codes. For purposes of the following discussion, NAICS codes may be substituted for SIC codes. The recipient may then combine all available businesses pertaining to construction, for example, and use this number as the denominator in the base figure for that particular procurement category.

EPA has a link to the Census Bureau's website at *osdbuweb.dot.gov/business/dbe/abe.pdf*. Utilizing this data, recipients would be able to customize their base figure within each procurement category. For example, major construction SIC codes are 15, 16 and 17. If a recipient estimates it will spend 10% of its federal funds within SIC code 15, 40% in SIC code 16, 25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 35 (equipment) and 87 (services), the recipient could separately determine the availability of MBEs for each of the SIC codes and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of MBEs in its directory for each of the SIC codes, then extracting the availability of CBP businesses for the same SIC codes. The recipient would then perform the following calculation to arrive at a base figure for step one of the objective setting process for MBEs.

Numerator = [.10 *(MBEs in SIC code 15)* + .40(*MBEs in SIC code 16*) + .25(*MBEs in SIC code 17*) + .25(*MBEs in SIC codes 35 & 87*)] × 100

Denominator = CBPs in SIC code 15 + CBPs in SIC code 16 + CBPs in SIC code 17 + CBPs in SIC codes 35 & 87

$$\text{Base Figure} = \frac{\text{Numerator}}{\text{Denominator}}$$

This formula is offered only as an example of how a recipient could choose to use the CBP Database. Recipients using the CBP data could choose whether to weight their calculation, and whether to do so by individual SIC codes or by groups of SIC codes, based on their own assessment of which method will best fit their spending patterns.

EPA is proposing to allow a recipient to negotiate separate MBE and separate WBE fair share objectives for each of the four procurement categories of construction, equipment, services and supplies or, at its option, negotiate a combined weighted objective for these four procurement category objectives for MBEs and separately for WBEs. This proposed approach would give recipients flexibility in preparing their availability analyses.

Several issues arise when comparing numbers from two different data sources. First, recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. A recipient using its own MBE and WBE directories will still need to determine a similar scope for the fields it will use for the denominator. A good way for a recipient to do this would be to examine its contracting program and determine the SIC codes for the majority of its contracts. While it may be sufficient for some recipients to use their State borders as the boundaries for their relevant geographic market, this may not be appropriate for other recipients whose relevant geographic market may extend beyond their State borders. Conversely, the relevant geographic market for some recipients may be a specific region within a State's borders.

An alternative means of calculating the numerator is to use a bidders list. Under this approach the recipient would measure availability by the number of firms that have previously competed in the recipient's procurement process. The recipient must include all firms that have competed for prime and/or subcontracts.

In the category of construction, most MBE and WBE participation occurs through subcontracting. It is therefore crucial that all firms competing for subcontracts be included in the bidders list. EPA encourages recipients to use any sources of local data which allows them to make a more accurate calculation.

(B) Data From a Disparity Study

Another option for a recipient in determining a base figure is using a disparity study. Disparity studies involve comparing available MBE and WBE contractors with the contracts actually awarded to them. They generally are based on statistics which measure MBE and WBE utilization and anecdotal evidence showing that the underutilization of MBEs and WBEs is caused by conditions other than chance. These studies may be expensive and time consuming to perform.

EPA is not requiring a recipient to conduct a disparity study. EPA is also not specifying the data or analysis required in a disparity study since the design and conduct of the study are best left to recipients and the professional organizations with which they contract to perform the studies. If a disparity study is used it must address MBE and WBE utilization under the four procurement categories and be no more than ten years old. 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.

(C) The Objective of Another EPA Recipient

A recipient may also use another EPA recipient's MBE and WBE objectives if they were established in accordance with this Rule and were based on a substantially similar relevant geographic market. For example, a non-State agency recipient may use a State agency's MBE and WBE fair share objectives, but only if the non-State agency uses a substantially similar geographic market. Otherwise, the non-State Agency recipient would have to negotiate its own MBE and WBE fair share objectives with EPA based on the availability of MBEs and WBEs in its relevant geographic market. With the proposed exemption from the fair share objective negotiation process, the number of recipients who would be required to separately negotiate with EPA would be substantially reduced.

(D) Alternative Methods

This proposal also includes an option for recipients to propose an alternative method for calculating MBE and WBE base figures. Recipients may use this option to take advantage of any unique expertise or source of data that may not be available to other recipients, such as a comparable objective negotiated with DOT. EPA will consider any such proposal that recipients believe will better reflect their relevant market than any of the examples provided in this Rule.

Step 2: Adjusting the Base Figure for the MBE and WBE Objectives

Once a recipient has derived base figures for its proposed MBE and WBE objectives, it must then consider whether an adjustment from the Step 1 MBE and WBE base figures is appropriate. This second step is needed to ensure that objectives more

accurately reflect the MBE and WBE participation expected absent the effects of discrimination. A recipient should consider the proven capacity of MBEs and WBEs to perform on contracts under EPA financial assistance agreements. MBE and WBE past utilization does not necessarily reflect the availability of MBEs and WBEs. However, such past utilization is an indicia of the proven capacity of an MBE or WBE to perform on contracts under EPA financial assistance agreements. Other relevant information which should be examined, if available, include any other disparity studies conducted within a recipient's relevant geographic market; statistical disparities in the ability of MBEs and WBEs to get necessary financing, bonding and insurance; and data on limitations for employment, self employment, education, training and union apprenticeship.

EPA is not proposing to require recipients to make an adjustment to their base figures. Rather, recipients must consider whether an adjustment to the base figures is appropriate, and if so, make the adjustment. It is important to note that the data recipients would consider under this proposed approach only involve existing data and not the generation of any new data.

The question of allowability of costs of preparing availability analyses or disparity studies in connection with the DBE Program is determined in accordance with the cost principles applicable to the organization incurring the cost. 40 CFR 30.27 and 31.22. For State and local governments, the pertinent cost principles are found in OMB Circular A–87, as amended 8/29/97 (''A–87''). For institutions of higher education and other non-profit institutions, OMB Circulars A–21 and A–122 apply, respectively. Allowability of costs for hospitals is determined in accordance with the provision of appendix E of 45 CFR Part 74.

In general, the cost must be necessary and reasonable, be allocable to the Federal grant, be consistent with State law and be afforded consistent treatment as direct or indirect. The cost must be adequately documented, and be the net of any applicable credits. There is nothing inherent in the cost principles that would render the DBE costs unallowable.

Each recipient will have different fact situations to apply. In CERCLA Core Program Cooperative Agreements, costs incurred in encouraging DBE utilization in the Superfund Program are allowable for funding. The recipient may have conducted an analysis or study for its own purposes prior to the EPA financial assistance agreement, in which case some of the costs might be allocable to the EPA grant as an in-kind contribution. Costs must also be treated consistently as either direct or indirect in similar circumstances. Under OMB cost principles the costs of such analyses or studies could either be allowable direct or allowable indirect costs under an EPA assistance award. The recipient must determine whether under its particular circumstances, the DBE costs are allocable to the cost objective in question, and whether it is a direct or indirect cost.

In each case, the recipient will have to devise a method of allocating the cost of the analysis or study appropriately. If audited, the recipient may be asked to document and justify the allocation. If a recipient has questions concerning allocation issues, it should contact its appropriate EPA grants administration office.

Section 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.

Section 33.407 How Long Do MBE and WBE Fair Share Objectives Remain in Effect?

Once approved, a recipient's MBE and WBE fair share objectives would remain in effect for three fiscal years. However, if significant changes have occurred rendering the data relied upon in establishing the fair share objectives obsolete, the fair share objectives may need to be renegotiated before the end of the three fiscal year period. 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.

Section 33.408 May a Recipient Use Race and/or Gender Conscious Measures as Part of This Program?

To the extent good faith efforts described in Subpart C of this Rule and other race and/or gender neutral efforts prove to be adequate to achieve fair share objectives for MBEs and WBEs, a recipient or prime contractor need not take any race and/or gender conscious action. To the extent good faith efforts described in Subpart C of this Rule and other race and/or gender neutral efforts prove to be inadequate to achieve fair share objectives for MBEs and WBEs, a recipient or prime contractor is encouraged to take reasonable race and/or gender conscious action, subject to § 33.409, to more closely achieve the fair share objectives. Such actions may include, among other things, price incentives and technical evaluation credits. Any use of race and/or gender conscious measures must not result in the selection of an unqualified MBE or WBE. A recipient must notify EPA in advance of any race and/or gender conscious action it plans to take.

Section 33.409 May a Recipient Use Quotas as Part of This Program?

Quotas may never be used under EPA's 8% or 10% statute. In fact, EPA's 10% statute specifically prohibits quotas.

Section 33.410 May a Recipient Be Penalized for Failing To Meet Its Fair Share Objectives?

Under this Rule, a recipient may not be penalized or considered to be in noncompliance solely because its MBE or WBE utilization falls short of its fair share objectives. However, EPA may take remedial action under § 33.105 for a recipient's failure to administer any portion of the DBE Program including, but not limited to, the good faith efforts requirements described in Subpart C of this part.

Section 33.411 Who May be Exempted From This Subpart?

EPA is proposing to exempt recipients of financial assistance agreements with a combined total of $250,000 or less in EPA funds for any particular EPA financial assistance project or in any one fiscal year from the fair share objective requirements. These recipients would not be exempted from the six good faith efforts requirements of Subpart C or the recordkeeping and reporting requirements of Subpart E. The Agency is requesting comments on whether the exemption should be extended to the other requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of extending the exemption to the other requirements of this Rule.

Financial assistance agreements of $250,000 or less account for about 82% of new EPA financial assistance awards each fiscal year, but less than 12% of the total EPA financial assistance funds awarded. For the Clean Water State Revolving Fund (CWSRF), Drinking Water State Revolving Fund (DWSRF), and Brownfields Cleanup Revolving

Loan Fund (BCRLF) Programs, recipients are not required to apply the fair share objective requirements to an entity receiving an identified loan in the amount of $250,000 or less or to an entity receiving a combination of loans totaling in the amount of $250,000 or less in any one fiscal year. These exemptions are designed to minimize administrative burdens on EPA recipients. Recipients exempted by this provision are not exempted from the other requirements of the rule. The Agency is requesting comment, including comments from Tribes, on whether the exemptions should apply to other requirements, specifically the good faith efforts and reporting requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of their comments to extend the exemption to other requirements of this Rule, including the good faith efforts and reporting requirements.

EPA is proposing to exempt Tribal and tribal consortia recipients from applying the fair share objective requirements to eligible program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR Part 35, Subpart B, due to the nature of these program grants and the unique nature of eligible recipients.

Finally, a recipient of a Technical Assistance Grant (TAG) would not be required to apply the fair share objective requirements of this Subpart to that grant. This provision would not, however, exempt such recipients from any other requirements of this Part.

Section 33.412 Is There a Special Rule for an Insular Area or Indian Tribal Government Recipient?

Currently, Insular Area and Indian Tribal Government recipients are not required to negotiate fair share objectives with EPA. For the most part, EPA is proposing to treat Insular Area and Indian Tribal Government recipients the same as other recipients with regard to the fair share objective negotiation requirements. For example, the fair share objectives of another recipient may be used so long as the relevant geographic market is the same or substantially similar.

The impact of this change on Indian Tribal Government recipients would be minimized by the general exemption described in § 33.411(a). The impact is further minimized in the case of tribes and tribal consortia by the exemption for eligible program grants which can be included in Performance Partnership Grants (PPGs) under 40 CFR Part 35, Subpart B, described in § 33.411(c). As with other recipients, fair share objectives would remain in effect for three years.

EPA is proposing to phase-in the MBE and WBE fair share objective negotiation process for Insular Area and Indian Tribal Government recipients over three years in order for such recipients to adjust to this change in policy. The Agency will develop guidance on what specific factors should be taken into account in determining the phase-in period for these recipients. In the interim, such recipients must still comply with all other requirements of this Rule.

Subpart E—Recordkeeping and Reporting

Section 33.501 What Are the Recordkeeping Requirements of This Part?

A recipient is required to maintain the records documenting its compliance with the requirements of this Part, including documentation of its and its prime contractor's good faith efforts and data relied upon in formulating its fair share objectives. A recipient must also comply with the applicable retention and access requirements for its financial assistance agreement, *e.g.*, 40 CFR 30.53 (for institutions of higher education, hospitals and other non-profit organizations); 40 CFR 31.42 (for Indian Tribal, State and local Government recipients); and 40 CFR 35.6705, 35.6710 (for Superfund Response Action Cooperative Agreements). In addition, a recipient of a Continuing Environmental Program Grant (*e.g.*, a State) or other annual grant would be required to create and maintain a bidders list. Such a list must only be kept until the grant project period has expired and the recipient is no longer receiving EPA funding under the grant. 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.*, 40 CFR 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. Such a list must only be kept until the project period for the identified loan has ended. Recipients are required to comply with these recordkeeping requirements, even if they are exempted by § 33.411 from applying the fair share objective requirements. The Agency is requesting comments on whether the exemption should be extended to the recordkeeping requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of their comment to extend the exemption to the recordkeeping requirements.

Section 33.502 What Are the Reporting Requirements of This Part?

The effectiveness of EPA's DBE Program may be measured through its reporting requirements. These reports measure EPA's progress in achieving the national objectives established by EPA's 8% and 10% statutes.

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. Examples of continuing environmental program grants include those specified in 40 CFR Part 35, Subpart A, as well as Performance Partnership Grants (PPGs) and GAP Grants for Indian Tribal governments and intertribal consortia. Recipients of grants capitalizing CWSRF or DWSRF Programs have historically reported MBE/WBE participation quarterly, and will continue to do so under this rule. 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 quarterly basis to the financial assistance agreement recipient, rather than to EPA. Private and non-profit organization loan recipients are not required to maintain a certified procurement system (*e.g.*, see 40 CFR 35.6055(a)).

In the past, EPA has presumed that all financial assistance award funds to Indian Tribal Government and Insular Area recipients have benefitted MBEs. Accordingly, despite the reporting requirements contained in 40 CFR Part 31, as a matter of policy, EPA has not uniformly required Indian Tribal Government and Insular Area recipients to report their degree of MBE or WBE utilization. In this proposed Subpart, Indian Tribal Government and Insular Area recipients are treated the same as other recipients with regard to recordkeeping and reporting requirements. All such recipients would therefore be required to retain records and report on actual MBE and WBE utilization.

The reporting requirements are applicable to all recipients, even those exempted from applying the fair share

objective requirements. The Agency is requesting comments on whether the exemption should be extended to the reporting requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of their comment to extend the exemption to the reporting requirements.

Section 33.503 How Does a Recipient Calculate MBE and WBE Participation for Reporting Purposes?

In this rulemaking proposal the Agency is proposing to codify the principles of Chapter 8 of its 1997 Guidance concerning how MBE and WBE participation is counted.

EPA requires that a recipient report the total amount of financial assistance spent on procurement and the amount awarded to an MBE or WBE. For EPA assistance awards, except the CWSRF and DWSRF Revolving Funds, all project expenditures are deemed to include both the Federal Share and the recipient's required matching share. Therefore, except in the SRF Programs, the amount of procurement in the assistance award as a whole, *i.e.*, including any required cost share funds contributed by the recipient is reported. In the SRF Programs, only identified loans are considered to include Federal funds. Negative reports are required, *i.e.*, if a recipient does not make an MBE or WBE procurement award in a reporting period, the recipient must still file a Form 5700–52A.

By requiring recipients to report, EPA is attempting to measure the amount of overall MBE and WBE participation under the DBE Program. The reporting of MBE and WBE dollar amounts under a particular prime contract will result in a total that is no more than 100% of the prime contract value. For example, if an MBE is awarded a prime contract and then subcontracts 30% of the value of the contract, the total number of dollars reported would remain at the 100% level. This would be true even if the subcontractor in this example is another MBE.

If all project costs attributable to MBE and WBE participation are not eligible for funding under the EPA financial assistance agreement, the recipient may report MBE and WBE participation compared to the total eligible and non-eligible costs of the project.

Joint Ventures. The MBE and WBE participation within a joint venture shall be credited in a *pro rata* fashion. Where an MBE's or WBE's risk of loss, control or management responsibilities is not consistent with its share of the profit, the award official may direct an adjustment in the percentage of MBE or WBE participation.

Central Purchasing or Procurement Centers. Recipients must verify procurement dollars awarded to MBE and WBE firms from a recipient's central purchasing or procurement center.

In reporting MBE and WBE utilization, a recipient may use one of the methods described below or propose another method for approval by EPA.

(1) A recipient may report actual dollars expended on procurement from EPA financial assistance agreement funds to MBEs and WBEs, if sufficient records are maintained;

(2) If records are maintained for a recipient's MBE and WBE procurement generally but records are not specifically maintained for procurement under EPA financial assistance agreements, a recipient's MBE and WBE percentage utilization for its funds as a whole may be applied proportionally to the amount of procurement under EPA financial assistance agreements; or

(3) If actual records of MBE and WBE utilization are not maintained, a recipient may authorize its procurement center to estimate the total amount of funds awarded to MBEs and WBEs. Such estimate, provided it is reasonable, will be accepted.

Brokers. MBE and WBE participation will be credited for those MBEs and WBEs performing a useful business function according to industry custom and practice. Recipients *may not* count expenditures to an MBE or WBE that acts merely as a broker or passive conduit in a transaction. A broker is 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. However, an MBE or WBE may subcontract a portion of the work to a non-MBE or non-WBE, provided that such further subcontracting is in accordance with this proposed regulation and that the majority of work is retained by the MBE or WBE having the prime contract.

Presumption. If an MBE or WBE prime contractor awards 50% or more of the prime contract value to a non-MBE and non-WBE, EPA presumes that such a MBE or WBE prime contractor is a broker. No MBE or WBE utilization may be reported for a broker.

Rebuttal. An MBE or WBE contractor may rebut this presumption by demonstrating that the degree of subcontracting is consistent with normal business practice and that it will actively perform, manage and supervise the work under its contract.

MBE or WBE Truckers/Haulers. A recipient may only count expenditures to an MBE or WBE Trucker/Hauler if that MBE or WBE Trucker/Hauler is performing a commercially useful function. The proposed rule discusses two factors to consider in determining whether an MBE or WBE Trucker/Hauler is performing a commercially useful function.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

This rule is a significant rule under Executive Order 12866 because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally assisted contracting. It 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 such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

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 does not plan to prepare a regulatory impact statement for this rule. However, EPA invites commentors

to furnish information on the economic costs, impacts and distributional effects of this proposed rule, after which the agency may reconsider its position.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned ICR No–2047.01.

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. *Pena*, 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 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 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 hours 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 are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this ICR under Docket ID No. OA–2002–0001 which is available for public viewing at the OEI Docket in the EPA Docket Center (EPA/DC), EPA West Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket and to access those documents in the public docket, and to access those documents in the public docket that are available electronically. Once on the system, select ''search,'' then key in the docket ID number identified above. Also, you can send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725

17th St., NW., Washington, DC 20503, Attention: Desk Officer for EPA. Please include the EPA Docket ID No. OA–2002–0001 in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after July 24, 2003, a comment to OMB is best assured of having its full effect if OMB receives it by August 25, 2003. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

Today's proposed rule is not subject to the 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.

Although this proposed rule is not subject to the RFA, EPA nonetheless will assess the potential of this rule to adversely affect small entities, which include small businesses, small not for profit enterprises and small governmental jurisdictions. At the outset, 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.*, HBCUs, etc.). Accordingly, EPA believes that this proposed rule would affect a substantial number of small entities.

However, if the proposed exemptions at the $250,000 level or less from the fair share objective requirements are adopted, EPA believes that the effect on small entities, including small government jurisdictions, would be minimal. Additionally, under this rulemaking proposal, small entity recipients would be able to use State Agency negotiated MBE/WBE objectives if such recipients solicit bids/offers from a substantially similar geographic market as that State Agency. Accordingly, EPA believes that the economic impact of this rule, if enacted, on small entities should be minimal.

In EPA's view, this rule, if enacted, would not affect the total funds or business opportunities available to small businesses that seek to work in EPA financial assistance programs. To the extent that the provisions in this rulemaking proposal (*e.g.*, with respect to changes in the methods used to set objectives) lead to different objectives than those under EPA's current program policy, some firms may gain and others lose, business.

EPA is unaware of any data which would enable the Agency at this time to measure the distributive effects of the rulemaking proposal on various types of small entities. We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

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 adopt 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 that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Morever, 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.

Today's 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.

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. If the proposed exemptions at the $250,000 level or less from compliance with the fair share objective requirements are adopted, EPA believes that there would be minimal impacts on small entities, including small government jurisdictions. Additionally, under this rulemaking proposal, small entity recipients would 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.''

Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State

law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule does not have ''federalism implications,'' as that phase is 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.

Stakeholders, including representatives from State government agencies, State government organizations and local governments, were given an opportunity to comment on a draft of the rule which was posted on the Internet for public comment. Meetings were also held in several states across the country to discuss the draft of the rule and to encourage comment.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

On November 6, 2000, the President issued Executive Order 13175 (65 FR 67249) entitled, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 took effect on January 6, 2001, and revokes Executive Order 13084 (Tribal Consultation) as of that date. EPA to a great extent developed this proposed rule, however, during the period when Executive Order 13084 was in effect. Although EPA believes that it has fully complied with the requirements of Executive Order 13175, as indicated in the following discussion, EPA will analyze and ensure full compliance with the requirements of Executive Order 13175 before promulgating the final rule.

Executive Order 13175 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.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Under section 5(b) of Executive Order 13175, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation. Under section 5(c) of Executive Order 13175, EPA may not issue a regulation that has tribal implications and that preempts tribal law, unless the Agency consults with tribal officials early in the process of developing the proposed regulation. However, today's proposed rulemaking will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Thus, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule.

EPA has concluded that the proposed rule would have tribal implications because it will have substantial direct effects on one or more Indian tribes. The substantial direct effects on tribal governments 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 PPG eligible grants to tribes and intertribal consortia under 40 CFR Part 35, Subpart B) would have to negotiate fair share objectives with EPA unless they choose to adopt MBE and WBE objectives of another EPA recipient consistent with today's proposed rule. Those tribes required to negotiate fair share objectives with EPA would 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) would not be eligible to be counted in the future 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); under EPA's current requirements such businesses may self certify their MBE status. 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 could not count such procurements toward meeting MBE/WBE objectives. In addition, the proposed rule would 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 today's proposed rulemaking.

Second, a business owned by a Federally recognized tribal government would 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, would 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 would 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 would 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 would 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 § 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 name; (2) Entity address; (3) Entity's status as an MBE/WBE.

Consistent with EPA policy, EPA nonetheless 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. Because E.O. Sections 5(b) and 5(c) do not apply, a Tribal Impact Summary is not required. EPA nonetheless is including one in this preamble.

The following constitutes a Tribal Impact Summary under Executive Order 13175:

EPA posted a staff draft of this proposed rule, dated June 19, 2000, on EPA's internet website. As part of its ongoing tribal consultations 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 formal consultations with tribal officials to discuss a draft of this Rule in Ocean Shores, Washington during the week of January 28, 2002.

By way of further background, today's proposed rule has been under development for the past several years. EPA invited tribal recipients of EPA grants and cooperative agreements to an EPA/State/Tribal Annual Conference held on February 2–4, 1999 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. 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 website. 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 has received a total of 17 written comments on the staff draft from Indian tribes.

During the development of this rule EPA representatives have 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 having EPA Regional offices in order to discuss the staff draft rule. EPA has 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.

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

1. In general, tribes believe they should be exempt from the rule.

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 proposed 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 10% MBE/WBE procurement objective statute for research relating to the requirements of the Clean Air Act Amendments of 1990 nor EPA's statutory 8% MBE/WBE procurement objective requirements for all other programs contain language exempting tribes from their applicability. Therefore, EPA proposes that tribes should not be exempted 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 GAP grants. One commentor 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, under today's proposed rulemaking, the trigger requiring compliance with the fair share objective requirements has been increased to $250,000 from $100,000 contained in the staff 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 proposing to exempt 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) would 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 today's rulemaking 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 today's rulemaking. In any case, the rule would provide tribes with a three year phase-in period to comply with the fair share negotiation requirements.

Comments were also received suggesting that EPA exempt tribes from Fair Share Negotiations based on procurement dollars, rather than on total grant dollars. EPA is considering this option which would exempt tribal grantees whose actual procurement activities total $250,000 or less from Fair Share Negotiations. EPA is specifically requesting public comment on this suggestion.

3. The 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. However, 40 CFR Part 31 already requires tribes to comply with Part 31's recordkeeping and reporting requirements, which include MBE/WBE recordkeeping and reporting. Today's proposed rulemaking make no changes to the existing Part 31 reporting and recordkeeping requirements. 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. EPA is not proposing to change this requirement.

4. Compliance with the good faith efforts requirements.

One commentor 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.

However, as discussed above, 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 currently 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 not proposing to change this requirement. EPA does not believe that the good faith efforts requirements are unduly burdensome. The good faith efforts requirements would take effect only if no DBEs are found to do the work in each of the four procurement categories of construction, equipment, services and supplies in the initial tribal solicitation.

5. Phase-In Period.

One commentor 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 expects those tribes who could implement this requirement before the expiration of the three year phase-in period to do so. Those tribes who cannot do so would be given the full three years. It is important for tribes to note that the three year phase-in period would only begin after the final rule's effective date, which should allow tribes sufficient time to comply with prepare for the implementation of the requirement.

In the spirit of Executive Order 13175 and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

Copies of written communications submitted by tribal officials/representatives are available upon request from the docket clerk for this rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 applies to any rule that is determined to be: (1) ''economically significant'' as defined under Executive Order 12866, and (2) concerns 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 has determined that the proposed rule is not a covered regulatory action because it is not economically significant and it does not involve decisions based on environmental health or safety risks. As a result, the proposed rule is not subject to the requirements of the Executive Order.

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

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 impracticable. 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 proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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: July 9, 2003.

Linda J. Fisher,

Acting Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be 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: 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 9601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1401 *et seq.*

§ 31.36 [Amended]

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

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 an EPA Private Certifier?
33.212 Can an EPA Private Certifier charge a fee to an entity to process the entity's application for MBE or WBE certification?
33.213 How does an organization or business concern become an EPA Private Certifier?
33.214 How long may an organization or business concern be an EPA Private Certifier?
33.215 Is there a list of EPA Private Certifiers?
33.216 What is the process for appealing or challenging an EPA MBE or WBE certification determination?
33.217 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 requirement of this part?
33.503 How does a recipient calculate MBE and WBE participation for reporting purposes?
Appendix to Part 33—Term and Condition

Authority: 42 U.S.C. 7601 note, 42 U.S.C. 4370d, 15 U.S.C. 637 *note,* 42 U.S.C. 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;

(b) To ensure that EPA's DBE Program is narrowly tailored in accordance with applicable law;

(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.

EPA Private Certifier means an organization or business concern approved by EPA's Office of Small and Disadvantaged Business Utilization (OSDBU) to assist in EPA OSDBU's determination of whether an entity is owned and/or controlled by one or more individuals claiming disadvantaged status.

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 two or more concerns to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge.

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 subrecipient of such agreement.

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 a recipient 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 (OSDBU Director).

(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 OSDBU Director has the authority to approve a recipient's request. If the OSDBU 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 OSDBU Director makes on the grant of the waiver.

(d) The OSDBU 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 OSDBU 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.*).

§ 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 the appendix 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 Certifier and EPA recipient 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 participate as an MBE or WBE prime or subcontractor for EPA recipients under EPA's DBE Program, an entity must be properly certified.

(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.

(2) A person who is not an economically disadvantaged individual or an entity owned and controlled by a socially and economically disadvantaged individual, as a party to a joint venture, may not be a party to more than two awarded contracts in a fiscal year solely by reason of paragraph (g)(1) of this section.

§ 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 should first attempt to become 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.

(4) Such certifications shall be considered acceptable for establishing MBE or WBE status, as appropriate, under EPA's DBE Program so long as the certification meets EPA's U.S. citizenship requirement under § 33.202 or § 33.203. 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. In order to become certified as an MBE or WBE, an entity may apply to EPA OSDBU or, if directed by EPA OSDBU, to an EPA Private Certifier. 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 OSDBU or an EPA Private Certifier 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 OSDBU 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 OSDBU 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 OSDBU determines that the applicant does not meet the ownership and/or control requirements of this Subpart, EPA OSDBU will issue a written decision to the entity rejecting the application and set forth the reasons for disapproval.

(d) *Disadvantaged determination*. Once EPA OSDBU determines whether an applicant meets the ownership and/or control requirements of this subpart, EPA OSDBU will determine whether the applicable disadvantaged status requirements under EPA's 8% or 10% statute have been met. If EPA OSDBU determines that the applicable disadvantaged status requirements have been met, EPA OSDBU shall notify the applicant that it has been certified and place the MBE or WBE on EPA OSDBU's list of qualified MBEs and WBEs. If EPA OSDBU determines that the applicable disadvantaged status requirements have not been met, EPA OSDBU will reject the entity's application for certification. EPA OSDBU will issue a written decision to the entity setting forth EPA OSDBU'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 OSDBU 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 OSDBU 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 OSDBU's certification determination, EPA OSDBU itself, or through an EPA Private Certifier, 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 OSDBU will maintain a list of certified MBEs and WBEs on EPA OSDBU's Home Page on the Internet. Any interested person may also obtain a copy of the list from EPA OSDBU.

§ 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 OSDBU to decline the application.

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

Once EPA OSDBU certifies an entity to be an MBE or WBE by placing it on the EPA OSDBU 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 OSDBU 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 OSDBU will issue a written determination regarding the MBE or WBE status of the questioned entity.

(b) If EPA OSDBU finds that the entity does not qualify as an MBE or WBE, EPA OSDBU will decertify the entity as

an MBE or WBE, and immediately remove the entity from the EPA OSDBU list of certified MBEs and WBEs.

(c) If EPA OSDBU 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 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 an EPA Private Certifier?

An EPA Private Certifier is an organization or business concern assisting EPA OSDBU in its determination of whether an entity applying for MBE or WBE certification is owned and/or controlled by one or more individuals claiming disadvantaged status. EPA OSDBU may elect to arrange for one or more EPA Private Certifiers to perform certain functions in the certification process; however the determination as to whether an entity will be certified as an MBE or WBE under this program shall only be made by EPA OSDBU. If EPA OSDBU elects to use EPA Private Certifiers to perform certain functions in the certification process, the provisions of §§ 33.212 through 33.214 will apply to those EPA Private Certifiers. EPA OSDBU may establish more detailed standards regarding qualifications, monitoring, procedures and use, if any, of EPA Private Certifiers in specific contracts or agreements between EPA and the EPA Private Certifiers.

§ 33.212 Can an EPA Private Certifier charge a fee to an entity to process the entity's application for MBE or WBE certification?

With EPA OSDBU's approval, an EPA Private Certifier may charge a reasonable fee to an entity in order to screen the entity's application for completeness. The fee must be for actual services rendered and must not be related to whether or not the entity is found to be owned and/or controlled by one or more individuals claiming disadvantaged status.

§ 33.213 How does an organization or business concern become an EPA Private Certifier?

(a) EPA may execute contracts or agreements with organizations or business concerns seeking to become EPA Private Certifiers. Any such contract or agreement will include provisions for the oversight, monitoring, and evaluation of all certification related activities by EPA.

(b) The organization or business concern must demonstrate a knowledge of EPA and SBA regulations regarding ownership and control, as well as business organizations and the legal principles affecting their ownership and control generally, including stock issuances, voting rights, convertibility of debt to equity, options, and powers and responsibilities of officers and directors, general and limited partners, and limited liability members.

(c) The organization or business concern must also, along with its principals, demonstrate good character. Good character does not exist for these purposes if the organization or concern or any of its principals:

(1) Is debarred or suspended under any Federal procurement or non-procurement debarment and suspension regulations; or

(2) Has been indicted or convicted for any criminal offense or suffered a civil judgment indicating a lack of business integrity.

(d) As a condition of approval, EPA may require that appropriate officers and/or key employees of the organization or business concern attend a training session on EPA and SBA rules and requirements.

(e) An organization or business concern seeking to become an EPA Private Certifier must agree to provide access to EPA of its books and records when requested, including records pertaining to its certification related activities.

(f) EPA will include in any contract or agreement document authorizing an organization or business concern to act as an EPA Private Certifier appropriate conditions to prohibit conflicts of interests between the EPA Private Certifier and the entities for which it processes MBE or WBE certifications.

§ 33.214 How long may an organization or business concern be an EPA Private Certifier?

(a) EPA's contract or agreement with the EPA Private Certifier will specify how long the organization or business concern may be an EPA Private Certifier.

(b) EPA may terminate a contract or agreement with an organization or business concern which is an EPA Private Certifier for the convenience of the Government at any time, and may terminate the contract or agreement for default where appropriate. Specific grounds for termination for default include, but are not limited to:

(1) Charging improper, unreasonable or contingent fees in violation of § 33.212; or

(2) Engaging in prohibited business transactions with firms for which it processes MBE or WBE certification applications in violation of § 33.213(f).

§ 33.215 Is there a list of EPA Private Certifiers?

EPA OSDBU will maintain a list of approved EPA Private Certifiers on EPA OSDBU's Home Page on the Internet. Any interested person may also obtain a copy of the list from EPA's OSDBU. The list is available at: *www.epa.gov/osdbu.*

§ 33.216 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 1230A, 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.

§ 33.217 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 under circumstances indicating 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 within a specific number of 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 OSDBU's Home Page on the Internet or directly from EPA OSDBU.

(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 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 90 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 qualified MBEs and WBEs in the relevant geographic market for each of the four procurement categories. 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 qualified MBEs and WBEs 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)

data base, 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, a recipient and its prime contractor are encouraged, but not required, to take reasonable race and/or gender conscious action, subject to § 33.409, to more closely achieve the fair share objectives.

(b) A recipient must notify EPA in advance of any race and/or gender conscious action it plans to take. 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 provision does not exempt such recipients from any other requirements of this part.

(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 provision does not exempt such recipients from any other requirements of this part.

(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.

(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 provision does not exempt such recipients from any other requirements of this part.

§ 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 contractor's, 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. Such a list must only be kept until the grant project period has expired and the recipient is no longer receiving EPA funding under the grant. 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 of a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors. Such a 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: entity name; entity address; entity's status as an MBE/WBE.

§ 33.502 What are the reporting requirements of this part?

MBE and WBE participation must be reported by recipients, including those recipients exempted under § 33.411 from the requirement to apply the fair share objectives, on EPA Form 5700–52A 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 agreements under 40 CFR part 30, which report on an annual basis. Recipients of financial assistance agreements capitalizing revolving loan funds, including those exempted by § 33.411 from the requirement of applying the fair share objectives, will continue to report quarterly. 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 quarterly 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.* 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 are 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 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]

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

Subpart K—[Amended]

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

Authority: Sections 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]

9. Section 35.3145(d) is removed and reserved.

§ 35.3145 [Amended]

10. Section 35.3145(e) is removed.

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. Sections 35.6015(a)(26) and (a)(54) are removed and reserved.

§ 35.6580 [Removed]

19. Section 35.6580 is removed.

§ 35.6665 [Amended]

20. Section 35.6665(b) is removed.

PART 40—[AMENDED]

21. The authority citation for part 40 continues to read as follows:

Authority: Cited in § 40.110.

§ 40.145–3 [Amended]

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

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