

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 35**

[FRL-6373-2]

RIN 2030-AA56

Environmental Program Grants for Indian Tribes**AGENCY:** Environmental Protection Agency.**ACTION:** Proposed rule.

SUMMARY: This rule proposes to revise and update requirements in several Environmental Protection Agency (EPA) regulations, particularly subpart A of 40 CFR part 35, governing grants to Indian Tribes and Intertribal Consortia. It creates a new Tribal-specific subpart which contains only the provisions for environmental program grants that apply to Tribes; simplifies, clarifies, and streamlines current provisions for environmental program grants to Tribes, and addresses the Performance Partnership Grant (PPG) program for Tribes. The PPG program fosters EPA's continuing efforts to improve partnerships with its Tribal recipients by increasing flexibility in using environmental program funding. The regulation reflects efforts by EPA and its Tribal partners to increase administrative and programmatic flexibility for Tribes while moving toward improved environmental protection.

DATES: Please submit comments on this proposed rule by September 7, 1999.

ADDRESSES: Written comments should be submitted to: Performance Partnership Grants—Tribal Comment Clerk (Docket #WD-98-16); Water Docket (MC-4104); U.S. Environmental Protection Agency; 401 M Street, SW; Washington, DC 20460. Comments may be hand-delivered to the Water Docket; U.S. Environmental Protection Agency; 401 M Street, SW; East Tower Basement; Washington, DC 20460. Comments may be submitted electronically to owdocket@epamail.epa.gov.

FOR FURTHER INFORMATION CONTACT: Maureen J. Ross, Grants Policy, Information, and Training Branch (3903R), United States Environmental Protection Agency, 401 M. Street, SW, Washington, DC 20460 (202) 564-5356.

SUPPLEMENTARY INFORMATION:**I. Regulated Entities**

Entities regulated by this action are eligible to receive the environmental grants listed in 40 CFR 35.501. Regulated categories and entities include:

Category	Regulated entities
Government ...	Federally recognized Indian Tribal Governments.
Other Entities	Intertribal Consortia.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the definitions of Tribe and Intertribal Consortium in § 35.502 and in the specific program rules found following § 35.540 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Comments and Record

Please submit an original and three copies of your comments and enclosures (including references). The Agency requests that commenters follow the following format: Type or print comments in ink, and cite, where possible, the paragraphs in this notice to which each comment refers. Electronic comments must be submitted as a WP5.1 or WP6.1 file or as an ASCII file avoiding the use of special characters. Comments and data will also be accepted on disks in the formats above. Electronic comments may be filed online at many Federal Depository Libraries. Commenters who want EPA to acknowledge receipt of their comments should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted.

The record for this Notice, which includes supporting documentation as well as printed, paper versions of electronic comments, is available for inspection from 9 to 4 p.m. (Eastern Time), Monday through Friday, excluding legal holidays, at the Water Docket, U.S. EPA Headquarters, 401 M Street, SW; East Tower Basement; Washington, DC 20460. For access to docket materials, please call 202-260-3027 to schedule an appointment.

III. Background

The United States Government has a unique legal relationship with Tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. EPA recognized this uniqueness of Tribal governments by issuing and reaffirming its 1984 policy on the

“Administration of Environmental Programs on Indian Reservations.” Specifically, EPA recognizes the existence of the trust responsibility in Principle Number 5 of its Indian Policy, which states that the Agency will assure that Tribal concerns and interests will be considered when Agency actions may affect Tribal environments. Additionally, in 1994, the President of the United States issued a presidential memorandum for the heads of Executive Departments and Agencies reaffirming the government-to-government relationships with Native American Tribal Governments. Most recently, on May 14, 1998, the President issued Executive Order 13084, “Consultation and Coordination With Tribal Governments.” The Executive Order addresses regular and meaningful consultation and collaboration with Indian Tribal governments in developing regulatory policies on federal matters affecting their communities, reducing the imposition of unfunded mandates on Indian Tribal governments, and streamlining the application process and increasing the availability of statutory or regulatory waivers for Indian Tribal governments. Consistent with these principles, this regulation provides an easy-to-use Tribal-specific subpart to optimize the administration of Tribal assistance programs through increased flexibility and to remove procedural impediments to effective environmental programs for Indian Tribes.

In various program specific regulations in this subpart we have used terms such as “treatment as a State” or “treatment in a manner similar to a State.” We have used those terms because they are in the statutes authorizing awards to Tribes. EPA recognizes that Tribes are sovereign nations with a unique legal status and a relationship to the federal government that is significantly different than that of States. EPA believes that Congress did not intend to alter this when it authorized treatment of Tribes “as States;” rather, the purpose was to reflect an intent that, insofar as possible, Tribes should assume a role in implementing the environmental statutes on Tribal land comparable to the role States play on State land.

Generally, the administration of financial assistance to Tribes is the same as the administration of financial assistance to States. However, there are provisions in some assistance programs unique to Indian Tribes. For example, Indian Tribes currently compete with each other for limited financial resources in many of the Tribal environmental grant programs listed

under § 35.501(a) of the proposed rule. Thus, the stability of annual grant funding for State, interstate, and local environmental programs grants (see 40 CFR part 35, subpart A) is not shared by Tribes. Indian Tribes do not currently receive and cannot rely on continuity of funding from year to year. This uncertainty in financial assistance makes long-term environmental planning difficult. Therefore, the administration of these programs by EPA requires a different approach compared to the approach used when administering an environmental program for State, interstate, or local government agencies.

EPA and many Indian Tribal governments have forged partnerships on a government-to-government basis. An important mechanism to further support these relationships was established when EPA requested and received authorization for a Performance Partnership Grants (PPG) program for Indian Tribes and Intertribal Consortia. (Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, 110 Stat. 1321, 1321-299 (1996); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Public Law 105-65, 111 Stat. 1344, 1373 (1997)). PPGs allow eligible Tribes and Intertribal Consortia to combine environmental program grants into a single grant in order to improve environmental performance, increase programmatic flexibility, achieve administrative savings, and strengthen the partnerships between States, Indian Tribes, and EPA. Environmental program grants that may be included in PPGs are listed in 40 CFR 35.501(a) and funded under EPA's State and Tribal Assistance Grant (STAG) appropriation.

This regulation will be codified in 40 CFR part 35, subpart B, as "Environmental Program Grants for Indian Tribes." Subpart B incorporates administrative provisions for grants formerly included in 40 CFR part 35, subparts A and Q. This regulation supplements EPA's regulation, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," contained in 40 CFR part 31, which will apply to grants awarded under this regulation (including grants to Intertribal Consortia as defined in § 35.502, regardless of whether the Consortia are organized as nonprofit corporations).

We have used the terms "Tribe" and "Intertribal Consortium" to refer to the entities eligible to receive grants

throughout this subpart. Those terms are defined in § 35.502 for environmental programs that do not include their own program-specific definitions. When the definition of either term is different in a specific program provision in §§ 35.540 through 35.718 of the rule, the specific definition will determine the entities eligible for a grant under such programs.

IV. Requirements for All Environmental Program Grants

Sections 35.500 through 35.518 apply to all environmental program grants covered by 40 CFR part 35, subpart B, including PPGs. This rule contains changes to foster Tribal-EPA partnerships, improve accountability for environmental and program performance, and streamline administrative requirements. Some of the rule's key features are discussed below.

Tribal-EPA Partnerships

To foster joint planning and priority setting, the rule explicitly requires consideration of Tribal priorities along with national and regional guidance in negotiating all grant work plans. All Tribes are provided flexibility through the work plan negotiation process, and, in particular, through their ability to organize work plan components in whatever way fits the Tribe best. Tribes applying for PPGs will have still greater flexibility as described in the PPG discussion below. The EPA Regional Administrator must consult with the National Program Manager before agreeing to a Tribal work plan that deviates significantly from national program guidance. Where appropriate, the grant work plan will reflect both EPA and Tribal roles and responsibilities in carrying out work plan commitments and there will be a negotiated process for jointly evaluating performance.

Core Performance Measures

Core performance measures for Tribal programs are still evolving and may be different from those negotiated by EPA National Program Managers with the States. When EPA has negotiated these measures with the Tribes, they will be included in national program guidance and incorporated, as appropriate, into Tribal/EPA Environmental Agreements and grant work plans as the basis for reporting requirements. Until the Tribal core performance measures are further developed, the regions should use significant work plan goals, objectives or commitments for measuring performance, as appropriate.

Accountability

The proposed rule accommodates results-oriented approaches to planning and managing environmental programs. Definitions and other aspects of the rule dovetail with the new Government Performance and Results Act (GPRA) and reflect efforts to establish goals and objectives as well as environmental and program performance measures at both the national and Tribal levels. The rule recognizes the need for a mix of outcome (results) and output (activity) measures for management purposes. The rule encourages Tribes and Intertribal Consortia to organize their work plans around goals and objectives to reflect the new GPRA requirements.

Administrative Changes

Under the proposed rule, Tribes can negotiate budget periods of more than one year with EPA thereby improving stability in the programs. EPA recommends, however, that budget periods not exceed five years because it is difficult to account for funds and maintain records for longer periods. (The budget period of a General Assistance Program (GAP) grant cannot exceed four years.)

The rule streamlines some requirements and eliminates other requirements associated with post-award changes to grant work plan commitments and budgets. It replaces the requirements regarding changes found in 40 CFR 31.30. Prior written approval from EPA is still required for significant changes in a recipient's work plan commitments. Written, but not prior, approval is required for work that will result in a need for increases in grant amounts and extensions of the budget period. However, recipients beginning such work without prior, written approval do so at their own risk. EPA approval is no longer required for other changes in the work plan, budget, key persons, or to carry out portions of the work through subgrants or contracts unless the Regional Administrator determines, on a case-by-case basis, that circumstances warrant imposing additional approval requirements on a particular recipient.

Pre-Award Costs

Pre-award costs may be reimbursed under the grants without prior approval so long as they are incurred within the budget period, identified in the approved grant application, and would have been allowable if incurred after the award.

Intertribal Consortia

Under this rule, EPA will treat a group of Tribes that applies for a grant

(called an Intertribal Consortium in the rule) in the same manner as a single Tribe. Thus, in the absence of clear Congressional intent to the contrary, if a Tribe is eligible for a particular grant, EPA will also treat a group of individually eligible Tribes as eligible for the grant. EPA believes this approach is a practical, reasonable and prudent way to help interested Tribes strengthen environmental protection when limited funding is available to support Tribal environmental programs. Tribes that form Consortia may be able to use their limited resources more efficiently and address environmental issues more effectively than they could if each Tribe separately developed and maintained separate environmental programs. Accordingly, Intertribal Consortia as defined in § 35.502, will be eligible to receive grants under the programs listed in 40 CFR 35.501.

For all grants except General Assistance Program (GAP) grants, all members of an Intertribal Consortium must be eligible to receive the grant and must authorize the Consortium to apply for and receive the grant. This means, for example, that for a Consortium to be eligible for a Clean Water Act section 106 grant, each member of the Consortium must establish that it is a federally recognized Tribe and that it has met the requirement for treatment in a manner similar to a State, because that is required for individual Tribes seeking section 106 grants. If a grant authority does not require Tribes to establish eligibility for treatment in a manner similar to a State to receive a grant, then the authorizing members of a Consortium need not satisfy that prerequisite.

For GAP grants, an Intertribal Consortium will be eligible if (1) a majority of the Consortium's members meet the eligibility requirements for the grant; (2) all members that meet the eligibility requirements authorize the Consortium to apply for and receive the grant; and (3) only the members that meet the eligibility requirements will benefit directly from the grant project and the Consortium agrees to a grant condition to that effect. This means that a Consortium may receive a GAP grant even if the Consortium includes Tribal governments that are not recognized as eligible for the special services provided by the United States to Indians because of their status as Indians so long as the Consortium meets the three requirements specified above. EPA decided to impose somewhat less restrictive requirements on Intertribal Consortia seeking GAP grants because the Indian Environmental General Assistance Program Act of 1992, 42

U.S.C. 4368b (IEGAPA), explicitly authorizes GAP grants to an "intertribal consortium," which it defines as "a partnership of two or more Indian Tribal governments authorized by the governing bodies of those Tribes to apply for and receive assistance pursuant to this section." This definition may reasonably be interpreted to include a Consortium comprised of a majority of federally recognized Tribes and a few non-recognized Tribal governments. Such a Consortium would be a partnership of federally recognized Tribes, although it would not be a partnership of only federally recognized Tribes. In effect, the recipient of the GAP grant to such an Intertribal Consortium would be a subset of the original Consortium consisting only of those individually eligible Tribes. The Agency is adopting this approach to meet those very rare circumstances where awarding a GAP grant to such a Consortium would be consistent with the intent of the IEGAPA.

EPA believes its proposed approach for making environmental program grants available to Intertribal Consortia is consistent with President Clinton's Executive Order 13084, which encourages agencies to adopt "flexible policy approaches" and to respect the principle of Indian self-government and sovereignty.

Preferences for Indians, Indian Organizations, and Indian-Owned Economic Enterprises

Section 450e(b) of the Indian Self-Determination Act (25 U.S.C. 450 *et seq.*) provides:

Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended [25 USCS 452 *et seq.*], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians shall require to the extent feasible'

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 USCS § 1452].

EPA has determined that these preference requirements of the Indian Self-Determination Act apply to the award of grants, contracts, subcontracts and subgrants under the grant programs covered by this subpart. EPA seeks comments on implementing this provision. In particular, EPA seeks comments on adapting the requirements

at 40 CFR 31.36(c) (governing competition in procuring property and services under a grant) to reflect the preference requirements of the Indian Self-Determination Act.

V. Performance Partnership Grants

Sections 35.530 through 35.538 contain the requirements that apply only to Performance Partnership Grants (PPGs) to Tribes or Intertribal Consortia. In a PPG, the recipient can combine funds from two or more environmental program grants into a single grant under streamlined administrative requirements. Before a Tribe or Intertribal Consortium can include funds from an EPA environmental program in a PPG, the Tribe or Intertribal Consortium must meet the requirements for that program with a few specified exceptions. For example, if a program requires treatment in a manner similar to a State, the Tribe or Tribal members of a Consortium must satisfy that requirement in order to include that program's funds in a PPG. The exceptions are requirements that restrict how a specific environmental program grant can be used after award. These requirements are not appropriate to be carried over to PPGs because after funds are awarded in a PPG, they may be used for cross-media activities or strategies and do not need to be accounted for in accordance with their original program sources. However, the source of the funds is considered by the Regional Administrator in negotiating a work plan with the applicant. See §§ 35.507(a) and 35.535. Key features of the PPG rule are discussed below.

Funds and Activities Eligible for Inclusion in a PPG

Funds for any environmental program grant listed in § 35.501 may be included in a PPG if the funds for that grant were appropriated in the same specific appropriation as the funds for PPGs. EPA will announce any changes in its appropriation acts that affect the list of programs in § 35.501.

Unlike the rule governing PPGs to States, § 35.535 of this rule allows Tribes and Intertribal Consortia to use PPG funds for any environmental activity that is eligible under the environmental programs listed in § 35.501 (except EPA-delegated or EPA-authorized activities, which still require delegation or authorization), regardless of whether a Tribe applied for or was selected for funding for that particular activity, provided that the Regional Administrator consults with the appropriate National Program Managers. The National Program Manager may expressly waive or modify the

consultation requirement in national program guidance. For example, if EPA found that a Tribe was not eligible for a Clean Air Act section 105 grant, but the Tribe wanted to perform air program monitoring or inspections, the Tribe could pay for those activities with PPG funds, provided that: (1) the Regional Administrator consulted with the National Program Managers for the sources of the PPG funds (unless waived in national program guidance) and (2) the activity was included in the approved PPG work plan. The Tribe would perform these air activities using Tribal authority. To implement an EPA-delegated or authorized program under a PPG, a Tribe would need the delegation(s) or authorization(s) as required under § 35.535(a). Given the wide variety of environmental activities eligible under the General Assistance Program (GAP) (see §§ 35.540–35.548), this will allow Tribes, as determined by the Regional Administrator, to use funds from other programs that are put into a PPG for the same wide variety of activities. Furthermore, this will allow Tribes to use GAP funds, if they are included in a PPG, to implement as well as develop environmental programs.

Within the framework of EPA oversight established by §§ 35.507, 35.514(a), 35.535 and national program guidance, EPA is proposing that Tribes have considerable flexibility to use PPG funds for a broad variety of activities. EPA is proposing this approach because Tribes need to address a broad range of environmental issues, but do not have the same access to diverse funding sources as States and, generally, Tribes must compete annually for their funds while States do not. EPA believes this approach will help achieve a key purpose of the PPG program: to provide Tribes and Intertribal Consortia with the flexibility to direct resources where they are most needed to address environmental and public health priorities. EPA will retain sufficient programmatic control because § 35.535(b) requires the Regional Administrator to consult with the appropriate National Program Managers before agreeing to a work plan that would differ significantly from any of the proposed work plans submitted with the Tribe's or the Consortium's applications for funds. For example, if a Tribe or Intertribal Consortium was selected for funding in a competition based on its proposed work plan for that grant and the Tribe or Consortium proposed a PPG work plan that would significantly modify those proposed work plan activities, then the Regional Administrator would have to consult

with the National Program Manager associated with the funding source (unless waived in national program guidance). Accordingly, the Regional Administrator will be responsible for ensuring that the Tribes and Intertribal Consortia meet the basic requirements of programs which provide funds for the PPG before the Tribes use funds for other important activities.

EPA intends to evaluate the flexibility provided under the rule regarding the activities eligible for funding under a PPG. After the third year of implementing the program, but before the end of the fifth year, the Agency will evaluate the environmental benefits of this flexibility as compared to the costs, which may include reduced accountability for funds and outcomes. Based on that evaluation, the Agency will determine whether to continue to allow Tribes to use PPG funds to perform activities under programs for which they are not eligible to receive a grant. If the Agency determines that a change in the regulation is appropriate, it will undertake a rulemaking to make such a change.

Administrative Flexibility

A primary advantage of PPGs is the administrative flexibility provided to all PPG recipients. A PPG requires only a single application, work plan, and budget. Once funds are awarded in a PPG, the Tribe or Intertribal Consortium can direct the funds as needed to achieve work plan commitments and does not need to account for funds in accordance with their original program sources. These administrative features also make it possible for Tribes to negotiate a work plan that includes cross-media or innovative strategies for addressing environmental problems.

Cost Share

The PPG cost share is the sum of the cost shares required for all individual program grants included in the PPG in accordance with 40 CFR 35.536(b) and (c) for each individual program grant included in the PPG. EPA will not require Tribes and Intertribal Consortia to provide a PPG cost share for funds from programs which do not require cost shares, such as GAP. (Cost sharing requirements for individual programs are found under §§ 35.540 through 35.718.) For funds from programs with a cost share requirement of five percent or less under the provisions of §§ 35.540 through 35.718, the PPG cost share will be the same as the cost share for the individual programs, as identified in §§ 35.540 through 35.718. For funds from programs with a required cost share greater than five percent, EPA is

proposing a PPG cost share similar to that required under the Tribal Air Pollution Control program provision found at § 35.575. For funds from such programs, EPA will require Tribes to provide a cost share of five percent; however, after the first two years, the Regional Administrator will determine through an objective assessment whether the Tribe or the members of an Intertribal Consortium meet socio-economic indicators that demonstrate the ability of the Tribe or the Intertribal Consortium to provide a cost share greater than five percent. If the Regional Administrator determines that the Tribe or members of the Intertribal Consortium meet such indicators, then the Regional Administrator shall increase the required cost share up to a maximum of 10 percent. If the Regional Administrator determines that the Tribe or the members of the Intertribal Consortium do not meet such indicators, then the cost share will remain at five percent. (The required cost share for the Tribal Water Pollution Control Grant Program (Clean Water Act, section 106) is five percent. Thus, this program is not included in the grant programs whose cost share could be raised to 10 percent through the Regional Administrator assessment and determination process.)

Further, the Regional Administrator may waive the required PPG cost share at the request of the Tribe or Intertribal Consortium if the Regional Administrator determines, based on an objective assessment of socio-economic indicators that fulfilling the cost share requirement would impose undue hardship on the Tribe or members of the Intertribal Consortium.

EPA invites suggestions for the socio-economic indicators for approval of the lower cost share and waiver of cost share, as well as suggestions for how the cost share for Intertribal Consortia should be calculated.

VI. Indian Environmental General Assistance Program (GAP) and Performance Partnership Grants

An important and unique environmental program available only to Tribes and Intertribal Consortia is the Indian Environmental General Assistance Program (GAP) (40 CFR 35.540 *et seq.*) This program was created to assist Indian Tribes in developing the capacity to manage their own environmental programs. GAP offers the opportunity for Tribes to develop integrated environmental programs, to develop capacity to manage specific programs that can be delegated by EPA, and to plan and establish a core program for environmental protection. It also

provides the opportunity for Tribes to define and develop administrative and legal infrastructures, to conduct assessments, monitoring, and planning, and to undertake additional activities to develop environmental programs within a simplified administrative framework.

GAP funds can be used more flexibly than categorical environmental program funds. EPA recognizes the Tribes' need for flexibility in using limited resources available for protecting Tribal environments, but believes that this need for flexibility must be balanced with the Agency's goals of establishing a strong Tribal environmental presence throughout Indian country and of diversifying financial resources available to Tribes for the administration of comprehensive environmental programs. GAP funds are primarily available for and critical to the development of sustainable, integrated Tribal environmental programs. The long-term goal of developing and maintaining an adequate level of funding for Tribal environmental programs will be best served not by increasing the number of activities that are funded by GAP, but rather by expanding and diversifying the use of various categorical environmental programs funds, in addition to the use of GAP funds.

When Congress authorized the PPG program, it allowed GAP funds to be included in such a grant. However, to balance competing interests in the use of GAP funds, EPA encourages Tribes and Intertribal Consortia to continue to use GAP funds, at least in the first instance, for the development of Tribal capacity to manage environmental programs and not to use these funds for environmental media activities. EPA believes that the overriding value of the General Assistance Program lies in its ability to assist Tribes in the development of their environmental capacity. This original and primary purpose of GAP has not been fully realized since some Tribes have not yet developed an environmental program capacity. Including a GAP grant in a PPG should not result in a reduction of EPA media-specific environmental program assistance available to Indian Tribes and Tribal Consortia.

VII. Implementing GPRA

EPA has developed an approach toward the integrated implementation of GPRA, the Chief Financial Officers Act (CFOA), and the Federal Financial Management Improvement Act of 1996 (FFMIA). These laws provide EPA with a framework to demonstrate to Congress and the taxpayers the costs to the federal government of EPA's program

accomplishments or outcomes. Tribes and Intertribal Consortia, by virtue of delegated program authorities and as recipients of EPA grant funds, play an integral part in achieving those goals and objectives. Thus EPA's reports of Agency resources associated with results-based outcomes will incorporate—at some level—expenditures incurred in the form of payments to the Tribes under grants and cooperative agreements. In order to comply with the Paperwork Reduction Act and the federal government's general grant regulations, EPA also has a responsibility to minimize additional administrative reporting requirements and costs borne by the Tribes. In addition, under current regulations EPA generally may not impose accounting requirements on Tribes beyond those currently required by 40 CFR part 31.

EPA will therefore use the budget information that Tribes and Intertribal Consortia provide in grant applications as a basis for linking the Agency's actual expenditures with EPA's results-based accomplishments or outcomes. EPA will be able to sufficiently rely on Tribal budget information to determine the costs of EPA's results-based outcomes based on the following three requirements of the proposed regulation:

(1) Tribes and Intertribal Consortia provide the program budget information required as part of the application;

(2) EPA and the recipients explicitly define work plan goals, objectives, outcomes, and outputs, as well as the program flexibility contained in the work plan; and

(3) Recipients report back on work plan accomplishments.

The proposed rule ensures that Tribes and Intertribal Consortia will meet these three conditions. EPA will thus have a reasonable basis for associating the costs of its grants with the Agency's results-based outcomes.

EPA's Regional offices, with necessary consultation with recipients, will be responsible for cross-walking the State budget information (grant application and work plan data) into the GPRA goals and objectives architecture. If a grant is subsequently amended to reflect significant adjustments to work plan commitments, the region will consult with the State to develop an estimate of the budget associated with the revision so that it can be reflected in regional GPRA reporting. The Office of the Chief Financial Officer will provide regions with guidance on the approach to use for the cross-walk process to ensure that the results achieved by States with EPA funds are captured in the Agency's Annual Performance Reports.

VIII. Program Specific Provisions

Requirements applicable to each environmental grant program, such as the requirements regarding eligibility and cost share, are located in 40 CFR 35.540 through 35.718.

Programs Not Specifically Available to Tribes

Sections 28 and 306 of the Toxic Substances Control Act (TSCA) and section 6605 of the Pollution Prevention Act (PPA) provide explicit authority for grants to States, but are silent regarding grants to Tribes. This rule reflects EPA's determination that those statutes may also be interpreted to authorize grants to Tribes for radon abatement (TSCA section 306) and toxic substances compliance monitoring programs (TSCA sections 28), and reaffirms EPA's determination that Tribes are eligible for Pollution Prevention Incentive grants under section 6605 of the PPA (see, e.g., 56 FR 11553 (1991)).

Previously, EPA determined that it has the authority to approve Tribal lead-based paint abatement certification and training programs and make grants to Tribes under section 404(g) of TSCA for the development and implementation of such programs even though TSCA makes no mention of Tribes. 61 FR 45778, 45805–808 (1996). The Agency reasoned that its interpretation of TSCA is governed by the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and that because Congress had not explicitly stated its intent in adopting the statutory provision, the Agency could adopt an interpretation which in its expert judgment is reasonable in light of the goals and purposes of the statute. EPA opined further that since TSCA did not define a role for Tribes, there was an ambiguity in Congressional intent and therefore, the Agency's interpretation of TSCA to allow Tribes to apply for program authorization was permissible under *Chevron*. EPA reasoned further that this interpretation is consistent with Supreme Court precedent holding that limitations on Tribal sovereignty must be "unmistakably clear," *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985), and that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 268 (1992). Finally, EPA noted that allowing Tribes to apply for program authorization is consistent with the general principles of federal Indian law "encouraging tribal independence," *Ramah Navaho Sch. Bd. v. Bureau of*

Revenue, 458 U.S. 832, 846 (1985), and the Agency's Indian policy which states that environmental programs in Indian country will be implemented to the maximum extent possible by Tribal governments. In light of these principles, EPA reasoned that Tribes are also eligible for grants to develop and implement lead-based paint certification and training programs under section 404(g) of TSCA.

Consistent with the reasoning that warranted EPA's determination with respect to Tribal lead program approval and grant authority, EPA interprets sections 28 and 306 of TSCA and section 6605 of PPA to authorize grants to Tribes as well as States, even though there is no program approval or authorization associated with the grant programs for radon abatement, toxics substance compliance monitoring, or pollution prevention incentives. While Congress did not expressly provide a role for Tribes in either TSCA or PPA, both statutes were clearly intended to have comprehensive, nationwide coverage—including the provisions regarding financial assistance for these programs. EPA does not believe that Congress intended the Agency to provide grants exclusively to States and thereby leave Tribal lands without the benefit of the grant assistance for these programs, since the problems and goals they address—toxic substances, radon abatement and pollution prevention—are relevant throughout the nation in both State and Tribal areas. Therefore, EPA has determined that it is appropriate to provide grants to Tribes for Radon Abatement programs under section 306 of TSCA, Toxics Substances Compliance Monitoring programs under section 28 of TSCA, and Pollution Prevention Incentives programs under section 6605 of PPA, EPA invites comments on this issue.

In order to be eligible for a grant under TSCA section 28, TSCA section 306, or PPA section 6605, a Tribe or each member of an Intertribal Consortium must establish eligibility for treatment in a manner similar to a State by demonstrating that it:

- (1) Is recognized by the Secretary of Interior;
- (2) Has an existing government exercising substantial governmental duties and powers;
- (3) Has adequate authority to carry out the grant activities; and,
- (4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

If the Administrator has previously determined that an Indian Tribe has met the prerequisites in (1) and (2) for

another EPA program, the Tribe need provide only that information unique to the particular program required by paragraph (3) and (4).

Public Water System Supervision Tribal Reserve

The current regulation (40 CFR 35.115(g)) provides that the EPA shall annually reserve up to three percent of each year's Public Water System Supervision (PWSS) funds for use on Indian lands. The Agency is proposing to increase the authorized amount of the reserve to up to seven percent. This increase will provide needed funds for the Tribal PWSS program without affecting States' current funding.

The Tribal reserve is used for two purposes: to allow EPA to directly implement the PWSS program on Tribal lands; and to assist Tribes with developing PWSS primacy programs. The three percent ceiling, established in 1988, was EPA's estimate of the amount that would be needed to achieve both of these purposes. Over the past 10 years, we have realized that three percent is not adequate to achieve both purposes. To date, only the Navajo Nation has submitted a complete PWSS primacy package and only three other Tribes have taken steps toward primacy. We believe that there are more Tribes which may be interested in the program but have not yet voiced that interest because they do not have the capacity to develop an adequate program. We also believe more Tribes would take interest in the program if sufficient funds were available.

In addition, the current Tribal reserve is insufficient to cover basic direct implementation needs. Tribal systems have a high number of monitoring/reporting and maximum contaminant level violations. These same systems will need to abide by upcoming drinking water regulations and will be asked to partake in several new initiatives outlined in the revised SDWA, including source water protection, capacity development, and operator certification. Although these initiatives are not required of Tribes, we believe that EPA, as the primary enforcement authority of non primacy Tribal systems, should address these initiatives on Tribal lands. Additional Tribal funding can help EPA and Tribes respond to Tribal safe drinking water needs.

EPA requested Congress to provide for funding in excess of an amount necessary for the traditional three percent reserve in fiscal year 1998 to assist Tribes in developing capacity, maintaining their own PWSS programs and to provide additional support to the

Tribal PWSS Direct Implementation program. In fiscal years 1998 and 1999, EPA received an additional \$3,780,500 for these purposes. In order to use those funds for Tribes, EPA needed to deviate from the regulation at 40 CFR 35.115(g), which limits EPA's Tribal PWSS reserve to three percent. Instead of continuing to deviate from the regulations, EPA proposes to raise the ceiling of our annual Tribal reserve to up to seven percent. With the additional \$3.78M PWSS program appropriation, the ceiling of funding for Tribes can be raised to 6.91 percent (the amount we propose to give Tribes in FY-00) without taking away from States' current funding levels.

Safe Drinking Water Act and Alaska Native Villages

EPA is proposing a new interpretation of the definition of "Indian Tribe" in 42 U.S.C. 300f(14) that would include eligible Alaska Native Villages (ANVs) in that definition for purposes of PWSS and Underground Water Source Protection (also known as underground injection control (UIC)) grants under 42 U.S.C. 300j-2(a) and (b), and primacy for PWSS and UIC programs under 42 U.S.C. 300g-2, 300h-1 and 300h-4. Under this proposed approach, a federally-recognized Tribe in Alaska could seek to demonstrate that it is eligible for treatment in the same manner as a State according to the criteria established by Congress in 42 U.S.C. 300j-11 and in EPA's regulations at 40 CFR 142.72 and 145.52.

In 1988, EPA announced its interpretation that the term "Indian Tribe" in 42 U.S.C. 300(f)(14) does not include ANVs. 53 FR 37396, 37407. This interpretation was based on the Agency's reading of legislative history and EPA's view that Congress would have explicitly mentioned ANVs if it intended to include ANVs in the definition of Indian Tribes. EPA now believes it is more consistent with Congressional intent and federal Indian law and policy to interpret the term "Indian Tribe" in 42 U.S.C. 300f(14) to include Indian Tribes located in Alaska (i.e., ANVs) that otherwise meet the SDWA's definition of Indian Tribe.

Under the SDWA, the term "Indian Tribe" means "any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area." 42 U.S.C. 300(f)(14). In 1993, the Department of the Interior (DOI) clarified that the Alaska Native entities listed on DOI's list of federally-recognized Tribes have the same governmental status as other federally acknowledged Indian Tribes by

virtue of their status as Indian Tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged Tribes; have the right, subject to general principles of federal Indian law, to exercise the same inherent and delegated authorities available to other Tribes; and are subject to the same limitations imposed by law on other Tribes. 58 FR 54364, 54366 (1993).

Thus, because DOI has clarified that federally-recognized Tribes in Alaska have the same status as other federally-recognized Tribes, EPA believes that ANVs that otherwise meet the SDWA's definition of Indian Tribe should not be excluded from seeking PWSS and UIC program primacy or related program grants. This interpretation is consistent with the plain language of the SDWA's definition of "Indian Tribe" and EPA's policy that Indian Tribes are the appropriate entities to set environmental standards and manage their environments where they have the authority and capability to do so. See EPA's 1984 Indian Policy. It is also consistent with Supreme Court precedent holding that any statutory limitations on Tribal sovereignty must be stated explicitly, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985), and that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 268 (1992).

EPA notes that, while this change in interpretation would include ANVs that otherwise meet the SDWA's definition of Indian Tribe within the context of the PWSS and UIC programs, any ANV wishing to seek primacy, or a primacy development grant, for either the PWSS or UIC programs would still need to demonstrate that it meets the relevant statutory and regulatory eligibility criteria, including the jurisdictional requirements contained in 42 U.S.C. 300j-11, 40 CFR 142.72 and 145.52, 40 CFR 35.676 and 35.686 of this subpart. The Agency also wants to clarify that under this proposal, EPA would evaluate, on a case-by-case basis (when requested to do so by an Alaska Tribe in an application for grant or primacy eligibility) whether an Alaska Tribe meets the criteria for program primacy or a related program grant. The State of Alaska currently has primacy for PWSS and UIC (Class II wells) for all areas in Alaska except Indian country. EPA is not proposing to amend the extent of the State's primacy through this notice.

In the 1996 amendments to the Safe Drinking Water Act, Congress added a

sentence to the definition of Indian Tribe explicitly noting that the term "Indian Tribe" for purposes of the State Revolving Fund (SRF) program includes "any Native village." 42 U.S.C. 300f(14) (emphasis added). EPA believes that, through this change, Congress only intended to ensure that all Native villages may receive SRF grants. EPA believes that this provision was not intended to mean that federally-recognized Tribes carrying out substantial governmental duties and powers in Alaska are excluded from the definition of Indian Tribe for purposes other than SRF.

EPA requests comments on this change in interpretation of the definition of an Indian Tribe.

Regulations for Programs To Manage Hazardous Waste and Underground Storage Tanks

After the EPA workgroup reached closure on this proposed rulemaking, Congress authorized the Agency to award grants to Tribes "for the development and implementation of programs to manage hazardous waste, and underground storage tanks." Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. 105-276, 112 Stat. 2461, 2499 (1998). EPA intends to include regulations for these programs in the final rule. Therefore, EPA seeks comments on providing financial assistance to Tribes for programs to manage hazardous waste and underground storage tanks.

IX. Conclusion

This Tribal-specific subpart reflects EPA's regulatory and budgetary efforts to improve the continuity and stability of financial assistance for Tribal environmental programs. Recipients will benefit from the streamlined and simplified requirements of the regulation. In addition, it will provide Tribes and Intertribal Consortia choosing to participate in the PPG program with the flexibility to better use funds to address their environmental priorities.

Regulatory Flexibility Act

The Agency has determined that the requirement in the Regulatory Flexibility Act (RFA) to prepare a regulatory flexibility analysis does not apply to this rule. A regulatory flexibility analysis must be prepared only where the Agency is required by the Administrative Procedure Act (APA) or any other statute to publish a general notice of proposed rule making (5 U.S.C. 603). Grant-related matters, such as this

rule, are not subject to the notice and comment requirements of the APA (5 U.S.C. 553(a)(1)). Nor is this rule required to undergo notice and comment rule making by any other statute.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. This regulation contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The UMRA excludes from the definitions of "federal intergovernmental mandate" and federal participation mandates" duties that arise from conditions of federal assistance.

National Technology Transfer and Advancement Act

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

This proposed rule does not involve any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. Commenters who disagree with this conclusion should indicate how the Notice is subject to the Act and identify any potentially applicable voluntary consensus standards.

Executive Order 13045

Executive Order 13045 applies to any rule that is determined to be: (1) "economically significant" as defined

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

EPA 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 and safety risks. As such, the proposed rule is not subject to the requirements of the Executive Order.

Executive Order 12866

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

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

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

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

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

It has been determined that this rule is a "significant regulatory action" under the terms of Executive Order 12866 because the Performance Partnership Grant authority is a new type of grant authority and therefore raises novel policy issues. As such, this action was submitted to the Office of Management and Budget (OMB) for review. Changes made in response to OMB suggestions and recommendations will be documented in the public record.

Paperwork Reduction Act

In keeping with the requirements of the Paperwork Reduction Act (PRA), as amended, 44 U.S.C. 3501 *et seq.*, the information collection requirements

contained in this rule have been approved by OMB under General Administrative Requirements for Assistance Programs information collection request number 0938.06 (OMB Control Number 2030-0020) and Quality Assurance Specifications and Requirements information request number 0866.05 (OMB Control Number 2080-0033). This rule does not contain any collection of information requirements beyond those already approved. Since this action imposes no new or additional information collection, reporting, or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, no information request will be submitted to the Office of Management and Budget for review.

Executive Order 12875

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

This proposed rule does not create a mandate on State, local or Tribal governments nor does it impose any enforceable duties on these entities as it governs the award of financial assistance. Instead, this proposed rule is designed to reduce the administrative burden associated with grants for environmental programs. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply.

Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or

uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal governments or consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule may significantly or uniquely affect the communities of Indian Tribal governments, but it will not impose substantial direct compliance costs on such communities. This rule governs financial assistance to Tribes. Any costs associated with this regulation will be incurred by a Tribe as a result of its discretionary decision to seek financial assistance. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply.

List of Subjects in 40 CFR Part 35

Environmental protection, Administrative practice and procedures, Evaluation of performance, Performance partnership grants, Requirements for specific grant programs, Work plan requirements.

Dated: June 30, 1999.

Carol M. Browner,
Administrator.

For the reasons set forth in this preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 35—[AMENDED]

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

Authority: 42 U.S.C. 4368b.

2. EPA is proposing to remove subpart Q.

3. EPA is proposing to add a new subpart B to read as follows.

Subpart B—Environmental Program Grants for Indian Tribes**All Grants—General**

Sec.

- 35.500 Purpose of the subpart.
- 35.501 Environmental programs covered by the subpart.
- 35.502 Definition of terms.
- 35.503 Deviation from this subpart.
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Preparing an Application

- 35.505 Components of a complete application.
- 35.506 Time frame for submitting an application.
- 35.507 Work plans.
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EPA Action on Application

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- 35.512 Factors considered in determining award amount.
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- 35.514 Amendments and other changes.
- 35.515 Evaluation of performance.
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- 35.518 Unexpended balances.
- 35.519 Preferences for Indians, Indian organizations, and Indian-owned economic enterprises.

Performance Partnership Grants

- 35.530 Purpose of Performance Partnership Grants.
- 35.532 Requirements summary.
- 35.533 Programs eligible for inclusion.
- 35.534 Eligible recipients.
- 35.535 Activities eligible for funding.
- 35.536 Cost share requirements.
- 35.537 Application requirements.
- 35.538 Project period.

Indian Environmental General Assistance Program (GAP)

- 35.540 Purpose.
- 35.542 Definitions.
- 35.543 Eligible recipients.
- 35.545 Eligible activities.
- 35.548 Award limitations.

Air Pollution Control (Section 105)

- 35.570 Purpose.
- 35.572 Definition.
- 35.573 Eligible tribe.
- 35.575 Maximum Federal share.
- 35.576 Maintenance of effort.
- 35.578 Award limitation.

Water Pollution Control (Sections 106 and 518)

- 35.580 Purpose.
- 35.582 Definitions.
- 35.583 Eligible recipients.
- 35.585 Maximum Federal share.
- 35.588 Award limitations.

Water Quality Cooperative Agreements (Section 104(b)(3))

- 35.600 Purpose.

- 35.603 Competitive process.
- 35.604 Maximum Federal share.

Wetlands Development Grant Program (Section 104(b)(3))

- 35.610 Purpose.
- 35.613 Competitive process.
- 35.615 Maximum Federal share.

Nonpoint Source Management Grants (Sections 319(h) and 518(f))

- 35.630 Purpose.
- 35.632 Definition.
- 35.633 Eligibility requirements.
- 35.635 Maximum Federal share.
- 35.636 Maintenance of effort.
- 35.638 Award limitations.

Pesticide Cooperative Enforcement (Section 23 (a)(1))

- 35.640 Purpose.
- 35.641 Eligible recipients.
- 35.642 Maximum Federal share.
- 35.645 Basis for allotment.

Pesticide Applicator Certification and Training (Section 23(a)(2))

- 35.646 Purpose.
- 35.649 Maximum Federal share.

Pesticide Program Implementation (Section 23(a)(1))

- 35.650 Purpose.
- 35.653 Eligible recipients.
- 35.655 Basis for allotment.
- 35.659 Maximum Federal share.

Pollution Prevention Incentive Grants (Section 6605)

- 35.660 Purpose.
- 35.661 Competitive process.
- 35.662 Definitions.
- 35.663 Eligible recipients.
- 35.668 Award limitations.
- 35.669 Maximum Federal share.

Public Water System Supervision (Sections 1443(a) and 1451)

- 35.670 Purpose.
- 35.672 Definition.
- 35.673 Annual amount reserved by EPA.
- 35.675 Maximum Federal share.
- 35.676 Eligible recipients.
- 35.678 Award limitations.

Underground Water Source Protection (Section 1443(b))

- 35.680 Purpose.
- 35.682 Definition.
- 35.683 Annual amount reserved by EPA.
- 35.685 Maximum Federal share.
- 35.686 Eligible recipients.
- 35.688 Award limitations.

Lead-Based Paint Program (Section 404(g))

- 35.690 Purpose.
- 35.691 Funding coordination.
- 35.693 Eligible recipients.

Indoor Radon Grants (Section 306)

- 35.700 Purpose.
- 35.702 Basis for allotment.
- 35.703 Eligible recipients.
- 35.705 Maximum Federal share.
- 35.708 Award limitations.

Toxic Substances Compliance Monitoring (Section 28)

- 35.710 Purpose.
- 35.712 Competitive process.
- 35.713 Eligible recipients.
- 35.715 Maximum Federal share.
- 35.718 Award limitation.

Subpart B—Environmental Program Grants—Indian Tribes

Authority: 42 U.S.C. 300f *et seq.* 6901 *et seq.*, 7401 *et seq.*, 13101 *et seq.* 33 U.S.C. 1251 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Pub. L. 105-65, 111 Stat. 1344, 1373 (1997).

All Grants—General**§ 35.500 Purpose of the subpart.**

This subpart establishes administrative requirements for grants awarded to Indian Tribes and Intertribal Consortia for the environmental programs listed in § 35.501. This subpart supplements requirements in EPA's general grant regulations found at 40 CFR part 31. Sections 35.500 through 35.518 contain administrative requirements that apply to all environmental program grants included in this subpart. Sections 35.530 through 35.718 contain requirements that apply to specified environmental program grants. Many of these environmental programs also have programmatic and technical requirements that are published elsewhere in the Code of Federal Regulations.

§ 35.501 Environmental programs covered by the subpart.

(a) The requirements in this subpart apply to grants awarded for the following programs:

(1) Performance Partnership Grants (1996 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, 110 Stat. 1321, 1321-299 (1996) and Departments of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act of 1998, Public Law 105-65, 111 Stat. 1344, 1373 (1997)).

(2) The Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. 4368b.

(3) Clean Air Act. Air pollution control (section 105).

(4) Clean Water Act.

(i) Water pollution control (section 106 and 518).

(ii) Water quality cooperative agreements (section 104(b)(3)).

(iii) Wetlands development grant program (section 104(b)(3)).

(iv) Nonpoint source management (section 319(h)).

(5) Federal Insecticide, Fungicide, and Rodenticide Act.

(i) Pesticide cooperative enforcement (section 23(a)(1)).

(ii) Pesticide applicator certification and training (section 23(a)(2)).

(iii) Pesticide program implementation (section 23(a)(1)).

(6) Pollution Prevention Act of 1990. Pollution prevention incentives for Tribes (section 6605).

(7) Safe Drinking Water Act.

(i) Public water system supervision (section 1443(a)).

(ii) Underground water source protection (section 1443(b)).

(8) Toxic Substances Control Act.

(i) Lead-based paint program (section 404(g)).

(ii) Indoor radon grants (section 306).

(iii) Toxic substances compliance monitoring (section 28).

(b) Unless otherwise prohibited by statute or regulation, the requirements in § 35.500 through § 35.518 of this subpart also apply to grants to Indian Tribes and Intertribal Consortia under environmental programs established after this subpart becomes effective, if specified in Agency guidance for such programs.

§ 35.502 Definition of terms.

Terms are defined as follows when they are used in this regulation.

Budget period. The period specified in the grant agreement during which the recipient may expend or obligate funds for the purposes specified in the agreement.

Consolidated grant. A single grant made to a recipient consolidating funds from more than one environmental grant program. After the award is made, recipients must account for grant funds in accordance with the funds' original environmental program sources. Consolidated grants are not Performance Partnership Grants.

Environmental program. A program for which EPA awards grants under the authorities listed in § 35.501. The grants are subject to the requirements of this subpart.

Federal Indian reservation. All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Indian country. (1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States, whether within the original or

subsequently acquired territory thereof, and whether within or without the limits of a State; and,

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Intertribal Consortium or Consortia. A partnership between two or more Tribes that is authorized by the governing bodies of those Tribes to apply for and receive assistance under one or more of the programs listed in § 35.501. A Consortium must have adequate documentation of the existence of the partnership and the authorization to apply for and receive assistance.

National program guidance. Guidance issued by EPA's National Program Managers for establishing and maintaining effective environmental programs. This guidance establishes national goals, objectives, and priorities as well as other information to be used in monitoring progress. The guidance may also set out specific environmental strategies, core performance measures, criteria for evaluating programs, and other elements of program implementation.

Outcome. The environmental result, effect, or consequence that will occur from carrying out an environmental program or activity that is related to an environmental or programmatic goal or objective. Outcomes must be quantitative, and they may not necessarily be achievable during a grant budget period. See "output."

Output. An environmental activity or effort and associated work products related to an environmental goal or objective that will be produced or provided over a period of time or by a specified date. Outputs may be quantitative or qualitative but must be measurable during a grant budget period. See "outcome."

Performance Partnership Grant. A single grant combining funds from more than one environmental program. A Performance Partnership Grant may provide for administrative savings or programmatic flexibility to direct grant resources where they are most needed to address public health and environmental priorities (see also § 35.530). Each Performance Partnership Grant has a single, integrated budget and recipients do not need to account for grant funds in accordance with the funds' original environmental program sources.

Planning target. The amount of funds that the Regional Administrator suggests a grant applicant consider in developing its application, including the work plan, for an environmental program.

Regional supplemental guidance. Guidance to environmental program grant applicants prepared by the Regional Administrator, based on the national program guidance and specific regional and applicant circumstances, for use in preparing a grant application.

Tribal Environmental Agreement (TEA). A strategic planning document designated as a TEA and signed by the Regional Administrator and an appropriate Tribal official that sets out negotiated environmental goals, objectives, outcomes, outputs, priorities, actions to be taken, and measures of performance.

Tribe. Except as otherwise defined in statute or this subpart, Indian Tribal Government (Tribe) means: any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, which is recognized as eligible by the United States Department of the Interior for the special services provided by the United States to Indians because of their status as Indians.

Work plan. The document which identifies how and when the applicant will use funds from environmental program grants and is the basis for management and evaluation of performance under the grant agreement to produce specific outputs and outcomes (see 35.507). The work plan must be consistent with applicable statutes, regulations, and delegation or authorization agreements.

Work plan commitments. The outputs and outcomes associated with each work plan component, as established in the grant agreement.

Work plan component. A negotiated set or group of work plan commitments established in the grant agreement. A work plan may have one or more work plan components.

§ 35.503 Deviation from this subpart.

EPA will consider and may approve requests for an official deviation from non-statutory provisions of this regulation in accordance with 40 CFR 31.6.

§ 35.504 Eligibility of an Intertribal Consortium.

(a) An Intertribal Consortium is eligible to receive grants under the authorities listed in § 35.501 only if the Consortium demonstrates that all members of the Consortium meet the eligibility requirements for the grant and authorize the Consortium to apply for and receive assistance, except as provided in paragraph (b) of this section.

(b) An Intertribal Consortium is eligible to receive a grant under the

Indian Environmental General Assistance Program Act, in accordance with § 35.540, if the Consortium demonstrates that:

- (1) A majority of its members meets the eligibility requirements for the grant;
- (2) All members that meet the eligibility requirements authorize the Consortium to apply for and receive assistance; and
- (3) Only members that meet the eligibility requirements will benefit directly from the grant project and the Consortium agrees to a grant condition to that effect.

Preparing an Application

§ 35.505 Components of a complete application.

A complete application for an environmental program grant must:

- (a) Meet the requirements in 40 CFR part 31, subpart B;
- (b) Include a proposed work plan (§ 35.507 of this subpart); and
- (c) Specify the environmental program and the amount of funds requested.

§ 35.506 Time frame for submitting an application.

An applicant should submit a complete application to EPA at least 60 days before the beginning of the proposed budget period.

§ 35.507 Work plans.

(a) *Bases for negotiating work plans.* The work plan is negotiated between the applicant and the Regional Administrator and reflects consideration of national, regional, and Tribal environmental and programmatic needs and priorities.

(1) *Negotiation considerations.* In negotiating the work plan, the Regional Administrator and applicant will consider such factors as national program guidance; any regional supplemental guidance; goals, objectives, and priorities proposed by the applicant; other jointly identified needs or priorities; and the planning target.

(2) *National program guidance.* If an applicant proposes a work plan that differs significantly from the goals and objectives, priorities, or performance measures in the national program guidance associated with the proposed work plan activities, the Regional Administrator must consult with the appropriate National Program Manager before agreeing to the work plan.

(3) *Use of existing guidance.* An applicant should base the grant application on the national program guidance in place at the time the application is being prepared.

(b) *Work plan requirements.*

(1) The work plan is the basis for the management and evaluation of performance under the grant agreement.

(2) An approvable work plan must specify:

- (i) The work plan components to be funded under the grant;
- (ii) The estimated work years and funding amounts for each work plan component;
- (iii) The work plan commitments for each work plan component, and a time frame for their accomplishment;
- (iv) A performance evaluation process and reporting schedule in accordance with § 35.515 of this subpart; and
- (v) The roles and responsibilities of the recipient and EPA in carrying out the work plan commitments.

(3) The work plan must be consistent with applicable federal statutes, regulations, circulars, executive orders, and delegation or authorization agreements.

(c) *Tribal Environmental Agreement as work plan.* An applicant may use a Tribal Environmental Agreement (TEA) or a portion of the TEA as the work plan or part of the work plan for an environmental program grant if the portion of the TEA that is to serve as the grant work plan:

- (1) Is clearly identified and distinguished from other portions of the TEA; and
- (2) Meets the requirements in § 35.507(b).

§ 35.508 Budget period.

The Regional Administrator and applicant may negotiate the length of the budget period for environmental program grants, subject to limitations in appropriations and authorizing statutes.

§ 35.509 Consolidated grants.

Any applicant eligible to receive funds from more than one environmental program may submit an application for a consolidated grant. For consolidated grants, an applicant prepares a single budget and work plan covering all of the environmental programs included in the application. The consolidated budget must identify each environmental program to be included, the amount of each program's funds, and the extent to which each program's funds support each work plan component. Recipients of consolidated grants must account for grant funds in accordance with the funds' environmental program sources; funds included in a consolidated grant from a particular environmental program may be used only for that program.

EPA Action on Application

§ 35.510 Time frame for EPA action.

The Regional Administrator will review a complete application and either approve, conditionally approve, or disapprove it within 60 days of receipt. The Regional Administrator will award grants for approved or conditionally approved applications if funds are available.

§ 35.511 Criteria for approving an application.

(a) After evaluating other applications as appropriate, the Regional Administrator may approve an application if he or she determines that:

(1) The application meets the requirements of this subpart and 40 CFR part 31;

(2) The application meets the requirements of all applicable federal statutes, regulations, circulars, executive orders, and delegation or authorization agreements;

(3) The proposed work plan complies with the requirements of § 35.507 of this subpart; and

(4) The achievement of the proposed work plan is feasible, considering such factors as the applicant's existing circumstances, past performance, program authority, organization, resources, and procedures.

(b) If the Regional Administrator finds the application does not satisfy the criteria in paragraph (a) of this section, the Regional Administrator may either:

(1) Conditionally approve the application if only minor changes are required, with grant conditions necessary to ensure compliance with the criteria, or

(2) Disapprove the application in writing.

§ 35.512 Factors considered in determining award amount.

(a) After approving an application under § 35.511, the Regional Administrator will consider such factors as the amount of funds available for award to Indian Tribes and Intertribal Consortia, the extent to which the proposed work plan is consistent with EPA guidance and mutually agreed upon priorities, and the anticipated cost of the work plan relative to the proposed work plan components to determine the amount of funds to be awarded.

(b) If the Regional Administrator finds that the requested level of funding is not justified, he or she will attempt to negotiate a resolution of the issues with the applicant before determining the award amount.

§ 35.513 Reimbursement for pre-award costs.

(a) Notwithstanding the requirements of 40 CFR 31.23(a) (Period of availability of funds), and OMB cost principles, EPA may reimburse recipients for pre-award costs incurred from the beginning of the budget period established in the grant agreement if such costs would have been allowable if incurred after the award. Such costs must be specifically identified in the grant application EPA approves.

(b) The applicant incurs pre-award costs at its own risk. EPA is under no obligation to reimburse such costs unless they are included in an approved grant application.

Post-Award Requirements**§ 35.514 Amendments and other changes.**

The provisions of 40 CFR 31.30 do not apply to environmental program grants awarded under this subpart. The following provisions govern amendments and other changes to grant work plans and budgets after the work plan is negotiated and a grant awarded.

(a) *Changes requiring prior approval.* The recipient needs the Regional Administrator's prior written approval to make significant post-award changes to work plan commitments. The Regional Office, in consultation with the recipient, will document approval of these changes including budgeted amounts associated with the revisions.

(b) *Changes requiring approval.* Recipients must request, in writing, grant amendments for changes requiring increases in environmental program grant amounts and extensions of the budget period. Recipients may begin implementing a change before the amendment has been approved by EPA, but do so at their own risk. If EPA approves the change, EPA will issue a grant amendment. EPA will notify the recipient in writing if the change is disapproved.

(c) *Changes not requiring approval.* Other than those situations described in paragraphs (a) and (b) of this section, recipients do not need to obtain approval for changes, including changes in grant work plans, budgets, or other parts of grant agreements, unless the Regional Administrator determines approval requirements should be imposed on a specific recipient for a specified period of time.

(d) *OMB cost principles.* The Regional Administrator may waive, in writing, approval requirements for specific recipients and costs contained in OMB cost principles.

(e) *Changes in consolidated grants.* Recipients of consolidated grants under

§ 35.509 may not transfer funds among environmental programs.

(f) *Subgrants.* Subgrantees must request required approvals in writing from the recipient and the recipient shall approve or disapprove the request in writing. A recipient will not approve any work plan or budget revision which is inconsistent with the purpose or terms and conditions of the federal grant to the recipient. If the revision requested by the subgrantee would result in a significant change to the recipient's approved grant which requires EPA approval, the recipient will obtain EPA's approval before approving the subgrantee's request.

§ 35.515 Evaluation of performance.

(a) *Joint evaluation process.* The applicant and the Regional Administrator will develop a process for jointly evaluating and reporting progress and accomplishments under the work plan. A description of the evaluation process and reporting schedule must be included in the work plan. The schedule must require the recipient to report at least annually and must satisfy the requirements for progress reporting under 40 CFR 31.40(b).

(b) *Elements of the evaluation process.* The evaluation process must provide for:

(1) A discussion of accomplishments as measured against work plan commitments;

(2) A discussion of the cumulative effectiveness of the work performed under all work plan components;

(3) A discussion of existing and potential problem areas; and

(4) Suggestions for improvement, including, where feasible, schedules for making improvements.

(c) *Resolution of issues.* If the joint evaluation reveals that the recipient has not made sufficient progress under the work plan, the Regional Administrator and the recipient will negotiate a resolution that addresses the issues. If the issues cannot be resolved through negotiation, the Regional Administrator may take appropriate measures under 40 CFR 31.43. The recipient may request review of the Regional Administrator's decision under the dispute processes in 40 CFR 31.70.

(d) *Evaluation reports.* The Regional Administrator will ensure that the required evaluations are performed according to the negotiated schedule and that copies of evaluation reports are placed in the official files and provided to the recipient.

§ 35.516 Direct implementation.

If funds for an environmental program remain after Tribal and Intertribal

Consortia environmental program grants for that program have been awarded or because no grants were awarded, the Regional Administrator may, subject to any limitations contained in appropriation acts, use all or part of the funds to support a federal program required by law in Indian country in the absence of an acceptable Tribal program.

§ 35.517 Unused funds.

If funds for an environmental program remain after Tribal and Intertribal Consortia grants for that program have been awarded or because no grants were awarded, and the Regional Administrator does not use the funds under § 35.516 of this subpart, the Regional Administrator may award the funds to any eligible Indian Tribe or Intertribal Consortium in the region (including a Tribe or Intertribal Consortium that has already received funds) for the same environmental program or for a Performance Partnership Grant, subject to any limitations in appropriation acts.

§ 35.518 Unexpended balances.

Subject to any relevant provisions of law, if a recipient's final Financial Status Report shows unexpended balances, the Regional Administrator will deobligate the unexpended balances and make them available, either to the same recipient or other Tribes or Intertribal Consortia in the region, for environmental program grants.

§ 35.519 Preferences for Indians, Indian organizations, and Indian-owned economic enterprises.

Any grant awarded under this subpart, and any subgrant, contract, or subcontract under such grant, shall require that to the greatest extent feasible:

(a) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants be given to Indians; and

(b) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 USCS 1452].

Performance Partnership Grants**§ 35.530 Purpose of Performance Partnership Grants.**

(a) *Purpose of section.* Sections 35.530 through 35.538 govern Performance Partnership Grants to Tribes and

Intertribal Consortia authorized in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134, 110 Stat. 1321, 1321-299 (1996) and Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Public Law 105-65, 111 Stat. 1344, 1373 (1997).

(b) *Purpose of program.* Performance Partnership Grants enable Tribes and Intertribal Consortia to combine funds from more than one environmental program grant into a single grant with a single budget. Recipients do not need to account for Performance Partnership Grant funds in accordance with the funds' original environmental program sources; they need only account for total Performance Partnership Grant expenditures. Subject to the requirements of this subpart, the Performance Partnership Grant program is designed to:

(1) Strengthen partnerships between EPA and Tribes and Intertribal Consortia through joint planning and priority-setting and better deployment of resources;

(2) Provide Tribes and Intertribal Consortia with flexibility to direct resources where they are most needed to address environmental and public health priorities;

(3) Link program activities more effectively with environmental and public health goals and program outcomes;

(4) Foster development and implementation of innovative approaches, such as pollution prevention, ecosystem management, and community-based environmental protection strategies; and

(5) Provide savings by streamlining administrative requirements.

§ 35.532 Requirements summary.

(a) Applicants and recipients of Performance Partnership Grants must meet:

(1) The requirements in §§ 35.500 to 35.518 of this subpart which apply to all environmental program grants, including Performance Partnership Grants; and

(2) The requirements in §§ 35.530 to 35.538 of this subpart which apply only to Performance Partnership Grants.

(b) In order to include funds from an environmental program grant listed in § 35.501(a) of this subpart in a Performance Partnership Grant, applicants must:

(1) Meet the requirements for award of each environmental program from which funds are included in the Performance Partnership Grant, except

the requirements at §§ 35.548(c), 35.638(b) and (c), 35.691, and 35.708 (c), (d), (e), and (g). These requirements can be found in this regulation beginning at § 35.540. If the applicant is an Intertribal Consortium, each Tribe that is a member of the Consortium must meet the requirements.

(2) Apply for the environmental program grant.

(3) Obtain the Regional Administrator's approval of the application for that grant.

(c) If funds from an environmental program are not included in a Performance Partnership Grant, an applicant is not required to meet the requirements of that environmental program in order to carry out activities eligible under that program as provided in § 35.535.

§ 35.533 Programs eligible for inclusion.

(a) *Eligible programs.* Except as provided in paragraph (b) of this section, the environmental program grants eligible for inclusion in a Performance Partnership Grant are listed in § 35.501(a)(2) through (8) of this subpart.

(b) *Changes in eligible programs.* The Administrator may, in guidance or regulation, describe subsequent additions, deletions, or changes to the list of environmental programs eligible for inclusion in Performance Partnership Grants.

§ 35.534 Eligible recipients.

(a) A Tribe or Intertribal Consortium is eligible for a Performance Partnership Grant if the Tribe or each member of the Intertribal Consortium is eligible for, and the Tribe or Intertribal Consortium receives funding from, more than one of the environmental program grants listed in § 35.501(a) in accordance with the requirements for those environmental programs.

(b) For grants to Tribes, a Tribal agency must be designated by a Tribal government or other authorized Tribal process to receive grants under each of the environmental programs to be combined in the Performance Partnership Grant.

§ 35.535 Activities eligible for funding.

(a) *Delegated or authorized activities.* A Tribe or Intertribal Consortium may use Performance Partnership Grant funds to carry out EPA-delegated or EPA-authorized activities, such as permitting and primary enforcement responsibility only if the Tribe or each member of the Intertribal Consortium receives from the Regional Administrator the delegations or authorizations to conduct such activities.

(b) *Other program activities.* Except for the limitation in paragraph (a) of this section, a Tribe or Intertribal Consortium may use Performance Partnership Grant funds for any activity that is eligible under the environmental programs listed in § 35.501(a) of this subpart, as determined by the Regional Administrator. If an applicant proposes a Performance Partnership Grant work plan that differs significantly from any of the proposed work plans approved for funding that the applicant now proposes to move into a Performance Partnership Grant, the Regional Administrator must consult with the appropriate National Program Managers before agreeing to the Performance Partnership Grant work plan. National Program Managers may expressly waive or modify this requirement for consultation in national program guidance. National Program Managers may also define in national program guidance "significant" deviations from a work plan submitted with a Tribe's or a Consortium's application for funds.

§ 35.536 Cost share requirements.

(a) The Performance Partnership Grant cost share shall be the sum of the amounts required for each environmental program grant included in the Performance Partnership Grant, as determined in accordance with paragraphs (b) and (c) of this section, unless waived under paragraph (d) of this section.

(b) For each environmental program grant included in the Performance Partnership Grant that has a cost share of five percent or less under the provisions of §§ 35.540 through 35.718, the required cost share shall be that identified in §§ 35.540 through 35.718 of this subpart.

(c) For each environmental program grant included in the Performance Partnership Grant that has a cost share of greater than five percent under the provisions of §§ 35.540 through 35.718 of this subpart, the required cost share shall be five percent of the allowable cost of the work plan budget for that program. However, after the first two years in which a Tribe or Intertribal Consortium receives a Performance Partnership Grant, the Regional Administrator must determine through objective assessment whether the Tribe or the members of an Intertribal Consortium meet socio-economic indicators that demonstrate the ability of the Tribe or the Intertribal Consortium to provide a cost share greater than five percent. If the regional Administrator determines that the Tribe or the members of Intertribal Consortium meets such indicators, then

he or she shall increase the required cost share up to a maximum of 10 percent of the allowable cost of the work plan budget.

(d) The Regional Administrator may waive the cost share required under this section upon request of the Tribe or Intertribal Consortium, if he or she determines, based on an objective assessment of socio-economic indicators, that meeting the cost share would impose undue hardship.

§ 35.537 Application requirements.

An application for a Performance Partnership Grant must contain:

(a) A list of the environmental programs and the amount of funds from each program to be combined in the Performance Partnership Grant;

(b) A consolidated budget;

(c) A consolidated work plan that addresses each program being combined in the grant and which meets the requirements of § 35.507.

§ 35.538 Project period.

If the projected completion date for a work plan commitment funded under an environmental program grant that is added to a Performance Partnership Grant extends beyond the end of the project period for the Performance Partnership Grant, the Regional Administrator and the recipient will agree in writing as to how and when the work plan commitment will be completed.

Indian Environmental General Assistance Program (GAP)

§ 35.540 Purpose.

(a) *Purpose of section.* Sections 35.540 through 35.547 govern grants to Tribes and Intertribal Consortia under the Indian Environmental General Assistance Program Act of 1992 (42 U.S.C. 4368b.)

(b) *Purpose of program.* Indian Environmental General Assistance Program grants are awarded to build capacity to administer environmental programs on Indian lands by providing general assistance to plan, develop, and establish the capability to implement environmental protection programs in Indian country.

§ 35.542 Definitions.

Tribe. Any Indian Tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C.A. 1601, *et seq.*)), which is recognized as eligible for the special services provided by the United States

to Indians because of their status as Indians.

§ 35.543 Eligible recipients.

The following entities are eligible to receive grants under this program:

(a) Tribes and

(b) Intertribal Consortia as provided in § 35.504.

§ 35.545 Eligible activities.

Tribes and Intertribal Consortia may use General Assistance Program funds for planning, developing, and establishing capability to implement environmental protection programs and to develop and implement solid and hazardous waste programs on Indian lands.

§ 35.548 Award limitations.

(a) Each grant awarded under the General Assistance Program shall be not less than \$75,000. This limitation does not apply to additional funds that may become available for award to the same Tribe or Intertribal Consortium.

(b) The Regional Administrator shall not award a grant to a single Tribe or Intertribal Consortium of more than 10 percent of the total annual funds appropriated under the Act.

(c) The project period of a General Assistance Program award may not exceed four years.

(d) No award under this program shall result in reduction of total EPA grants for environmental programs to the recipient.

Air Pollution Control (Section 105)

§ 35.570 Purpose.

(a) *Purpose of section.* Sections 35.570 through 35.577 govern air pollution control grants to Tribes (as defined in section 302(r) of the Clean Air Act (CAA)) authorized under sections 105 and 301(d) of the Act and Intertribal Consortia.

(b) *Purpose of program.* Air pollution control grants are awarded to develop and administer programs that prevent and control air pollution or implement national air quality standards in Indian country.

(c) *Associated program regulations.* Refer to 40 CFR parts 49, 50, 51, 52, 58, 60, 61, 62, and 81 for associated program regulations.

§ 35.572 Definitions.

In addition to the definitions in § 35.502, the following definitions apply to the Clean Air Act's section 105 grant program:

Nonrecurrent expenditures are those expenditures which are shown by the recipient to be of a nonrepetitive, unusual, or singular nature such as

would not reasonably be expected to recur in the foreseeable future. Costs categorized as nonrecurrent must be approved in the grant agreement or an amendment thereto.

Recurrent expenditures are those expenses associated with the activities of a continuing environmental program. All expenditures are considered recurrent unless justified by the applicant as nonrecurrent and approved as such in the grant award or an amendment thereto.

§ 35.573 Eligible tribe.

(a) A Tribe is eligible to receive financial assistance if it has demonstrated eligibility to be treated as a State under 40 CFR 49.6. An Intertribal Consortium consisting of Tribes that have demonstrated eligibility to be treated as States under 40 CFR 49.6 is eligible for financial assistance under this paragraph.

(b) A Tribe that has not made a demonstration under 40 CFR 49.6 is eligible for financial assistance under sections 105 and 302(b)(5) of the Clean Air Act. An Intertribal Consortium consisting of Tribes that have not demonstrated eligibility to be treated as States under 40 CFR 49.6 is eligible for financial assistance under this paragraph.

§ 35.575 Maximum Federal share.

(a) For Tribes and Intertribal Consortia eligible under § 35.573(a), the Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 95 percent of the approved costs of maintaining that program. After two years from the date of each Tribe's or Intertribal Consortium's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent if the Regional Administrator determines that the Tribe or each member of the Intertribal Consortium meets certain economic indicators that would provide an objective assessment of the Tribe's or each of the Intertribal Consortia's member's ability to increase its share. For a Tribe or Intertribal Consortium eligible under § 35.573(a), 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 the member Tribes of the Intertribal Consortium are constrained to such an extent that fulfilling the

match requirement would impose undue hardship.

(b) For Tribes and Intertribal Consortia eligible under § 573(b), the Regional Administrator may provide financial assistance in an amount up to 60 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 60 percent of the approved costs of maintaining that program.

§ 35.576 Maintenance of effort.

(a) For Tribes and Intertribal Consortia that are eligible for financial assistance under § 35.573(b) of this subpart, the Tribe or each of the Intertribal Consortium's members must expend annually, for recurrent section 105 program expenditures, an amount of non-federal funds at least equal to such expenditures during the preceding fiscal year.

(b) In order to award grants in a timely manner each fiscal year, the Regional Administrator shall compare a Tribe's or each of the Intertribal Consortia's member's proposed expenditure level, as detailed in the grant application, to its expenditure level in the second preceding fiscal year.

(c) The Regional Administrator may grant an exception to § 35.576(a) if, after notice and opportunity for a public hearing, the Regional Administrator determines that the reduction is attributable to a non-selective reduction of all the Tribe's or each of the Intertribal Consortia's member's programs.

(d) The Regional Administrator will not award section 105 funds unless the applicant provides assurance that the grant will not supplant non-federal funds that would otherwise be available for maintaining the section 105 program.

§ 35.578 Award limitation.

The Regional Administrator will not disapprove an application for, or terminate or annul an award of, financial assistance under § 35.573 without prior notice and opportunity for a public hearing within the appropriate jurisdiction or, where more than one area is affected, within one of the affected areas within the jurisdiction

Water Pollution Control (Sections 106 and 518)

§ 35.580 Purpose.

(a) *Purpose of section.* Sections 35.580 through 35.588 govern water pollution control grants to eligible Tribes and Intertribal Consortia (as defined in

§ 35.502) authorized under sections 106 and 518 of the Clean Water Act.

(b) *Purpose of program.* Water pollution control grants are awarded 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.

(c) *Associated program requirements.* Program requirements for water quality planning and management activities are provided in 40 CFR part 130.

§ 35.582 Definitions.

Federal Indian reservation. All lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior, exercising governmental authority over a federal Indian reservation.

§ 35.583 Eligible recipients.

A Tribe, including an Intertribal Consortium, is eligible to receive a section 106 grant if EPA has determined that the Indian Tribe or each member of the Intertribal Consortium meets the requirements for treatment in a manner similar to a State under section 518(e) of the Clean Water Act. (See 40 CFR 130.6(d))

§ 35.585 Maximum Federal share.

(a) The Regional Administrator may provide up to 95 percent of the approved work plan costs for Tribes or Intertribal Consortia establishing a section 106 program. Work plan costs include costs of planning, developing, establishing, improving or maintaining a water pollution control program.

(b) 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.

§ 35.588 Award limitations.

(a) The Regional Administrator will only award section 106 funds or reprogram section 106 funds to a Tribe or Intertribal Consortium if:

(1) All monitoring and analysis activities performed by the Tribe or

Intertribal Consortium meets the applicable quality assurance and quality control requirements in 40 CFR 31.45.

(2) The Tribe or each member of the Intertribal Consortium has emergency power authority comparable to that in section 504 of the Clean Water Act and adequate contingency plans to implement such authority.

(3) EPA has not assumed enforcement as defined in section 309(a)(2) of the Clean Water Act in the Tribe's or any Intertribal Consortium member's jurisdiction.

(4) The Tribe or Intertribal Consortium agrees to include a discussion of how the work performed under section 106 addressed water quality problems on Tribal lands in the annual report required under § 35.515(d).

(5) After an initial award of section 106 funds, the Tribe or Intertribal Consortium shows satisfactory progress in meeting its negotiated work plan commitments.

(b) A Tribe or Intertribal Consortium is eligible to receive a section 106 grant or section 106 grant funds even if the Tribe or each of the members of an Intertribal Consortium does not meet the requirements of section 106(e)(1) and 106(f)(1) of the Clean Water Act.

Water Quality Cooperative Agreements (Section 104(b)(3))

§ 35.600 Purpose.

(a) *Purpose of section.* Sections 35.600 through 35.604 govern Water Quality Cooperative Agreements to Tribes and Intertribal Consortia authorized under section 104(b)(3) of the Clean Water Act. These sections do not govern Water Quality Cooperative Agreements under section 104(b)(3) to organizations that do not meet the definitions of Tribe or Intertribal Consortium in § 35.502; such cooperative agreements generally are subject to the uniform administrative requirements for grants at 40 CFR part 30.

(b) *Purpose of program.* EPA awards Water Quality Cooperative Agreements for investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution. EPA issues guidance each year advising EPA regions and headquarters regarding appropriate priorities for funding for this program. This guidance may include such focus areas as National Pollutant Discharge Elimination System watershed permitting, urban wet weather programs, or innovative pretreatment programs and biosolids projects.

§ 35.603 Competitive process.

EPA will award water quality cooperative agreement funds through a competitive process in accordance with national program guidance. After the competitive process is complete, the recipient can, at its discretion, accept the award as a separate cooperative agreement or add the funds to a Performance Partnership Grant. If the recipient chooses to add the funds to a Performance Partnership Grant, the water quality work plan commitments must be included in the Performance Partnership Grant work plan.

§ 35.604 Maximum Federal share.

The Regional Administrator may provide up to 100 percent of approved work plan costs.

Wetlands Development Grant Program (Section 104(b)(3))**§ 35.610 Purpose.**

(a) *Purpose of section.* Sections 35.610 through 35.615 govern wetlands development grants to Tribes and Intertribal Consortia under section 104(b)(3) of the Clean Water Act. These sections do not govern wetlands development grants under section 104(b)(3) to organizations that do not meet the definitions of Tribe or Intertribal Consortium in § 35.502; such grants generally are subject to the uniform administrative requirements for grants at 40 CFR part 30.

(b) *Purpose of program.* EPA awards wetlands development grants to assist in the development of new, or the refinement of existing, wetlands protection and management programs.

§ 35.613 Competitive process.

Wetlands development grants are awarded on a competitive basis. EPA annually establishes a deadline for receipt of grant applications. EPA reviews applications and decides which grant projects to fund based on criteria established by EPA. After the competitive process is complete, the recipient can, at its discretion, accept the award as a wetlands development program grant or add the funds to a Performance Partnership Grant. If the recipient chooses to add the funds to a Performance Partnership Grant, the wetlands development program work plan commitments must be included in the Performance Partnership Grant work plan.

§ 35.615 Maximum Federal share.

EPA may provide up to 75 percent of the approved work plan costs for the development or refinement of a wetlands protection and management program.

Nonpoint Source Management Grants (Sections 319(h) and 518(f))**§ 35.630 Purpose.**

(a) *Purpose of section.* Sections 35.630 through 35.638 govern nonpoint source management grants to eligible Tribes and Intertribal Consortia under sections 319(h) and 518(f) of the Clean Water Act.

(b) *Purpose of program.* Nonpoint source management grants may be awarded for the implementation of EPA-approved nonpoint source management programs, including ground-water quality protection activities that will advance the implementation of a comprehensive approved nonpoint source management program.

§ 35.632 Definition.

Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

§ 35.633 Eligibility requirements.

A Tribe or Intertribal Consortium is eligible to receive a Nonpoint Source Management grant if EPA has determined that the Tribe or each member of the Intertribal Consortium meets the requirements for treatment in a manner similar to a State under section 518(e) of the Clean Water Act. (See 40 CFR 130.6(d).)

§ 35.635 Maximum Federal share.

(a) The Regional Administrator may provide up to 60 percent of the approved work plan costs in any fiscal year. The non-Federal share of costs must be provided from non-Federal sources.

(b) 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 the Intertribal Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship. In no case shall the Federal share be greater than 90 percent.

§ 35.636 Maintenance of effort.

To receive funds under section 319 in any fiscal year, a Tribe or each member of an Intertribal Consortium must agree that the Tribe or each member of the Intertribal Consortium will maintain its aggregate expenditures from all other sources for programs for controlling nonpoint source pollution and improving the quality of the Tribe's or the Intertribal Consortiums members'

waters at or above the average level of such expenditures in Fiscal Years 1985 and 1986.

§ 35.638 Award limitations.

(a) *Available funds.* EPA may use no more than the amount authorized under the Clean Water Act section 319 and 518(f) for making grants to Tribes or Intertribal Consortia.

(b) *Financial assistance to persons.* Tribes or Intertribal Consortia may use funds for financial assistance to persons only to the extent that such assistance is related to the cost of demonstration projects.

(c) *Administrative costs.*

Administrative costs in the form of salaries, overhead, or indirect costs for services provided and charged against activities and programs carried out with these funds shall not exceed 10 percent of the funds the Tribe or Intertribal Consortium receives in any fiscal year. The cost of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs are not subject to this limitation.

(d) The Regional Administrator will not award section 319(h) funds to any Tribe or Intertribal Consortium unless:

(1) *Approved assessment report.* EPA has approved the Tribes' or each member of the Intertribal Consortium's Assessment Report on nonpoint sources, prepared in accordance with section 319(a) of the Act;

(2) *Approved Tribe or Intertribal Consortium management program.* EPA has approved the Tribes' or each member of the Intertribal Consortium's management program for nonpoint sources, prepared in accordance with section 319(b) of the Act;

(3) *Progress on reducing pollutant loadings.* The Regional Administrator determines, for a Tribe or Intertribal Consortium that received section 319 funds in the preceding fiscal year, that the Tribe or each member of the Intertribal Consortium made satisfactory progress in meeting its schedule for achieving implementation of best management practices to reduce pollutant loadings from categories of nonpoint sources, or particular nonpoint sources, designated in the Tribe's or each member of the Intertribal Consortium's management program. The Tribe or each member of the Intertribal Consortium must develop this schedule in accordance with section 319(b)(2) of the Act;

(4) *Activity and output descriptions.* The work plan briefly describes each significant category of nonpoint source

activity and the work plan commitments to be produced for each category; and

(5) *Significant watershed projects.* For watershed projects whose costs exceed \$50,000, the work plan contains:

- (i) A brief synopsis of the watershed implementation plan outlining the problems to be addressed;
- (ii) The project's goals and objectives; and
- (iii) The performance measures and environmental indicators that will be used to evaluate the results of the project.

Pesticide Cooperative Enforcement (Section 23(a)(1))

§ 35.640 Purpose.

(a) *Purpose of section.* Sections 35.640 through 35.645 govern cooperative agreements to Tribes and Intertribal Consortia authorized under section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act for pesticide enforcement.

(b) *Purpose of program.* Cooperative agreements are awarded to assist Tribes and Intertribal Consortia in implementing pesticide enforcement programs.

(c) *Associated program regulations.* Refer to 19 CFR part 12 and 40 CFR parts 150 through 189 for associated regulations.

§ 35.641 Eligible recipients.

Eligible recipients of pesticide enforcement cooperative agreements are Tribes and Intertribal Consortia.

§ 35.642 Maximum Federal share.

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

§ 35.645 Basis for allotment.

The Administrator allots pesticide enforcement cooperative agreement funds to each regional office. Regional offices award funds to Tribes and Intertribal Consortia based on their programmatic needs and applicable EPA guidance.

Pesticide Applicator Certification and Training (Section 23(a)(2))

§ 35.646 Purpose.

(a) *Purpose of section.* Sections 35.646 through 35.649 govern pesticide applicator certification and training grants to Tribes and Intertribal Consortia under section 23(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act.

(b) *Purpose of program.* Pesticide applicator certification and training grants are awarded to train and certify restricted use pesticide applicators.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 162, 170, and 171.

§ 35.649 Maximum Federal share.

The Regional Administrator may provide up to 50 percent of the approved work plan costs.

Pesticide Program Implementation (Section 23(a)(1))

§ 35.650 Purpose.

(a) *Purpose of section.* Sections 35.650 through 35.659 govern cooperative agreements to Tribes and Intertribal Consortia for pesticide enforcement and compliance programs under section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act.

(b) *Purpose of program.* Cooperative agreements are awarded to assist Tribes and Intertribal Consortia to develop and implement pesticide programs, including programs that protect farm workers, ground water, and endangered species from pesticide risks and other pesticide management programs designated by the Administrator.

(c) *Program regulations.* Refer to 40 CFR parts 150 through 189 and 19 CFR part 12 for associated regulations.

§ 35.653 Eligible recipients.

Eligible recipients of pesticide program implementation cooperative agreements are Tribes and Intertribal Consortia.

§ 35.655 Basis for allotment.

The Administrator allots pesticide program implementation cooperative agreement funds to each regional office. Regional offices award funds to Tribes and Intertribal Consortia based on their programmatic needs and applicable EPA guidance.

§ 35.659 Maximum Federal share.

The Regional Administrator may provide up to 100 percent of the approved work plan costs.

Pollution Prevention Incentive Grants (Section 6605)

§ 35.660 Purpose.

(a) *Purpose of section.* Sections 35.660 through 35.669 govern grants to Tribes and Intertribal Consortia under section 6605 of the Pollution Prevention Act.

(b) *Purpose of program.* Pollution Prevention Incentive Grants are awarded to promote the use of source reduction techniques by businesses.

§ 35.661 Competitive process.

EPA regions award pollution prevention grant funds to Tribes and Intertribal Consortia through a

competitive process in accordance with EPA guidance. When evaluating a Tribe's or Intertribal Consortium's application, EPA must consider, among other criteria, whether the proposed program would:

(a) Make specific technical assistance available to businesses seeking information about source reduction opportunities, including funding for experts to provide onsite technical advice to businesses seeking assistance in the development of source reduction plans;

(b) Target assistance to businesses for whom lack of information is an impediment to source reduction; and

(c) Provide training in source reduction techniques. Such training may be provided through local engineering schools or other appropriate means.

§ 35.662 Definitions.

The following definition applies to the Pollution Prevention Incentive grant program and to §§ 35.660 through 35.669:

(a) Pollution prevention/source reduction is any practice that:

(1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal;

(2) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants; and

(3) Reduces or eliminates the creation of pollutants through:

(i) Increased efficiency in the use of raw materials, energy, water, or other resources; or

(ii) Protection of national resources by conservation.

(b) Pollution prevention/source reduction does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service.

§ 35.663 Eligible recipients.

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for a pollution prevention incentive grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraph (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the pollution prevention incentive grants program required by paragraph (b)(3) and (4) of this section.

§ 35.668 Award limitations.

If the Pollution Prevention Incentive grant funds are included in a Performance Partnership Grant the Pollution Prevention Incentive work plan commitments must be included in the Performance Partnership Grant work plan.

§ 35.669 Maximum Federal share.

The Federal share for Pollution Prevention Incentive Grants will not exceed 50 percent of the allowable Tribe and Intertribal Consortium Pollution Prevention Incentives project cost.

Public Water System Supervision (Section 1443(a) and Section 1451)

§ 35.670 Purpose.

(a) *Purpose of section.* Sections 35.670 through 35.678 govern public water system supervision grants to Tribes and Intertribal Consortia authorized under sections 1443(a) and 1451 of the Safe Drinking Water Act.

(b) *Purpose of program.* Public water system supervision grants are awarded to carry out public water system supervision programs including implementation and enforcement of the requirements of the Act that apply to public water systems.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 141, 142, and 143.

§ 35.672 Definition.

Tribe. Any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area.

§ 35.673 Annual amount reserved by EPA.

Each year, EPA shall reserve up to seven percent of the public water system supervision funds for grants to Tribes and Intertribal Consortia under section 1443(a).

§ 35.675 Maximum Federal share.

(a) The Regional Administrator may provide up to 75 percent of the approved work plan costs.

(b) 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 Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship, except that the federal share shall not be greater than 90 percent.

§ 35.676 Eligible recipients.

A Tribe or Intertribal Consortium is eligible to apply for a public water system supervision grant if the Tribe or each member of the Intertribal Consortium meets the following criteria:

(a) The Tribe or each member of the Intertribal Consortium is recognized by the Secretary of the Interior;

(b) The Tribe or each member of the Intertribal Consortium has a governing body carrying out substantial governmental duties and powers over any area;

(c) The functions to be exercised under the grant are within the area of the Tribal government's jurisdiction; and

(d) The Tribe or each member of the Intertribal Consortium is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised under the grant.

§ 35.678 Award limitations.

(a) *Initial grant.* The Regional Administrator will not make an initial award unless the Tribe or each member of the Intertribal Consortium has:

(1) Met the requirements of 40 CFR part 142, subpart H (treatment in a manner similar to a State);

(2) Established an approved public water system supervision program or agrees to establish an approvable program within three years of the initial award and assumed primary enforcement responsibility within this period; and

(3) Agreed to use at least one year of the grant funding to demonstrate program capability to implement the requirements found in 40 CFR 142.10.

(b) *Subsequent grants.* The Regional Administrator will not make a subsequent grant, after the initial award, unless the Tribe or each member of the Intertribal Consortia can demonstrate reasonable progress towards assuming primary enforcement responsibility within the three-year period after initial award. After the three-year period expires, the Regional Administrator will not award section 1443(a) funds to an Indian Tribe or Intertribal Consortium

unless the Tribe or each member of the Intertribal Consortia has assumed primary enforcement responsibility for the public water system supervision program.

Underground Water Source Protection (Section 1443(b))

§ 35.680 Purpose.

(a) *Purpose of section.* Sections 35.680 through 35.688 govern underground water source protection grants to Tribes and Intertribal Consortia under section 1443(b) of the Safe Drinking Water Act.

(b) *Purpose of program.* The Underground Water Source Protection grants are awarded to carry out underground water source protection programs.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR parts 124, 144, 145, 146, and 147.

§ 35.682 Definition.

Tribe. Any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over any area.

§ 35.683 Annual amount reserved by EPA.

EPA shall reserve up to five percent of the underground water source protection funds each year for underground water source protection grants to Tribes under section 1443(b) of the Safe Drinking Water Act.

§ 35.685 Maximum Federal share.

(a) The Regional Administrator may provide up to 75 percent of the approved work plan costs.

(b) 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 Consortium are constrained to such an extent that fulfilling the match requirement would impose undue hardship, except that the Federal share shall not be greater than 90 percent.

§ 35.686 Eligible recipients.

A Tribe or Intertribal Consortium is eligible to apply for an underground water source protection grant if the Tribe or each member of the Intertribal Consortium meets the following criteria:

(a) The Tribe or each member of the Intertribal Consortium is recognized by the Secretary of the Interior;

(b) The Tribe or each member of the Intertribal Consortium has a governing body carrying out substantial governmental duties and powers over any area;

(c) The functions to be exercised under the grant are within the area of the Tribal government's jurisdiction; and

(d) The Tribe or each member of the Intertribal Consortium is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised under the grant.

§ 35.688 Award limitations.

(a) *Initial grants.* The Regional Administrator will not make an initial award unless the Tribe or each member of the Intertribal Consortium has:

(1) Met the requirements of 40 CFR part 145, subpart E (treatment in a manner similar to a State); and

(2) Established an approved underground water source protection program or agrees to establish an approvable program within four years of the initial award.

(b) *Subsequent grants.* The Regional Administrator will not make a subsequent grant, after the initial award, unless the Tribe can demonstrate reasonable progress towards assuming primary enforcement responsibility within the four-year period after initial award. After the four-year period expires, the Regional Administrator shall not award section 1443(b) funds to an Indian Tribe unless the Tribe has assumed primary enforcement responsibility for the underground water source protection program.

Lead-Based Paint Program (Section 404(g))

§ 35.690 Purpose.

(a) *Purpose of section.* Sections 35.690 through 35.693 govern grants to Tribes and Intertribal Consortia under section 404(g) for the Toxic Substances Control Act.

(b) *Purpose of program.* Lead-Based Paint Program grants are awarded to develop and, if the recipient is authorized, to carry out lead-based paint activities programs to ensure that individuals employed in lead-based paint activities are properly trained; that training programs are accredited; and that contractors employed in such activities are certified.

(c) *Associated program regulations.* Associated program regulations are found in 40 CFR part 745.

§ 35.691 Funding coordination.

Recipients must use the Lead-Based Paint program funding in a way that complements any related assistance they receive from other federal sources for lead-based paint activities.

§ 35.693 Eligible recipients.

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for a lead-based paint program grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraph (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the lead-based paint program required by paragraph (b)(3) and (4) of this section.

Indoor Radon Grants (Section 306)

§ 35.700 Purpose.

(a) *Purpose of section.* Sections 35.700 through 35.708 govern Indoor Radon Grants to Tribes and Intertribal Consortia under section 306 of the Toxic Substances Control Act.

(b) *Purpose of program.* (1) Indoor radon grants are awarded to assist Tribes and Intertribal Consortia with the development and implementation of programs that assess and mitigate radon and that aim at reducing radon health risks. Indoor radon grant funds may be used for the following eligible activities.

(i) Survey of radon levels, including special surveys of geographic areas or classes of buildings (such as public buildings, school buildings, high-risk residential construction types);

(ii) Development of public information and education materials concerning radon assessment, mitigation, and control programs;

(iii) Implementation of programs to control radon on existing and new structures;

(iv) Purchase, by the Tribe or Intertribal Consortium of radon measurement equipment and devices;

(v) Purchase and maintenance of analytical equipment connected to radon measurement and analysis, including costs of calibration of such equipment;

(vi) Payment of costs of Environmental Protection Agency-approved training programs related to radon for permanent Tribal employees;

(vii) Payment of general overhead and program administration costs;

(viii) Development of a data storage and management system for information

concerning radon occurrence, levels, and programs;

(ix) Payment of costs of demonstration of radon mitigation methods and technologies as approved by EPA, including Tribal and Intertribal Consortia participation in the Environmental Protection Agency Home Evaluation Program; and

(x) A toll-free radon hotline to provide information and technical assistance.

(2) In implementing paragraphs (b)(1)(iv) and (ix) of this section, a Tribe or Intertribal Consortia should make every effort, consistent with the goals and successful operation of the Tribal radon program, to give preference to low-income persons.

§ 35.702 Basis for allotment.

(a) The Regional Administrator will allot indoor radon grant funds based on the criteria in EPA Guidance in accordance with section 306(d) and (e) of the Toxic Substances Control Act.

(b) No Tribe or Intertribal Consortium may receive an indoor radon grant in excess of 10 percent of the total appropriated amount made available each fiscal year.

§ 35.703 Eligible recipients.

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for an indoor radon grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that a Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the radon grant program required by paragraphs (a)(3) and (4) of this section.

§ 35.705 Maximum Federal share.

The Regional Administrator may provide Tribes and Intertribal Consortia up to 75 percent of the approved costs for the development and implementation of radon program activities incurred by the Tribe in the first year of a grant to the Tribe or Consortium; 60 percent in the second year; and 50 percent in the third and each year thereafter.

§ 35.708 Award limitations.

(a) The Regional Administrator shall consult with the Tribal agency which has the primary responsibility for radon programs as designated by the affected Tribe before including indoor funds in a Performance Partnership Grant with another Tribal agency.

(b) No grant may be made in any fiscal year to a Tribe or Intertribal Consortium which did not satisfactorily implement the activities funded by the most recent grant awarded to the Tribe or Intertribal Consortium for an indoor radon program.

(c) The costs of radon measurement equipment or devices (see § 35.820(b)(1)(iv)) and demonstration of radon mitigation, methods, and technologies (see § 35.820(b)(1)(ix)) shall not, in aggregate, exceed 50 percent of a Tribe's or Intertribal Consortium's radon grant award in a fiscal year.

(d) The costs of general overhead and program administration (see § 35.820(b)(1)(vii)) of an indoor radon grant shall not exceed 25 percent of the amount of a Tribe's or Intertribal Consortium's radon grant in a fiscal year.

(e) A Tribe or Intertribal Consortium may use funds for financial assistance to persons only to the extent such assistance is related to demonstration projects or the purchase and analysis of radon measurement devices.

(f) Recipients must provide the Regional Administrator all radon-related information generated in its grant supported activities, including the results of radon surveys, mitigation demonstration projects, and risk communication studies.

(g) Recipients must maintain and make available to the public, a list of firms and individuals that have received a passing rating under the EPA proficiency rating program under section 305(a)(2) of the Act.

(h) Recipients may not use radon program grant funds to cover the costs of proficiency rating programs under section 305(a)(2) of the Act.

Toxic Substances Compliance Monitoring (Section 28)**§ 35.710 Purpose.**

(a) *Purpose of section.* Sections 35.710 through 35.715 govern Toxic Substances Compliance Monitoring grants to Tribes and Intertribal Consortia under section 28 of the Toxic Substances Control Act.

(b) *Purpose of program.* Toxic Substances Compliance Monitoring grants are awarded to establish and operate compliance monitoring programs to prevent or eliminate unreasonable risks to health or the environment associated with chemical substances or mixtures on Tribal lands with respect to which the Administrator is unable or not likely to take action for their prevention or elimination.

(c) *Associated program regulations.* Refer to 40 CFR parts 700 through 799 for associated program regulations.

§ 35.712 Competitive process.

EPA will award Toxic Substances Control Act Compliance Monitoring grants to Tribes or Intertribal Consortia through a competitive process in accordance with national program guidance.

§ 35.713 Eligible recipients.

(a) The Regional Administrator will treat a Tribe or Intertribal Consortium as eligible to apply for a Toxic Substances Compliance Monitoring grant if the Tribe or each member of the Intertribal Consortium:

(1) Is recognized by the Secretary of Interior;

(2) Has an existing government exercising substantial governmental duties and powers;

(3) Has adequate authority to carry out the grant activities; and,

(4) Is reasonably expected to be capable, in the Regional Administrator's judgment, of administering the grant program.

(b) If the Administrator has previously determined that an Indian Tribe has met the prerequisites in paragraphs (a)(1) and (2) of this section for another EPA program, the Tribe need provide only that information unique to the Toxic Substances Compliance Monitoring grant program required by paragraphs (a)(3) and (4) of this section.

§ 35.715 Maximum Federal share.

The Regional Administrator may provide up to 75 percent of the approved work plan costs.

§ 35.718 Award limitation.

If the Toxic Substances Compliance Monitoring grant funds are included in a Performance Partnership Grant, the toxic substances compliance monitoring work plan commitments must be included in the Performance Partnership Grant work plan.

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