



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

April 5, 2022

OFFICE OF MISSION SUPPORT

MEMORANDUM

SUBJECT: Class Exception from 40 CFR 35.585, Maximum Federal Share

FROM: Michael Osinski, Director
Office of Grants and Debarment

TO: Andrew D. Sawyers, Director
Office of Wastewater Management
Office of Water

I am responding to your request for a class exception from the cost share requirements for tribes and intertribal consortia at [40 CFR 35.585](#). For the reasons discussed below, I have granted the exception.

BACKGROUND

The Clean Water Act (CWA) Section 106 program purpose, as described in [40 CFR 35.580](#), is, “to assist Tribes and Intertribal Consortia in administering programs for the prevention, reduction, and elimination of water pollution, including programs for the development and implementation of ground-water protection strategies.”

The cost share requirements at [40 CFR 35.585](#) state:

1. The Regional Administrator may provide up to 95% of the approved work plan costs for tribes or intertribal consortia establishing a CWA Section 106 program. Work plan costs include costs of planning, developing, establishing, improving, or maintaining a water pollution control program.
2. The Regional Administrator may increase the maximum federal share if the tribe or intertribal consortium can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe or within each tribe that is a member of an intertribal consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship.

To receive a socioeconomic-based waiver from a Regional Administrator, tribes must submit the documentation specified in [40 CFR 35.585](#). A tribe’s particular socioeconomic indicators are not static and can change rapidly, as occurred during the COVID-19 pandemic. In addition, staff capacity to prepare such documentation can vary widely among the tribes, limiting the information available for Regional Administrators to make an objective assessment of undue hardship.

A class exception will eliminate the five percent cost share for tribes and intertribal consortia CWA Section 106 grants currently required by 40 CFR 35.585.

Waiving the cost share requirement will increase flexibility for tribes and intertribal consortia when choosing how best to structure their grants. It also will align with the Office of Grants and Debarment's recent approved class exception from [40 CFR 35.536](#) which waived the cost share requirements for new tribal or intertribal consortia Performance Partnership Grants (PPGs) and new funding awarded via supplemental amendments to tribal or intertribal consortia PPGs awarded on or before October 1, 2021.

ACTION

I have reviewed the request for a class exception from the cost share requirements at 40 CFR 35.585. Elimination of the cost share requirement will ensure equitable financial assistance to tribes, retain tribes' ability to choose the best grant vehicle for their program needs, and eliminate the need for individual grant-by-grant deviation requests to waive the cost share. Therefore, this class exception is in the best interest of the Agency and public. As authorized by 2 CFR 1500.104(b), I approve the class exception from 40 CFR 35.585 with the following conditions:

This class exception is effective April 5, 2022 and applies only to new tribal or intertribal consortia standalone CWA Section 106 grants and new funding awarded via supplemental amendments to tribal or intertribal consortia standalone tribal grants. This class exception cannot be applied retroactively from the effective date and will remain in place until EPA revises the cost share requirements in 40 CFR 35.585.

Pending revision or removal of the cost share requirement in 40 CFR 35.585, grants to tribes and intertribal consortia under the CWA 106 program must include a clause that notifies recipients that compliance with the regulation is no longer required.

The Office of General Counsel concurs with granting the class exception.

cc: Grants Management Officers
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