

RAIN-2023-G02

Partial Revocation of Class Exception for Fair Share Objectives Pursuant to 40 CFR Part 33, Subpart D and EPA Minority Business Enterprise/Women’s Business Enterprise Certification Pursuant to 40 CFR Part 33, Subpart B

Notification Date: June 29, 2023

Effective Date: October 1, 2023

Purpose: This Recipient/Applicant Information Notice (RAIN) informs recipients and applicants of the U.S. Environmental Protection Agency’s (EPA’s) reinstatement of the requirements set forth at [CFR Part 33, Subpart D](#) (fair share objectives or FSOs). This RAIN does not affect EPA’s suspension of the EPA certification process set forth at [40 CFR Part 33, Subpart B](#).

Policy Summary: EPA is partially rescinding [RAIN-2019-G10](#) and reinstating the requirement for recipients to negotiate FSOs for minority business enterprise (MBE) and women’s business enterprise (WBE) participation in procurement under assistance agreements.

Background: Under Subpart D of 40 CFR Part 33, recipients are required to negotiate a fair share objective to serve as a goal for all procurements under financial assistance agreements. On October 1, 2019, EPA issued a class exception waiving the requirements set forth under 40 CFR Part 33, Subpart D.

On January 20, 2021, President Biden signed [Executive Order 13985 on “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”](#) (EO 13985), calling for the federal government to pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. EO 13985 charged the head of each federal agency to conduct an equity assessment of certain of the agency’s programs and policies and create a plan to identify and address any barriers to full and equal participation in the agency’s contracting opportunities by eligible individuals, including eligible individuals who are the majority owners in businesses in, from or serving underserved communities. In addition, EO 13985 allows for the federal government’s allocation of resources, consistent with applicable law, to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities.

In consideration of the Administration’s goals, EPA analyzed its DBE regulation to determine how to better achieve the program objectives, which include ensuring nondiscrimination in the award of contracts under EPA financial assistance agreements; removing barriers to the participation of DBEs in the award of contracts under EPA financial assistance agreements; and

providing appropriate flexibility to recipients of EPA financial assistance in establishing and providing contracting opportunities for DBEs. In light of these objectives and in consideration of EO 13985, OGD has determined that reinstating the fair share objectives would strengthen the EPA's DBE Program and promote equal participation of all, including underserved communities and individuals, in EPA procurement and contracting opportunities.

Action: Effective October 1, 2023, EPA financial assistance recipients are required to submit proposed MBE and WBE fair share objectives and supporting documentation to EPA within 120 days after acceptance of a financial assistance award in accordance with [40 CFR Part 33, Subpart D](#). The national term and condition relating to compliance with [40 CFR Part 33](#) will be updated and placed on all new awards made on or after October 1, 2023 to reflect this change in policy.

EPA will provide flexibility, to the extent allowable under statute and regulations, in approving proposed FSOs so long as they are reasonably in alignment with the objectives of EPA's DBE program. In addition to the methods used to determine FSOs listed in [40 CFR 33.405](#), recipients may submit proposed FSOs that were previously approved by EPA, even if expired, so long as they are based on data that are no more than ten years old. Recipients may also adopt FSOs already negotiated with other federal agencies, such as U.S. Department of Transportation, so long as they are rationally related to the relative availability of MBEs and WBEs in the relevant geographic market. EPA will consider other methods of determining FSOs in order to allow recipients to adjust to the reinstatement of this requirement.

All other elements in [RAIN-2019-G10](#), including suspension of the EPA certification process established by 40 CFR Part 33, Subpart B remain in effect.

Related Resources:

- [RAIN-2018-G04 Micro-Purchase and Simplified Acquisition Threshold for Procurements by EPA Assistance Agreement Recipient and Subrecipients](#)
- EPA Form 5700-52A, United States Environmental Protection Agency Minority Business Enterprise/Woman Business Enterprise Utilization under Federal Grants and Cooperative Agreements [EPA Form 5700-52A \(fillable\) \(pdf\)](#) (544.26 KB)

Attachment A: Stakeholder Comments and EPA Response

Comment	EPA Response
May the recipient utilize its most recent disparity study to develop FSOs, even if the study was conducted prior to the issuance of the class exception?	Yes; however, 40 CFR 433.405 requires that disparity study data used for FSOs be under ten years old. Therefore, recipients may only utilize their most recent disparity study if the study was conducted within the past 10 years.
Upon reinstatement of the FSOs requirements, may a recipient use FSOs that were negotiated prior to the suspension for an interim period until new FSOs can be developed?	Yes, recipients may use FSOs that were negotiated prior to the suspension for interim period still to be determined by EPA, even if the FSOs were developed based on disparity studies that are over 10 years old.
If a recipient conduct a new disparity study, how long can the recipient rely on that disparity study for formulating FSOs?	Under 40 CFR 33.405(b)(2), disparity studies may be used to formulate FSOs for ten years from the date of the study's publication.
If a recipient chooses to apply FSOs established by another entity (such as a state or DOT), will EPA provide guidance on how to apply that FSO to the recipient's circumstances?	EPA is still deliberating on these implementation issues but will likely provide guidance on how to apply those FSO objectives to the recipient's circumstances.