United States
Environmental Protection
Agency

Office of Water
(WH 557)



EPA

# Transmittal Memorandum 89-1

# Handbook Of Procedures

# Construction Grants Program For Municipal Wastewater Treatment Works

Municipal Construction Division
Office of Municipal Pollution Control
Office of Water

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 23 1989

OFFICE OF
WATER

Transmittal Memorandum
TM 89-1

MEMORANDUM

SUBJECT: Updating of Handbook of Procedures

FROM: James A. Hanlon, Director
Municipal Construction Division (WH-547)

TO: Handbook Users

Attached is a copy of the fourth updating of the Handbook of Procedures, TM 89-1. As is evident, this update is considerably more voluminous than those of the past. However, a large majority of the revisions are citation notations and additions brought about by the promulgation of 40 CFR Part 31 which, for construction grants awarded after September 30, 1988, replaces 40 CFR Parts 30 and 33. A discussion of how these revisions were dealt with in the text of the TM is provided of page 112.

As with previous Transmittal Memoranda, replacement pages are marked "TM 89-1" on the bottom right side to distinguish them from both the originals and those revised in the previous updatings. Revised or added text material has been underlined so that the latest changes are readily recognized. All previous underlinings on the TM 89-1 pages have been removed. The TM noted pages without underlinings contain either shifted material, to accommodate lengthy insertions on adjacent pages, or clarifications which are primarily editorial.

Also attached is a summary chart listing each revised page and the reason for the revision.

For persons interested in maintaining continuous records, it is suggested the this memorandum, the summary chart and the replaced pages be filed at the end of the Handbook behind the flow chart.

Attachment

# SUMMARY OF HANDBOOK OF PROCEDURES CHANGES IN TM 89-1

| PAGE | Note:Pts. 30/33 Ref | Note:Pts. 30/33 Text | Add Part 31 Ref | Add Part 31 Text | Update Changes Ref | Update Changes Text | Notes on Update Changes |
|---|---|---|---|---|---|---|---|
| 108 | | x | | x | | | |
| 112 | | | | | | x | Discussion of impact of Pt.31 on Handbook. |
| 113 | | | | | | | Spacing page (SP) |
| 114 | | | | | | x | Brief discussion on SRFs. |
| 115 | | | | | | x | " " " " |
| 116 | | | | | | | SP |
| 117 | | | | | | | SP |
| 118 | | | | | | | SP |
| 119 | | | | | | | SP |
| 120 | | | | | | | SP |
| 121 | | | | | | | SP |
| 122 | | | | | | | SP |
| 123 | | | | | | | SP |
| 204 | x | | x | | | | |
| 309 | x | | x | | | | |
| 310 | x | | x | | x | x | Update reference to debarment/suspension list. |
| 70 | x | | x | | | | |
| 38 | x | | | | | | |
| 493 | x | | x | | | | |
| 504 | | x | | x | | x | Comment on Pt.31; Add drug free work-place & debarment/suspension. |
| 505 | | | | | | | SP |
| 506 | | | | | | | SP |
| 507 | x | x | x | x | | x | Written agreement on eligible cost between EPA and applicant. |
| 508 | x | x | x | | | | |
| 509 | x | | x | | | | |
| 510 | x | x | x | x | | x | Add drug free workplace. |
| 511 | x | | x | | | | |
| 512 | x | | x | | | | |
| 513 | x | x | x | x | x | x | Add debarment/suspension certification. |
| 514 | x | | x | | | | |
| 515 | x | x | x | x | | x | Expand guidance on liquidated damages. |
| 516 | x | | x | | | | |
| 519 | x | x | x | x | | | |
| 540 | x | | x | | | | |
| 541 | x | | x | | | | |
| 546 | | | | | | | SP |
| 547 | | | | | | x | User charge systems & low income residential users. |

| PAGE | Note:Pts. 30/33 Ref | Note:Pts. 30/33 Text | Add Part 31 Ref | Add Part 31 Text | Update Changes Ref | Update Changes Text | Notes on Update Changes |
|---|---|---|---|---|---|---|---|
| 548 | | | | | | x | User charge systems & low income residentia users. |
| 549 | | | | | x | | |
| 604 | | | | | | x | Remove requirement for document; now included as certification on applic. form. |
| 605 | | | | | | x | Debarment/suspension guidance revised to reflect current regs. |
| 606 | x | | x | | | x | Drug free workplace and Brooks-Murkowski amendment added to review procedures. |
| 608 | x | | | | | x | Remove requirement for document; now included as certification on applic. form. |
| 609 | x | | x | x | | | |
| 611 | x | | x | | | | |
| 616 | x | | x | | x | | |
| 617 | | | | | | x | Update debarment/suspension guidance. |
| 618 | x | | x | | x | | |
| 628 | | x | | x | | | |
| 634B | | | | | | x | Add Guidance to project reviewer on Drug Free Workplace. |
| 634C | | | | | | x | " " " " " " |
| 634D | | | | | | x | Add Guidance to project reviewer on Brooks Murkowski Amendment. |
| 634E | | | | | | | " " " " " " |
| 634F | | | | | | x | SP |
| 639 | x | | | | | | |
| 640 | x | | x | | | | |
| 641 | x | x | x | x | x | | |
| 642 | x | | x | | x | | Add 49CFR Part 24. |
| 643 | | | | | | x | Change outline designation; correct form n |
| 644 | | | | | | x | " " " " |
| 644A | | | | | | x | Design-build grants. |
| 644B | | | | | | x | " |
| 644C | | | | | | x | " |
| 644D | | | | | | x | " |
| 645 | | | | | | x | " |
| 649 | | | | | | | SP |
| 650 | | | | | | | SP |
| 651 | | | | | | x | Add guidance to reflect changes to the Uniform Act Amendments of 1987. |
| 652 | | | | | | x | " " " " " " " |
| 654 | x | | x | | x | x | Add 49 CFR Part 24 references. |
| 654A | x | x | x | x | x | x | " " " " " " |
| 654B | | x | | | x | x | " " " " " " |
| 657 | x | | x | | | | |
| 658 | | | | | | x | 100% M/R grants for RBCs. |
| 659 | | | | | | x | " " " " " |
| 660 | | | | | | x | " " " " "; add Step 7. |
| 661 | | | | | | x | Add Step 7. |
| 662 | | | | | | x | " " " |

| | Note:Pts. 30/33 | | Add Part 31 | | Update Changes | | |
|---|---|---|---|---|---|---|---|
| AGE | Ref | Text | Ref | Text | Ref | Text | Notes on Update Changes |
| 563 | | | | | | | Correct application form number. |
| 567 | | | | | | | SP |
| 568 | | | | | | x | 100% M/R grants for RBCs. |
| 569 | | | | | | | SP |
| 571 | | x | | x | | x | Add 49 CFR Part 24 cite. |
| 572 | x | | x | | | x | " " " " " "; add Step 7. |
| 573 | x | | | x | | x | Written agreement between EPA and grantee on eligible costs. |
| 574 | | | | | x | x | " " " " " " |
| 704 | | x | | x | | | |
| 705 | | x | x | x | | | |
| 706 | x | x | x | x | | x | NOTE: increase in reporting minimum from $10,000 to $25,000 under 40 CFR Pt.31. |
| 707 | x | x | x | x | | | |
| 708 | x | | x | x | | | |
| 709 | | x | | | | | |
| 710 | x | | x | | | | |
| 713 | x | x | x | x | | | |
| 714 | x | | x | | x | | |
| 715 | x | x | | | | | |
| 716 | x | x | x | x | | | |
| 717 | | x | | x | | | |
| 718 | x | x | x | x | | | |
| 719 | x | x | x | x | | | |
| 20 | | x | | | | | |
| 721 | | x | | x | | | |
| 722 | x | | x | | x | | |
| 724 | x | | x | | | | |
| 725 | | x | | x | | | |
| 726 | x | | x | | | | |
| 727 | x | x | x | | | | |
| 737 | | x | | x | | | |
| 740 | x | | x | | | | |
| 744 | x | | x | | | | |
| 745 | x | x | x | x | | | |
| 746 | x | | x | | | | |
| 748 | | x | | x | | | |
| 803 | | | | | | x | Add Step 7 |
| 805 | | | | | | x | " " " |
| 806 | | | | | | x | " " " |
| 813 | x | | x | | | | " " " |
| 814 | | | | | | x | " " " |
| 815 | x | | x | | x | | |
| 816 | | x | | x | | | |
| 818 | | | | | | x | Add Step 7 |
| 821 | | x | | x | | | |

| PAGE | Note: Pts. 30/33 Ref | Note: Pts. 30/33 Text | Add Part 31 Ref | Add Part 31 Text | Update Changes Ref | Update Changes Text | Notes on Update Changes |
|---|---|---|---|---|---|---|---|
| 822 | | | | | | | SP |
| 823 | x | | x | | | | |
| 824 | x | | x | x | | | |
| 825 | x | | x | | | | |
| 828 | x | | x | | | | |
| 829 | | | | | | x | Update of discussion of Regulation & Policy Matrices. |
| 830 | | | | | | x | " " " " " " |
| 834 | x | x | x | x | | | |
| 905 | x | | x | | | | |
| 907 | x | | x | | | x | Add Step 7 |
| 909 | x | | x | | | | |
| 910 | | | | | x | | Add Uniform Act regulations cites. |
| 911 | x | | x | | | | |
| 912 | x | | x | | | x | Credit grantee refunds to allowable cost. |
| 916 | | x | | x | | | |
| 917 | x | | x | | | x | Update of guidance on requesting deviation |
| 918 | | x | | x | | | |
| 921 | x | | x | | x | | |
| 922 | x | | x | | | | |
| 925 | | x | | x | | | |
| 926 | | x | | x | | x | Add reference to A-87. |
| 927 | | x | | x | | x | " " " " |
| 929 | | x | | x | | | |
| 933 | x | x | | | | | |
| 936 | | | | | | x | Failed RBCs. |
| 939 | | | | | | x | Add Step 7. |
| 940 | | x | | x | | | |
| 946 | | | | | | x | "Note":Removed erroneous implication re application of 12/27/77 date to privately owned small onsite systems. |
| 949 | | | | | | x | Add 49 CFR Part 24. |
| 950 | | | | | | x | Guidance on reconnection of service laterals. |
| 951 | | | | | | x | " " " " " " |
| 952 | | | | | | x | " " " " " " |
| 961 | | | | | | x | M/R costs of failed RBCs. |
| 966 | x | | x | | | | |

TABLE OF CONTENTS

Discussion:

The function is placed in program perspective and information is given on such topics as general operating policy, important underlying issues, key considerations in approaching the function under review, and how the function relates to other aspects of the construction grants program.

Procedures:

The procedures for reviewing documents submitted and activities conducted by applicants and grantees are briefly described. Frequently, for presentation purposes, processing procedures for administrative and technical functions are addressed separately. However, whenever possible, the review of both functions should take place simultaneously. Where specific program items are required, they are listed. Other more general review items are also included as a reminder. However, the review procedures listed here are not substitutions for, nor do they supersede, the requirements described in the regulations. Checklists developed by State agencies or EPA Regional Offices and contained in delegation agreements are also to be used in performing the review process.

References:

Appropriate laws, regulations, guidelines, and technical documents are cited. Copies of such reference material can generally be found in EPA Regional or State agency offices.

Some of the review procedures are self-explanatory or do not lend themselves to the above format. In these cases, the requirements or procedures are briefly described.

4. Regulations

This third edition of the Handbook is based on regulations in effect as of October 1, 1984, primarily those contained in Title 40 of the Code of Federal Regulations (CFR). The following regulations are cited at appropriate locations in the Handbook:

a. 40 CFR Parts

4 - Implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

6 - Implementation of Procedures on the National Environmental Policy Act

7 - Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency

15 - Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans

25 - Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act

29 - Intergovernmental Review of the Environmental Protection Agency Programs and Activities

*30 - General Regulation for Assistance Programs

31 - Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

32 - Debarment and Suspension under EPA Assistance Programs

*33 - Procurement Under Assistance Agreements

35 - State and Local Assistance

Subpart A - Financial Assistance for Continuing Environmental Programs

Subpart E - Grants for Construction of Treatment Works - Clean Water Act

Subpart I - Grants for Construction of Treatment Works

Subpart J - Construction Grants Program Delegation to States

52 - Approval and Promulgation of Implementation Plans

60 - Standards of Performance for New Stationary Sources

*Do not apply after September 30, 1988.

- the requirements apply to all public construction projects in the State, regardless of the source of funds (e.g., a requirement that all public projects be advertised as separate contracts for mechanical, plumbing, electrical, and general construction); and

- the requirements do not directly conflict with Federal laws or regulations.

Those States which have supplemental State grant programs may impose additional grantee requirements without regard to the above restrictions, provided that:

- they do not directly conflict with Federal laws and regulations, and

- they do not apply to Federal grantees who do not receive a supplemental State grant.

## 7. Related Materials

The review procedures in this Handbook describe the essential or minimum requirements necessary in processing construction grant applications and related documents. More detailed information may be obtained by reading the reference materials which are identified throughout the text. Generally, references concerning technical matters have been limited to EPA publications.

Although the processing steps set forth in the Handbook are intended to bring about uniformity in the processing of construction grant applications nationwide, differences in the structure of EPA Regional Offices, State agency offices, or delegation agreements may require some adjustment in the manner in which various review procedures are followed.

## 8. Updating

This Handbook reflects requirements contained in the regulations as of October 1, 1984. The Handbook will be updated to reflect changes in laws, regulations, and policies. Responsibility for revising and updating the Handbook resides with the Program Policy Branch, Municipal Construction Division, Office of Water Program Operations, and revisions will be issued from that office.

Handbook revisions will be forwarded by a TM. Each TM will be designated with a sequential number (e.g., TM 85-11), indicating

the fiscal year and number of the issuance, and will provide specific instructions for removal of obsolete and insertion of new pages. In order for changes to be readily identified, text revisions will be printed in italics. Additionally, each revised page will show the number of the TM which transmitted the revision.

9. Impact of Issuance of 40 CFR Part 31

The promulgation of 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments", on March 11, 1988, has brought about a considerable number of Handbook changes. (See TM 89-1.) This is because 40 CFR Part 31, for the purpose of construction grants, supersedes 40 CFR Parts 30 and 33 which markedly impact the administration of the construction grants program. Part 31 applies only to grants and grant increases awarded after September 30, 1988; hence, its provisions have little to do with the large mass of projects which were active as of that date.

Accordingly, the advent of Part 31 has created a dichotomy in the application of the Handbook to construction grant projects. To enable the user to deal with the two conditions, Parts 30 and 33 citations have not been removed. Instead, they are asterixed (*) in reference sections and bracketed ([]) where they appear in the text. Where comparable (often identical) provisions appear in the Part 31 regulations, they have been inserted immediately after the Parts 30 and 33 notations.

Except in a few instances, differences between the provisions of Part 31 and the older Parts 30 and 33 have not been discussed. The reasons are: (1) time and resources did not permit that extensive a rewrite; (2) we did not want to substantially increase the size of the Handbook; (3) the final decision on the contents of Part 31 has not been made. (That is, EPA has been negotiating with OMB to reinsert provisions of Parts 30 and 33 which were eliminated in the March 1988 edition of Part 31); and (4) recognizing that the Handbook is "guidance," even though a number of procedural steps in Parts 30 and 33 were deleted from Part 31, most remain useful suggestions for project managers to follow. Hence, their standing as guidance in the Handbook has not been diminished by their absence in Part 31.

## E. LEGISLATIVE HISTORY

The Federal Water Pollution Control Act of 1956 (PL 84-660) represented the first authorization for Federal grants to assist in the construction of waste treatment works. (A 1948 loan program was authorized, but never funded.) Selection of projects to be funded resided with the States, reflecting the policy of Congress to recognize and preserve the primary responsibility of the States to prevent and control water pollution. The 1956 Act authorized fifty million dollars per year, with grants limited to 30 percent of the eligible project cost, not to exceed $250,000 per project.

Authorizations were increased during the early 1960's, with major amendments occurring in 1965. At that time, authorizations were again increased, the maximum dollar limitation on grants was dropped, the Federal share was increased to a maximum of 55 percent, and provision was made for future reimbursement of State or local funds used in lieu of Federal funds.

Between 1965 and 1972 other initiatives were undertaken, the most important of which were the enactment of the National Environmental Policy Act (NEPA) in 1969 and the creation of EPA in 1970.

Enactment of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500) resulted in extensive changes to the construction grants program. The Federal share was increased to 75 percent and project eligibility was expanded to include sewage collection systems, sewer system rehabilitation, and correction of CSOs. In addition, the 1972 Amendments mandated a strong enforcement program, statewide planning, areawide planning, and the issuance of discharge permits.

The 1972 Amendments also introduced the three-step grant process (e.g., Step 1 - planning, Step 2 - design, and Step 3 - building). Under the Act, grantees were required to provide a minimum of secondary treatment to be eligible for a Federal grant. New concepts were introduced such as facilities planning, infiltration/inflow (I/I) analysis, assessment of environmental impacts, user charge (UC) systems, industrial cost recovery, cost effectiveness, best practical waste treatment technology (BPWTT), etc. The Act also authorized $18 billion over a five year period to support the construction grants program and to provide for a continuity of funding.

The Clean Water Act of 1977 (PL 95-217) contained mid-course corrections to the 1972 legislation and authorized $24.5 billion over a five year period in support of the construction grants program. Several significant changes were introduced into the construction grants program, one of which required grantees to evaluate I/A technologies when planning their projects. The

mandatory I/A evaluations conveyed the desire of Congress to bring about conservation through recycling and more efficient energy use or recovery. For approved I/A projects, the Federal grant share could be increased to 85 percent.

Another significant provision of the 1977 Amendments was the encouragement of, and financial support for, States to administer the construction grants program. Under this provision, the EPA Regional Administrators (RAs) were able to negotiate delegation agreements with the State agencies, detailing the staffing, scheduling, functions, and procedures to be used by the State in program administration.

The Municipal Wastewater Treatment Construction Grant Amendments of 1981 (PL 97-117) eliminated Step 1 and Step 2 grants after December 29, 1981, and replaced them with an allowance to help defray the costs of planning and design. Other provisions reduced the Federal grant share to 55 percent after September 30, 1984; eliminated grants for collection sewer systems, major sewer rehabilitation, and correction of CSOs after September 30, 1984 (except under certain conditions); required States to reevaluate their water quality standards; emphasized low cost alternatives, particularly for small communities; limited the eligibility of reserve capacity; required engineering services to be provided for one year after project completion; and required each grantee to certify, one year after initiation of operation, whether the project is meeting its performance standards.

The Handbook reflects the provisions of the 1981 Amendments and its implementing regulations. Projects receiving grants prior to the 1981 Amendments are subject to the policies and regulations in effect at the time of grant award and, therefore, are not necessarily subject to the review procedures and regulatory requirements contained in this Handbook.

Although the authorizing legislation for the construction grants program is officially entitled the Federal Water Pollution Control Act, Section 518 of the Act provides for the use of the title Clean Water Act (CWA), and this latter title is used throughout the Handbook.

In February 1987, PL 100-4, the Water Quality Act of 1987, which amended the Clean Water Act, was enacted. Significant among the provisions of this legislation was that it provided for the gradual changing of the method of assistance used by the Federal government to encourage municipalities to build needed wastewater treatment projects and, in the process, the State was established as the (eventual) sole manager of the operations of the construction program. Under Title VI of that Act, State allotments of Federally appropriated funds could be used for establishing a Revolving Fund in each State (SRF) which would make loans (also guarantee or insure indebtedness) to municipalities for constructing WWT facilities. Repayments, principal and interest, would return to the SRFs for use in making other loans to meet additional WWT needs ("revolving" concept). The new statute provided for allowing the States to transfer portions of their FY 87 and FY 88 construction grants

allotments to their SRF programs. In FY 89 and 90, half the appropriations were for grants to capitalize State Revolving funds and nearly all of the other half (Title II funds) could be used for Title VI purposes. Beginning October 1, 1990, appropriations are for Title VI activities only.

Details regarding the implementation of SRF programs can be found in "Initial Guidance for State Revolving Funds", January 1988, the State Water Pollution Control Revolving Fund Management Manual, the "Clarifying and Supplementing Requirements in the Initial Guidance for State Revolving Funds" memorandum issued September 30, 1988, and in the interim final regulations expected to be published in September 1989.

As of May 1989, twenty-four States had established revolving loan programs and have been awarded Title VI grants to capitalize their revolving funds. By 1990, nearly all of the States are expected to receive capitalization grants. (It should be noted that, in addition to funding the construction of WWT projects, nonpoint source management programs and estuary conservation and management plans are also eligible for assistance under SRF.)

Although projects assisted under Title VI are not required to meet all of the requirements which Title II (construction grant) projects must meet, basically, the general review and approval process for both types of assistance will tend to be similar. And, since the same staff will be conducting technical reviews of both grant and loan projects, and their ultimate purpose is not effected by method of funding, such reviews will have far more steps in common than they will have differences.

Since the guidance contained in the Handbook represents both an adherance to regulatory requirements as well as a best, experienced judgement in managing a program of constructing WWT projects from conception to completion, its underlying precepts remain a useful standard for reviewers of Title VI as well as Title II projects.

## F. STATE DELEGATION

### 1. General

The 1977 Amendments added Section 205(g) to the CWA, authorizing EPA to use a portion of each State's annual allotment of construction grants funds to award grants to the States to administer the day-to-day operations of the construction grants program. The grants are for 100 percent of the eligible operational costs. Under EPA regulations, the execution of a delegation agreement between an RA and a comparable level State official provides the basis for a construction management assistance (CMA) grant (frequently referred to as a 205(g) grant). The purpose of the agreement is to describe, in specific terms, the relative roles of the State and EPA in the management of the construction grants program in that State.

Delegation agreements were developed and negotiated on a "phase in" basis. That is, once the many specific functions of the program to be delegated were identified, a timetable was established for transferring (i.e., delegating) those functions. Each function was delegated only after the Region determined that the State had trained staff in sufficient numbers to effectively perform that function without direct assistance from the Region.

All agreements describe the procedures to be followed in implementing each function and the forms to be completed by the States as evidence that each function has been fully performed. Periodically, EPA reviews the State's program and representative grant projects, to insure that the delegated functions are being carried out in accordance with the delegation agreement.

Since 1977, all fifty States and the Commonwealth of Puerto Rico have entered into delegation agreements with EPA. During those years, considerable experience has been gained concerning the form of delegation agreements, the respective roles of each agency, and the most practical and efficient management implementation practices. Because of the attention to detail and mutual concern continuously exercised by EPA Headquarters, the Regions, and the States during this period of transition, the goal of achieving full delegation of the construction grants program to the States is close to being realized.

Regulations implementing State delegation are found primarily in three subparts to 40 CFR Part 35:

Subpart A - Financial Assistance for Continuing Environmental Programs. This subpart deals primarily with grants for State water pollution control programs under Section 106 of the CWA, for State management of the construction grants program under Section 205(g) of the CWA, and for water quality management (WQM) planning under Section 205(j) of the CWA.

Subpart I - Grants for Construction of Treatment Works. This subpart deals with grant requirements for building wastewater treatment works.

Subpart J - Construction Grants Program Delegation to States. This subpart addresses the requirements for delegation agreements, oversight, and grants to States to perform delegated functions, in accordance with Section 205(g) of the CWA.

Guidance on the general use of CMA grant funds and, more particularly, on the conditions under which Section 205(g) funds may be used to support the costs of conducting certain water quality management and permitting activities, is presented in the Office of Water issuance of April 17, 1985, titled "Use of 205(g) Funds for Construction Grants Management and Nonconstruction Grants Activities."

In addition, "Construction Grants Delegation and Overview Guidance," dated December 1983, was prepared to integrate in one document the relevant regulatory requirements, policies, and guidance for managing the delegated program. The sections below briefly summarize relevant aspects of this publication. Program managers responsible for delegation should consult the text for specific details.

## 2. Delegation Agreements

Delegation agreements, which vary from Region to Region with regard to specific procedural requirements, generally contain two main parts:

### a. Basic or "Umbrella" Agreement

This part of the delegation agreement sets forth the basic commitments between the State and the EPA Regional Office, and defines the operational framework for accomplishing those commitments. In addition, it covers specific operational items such as scheduling, cost information, hiring and training, accounting methods, and level of effort.

### b. Functional Agreements or Subagreements

Along with the basic agreement are a series of individual agreements describing each function or activity (or group of activities) to be delegated. These agreements contain information which State reviewers are expected to be familiar with and use, including the procedures to be followed in reviewing

project documents and conducting grant activities, the interface with the Regional Office and other Federal and State offices, and the criteria to be used in evaluating the effectiveness of State grant program activities. The format of functional agreements may vary (e.g., checklists and/or evaluation procedures may be separated from review documents, and included separately as a supplement or appendix).

Functional agreements are critical to the operation of the construction grants program and need to be kept current. That is, as improvements in procedures are developed, as regulations are revised, and as guidance documents are changed, modifications to the agreements will be necessary. Such revisions can be formally adopted by approvals at the State and EPA program manager's level (e.g., Division Directors or Branch Chiefs). It should be noted that one of the purposes of this Handbook is to help bring about general agreement on current review procedures so that they can be more uniformly practiced among the States.

Re: 40 CFR 35.3005, 35.3010

3. Delegated Functions

Earlier regulations included a listing of functions which could be delegated to the States and those functions which because of statutory requirements could not be delegated. Current regulations do not contain these specific listings, but rather indicate that all functions may be fully delegated to the States, except those for which EPA must retain responsibility under Federal law. Statutory requirements continue to preclude full delegation of the following functions:

- approval of grant awards, grant amendments, payments, and terminations;
- final determinations under Federal statutes and Executive Orders (e.g., NEPA determinations, and determinations of compliance with Title VI of the Civil Rights Act);
- final resolution of audit exceptions;
- procurement determinations concerning procurement system reviews and protests; and
- projects where an overriding Federal interest requires greater Federal involvement.

However, States are encouraged to undertake all project-level activities, including preliminary determinations for nondelegable requirements. Preliminary determinations by States will usually include the preparation of all documentation in anticipation of EPA's approval and signature. A summary chart containing delegable and shared activities, their legal or administrative citations, and brief comments on State/EPA roles is contained in Appendix A to EPA's publication "Construction Grants Delegation and Overview Guidance," dated December 1983. That same publication, on pages 28 through 31, contains a clarification of the delegability of those activities whose delegability previously had been uncertain.

The EPA guidance also contains a partial listing of project conditions for which there may be an overriding Federal interest, thereby precipitating EPA involvement. The project conditions include:

- projects subject to an Environmental Impact Statement (EIS);
- projects subject to special and/or complex eligibility considerations;
- projects which are the subject of unusually strong Congressional interest;
- projects involved in Federal court cases or subject to other directives (e.g., consent decrees, ocean dumping restrictions, international agreements) that EPA must administer despite delegation;
- projects involved in law enforcement investigations or in allegations of waste, misuse, or mismanagement of Federal funds;
- projects subject to review of advanced treatment with an incremental cost in excess of $3 million;
- projects for which a marine discharge waiver request has been submitted to EPA; and
- projects having interstate or international impacts that go beyond State jurisdiction.

Re: 40 CFR 33.001(g)*, 35.3015(a) and (c), 31.4, 31.36

4. EPA Oversight

EPA maintains overall responsibility for insuring that Federal requirements are adhered to and that progress toward national goals and objectives is maintained. In carrying out this responsibility, EPA conducts an annual evaluation of each delegated State program. The purpose of this evaluation is to insure that both the delegated State and EPA efficiently and effectively execute their respective fiscal and program responsibilities.

The annual evaluation consists of three steps, namely:

a. Developing the Plan for Oversight

Each year EPA and the State establish, in advance, priority objectives, key measures of performance, and monitoring and evaluation activities.

b. Negotiating Annual Outputs

In keeping with the oversight plan, EPA and the State negotiate and agree upon specific outputs which correspond to priority objectives for the year.

c. Monitoring and Evaluating Program Performance

As part of the oversight plan and to confirm annual outputs, EPA monitors and evaluates each State's performance under delegation. An onsite evaluation is conducted annually, and additional monitoring activities, as appropriate for each delegated State, are conducted as needed.

In developing and conducting monitoring programs, extensive use should be made of the data contained in the Grants Information and Control System (GICS) (See Section I.G. below). GICS data allows program managers and analysts to identify critical or emerging problems and to develop timely plans for alleviating them. For example, data on State workload (e.g., number of projects awaiting administrative completion), can be used in developing State commitments (e.g., number of administrative completions to be performed), and in subsequently monitoring the State's progress against these commitments.

Carefully structured and conducted, the annual evaluation should help to solidify the unity of effort between EPA and the delegated States which is critical to the successful implementation of the delegation program.

By memorandum dated May 31, 1985, the Administrator issued a Policy on Performance-Based Assistance to establish "an Agency-wide approach which links EPA's assistance funds for continuing State environmental programs to recipient performance." Within the construction grants program, the Policy applies only to Construction Management Assistance (CMA) grants awarded under Section 205(g). Guidelines to assist the Regional Offices in applying the Policy to CMA grants were issued by an OMPC memorandum dated January 6, 1986, Subject: Construction Grants Program Guidelines for the Policy on Performance-Based Assistance.

Re: 40 CFR 35.3025; EPA publication, "Construction Grants Delegation and Overview Guidance," December 1983.

5. U.S. Army Corps of Engineers

EPA entered into an interagency agreement with the U.S. Army Corps of Engineers (COE) at the national level, under which the COE provides assistance in administering portions of the construction grants program. The specific functions being carried out by the COE are identified in regional interagency agreements developed between EPA Regional Offices and the corresponding COE Division offices. COE responsibilities and procedures vary from Region to Region, and serve as a supplement to a State's delegation agreement (i.e., in some States, the COE performs functions which are not delegated to the State until such time as the State is able to assume those functions, while in other States, the COE performs functions which have been delegated, but not yet assumed by the State).

COE functions may range from limited onsite inspection services to total project management responsibilities which begin as soon as the grantee has accepted the grant offer.

In many States, the COE conducts biddability/constructibility reviews of contract documents, including plans and specifications (see Section V.C.3). On very large projects or clusters of projects (e.g., where the building costs exceed $50 million), the COE may provide full-time onsite presence. Project reviewers should be aware of the contents of EPA/COE agreements in their respective States, including specific procedures and documentation requirements.

It is EPA's long term goal to have each delegated State assume those activities now being performed by the COE as soon as the State is able to do so. However, where temporary shortages in staff

resources exist in a delegated State, the State may request, through EPA, COE assistance in carrying out program functions for an interim period.

Re: EPA publication, "Operating Procedures for Monitoring Construction Activities at Projects Funded under the Environmental Protection Agency's Construction Grants Program," September 1983; EPA publication, "Guidelines for Overviewing Construction Grant Activities Conducted under the Interagency Agreement with the Corps of Engineers," February 1984.

## G. INFORMATION MANAGEMENT

The Grants Information and Control System (GICS) is a computerized system which is used to collect, edit, and summarize essential information concerning EPA's construction grants program. As such, it represents a significant administrative tool which enables EPA and the delegated States to efficiently manage the program. They system also provides for the retrieval of information for use by program personnel at all levels, as well as members of Congress and the public. The core of the system is the computerized data bank which stores data related to a project pre-application status, stage of application review, milestones during building, and administrative progress through audit to closeout.

Once data is entered into the system, existing computer programs are capable of producing reports ranging from the status of a single project to statewide and nationwide trends. Typical reports include the priority rating and ranking of all projects within a State, grant application and milestone tracking, audit and closeout tracking, payment tracking, etc.

The uses and limitations of GICS are described in the "Users Manual," "Reports Library," and "Data Element Dictionary," which are maintained by a GICS coordinator in each State, EPA Regional Office, and EPA Headquarters. These documents provide a detailed description of the system, a listing of available reports, a definition of data elements, and coding instructions for data entry.

From the perspective of a project reviewer, GICS output can be an effective tool in terms of tracking progress during construction, thereby insuring timely inspections. Also, the project's progress may be compared with the approved project schedule by mathematically converting the sum of all grant payments to a percentage of the grant award amount, which should be approximately equal to the project's percentage of completion. Program managers may also use GICS reports to forecast workloads for use in budget preparation and resource allocation.

As with any computerized system, GICS is only as good as the information contained therein, and the need to have construction grants program personnel enter accurate and timely information into the system cannot be overemphasized. To help ensure the accuracy of the inputed data, an edit has been built into the system which will inhibit obviously erroneous data from entry. In addition, a GICS Audit Report is run monthly for the purpose of detecting other data errors.

In most States and Regions, one person has been assigned the responsibility for maintaining GICS, including the training of both project officers and clerical support staff in its use. Also, annually, the system is examined and, as needed, upgraded through user group meetings and the formally conducted meetings of the GICS Executive Committee which is comprised of State and EPA Regional and Headquarters construction grants program staffs.

Whenever the reviewing agency corresponds with a grant applicant or a grantee regarding the submission or approval of project documents or regarding other project milestones, an appropriate entry should be made in GICS. In at least one State, GICS coding sheets are printed on the reverse side of standard form letters, and typists have been instructed not to address and mail the letters unless the coding sheet has been completed.

GICS has been designed to help manage the construction grants program effectively. Its usefulness depends largely on the construction grants program staff providing timely input of accurate information.

## A. INTRODUCTION

The discussion in this chapter is limited to those aspects of water quality planning which are relevant to the construction grants program. It is designed to provide the project reviewer with background information and a general working knowledge of the management and planning processes required by the Clean Water Act (CWA) and its implementing regulations. The principle function of each planning activity is highlighted, placed in perspective, and related to its impact on the construction grants program.

Section B, Defining Water Quality, discusses the procedures used in setting water quality goals and standards, in monitoring water quality, and in relating current water quality to the goals and standards.

Section C, Water Quality Management Planning, describes the planning processes which are used to produce management plans for achieving water quality goals and standards.

Section D, Implementing the Water Quality Management Plan, describes the implementation of the plan through EPA's municipal policy, permit program, and facilities planning requirement.

Section E, Funding the Construction Grants Program, discusses the mechanisms for making funds available to the construction grants program, for prioritizing projects, and for setting aside funds in reserves for specific purposes.

Section F, Summary of the Planning Process, summarizes the steps in the planning process in a list of activities, followed by a schematic flow diagram.

## B. DEFINING WATER QUALITY

### 1. Water Quality Goals and Standards

Water quality goals, which are the basis for all activities authorized under the CWA, represent value judgements articulated by Congress in Title I of the CWA. The water quality goals of the CWA may be summarized as: protection and propagation of fish, shellfish, and wildlife; provision for recreation in and on the water wherever attainable; restoration and maintenance of the chemical, physical, and biological integrity of the Nation's

waters; prohibition of toxic substances in toxic amounts; protection of public health and welfare; and reduction of water pollutants from nonpoint sources to the maximum extent feasible.

To translate water quality goals into objective, measurable terms, water quality standards are established by the States. Water quality standards implement the water quality goals for a water body or portion thereof by setting standards necessary to achieve these goals. These standards serve as the legal basis for water pollution control decisions (e.g., treatment levels, National Pollutant Discharge Elimination System (NPDES) permit effluent limitations, and enforcement actions).

Water quality standards have been established by the States and approved by EPA for practically all of the Nation's water bodies. However, Section 24 of the 1981 CWA amendments required the States to reevaluate their water quality standards and, where necessary, to revise them to reflect current and realistic goals and uses. Construction grant assistance may not be provided in States which fail to conduct such water quality standards reevaluation by December 29, 1984 (see Section VI.D.11). The establishment and revision of water quality standards is subject to the public participation requirements of 40 CFR Part 25.

Re: 40 CFR 130.0, 130.3; 40 CFR Part 131

2. Water Quality Monitoring

Once a State establishes water quality standards, the State is required to implement a water quality monitoring program which includes the collection and analysis of physical, chemical and biological data on water quality. This data is used by the State to evaluate the effectiveness of its water quality management (WQM) program, to determine abatement and control priorities, to develop or revise water quality standards, to develop total maximum daily loads and wasteload allocations, to assess compliance with NPDES permits, and to prepare reports which assess the trends in water quality.

Water quality monitoring programs must include quality assurance and quality control programs to insure that collected data are scientifically valid. The monitoring program provides a scientific basis for the preparation of abatement and control reports and for the designation of priority water quality areas.

Re: 40 CFR 30.503*, 130.4, 31.45

1. Permits and Compliance Schedules

Potential grant applicants are to be made aware that existing projects must be in compliance with schedules resulting from the implementation of EPA's National Municipal Policy (see Section II.D.1), the NPDES permit program, court orders, or State enforcement orders (see Section VI.C.6).

2. Procurement of Engineering Services

a. Procedures

The procurement of engineering or other professional services for facilities planning and/or design is not subject to the EPA procurement regulations or to an EPA audit. However, if the grant applicant anticipates using the same engineer for Step 3 construction activities, and wishes to avoid advertising and evaluating proposals for engineering services during construction, it must have procured the engineer for facilities planning and/or design in accordance with EPA procurement requirements (see Section VII.C.3).

Re: 40 CFR 33.715*, 31.36(d)

b. Use of Small, Minority, Women's, and Labor Surplus Area Businesses

Grant applicants are encouraged to utilize the services of small, minority, women's, and labor surplus area businesses (see Section V.C.1.w) during facilities planning and design. At the time of grant application, they will be required to report the level of minority business enterprises and women's business enterprises (MBE/WBE) partici-

pation in facilities planning and design. Some States and municipalities may have established goals for this purpose (see Section VI.D.5).

Re: 40 CFR 33.240*, 35.2104(d), 31.36(e); OMB Circular A-102 ¶7.d. (3/3/88)

c. Use of Debarred or Suspended Firms

Grant applicants should be advised not to use individuals or firms included on the General Services Administration's Lists of Parties Excluded from Procurement or Nonprocurement Programs (GSA List) for facilities planning or design work (see Section VI.D.7). Grant applicants should also be advised to report any instances of misconduct by their contractors (e.g., engineers, construction firms, equipment suppliers, etc.) to EPA's Office of the Inspector General (OIG), using the hotline (800-424-4000 or 202-382-4977) established for that purpose.

Re: 40 CFR 35.2105, 32.200

3. Financial Considerations

a. State Priority System and Project Priority List

Grant applicants should have a clear understanding of the State priority system and project priority list. Proposed projects should be evaluated and an assessment made as to the likelihood of receiving a future grant (see Sections II.E.3 and VI.D.3).

Re: 40 CFR 35.2015, 35.2103

## 7.2 Engineering Evaluation

An engineering evaluation of the principal alternatives is a second criterion used in the selection of the proposed project. Engineering feasibility of alternatives is considered throughout the entire facilities planning process. However, several specific areas of engineering evaluation are required by the regulations, as described below. Project reviewers are to insure that the following areas have been adequately evaluated and addressed in the facilities plan:

a. Reliability

Each alternative is to be evaluated for its reliability in terms of meeting and consistently maintaining the applicable effluent limitations throughout the project's useful life. Reliability is of particular importance, as reflected in the CWA's requirement that grantees certify after one year of operation that the project is achieving its performance standards (see Section VII.I.2). Several approaches to evaluating and achieving reliability are discussed in Section V.C.2.g.

Re: 40 CFR 35.2005(b)(48)

b. Energy Use

While one of the criteria for classification of a project as innovative is net primary energy reduction, the regulations require that each alternative, whether conventional or I/A, be evaluated for opportunities to recover, or reduce the use of energy. As mentioned in Item 6.13 above, the CAPDET program can be used for this analysis. Where energy reduction is the basis for claiming that a process is innovative, the energy evaluation will generally provide an indepth analysis.

Re: 40 CFR 35.2030(b)(3)(vi)

c. Water Supply

The facilities plan is to evaluate the water supply implications of the project, considering both the impact of future growth upon the water resources and the impact of alternatives in terms of replenishing or depleting water supplies.

Re: 40 CFR 35.2030(b)(7)

d. Revenue Generating Applications

Each principal alternative is to be evaluated for revenue generating application (e.g., the sale of methane gas from anaerobic digestion, the sale of effluent or sludge for agricultural purposes, etc.). Revenue generating applications may possibly be considered multiple purpose projects (see Item 7.1.h above). Revenues generated by the project must be used to reduce OM&R costs (see Section V.E).

Re: 40 CFR 30.200*, 35.2030(b)(3)(v), 31.25

e. Open Space and Recreation

Each principal alternative is to be evaluated for potential open space or recreational opportunities. In many cases, relevant information may be found in the State Comprehensive Outdoor Recreation Plan, or from the National Park Service, United States Department of the Interior. The project reviewer may wish to have the grant applicant contact the appropriate agencies if the project has potential open space or recreational opportunities. While recreational or open space opportunities associated with a water pollution control facility could denote a multiple purpose project, such facilities are more appropriately a multiple use project (see Item 7.1.h above). Typical recreational or open space opportunities associated with wastewater projects include:

- use of interceptor rights of way for running, hiking, bicycling, or equestrian trails;

c. Site Definition and Evaluation Survey

This level of survey consists of intensive investigation of specific resources previously identified as partially or entirely existing in the project's direct impact area, or discovered as a result of previous surveys. This survey is undertaken when direct effects cannot be avoided by reasonable project modification, or when information (e.g., extent, depth, significance) is insufficient to assess project alternatives. This survey should, at a minimum, provide data to allow a determination of National Register of Historic Places eligibility. The State reviewing agency or EPA, in consultation with the SHPO, uses the survey data to:

- evaluate methods of avoiding adverse impacts on the resources, or make a "no effect" determination;

- assess the need to request a National Register of Historic Places eligibility determination from the National Park Service, U.S. Department of the Interior;

- assess the effects of the project on the resource;

- develop mitigating measures; and

- assess the need to request ACHP comments.

Should the review result in an adequately documented determination of no effect, the project may proceed as proposed. Should the review result in a determination of no adverse effect, the ACHP is to be provided with the documentation in accordance with its regulations. If the ACHP concurs or does not object within 30 calendar days of the submittal, the project may proceed.

Should the agency review result in a determination of adverse effect, or if the ACHP objects within 30 calendar days to a determination of no adverse effect, the ACHP is to be provided with documentation for the full consultation procedure, according to ACHP regulations, for the preparation of a

memorandum of agreement. EPA, with the assistance of the delegated State, will:

- prepare the preliminary case report, formally requesting the comments of the ACHP;

- notify the SHPO of this request; and

- proceed with the consultation process (e.g., on-site visits, public information meetings) as detailed in the ACHP regulations.

During this consultation process, EPA will examine all feasible and prudent alternatives to avoid adverse effects on cultural resources. Examples include the examination of alternative project sites, alternative designs, or no action. Should EPA determine that alternatives to avoid affecting cultural resources are not feasible, measures to minimize the potential effects will be developed in consultation with the SHPO and the ACHP. Generally, the consultation should result in a resolution of any adverse effects. Specific conditions, including the agreed mitigating measures are to be included in the memorandum of agreement signed by EPA, the ACHP and the SHPO. EPA will not approve any action having an adverse effect or no adverse effect until the ACHP comments. Reasonable costs of mitigating measures are eligible for grant participation. EPA may condition any subsequent grant to require mitigating measures to be undertaken by the grantee.

It is the responsibility of the project reviewer to insure that the above procedures are, or have been, carried out. EPA retains the final responsibility for compliance with the ACHP regulations. EPA will publish the review findings, effect determinations, and consultation results as part of the project's environmental assessment.

Re: 36 CFR Parts 63 and 800; 40 CFR 6.301, 30.600(a)*; 40 CFR Part 35, Subpart I, Appendix A, Paragraph B.1.b.

b. submit the conformity determination to the designated lead State or local agency for concurrence. Lack of response by the lead agency during the 30 day FONSI and 45 day draft EIS review periods will be interpreted as concurrence.

c. EPA must provide in the FONSI or EIS a response to non-concurrence, including the basis on which conformity will be assured. If EPA finds that non-concurrence is unjustified, an explanation must be included in the FONSI or EIS.

Re: 40 CFR 6.303; 40 CFR 30.600(c)*, 31.13(a)

### 2.4 Drinking Water

The Safe Drinking Water Act prohibits EPA from awarding grant assistance if a proposed project may contaminate a sole source aquifer and result in a significant hazard to public health. Determine if a sole source aquifer is located in the project area, and if so, evaluate the potential impacts (both direct and indirect) of the project on drinking water quality.

Re: 40 CFR 30.600(l)*, 31.13(c); 40 CFR Parts 141 and 149

## 3. Direct and Indirect Impacts

Environmental impacts are generally classified as direct or indirect.

### 3.1 Direct Impacts

Direct impacts are caused by construction or operation of the treatment works, and typically include:

a. disruption of traffic, businesses, or other activities during construction;

b. disturbance of sensitive ecosystems, such as wetlands and habitats of endangered or threatened species, during construction;

c. impact on water quality by the effluent discharged from the treatment works;

d. displacement of households, businesses, or services; and

e. destruction of, or a significant adverse effect on, archaeological and historic sites and similar nonrenewable resources.

3.2 Indirect Impacts

Indirect impacts are caused by development made possible by the project, and typically include:

a. changes in the rate, density, location, or type of development;

b. increased air, water, or noise pollution from induced changes in population and land use;

c. increased solid waste production or demand for potable water from induced changes in population and land use; and

d. socioeconomic pressures for the expansion of existing facilities and services (e.g., housing, schools, highways, police, fire, medical, energy) from induced changes in population and land use.

As a facilities plan is reviewed, and as the environmental review process is carried out, the project reviewer is to note both the direct and indirect impacts of the

## A. INTRODUCTION

This chapter discusses the review of activities which take place during the design of the project. It begins with the predesign conference, followed by a discussion of the administrative and technical review of the plans and specifications. It also discusses other activities which are usually accomplished concurrently with design, and which are prerequisites to grant award.

Section B, Predesign Conference, describes suggested issues which may be discussed with the grant applicant and the design engineer.

Section C, Review of Plans and Specifications, describes administrative items to be included in the specifications, based primarily on construction procurement requirements, and technical requirements and guidance which EPA feels represent sound engineering design principles.

Section D, Value Engineering, describes those conditions under which a separate value engineering (VE) study is required, the methodology to be used in conducting the study, and provisions for implementing the VE recommendations.

Section E, User Charge System, describes the requirements for a user charge (UC) system, which must charge each user of the wastewater treatment system a proportional share of the cost of providing treatment services.

Section F, Sewer User Ordinance, describes the requirements for a sewer use ordinance (SUO), and its use in implementing EPA requirements and other municipal requirements for effective operation of the project.

Section G, Plan of Operation, describes the requirements for an effective plan of operation, including staffing, training, budgeting, and the preparation of an operation and maintenance (O&M) manual.

Section H, Intermunicipal Service Agreement, describes the requirements for an intermunicipal service agreement and its importance in providing proper financial and institutional support for the project.

Section I, Industrial Wastes and Federal Facilities, describes limitations on the eligibility of capacity to treat industrial wastes and wastes from Federal facilities.

Section J, Design Acceptance, describes the effect of design acceptance by the reviewing agency, and discusses other issues which must be resolved prior to application submission.

B. PREDESIGN CONFERENCE

Purpose:

Meet with the grant applicant and the grant applicant's design team to review administrative and technical requirements for design, as well as other activities that are usually accomplished concurrently with design.

Discussion:

A predesign conference is not required by EPA regulations, but is encouraged for all projects whenever possible. A predesign conference affords an opportunity for the reviewing agency to meet with the grant applicant and the grant applicant's design team to review the many activities which take place during project design. Practically all reviewing agencies have developed specific procedures for arranging and conducting a predesign conference, frequently including a checklist of items for discussion. The reviewer should use these procedures, modified as necessary for the specific project. Particular emphasis should be placed on the significant changes in the construction grants program which became effective on October 1, 1984.

Procedures:

As soon as possible after completion and approval of a facilities plan and prior to the initiation of design, the project reviewer should arrange a predesign conference with the grant applicant and the design team. Major program requirements to be discussed include:

1. Technical design criteria, which must meet State design standards and the EPA requirements and guidance discussed in Section C.2 below. If the reviewing agency requires the submission of an engineering design report, the format and timing for submission of the report by the grantee should be discussed. Design parameters may include items such as loadings, system head curves, detention times, peaking factors, and the capacity of various components.

2. Contract documents, which must comply with State and EPA requirements (primarily 40 CFR [Part 33] 31.36, as discussed in Section C.1 below. These requirements include competitive selection, non-restrictive specifications, bonding, insurance, wage rates, labor standards, drug free workplace, debarement/suspension, and [required subagreement clauses.] (NOTE: Many of these subagreement clauses are addressed sporadically in Part 31; also, efforts are currently underway to obtain OMB approval for including these clauses, verbatim, in Part 31.)

3. Recent changes in the construction grants program, such as:

   a. reduced Federal grant share (see Section VI.L.2);

   b. allowances (see Section VI.L.1) and advances of allowance (see Section III.E);

   c. revised definition of secondary treatment or its equivalent (see Section IV.C.3.1);

   d. infiltration/inflow (I/I) limitation (see Section IV.C.4.3);

   e. limitations on the eligibility of reserve capacity (see Section VI.D.18);

   f. project performance certification, including sewer rehabilitation, after one year of operation (see Section VII.I.2.a);

   g. limited eligibility of collection sewers, major sewer system rehabilitation, and combined sewer overflow (CSO) projects (see Section II.E.3).

d. Compliance with facilities plan and FONSI or EIS conditions (see Sections IV.C.8 and IV.D).

e. UC system (see Section E below) and SUO (see Section F below).

f. Requirements for VE studies (see Section D below).

g. Preliminary and final plan of operation (see Section G below).

h. Acquisition of land, rights of way, and easements (see Section VI.H).

i. Intermunicipal service agreements (see Section H below).

j. Service agreements with major industrial users (see Section I below).

k. Additional I/I investigations which may be required (see Section VI.D.16).

l. Pretreatment (see Sections IV.E.2 and VI.E.4).

m. Design features associated with industrial flows (see Section I below).

n. Timing and arrangements for funding the municipal share of project costs (see Section VI.D.4).

## C. REVIEW OF PLANS AND SPECIFICATIONS

Purpose:

Insure that the proposed project conforms with the selected alternative in the facilities plan, satisfies State and EPA design criteria and administrative requirements, is biddable and constructible, and will satisfy discharge requirements in accordance with the project's National Pollutant Discharge Elimination (NPDES) or State Pollutant Discharge Elimination System (SPDES) permit.

Discussion:

Contract documents, primarily the plans and specifications, are prepared by an engineer licensed in the State in which the project is to be constructed. In designing the project, the engineer must comply with State design standards, and the enforceable requirements of the Clean Water Act (CWA). The engineer is responsible for employing sound engineering principles, as represented by his seal and signature on the plans and specifications.

The reviewer is responsible for insuring that the project conforms with the selected alternative described in the facilities plan, includes special considerations which were noted in the facilities plan (e.g., mitigation of adverse environmental impacts), and in general meets minimum technical and administrative State and EPA requirements. Ideally, periodic progress reviews should be conducted with the grant applicant and the design team to insure compliance with technical and administrative requirements.

In performing the review of the plans and specifications, the reviewer is to note and call to the attention of the design team, through the grant applicant, any apparant discrepancies with State or EPA requirements (e.g., oversized or unnecessary units, "gold plating," etc.). Reviews should also be conducted with a cost conscious eye; and, items judged not to be reasonably required and necessary for the proper operation and maintenance of the facility and the attainment of effluent limits, or required to mitigate adverse environmental benefits, should be recommended for reevaluation and possible elimination. However, the review and acceptance of the plans and specifications by the State or EPA project reviewer does not relieve the grantee or the design engineer of his legal responsibilities for the overall integrity of the project (see Section J.1.c below).

In addition to reviewing the contract documents for technical and administrative adequacy, the reviewer should note and resolve any possible conflicts that could later result in contractor change orders or claims. The most common conditions resulting in change orders include differing site conditions, errors and omissions in the contract documents, State and Federal government regulatory changes, design changes, overruns and underruns in quantities, and factors affecting the time of completion of the project. Bearing these conditions in mind, the reviewer should carefully review the plans and specifications to insure that the information and details contained therein will help to minimize future change orders and claims.

In addition, and consistent with Section 203(a)(2) of the Water Quality Act of 1987, the reviewing (and approving) Agency must enter into a written agreement with the applicant that establishes which items of the proposed project are eligible for Federal participation. Once established, the Agency cannot unilaterally modify the agreement unless the items specified in the eligibility agreement are found to be in violation of Federal statutes or regulation. Details on implementing this requirement are described in Section VI,M,6.

Review Procedures:

1. Administrative Review

The procurement of construction contractors must comply with at least the minimum EPA requirements as set forth in 40 CFR [Part 33] 31.36 for recipients other than State governments. These minimum EPA requirements may be supplemented by additional State or local requirements provided they do not conflict with EPA requirements nor in any other way unduly restrict or eliminate competition (see Section I.D.6). Practices considered to be unduly restrictive and therefore not allowed include:

- noncompetitive practices between firms;
- organizational conflicts of interest;
- State and local laws, ordinances, regulations, or procedures which give local or in-State bidders preference over other bidders;
- unnecessary qualification requirements, such as excessive experience or bonding in lieu of experience;
- placing other unreasonable requirements on firms in order for them to qualify to do business.

Re: 40 CFR 33.230*, 31.36

a. Formal Advertising

Except for very unusual circumstances, the formal advertising procurement method must be employed. Formal advertising procurement essentially consist of:

i. formal advertising or solicitation of bids through a public notice,

ii. public receipt and opening of bids, and

iii. award of the contract to the lowest responsive, responsible bidder.

Items b through f below briefly describe EPA's administrative requirements for bidding documents and procedures. See Sections VII.B and VII.D for a more complete discussion.

Re: 40 CFR 33.405*, 33.430*, 31.36(d)

b. Public Notice

The public notice soliciting bids must state when and how bidding documents, including plans and specifications, can be obtained or examined, and the time, date, and location for receipt of bids. The public notice must provide adequate time (normally 30 days) between the date of public notice and the date for receipt of bids.

The advertisement or invitation for bids is placed in newspapers and trade journals, and in the case of large projects, in publications with nationwide distribution.

Re: 40 CFR 33.410*, 33.415*, 31.36(d)(2)(ii);
40 CFR Part 33, Appendix A*

c. Prequalification of Contractors and Products

If allowed by State law, grant applicants may use a prequalified list of contractors and/or major items of equipment before receipt of bids provided the following conditions are met:

i. prequalified list is updated [at least every six months];

ii. requests for inclusion on the list made [30 days] before bid opening are considered and acted upon;

iii. adequate public notice of the prequalification procedure is provided; and

iv. the procedure does not unnecessarily restrict competition.

Re: 40 CFR 33.230(c)* and (d)*, 31.36(c)(4)

d. Addenda

Prior to the receipt of bids, it is sometimes necessary for the grantee to issue addenda to the plans or specifications. Such addenda may be required to update a wage rate determination (see Item q below) or to clarify the plans or specifications. The proposal form or other bid submission documents should include a statement to be completed by bidders acknowledging receipt of each addendum (see Section VII.D.1.c).

e. Bid Proposal

The bid proposal is a form which briefly describes the required items of equipment, materials, and work to be performed, and provides blank spaces to be completed by the bidder, indicating the amount being bid for each bid item. The amount will be a fixed price (lump sum), or in the case of estimated quantities, unit prices. The price is generally expressed in words and numbers, with a separate price for each major item or system and a total for the entire contract. The proposal is to be signed by an authorized official of the bidding firm. The individual items on the proposal form should set forth, in clear and understandable terms, the limits of work for each item.

f. Basis for Award

The contract documents must clearly describe the method of bidding, the method of evaluating bid prices, and the method of awarding the contract. A contract will be awarded to the lowest responsive, responsible bidder. The selection of the successful bidder is to be made principally on the basis of price.

A responsible contractor is one that has:

i. financial resources, technical qualifications, experience, organization, and facilities adequate to complete the project within the required schedule, or a demonstrated ability to obtain these;

ii. a satisfactory performance record;

iii. adequate accounting and auditing procedures;

iv. demonstrated compliance or willingness to comply with the civil rights, equal employment opportunity, labor law, and other requirements of 40 CFR [Part 30] 31.36(i)(3); and

v. certified that a drug free workplace will be maintained.

A contract may not be awarded to a contractor, nor a subcontract to a subcontractor, who has been suspended, debarred, or voluntarily excluded under 40 CFR Part 32, nor may any portion of the work be performed at any facility listed on EPA's List of Violating Facilities.

The contract documents should also include a description of conditions under which all bids may be rejected. Such conditions must be based on sound business reasons which are in the best interests of the construction grants program.

Re: 40 CFR Part 15; 40 CFR 33.220*, 33.250*, 33.405*, 33.420*, 33.430*, 31.36(b) through (i)

g. Sole Source Procurement

Noncompetitive negotiation may be used when small purchases, formal advertising and competitive negotiation are inappropriate because:

[i. it is necessary to test or demonstrate a specific thing, such as equipment or processes used in innovative technology designs;] or

ii. an item is available only from a single source; or

iii. a public exigency or emergency exists and the urgency will not permit delay, or

iv. after solicitation from a number of sources, competition is inadequate (e.g., after formal advertising, no bids or only one bid is received).

Re: 40 CFR 33.605*, 31.36(d)(4)(i)

h. Scope of Work

The contract documents must include a clear statement of work, especially where multiple contracts may be awarded. The statement of work must establish the limits of work for each contract, in order to eliminate confusion or overlapping of work between contractors. To the extent feasible, the limits of work for each contract should also be indicated on each page of the design drawings (i.e., plans). The statement of work must also include a required performance schedule for each contract and a requirement for coordination between contractors.

Re: 40 CFR 33.420(a)*, 31.36(c)(3)

i. Responsibilities of Parties

The specifications should provide a clear description of the responsibilities of each party, including the owner (grantee), the grantee's representative (generally the engineer's project inspector), and the construction contractor. The specifications should indicate who may authorize a change in the work (procedures for change orders are described in Section VII.H), who is responsible for checking quantities and quality of materials, who is authorized to allow extensions of time, who is authorized to approve the construction contractor's payment requests, who is authorized to interpret the plans and specifications and resolve conflicts, and how disputes are to be resolved. The specifications may also describe the role of the State, EPA and/or the U.S. Army Corps of Engineers (COE). In general, however, regulatory officials are observers to help insure that the project is constructed in accordance with the approved plans, specifications, and change orders. Their recommendations for compliance are provided only to and through the grantee.

Re: 40 CFR 33.210*; EPA publication "Operating Procedures for Monitoring Construction Activities at Projects Funded under the Environmental Protection Agency's Construction Grants Program," September 1983

j. Subagreement

The contract documents must include a proposed subagreement which clearly sets forth the terms and conditions of the subagreement including payment, delivery schedules, points of delivery, and acceptance criteria. The subagreement must be a fixed price (lump sum) or unit price subagreement and shall incorporate by reference all contract documents, including plans, specifications, and addenda.

Re: 40 CFR 33.285*, 33.420*, 31.36(d)

[k. Lower Tier Subagreements

The contract documents must require the prime contractor to include specific requirements in any lower tier subagreement awarded by the prime contractor. This requirement will be satisfied by inclusion in the contract documents of the required provisions described in Item m below.]

Re: 40 CFR 33.295*

l. Bonding and Insurance

For construction contracts of $100,000 or less, grantees may use local or State requirements for bonding. For construction contracts in excess of $100,000, the minimum EPA bonding requirements are:

i. bid guarantee (bond, certified check, or other negotiable instrument) equal to 5 percent of the bid price;

ii. performance bond for 100 percent of the bid price; and

iii. payment bond for 100 percent of the bid price.

Bonds obtained by bidders must be from companies holding certificates of authority as acceptable sureties in the State in which the project is located. It is recommended that performance and payment bonds remain in effect for one year after contract completion.

Contractors should be required to obtain adequate construction insurance (e.g., fire and extended coverage, workmen's compensation, public liability and property damage, and all risk) in accordance with local or State laws.

EPA regulations require that a grantee participate in the National Flood Insurance Program if the proposed project involves construction or acquisition of insurable structures (i.e., four walls and a roof, principally above ground), with a value of $10,000 or more and located in a flood hazard area. Flood protection insurance adequate to protect the grantee's financial interest must be provided for structures as soon as the walls and roof exist. Insurance must be provided during construction and maintained by the grantee thereafter. Building materials for the insurable structure can also be insured if stored on the premises in an enclosed building.

Re: 40 CFR 30.600(b)*, 33.265*, 31.36(h); Treasury Circular 570; Flood Disaster Protection Act of 1973, PL 93-234

m. Regulatory Provisions

The contract documents must include [a copy of the most recent EPA specification inserts, including 40 CFR 33.295 ("Subagreement Awarded by a Contractor"), Subparts F ("Subagreement Provisions") and G ("Protests"),] or, the contract provisions of 40 CFR 31.36(i); and, EPA Form 5720-4 ("Labor Standard Provisions for Federally Assisted Contracts"). [By including these inserts in the contract documents, many of the administrative requirements will be satisfied.] In addition, the grant applicant must certify regarding debarment, suspension and other responsibility matters.

[Subpart F] and, as applicable, 40 CFR 31.36(i) includes subagreement provisions such as labor standards provisions, patents data and copyrights clause, violating facilities clause, energy efficiency clause and model subagreement clauses. The model subagreement clauses include the Buy American requirements (see Item 2.aa below) and the quality assurance requirements (see Section VI.5.M.f). [With regard to the model subagreement clauses, the grant applicant may use the exact wording in 33.1030 or their equivalent, and should exclude those clauses which are not applicable to construction contracts.] Grant applicants should be encouraged to have their model subagreement or substitute clauses reviewed by their legal counsel, to insure their compatibility with State laws and prevailing legal practices.

Also, see "NOTE" in V.B.2.

Re: 40 CFR 30.302(d)(3)*, 30.503(f) and (h)*, 33.420(f)*, 33.710*, 31.36(c)(5), 31.36(i); 40 CFR Part 33 Subparts F* and G*, $) CFR 32.510

n. Safety

Project specifications must require contractors to comply with applicable regulations issued by the Occupational Safety and Health Administration, U.S. Department of Labor (DOL). In addition, where a State has promulgated additional regulations concerning safety in design of structures or safety during construction, such regulations should be incorporated into the specifications (generally by reference).

At the time of plan and specification review, the reviewing agency should insure that the specifications require contractor compliance with applicable State and DOL safety requirements, as well as the specific additional safety provisions for chlorination facilities, wet and dry wells, and other hazardous locations which are described in Items 2.c through 2.e below.

Re: 40 CFR 31.36(i)(6)

o. Schedule

Each construction contract must include a completion schedule and provisions for coordination among contractors. Since the grant applicant is required to submit a project schedule with the grant application, the construction schedule should be reviewed for reasonableness and conformance with the project schedule, as well as with any permits, compliance schedules, court orders, or State administrative orders. The construction completion schedule is generally given in calendar days from the date of the notice to proceed, and forms the basis for assessing liquidated damages against the contractor (see Item r below). Any circumstances under which the completion schedule would be amended should be clearly defined in the contract documents, which should also indicate that a formal change order is required in such cases.

Re: 40 CFR 33.420(a)*, 35.2040(b)(6)

p. Permits

The contract documents should require that, to the extent possible, contractors obtain all necessary permits for construction. (Some permits may be required to be held by the owner of the project.)

q. Wage Rate Determination

Each EPA funded project with construction contracts in excess of $2,000 must contain the prevailing wage rate determination issued by DOL under the Davis-Bacon Act. The wage rate determination will include the prevailing wages and fringe benefits for various construction labor categories. Contractors are required to pay employees at least these prevailing wage rates. Since wage rate determinations are periodically revised, provisions should be included in the contract document for updating the determination by an addendum if the determination is issued by DOL at least 10 days prior to bid receipt. Where project-specific rates are requested from DOL, this 10 day limitation does not apply, and the rates are applicable regardless of the date of issuance by DOL.

Since January 3, 1986, Davis-Bacon general wage determinations have been published in a new special purpose document, "General Wage Determinations Issued Under The Davis-Bacon And Related Acts" and is available through subscription or at Regional Depository Libraries. At the same time, publication of these wage determinations in the Federal Register ceased. However, weekly Federal Register notice of new general wage determinations, and those being modified or superseded will continue.

An amendment to DOL wage rate regulations requires that, if a change to the wage decision is received less than 10 days before bid opening and the agency finds that there is not enough time to add by addendum, a report of such determination shall be kept in the contract file. Also if a contract is not awarded as the result of the solicitation within 90 days after bid opening, any modification to the wage determination published before contract award shall apply to the resulting contract (add by Change Order), unless an extension request is approved by DOL.

Re: 40 CFR 30.603(a)*, 33.420(e)*, 33.1016*, 31.36(i)(5)
29 CFR Part 1; 50 FR 49822 (December 4, 1985)

r. Liquidated Damages

The assessment of liquidated damages by the grantee is a potential source of disputes and contractor counter-claims, and must therefore be carefully evaluated. EPA regulations contain no provisions for liquidated damages. However, many engineers include liquidated damages (e.g., $1,000 per day for each day of delay beyond the construction completion date) in the specifications. Where liquidated damages are included in the contract documents, they should be reviewed against applicable State laws and court decisions. The amount of liquidated damages should be adequate to cover additional costs which would be incurred by the grantee as a result of delay (e.g., additional inspections, interest on borrowed funds, etc.). Liquidated damages may affect allowable project costs (see Section IX.F.4, Paragraph A.3.a).

It is important to note that in contracts containing liquidated damages provisions, such provisions will only be enforced by courts as long as the amount fixed is not found to be a penalty nor a measure of injury actually suffered. In addition, a term fixing unreasonably large liquidated damages would be void in states which have adopted the Uniform Commercial Code.

s. Change Order Procedures

[A clause for changes (Paragraph 3) is included in the model subagreement clauses in 40 CFR 33.1030.] However, the contract documents should also clearly describe the specific procedures, including negotiation, for reviewing and approving change orders (see Section VII.H).

t. Payment Request Procedures

The contract documents should clearly describe the procedures and timing for processing contractor payment requests, including payment request forms, documentation (e.g., paid invoices or inspector's verification of work in place), retainage, and time from receipt of payment request until payment.

u. Retainage

Many project specifications include a requirement for retainage of a portion of a progress payment request until the project is substantially or fully completed. Typical retainage is 5 to 10 percent of the monthly progress payment request until the project is substantially complete (e.g., 90 percent completion). When the project is substantially complete, the retainage is reduced to an amount at least equal to the value of any uncompleted or deficient work. Retained amounts are paid when remaining work items are satisfactorily completed.

Contract documents should clearly describe the grantee's retainage policy in order to preclude future disputes, and should be reviewed to ensure that the retainage policy is in accordance with State laws and requirements

EPA regulations do not address retainage. However, EPA will only pay the grantee the Federal share of allowable project costs which are currently due and payable to the grantee (i.e., costs incurred by the grantee, minus any retainage). EPA may also withhold grant payments otherwise due a grantee for failure to comply with specific requirements and conditions of the grant agreement, but only to the extent necessary to insure compliance. In order to avoid any future cash flow problems, grantees should be advised of EPA's withholding policy (see Sections IX.B.2.b and IX.B.4).

Re: 40 CFR 30.902*, 31.12

v. Construction Incentive Clause

A construction incentive (CI) clause is an option which may be included in the contract documents if not prohibited by State and local laws. The CI clause allows a contractor or subcontractor to propose changes in the project which will:

i. provide at least a $50,000 gross capital savings (a lower amount may be specified by the grantee, if it can demonstrate that a smaller CI proposal can be cost-effectively reviewed by the grantee),

Re: 40 CFR 30.600(j)*, 33.240*; preamble to 40 CFR Part 33*, 48 FR 12923, "Small, Minority, Women's, and Labor Surplus Area Businesses" (March 28, 1983), 40 CFR Part 31.36

x. Selecting City Engineer as Consultant for EPA Funded Work

The practice of utilizing a firm as a "city engineer" and as a consultant is fairly common in smaller municipalities. This practice is acceptable provided that the grantee follows the applicable EPA regulations concerning procurement and code of conduct. If questioned, the grantee must document to the Agency's satisfaction that applicable procurement regulations were followed and that no conflict of interest exist. Accordingly, when a firm is selected to serve in the dual role of "city engineer" and prime consultant on EPA funded projects, it is strongly recommended that the responsible city officials certify that they are aware of EPA's regulations governing conflict of interest and that the award of a contract to the firm was made in accordance with these regulations.

## 2. Technical Review

Except in the case of approved marine discharge waiver applicants, project designs must meet the minimum requirements for achieving secondary treatment or its equivalent, as defined in EPA's regulations (40 CFR Part 133), in order to be eligible for grant assistance. Plans, specifications, and contract documents must conform to State design criteria and also meet the requirements for competitive bidding in accordance with EPA's procurement regulations (40 CFR Part [33], 31.36. Based on past experience, EPA has established, as described below, several basic policies concerning the design of treatment works which are to be incorporated into the plans and specifications. These items do not represent a complete list of design standards, and should be used only to supplement a State's design criteria.

### a. Project Performance Standards

Grantees are required to certify, after one year of operation, whether the project meets its project performance standards. Therefore, at the time of plan and specification review it is necessary to establish the parameters which constitute project performance standards and judge whether the proposed project is likely to achieve a minimum of secondary treatment or its equivalent, in accordance with 40 CFR Part 133.

Project performance standards are performance and operational requirements applicable to the project, including the enforceable requirements of the CWA and the design upon which the specifications are based. For projects which will contribute to compliance with the enforceable requirements of the CWA, project performance standards include design criteria (e.g., engineers design report, facilities plan, plans and specifications) and effluent requirements. For projects which will not contribute to compliance with the enforceable requirements of CWA, such as interceptor sewers and pumping stations, project performance standards include only the design criteria. For projects which include sewer rehabilitation, the quantity of excessive infiltration and inflow which is to be eliminated is also considered a component of the project performance standards.

During the technical review of the plans and specifications, those parameters which constitute project performance standards should be identified and recorded in the project files and in the Grants Information and Control System (GICS) for later use. (This can usually be done even if a NPDES permit has not been issued at the time of design, since effluent limitations should have been established during facilities planning.) It may also be prudent to contact the grant applicant and reach agreement concerning project performance standards as a basis for future evaluation. At a minimum, the grant applicant should be informed of the parameters which have been identified as project performance standards (see Sections VI.M.5.g and VII.I.2.a).

Re: 40 CFR 35.2005(b)(15) and (b)(33), 35.2218;
40 CFR Part 133

b. Mitigation of Adverse Environmental Impacts

Plans and specifications should be compared to the facilities plan and the finding of no significant impact (FONSI) or the environmental impact statement (EIS) prepared for the project to insure that the project design incorporates all measures for the mitigation of adverse environmental impacts (i.e., measures to protect environmentally sensitive areas and cultural resources). Mitigation measures may include a soil erosion and control plan, fencing of "off-limits" areas to avoid physical disturbance, restrictions on hours of the day or seasons of the year for construction activities, backfilling and immediate seeding requirements, avoidance of impacts on cultural resources, structural designs for facilities located in floodplains or wetlands, etc.

Re: 40 CFR 6.509(b), 40 CFR 35.2030(b)

y. Reconfirmation of Innovative or Alternative Technology

While not specifically required by EPA regulations, review of project design may also afford an opportunity to reconfirm earlier decisions, generally made on the basis of preliminary information in the facilities plan, concerning the classification of the project or project components as innovative or alternative (I/A) technology (see Section VI.E.3). Grant applicants should be notified of any changes to the I/A classification, since this will affect project financing.

z. Project Sign

The specifications must require the contractor to provide and erect a project sign in accordance with the project sign details found in the EPA publication, "Construction Grants 1985" (CG-85), or in accordance with alternative State requirements which have been approved by EPA.

aa. Buy American

By inclusion of the model subagreement clauses or their equivalent in the specifications (see Item 1.m above) the grant applicant has initially satisfied the Buy American provision. However, the regulations further clarify this issue by providing that contractors must use domestic construction material in preference to nondomestic material if it is priced no more than 6 percent higher than the bid or offered price of the non-domestic material, including all costs of delivery to the construction site and any applicable duty, whether or not assessed. Where a product consists of domestic and nondomestic materials the product shall be considered domestic if the American manufactured components represent 50 percent or more of the product.

EPA may waive the Buy American provision based upon relevant factors such as:

i. such use is not in the public interest,

ii. the cost is unreasonable,

iii. available EPA resources are not sufficient to implement the provisions (requires EPA Headquarters approval),

iv. products are not reasonably available or of satisfactory quality in the United States, and

v. provisions conflict with multilateral government procurement agreements (requires EPA Headquarters approval).

Re: 40 CFR 33.710*, 33.1030, Par. 12*, 31.36(c)(5)

bb. Nonrestrictive Specifications

Specifications must be written to encourage free and open competition. The specifications shall contain a clear and accurate description of the technical requirements for the material or product. The description shall include a statement of the qualitative nature of the material or product and set forth those minimum essential characteristics and standards to which it must conform.

When, however, in the judgement of the grant applicant it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used to define the performance or other salient requirements of the material or product. In so doing, the specifications must clearly state the salient requirements which must be met by the material or product.

With regard to materials such as pipe or grout, it is preferable to use nationally recognized performance specifications such as AWWA, ASTM, or Federal specifications.

While the decision to use a "brand name or equal" specification rests with the grant applicant, the project reviewer is to insure that the exercise of this provision does not frustrate the requirements for free and open competition.

An exception to the nonrestrictive specifications requirement is allowed where the features of a material or product are necessary to demonstrate a specific thing, such as in the case of proposed innovative technologies, or to provide for the interchangeability of parts or equipment.

Where a grant applicant uses restrictive specifications, it may be prudent to advise the grant applicant that the project files should contain a justification for such actions, developed prior to the bid opening date, in the event of a future bid protest.

Re: 40 CFR 33.255*, 31.36(c)(3)

cc. Subsurface Information

Adequate subsurface information (soil borings, etc.) must be provided to allow each bidder to accurately estimate the cost of excavation required by the plans and specifications. Failure to provide such information increases the probability of a future contractor claim under the "differing site conditions" clause.

dd. Storage of Equipment and Materials

The specifications should require that equipment and materials delivered to the project site are properly secured and stored in accordance with the manufacturer's recommendations. If the grantee purchases equipment directly from a supplier, specific provisions must be made for transfer of ownership of the equipment from the grantee to the contractor.

3. Biddability and Constructibility Review

In order to prevent unnecessary costs due to such problems as unclear specifications or unusual construction techniques, it is important that plans and specifications be reviewed for biddability and constructibility (B/C). While the B/C review does not involve an evaluation of the adequacy of design to achieve the required level of treatment, it does attempt to insure that the plans and specifications are suitable for bidding and that the project can be constructed as proposed.

a. Biddability - A "biddability" review esentially attempts to insure that:

i. the bid documents are clear and understandable,

ii. all necessary information has been included,

iii. the project is divided into biddable packages or contracts,

iv. specific bid items are clearly defined to facilitate bidding and evaluation, and

v. the plans and specifications are sufficiently detailed to allow reasonable bidding.

b. Constructibility - A "constructibility" review evaluates the suitability of the proposed project and its components in relation to the project site, including:

i. any potential construction constraints imposed by the site,

ii. real or possible conflicts inherent in the plans and specifications,

iii. compatability between plans and specifications,

iv. compatability of the plans and specifications with construction procedures and equipment, and

v. other potential problems in constructing the project.

Because this review requires an up-to-date knowledge of current construction practices and the cost and availability of various categories of labor and construction equipment, it is usually performed by specialized personnel who maintain this up-to-date knowledge. In some States, the COE performs this review for the State agency, under an interagency agreement with EPA (see Section I.F.5).

4. Discrepancies

Contract documents, plans, and specifications are reviewed by the reviewing agency to insure that they meet minimum State and EPA requirements concerning treatment level and competitive bidding. Implicit in this review is the assumption that the project, if constructed in accordance with the plans and

The VE study will conclude with a final report (intermediate reports may also be issued) which incorporates:

- accepted VE recommendations,
- costs and schedules for implementing the accepted recommendations,
- rejected recommendations and reasons for rejection, and
- net savings from the VE recommendations over the useful life of the project.

In order to better understand the VE recommendations, it may be helpful for the reviewer to attend key sessions of the VE review. Grant applicants should be encouraged to implement all feasible recommendations of the VE study, and rejection of recommendations should be adequately justified before acceptance of the study by the reviewing agency. However, reviewing agencies must exercise reasonable judgement in questioning those recommendations not accepted by the grant applicant.

Review Procedures:

1. Conduct of the Study

During periodic progress reviews with the grant applicant, review:

a. the scope of the VE study to insure that it is commensurate with the size and complexity of the project;

b. the qualifications of the VE coordinator and team members;

c. the independence and objectivity of the VE team; and

d. the methodology proposed or employed during the study.

2. Implementation of Recommendations

At the completion of the VE study and during review of the plans and specifications:

a. obtain a copy of the final VE report, noting recommendations accepted and net cost savings (both capital and O&M over the life of the project);

b. insure that accepted recommendations are incorporated into the project design and reflected in the plans and specifications; and

c. review VE recommendations rejected by the grant applicant and the justification for rejection.

Re: 40 CFR 35.926, 35.2114; EPA publication 430/9-76-008, "Value Engineering Workbook for Construction Grant Projects," July 1976.

E. USER CHARGE SYSTEM

Purpose:

Develop a municipally enacted financial managment system which provides for the collection of revenues from users in proportion to their use. Collected revenues must be sufficient to offset the costs of operation, maintenance, and replacement of equipment (OM&R).

Discussion:

As a prerequisite to Step 3 grant award, the UC system submitted by the grant applicant and by each subscriber community must be approved by the reviewing agency. The UC system provides for the collection of revenues from all system users to offset OM&R costs, including salaries, supplies, chemicals, utilities, insurance, and replacement of equipment and accessories (e.g., pumps, motors, bearings, etc.) which are necessary during the useful life of the project to maintain capacity and performance. As a component of the UC system, the term "replacement" does not include the replacement of the treatment works at the end of its useful life. The UC system mandated by EPA regulations also does not include charges levied on customers to pay bond interest, retire bonds, or amortize debt.

The charge to each user must be based on actual use, ad valorem taxes, or a combination of both. A system based on actual use (or estimated use during the first year for new facilities) assumes that discharges are measured in some way, such as through water meters (or sewage flow meters for large industrial dischargers), and that each user or class of users pays its proportionate contribution relative to the total flow. Very often the basic UC will be proportionate to the volume of discharge with a surcharge added for non-domestic wastes, considering items such as sewage strength and rate of discharge (e.g., peak flows). The UC system must also provide that each user which discharges pollutants that cause an increase in the cost of managing effluent or sludge pay for such increase based on the actual additional cost.

In conjunction with the above, a provision in the 1987 amendments to the Clean Water Act allows grantees to include in their UC systems an optional class of low income residential users (LIRUs) and charge these users lower user rates. An LIRU is any residence with a household income below the Federal poverty level as defined in 45 CFR 1060.2 or any residence designated as low income under State law or regulation. Grantees receiving construction grants after March 1, 1973 may implement this provision after providing for public notice and hearing and receiving the delegated State or Regional approval.

The use of ad valorem taxes as a basis for a UC system is allowed under EPA regulations for a grant applicant which had in existence on December 27, 1977, and in continuous use thereafter, a system of dedicated ad valorem taxes for the collection of revenues to offset wastewater treatment OM&R costs. In most cases, the existing system will require revision to meet EPA requirements. To be approvable, the proposed UC system must distribute costs to residential and small nonresidential users (including, at the grant applicant's option, commercial and industrial users discharging no more that the equivalent of 25,000 gallons per day of domestic sanitary waste) in proportion to their use as a class, and must charge each commercial and industrial user discharging more than 25,000 gallons per day its share based upon actual use. This last requirement is normally met through the use of a surcharge based on sewage strength and/or rate of discharge. In some cases, rebates of property taxes may be required for industries with large property taxes and proportionately smaller wastewater loadings.

Communities with combined sewer systems, or with significant amounts of inflow into nominally separate sewer systems, may distribute the OM&R costs of treating this flow among all users based either on actual use, or on a system which uses factors such as flow, the land area of each user, or the number of hookups or discharges (or property value for ad valorem systems). Projects which generate revenues from the sale of wastewater byproducts (e.g., sale of crops, sludge fertilizer, digestor gas, etc.) must use the revenues to reduce all user charges proportionately.

The UC system represents part of the financial management system developed by the grant applicant and must include an accurate accounting of generated revenues, expenditures and reserves for replacement. The financial management system must provide for periodic revision to UC rates and an annual notification to users, in conjunction with a regular bill, of the UC rates (including surcharge rates) and the portion of total charges attributable to wastewater treatment. If the grant applicant will provide wastewater treatment services to other subscriber communities, each such community must also enact a UC system as described above. The UC system developed in accordance with EPA regulations will take precedence over any terms or conditions of other inconsistent agreements.

Review Procedures:

The reviewer of a proposed UC system should:

1. Compare the proposed UC rates against those presented to the public during facilities planning. If a significant increase has occurred, it may be necessary to provide for additional public participation.

2. Insure that the budget upon which the user charges are based include reasonable OM&R costs. Debt, bond costs, and other costs not associated with OM&R are not subject to EPA regulations, and must be separately identified by the grantee and recovered separately from the UC system.

3. For systems based on actual use, insure that each user or class of users will pay its proportionate share, and that a reasonable means of determining actual use has been or will be established.

4. For systems based on ad valorem taxes, insure that the limitations described in the discussion above are satisfied.

5. Insure that OM&R costs for treating I/I (and storm water in systems with combined sewers) are proportioned among all users based either on actual use, or on factors such as flow volume, land area of users, or number of hookups or discharges (or property valuation only for ad valorem systems).

6. Insure that the system provides for an accurate accounting of revenues and expenditures, periodic updating (first year may be based on estimates for new systems and ideally annual updating thereafter) and annual notification to users of the UC rates and portion of charges for wastewater treatment services.

7. Insure that the user rate for LIRUs is defined as a uniform percentage of the user charge rate charged other residential users and that the amount of any cost reductions afforded the low income residential class is proportionately absorbed by all other user classes so that the total revenues for OM&R are not reduced as a result of establishing a low income residential class.

8. For multijurisdictional projects, insure that each participating community will enact a UC system.

9. Insure that the UC system will take precedence over any other inconsistent agreement.

10. Insure that the UC system is in a form which will allow municipal enactment before the project is placed in operation, and will continue for the life of the project.

Re: 40 CFR 35.2140, 35.2122, 35.2208; EPA publication 430/9-84-006, "User Charge Guidance Manual for Publicly-Owned Treatment Works," June 1984; EPA publication, "Utility Manager's Guide to Financial Planning," May 1984; FR 15821, 5/4/88.

F. SEWER USE ORDINANCE

Purpose:

Develop an ordinance which will limit the types and amounts of materials discharged into the sewer system, preclude the introduction of new inflow sources, and protect the integrity of the wastewater treatment and disposal system.

Discussion:

As a prerequisite to Step 3 grant award, the reviewing agency must approve the grant applicant's SUO or other legally binding instrument. Regulatory requirements for the SUO include:

- prohibition of new inflow sources;
- proper design and construction of new sewers and connections, and
- prohibition of toxic waste or other pollutants in amounts or concentrations that:
  - o endanger the public safety or the physical integrity of the plant,
  - o cause violation of effluent limitations, or
  - o preclude the selection of the most cost effective alternative for wastewater treatment and sludge disposal.

While the three items above are required, the SUO may also be used as a legal basis for other municipal requirements which represent good management practices. These requirements may include:

- removal of illegal connections or rehabilitation of deficient sewer connections as a condition of property sale,
- limitations on wastewater strength from non-domestic users,

- prohibition against dilution,

- notification procedures concerning accidental spills,

- discharge reporting requirements,

- rights of all parties, including the right of the municipality or authorized EPA/State personnel to enter all properties for testing and measurement,

- rights of industrial users, including protection of trade secrets, and

- safety requirements.

Subscriber communities must also enact SUOs, in order to provide protection for the entire system. These subscriber communities' ordinances must also be approved by the reviewing agency.

Review Procedures:

An approved SUO must, at a minimum:

1. Prohibit new inflow sources.

2. Require the proper design and construction of new sewers and sewer connections.

3. Prohibit toxic or other pollutants in amounts or concentrations which:

   a. endanger public safety or the physical integrity of the treatment works,

   b. cause a violation of effluent limitations, or

   c. preclude selection of the most cost effective alternative for wastewater treatment and sludge disposal.

4. Be adopted before the project is placed in operation.

Re: 40 CFR 35.2122, 35.2130, 35.2208

## A. INTRODUCTION

This chapter describes the documents which constitute a Step 3 grant application package, the review procedures for each document, and the limitations which must be satisfied before grant award. Later sections describe Step 2+3 and other special purpose grants and the limitations which must be satisfied before these grants can be awarded. The final sections discuss the methodology for establishing the EPA grant amount and the procedures associated with the award of a grant.

Section B, Application Contents, lists those items specifically required by the regulations for a Step 3 grant application.

Section C, Application Review, describes the review of the basic documents which constitute a Step 3 grant application. It does not include limitations on award.

Section D, Limitations on Award, describes those limitations, specifically required by the regulations, which must be satisfied before grant award. This section also discusses phased and segmented projects and limitations on the eligibility of reserve capacity.

Section E, Additional Considerations for Award, describes other considerations which may have to be satisfied before grant award, but which are not listed under the specific heading "Limitations on Award" in the construction grant regulations.

Section F, Step 2+3 Grants, describes the conditions under which a Step 2+3 grant may be awarded.

Section G, Combined Sewer Overflow Grants, describes conditions for the award of grants for both marine and nonmarine combined sewer overflow (CSO) Step 3 projects.

Section H, Land Acquisition Grants, describes conditions and limitations for the award of grants for the acquisition of eligible land.

Section I, Innovative or Alternative Technology Field Testing Grants, describes conditions and limitations for the award of grants for field testing of an innovative or alternative (I/A) technology.

Section J, Innovative or Alternative Technology Modification or Replacement Grants, describes the regulatory requirements which must be satisfied before a 100 percent modification or replacement (M/R) grant may be awarded for a failed I/A technology.

Section K, Grants to States for Advances of Allowance, describes the procedures for awarding a grant to a State, in order for the State to provide advances of the allowance for facilities planning and/or design to small communities.

Section L, Federal Grant Share, describes the methodology for computing the EPA grant share.

Section M, Grant Award Procedures, describes the procedures for awarding grants and the circumstances under which special grant conditions may be added to the grant agreement.

## B. APPLICATION CONTENTS

The basic items to be included in a grant application package for a Step 3 grant are listed below. The requirements for other grants (e.g., Step 2+3, Step 7, correction of CSO, land acquisition, etc.) are described later in this chapter. The items below are only those submitted by the applicant, and do not include items prepared by the State and submitted to EPA. The items are listed here for quick reference, while the review procedures for each item are described later. The reviewer is to make a preliminary review of the application package to insure that all items are included (some may be contained within the facilities plan), that all applicable portions of the forms are completed, and that the documents are signed by the appropriate officials. If items are missing or an explanation is necessary, the reviewing agency should contact the grant applicant; however, the review is to proceed as far as possible, to minimize delays once corrections are made. A complete application package includes:

1. application (EPA Form 5720-12);

2. facilities plan prepared in accordance with 40 CFR Part 35, Subpart E or Subpart I as appropriate;

3. evidence of adequate public participation based on State or local statutes;

4. notification of any previous advance of allowance or Step 1 or Step 2 grant received;

5. final design drawings (i.e., plans) and specifications;

6. project schedule;

7. evidence of compliance with the applicable limitations on award, including:

   a. advanced treatment review;

   b. conformance with the approved water quality management (WQM) plan;

   c. demonstration and certification of financial and management capability to build, operate, and maintain the proposed project;

   d. certification that the grant applicant has not violated any Federal, State, or local law relating to corrupt practices in connection with facilities planning or design;

   e. indication of the level of participation for minority and women's business enterprises (MBE/WBE) during facilities planning and design (EPA Form 6005-1);

   f. certification regarding debarment, suspension and other responsibility matters - i.e., that the grantee and its principals are not presently debarred or suspended, etc. and have not, in the past three years, been involved in fraud or other criminal offenses regarding public contracts or had a public transaction terminated for cause or default.

   g. draft plan of operation;

   h. executed intermunicipal service agreements,

   i. environmental review;

   j. value engineering (VE) study;

   k. for collector sewers, evidence that either:

      i. the existing collection system being replaced or rehabilitated was not built with Federal funds awarded on or after October 18, 1972, or

      ii. the new collection system will serve a community which was in existence on October 18, 1972;

l. prior approval of any preaward costs;

m. analysis of infiltration and inflow (I/I);

n. user charge (UC) system;

o. sewer use ordinance (SUO);

p. estimate of capacity required to treat current needs, and amount of reserve capacity;

q. amount and nature of industrial and Federal facility wastes to be treated; and

r. assurance of access to individual systems;

s. certification that the grant applicant will take steps to provide and maintain a drug free workplace in accordance with the Drug Free Workplace Act of 1988.

t. assurance that the requirements of the Brooks-Murkowski Amendment, which related to restrictions on contracting with firms of countries (viz Japan) which deny fair and equitable market opportunities for U.S. products and services, will be met on grants awarded between December 22, 1987 and September 30, 1988.

8. intergovernmental review;

9. procurement system certification (EPA Form 5700-48) and related documents; and

10. certification of nondiscrimination (EPA Form 4700-4)

Re: 40 CFR Part 7; 40 CFR Part 29; 40 CFR Part 33*; 40 CFR 35.2040, 35.2100 through 35.2140, 40 CFR 32.600 and 32.510; 40 CFR Part 31.

## C. APPLICATION REVIEW

### 1. Application Form

Purpose:

Present information from the grant applicant which is necessary for a grant award. The application also contains a list of assurances from the applicant which are necessary to satisfy statutory requirements. Additional assurances may also be necessary.

Discussion:

The application for grant assistance is submitted by the municipality designated in the approved WQM plan and in the facilities plan for the project. The application must be signed by an official of the municipality, and must be accompanied by a resolution from the municipal governing body, designating this official as the municipality's authorized representative.

Individual items in the application form are reviewed for completeness and accuracy. In reviewing the application form, the reviewer insures that the grant applicant:

- has the legal, institutional, managerial, and financial capability to insure adequate building and operation of the project;
- has the ability to expeditiously initiate procurement and to complete the project in accordance with the project schedule;
- has complied with all applicable statutory and regulatory requirements prior to grant application;
- recognizes and agrees to comply with all other applicable statutory and regulatory requirements during construction and for the useful life of the project; and
- provides documentation or narrative statements supporting the cost estimates included in the application.

During the review of the application form, particular attention should be given to the source of funds for the local share of project costs (e.g., State grants, sale of bonds, other Federal grants which are authorized by statute to be used as non-Federal

funds on EPA-funded construction projects, etc.). In addition, title to ineligible land, easements, and rights-of-way must be acquired prior to application, or have progressed to the stage where title or interest in the property may be obtained prior to the award of construction contracts. Problems with local share funding and land acquisition must be satisfactorily resolved prior to grant award in order to prevent costly delays in building the project. Condemnation proceedings, if required, are usually time consuming, and therefore should be undertaken well in advance of submitting the grant application.

Review Procedures:

Review the application form and insure that:

a. the name, project number, description of the project, and grant amount requested agree with the approved State project priority list;

b. the application form is signed by the municipality's authorized representative;

c. documentation of the applicant's interest in the project site, easements, and rights-of-way is complete; the method of acquisition, including relocation, complies with applicable provisions of 40 CFR Parts 4, [30] and 49 CFR Part 24; and where land acquisition costs are eligible for grant participation, the Federal interest in the eligible land is protected (sees Sections H.1.f, H.3.b, and M.5.d below);

d. the applicant can obtain funds for the balance of project costs beyond the EPA grant to allow the prompt initiation of construction;

e. the applicant has the legal, institutional, managerial, and financial capabilities to build, operate, and maintain the project (see Section D.4 below);

f. the estimated project costs reasonably compare with the costs in the facilities plan, the financial capability analysis, and presentations to the public;

g. estimated project costs are separated into allowable and unallowable costs, and allowable costs are separated into the following cost categories: construction, administration, legal, fiscal, engineering services (both during construction and for one year after the initiation of operation), contingency allowance, allowance for facilities planning and design, force account, and land acquisition and relocation;

h. the assurances section of the application is attached to the application form; and

i. all items in the application form are either complete or marked "not applicable" (may be abbreviated "N/A").

Re: 40 CFR 30.302*, 30.520*, 30.535*, 35.2040(b), 35.2104, 35.2212, 31.10, 31.31(a) and (b)

2. Facilities Plan

An approvable facilities plan which satisfies the requirements of 40 CFR Part 35 must accompany the application for grant assistance.

If work on facilities planning was initiated before May 12, 1982 (the effective date of 40 CFR Part 35, Subpart I), the facilities plan must satisfy the requirements of 40 CFR Part 35, Subpart E, rather than Subpart I. If the facilities plan was not prepared under an EPA Step 1 grant, a grant applicant claiming initiation of facilities planning before May 12, 1982 will need to substantiate this claim with appropriate documentation. If facilities planning was initiated prior to May 12, 1982, and meets the requirements of Subpart E, no revisions to the facilities plan will be required solely to satisfy the requirements of Subpart I. However, if considerable time has elapsed since the completion of the facilities plan, this work should be carefully reviewed and updated as necessary, since it may have been based on information (e.g., existing population, flows, costs, etc.) which is no longer valid.

Facilities planning initiated after May 12, 1982 must satisfy the requirements of 40 CFR Part 35, Subpart I, as described in

Chapter IV. Where a facilities plan has been submitted, reviewed, and approved by the reviewing agency prior to grant application, the reviewer is to insure that the project described in the application agrees with the selected plan in the approved facilities plan and that the environmental review has been completed (see Section D.12 below).

Re: 40 CFR 35.2040(b)(1)

3. Public Participation

State agencies, when certifying a project to EPA for grant award, are required to certify that adequate public participation was provided by the grant applicant, based on applicable State and local statutes. In making this certification, the State agency should review the application documents, primarily the facilities plan, to verify that this requirement was met (see Section IV.C.7.4 for a full discussion of public participation requirements).

Re: 40 CFR 35.2040(b)(2)

4. Notification of Advance of Allowance

Where a State has made an advance of allowance to help a grant applicant prepare a facilities plan and/or design documents, the grant applicant must so indicate in the application, and state the date and amount of the advance and any conditions attached to the advance. Refer to Section III.E for procedures on providing an advance of allowance to a potential grant applicant.

Re: 40 CFR 35.2025, 35.2040(b)(3)

5. Plans and Specifications

Approvable contract documents, including plans (i.e., final design drawings) and specifications, must accompany the application for grant assistance. The plans and specifications must comply with all State requirements and EPA regulations and policies, and must be consistent with the facilities plan and any mitigating measures as a result of the project's environmental review (see Sections IV.C.7.3 and IV.D).

Design work initiated after May 12, 1982 must satisfy the requirements of 40 CFR Part 35, Subpart I, as described in Section V.C. Where the plans and specifications have been submitted, reviewed, and accepted (i.e., found to be approvable) by the reviewing agency prior to grant application, the reviewer is to verify that the project described in the application agrees with the previously approved plans and specifications.

If the design work was initiated before May 12, 1982 (the effective date of 40 CFR Part 35, Subpart I), the design must satisfy the requirements of 40 CFR Part 35, Subpart E, rather than Subpart I. If the design work was not accomplished under a Step 2 grant (or in rare cases, a Step 2+3 grant which was terminated prior to the initiation of construction), a grant applicant claiming initiation of design work before May 12, 1982, will need to substantiate this claim with appropriate documentation. If design work was initiated prior to May 12, 1982, and meets the requirements of Subpart E, no revisions to the design work will be required solely to satisfy the requirements of Subpart I. However, if considerable time has elapsed since the completion of the design work, this work should be carefully reviewed and updated as necessary, since it may be based on information (e.g., site conditions, availability of construction materials and labor, etc.) which is no longer valid.

In all cases, a current wage rate determination, current labor standards provisions, and all current procurement requirements must be incorporated into the contract documents.

Re: 40 CFR Part 33*; 40 CFR 35.2040(b)(5), 31.36

6. Project Schedule

Purpose:

Set forth a timetable for key project events, provide for the timely completion of the project, and insure compliance with permit and compliance schedules, court orders, and State enforcement orders.

Discussion:

A project schedule is an important part of the grant application. It is to be reviewed carefully to verify that the grant applicant has anticipated all key project events, including procurement actions, construction initiation, building milestones and completion, implementation of the plan of operation, startup, pretreatment program actions (where needed), engineering supervision during the first year of operation and project certification. Since the date of grant award is not known at the time the grant

applicant prepares the schedule, the timetable may be expressed in terms of the number of weeks from the date of grant award.

The major component of a Step 2+3 or a Step 3 project schedule is the construction schedule. Realistic and reliable construction schedules will facilitate meeting the 1988 compliance deadline for new POTWs and avoid extra costs associated with poor scheduling practices. To assist project reviewers in evaluating construction schedules, OMPC issued guidance to the Regional Office by memorandum dated May 20, 1986. The emphasis in the guidance is intended to be on the many and diverse factors which should be considered in evaluating a construction schedule rather than on specific numerical values.

The project schedule must be carefully reviewed for reasonableness, and may require review and coordination with other sections within the State agency, EPA, or other Federal agencies (e.g., National Pollutant Discharge Elimination System (NPDES) permit section, U.S. Army Corps of Engineers (COE), U.S. Fish and Wildlife Service, etc.). The project schedule forms a part of the grant agreement, and significant changes in the schedule require a formal grant amendment.

Review Procedures:

Review the project schedule to insure that:

a. the schedule includes key project events (e.g., procurement, initiation of construction, building milestones, project completion, startup, certification, etc.), and that the timetable is reasonable, considering the size and complexity of the project;

b. the schedule agrees with other regulatory compliance schedules (e.g., NPDES permits), court orders, and State enforcement orders; and

c. the schedule is coordinated, as appropriate, with the schedule in the draft plan of operation and, where appropriate, with the schedule for the development of a pretreatment program.

Re: 40 CFR 35.2005(35), 35.2040(b)(6), 35.2204(b)(3)

"Wastewater Facilities Financial Information Sheet," is included as Attachment A to the policy statement. Additional guidance is provided to the applicant in a publication entitled "Financial Capability Guidebook." While the five basic questions must be answered, both the information sheet and the guidebook are only guidance, and States are encouraged to modify them according to the individual State's needs.

Other documents submitted by the grant applicant will also provide evidence of the applicant's financial and managerial capability. In the case of a project serving more than one municipality, the executed intermunicipal service agreement (see Section V.H) will be an indication of the institutional and financial obligations of each participating municipality. Additionally, the draft plan of operation (see Section V.G) will demonstrate that the applicant has considered the financial and managerial needs, including a staffing plan and budget, for the operation of the facility. The UC system (see Section V.E) will provide further evidence that the applicant will be able to collect adequate revenues for operation, maintenance, and replacement (OM&R). Finally, the SUO (see Section V.F) will demonstrate that the grant applicant has considered the problems resulting from extraneous or nonresidential wastes, and has the legal authority to prevent or correct such problems.

The initial demonstration of financial and managerial capability should have taken place either during or at the time of completion of facilities planning. At the time of grant application, however, it may be necessary to reevaluate this information and request that the grant applicant update some of the information to reflect current conditions. Such an update, combined with a review of the entire application package (with particular emphasis placed on the items cited above), will collectively allow the reviewing agency to determine whether or not the grant applicant has the financial and managerial capability to finance, build, and operate the proposed project successfully.

Review Procedures:

Review the application documents to insure that the grant applicant has agreed to pay the non-Federal share of project costs. The authorized representative's signature on the application form will usually satisfy this requirement. However, more specific assurances should be required from an applicant which has previously failed to provide the non-Federal share in a timely manner, or when there are other reasons to suspect that the applicant may not be able to pay the non-Federal share.

Review the applicant's demonstration that it has the legal, institutional, managerial, and financial capability to adequately build and operate the treatment works. Again, more specific assurances should be required from an applicant which has previously failed to adequately build and operate a treatment works or other construction project, or when there are other reasons to suspect that the grantee lacks the required capability.

Review the applicant's answers to the five basic questions contained in the "Financial and Management Capability" policy statement. These answers, combined with the information in the intermunicipal service agreement, draft plan of operation, UC system, and SUO, must demonstrate the applicant's financial and managerial capability.

The reviewing agency should have developed screening procedures for identifying applicants whose projects need greater attention to satisfy the above requirements (e.g., based on high cost per user, the use of unusually complex technology, etc.), and should not approve applications which do not adequately demonstrate that the project can be successfully financed, constructed, and operated. Where an adequate demonstration has not been made, the reviewing agency should provide advice to the applicant on both the technical and financial aspects of the proposed project, in order to help the applicant improve its capabilities or decrease the complexities of the project

Re: 40 CFR 35.2104; EPA final policy on "Financial and Management Capability for Construction, Operation and Maintenance of Publicly Owned Wastewater Treatment Systems," 49 FR 6254 through 6258 (February 17, 1984); EPA publication, "Financial Capability Guidebook," March 1984

5. Utilization of Small, Minority, Women's, and Labor Surplus Area Businesses

In order to increase the utilization of small, minority, women's, and surplus area businesses during facilities planning and design, it is EPA's policy to encourage potential grant applicants to adopt procurement procedures which, at a minimum, include the six affirmative steps in EPA's procurement regulations (see Section V.C.1.w) for all activities of their construction program.

At the time of grant application, the grant applicant is required to indicate to the reviewing agency the level of MBE/WBE participation in facilities planning and design by completing EPA Form 6005-1. This information will be used by EPA to meet its obligation to report MBE/WBE participation in the construction grants program.

Re: 40 CFR 33.240*, 35.2104(d), 31.36(e); OMB Circular A-102, ¶7.d. (3/3/88)

6. Unlawful Practices

The grant applicant is required to certify to the reviewing agency that it has not violated any Federal, State, or local law pertaining to fraud, bribery, graft, kickbacks, collusion, conflict of interest, or other unlawful or corrupt practices in connection with facilities planning or design work for the wastewater treatment project. This certification will normally be in the form of a letter signed by the authorized representative.

7. Debarment and Suspension

Purpose:

Determine if an individual, organization, or unit of government which is listed on the General Services Administration's Lists of Parties Excluded from Procurement or Nonprocurement Programs (GSA List) has performed facilities planning or design work for the grant applicant, and if so, what remedial action may be appropriate on the part of the State agency or EPA.

Discussion:

It is EPA policy to limit financial assistance and grant subagreements to participants which properly use Federal funds, and to deny participation in its programs to those who have been debarred or suspended in accordance with 40 CFR Part 32.

A grant applicant is required to indicate whether it has used the services of an individual, organization, or unit of government, which is listed on the GSA List, to perform facilities planning or design work. Any individual, organization, or unit of government whose name appears on the GSA List may be excluded throughout the Federal Government from receiving Federal contracts or federally approved subcontracts and from certain types of Federal financial and nonfinancial assistance and benefits.

Review Procedures:

Review the application or separate submission to determine:

a. whether the grant applicant has used the services of an individual, organization, or unit of government, which is on the GSA Lists for facilities planning and design work; and

b. if the grant applicant answers affirmatively, determine whether to award a grant or whether the applicant should be found non-responsible.

Re: 40 CFR 30.301(d)*, 32.200, 32.500, 32.510, 35.2105, 31.35

8. Plan of Operation

A draft plan of operation is part of the application package. The draft plan is to address the development of a plan to provide adequate wastewater treatment during construction, an operation and maintenance (O&M) manual, an emergency operating program, personnel training, an adequate budget consistent with the UC system, operator reports, laboratory testing capability, and an O&M program for the complete waste treatment system of which the project is a part. The draft plan may be in the form of a descriptive chronological schedule which provides a timetable for the preparation and submission of the required documents and for actions to be taken by the grantee during construction. Refer to Section V.G for a more complete discussion.

Re: 40 CFR 35.2106

9. Intermunicipal Service Agreement

An executed intermunicipal service agreement is to accompany the grant application for projects which will serve more than one municipality. At a minimum, the agreement must include the following information:

a. the basis upon which costs are allocated,

b. the formula by which costs are allocated, and

c. the manner in which the cost allocation system will be administered.

In order to prevent costly delays in building the project (due to a lack of funds to pay the grantee's non-Federal share), and later in implementing necessary UC increases, the agreement should include provisions for rapidly resolving disputes between the grantee and a subscriber community. The intermunicipal service agreement may also serve as the legal document which commits each participating municipality to developing, enacting, and enforcing a UC system, a SUO and if required, a pretreatment program. The intermunicipal service

iv. the grantee provides assurances that if grant assistance is awarded, the existing population will connect to the collection system within a reasonable time (as determined by the reviewing agency) after project completion.

Re: 40 CFR 35.2116

15. Preaward Costs

Purpose:

Provide grant assistance for the cost of work which was accomplished prior to the date of grant award, if such work is normally accomplished after the award of a Step 3 grant, only if such work has been approved in advance by the reviewing agency.

Discussion:

Where a potential grant applicant requests approval of preliminary work normally accomplished after the award of a Step 2+3 or a Step 3 grant, approval may be given by the reviewing agency only in an emergency or an instance where delay could result in a significant cost increase, and only after completion of the environmental review (see Item 12 above). Examples of the types of preliminary Step 3 3 work which may be approved are:

a. procurement of major equipment requiring long lead times;

b. field testing of I/A technologies (see Section I below);

c. minor sewer rehabilitation;

d. acquisition of eligible land or of an option for the purchase of eligible land (see Section H below); and

e. advance building of minor portions of treatment works.

Review Procedures:

Where the grant application requests EPA participation in the cost of preaward work which is normally accomplished after the award of a Step 3 grant, insure that:

- prior written approval by the reviewing agency has been given;
- the work is eligible for grant participation; and
- associated procurement actions satisfy the requirements of 40 CFR [Part 33] 31.36, or in the case of acquisition of eligible real property, 40 CFR Part 4.

Where approval of preaward costs is given by the reviewing agency, the potential grant applicant should be advised in writing that: approval is not an actual nor implied commitment of grant assistance (i.e., that the applicant proceeds at its own risk);, and that if a grant is awarded, this preaward work will be eligible only if it was procured in accordance with 40 CFR [Part 33] 31.36 for services, equipment, or supplies, or 40 CFR Parts 4, [30], 49 CFR Part 24 and 40 CFR 31.31 for the acquisition of real property.

This limitation on preaward costs applies equally to Step 2+3 and Step 3 grants, but concerns only work which is normally accomplished after the award of a Step 3 grant. Work which is normally accomplished before the award of a Step 3 grant is classified as design-related work, whose cost is not directly eligible for grant assistance, but instead is expected to be defrayed by the allowance for facilities planning and/or design.

Re: 40 CFR 35.2118; 40 CFR Part 35, Subpart I, Appendix A, Paragraph A.2.a, and Appendix B, Paragraph 3

16. Infiltration and Inflow

This limitation on award is applicable only to grant applicants with existing sewer systems. Before grant award, the grant applicant must demonstrate that the existing sewer system is not or will not be subject to excessive I/I.

The analysis of the sewer system to determine the presence of excessive or nonexcessive I/I is performed during the facilities planning and is used to establish present and future flows. If a

20. Pick-Up Projects

Projects which are ready for a construction grant, but are not high enough on a State's priority list to be funded, but high enough to expect to be funded in a following fiscal year, may elect to initiate bidding and construction in advance of an expected grant. This would be done with the understanding that, as soon as State allotted funds become available, a grant would be awarded for the unfinished portion of the project. (E.g., if the project were 30% complete at the time funds are available, it would receive a grant based on 70% of the project's eligible cost.) In addition, an allowance for planning and design costs would not be reduced by the (percent of the) portion of the project completed prior to the pick-up award.)

For a project to be awarded a grant on a "pick-up" basis, it must satisfy, at the time of grant award, all of the same grant and post award approvals required of a regularly funded grant project.

Accordingly, potential pick-up grant projects must undergo the same facility planning, plans and specifications, bidding and contract award review and approval as a fully funded project in order to be eligible for a post initiation of construction grant. Unless, at the time the pick-up grant is requested, there is documented evidence in State files clearly indicating that such reviews were satisfactorily completed, the pick-up grant award cannot be made. In addition, grant anticipating municipalities must maintain complete construction records so that an audit trail of invoices and expenditures are accessible enabling ineligible pre-award and eligible post award costs to be readily determined.

When a partially funded project rises to the fundable portion of a State's priority list, construction grant funds may be awarded for the remaining unconstructed portion -- regardless of the status of construction contracts involved.

At such time as funding can occur, the cost of the completed portion of the project must be determined. This may be accomplished indirectly by obtaining percent of construction-in-place documents for the months before and after the grant award date and interpolating or directly by dispatching Federal or State construction inspectors to the site to establish the amount of construction-in-place and on-site materials stored. Preferably photographs should also be taken on the site to further

establish the project's status. A grant would be awarded for the balance or uncompleted eligible portion of the project. Upon awarding a pick-up grant, the grantee must be notified in writing that any and all expenses accrued before the award date are and will remain ineligible for construction grant funding.

Re: 40 CFR 35.2118; Memorandum, 5/29/86 "Initiation of Construction and Grant Eligibility" from M. Quigley

21. Drug Free Workplace

Purpose

To assure that grantees provide for, and take the necessary steps to maintain, a drug free workplace in accordance with the provisions of Federal statutes and regulations.

Discussion

As a result of the passage of the Drug Free Workplace Act of 1988, beginning March 18, 1989, every applicant is required to certify to EPA, prior to receiving a grant, that it will take steps to provide and maintain a drug free workplace in accordance with the provisions of the Act. Regulations pertaining to this Act have been incorporated in 40 CFR Part 32 and failure to comply with its provisions may result in penalities as described in the debarment and suspension regulations.

Review Procedures

Review the application or separate submission to determine that the grantee has met the statutory requirements for a drug free workplace by certifying that it has or will:

a. Publish a drug free workplace policy statement notifying employees that unlawful drug related activity is prohibited, and specifiying actions to be taken against violating employees;

b. Establish a drug free awareness program to include -- information on the dangers of drug abuse, the grantees drug free policy, available drug counseling and rehabilitation programs, and penalties for violaters;

c. Issue a copy of the policy statement to all employees working under the assistance agreement;

d. Notify employees that they must abide by the terms of the policy statement as a condition of employment under the grant including notifying their employer of any criminal drug statute conviction in the workplace within five days of being convicted;

e. Notify the EPA Regional Administrator of any employees who have been criminally convicted of a drug offense occurring in the workplace within 10 days of the conviction;

f. Take appropriate personnel action against, or require satisfactory participation in a drug abuse rehabilitation program by any employee convicted of a drug offense occurring in the workplace within 30 days of receiving notice of the occurrence; and

g. Make a good faith effort to continue maintaining a drug free workplace program.

Re: 54 FR 4946 "Drug Free Workplace Requirements; Notice and Interim Final Rules" (January 31, 1989); 40 CFR Part 32.

## 22. Brooks-Murkowski Amendment

### Purpose

To assure that the provisions of the Brooks-Murkowski Amendment will be applied to all grants awarded between December 22, 1987 and September 30, 1988.

### Discussion

The Brooks-Murkowski Amendment, enacted by Congress on December 22, 1987, prohibited obligation or expenditure of Federal funds in FY 1988 for public works contract awards to firms of countries which deny fair and equitable market opportunities for United States products and services in major foreign construction projects. The restrictions apply to contract awards using funds obligated in FY 1988 (after 12/21/87) regardless of the contract award date. The only country affected by the Brooks-Murkowski Amendment is Japan. A Japanese contractor or subcontractor affected by this provision is a citizen or national of Japan or a firm which is controlled directly or indirectly by citizens of nationals of Japan.

The law applies to (a) architect, engineering, and construction services and any other services directly related to the preparation for or performance of the construction, alternation, or repair; (b) and product used in the construction, alteration, or repair if more than 50% of the total cost of the product is allocable to production or manufacture in Japan. The law does not apply to construction equipment or vehicles which do not become part of a delivered structure, product or project.

### Review Procedures

To implement this requirement, the reviewing official must assure that construction grants awarded in the defined FY 1988 period include the following special conditions:

a. The recipient agrees that no subagreement (contract or subcontract) for construction, alteration, or repair of a public building or public work will be awarded to (1) a Japanese citizen or natural; (2) a firm controlled directly or indirectly by Japanese citizens or nationals, or (3) a supplier of any product if more than 50% of the total cost of the product is allowable to production or manufacture in Japan.

b. The recipient further agrees that no subagreement for architect, engineering, or other services directly related to the preparation for or performance of such construction, alteration, or repair will be awarded to a Japanese citizen or national or a firm controlled directly or indirectly by Japanese citizens or nationals.

c. All public notices requesting proposals for bids must state that bids or proposals from such firms or suppliers shall be deemed nonresponsive and rejected.

d. The recipient may request the EPA Administrator, through State and Regional channels, to waive this condition where the recipient believes such a waiver to be in the public interest.

Re: Section 109, PL 100-202 (Brooks-Murkowski Amendment); OMB Memorandum M-88-17 (3/17/88); Memorandums, Brooks-Murkowski Compromise, Grants Administration Division (4/1/88) and (3/31/89).

## E. ADDITIONAL CONSIDERATIONS FOR AWARD

The items listed below are additional considerations which must be satisfied, where applicable, prior to grant award. Some of the items are considered limitations on award, but are listed separately here because they are not applicable to all projects.

### 1. Small Alternative Wastewater Systems

A small alternative wastewater system (SAWS) is characterized by onsite treatment and disposal, and/or alternative conveyance systems (i.e., pressure, vacuum, or small diameter gravity sewers). A SAWS project qualifies as an alternative technology, and may therefore receive a higher Federal grant share. A SAWS may be privately or publicly owned, but the responsibility for management and operation of the system must reside with the grant applicant. Where a SAWS is proposed, it is necessary to insure that the grant applicant recognizes and accepts the managerial responsibilities which are unique to these projects.

#### Review Procedures:

The review procedures below assume that a SAWS was selected as the cost effective alternative in the facilities plan. Much of the information necessary to satisfy the limitations on award described below may be found in the facilities plan or the applicant's demonstration of financial and managerial capability. The reviewing agency is to insure that a SAWS project satisfies the following conditions:

proposed, and where the costs will exceed $25,000, it is necessary for the grantee to obtain prior approval from the reviewing agency. The reviewing agency may approve force account work as an allowable project cost provided the conditions described in the review procedures below are satisfied. There are no restrictions on the use of force account work for facilities planning, design, or design-related work which is accomplished under an allowance (see Section III.D.3.c) rather than a Step 1 or Step 2 grant.

Review Procedures:

a. The reviewing agency may approve force account construction or construction related work provided that:

   i. the grant applicant demonstrates that municipal employees can complete the work competently and more economically than contractors; or

   ii. an emergency circumstance arises which makes the use of force account necessary.

b. Where force account work is approved by the reviewing agency, the grant applicant should be advised that force account costs are subject to audit, and that records or documents supporting such costs must be maintained. Substantiating records must include:

   i. time sheets approved and signed by a responsible supervisor, accounting for all hours worked during the period, showing separately the hours worked on the EPA funded project and on all other activities; and

   ii. documentation of an approved indirect cost rate (see Section IX.F.2.d.ii) where such burden rate is to be applied to force account work.

Re: 40 CFR 30.520*, 35.936-14

6. Intergovernmental Review

Under 40 CFR Part 29, States are encouraged to establish a State process, which is the framework under which States and local officials carry out intergovernmental review of proposed projects. The State process replaces the clearinghouse review process previously required

by Office of Management and Budget (OMB) Circular A-95 (frequently called A-95 review), and allows States to select the EPA programs which will be subject to intergovernmental review.

The regulations governing the establishment of the State process are designed to allow the States considerable flexibility in establishing procedures, while still insuring that proposed projects receive adequate review by concerned or interested parties and agencies, and that these parties and agencies are provided an opportunity to comment on proposed projects. Because the details of the State process will vary from State to State, only general review procedures are described below.

Based on the intergovernmental review regulations and the State process developed for a specific State, determine if the construction grants program is subject to an intergovernmental review, and if so, verify that the grant applicant has followed the specific procedures and requirements of the State process, and that any problems have been satisfactorily resolved.

Re: 40 CFR Part 29; 40 CFR 35.2040(b)(2)

7. Procurement of Professional Services

Procurement of professional services (e.g., engineering, construction management, legal, accounting, land appraisel, etc.) should be undertaken only after EPA reviews the completed "Procurement System Certification" (EPA Form 5700-48). Note that the review of the "Procurement System Certification" may not be delegated to State reviewing agencies. If the grant applicant procures professional services before grant award, the costs associated with the procurement action and any work performed under the subagreement prior to grant award are unallowable for grant participation (see Section IX.B.5.e), unless approved as a preaward cost (see Section D.15 above). However, if this work is classified as facilities planning or design work, it may be defrayed in part by an allowance for facilities planning and/or design (see Section III.E), or may be an eligible cost under an existing Step 1 or Step 2 grant. Preapplication review of the "Procurement System Certification" is encouraged, and is described in Section VII.B.1.

Re: 40 CFR 33.001(g)*, 33.110*, 31.36(g)(3)(ii)

8. General Grant Conditions

Along with the demonstration that the grant applicant has the financial and managerial capability to build and operate the proposed treatment works, the grant applicant is required to demonstrate its ability to comply with 40 CFR Part [30] 31.

Among other things, 40 CFR Part [30] 31 addresses the requirements for a grant application, payments, project management, deviations, etc. At the time of grant application review, particular attention should be given to property management standards and compliance with other Federal laws. Compliance with some Federal laws will be satisfied initially by including the "Labor Standards Provisions for Federally Assisted Construction Contracts" (EPA Form 5720-4) in the contract documents. Compliance with other Federal laws will also be fulfilled initially by the grant applicant's "assurance of compliance" in the grant application form (see Section C.1 above). The review procedures below highlight some of the requirements from the general grant regulations which may require special consideration during application review.

Where applicable, insure that the grant applicant has or will have the ability to fulfill the general grant requirements listed below:

a. property management standards;

Re: 40 CFR 30.530* through 30.537*, 40 CFR Parts 31 and 32

b. compliance with the Flood Disaster Protection Act (if the proposed project involves construction or property acquisition in a special flood hazard area and if the project is located in a community participating in the National Flood Insurance Program, the grant applicant must purchase flood insurance or commit to purchase it at the appropriate time as a condition of receiving grant assistance) (see Section V.C.1.1);

Re: 40 CFR 30.600(b)*; 40 CFR Part 6, Appendix A

c. the grant applicant may not propose the performance of any work on the proposed project by a facility on EPA's List of Violating Facilities, which includes facilities which have violated either the Clean Air Act or the CWA;

Re: 40 CFR 30.600(c)* and (d)*, 31.36(i)(12)

d. discrimination on the grounds of race, color, national origin, age, sex, and handicap is prohibited, and the grant applicant is required to submit a certification of non-discrimination (EPA Form 4700-4) with the grant application;

Re: 40 CFR 7.8(b), 30.600(d) through (g)*, 31.36(i)(3)

e. compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended, whether or not the real property is eligible for grant assistance (see Section VI.H).

Re: 40 CFR 30.600(i)*, 40 CFR Part 4, 40 CFR Part 24

f. if the proposed project will benefit Indians, compliance with the Indian Self-Determination and Education Assistance Act, which requires that Indians be given preference in training and employment opportunities;

Re: 40 CFR 30.600(j)*, PL 93-638, 25 USC Sec. 450e(b)

g. compliance with the Hatch Act, which requires State and local government employees to comply with restrictions on political activities if their principal employment activities are funded in whole or part by Federal Assistance;

Re: 40 CFR 30.600(k)*, Hatch Act of 1939, 5 USC Sec. 1501.08, 7320-28, 5 CFR Part 151

h. compliance with the Safe Drinking Water Act, which prohibits EPA grant assistance if the proposed project may contaminate a sole source aquifer which will result in a significant hazard to public health; and

Re: 40 CFR 30.600(l)*, PL 93-523 Sec. 1424(e), 42 USC Sec. 300h-3(e), 40 CFR Part 149

i. compliance with the reporting requirements for MBE/WBE utilization (see Sections B.7.E and D.5 above).

Re: 40 CFR 35.2104(d)

## F. STEP 2+3 GRANTS AND DESIGN/BUILD GRANTS

### 1. Step 2+3 Grants

Purpose:

Provide grant assistance for smaller projects (meeting specific size and cost limitations) after completion of facilities planning but prior to the completion of design.

Discussion:

Grant assistance may be provided to a community with a populations of 25,000 or less, for a project with an estimated building cost of $8 million or less, prior to the completion of the design work (i.e., a Step 2+3 grant). The grant is based on the estimated allowable costs, derived from the facilities plan, plus the appropriate allowance for facilities planning and/or design. The procedure assists smaller communities in financing their design costs and provides assurance that grant funds will be available (i.e., funds have been obligated) for building the project, assuming successful completion of the design and the satisfaction of all other requirements.

The review procedures below describe the conditions which must be satisfied before a Step 2+3 grant can be awarded.

Review Procedures:

#### a. Qualifications

Applicant and project qualifications for Step 2+3 grant award include:

(1) the population of the applicant's municipality is 25,000 or less, according to the most recent U.S. Census;

(2) the total building cost is estimated to be $8 million or less; and

(3) the project is not for a treatment works phase or segment.

#### b. Application Contents

The application package for a Step 2+3 grant must include:

(1) application, using EPA Form 5700-12 (see Section C.1 above);

(2) facilities plan (see Section C.2 above);

(3) State certification of adequate public participation (see Section C.3 above);

(4) notification of any previous advance of allowance or Step 1 grant received (see Section C.4 above);

(5) evidence of compliance with all applicable limitations on award described in Section D above, except draft plan of operation, intermunicipal service agreement, UC system, and SUO; and

(6) evidence of compliance with all applicable additional considerations for award described in Section E above.

c. Deferred Provisions

During the course of a Step 2+3 project, the grantee is required to submit the following documents to the reviewing agency:

(1) prior to initiating action to acquire eligible real property, a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the real property (see Section H below) and

(2) before initiating a procurement action for building the project (i.e., advertising for bids):

i. contract documents, including plans and specification (see Section C.5 above);

ii. a project schedule (see Section C.6 above);

iii. a draft plan of operation (see Section D.8 above);

iv. an executed intermunicipal service agreement (see Section D.9 above);

v. a UC system (see Section D.17 above); and

vi. an SUO (see Section D.17 above).

Re: 40 CFR 35.2040(a), 35.2109, 35.2202

2. Design/Build (Step 7) Grants

Purpose:

Provide grant assistance for smaller projects that utilize specific processes and meet cost limitations. Grant assistance may include participation of pre-bid package, design, construction, related construction and post construction services and an allowance for facility planning, if the applicant did not receive a Step 1 grant.

Discussion:

The Water Quality Act of 1987 (PL 100-4) amended the Clean Water Act (CWA) at section 203(f) to provide for funding of design/build (D/B) projects.

There are two similarities between the Step 2+3 grant and the new Step 7 grant. Both of these grants are limited to projects with total estimated costs of $8,000,000, and both involve a single grant (agreement) to provide Federal support for the preparation of construction plans and specifications and for the building of the treatment works. Beyond these two similarities there are many differences.

The Step 2+3 grant is a special case within the established grant award procedures. It combines the Step 2 grant for preparation of design drawings and specifications and the Step 3 grant for building a treatment works (including related services and suppplies) into a single Step 2+3 award, but with two separate contracts (for design and building). The Regional Administrator must review and approve, in writing, the plans and specifications for these Step 2+3 grants.

The new Step 7 grant is also a single grant agreement, which sets forth an amount agreed to as the maximum Federal contribution and which provides for one fixed price contract for both design and building. Other limitations and requirements for Step 7 grants are itemized in the review procedures below.

Review Procedures:

a. Qualifications

(1) The total building cost cannot exceed $8,000,000.

(2) The proposed treatment works must be an aerated lagoon, trickling filter, waste stabilization pond, land application system (wastewater or sludge), slow rate (intermittent) sand filter or subsurface disposal system.

(3) The treatment works must be an operable unit.

b. Application Contents

The application for a Step 7 grant award is submitted in two phases. The first submission is to establish eligibility and provide an estimated project cost. In the second, the maximum eligible project cost is determined and a grant amendment, establishing that maximum cost, is awarded.

(1) Phase I

The application package for a Step 7 grant must include:

i. application, using EPA Form 5700-32, (see Section C.1. above);

ii. facilities plan (see Section C.2. above);

iii. Pre-bid package: Before initiating procurement action for designing and building the project (i.e., advertising for design/build bids), the pre-bid package must be submitted to the reviewing agency (see Section C below).

The information included in the pre-bid package should be sufficiently detailed to insure that bids received for the D/B work are complete, accurate and comparable and will result in a cost effective, operable facility. Included should be, e.g., cost of preliminary borings and site plan, concept and layout drawings, schematic, general material and major component lists, instruction to builders, general and special conditions, specifications, project performance standards and permit limits, applicable State and other design standards, requirements to be included in the bid tablulation and analysis and other contract documents, forms or certificates;

iv. State certification of adequate public participation (see Section C.3. above);

v. notification of any previous advance of allowance or Step 1 grant received (see Section C.4. above); (NOTE: If neither was received, the request should include funds for a facilities planning allowance

based on the allowance table in Attachment 1 of FR 15822 dated 5/4/88 plus funds to cover the cost of the pre-bid package. If these costs are not itemized for this grant, they may be included in the phase II request.);

vi. evidence of compliance with all applicable limitations on award described in Section D above, except draft plan of operation, inter-municipal service agreement, UC system, and SUO;

vii. funds requested must be those appropriated after February 3, 1987;

viii. no more than 20% of the State's allotments are obligated for D/B projects;

ix. evidence that the project will meet permit requirements within one year after completion; and

x. evidence of compliance with all applicable additional considerations for award described in Section E above.

(2) Phase II

After a Step 7 grant is awarded, the grant will subsequently be amended once, after bids are taken but before the D/B work is begun, to establish an amount agreed to as the maximum Federal contribution. Increases to this amount are unallowable. Information to be submitted to amend the grant agreement include:

i. facilities plan: If Phase I contains an allowance to prepare a facilities plan, then the completed plan must be submitted to the reviewing authority before beginning work on the pre-bid package (see Section C below).

ii. Pre-bid package: If Phase I contains costs to prepare a pre-bid package, then the completed package must be submitted to the reviewing authority before taking bids for the D/B work (see Section C below).

iii. the lowest responsive, responsible bid and documents indicating that grantee entered into a single fixed price contract to design and build the project and that the procurement provisions of Part 33 were

followed in selecting the bidder. (NOTE: the D/B contractor must not have provided the facilities planning or pre-bid services.)

iv. a description of the construction management, contract and project administration services. (NOTE: the A/E that prepares the facilities plan can also prepare the pre-bid package and/or conduct the construction management and/or contract administration activities, providing the provisions of 40 CFR [30.520] 35.936.14, [33.715] and 31.36(k) are met.)

v. a lump sum estimate for the necessary and reasonable costs of ii. above including contingencies -- up to 5%.

vi. a building schedule to include start and completion dates; and a Federal payment schedule.

vii. evidence that the grantee obtained a bond from the contractor in an amount adequate to protect the Federal interest in the treatment works. (40 CFR [33.265] 31.36(h))

c. Deferred Provisions

During the course of a Step 7 project, the grantee is required to submit the same documents (including the pre-bid package) to the reviewing agency as are required for the Step 2+3 project, (see F.1.C above) except -- detailed construction plans and specifications are not submitted prior to initiating a procurement action. In addition, if the facilities plan was not submitted with the Phase I application, the completed plan must be submitted to the reviewing agency as required for Step 2+3 projects (see Section C.2 above) before work on the pre-bid package is begun.

d. Special Restrictions

i. no more than 95% of the grant can be paid until after the building is completed and the RA gives his final approval.

ii. if the grantee fails to comply with the conditions of the grant agreement, the RA, may recover the amount of the grant.

iii. excess funds at the close of the project must be recovered.

iv. no further Title II funds can be awarded for a project which has received a Step 7 grant.

G. COMBINED SEWER OVERFLOW GRANTS

Purpose:

Award grants to CSO projects which are designed to restore uses of the receiving waters in priority water quality areas which have been impaired by the impact of CSOs.

Discussion:

The 1981 CWA amendments and the implementing regulations make a distinction between marine CSO and nonmarine CSO projects. The distinction is primarily related to the source of funding for such projects and the corresponding regulatory requirements which must be satisfied prior to grant award. The most significant difference in regulatory requirements, depending on the source of funding, is whether or not the State must provide a special demonstration that the proposed CSO project is necessary to restore impaired uses of the receiving waters.

Procedures:

1. Source of Funds

Three potential funding sources for CSO projects are available:

a. State's Regular Allotment

After September 30, 1984, the Governor may include in the State's priority system a category of projects needed to correct CSOs which impair water uses in priority water quality areas. Such projects require a special demonstration as described in Item 2a below. Funds from the State's regular allotment may be used only for nonmarine CSO projects.

Re: 40 CFR 35.2015(b)(2)(iv), 35.2024

b. Governor's Discretionary Set-aside

After September 30, 1984, up to 20 percent of a State's regular allotment, at the discretion of the Governor, may be used to fund categories of projects which were previously eligible for grant assistance before this date. Among the previous categories of projects is the correction of CSOs, either marine or nonmarine. For CSO projects funded from the

Governor's discretionary set-aside, the State is not required to provide the special demonstration described in Item 2a below. However, this source of CSO funding is subject to certain restrictions, as explained in Section II.E.3.

Re: 40 CFR 35.2015(b)(2)(iii), 35.2024

c. Separate Appropriation for Marine Projects

After September 30, 1982, marine CSO projects may be funded through a separate Congressional appropriation. Unlike other construction grant appropriations, funds to be used for marine CSO projects are not allotted to each State, but instead are administered at EPA headquarters. Hence, proposed projects are subject to a national (rather than State) priority system. Projects awarded grant assistance using the marine CSO fund are to address impaired uses or public health risks in priority water quality areas in marine bays and estuaries caused by the impacts of CSOs. These projects require a special demonstration as described in Item 2c below.

Re: 40 CFR 35.2024(b)

2. Project Requirements

The regulatory provisions which must be satisfied for CSO projects depend on the source of the funds which will be used for providing grant assistance:

a. State's Regular Allotment

After September 30, 1984, nonmarine CSO projects may be awarded grant assistance from the State's regular allotment provided that:

i. the Governor has included this category of projects in the State's priority system;

ii. the specific project is within the fundable range on the State's project priority list;

priority water quality areas of marine bays or estuaries which are due to the impacts of the CSO, and specifically that, at a minimum:

- significant usage of the water for shellfishing and swimming will not be possible without the proposed project; and

- the proposed project will result in substantial restoration of an existing impaired use.

Re: 40 CFR 35.2024(b)(2)

iv. The project must satisfy all applicable limitations on award, grant conditions, Federal grant share provisions, and allowable cost provisions, except for:

- allotment and reallotment (see Sections II.E.2 and II.E.4);

- State priority system and project priority list (see Section II.E.3);

- reserves and reallotment of reserves (see Section II.E.4);

- advances of allowance to potential grant applicants (see Sections II.E.4.e, III.D.3.c, III.E, VI.K, and IX.B.8.c);

- review of grant applications and priority determinations (see Sections VI.M.1 through VI.M.3); and

- Step 2+3 projects (see Section VI.F).

Re: 40 CFR 35.2024(b)(4)

v. Two regulatory provisions for marine CSO projects vary slightly from those for other construction grant projects:

- final plans and specifications may, but need not, accompany the grant application; however, the grant applicant must commit itself to providing them by a date set by the reviewing agency; and

- if the proposed project is a phase or segment described in the facility plan, the criteria used to demonstrate need for the project

(see Item ii above) must be applied to the entire facilities plan proposal and to each segment proposed for funding.

Re: 40 CFR 35.2024(b)(3)

vi. Marine CSO project applications and supporting documents are submitted to the State by the grant applicant. The State reviews the project, prepares the special demonstration described in Item iii above, and submits the project to the EPA Regional Office. The Regional Office determines whether all Federal requirements have been met, completes the environmental review, prepares a statement of regional and national significance, determines the eligibility of the project for consideration of funding, and submits the required information to EPA Headquarters.

vii. Once a year, EPA Headquarters will prepare a priority list, based on the criteria in Item ii above, for proposed marine CSO projects.

viii. On the basis of the priority list described in Item vii above, EPA headquarters will provide obligating authority for grant award to the appropriate EPA Regional Office.

ix. Projects receiving marine CSO grant awards will be administered by EPA Regional Offices or, where delegated, State reviewing agencies.

Re: 40 CFR 35.2024(b), 35.2040(f); EPA publication, "Guidance for the Preparation and Review of Applications, Special Fund for Abatement of Combined Sewer Overflow Pollution in Marine Bays and Estuaries (The Marine CSO Fund)," dated January 1984

## H. LAND ACQUISITION GRANTS

Purpose:

Provide grant assistance for the acquisition of real property (i.e., land) which will be an integral part of the treatment process or provide for ultimate disposal of residuals and assure grantee compliance with land acquisition regulations for all land acquired for the project.

Discussion:

During facilities planning, the grant applicant will have evaluated various treatment alternatives, including land application of wastewater or sludge, and selected the cost effective alternative. Land associated with the proposed project may already be owned by the applicant, may be available for lease or purchase, or may be available for use without payment. Since most acquisitions are fee simple purchases of eligible land, this section will generally deal with that acquisition method. Other types of acquisitions methods for eligible land (e.g., long-term lease, permanent easements) are also grant eligible and should be considered where appropriate. Regardless of the acquisition method, acquisition must be accomplished in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (The Uniform Act) and EPA's implementing regulations, 40 CFR Part 4 and 49 CFR Part 24. The Uniform Act and regulations are applicable to the acquisition of real property necessary for EPA assisted projects whether or not the land so acquired is eligible for grant assistance. Regardless of the method of acquisition, owners must be fully informed by the grantee, in writing, of their rights under The Uniform Act. After being informed of these rights, landowners may voluntarily waive their right to an appraisal and may donate their land or easements. Such waivers should be in writing and include a statement that the landowner has read and understood the summary of his rights under The Uniform Act. Pursuant to the Uniform Act Amendments of 1987 an acquiring agency may waive the requirement for an appraisal if the estimated cost of the land or easement is $2,500 or less, in cases involving land that is being purchased or donated (49 CFR 24.102 (c)(2)). However, if the owner requests an appraisal it must be provided as stated in the preface to the regulation published 3/2/89.

Arrangements for long-term lease, permanent easement, and use without payment of the treatment site need to be reviewed to insure that they are adequate for the successful construction and operation of the project (e.g., that they are not subject to an expiration or revocation which would prevent the continuing operation of the project).

Acquisition of eligible real property may generally be accomplished in one of three ways under the construction grants program:

- under authorization to proceed as a preaward cost

- under a grant solely for land acquisition, or

- as a part of the grant for the construction of the project.

In any of the above situations, the provisions of 40 CFR Part 4 or 49 CFR Part 24 for land acquired on or after 4/2/89, must be satisfied if the land is to be eligible for grant assistance. 40 CFR Part 4 in essence is separated into two parts:

- requirements for the acquisition of real property, and

- requirements applicable when persons, businesses or farms will be displaced as a result of such acquisition.

In view of the potentially high costs and legal fees associated with land acquisition, grant applicants and reviewing agencies should use personnel experienced in all phases of the acquisition process, including qualified appraisers. The reviewing agency should provide guidance to the grantee in the selection of qualified appraisers. For example, the selected appraiser should: have experience in appraising property similar to the subject property; be familiar with Federal appraisal standards and acceptable procedures; and, preferably, be affiliated with a professional organization. A list of professional appraisal organizations can be found in Appendix G of CG-85. In some areas, other Federal agencies maintain lists of appraisers experienced in appraisal work for Federal projects (e.g., General Services Administration, Corps of Engineers, Housing and Urban Development and Department of Transportation.

Note that revised 40 CFR Part 4 regulations were issued in late February 1986 to be effective in May 1986. Many of the new requirements are incorporated herein. These new requirements are not retroactive. Government wide final regulations implementing the Uniform Act Amendments of 1987 were issued March 2, 1989 to be effective April 2, 1989. EPA adopted the Government Wide Regulation, 49 CFR 24, on December 17, 1988, to be effective April 2, 1989. The changes in the law did not become mandatory until April 2, 1989, therefore, the regulation is not to be applied retroactively.

All appraisals must be reviewed. Review of appraisals must be conducted by a qualified review appraiser who is either under contract to the grantee, or an employee of, or under contract to, a State agency (e.g., transportation department). In some cases, it may be appropriate to use qualified review appraisers working for a Federal agency.

The review procedures below address the highlights of the regulatory requirements, but are not a substitute for a detailed review by professional personnel to insure compliance with 40 CFR Part 4 or 40 CFR Part 24, as applicable. Eligibility of land acquisition and associated costs is discussed in Section IX.D which should be consulted prior to grant award.

The Uniform Act Amendments of 1987 designated the Federal Highway Administration to be the lead agency for implementing and enforcing the Uniform Act as amended. Its duties are discussed in part under 49 CFR Part 24, Subpart G. Among the lead agencies duties, it will approve a grantee's application to comply with state law rather than the Uniform Act, after it determines that the state law will accomplish the purpose and effect of the Uniform Act. The procedure that grantees, federal agencies and the lead agency are to follow are discussed at Subpart G of 49 CFR 24.

Because few wastewater construction grant projects result in displacement, regulatory requirements and recommended management procedures on this topic are not discussed. Should a displacement problem arise, the land acquisition coordinator in the EPA Regional Office or, as needed, the Office of Municipal Pollution Control and provide assistance.

Re: 4.101, 4.102, 4.103, 4.104, 4.108

Review Procedures:

1. Grant Application Review

In reviewing the grant application, the reviewing agency should determine that:

a. only land required directly for treatment works is determined to be eligible for cost participation;

b. methods less costly than fee-simple acquisition were considered;

c. the proposed acquisition method provides sufficient control for project purposes;

d. the proposed acquisition schedule is realistic; and

e. projected land purchase and 40 CFR Part 4 compliance costs are realistic.

2. Grant Application Contents

A grant application which requests funds for the acquisition of real property must include:

a. all applicable information and documents described in Sections C through E above, except that grant applications solely for the acquisition of real property need not include the information described in Item 2 below;

b. a plat map which includes the legal description of the property to be acquired as well as other land being acquired for project purposes. In addition, the map should differentiate between lots which are fully and partially acquired, (i.e., landholding split by project land acquisition);

c. a preliminary layout of the distribution and drainage system (in lieu of design and specifications if not available, applies to pre Step 3 authorizations/grants only for eligible land purchases);

d. an identification of the interest in real property to be acquired (e.g., fee simple purchase, long-term lease, permanent easement). If available, lease agreements must be included;

e. a copy of the appraisal reports for the property, including a review appraisal if conducted by the grantee;

f. information demonstrating that the project is still cost-effective if land costs significantly exceed estimates in the approved facilities plan;

g. assurances that the property will be used only for the purpose for which it is purchased, and that EPA's interest in the property will be adequately reflected and protected in compliance with all recordation or registration requirements of applicable local laws on real property (see CFR Part 30; Item 3.b and Section M.5 below);

h. information showing funds requested for land purchase separate from those for 40 CFR Part 4, or 49 CFR Part 24 as applicable, compliance activities; and

i. assurances of compliance with The Uniform Act.

Re: 40 CFR 30.535*, 30.600(i)*, 35.2040(b), 31.31
40 CFR Part 4, Subpart B, 49 CFR Part 24

3. Deferred Provisions

Grant applications which request funds solely for land acquisition need not include information regarding the following items whose submission may be deferred until the award of grant assistance to build the project:

a. debarment and suspension (see Section D.7 above);

b. user charge system (see Section V.E and Section D.17 above);

c. sewer use ordinance (see Section V.F and Section D.17 above);

d. O&M manual payment limitations (see Section IX.B.5);

e. adoption of UC system and SUO (see Sections V.E and V.F, and Section D.17 above); and

f. final design drawings and specifications.

Re: 40 CFR 35.2122, 35.2260, 35.2040

4. Grant Conditions

Grant awards which include the acquisition of eligible real property are to include grant conditions (see Section M.5.d below) stating that:

a. real property must not be acquired until the reviewing agency has determined, based on documentation submitted by the grantee, that the applicable provisions of 40 CFR Part 4, or 49 CFR Part 24, as applicable, have been or will be met;

b. consistent with 40 CFR [Part 30] 31.31, the Federal interest in the property to be acquired must be protected by the inclusion of the following language in the title or other recordation instrument:

> "Federal lien: Federal grant funds have been used to purchase this property. The United States interest is _____ percent (depending on the Federal share at the time of grant award) of the proceeds from any subsequent sale or current fair market value of the property on the date of the transaction which removes it from the use for which it was purchased. [(See 40 CFR 30.535(e), revised on September 30, 1983).] A lien to this effect and extent is hereby asserted."

c. all land necessary for the project will be acquired prior to the initiation of construction.

In addition, it is recommended that the grantee provide a land acquisition management schedule indicating key activities and target dates.

Re: 40 CFR 30.535*, 35.2210, 31.31, 40 CFR Part 4, 49 CFR Part 24

5. Preaward Costs

Potential grant applicants requesting approval, as a preaward cost, of the acquisition of eligible land or of an option for the purchase of eligible land may receive such approval after completion of the environmental review (see Section D.12). In addition, the reviewing agency should request sufficient information from the

applicant, such as that required for grant award in Items 2.b through 2.g above, to insure that grant application requirements will be met for a subsequent grant. The approval letter from the reviewing agency should include notification that the acquisition of real property, to be eligible, must be procured in accordance with the applicable provisions of 40 CFR Parts 4, 49 CFR Part 24 and [30.]

The approval letter should note that these costs will only be reimbursed if a grant is subsequently made and thus does not represent a commitment of funds. Grantees should be advised that certain costs incurred prior to grant award may not be deemed allowable if specific authorization for preaward costs was not obtained. Refer to Section D.15 above for additional warning language to be included in the approval letter. In order to reduce project costs and maintain construction schedules, reviewing agencies may encourage the early acquisition of real property.

Re: 40 CFR 35.2118

6. Project Management

After grant award (or pre-award authorization), the grantee is required to manage its acquisition activities in compliance with 40 CFR Part 4 regulations and submit to the reviewing agency appropriate documentation of such compliance. Reviewing agencies are encouraged to:

a. provide guidance to grantees on their responsibilities to comply with 40 CFR Part 4 and 49 CFR Part 24;

b. provide assistance to grantees in the selection of appraisers and guidance regarding appropriate level of detail and standards for appraisal work;

c. establish procedures for conducting review appraisals;

d. establish minimum standards for project file documentation (e.g., checklists, standard letters);

e. establish procedures to assure that site certificates are submitted and compliance with 40 CFR Part 4 and 49 CFR Part 24 requirements are documented prior to grant reimbursement; and

f. establish procedures for approving amounts of just compensation, requiring updated appraisals when necessary and conducting administrative settlements to approve payments higher than just compensation when negotiated purchase is unsuccessful.

Re: 40 CFR 4.102(d), 4.102(g), 4.102(i), 4.103(b), 4.103(e), 4.103(f), 4.104, 49 CFR 24.102(d),(g) and (i), 24.103(a),(d) and (e), 24.104 for real property acquired on or after 4/2/89.

3. Grant Conditions

Grant awards which include I/A field testing are to include grant conditions which require the grantee to submit a quality assurance program and a report which describes the procedure, cost, results, and conclusions of field testing in accordance with the schedule contained in the grant agreement (see Section M.5 below).

Re: 40 CFR 30.302(d)(3)*, 30.503(f)* and (h)*, 35.2211, 31.45

4. Preaward Costs

Potential grant applicants requesting approval of I/A field testing as a preaward cost may receive such approval after completion of the environmental review (see Section D.12). The reviewing agency should obtain sufficient information from the applicant, such as that required for grant award in Item 1.b above, to substantiate that the I/A field testing is warranted and is likely to satisfy grant application requirements for a subsequent grant. The approval letter from the reviewing agency should remind the applicant that the procurement of services, supplies, and materials must comply with 40 CFR Part [30 and 33] 31.36 and that the acquisition of real property must comply with 40 CFR Parts 4 and [30] 31, if such costs are to be allowable for grant participation. Refer to Section D.15 for additional warning language to be included in the letter.

Re: 40 CFR 35.2118, 40 CFR Part 31

J. INNOVATIVE OR ALTERNATIVE TECHNOLOGY MODIFICATION OR REPLACEMENT GRANTS

Purpose:

Provide grant assistance to fund 100 percent of the allowable cost of the modification or replacement (M/R) of any project funded with increased funds under the I/A technology provisions of the CWA and the implementing regulations.

Discussion:

The 1977 CWA amendments introduced I/A technology provisions into the construction grants program. The I/A provisions were designed to conserve resources and reduce costs for wastewater treatment projects through the use of new or improved technologies, which are inherently subject to a greater than normal risk of failure. As an incentive for using I/A technology and accepting this higher degree of risk, I/A projects were made eligible for increased grant funding, and for 100 percent M/R grants in the event of failure.

The review procedures below address the regulatory and program guidance provisions applicable to 100 percent M/R grants. It is to be noted that I/A projects which received grant assistance after December 29, 1981 are subject to project performance standards, as required by the 1981 CWA amendments.

The requirements for project performance (40 CFR 35.2218) apply equally to all projects, including those projects where an I/A funded process or unit has been identified as the reason, or part of the reason, preventing the grantee from certifying the project's performance. When a prospective I/A failure is documented under 40 CFR 35.2032(c), grantees are encouraged to independently remedy the problem to prevent such failure through minor modifications such as the corrective action activities described in §35.2218. Where such minor modifications are not successful or possible, the corrective action analysis required by §35.2218 will be an integral element of the documentation of an I/A failure which has occurred within two-years after initiation of operation of the project.

One hundred percent M/R grants must be viewed as a one-time correction for a failed system. For this reason, innovative technologies generally should not be used to modify or replace a failed I/A system.

(NOTE: As a result of the 1987 amendments to the Clean Water Act, Section 202(a)(3) has been amended to allow EPA to fund all of the costs of modifying or replacing rotating biological contactors if they fail to meet design performance specifications.)

Review Procedures:

a. Grant assistance, either as a grant amendment or a new grant, to fund 100 percent of the allowable costs (including planning and design costs) for the M/R of any I/A project, may be awarded only if the reviewing agency determines that:

(1) the I/A elements of the project have caused the project, or significant elements of the complete waste treatment system of which the project is a part, to fail to meet the project performance standards;

(2) the failure has significantly increased O&M expenditures for the project, or for the complete waste treatment system of which the project is a part, or requires significant additional capital expenditures for corrective action;

(3) the failure has occured prior to two years after the initiation of operation of the project; and

(4) the failure is not attributable to negligence on the part of any person.

The report or documentation necessary to substantiate the above four items will vary from project to project, and will depend on the extent and nature of the failure and the size, cost and complexity of the project. Projects which satisfy Items (1) through (4) above are also required to receive priority certification from the State agency. It should be noted that some alternative technology projects which received increased grant assistance may have included conventional components which also received increased funding (e.g., treatment prior to land application). It is intended that the conventional components receive 100 percent M/R funding only if their failure was caused by an I/A component of the project.

OMPC and WERL are working jointly on a phased assessment and advisory procedure to keep State and EPA regional staff apprised of current developments. This procedure is described in the November 1985 and July 1986 I/A Updates. Project reviewers should check the status of 100% M/R activities with their local I/A coordinator when reviewing projects with I/A technology components.

Re: 40 CFR 35.2032(c)

b. A grant for 100 percent of the cost, including planning and design costs, of modification or replacement of RBCs which have failed to meet design performance specifications can be awarded providing the applicant for an M/R grant clearly demonstrates to the Regional Administrator's satisfaction that:

(1) the RBC failure is not due to the negligence of any person, including the owner of the POTW, the applicant, its engineers, contractors, equipment manufacturers, or suppliers;

(2) for projects built using plans and specifications completed after September 1984, that the design considered the results of information published by EPA in May and September 1984 related to RBC failures;

(3) the RBC failure has significantly increased the project's capital or operation and maintenance costs;

(4) the M/R project meets all requirements of EPA's construction grant and other applicable regulations;

(5) the M/R project is included within the fundable range of the State's annual project priority list; and

(6) the State certifies the project for funding from its regular (i.e., nonreserve) allotments and from funds appropriated after February 4, 1987.

Re: FR 15820-22, May 4, 1988

## K. GRANTS TO STATES FOR ADVANCES OF ALLOWANCE

### 1. Defining the State Program

Purpose:

Provide financial assistance to small communities which would otherwise be unable to perform planning and/or design work prior to the award of a Step 2+3, a Step 3, or Step 7 grant.

Discussion:

The 1981 CWA amendments provide for an advance of allowance to certain potential grant applicants. State agencies are to identify small communities, as defined by the State, which would be unable to complete an application for a Step 2+3, a Step 3 or Step 7 grant (i.e., to perform facilities planning and/or design work) without such an advance. States are also required to reserve a reasonable portion of their annual allotment, up to 10 percent, for advances of allowance, unless this requirement is waived by EPA (see Section II.E.4.e).

The amount of funds provided to potential grant applicants is computed in accordance with 40 CFR Part 35, Subpart I, Appendix B. Note that the maximum amount of the advance is not the allowance, but is the allowance times the appropriate EPA grant percentage (see Sections L.1 and L.2 below). This advance may be less than this maximum amount, at the discretion of the State. Also note that the allowance is based on the estimated allowable building costs, which do not include other associated Step 3 costs such as engineering, legal, accounting, etc.

Unless the total amount of the advance is small and the work is to be performed in a short period of time (e.g., less than six months), it may be advisable to divide the advance into two or more payments (e.g., one for facilities planning, one at the initiation of design, and the balance when 50 percent of the design work has been completed).

If Step 2+3, Step 3 or Step 7 grant assistance is subsequently awarded to a community which received an advance, the amount of the advance is subtracted from the grant amount. If Step 2+3, Step 3 or Step 7 assistance is not awarded, the State may seek repayment of the advance on such terms and conditions as the State may determine.

Procedures:

Before applying for a grant for advances of allowance, a State must define the following procedures for the administration of advances of allowance:

a. Qualified Communities

Advances may be made only to small communities, as defined by the State, which would otherwise be unable to perform the necessary planning and/or design work. The State must:

i. define a "small community" (e.g., by population size), and

ii. set objective criteria by which it will determine whether a community would be "otherwise unable to perform" (e.g., by income per capita in relation to the estimated per capita cost of planning and/or design).

Re: 40 CFR 35.2025(b)(3)

b. Application Procedure

Application forms and their required contents, as well as review and approval procedures, must be defined by the State. At a minimum, the applicant for an advance should be required to agree to complete the facilities planning and/or design work for which the advance is provided.

Re: 40 CFR 35.2025(b)(1)

c. Amount of Advance

The State is to determine the amount of each community's advance, subject only to the requirement that the total advance cannot exceed the Federal share of the estimated allowance (see Section III.E). The advance can be equal to this maximum, or lower; the decision as to whether it should be lower, and if so, how much lower, must be defined by the State, in language that is objective and treats all communities equally.

In most States, all of the anticipated allotment for the next several years could easily be consumed by high priority Step 3 projects which have already been designed. Since advances in these States would reduce the amount of money available for high-priority Step 3 projects, some States may decide to limit each advance to a smaller amount which would still meet the minimum needs of each community.

Re: 40 CFR 35.2025(b)(4)

d. Timing of Payments

The advance can be paid at any time after the State approves the community's application for an advance. The advance can be paid in one lump sum, or in several partial payments, depending on the procedures established by the State. A State may decide to mandate multiple payments, since expenses for planning and design are incurred over a substantial period of time, and the payment of the maximum allowable advance during the planning stage would result in most of the funds being advanced long before the expenses are incurred.

State requirements for the timing of payments must apply equally to all communities.

Re: 40 CFR 35.2025(b)(4)

e. Repayment of Advance

The State must define the conditions, if any, under which a municipality which never receives a Step 2+3, Step 7 or a Step 3 grant would have to repay an advance of allowance. The 1981 CWA amendments authorize, but do not require, the State to seek repayment of the advance, "on such terms and conditions as it may determine." The terms and conditions for repayment may include the collection of interest, at the discretion of the State, as long as all communities are treated equally.

There is no Federal requirement for the collection of interest, since once the State makes an advance to a third party, the advance loses its character as Federal funds. On the other hand, any funds recovered from a municipality by the State (advance and/or interest) must be returned to the grant account for re-use in advancing funds to other municipalities. However, interest earned by the State on funds received from EPA but not yet advanced to a municipality (or recovered from a municipality but not yet advanced to another municipality) may be retained by the State for other uses, as specified in 40 CFR 30.526.

Re: 40 CFR 35.2025(b)(5)

2. Applying for the State Grant

Purpose:

Award Federal grant funds to the State, for the State to provide advances of allowance to small communities.

Discussion:

To acquire funds for making advances of allowance, the State agency applies to EPA for a State grant which will be used for providing advances to small communities. The application includes a list of small communities which, in the judgement of the State, are eligible for the advance. The application may also include a request by the State that payments under the grant be sent directly from EPA to each community, after the State has approved the community's application for an advance (see Section IX.B.8.c).

Procedures:

In order to receive a grant for advances of allowance, a State must:

a. submit an application, using EPA Form SF-424;

Re: 40 CFR 35.2040(d)

b. define an acceptable program for the administration of advances of allowance (see Item 1 above);

Re: 40 CFR 35.2025(b)

c. notify EPA of the basis for the grant amount requested (normally, by submitting a list of the small communities which are expected to receive an advance, and the amount of the advance which is expected to be provided to each community); and

Re: 40 CFR 35.2040(d)(2)

d. include with the application a list of the communities which received an advance of allowance under the previous grant to the State, and the amount of the advance received by each community.

Re: 40 CFR 35.2040(d)(1)

## L. FEDERAL GRANT SHARE

In order to compute the Federal grant share, several factors must be taken into account. While the grant applicant will have computed its grant request, the grant amount offered may be different after the application package and supporting documents have been reviewed. If the grant to be offered is less than that requested, the grantee should be contacted to determine if further clarifying information is available. The letter forwarding the grant offer should clearly explain the reason for any difference in the grant amount.

Procedures:

### 1. Total Allowable Project Cost

Total project cost consists of many elements of cost, not all of which are allowable for grant participation. Allowable/unallowable costs are determined in accordance with 40 CFR Part 35, Subpart I, Appendix A, as discussed in Section IX.F.

One additional factor arises where the project includes unallowable reserve capacity. The allowable project costs for grants awarded after September 30, 1984, must be limited to the treatment capacity required to serve existing needs on the date of Step 3 grant approval. If the project includes ineligible reserve capacity, it will be necessary to establish a cost ratio (see Section D.18 above). All Step 3 costs which are normally allowable for grant participation are reduced, using the cost ratio. Phased and segmented projects which received a previous Step 3 grant before October 1, 1984 may be exempt from this limitation (see Section D.10 above). A suggested method for determining the total allowable project cost is given below:

a. Establish an estimated total building cost, which is the sum of the estimated award amount of all prime subagreements for building the project, plus amounts approved for force account work performed in lieu of awarding a subagreement for building the project, plus the estimated purchase price of eligible real property. The estimated total building cost so determined does not include project components which are ineligible for grant participation (e.g., collection sewers and related pumping stations). The estimated total building

2. EPA Grant Share

In computing the EPA grant share, the project reviewer is to examine the applicable conditions noted below to determine the EPA grant percentage, and multiply this percentage by the total allowable project cost (see Item 1.g above). The resulting figure, minus any advance of allowance, is the EPA grant amount.

a. Standard Grant Share

After September 30, 1984 the EPA grant is 55 percent, except as described below.

b. Uniform Lower Federal Share

The Governor of a State may elect to uniformly lower the EPA grant share for all categories of projects. Except for I/A projects, the EPA grant will be the percentage established by the Governor and approved by EPA.

c. Phased or Segmented Projects

These projects are discussed in Section D.10.d above.

d. Projects Using An Innovative or Alternative Technology

The EPA grant share for eligible treatment works or unit processes determined to meet the definition of an I/A technology (including an I/A field testing project) shall be increased by 20 percent of the total allowable cost of the I/A project or the I/A portion of the project, but in no event shall the total Federal share exceed 85 percent. Only I/A components and unique non-I/A components necessary to make the I/A components operate may receive the additional grant percentage. Where a State grant program exists, the State grant percentage of the non-Federal share must not be decreased for an I/A project. For example, assume an EPA standard grant share of 55 percent, a State standard grant share of 10 percent, and a local standard grant share of 35 percent, for a total non-Federal share of 45 percent. The State share of the non-Federal share is 10 divided by 45, or 22.2 percent. For an I/A project, the Federal share is 75 percent and the non-Federal share is 25 percent. The State's proportional contribution must be at least 22.2 percent of the 25 percent non-Federal share (i.e., at least 5.55 percent of the eligible I/A project cost. This requirement is expected to be met in most States by providing the same State percentage grant to all projects (in this example, 10 percent), but the State percentage

grant may be reduced for I/A projects at the discretion of the State, provided that all I/A projects are treated equally, (in this example, to a share not lower than 5.55 percent).

e. Projects for the Modification or Replacement of Failed Innovative or Alternative Technologies

The EPA grant is 100 percent of the allowable cost of the M/R of failed I/A projects, including specific planning and design costs incurred on these projects funded under §35.2032(c), which meet the conditions described in Section J above.

The source of funds for 100% M/R grants can be determined as follows:

- When a failed I/A technology system is being modified or replaced with an innovative or an alternative technology, as a minimum, an amount equal to the uniform Federal share for the State for conventional technology projects (i.e., 55% or a reduced share amount set in accordance with 40 CFR 35.2152(c) must come from the regular portion of the State's allotment (which includes the Governor's discretionary fund). The remaining portion of the grant to bring the Federal share to 100% can come from the I/A set-aside, the regular portion of the allotment or any combination of the two. The "regular portion of the State's allotment" can include the reserve for alternative systems for small communities if the community qualifies.

- When a failed I/A system is being modified or replaced with a conventional technology, the entire grant amount must come from the regular portion of the State's allotment.

f. Other Projects

(1) The EPA grant share does not change because a project receives a Step 2+3, a Step 7, a land acquisition, or a CSO (including a marine CSO) grant. The standard EPA grant share for such projects is 55 percent, unless this percentage is changed as discussed in Items b through e above.

(2) As noted in Section VI.J above, RBCs which fail to meet design performance specifications may be eligible for 100% M/R grants.

Re: 40 CFR 35.2024(b), 35.2032(c), 35.2109, 35.2152

M. GRANT AWARD PROCEDURES

Detailed grant award procedures may vary from State to State, depending on internal State procedures and the requirements of

the State/EPA delegation agreement. Fully delegated States may only need to submit project and priority certifications to EPA (see Items 2 and 3 below), while those States without delegation will need to submit complete application packages. In all cases, however, a grant may only be awarded by EPA. The procedures below are general, and are not a substitute for detailed procedures established in each State and EPA Regional Office.

1. State Procedures

All States have developed internal grant approval procedures which are to be followed prior to submission of the appropriate documentation to EPA. Such procedures usually include:

a. preparation of a one-page project summary for the head of the reviewing agency;

b. preparation of the State Priority Certification (EPA Form 5700-28);

c. preparation of the letter of approval from the State to EPA, including an explanation of any differences between the grant amount requested by the applicant and the grant amount approved by the State;

d. approvals by other offices within the State agency (e.g., compliance, permits, etc.);

e. approval by the State's fiscal office, to verify that funds, including reserves if appropriate (e.g., I/A, small communities), are available;

f. preparation of the grant award input coding sheet for the computerized Grants Information and Control System (GICS); and

g. preparation of a draft grant agreement/amendment (EPA Form 5700-20A), with recommended general and/or special grant conditions (see Items 5 and 6 below).

h. preparation of innovative/alternative (I/A) facility technology file data base entry form OMB No. 2040-0095 for all step 3 and step 2+3 grant awards for I/A projects including 100% modification/replacement and field testing of I/A technology. (See I/A Facility Technology File Data Base Users Manual for sample form).

2. Priority Certification

All States are to review each grant application to verify that it is complete. If the project is listed on the State's project priority list for the current fiscal year and is within the fundable range, the State will complete the State Priority Certification (EPA Form 5700-12) for submission to EPA.

Re: 40 CFR 35.2042(a), 35.2103

3. Project Certification by Delegated States

States which have been delegated authority to manage the construction grants program must submit a written certification to the EPA Regional Office for each project, stating that the applicable Federal requirements, within the scope of authority delegated to the State, have been met. The certification must be supported by documentation retained by the State, which will be made available to EPA upon request.

Upon receiving a certification covering all delegable preaward requirements, EPA must either approve or disapprove the grant within 45 calendar days. If disaproved, EPA will state the reasons and have an additional 45 days to review any subsequent revised submissions. If EPA fails to approve or disapprove within 45 days, the grant shall be deemed approved and EPA must issue the grant agreement to the applicant.

Re: 40 CFR 35.2042(a) and (b)

4. Grant Agreement/Amendment

After receipt, review, and approval of the State certifications and supporting documents, if any, EPA will prepare the Grant Agreement/Amendment (EPA Form 5700-20A) for the Regional Administrator's signature. EPA will also complete the following actions or documents which may already have been prepared (or partially prepared) by the delegated State:

a. briefing memorandum to the EPA Regional Administrator, if required by Regional procedures;

b. Commitment Notice (EPA Form 2550-9) for transmittal to the appropriate EPA fiscal office;

c. preparation and entry of applicable information into GICS (see Section III.C.3); and

d. Grant Agreement/Amendment (EPA Form 5700-20A):

i. the first page is to be data-phoned to EPA Headquarters immediately after signature by the Regional Administrator (RA);

ii. the entire form, with a transmittal letter, is mailed to the grant applicant 5 days after EPA Headquarters data-phone notification (not before); and

iii. the form must be signed by the applicant's authorized representative (see Section C. 1.b above) and returned to the Regional Office within 3 weeks of receipt by the applicant.

5. General Grant Conditions

The Grant Agreement/Amendment contains award conditions which require the grantee to comply with all applicable provisions of 40 CFR Chapter I, [Subchapter B] Parts 31, 32, 34 and 35. (Subchapter B includes 40 CFR Parts 30 through 35, and references all other applicable regulations, including 40 CFR Parts 4, 6, 7, 25, and 29; and 49 CFR Part 24.) (40 CFR 31.12 deals with special conditions for "high risk" grantees.)

The reviewing agency may wish to supplement these preprinted grant conditions by adding grant conditions which emphasize specific regulatory provisions. Although the inclusion of these additional conditions does not increase the grantee's obligation to comply with with these regulations, they are frequently added to increase the grantee's awareness of its obligations under the regulations. Representative samples of these conditions are identified below:

a. Effect of Approval

Approval or certification of project documents (e.g., facilities plan, plans and specifications, etc.) by the reviewing agency is for administrative purposes only, and does not relieve the grantee of its responsibility for the entire project.

Re: 40 CFR 35.2050

b. Step 2+3/Step 7

The grantee must obtain reviewing agency approval before initiating acquisition of eligible real property, procurement of equipment, or selection of construction contractors.

Re: 40 CFR 35.2202

c. Project Changes

The reviewing agency must approve certain project changes, as specified in 40 CFR 35.2204, by formal grant amendment.

Re: 40 CFR 35.2204, 31.30(a), (b), and (c)

d. Land Acquisition

The reviewing agency must verify that the requirements of 40 CFR Part 4 or 49 CFR Part 24, as applicable, have been met before real property is acquired, and the Federal interest in the property to be acquired must be protected (see Section H.3.b above).

Re: 40 CFR 30.535*, 35.2210, 31.31

e. Project Initiation

The grantee shall expeditiously initiate and complete the project in accordance with the schedule contained in the application and the grant agreement. Failure to award contracts and to issue notices to proceed for building all significant elements of the project within 12 months of grant award (or of final approval of plans and specifications, and the related documents described in Section F.3 above, under a Step 2+3 or Step 7 grant) may result in a limitation on allowable costs or the imposition of sanctions (see Sections VIII.B.4 and IX.F.4, Paragraph A.2.e).

Re: 40 CFR 30.900* through 30.906*, 35.2212, 31.43(a)

f. Quality Assurance Program

When environmentally related measurements or data generation are involved in a project, the grantee must develop and implement a quality assurance program which will assure that quality data will be produced and a minimum of data will be lost through out of control conditions or malfunctions. If a grant condition requires the grantee to gather environmental related data, a schedule for developing a quality assurance project plan must be submitted within 30 days of a grant award. Field testing of I/A technologies and evaluation of wastewater treatment plant performance (e.g., during the one year project performance period) are examples of activities which may entail gathering environmental or environmentally related data.

Re: 40 CFR 30.302(d)(3)*, 30.503(f)* and (h)*, 31.45

g. Project Performance Standards

The grantee should be informed of the parameters which have been identified by the reviewing agency as project performance standards (see Sections V.C.2.a and VII.I.2.a).

Re: 40 CFR 35.2218(c)

h. Field Testing of Innovative or Alternative Technologies

See Section I.3 above.

6. Special Grant Conditions

a. Where there are compelling reasons, special grant conditions may be included in the grant agreement. Unlike general grant conditions, special grant conditions do not repeat EPA's regulatory requirements, but rather are special conditions under which the grant has been awarded, due to unusual circumstances. All proposed special grant conditions should receive a technical and legal review, to insure that their inclusion in the grant agreement/amendment is appropriate.

b. A special grant condition which is an exception to the above, is the one required by the 1987 amendments to Section 203 of the Clean Water Act. Section 203(a)(2) requires EPA to enter into a written eligibility agreement with applicants who submit final plans, specifications and estimates to the State for Step 3,

Step 2+3 or design/build grant awards or amendments on or after April 6, 1987. This agreement must state that only those items specified in the project description (scope) portion of the grant agreement are eligible for Federal participation. Accordingly, a clear, detailed and specific description of the project must be included in the grant agreement.

Re: 40 CFR 31.12; Memorandum dated March 3, 1987 from Director, Municipal Construction Division - "Water Quality Act of 1987 - Agreement on Eligible Items."

## A. INTRODUCTION

This chapter begins with a discussion of EPA requirements for grantee procurement systems, and for the procurement of professional and construction services. Later sections discuss activities which take place during project construction, including project inspection and management of change orders. The chapter concludes with a discussion of the requirements for project performance during the first year following initiation of operation. Payments, payment limitations, and grant increase/decrease procedures are discussed in Chapter IX.

Section B, Procurement System Requirements, describes certification and reporting requirements for grantee procurement systems.

Section C, Procurement of Professional Services, describes specific requirements for the procurement of engineering, legal, accounting, and other professional services.

Section D, Procurement of Construction Contractors, describes competitive bidding procedures, grant adjustment, and protests concerning grantee procurement actions.

Section E, Small Purchases, describes EPA's simplified requirements for purchases costing $10,000 or less.

Section F, Noncompetitive Procurement, describes the limitations and approvals necessary for this type of procurement.

Section G, Monitoring Construction, describes monitoring activities, including preconstruction conferences, project management conferences (PMCs), interim inspections, construction management evaluations (CMEs), and final inspections.

Section H, Management of Claims and Change Orders, describes management activities which should be employed by grantees for the effective control of claims and change orders, and reviewing agency procedures for processing change orders.

Section I, Post-construction Activities, describes engineering services during the first year following project completion and the requirements for the grantee's certification concerning project performance standards.

## B. PROCUREMENT SYSTEM REQUIREMENTS

### 1. Procurement System Certification

In the interest of reducing the time and paperwork needed for processing grant applications, each grant applicant is encouraged to use its own procurement system, provided that the system meets all applicable Federal, State, and local laws and requlations. Each grant applicant is required to evaluate its procurement system, compare the system against EPA's procurement regulations, and complete the Procurement System Certification (EPA Form 5700-48) before any procurement action is undertaken with EPA grant assistance.

Where the grant applicant affirmatively certifies that its procurement system meets the intent of the requirements of 40 CFR [Part 33] 31.36, EPA will accept the applicant's certification unless EPA or the State agency has reason to question it. Where the grant applicant does not affirmatively certify, the grant applicant is required to comply with the requirements of 40 CFR Part [33], 31.36 and to submit specific documentation to the reviewing agency.

It is to be noted that most review and approval activities related to grantee procurement actions may be delegated to the State agency, including the review of a grantee's Procurement System Certification (EPA Form 5700-48) and the authorization for a grantee to use an innovative procurement method. However, EPA can not delegate the actual review of a grantee's procurement system under [40 CFR 33.115], nor the resolution of protests of grantee procurement actions under [40 CFR Part 33, Subpart G].

Review Procedures:

a. Each grant applicant is required to complete a Procurement System Certification (EPA Form 5700-48), indicating whether its procurement system meets the intent of all requirements in the EPA procurement regulations (40 CFR [Part 33] 31.36).

b. If the grant applicant affirmatively certifies, EPA must accept the applicant's certification. However, EPA reserves the right to review the procurement system or any individual procurement action:

   i. to determine if the EPA procurement requirements are being met, or

ii. if there is reason to believe that the procurement system is unacceptable based on:

- information from other Federal agencies or from Congress,
- information from the applicant's cognizant audit agency,
- information from State agencies or other organizations,
- information contained in the certification form,
- previous EPA experience with the applicant, or
- information from contractors or prospective contractors.

Re: 40 CFR 31.36(g)(3)(ii)

c. Prior written approval must be received from the reviewing agency, even though the applicant's procurement system was previously certified, if the applicant intends to:

i. use an innovative procurement method, or

ii. use the provisions of 40 CFR [33.715(a)(2)] 31.36(d)(i)(C), to noncompetitively procure the services of an engineer who provided facilities planning or design services, but whose selection for such previous work was not accomplished in accordance with the then-applicable EPA procurement regulations (if the work was performed under a Step 1 or a Step 2 grant) or the provisions of the current EPA procurement regulations which are listed in 40 CFR [33.715(a)(3)] 31.36.

d. An applicant's affirmative certification is valid for two years or for the length of the project period, whichever is longer, unless the procurement system is substantially revised, or EPA determines that the intent of the EPA procurement regulations is not being followed.

e. If the grant applicant does not affirmatively certify, the applicant is required to comply with the additional requirements of 40 CFR [Part 33, Appendix A] Part 31, for all procurement actions undertaken with EPA grant assistance. These requirements are described in Items 2.b and 3 below.

Re: 40 CFR 33.001(g)*, 33.105*, 33.110*, 33.115*, 31.36

2. Reporting Requirements

a. [All grantees must submit the following information to the reviewing agency, in writing, within ten calendar days of contract award, for all construction contracts whose cost is expected to exceed $10,000 within a 12 month period (e.g., a $15,000 contract with a 24 month performance period would not be reportable, nor would a $7,000 contract with a two month performance period): (NOTE: Under Part 31, the $10,000 base has been raised to $25,000.)

i. name, address, telephone number, and employer identification number of the construction contractor;

ii. amount of the contract award;

iii. estimated starting and completion dates;

iv. project number, name, and site location; and

v. copy of the tabulation of bids or offerors and the name of each bidder or offeror.

This information will be sent by EPA to the U.S. Department of Labor (DOL). In some States, the State/EPA delegation agreement provides for the State agency to perform this function.]

Re: 40 CFR 33.110(e)(2)*, 33.211*, 35.2212(d), 31.36(g)

b. Grantees without a certified procurement system are required by 40 CFR [33.110(b)(2)] 31.36(g)(2) to allow the reviewing agency to conduct a preaward review of all proposed procurement actions. The manner, timing, and extent to which this review is conducted is, therefore, at the discretion of the reviewing agency. Some agencies may require only a notice of intent from the grantee, with the actual documents to be submitted only at the request of the reviewing agency, while others will

require the submission of complete documentation. Unless otherwise instructed by the reviewing agency, grantees without a certified procurement system must submit the following information for all contracts (not only construction contracts) in excess of [$10,000] $25,000. All other grantees must retain these documents in their files, and make them available at the request of the reviewing agency and/or auditing agency:

i. basis for contractor selection;

ii. justification for the procurement method selected, if other than competitive bidding (i.e, formal advertising);

iii. justification for the use of any specification which does not provide for maximum free and open competition;

iv. justification for the type of contract, if other than fixed price;

v. basis for the award cost or price, including a copy of the cost or price analysis and documentation of negotiations, if other than a fixed price contract with the lowest responsive, responsible bidder (includes all contracts over [$10,000] $25,000, which are not competitively bid; must include EPA Form 5700-41 for all contracts awarded by grantees without a certified procurement system); and

vi. justification for the rejection of any or all bids (see Section D.2 below).

Re: 40 CFR 33.250*, 33.290(b)*, 31.36(d); 40 CFR Part 33, Appendix A*

3. Public Notice Requirements

Except for grantees whose certified procurement systems include provisions which meet the intent of EPA's public notice requirements, all grantees must give adequate public notice of all proposed procurement actions, as defined in the EPA procurement regulations. These regulations require a notice of the proposed procurement action to be published in professional journals, newspapers, or publications of general circulation

over a reasonable area -- depending on the size of the project; extremely large projects will usually warrant nationwide advertisement -- [for at least 30 days prior to the deadline for receipt of proposals or bids]. Posted public notices or written notifications mailed or delivered to interested persons, firms, or professional organizations may also be used.

Re: 40 CFR 33.415*, 33.510*, 31.36(d); 40 CFR Part 33, Appendix A, Paragraphs (b)(4) and (b)(5)*

## C. PROCUREMENT OF PROFESSIONAL SERVICES

This section discusses the procurement of professional services normally associated with Step 3 grant activities. The term "professional services" is used to designate engineering, architectural, construction management, legal, and accounting services, as opposed to services provided by construction contractors and equipment suppliers. All procurements made in whole or part with EPA grant assistance, however, are subject to EPA's procurement regulations (40 CFR Part [33] 31), which describe four types of procurement:

- formal advertising (i.e., competitive bidding, sealed bids)
- competitive negotiation, proposals
- noncompetitive negotiation, proposals, and
- small purchases.

While formal advertising, with contractor selection based on competitive prices, is the preferred method of procurement, practically all professional services procurement is accomplished using the competitive negotiation procedure. For this reason, the discussion below is limited to procurement using the competitive negotiation procedure.

### 1. Competitive Negotiation, Proposals

Purpose:

Advertise, receive, and evaluate proposals, negotiate with the best qualified offerors, and award a subagreement to the responsible offeror whose proposal is determined to be the most advantageous to the grantee, taking into account price and other objective evaluation criteria.

Discussion:

As with all procurements using EPA funds, procurement transactions are to be conducted in a manner that provides maximum open and free competition. The competitive negotiation method of procurement applies equally to the procurement of engineering, architectural, construction management, legal, and accounting services. Competitive negotiation differs from competitive bidding procurement primarily in the manner in which price is considered. Price, while important, may be only one of several criteria used to evaluate offers in competitive negotiation, while in competitive bidding, price competition is the primary consideration.

Procedures:

All grantees must follow the procedures described below, except that grantees which have certified procurement systems (see Section B.1 above) may follow their own procedures, if those procedures meet the intent of the procedures described below:

a. Public Notice

When advertising a request for proposals (RFP), the grantee must give adequate notice to the public (see Section B.3 above). The public notice must include adequate information to allow interested parties to readily obtain the proposal documents.

b. Proposal Documents

Proposal documents must include:

i. a copy of [40 CFR 33.295 and 40 CFR Part 33, Subparts F and G;]

ii. sufficient information to enable an interested party to prepare a proposal;

iii. a description of all evaluation criteria and the relative importance attached to each;

iv. the objective basis which will be used to select the firm to which the subagreement will be awarded; and

v. the deadline and the place for submission of proposals.

c. Proposal Evaluation

Proposals are to be uniformly and objectively evaluated solely on the basis of the evaluation criteria stated in the RFP.

d. Negotiation

Unless the request for proposals states that contract award may be based on initial proposals alone, the grantee must conduct meaningful negotiations with the best qualified offerors (i.e., those which have submitted acceptable proposals within the competitive range), and must permit these offerors to make revisions to their proposals, in order to obtain the best final offers. The best qualified offerors must have equal opportunities to negotiate and to revise their proposals. During negotiations, the grantee must not disclose the identity of competing offerors, nor any information from competing proposals.

e. Contract Award

A subagreement must be awarded to the responsible offeror whose proposal is determined in writing (see Section B.2.b above) to be the most advantageous to the grantee, taking into consideration price and other evaluation criteria stated in the RFP.

Re: 40 CFR 33.505*, 33.510*, 33.515*, 33.520*, 31.36(d)(3); 40 CFR Part 33, Appendix A*

2. Optional Method for Procuring Engineering Services

The grantee may use the optional procedures described below, in lieu of the procedures described in Item 1 above, for the procurement of engineering services. Grantees with a certified procurement system may follow their own procedures, if those procedures meet the intent of the procedures described below:

- competition (40 CFR [33.230] 31.36(c) and (d)(3));

- documentation (40 CFR [33.250] 31.36(b)(9)); and

- one of the following three procurement methods:

  - small purchases (40 CFR [33.305 through 33.315] 31.36(d)(1)),

  - formal advertising (40 CFR [33.405 through 33.430] 31.36(d)(2)), or

  - competitive negotiation, proposal (40 CFR [33.505 through 33.525] 31.36(d)(3)); and

iii. no conflicts of interest existed.

c. Noncompetitive Negotiation

Based on information submitted by the grantee, the reviewing agency finds sufficient justification to allow noncompetitive procurement for reasons other than simply using the same individual or firm which provided facilities planning or design services. Such justification must be based on sound business reasons (e.g., emergency conditions, inadequate competition, services available only from a single source, etc.). This condition requires prior approval from the reviewing agency (see Section F below).

The procurement of engineering services for Step 3 work must also satisfy all other provisions of the current EPA procurement regulations (e.g., type of subagreement, cost and price analysis, required subagreement clauses, etc.), and must comply with the documentation and reporting requirements discussed in Section B.2 above.

Re: 40 CFR 33.715*, 31.36(d)(4)

4. Small, Minority, Women's, and Labor Surplus Area Businesses

The affirmative action steps described in Section V.C.1.w are equally applicable to grantee actions in the procurement of professional services. Evidence that the grant applicant recognizes his responsibilities with regard to these businesses should be submitted with the grant application. The reviewing agency must insure that the affirmative steps were carried out, and that the applicant complied with State or local goals or other applicable standards.

Re: 40 CFR 33.240*, 31.36(e); OMB Circular A-102, ¶7.d. (3/3/88)

5. Scope of Work

Purpose:

Provide sufficient detail to clearly define the nature, scope, extent of work, time frame for completion, total compensation, and payment provisions for grantee subagreements for professional services.

Discussion:

a. Engineering Services during Construction

The scope of work will generally include:

i. those applicable services normally associated with engineering supervision and inspection during construction (e.g., interpretation of plans and specifications, resolution of technical problems, preparation of estimates of work in place, review of claims and change orders, etc.); and

ii. preparation and implementation of the final plan of operation, including the preparation of the operation and maintenance (O&M) manual.

b. Post-construction Engineering Services

The 1981 Clean Water Act (CWA) amendments require the grantee to select the engineer or engineering firm principally responsible for either supervising, or

providing engineering services during construction (i.e., facilities planning, design, and/or building of the project), to provide engineering services during the first year following initiation of operation. Such services should be reflected in the scope of work and will generally include:

i. directing the operation of the project, including both sewer projects and treatment facilities, commensurate with the type and complexity of the project;

ii. conducting studies regarding the elimination of excessive infiltration/inflow (I/I);

iii. revising the O&M manual as necessary to accommodate actual operating experience;

iv. training, including the preparation of curricula and training material, for operating personnel; and

v. advising the grantee whether the project is meeting the project performance standards (see Section I.2 below).

Procedures:

[The scope of work of the subagreement is to be reviewed to insure that it clearly defines:

- the nature, scope, and extent of the work to be performed;
- the time frame or schedule for performance;
- the total cost or compensation of the contractor; and
- payment provisions, including retainage, if any.]

Re: 40 CFR 33.1015*, 35.2218(b); preamble to 40 CFR Part 35, Subpart I, 49 FR 6228, "Project Performance," and 49 FR 6231, "Building" (February 17, 1984)

6. Types of Subagreements and Required Provisions

All professional services subagreements (contracts) must include the applicable provisions and clauses described in 40 CFR Part [33] 31, and must not include any provisions which are prohibited by 40 CFR Part [33] 31. The reviewing agency must verify that the following subagreement requirements have been satisfied:

a. Subagreements must be awarded only to responsible contractors (see Section V.C.1.f).

b. Prohibited types of subagreements are the cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) and the percentage-of-construction-cost.

c. The type of subagreement selected should be based on the nature of the work and the degree of risk inherent in performing the work. Typical types of subagreements used for professional services include:

   i. fixed price (lump sum), where the scope of work is clearly defined; or

   ii. cost-plus-fixed-fee, where the scope of work is less clearly defined. These subagreements include a cost ceiling which may not be exceeded without negotiation and the preparation of a contract amendment (i.e., change order).

d. In addition to including provisions which define a sound and complete subagreement (see Item 5 above), all subagreements must include the applicable provisions of 40 CFR Part [33] 31.3(d)(i) regarding labor standards; patents, data and copyrights; violating facilities; energy efficiency; and the model sub-agreement clauses or their equivalent. The grantee and the contractor must first determine which of these provisions apply to the work to be performed, and then create a contract clause to address each requirement.

Re: 40 CFR 33.220*, 33.285*, 33.1005* through 33.1030*, 31.36

## 7. Cost and Price Analysis

Purpose:

Insure that the total cost of a subagreement, including each component of its cost, is reasonable, allowable, and commensurate with the scope and complexity of the work.

Discussion:

The procurement regulations require the grantee to conduct a cost analysis, based on information submitted by contractors and subcontractors, of all negotiated change orders and negotiated subagreements in excess of [$10,000] $25,000. Cost analysis is the process of examining, verifying, and evaluating cost data, and projecting from the basic cost data to determine a reasonable estimated price that will be representative of the total cost of performance of the negotiated subagreement. To be allowable for grant participation, cost must comply with the cost principles in 48 CFR Part 31, "Contract Cost Principles and Procedures" (see Sections IX.F.1 and IX.F.2). Profit must be negotiated as a separate element of price where there is no price competition, or where price is based on a cost analysis.

In general, total cost consists of three elements: direct costs (labor, materials, and supplies for a specific project), indirect costs (overhead and/or general and administrative burden such as rent, utilities, fringe benefits, employee taxes, accounting costs, etc., where such costs cannot be directly assigned to a specific project), and profit.

The estimated hours necessary to perform a specific task times the hourly rate paid to the employees, which varies with their level of skill, represents direct labor costs.

Some costs included in an indirect cost category are not allowable for grant participation even though they are a cost of doing business. Examples of these costs are interest on borrowed capital, bad debts, advertising, entertainment, and business development expenses. Indirect costs may be allocated to all projects within the business, but must be reasonable and allocated on a rational basis.

The last element of cost is profit. While the EPA regulations do not discuss a specific level of profit, grantees are required to negotiate a "fair and reasonable" profit. The determination of a "fair and reasonable" profit requires judgement by all parties, and may be guided by practices in the area and the degree of risk incurred by the contractor. For example, a fixed

price contract, assuming that the costs were accurately estimated, exposes the contractor to a higher level of risk than a cost-plus-fixed-fee contract.

Review Procedures:

For all negotiated subagreements in excess of [$10,000] $25,000, the reviewing agency is to insure that the grantee has conducted a cost analysis for all contractors and subcontractors and that:

a. estimates of work hours, level of required skills, and direct labor rates are reasonable and commensurate with the work to be performed;

b. indirect cost rates are reasonable, allocated on a rational basis, conform with Federal cost principles, and do not include any unallowable costs; and

c. profit is negotiated as a separate element of cost, and is commensurate with the complexity of the work and the type of contract (i.e., the level of risk assumed by the contractor).

Re: 40 CFR 33.235*, 33.275*, 33.290*, 31.36(d) and (f)(2); 40 CFR Part 33, Appendix A*; 48 CFR Part 31; OMB Circular A-87

8. Additional Services

At times, additional professional services, beyond those originally envisioned (either in scope or extent) at the time of contract preparation, will be required by the grantee. Such additional services are most frequently required for deciding procurement protests filed by potential construction contractors and equipment suppliers (see Section IX.F.4, Paragraph A.1.c), and for assessing the merits and negotiating the settlement of claims filed by construction contractors and equipment suppliers (see Section IX.F.4, Paragraph A.1.f).

To be eligible for grant participation, the additional services must be within the scope of the project (i.e., the work necessary to construct the facility described by the facilities plan). If the additional work is within both the scope of the project and the scope of the existing contract for professional services

(see Item 5 above), a change order may be issued to the contractor by the grantee, with the price of the additional services negotiated as an equitable adjustment to the contract. If the change order requires prior approval by the reviewing agency (see Section H.3 below, and Section IX.F.4, Paragraph A.1.f), the review procedures described in Section H.5 below, modified to suit contracts for professional services, should be used.

If the additional work is within the scope of the project, but outside the scope of work of the existing contract, the additional services must be procured through the procedures described in Section C.1 or C.2 above, unless the procedures described in Section E or F below are appropriate.

Re: 40 CFR 33.1030, Paragraph 3(b)*, 31.30

## D. PROCUREMENT OF CONSTRUCTION CONTRACTORS

The grantee is required to award subagreements and issue notices to proceed for building all significant elements of the project as soon as possible, but no later than 12 months, after grant award. All grantees must submit limited information concerning each subagreement award to the reviewing agency. Grantees without a certified procurement system must submit more detailed information.

### 1. Competitive Bidding

In almost all cases, procurement of construction contractors and suppliers of equipment and materials must be done using the competitive bidding method (referred to as [formal advertising] competititve proposal in 40 CFR [Part 33] 31.36(d)(3)). Competitive bidding involves advertising for bids, receipt of sealed bids, public opening of bids, and the award of the contract to the responsive and responsible bidder who submits the lowest bid. In practically all cases (see Section B.2.a above), a bid tabulation must be prepared by the grantee's engineer, showing the prices bid by each contractor for each item in the contract proposal form. The reviewing agency is to insure that all required competitive bidding procedures were used, including:

a. Public Notice

When advertising for bids under the formal advertising (i.e., competitive bidding) method, the grantee must give adequate notice to the public. The public notice must include sufficient information to enable bidders to readily obtain and review bidding documents.

b. Bidding Documents

The bidding documents must include:

i. a copy of 40 CFR [33.295; 40 CFR Part 33, Subparts F and G]; and if appropriate, "Labor Standard Provisions for Federally Assisted Contracts" (EPA Form 5720-4);

ii. a complete statement of the work to be performed, including where appropriate, design drawings, specifications, and the required performance schedule;

iii. the terms and conditions of the subagreement to be awarded, including payment, delivery schedules, point of delivery, and acceptance criteria;

iv. the place and deadline for submitting bids;

v. a clear explanation of the bidding procedures and the method to be used by the grantee to evaluate bid prices and to award the subagreement;

vi. the criteria to be used in evaluating bidders' compliance with the responsibility requirements; and

vii. the DOL prevailing wage rate determination, if applicable.

c. Addenda

Prior to bid opening, the grantee may have issued addenda to correct errors, to clarify information in the bidding documents, or to incorporate the current wage rate determination. Contract proposal documents

should include a form for certification that the bidder has received all addenda before the bid date. Where addenda have been issued by the grantee, the reviewing agency is to insure that receipt of such addenda is acknowledged by each bidder, and that the addenda were issued in a reasonable time (generally 5 days) before the deadline for the receipt of bids (see Section V.C.1.d).

d. Number of Bids

Sufficient bids should have been received. If only one bid is received, the grantee should analyze the reasons for receipt of only one bid. If the grantee determines that the specifications were written in a manner which discouraged bidding, or that some other situation existed which caused the lack of bidders, the grantee must correct these problems and rebid the project.

If the grantee determines that there was a sufficient number of responsible contractors within the area that could have bid on the project, and that there is valid justification for receiving only one bid, the grantee may accept the bid provided that he conducts a price analysis, if the bid exceeded [$10,000] $25,000, and determines that the bid is reasonable (i.e., it compares favorably with the engineer's estimate or some other basis for a price comparison).

If the bid price significantly exceeds the engineer's estimate, the grantee may reject the bid as explained in Item 2 below.

e. Bid Evaluation

Evaluation of all bids must have been made using the objective criteria described in the bidding documents. All necessary bid bonds and certifications must have been submitted, and all required forms completed and signed. If less than three responsive and responsible bids were received and the low bid exceed [$10,000] $25,000, the grantee must have conducted a price analysis of the winning bid and determined that it was reasonable.

f. Contract Award

A fixed price contract must be awarded to the lowest responsive and responsible bidder (see Section V.C.1.f). The contractor to which the contract is awarded must not be on EPA's Master List of suspended and debarred contractors.

Re: 40 CFR 33.211*, 33.220*, 33.235*, 33,290(b)*, 33.405*, 33.420*, 33.415*, 31.36

2. Rejection of All Bids

The grantee may reject all bids only if it has sound, documented business reasons for doing so. The reviewing agency may approve such actions where justified as being in the best interests of the construction grants program. Because of varying State statutory requirements, it may be prudent to request that the grantee's legal counsel submit documentation supporting such actions under State law. If the grantee improperly rejects all bids, any additional costs incurred (including a contract price which is higher than the original low bid) will be ineligible for grant assistance. It is therefore advisable for the grantee to consult with the reviewing agency before rejecting all bids.

After rejection of all bids, the grantee may either readvertise using the competitive bidding method (see Item 1 above), or negotiate the procurement (if appropriate) in accordance with 40 CFR [33.505 through 33.525 or 33.605] 31.36(d)(3) and (4).

Re: 40 CFR 33.430(c)*, 31.36(d)

3. Small, Minority, Women's, and Labor Surplus Area Businesses

The reviewing agency is to insure that affirmative actions have been taken by the grantee, and where appropriate, by the grantee's contractors, to include small, minority, women's, and labor surplus area businesses in the bidding process (see Section V.C.1.w). Where State or local goals have been established, the reviewing agency is to compare those goals against the contract awards.

Re: 40 CFR 33.240*, 31.36(e); OMB Circular A-102, ¶7.d. (3/3/88)

4. Grant Adjustment

Each grant award is originally based on the estimated allowable costs of building the project, a reasonable construction contingency, the cost of eligible land, and the estimated

allowance for planning and/or design. After the receipt of bids and the acquisition of eligible land, the costs of building the project are more accurately known, and the grant should be adjusted accordingly. Any grant adjustment requires a formal grant amendment.

a. Building Cost

The sum of all prime contracts and subcontracts (including contracts for the direct purchase of equipment, materials, or supplies by the grantee), plus the cost of approved force account work in lieu of awarding construction contracts, equals the total allowable building cost. If the total allowable building cost is less than the estimates used for grant award, the grant is to be reduced accordingly (see Section IX.C.2). If the total allowable building cost is more than the estimated allowable building cost plus the construction contingency, the grant may be increased (see Section IX.C.1) if the bids are judged reasonable, and sufficient funds are available in the State's allotment (many States maintain a reasonable reserve of grant funds for this purpose). If bids are significantly higher than anticipated, it may be necessary for the grantee to reevaluate its financial capability in light of the higher costs. Also, if bids are significantly higher, it may be appropriate for the grantee to reevaluate the scope of work, or when appropriate, reject all bids and readvertise. This last course of action may only be undertaken in accordance with State law and EPA procurement regulations (see Item 2 above).

b. Construction Contingency

After receipt of bids, the construction contingency is usually reduced to between 2 and 5 percent of the total allowable building costs. The construction contingency is available for unanticipated cost increases (i.e., change orders) during construction. However, as a result of regulations revised in November 1985, for grants awarded on or after February 10, 1986, the maximum allowable project cost is equal to the allowable project costs plus 5% excluding an allowance. For grants awarded prior to that date, see Section IX.C.1.

c. Land Acquisition Cost

Assuming that the requirements of 40 CFR Parts 4 and 30 have been satisfied with regard to the acquisition of eligible land, the grant amount may require adjustment after the actual cost of eligible land and allowable costs of complying with 40 CFR Part 4 are known.

d. Allowance for Planning and/or Design

The final allowance for planning and/or design is determined only once, and is based on the initial allowable award amount of all prime construction contracts. (including contracts for the direct purchase of equipment, materials, and supplies by the grantee), plus the initial amount approved for force account work in lieu of awarding construction contracts, and the purchase price of eligible land. The amount of the allowance does not change, even if the actual building costs increase or decrease during the performance of the work. The final allowance is computed in accordance with 40 CFR Part 35, Subpart I, Appendix B (see Section VI.L.1).

e. Grant Amendment

Any grant adjustment, as determined in Items a through d above, requires the preparation of a formal Grant Agreement/Amendment (EPA Form 5700-20A). States are to verify that sufficient funds are available in the State's allotment, certify the grant amendment and other documents required by the State/EPA delegation agreement, and submit the grant amendment to EPA for approval (see Section VI.M).

Re: 40 CFR 30.700*, 31.30, 35.2204; 40 CFR 35.2205

5. Contract Award

Grantees are to award contracts and issue notices to proceed for building all significant elements of the project as soon as possible, but no later than 12 months, after grant award (see Section IX.F.4, Paragraph A.2.e).

Re: 40 CFR 35.2212

6. Protests

A protest is a written complaint concerning the grantee's solicitation or award of a subagreement, and may be filed with the grantee only by a party with a direct financial interest which has been adversely affected by the grantee's action. Protests may be filed during the procurement of professional services or construction services (including the direct purchase of equipment, materials, and supplies by the grantee), and should normally be submitted to the grantee prior to the closing date for the receipt of proposals or bids.

Grantees bear the primary responsibility for the resolution of protests, and should establish procedures for their prompt resolution. It is advisable that these procedures require protests involving allegations of improprieties in the grantee's solicitation practices to be submitted to the grantee prior to bid opening or the closing date for the receipt of proposals. Upon receipt of a protest, the grantee should first determine whether it is appropriate to defer the protested procurement action. If the procurement action is not deferred, the protester files an appeal with EPA, and EPA finds in favor of the protester, the cost of the protested procurement action may be disallowed for grant participation. Grantees should investigate the basis for the protest, seek the advice of legal counsel, document all meetings and actions, correspond by registered mail, and resolve the protest promptly and equitably.

EPA regulations primarily address the procedures to be used by EPA in considering a protest appeal. A protest appeal is a written complaint filed with EPA by a party with a direct financial interest which has been adversely affected by the grantee's decision on the initial protest. Protest appeals are to be filed with the Office of Regional Counsel in the appropriate EPA Regional Office (or for grants awarded by EPA Headquarters, the Assistant General Counsel for Grants).

EPA will not accept a protest appeal unless the protester has exhausted all administrative remedies at the grantee level. A protest appeal is limited to:

a. issues arising under the procurement provisions of 40 CFR Part [33] 31 (e.g., an appeal concerning the rejection of all bids);

b. alleged violations of State or local law, but only where EPA determines that there is an overriding Federal interest; and

c. issues arising over the award of a lower tier subagreement (subcontract) by a prime contractor.

When the protester files appeal documents with the Office of Regional Counsel (or for grants awarded by EPA Headquarters, the Assistant General Counsel for Grants), all protest documents and attachments must be concurrently transmitted by the protester to all other parties with a direct financial interest which may be adversely affected by the appeal.

The EPA official designated to resolve the appeal will consider only written appeals filed within seven calendar days after the adversely affected party (initial protester or other party) received the grantee's determination. This requirement can be met if the adversely affected party transmits a telegram to EPA within the seven calendar days, indicating an intent to file a protest appeal, and the complete protest appeal is received by EPA within seven days thereafter.

When EPA receives a protest appeal and the grantee has not deferred the procurement action, EPA will promptly request that the grantee defer the protested procurement action with respect to the subagreement or item at issue until the appeal is resolved.

EPA may summarily dismiss the appeal if:

- procurement issues are not involved,
- the appeal is otherwise not reviewable,
- procedural requirements (i.e., meeting deadlines) have not been complied with,
- the protester does not agree to extend the bid and bid bond period, or
- the appeal lacks merit.

If a review is warranted, EPA may arrange for the submission of written arguments or participation in a conference by all parties who may be adversely affected by the appeal. EPA will then determine whether the protest has a rational basis. EPA's determination will constitute the final action, from which there is no further administrative appeal. State reviewing agencies may not be delegated responsibility for the resolution of protest appeals under EPA's procurement regulations.

Re: 40 CFR 33.001(g)*, 31.36(b)(11) and (12); 40 CFR Part 33, Subpart G*

## E. SMALL PURCHASES

Small purchase procurement procedures provide for a simplified method of procurement where the dollar value is relatively small. Small purchases, however, must be conducted in such a way as to insure competition, so that the product or service is the best value for the lowest price. In reviewing small purchase procurements, insure that:

1. the aggregate amount of any one procurement does not exceed [$10,000] $25,000, or a lower amount established by State or local law;

2. [the procurement was not divided into smaller amounts to avoid the dollar limitation for small purchase procurement]; and

3. price or rate quotations were obtained and documented from an adequate number of qualified sources.

Re: 40 CFR 33.305*, 33.310*, 33.315*, 31.36(d)(1)

F. NONCOMPETITIVE NEGOTIATION

Noncompetitive negotiation (i.e., sole source procurement) is the least favored method of procurement, and may only be used if the other three methods of procurement are inappropriate, or where the requirements for continuation of engineering services have been satisfied (see Section C.3.c above). Noncompetitive negotiation for the continuation of engineering services requires the prior written approval of the reviewing agency.

Noncompetitive negotiation may only be used if the other three procurement methods (i.e., competitive bidding, competitive negotiation, and small purchase) are inappropriate because:

1. the item is available only from a single source;

2. a public exigency or emergency exists;

3. after solicitation from a number of sources, competition is inadequate (e.g., after formal advertising, only one responsive and responsible bid is received) (see Section D.1.d above); or

4. the reviewing agency authorizes noncompetitive negotiation for continuation of engineering services (see Section C.3.c above).

Re: 40 CFR 33.605*, 33.715*, 31.36(d)(4)

## G. MONITORING CONSTRUCTION

Purpose:

Insure that the grantee manages the project in accordance with the commitments made in the grant application and the grant acceptance, and that the project is constructed in accordance with the approved plans, specifications, and change orders.

Discussion:

To insure adequate performance by all equipment vendors and construction contractors, the reviewing agency must provide for sufficient monitoring of construction activities. The reviewing agency's monitoring program should begin with a preconstruction conference, extend through interim construction monitoring activities, and conclude with a final inspection. The extent and frequency of monitoring will depend on the size and complexity of the project, and the needs and performance of the grantee, the resident inspection team, and the construction contractors. The agency performing the monitoring activities will be designated in the State/EPA delegation agreement, with monitoring activities carried out by the State, EPA and/or the U.S. Army Corps of Engineers (COE). In some States, one of these agencies has been given the responsibility for all monitoring activities, while in others, two or all three agencies share this responsibility. Each agency is to follow the detailed monitoring procedures in the State/EPA delegation agreement and/or the EPA/COE interagency agreement.

To assist reviewing agencies in carrying out a thorough and efficient monitoring program, EPA has prepared two guidance documents which include a complete discussion of the specific actions to be undertaken during construction monitoring: "Operating Procedures for Monitoring Construction Activities at Projects Funded under the Environmental Protection Agency's Construction Grants Program," dated September 1983, and "Construction Management Evaluation and Project Management Conference Manual," dated December 1983. The documents should be used in conducting onsite construction monitoring activities. However, reviewing agencies must also maintain off-site (i.e., in the reviewing agency's office) construction monitoring through the review of payment requests, inspection reports, change orders, correspondence, and telephone communications. This information, when compared with the project schedule in the grant agreement, will provide an indication of the adequacy of construction progress, and may form the basis for changing the frequency of

be issued to the contractor, and the price of the change negotiated as an equitable adjustment to the contract.

Management of change orders by the grantee and the grantee's construction management team is one of the principal areas of discussion and review during the preconstruction conference and the PMC. Regulatory provisions concerning project changes have been included in all EPA funded projects, and are identified in 40 CFR [33.1030, Paragraphs 3 through 9] 31.30, for grants awarded on or after May 12, 1982; comparable provisions are included in 40 CFR Part 35, Subpart E, Appendix C-2, for grants awarded prior to May 12, 1982.

It is the reviewing agency's responsibility to insure that the grantee has an operating change order management system in place, and that the grantee reviews and acts upon all change orders promptly. All State agencies, and particularly those with delegation agreements, have developed detailed change order review checklists and reviewing procedures. These established procedures should be followed. In order to prevent costly delays, a strong effort should be made to review all change orders and issue approval/denial decisions promptly.

EPA's guidance document, "Management of Construction Change Orders - A Guide for Grantees," March 1983, includes a chapter entitled "Reviewing Agency Procedures." Review of change orders is also discussed in EPA's "Construction Management Evaluation and Project Management Conference Manual," December 1983.

Procedures:

The procedures discussed below highlight considerations to be taken into account by the grantee in managing claims and change orders, and by the reviewing agency during the processing of change orders:

1. Conditions that May Warrant a Change Order

The six conditions below are those which are most frequently encountered as the basis for a change order. The reviewing agency must carefully evaluate the circumstances surrounding the change and compare the proposed change against the original contract documents, including the plans and specifications. In some cases, the contractor may be entitled to a change order under State contract law, but the change may be ineligible for EPA grant assistance.

a. Differing Site Conditions

When bidding, contractors generally investigate site conditions and review information in the contract documents such as soil boring logs, quantities of rock, depth to groundwater, etc. After initiating construction, if the site conditions significantly differ from those described in the contract documents or differ from those normally encountered in construction, the contractor may be entitled to a change in the contract price. Judgement is required to determine whether the contractor should have anticipated the conditions as a normal risk in bidding the the project.

b. Errors and Omissions

Errors and omissions are usually design or drafting deficiencies in the plans and specifications. Where the error or omission would normally have been included in accurate plans or specifications, and can be added to the contract at approximately the same cost as the work would have cost if included in the original bidding documents, the change order may be considered an allowable cost. If the error or omission results in re-construction or other additional effort beyond that which would have been required if the work had been included in the original bidding documents, the cost of such additional work will not be allowable. In such cases, the grantee may seek redress from the designer or other responsible parties. See Section IX.F.4, Paragraph A.1.g (2)(i), for an additional discussion of the allowability of the cost of correcting errors and omissions.

c. Regulatory Changes

At times, new laws or regulations are enacted by the local, State, or Federal government requiring retroactive application of new requirements (e.g., revised State water quality

or design standards). Where applicable, such statutory or regulatory changes may warrant a change order, which may be considered an allowable cost.

d. Design Changes

A design change is a modification to an existing adequate design. In order to be approved, it should be cost effective and offer a net life cycle savings (i.e., including future O&M costs). Design changes usually originate as proposals from a construction contractor, based on the construction incentive (CI) clause (see Section V.C.1.v). Where a design change other than a CI proposal represents a substitution of equipment or material, care should be exercised to insure that the nonrestrictive specifications or sole source procurement provisions are not violated.

e. Overruns and Underruns

Bids for materials are often based on estimated quantities and unit prices. Actual quantities will usually differ, and the contract price will be adjusted accordingly. However, grant payments for such adjustments may be limited. (See Section IX.C.1.a.) Care must be exercised to insure that quantities are continually monitored and where possible, significant overruns are avoided. Many specifications contain a clause which allows unit prices to be renegotiated if the final quantity differs from the estimated quantity by 15 percent or more. (The term "renegotiated" is traditionally used, even when the original price was bid, rather than negotiated.)

f. Time of Completion

Because of the potential for claims and possible litigation, special care must be exercised in this area. Claims may arise with regard to the time of completion because the contract provides for the assessment of liquidated damages against the contractor if the contract completion date

is not met. Liquidated damages assess the contractor a specific dollar amount for each day of delay beyond the contract completion date to cover the grantee's extra costs (see Section IX.F.4, Paragraph A.3.a). However, the contract completion time may be extended for cause (e.g., work added by change orders, unusually adverse weather conditions, etc.) by the grantee, thereby reducing or eliminating the assessment of liquidated damages.

Conditions which may arise with regard to the time of completion include termination (either for convenience or for default), suspension of work, directed acceleration, time extensions or constructive acceleration. Each condition has its own inherent problems, and very often their use will be guided by existing State law.

A change order which merits an extension of the contract completion date must include a provision for an appropriate extension of that completion date. (When no time extension is required, the change order should clearly document that both the grantee and the contractor agree that no extension is needed.) Such changes will usually extend the time of project completion beyond the end of the grant budget period, in which case the change will also require the preparation of a formal grant amendment.

Re: 40 CFR 33.1030*, 31.30; 40 CFR Part 35, Subpart I, Appendix A, Paragraphs A.1.f, A.1.g, and A.2.c.; 40 CFR 35.2205.

2. Claims

When a written demand (voucher, invoice or other request for payment) or a written assertion (seeking money or an adjustment, interpretation or relief from contract terms) is submitted by a contracting party it is NOT a claim. However, when such a request is rejected or otherwise disputed by the recipient, it becomes a claim. If such claims are not addressed promptly and in an objective manner, costs can escalate dramatically, especially if the dispute leads to arbitration or litigation. For this reason, it is imperative that grantees develop and apply management techniques for the avoidance and quick resolution of claims. When a claim is made, the grantee should attempt to resolve the claim as promptly as possible, either

i. The reasonable costs of independent assessment and negotiation of costs (including legal, technical, and administrative costs) are allowable, but only if prior approval is received from the reviewing agency and certain other conditions, discussed in the "Claims Management Guidance," are met.

ii. Meritorious contractor claims are allowable, provided that all the rules of change order approval have been met, and the costs were not caused by the grantee's mismanagement or vicarious liability for the improper actions of others (see Section IX.F.4, Paragraph A.1.f, A.1.g, and A.2.c).

iii. The reasonable costs (including legal, technical, and administrative costs) of defending against a claim, or of prosecuting a claim to enforce a subagreement, are unallowable unless six specific conditions, discussed in the "Claims Management Guidance," are met, and prior approval is received from the reviewing agency.

A grantee may request technical or legal assistance from the reviewing agency. Such assistance may be provided, but generally is given only after all possible sources of assistance at the local level have been exhausted.

Re: 40 CFR 35.2350; 40 CFR Part 35, Subpart I, Appendix A, Paragraphs A.1.f, A.1.g, and A.2.c; 40 CFR 35.2205; and "Prevention and Resolution of Contractor Claims," March 1985.

3. Prior Approval

Minor changes in the project work, consistent with the objectives of the project and within the scope of the grant agreement, do not require a formal grant amendment. Prior approval by formal grant amendment is required

for changes (either by change order or by initiating a new procurement action) which:

a. increase grant funding (i.e., require additional funds beyond that provided in the contingency allowance);

b. transfer the project to another grantee (includes a reorganization which forms a new unit of government to build and/or operate the project);

c. alter the project performance standards;

d. alter the type of wastewater treatment provided by the project;

e. significantly delay or accelerate the project schedule;

f. substantially alter the facilities plan, design drawings and specifications, or the location, size, capacity, or quality of any major part of the project; or

g. require rebudgeting of amounts from one activity to another (e.g., from construction to non-construction activities, from indirect costs to direct costs, from employee training to another cost category, etc.).

Re: 40 CFR 30.700*, 30.705*, 31.30, 35.2204

4. Submission

Change orders, other than those involving a formal grant amendment as discussed in Item 3 above, do not have to be submitted to the reviewing agency prior to execution and implementation, regardless of whether or not the grantee has a certified procurement system. However, grantees should be encouraged to submit all change orders to the reviewing agency in a timely manner, since eventually, any cost increases (using part of the contingency allowance) or decreases will have to be reconciled with the existing project grant to determine the final grant amount. Also, it is to the grantees advantage to have allowability of costs determined by the reviewing agency prior to project closeout, to provide a basis for the review of project costs by EPA's Office of the Inspector General (OIG).

Except for grantees whose certified procurement systems include provisions which meet the intent of EPA's change order requirements, all grantees must conduct a cost or pricing analysis for negotiated change orders exceeding a net change of [$10,000] $25,000, (i.e., both additive and deductive changes), with profit negotiated as a separate element of the price, and obtain cost or price data from the contractor using EPA Form 5700-41, or a similar format which provides the same information. The cost or pricing analysis need not be submitted to the reviewing agency, but must be maintained in the grantee's files for review by the reviewing agency if desired.

Re: 40 CFR 33.235*, 33.290*, 31.30, 31.36(g)(2)(v), 35.2204; 40 CFR Part 33, Appendix A*

5. Change Order Review

Prior to change order approval, the reviewing agency is to insure that:

a. Justification of the need for the change order has been documented, and includes an evaluation of alternate ways of achieving the same objective.

b. A comparison has been made between the change order and the approved contract's scope of work, including plans and specifications, and the model change order clauses in the contract documents.

c. A method has been established for determining the price of the change order, and any additional time required for contract completion, including grantee/contractor negotiations, price or cost analysis, and comparison with the engineer's independent estimates.

d. The effect of the change order on other structures and items of equipment (secondary effects), the additional cost of extended engineering inspection services, and the additional O&M costs over the useful life of the project have been determined.

e. The effect of the change order on the quality of the work, including the project performance standards and the capacity of the treatment works, has been determined.

f. The change order will not circumvent EPA's procurement regulations, including the requirement for competitive equipment specifications.

g. A comparison with the reviewing agency's on-site inspection reports has been made.

h. The change order requires prior approval and/or the preparation of a formal grant amendment before implementation.

i. The cost of the change order is allowable for grant participation, or a percentage of the change order is allowable, excluding costs associated with reserve capacity (see Section VI.D.18).

Re: 40 CFR 30.700*, 30.705*, 33.1030*, 31.30, 35.2050, 35.2204; EPA publication, "Management of Construction Change Orders - A Guide for Grantees," March 1983

## I. POST-CONSTRUCTION ACTIVITIES

This section is concerned only with engineering services during the first year of operation and the project performance certification. Section G.5 above discusses the final project inspection. Closeout of projects is discussed in Section VIII.D.

### 1. Engineering Services during the First Year of Operation

The 1981 CWA amendments require that the grantee procure the services of the engineer or firm that provided engineering services during construction, or the engineer or firm that super-

vised construction, to assist in operating the project during its first year of operation. The term "construction" includes planning, design, and engineering services during the building of the project, and is not to be confused with the term "building," which includes only Step 3 activities. These terms are defined in 40 CFR 35.2005(b)(8) and (b)(13).

The 1981 CWA amendments use the term "supervise," whereas the regulations use the word "direct," when referring to the services to be provided by the engineer. The word "direct" better reflects the intent of the services, since it does not imply a daily "in charge" presence at the treatment works, nor a role as employee supervisor or chief operator.

a. Scope of Engineering Services

The regulatory requirements for the scope of engineering services during the first year of operation are described in Section C.5.b above. In essence, the engineer is to direct the operation of the treatment works, particularly with regard to problems which develop; revise the O&M manual to reflect actual operating experience; train employees; and provide engineering advice to the grantee as to whether the treatment works is meeting the project performance standards.

The intent of these requirements is that the engineer with the most experience in the planning, design, and building of the project will utilize this expertise to help the grantee insure that the project meets its performance standards. The engineering services will normally include reviewing laboratory procedures, including the frequency and results of tests to control unit process operations; recommending ways to maintain appropriate levels of solids or dissolved oxygen in the aeration tanks; determining the best conditions for the withdrawal of sludge from the digesters; etc.

Engineering services are also required for projects which include only sewers (collection, trunk, and/or interceptors) and pumping stations. Such services will be less extensive than those required for a treatment plant, but will typically include:

i. for pumping stations, periodic site visits to check operations (e.g., to insure that float control mechanisms are operating properly, that pump cycling is the most efficient, that seals are properly maintained and not leaking, etc.);

ii. for sewers, opening and inspecting manholes to observe signs of surcharging or sand deposits; after storms, checking for inflow or flooding; etc. If the project included rehabilitation of sewers to eliminate excessive I/I, the engineering services may also include a limited amount of flow monitoring at sites within the collection system, to supplement flow measurements at the treatment facility.

Engineering services during the first year of operation, therefore, are those necessary to insure the efficient operation of the treatment works project, and are directed toward achieving compliance with the project performance standards. The extent of such services will vary from project to project, depending on the size, type, and complexity of the project and the needs of the grantee's operating staff.

Re: 40 CFR 35.2218(b)

b. Procurement of Services

The scope of work for the engineering contract for inspection and supervision services during the building of the project should also include engineering services during the first year of operation. As an alternative, the grantee may procure the engineering services required for the first year of operation as the construction of the project nears completion. Regardless of the timing of procurement of engineering services, the procurement must be conducted in accordance with 40 CFR Part [33] 31.36 (see Sections B, C, E, and F above). While a fixed price contract is acceptable, because of uncertainties during the first year, a cost-plus-fixed-fe type contract may be more appropriate.

## A. INTRODUCTION

This chapter describes basic considerations for completing and closing out projects. It begins with a discussion of EPA's policies and procedures for completing and closing out Step 1 and Step 2 projects, all of which were awarded grant assistance prior to the enactment of the 1981 amendments to the Clean Water Act (CWA), which eliminated Step 1 and Step 2 grants. EPA's goal is to complete all Step 1 and Step 2 projects by September 30, 1985, and to do so without grant increases unless they are absolutely necessary.

Later sections describe the completion and closeout of Step 2+3, Step 3 and Step 7 projects. The chapter concludes with a discussion of audits, including the resolution of audit exceptions.

Since the completion and closeout processes are based on internal administrative procedures rather than EPA regulations, there are relatively few regulatory citations in this chapter. Therefore, although the procedures and sequence of events described in this chapter represent basic considerations for completing and closing out projects, specific step-by-step procedures are to be developed by the EPA Regions and the delegated States.

Section B, Step 1 and Step 2 Completions, describes EPA policies and goals concerning the completion of Step 1 and Step 2 projects, and includes guidance on the level of review, the conditions under which the work effort should be reduced, and the conditions under which a grant increase should be awarded.

Section C, Step 2+3, Step 3 and Step 7 Completions, describes considerations for completing construction projects, with particular emphasis on pre-1982 projects involving phased or segmented treatment works or sewer system rehabilitation.

Section D, Completion and Closeout Process, describes activities leading up to closeout, including final inspection, cutoff date, documentation, payments, property management, delays, engineering services, project officer certification, and file retention.

Section E, Audit Process, describes procedures for requesting and performing audits, and for resolving audit issues.

## B. STEP 1 AND STEP 2 COMPLETIONS

Purpose:

Complete Step 1 and Step 2 projects by September 30, 1985.

Discussion:

The 1981 CWA amendments eliminated the award of Step 1 and Step 2 grants after December 29, 1981. It is EPA policy to make every effort to complete all Step 1 and Step 2 projects (except large, complicated, or involved projects) by September 30, 1985. In so doing, reviewing agencies are to insure that all applicable regulatory requirements and EPA policies in effect on the date of grant award are satisfied, and that all grant conditions contained in the grant agreement are fulfilled. All of these projects are subject to EPA regulations contained in 40 CFR Part 35, Subpart E. However, since Subpart E has been amended several times over the years, EPA has published the "Regulation and Policy Matrix - A Guide to the Rules Governing Grants Awarded under the Construction Grants Program," dated December 1983, to assist project reviewers in identifying the regulations and policies applicable to earlier projects. The "Regulation and Policy Matrix" includes a summary of all revisions to 40 CFR Parts 30, 33, and 35, as well as all other EPA regulations and policy documents which pertain to the construction grants program. This publication should be consulted to identify the applicable regulations and policies in effect on the date of grant award.

In completing Step 1 and Step 2 projects, problems can arise with respect to requests for grant increases, evaluation of a project's likelihood for receiving a future grant, and the depth of review, primarily with regard to facilities plans. In all cases, every effort should be made to complete the project within its existing budget, without a grant increase, and in accordance with any applicable compliance schedule.

Step 1 and Step 2 projects must be completed in conformance with the approved scope of work in the grant agreement and the regulations which were in effect at the time of grant award, and are subject to audit to insure that these requirements have been met (see Section E below). It is therefore essential that project files document how decisions were made, and that proper value was received for the funds expended.

Review Procedures:

1. Step 1 Projects Completed or near Completion

   a. Projects Likely to Receive a Step 2+3, Step 3 or Step 7 Grant

      i. Review the facilities plan against all applicable regulations and grant conditions.

      ii. Complete the environmental review.

      iii. Advise the grantee applying for a Step 2+3 grant, to request an advance of allowance for design work, or to undertake design using local funds, whichever is applicable.

      iv. Make the final payment and administratively complete the project up to the point of audit request, but do not request an audit unless unusual conditions warrant it (see Item 6 below).

   b. Projects Unlikely to Receive a Step 2+3, Step 3 or Step 7 Grant

      i. Review the facilities plan against all applicable regulations and grant conditions to insure that all required items are present and complete (see Item c below).

      ii. Limit review comments to those that are substantive or will affect the plan recommendations.

      iii. Require the grantee to perform only the work necessary for conformance with the applicable regulations and grant conditions.

      iv. Prepare a letter to the grantee, identifying discrepancies which would have to be corrected by an addendum to the facilities plan if a grant were ever to be awarded in the future.

      v. Make final payment and administratively complete the project.

      vi. Request a final audit, if warranted (see Item 6 below).

c. Review of Facilities Plans for Completeness

In cases where a facilities plan is unlikely to result in the award of a Step 2+3, Step 3 or Step 7 grant, it is necessary for the facilities plan to be reviewed for completeness (see Item b above). The minimum requirements for completeness depend on the date of initiation of facilities planning:

i. Facilities Planning Initiated before May 1, 1974

Facilities plans initiated before May 1, 1974, may be approved under the regulations published on February 11, 1974, if a Step 2 grant was awarded before April 1, 1980. In those cases where facilities planning was initiated before May 1, 1974, but the project failed to receive a Step 2 grant before April 1, 1980, the facilities plan must comply with the requirements described in Item ii below.

Re: 40 CFR 35.917(c)

ii. Facilities Planning Initiated after April 30, 1974 and before October 1, 1978

If each of the following items is present and complete in a facilities plan which was initiated after April 30, 1974 and before October 1, 1978, the facilities plan can be considered complete for grant payment purposes:

- description of the treatment works for which construction drawings and specifications will be prepared, including design flow and analysis;
- description of the entire waste treatment system of which the proposed treatment works is a part;
- infiltration and inflow (I/I) documentation;
- cost effectiveness analysis of alternatives including renovation, upgrading operation and maintenance (O&M), and use of on-site or non-conventional systems;

The reviewing agency should use its best judgment in determining the most effective approach for annulling or terminating grants and negotiating termination agreements. All termination agreements should provide assurances that the Federal Government has received full value for the funds expended. Any termination agreement that is negotiated with a grantee must conform to EPA policies, regulations, and guidelines, and must be supported by factual data. All terminations require the concurrence of the Regional Counsel (or, in the case of Headquarters-awarded grants, the Assistant General Counsel for Grants). Additionally, all terminated and annuled grants are subject to audit (see Section E below). After completion of the audit process, these grants are closed out in the same manner as completed grants (see Section D.d below).

Re: For grants awarded prior to October 1, 1983, 40 CFR 30.920*, 30.950*; for grants awarded after September 30, 1983, 40 CFR 30.903* through 30.905*; for grants awarded after September 30, 1988, 40 CFR 31.43

5. Other Step 1 and Step 2 Projects

The circumstances described in Items 1 through 4 above represent the most common conditions likely to be encountered for Step 1 and Step 2 projects. However, other less common circumstances may arise which do not fall within these categories (e.g., phased, segmented, Step 2+3, Step 7, large, or complex projects). In these circumstances the reviewing agency must exercise judgement on a case-by-case basis, taking into account the availability of present and future grant funds, the State's priority system, the project's contribution toward improvement in priority water quality areas, and the likelihood of the grantee receiving a Step 2+3, Step 3 or Step 7 grant at some future time. As decisions are made for these projects, the integrity of the construction grants program must be maintained, and decisions must not circumvent the intent of the CWA (e.g., planning and design work for new projects should be accomplished under an allowance, not a grant).

6. Final Audit Requests

Before they can be closed out, all Step 1 and Step 2 projects must either be audited or be approved for closeout without an audit. Accordingly, a Step 1 or Step 2 project for which the claimed grant amount (i.e., the Federal share of allowable project costs) exceeds $250,000, and for which a Step 2+3, Step 3 or Step 7 grant is not expected to be awarded, should be forwarded to EPA's Office of the Inspector General (OIG) with a request for a final audit.

In addition, at the beginning of each month, the reviewing agency should provide the OIG Divisional Office with a list of Step 1 and Step 2 projects for which the claimed grant amount does not exceed $250,000, as is done for Step 2+3, Step 3, and Step 7 projects. Within 30 days of the receipt of this list, OIG will advise the reviewing agency, in writing, which of these projects will be audited and which can be closed out without an audit.

If a Step 2+3, Step 3 or Step 7 grant is expected to be awarded, a final audit for the Step 1 or Step 2 project should not be requested until all work on the Step 2+3, Step 3 or Step 7 grant has been completed, unless overriding circumstances require an immediate audit.

## C. STEP 2+3, STEP 3 AND STEP 7 COMPLETIONS

Purpose:

Complete Step 2+3, Step 3 and Step 7 grants in a timely manner, in accordance with the project schedule.

Discussion:

All Step 3 grants awarded under 40 CFR Part 35, Subpart I must include a project schedule for key milestones, including the date of building completion and initiation of operation. Step 2+3, Step 3 and Step 7 grants awarded under 40 CFR Part 35, Subpart E also should have included a project schedule, and although the regulations do not include a specific requirement for key milestones to be included in the schedule, these should have been included as a good management practice. Significant changes to all project schedules must be consistent with the schedule contained in the NPDES permit and, before changes are made, reviewing agency approval is required and a formal grant amendment must be prepared (see Section VI.M).

Renewed emphasis is being placed on the timely completion of all Step 2+3, Step 3 and Step 7 projects in accordance with their project schedules. Timely completion will result in the earliest possible achievement of water quality goals, and will allow projects to be efficiently managed and closed out.

The review procedures below address several problems associated with completing a project and preparing it for audit. The procedure for closing out projects is discussed in Section D.d below.

Review Procedures:

The subjects discussed below are those which have caused extended delays in completing projects. Each project, however, has its own unique characteristics which will require careful selection of the methods used to complete the project.

1. Project Schedule

Grant agreements for all projects must include a project schedule, and work must be accomplished in such a way as to maintain that schedule. Schedules should be reasonable, and must conform with other compliance or enforcement schedules, including those contained in court or State enforcement orders (see VI.C.6).

Requests for significant changes to project schedules must be critically reviewed. Approval cannot be given without coordinating the proposed changes with NPDES permit requirements and with those of other applicable schedules. Significant revisions to project schedules can only be made by using a formal grant amendment. Failure of a grantee to maintain its project schedule may form the basis for grant termination or annulment (see Section B.4 above).

Re: 40 CFR 35.935-11, 35.2040(b)(6), 35.2204, 35,2212, 35.2214, 35.2216; for grants awarded prior to October 1, 1983, 40 CFR 30.345-3*, 30.900-1*; for grants awarded after September 30, 1983, 40 CFR 30.700*; for grants awarded after September 30, 1988, 40 CFR Part 31 and OMB Circular A-102, ¶6.c (3/3/88)

2. Phased or Segmented Projects

One grant condition included in all phased or segmented projects, with the possible exception of very old projects, is a commitment from the grantee to complete the remaining phases or segments in order to make the treatment works, of which the phase or segment is a part, operational and in compliance with the enforceable requirements of the CWA. This commitment includes a schedule specified in the grant agreement, and must be accomplished regardless of whether grant funding is available for the remaining phases or segments. This schedule must also be incorporated into the grantee's NPDES permit.

All phased or segmented projects should be periodically reviewed by the reviewing agency to insure that the grantee is performing according to the schedule. Where this is not the case, and where negotiations with the grantee have failed to accomplish compliance with the schedule, enforcement action or action to initiate grant termination or annulment should be undertaken (see Section B.4 above).

Re: 40 CFR 35.2108, 35.2214

3. Sewer System Rehabilitation

Step 2+3 or Step 3 grant awards may have been made for projects which included both building of treatment facilities and rehabilitation of sewer systems. In some of these cases, the building of treatment facilities was completed, but the grantee was permitted to continue sewer system rehabilitation for a period of time after the treatment facilities became operational. The grant agreement for each of these projects contains a grant condition which requires the grantee to complete the rehabilitation on a schedule contained in the agreement.

A grantee whose project includes sewer system rehabilitation, and whose grant was awarded after December 29, 1981, is required to certify whether or not the project meets its performance standards after one year of operation (see Section VII.I.2.a), including the elimination of excessive I/I through rehabilitation. A grantee whose grant was awarded before December 29, 1981 is not required to certify the project's performance after one year of operation.

Reviewing agencies should periodically review all projects which include sewer system rehabilitation (with special emphasis on pre-1982 projects) to insure that the grantee is performing according to the schedule in the grant agreement. Where this is not the case, and where negotiations with the grantee have failed to accomplish compliance with the schedule, enforcement action or action to terminate or annul the grant should be undertaken (see Section B.4 above).

An alternative action which may be appropriate in some instances is the reduction in the allowable capacity of treatment facilities and interceptors to the equivalent of 120 gallons per capita per day (gpcd), based on the approved and allowable design flow. If this option is considered, care must be exercised that the project remains affordable, meets its NPDES permit requirements, and has received a deviation under the provisions of 40 CFR [Part 30] 31.6 (see Section IX.E).

Re: 40 CFR 35.2214

4. Special Grant Conditions

Many grant agreements contain special grant conditions (i.e., grant conditions unique to the project and beyond the regulatory requirements which apply to all grants). Such conditions may have addressed phased or segmented project completions, a sewer system rehabilitation schedule, enactment of ordinances forbidding connection to certain sewers (e.g., interceptors adjacent to environmentally sensitive or prime agricultural land), etc. (see Section VI.M.6).

Before any project can be completed, the reviewing agency must insure that all grant conditions have been fulfilled, with particular attention given to special grant conditions. Refusal by the grantee to fulfill all grant conditions may form the basis for grant termination or annulment (see Section B.4 above).

Re: 40 CFR 35.2200

## D. COMPLETION AND CLOSEOUT PROCESS

Purpose:

Insure that projects are completed on schedule, that all applicable regulations and grant conditions have been satisfied, and that project records are complete and available for audit.

Discussion:

The process of project completion and closeout will include many, if not all, of the items discussed below in the review procedures, which are presented in the order in which events should occur. However, because of unique circumstances surrounding each project, the order of events may vary.

There are four major milestones in the completion and closeout process:

a. Project Completion

A Step 1 project is considered physically complete when the project reviewer determines that the scope of work contained in the grant agreement has been accomplished and is approvable. For projects not expected to receive a

Step 2+3, Step 3 or Step 7 grant, a Step 1 project is considered physically complete when it has met the minimum requirements listed in Section B.1.c above.

A Step 2 project is considered physically complete when the plans and specifications are either approved or judged approvable (i.e., accepted) by the reviewing agency. For projects not expected to receive a Step 3 grant, a Step 2 project is considered complete when it has met the minimum requirements listed in Section B.2.b above.

A Step 2+3, Step 3 or Step 7 project is considered physically complete when an official final inspection (see Item 1 below) determines that:

i. All but minor components of the project have been completed (e.g., landscaping) in accordance with the approved plans, specifications, and change orders.

ii. The facility is capable of functioning as designed.

iii. All equipment is operational and performing satisfactorily.

iv. Laboratory facilities are complete and available to conduct appropriate tests.

All administrative requirements need not be satisfied at the time of physical completion (e.g., final payment, change order approval, fulfillment of grant conditions).

For Step 1 and Step 2 grants, project completion and physical completion are synonymous. For Step 2+3, Step 3 and Step 7 grants, project completion, physical completion, and construction completion are synonymous.

b. Administrative Completion

The administrative completion phase includes all activities occurring after physical completion of the project. These activities, which normally occur in the following order, include: completion of minor components, satisfaction of all grant conditions, resolution of all claims, final building payment (excluding payment for engineering services during the first year of operation), completion of engineering services during the first year of operation, grantee's certification that the project meets its

in accordance with the approved plans, specifications, and change orders, and that all necessary records are complete and available for audit (see Section VII.G.5). In addition, information is gathered at the final inspection which will allow the preparation, by the reviewing agency, of the project officer certification concerning flow level (75 percent or more of the anticipated initial flow), aesthetic features, and abandoned, unused, or inoperable facilities (see Item 8 below).

At the time of the final inspection, the reviewing agency will usually establish a cut-off date, after which any costs incurred by the grantee are unallowable for grant participation (see Item 2 below).

At times, a grantee may request a final inspection, but when the reviewing agency's inspector arrives at the project site, conditions exist (e.g., unsatisfied grant conditions, lack of flow data on which to base the project officer certification, etc.) which prevent the project from being considered administratively complete. In such cases, the inspection should be conducted, but the grantee should be informed, in writing, of the deficiencies which prevented the conduct of a final inspection, that the inspection which was conducted will be considered an interim inspection, that a final inspection will be rescheduled after the grantee informs the reviewing agency that the deficiencies which prevented the conduct of a final inspection have been corrected, and that the grantee's final grant payment will be withheld until the final inspection has been conducted.

Re: 40 CFR 35.2216

2. Cut-off Date

The establishment of a cut-off date is one of the actions required to ready a project for administrative completion. The basis for a cut-off date is found in the definition of the project's [budget] funding period in 40 CFR [Part 30] 31.23, since eligible project costs are limited to those incurred during the [budget] funding period. The [budget] funding period must start on or after the date of grant award, and must be consistent with the project schedule contained in the grant agreement.

A cut-off date may be established for the entire project or for individual subagreements. The cut-off date is the date by which all work and costs associated with a particular subagreement will have been incurred, and after which work or costs incurred are not allowable for grant participation. In very unusual circumstances it may be necessary to revise a cut-off date, if costs were incurred by the grantee due to circumstances beyond its control. Where a cut-off date is established, the "cut-off" letter to the grantee must clearly document the specific work or subagreement to which the cut-off date applies. This documentation will preclude misunderstandings during audit. For Step 1 and Step 2 projects, the "cut-off" letter should also remind the grantee that, since the 1981 CWA amendments prohibit the award of new Step 1 and Step 2 grants, any future revisions to the completed Step 1 or Step 2 project will have to be performed without EPA assistance.

The cut-off date is generally established at the time of final inspection, and usually with the agreement of the grantee. However, if the grantee will not agree to a cut-off date, the end of the project budget period should be used, since by regulation, no costs can be incurred after the end of the [budget] funding period. The cut-off date for all costs (except startup services and engineering services during the first year of operation) will usually coincide with the date of the final inspection, prior to which the grantee will normally have accepted the project from the construction contractor. If a project is essentially complete except for minor punch list items, the reviewing agency and the grantee may agree to a future cut-off date, by which time the contractor will have completed the punch list items.

Another cut-off date which must be established and documented in the project files concerns the termination of services provided by the engineer, including inspection, start-up, and supervision of the first year of operation. This cut-off date will almost always be established as one year after the initiation of operation for the project, to provide for continuing engineering services during the one year project performance period.

Once a cut-off date is established, the grantee should prepare cost summaries (relating to the work for which the cut-off date has been established) for submission to the reviewing agency (see Item 3 below).

Re: 40 CFR 35.2040(b)(6); for grants awarded prior to October 1, 1983, 40 CFR 30.135-6*; for grants awarded after September 30, 1983, 40 CFR 30.200*, for grants awarded after September 30, 1988, 40 CFR Part 31

3. Cost Summary and Documentation

The grantee is required to submit cost summaries for all costs incurred during the project. The cost summary for previous Step 1 or Step 2 projects which receive a Step 3 grant should be in the project files and available for audit. Cost summaries must be prepared for all categories of work identified in the grant application and the grant agreement, and typically include costs for:

a. administration,

b. subagreements for building the project,

c. engineering subagreements,

d. force account work,

e. land acquisition,

f. legal services, and

g. accounting services.

Cost summaries should identify the initial costs for each category of work and the final costs, including all change orders and adjustments to cost-plus-fixed-fee type contracts. If not previously submitted with a payment request or reviewed during the final inspection, documentation such as paid invoices or vouchers must be provided to support the cost summaries.

Construction contract cost summaries should be compared with cost data in the project files to verify that all change orders have been reviewed and acted upon by the reviewing agency, and that a final change order adjusting estimated quantities to actual quantities for unit price items is included. Cost summaries for services (e.g., engineering, legal, and accounting) should be compared against the original subagreement to insure that all services have been performed and that claimed costs are in agreement with direct costs, indirect costs, and profit items in the subagreement.

The unused portion of the construction contingency allowance is omitted from final project cost summaries and should be deobligated for use on other projects (see Section IX.C.2).

4. Final Building Payment Request

Processing of payment requests is discussed in Section IX.B. This section addresses only the final building payment. While this payment is referred to as the final building payment, since it represents the last payment for building the project, additional payments will be made during the first year of operation for appropriate engineering services (see Section VII.I.1).

Payments are made to the grantee during the course of the project for costs which have been incurred. When the grantee requests the final building payment, such payment is to be made promptly, and may only be delayed if it is determined that the payment request includes unallowable costs, or if information available or not available to the reviewing agency (e.g., a final inspection report or lack thereof) indicates a previous overpayment, a failure to comply with all grant conditions, or other irregularities.

If the grantee has received any grant related income (e.g., refunds, rebates, credits, etc.) such amounts are to be used to reduce the total project cost, thereby reducing the amount of the grant (see Section IX.B.10 and 40 CFR 31.25(g)). Final payment is based on the cost summaries and supporting documentation discussed in Item 3 above.

Re: 40 CFR 35.2300(a) and (b); for grants awarded prior to October 1, 1983, 40 CFR 30.615-1, 30.620* through 30.620-3*, 30.815*; for grants awarded after September 30, 1983, 40 CFR 30.400(a)* and (b)(3)*, 30.526*, 30.802*; for grants awarded after September 30, 1988, 40 CFR 31.21 and 31.41

5. Property Management

Grantees are required to have a property management system which identifies and traces property through its useful life or until disposal. The property management

system must meet the minimum requirements in the regulations, and must include both personal property (e.g., movable equipment) and real property (e.g., land and structures).

Before a project is administratively completed, the reviewing agency must verify that the grantee has a property management system in place. The review of the property management system should take place during project monitoring, and should be completed before the final building payment is made.

Re: For grants awarded prior to October 1, 1983, 40 CFR 30.810* through 30.810-9*; for grants awarded after September 30, 1983, 40 CFR 30.530(b)*, 30.531*, 30.532*, 30.535*, 30.536*; for grants awarded after September 30, 1988, 40 CFR 31.31, 32 and 33

6. Completion Delays

Completion delays most often occur where there is an unresolved dispute between the grantee and the construction contractor, resulting in the contractor filing a claim for additional construction costs (see Section VII.H). Projects may not be considered administratively complete until the claim is resolved either through negotiation, arbitration, or litigation. The reviewing agency is to make every effort to assist the grantee in resolving disputes and may, at the grantee's request, provide technical or legal assistance. However, the primary responsibility for resolving disputes rests with the grantee. Costs associated with defense against contractor claims may be allowable for grant participation provided certain limitations are satisfied (see Section IX F.4, Paragraphs A.1.f and A.2.c).

The reviewing agency is to insure that unresolved disputes are settled as quickly and efficiently as possible.

Re: 40 CFR 35.2214, 35.2350

7. Continuing Engineering Services

A grantee which was awarded a Step 2+3, Step 3 or Step 7 grant on or after December 29, 1981, is required to retain the

engineering firm which was principally responsible for providing engineering services during construction to also provide engineering services during the first year after initiation of operation (see Section VII.I.1). The project may not be considered administratively complete until the grantee affirmatively certifies, after one year of operation, that the project is meeting its performance standards (see Section VII.I.2). During the first year of operation, the engineer will submit invoices and the grantee will prepare payment requests in the routine manner (see Section IX.B.2.b). However, the cut-off date should have already been established as the date at the end of the first year of operation (see Item 2 above). The final grant payment, assuming affirmative certification by the grantee, will be made at the conclusion of the project performance period. However, when the final grant payment request is unjustifiably delayed, the grantee should be notified, in writing (certified mail, return receipt requested) that it should submit the final payment request within 90 days (or a similar reasonable time period), and that, if the final payment request is not received within the specified time, the last payment request will be considered as the final request and remaining unexpended grant funds will be deobligated. Where this action is taken, immediately after the deobligation, normal procedures would be followed in certifying the project and in requesting and resolving the audit.

Re: 40 CFR 35.2216, 35.2218

8. Project Officer Certification

Prior to requesting a final audit, the reviewing agency is to prepare a project officer certification. This certification is to accompany the request for a final audit, and in essence confirm that:

- funds have not been used for unnecessary or unreasonable aesthetic features;
- the flow at the treatment facilities at the time of final inspection was 75 percent or more of the anticipated flow on the date of initiation of operation;
- no facilities constructed with grant funds are unused, abandoned, or inoperable; and
- the project files are complete and contain all relevant documents necessary for the conduct of an audit.

Detailed information on the four primary subjects of the project officer certification is provided below:

a. Aesthetic Features

Aesthetic features must be reasonable and necessary in order to be allowable for grant participation (see Section IX.F.4, Paragraph B.2.a). A determination of the allowability of aesthetic features should have been made during the review of plans and specifications (see Section V.C.2.u). If aesthetic features which were not included in the approved plans, specifications, and change orders are discovered during the final inspection, they will be considered unallowable unless otherwise justified.

Re: 40 CFR Part 35, Subpart I, Appendix A, Paragraph B.2.a

b. Flow Level

Before requesting a final audit, the reviewing agency is to determine whether the treatment facilities (including sewers) are receiving 75 percent or more of the estimated initial flow. If the flow is less than 75 percent, the reviewing agency is to determine the cause, and in preparing the project officer certification, note the exception to the flow level.

c. Abandoned, Unused, or Inoperable Facilities

For purposes of project officer certification, this section deals with observations at the time of final inspection. On-going State programs are required to address abandoned, unused, or inoperable facilities which occur after a project is closed out but before the end of the project's useful life.

If any equipment or facilities are abandoned, unused, or inoperable at the time of final inspection, the project officer is to prepare an explanation of the circumstances, which is to be attached to the project officer certification and forwarded to OIG along with the request for an audit. In such cases, grantees are required to seek redress from other parties (e.g., design engineer, construction contractor, equipment supplier, etc.) responsible for

such conditions, and to make every effort to make the facilities useful and operational. Unless justified by the grantee, any abandoned, unused, or inoperable equipment will be considered unallowable for grant participation. (See Section IX.H.3.c)

When inoperable facilities are covered by a corrective action report (CAR), the project officer's certification should clearly identify that the project is not currently meeting its performance criteria but that an acceptable CAR has been submitted by the grantee and is being implemented.

Re: 40 CFR 35.2214

d. Project Files

Project files must be organized to facilitate the location of documents during the project audit, and must contain adequate documentation to support grantee procurement actions and all project costs which have been claimed for grant participation.

9. File Retention

Grantees and their contractors must maintain their project files for a period of three years after final grant payment (i.e., the payment which is made after affirmative certification by the grantee that the project meets its performance standards).

Reviewing agencies will maintain project files for a period of three years after project closeout. At the conclusion of the three year period, project files are to be stored in the U.S. General Services Administration (GSA) Regional Federal Records Center in accordance with EPA/GSA federal records management requirements. Since the construction grants regulations now prohibit the use of grant funds for the replacement of a facility during its design life if the facility was constructed with grant assistance, it will be necessary to store at least part of the project file for the design life of the facility (normally 20 years).

EPA Regional Offices should establish a records tracking system which will facilitate the retrieval and restorage of project files.

Re: For grants awarded prior to October 1, 1983, 40 CFR 30.805*; for grants awarded after 9/30/83, 40 CFR 30.501*; EPA Records Management Manual; for grants awarded after September 30, 1988, 40 CFR 31.42

E. AUDIT PROCESS

Purpose:

Review grantee records, and if necessary those of its contractors, to determine whether the costs claimed under the EPA grant are reasonable, allowable, and allocable to the grant project; whether the management controls exercised by the grantee were adequate to insure that costs claimed are allowable; and whether the grantee has complied with all EPA regulations (including the applicable procurement regulations) and grant conditions.

Discussion:

All completed construction grants projects are subject to a final audit. Audits may be conducted by EPA, by private sector or State auditors under contract to EPA, or by another cognizant Federal agency. Audits are generally performed after construction, and where Step 1 and Step 2 grants have been awarded, will include the review of records and costs for all three steps. Audits may also be performed at the conclusion of a Step 1 or Step 2 grant, but generally only in those instances where the project is unlikely to be awarded a Step 3 grant in the near future, or when unusual circumstances warrant an immediate audit.

The decision to conduct a final audit of the grantee's records will depend on the size and complexity of the project, and the amount of grant funds involved. (Audits are not usually conducted where claimed grant funds are $250,000 or less, unless information available to the reviewing agency suggests that a final audit is warranted.)

Historically, two problems arise during audits. The first problem concerns the identification of the regulations and policies which were in effect on the date of grant award, since audits may take place anywhere from 5 to 10 years after the initial grant award. In addition, a project which has progressed through the entire three step grant process may have different regulations and policies applicable to each of the three steps. In the case of phased or segmented projects, even more grants will be involved. To identify the regulations and policies in effect on the date of grant award, EPA has published the "Regulation and Policy Matrices - A Guide to the Rules Governing Grants Awarded under the Construction Grants Program," April 1985.

The "Regulation and Policy Matrices" traces the publication of all EPA regulations which have a bearing on procurement and allowable costs, from July 1, 1971 through September 30, 1984, and is updated annually. The publication also includes matrices for all EPA policy memoranda issued since January 1, 1970, as well as the three editions of the Handbook of Procedures and their updates (TMs), the decisions

of the Audit Resolution Board, and the Board of Assistance Appeals. With the elimination of the appeals process, a "Disputes Case" section has been added to the Matrices. It contains a chronological listing of those disputing grantees or applicants whose cases were decided by Regional Administrators along with a "Subject Index" indicating the issues disputed and the grantees or applicants involved. Wherever a question arises concerning regulations or policies in effect on the date of grant award, the "Regulation and Policy Matrices" should be consulted.

The second problem concerns the decision as to whether a particular cost is eligible or allowable under the construction grants program. EPA regulations, policy memoranda, and the Handbook of Procedures have, over the years, provided guidance for decisions concerning the most common allowable costs. However, by the very nature and sheer number of construction grant projects, it is not possible to anticipate all possible situations concerning allowable costs. Therefore, in those "gray" areas where such costs are not clearly defined in the applicable regulations or EPA policy documents, construction grants personnel are responsible for making such decisions. These decisions, and the rationale behind them, should be documented in the project files, to prevent misunderstandings at the time of audit.

Such documentation should explain the rationale for the decision and cite the specific regulation or policy which provided the broad or similar framework for the decision. Similarly, if an auditor takes exception to a cost not otherwise clearly defined in the regulations or EPA policies as allowable, such exception should also cite the specific regulation or policy which provides the broad or similar framework for the exception. By the proper use of the "Regulation and Policy Matrices" to identify applicable regulations and policies, and by the proper documentation and citation of specific regulations or policies, projects can be completed and closed out with a minimum of delay.

Final EPA decisions concerning allowable costs may be decided by the Audit Resolution Board if a difference of opinion cannot be resolved between OIG and the construction grants program.

The procedures below outline the major activities of the auditors, grantees, and construction grants staff in the audit process.

Procedures:

1. Request for Final Audit

After preparation of the project officer certification (see Section D.8 above), the reviewing agency will request an audit (or a determination that the project can

report date. The DIGA will advise the reviewing agency of issues where disagreement occurred on final determination letters not requiring concurrence.

Where a Corrective Action Report (CAR) is being implemented, the requirement that CAR implementation be continued in accordance with the approved plan and schedule should be highlighted in the final determination letter, with the possible sanctions for failure to implement the CAR (e.g., grant annulment) clearly articulated.

In the absence of an appeal by the grantee under the disputes provisions of the regulations or by the OIG to the ARB, the project is then closed out. Projects which are still undergoing corrective action cannot be closed out until a positive certification has been received from the grantee. The files for these projects should be retained by the reviewing agency until all grant requirements have been satisfied. After positive certification has been received and the reviewing agency has determined that all grant conditions have been satisfied, the project should be closed out and the file shipped to the Federal Records Center (see Section D.9 above).

5. Resolution of Audit Exceptions

Audit exceptions, if any. are to be resolved between the reviewing agency and the auditors at the lowest possible level. The grantee should be involved in the resolution process, since the grantee's financial interests are involved. Decisions concerning the allowability of costs which are not clearly defined in regulation or policy (i.e., fall into the "gray" area) should have been previously made and documented by the construction grants staff.

6. Review of Final Determination

If the grantee disagrees with the decision of the reviewing agency (other than a decision by the Audit Resolution Board), it may file a request for review of the decision in accordance with 40 CFR [Part 30, Subpart L] Part 31, Subpart F. (The procedures in Subpart [L] F are applicable after September 30, [1983] 1988, regardless of when EPA awarded grant assistance.)

Unresolved issues arising prior to receiving a final determination letter (based upon an audit) may be appealed by the grantee to the program office level at the State or Regional Office. A Disputes Decision Official's determination (see Section IX.D.) may be appealed to the Regional Administrator. The Regional Administrator's decision is the final agency action, although the grantee may petition the Assistant Administrators for review of the Regional Administrator's decision. However, after receiving a final determination letter, the grantee must appeal directly to the RA and then, if needed, to Headquarters.

7. Recovery of Funds

When the audit reveals an overpayment of grant funds, and where this opinion is sustained in an appeal or other proceedings, the grantee is required to refund the amount of overpayment to the U.S. Treasury.

If the grantee fails to pay what is owed within 30 days after receiving a final decision from a dispute decision official (see Section IX.D.), interest will be assessed on the unpaid debt at a rate established by the U.S. Treasury, even if a review of that decision is requested. However, should, under a review, the amount of the debt be reduced, EPA will refund the interest paid on the amount restored.

Upon repayment, the total grant award is reduced by the principal amount of the overpayment and, the deobligated funds are reallotted to the State's construction grant account. However, the interest portion of the overpayment remains with the U.S. Treasury.

Re: For grants awarded prior to October 1, 1983, 40 CFR 30.815*; for grants awarded after September 30, 1983, 40 CFR 30.802* and 30.1230* amended February 21, 1986; for grants awarded after September 30, 1988, 40 CFR 31.50 and 51

Payments may not be assigned to a third party, except that payments under a grant for advances of allowance may be assigned to the small communities which are to receive the advances (see Item 8.c below).

Re: 40 CFR 30.400(b)*, 30.405*, 31.21, 35.2300(e)(1)

b. Standard Form 271

For all grants except those discussed in Item a above, payment requests are to be made using Standard Form 271 (SF-271). Routine payment requests are reviewed to insure that:

i. the form has been properly completed,

ii. the computations are correct,

iii. all costs are eligible and allowable for grant participation,

iv. only costs for approved change orders are included,

v. costs are displayed by category corresponding to the grant agreement, and

vi. the amount requested is consistent with the outlay schedule (see Item 1 above).

Specific grant payment processing procedures vary from Region to Region, and should be detailed in the State/EPA delegation agreements. In some Regions, grantees submit the SF-271 simultaneously to EPA's Regional Financial Management Office (FMO) and to the State reviewing agency which, when deficiencies or inaccuracies are found, acts to insure that the next payment will reflect the necessary correction. In other Regions, the SF-271 is submitted first to the State agency, where it receives a priority review, and immediately thereafter, is sent to the FMO. In either case, after processing the SF-271, the FMO instructs the appropriate U.S. Department of the Treasury disbursing office to issue a check to the grantee in the amount approved by the FMO. Payments may not be assigned to a third party (e.g., engineer, construction contractor, equivalent supplier, bond or note holder, etc.).

Grantees are expected to submit payment requests no more than once a month, and routine payments are expected to be processed without delay. Certain requests for payment, however, which occur at critical points in a project's progress, require a program review before funds are disbursed. Generally, these payments are:

- the initial request, to insure that the allowance and the supporting documentation are correct;

- the 50 and 90 percent grant payment requests, which are governed by statutory requirements for a plan of operation and an operation and maintenance (O&M) manual; and

- the final payment request.

In addition, payment request issues may arise during construction which would preclude the reviewing agency from making prompt payment because:

- unallowable or ineligible items are included in the request,

- project deficiencies exist,

- the grantee has failed to comply with Federal or State reporting requirements, or

- the grantee has failed to comply with grant conditions or regulatory requirements.

In these instances, the grantee will be notified of the deficiency, and either the State or the FMO will:

- deduct the unallowable or ineligible items,

- insure that the sums in question are excluded from subsequent payment requests,

- withhold an amount sufficient to insure compliance or correction of the deficiency, or

- disapprove the entire payment.

To further insure that grantee payment requests are in keeping with construction progress, copies of these requests, along with the engineer's certification of

work in place, invoices from contractors and suppliers, copies of approved change orders, substantiation of force account work (see Section VI.E.5) and administrative costs, etc., are to be made available to, and reviewed by, construction field inspectors (see Section VII.G). Field inspector observations, based on these reviews, should be made available to the project reviewers, so that they can better assess future payment requests. This information should also be made available to those responsible for developing State and Regional outlay projections.

Where grant payments include funds from reserves (e.g., for innovative or alternative (I/A) technologies, small community assistance, etc.), State and EPA Regional Office procedures are to insure proper accounting for these funds.

Re: 40 CFR 30.400(b)(3)*, 30.405*, 31.21, 35.2300

3. Initial Payments

Initial payment requests may include:

a. Preaward Costs

Approved preaward costs allowable for grant participation (see Section VI.D.15).

b. Estimated Allowance

The Federal share of the estimated allowance for facilities planning and/or design according to the following schedule:

i. Step 2+3 and Step 7 Grants

If the grantee did not receive a facilities planning (Step 1) grant, 30 percent of the estimated allowance immediately after grant award, half

of the remaining estimated (or re-estimated) allowance when design is 50 percent complete, and the remainder of the actual allowance after award of all prime contracts, approval of all force account work in lieu of awarding construction contracts, and acquisition of all eligible land.

If the grantee received a facilities planning grant, 50 percent of the estimated allowance when the design is 50 percent complete, and the remainder of the actual allowance after award of all prime contracts, approval of all force account work in lieu of awarding construction contracts, and acquisition of all eligible land.

Re: 40 CFR Part 35, Subpart I, Appendix B, Paragraph 9

ii. Step 3 Grants

50 percent of the estimated allowance immediately after grant award, and the remainder of the actual allowance after award of all prime construction contracts, approval of all force account work in lieu of awarding construction contracts, and acquisition of all eligible land.

Re: 40 CFR Part 35, Subpart I, Appendix B, Paragraph 8

4. Retainage

Payment requests are to include only costs which the grantee is currently and legally obligated to pay. Therefore, if a construction contract allows the grantee to retain a portion of its contractor's payment requests, the Federal payment request is to reflect the same retainage policy (i.e., if a contractor bills the grantee for $10,000 worth of work in place, and the grantee is allowed by the contract to retain 10 percent, or $1,000, of the contractor's payment request,

then the payment request must be based on the $9,000 legally required to be paid by the grantee.

Re: 40 CFR 30.400(b)(3)*, 31.21(g)(3), 35.2300

5. Limitations

Grant payments are limited by EPA regulations to the Federal share of:

a. 50 percent of the total eligible project costs, unless the final plan of operation has been approved;

b. 90 percent of the total eligible project cost, unless the O&M manual has been approved;

c. for a phased or segmented project, 90 percent of the total eligible cost for the entire treatment works (i.e., for the sum of all phases or segments), unless the O&M manual has been approved;

d. for a project in which a component has been placed in operation before completion of the entire project, no additional payment, unless the O&M manual for the operating component has been approved; and

e. the allowable costs incurred within the budget period for the project.

Re: 40 CFR 30.200*, 31.21(g)(2), 35.2206

6. Final Building Payment

The final building payment is based on the grantee's submission of the final building payment request. This is not a final grant payment, since the grantee is required to retain an engineer during the project's first year of operation (see Section VII.I.1, and Item 7 below). A final onsite inspection of the project by the reviewing agency should be made before the final building payment is made (see Sections VII.G.5 and VIII.D.1). The payment request should be accompanied by the vouchers and cost summaries

required by the reviewing agency (see Section VIII.D.3), releases from the grantee and its contractors, and docments indicating that all grant conditions and limitations, including the adoption and implementation of the user charge (UC) system, and sewer use ordinance (SUO), have been complied with (see Section VIII.D.4 for a further discussion of the final building payment request).

7. Final Grant Payment

The final grant payment is made after the project's first year of operation, provided that the grantee affirmatively certifies that the project meets its project performance standards (see Section VII.I.2). Payments made during the first year of operation will be primarily for engineering services performed during that period, and may be made no more frequently than monthly.

8. Special Purpose Grants

a. Land Acquisition Grants

If a grant is awarded solely for the acquisition of eligible land, grant payments are not subject to the limitations listed in Items 5 and 6 above for a UC system, SUO, plan of operation, or O&M manual.

Re: 40 CFR 35.2260

b. Relocation Assistance Grants

Advance payment, as distinct from a reimbursement payment, may be made for projects which involve relocation assistance, but only for the relocation assistance costs.

Re: 40 CFR 4.502(c) (1974 regulation); 40 CFR 207(c) and 4.403(e) (1986 regulation); 49 CFR 24.207(c) and 24.403(d) (1989 regulation); 40 CFR 35.2300(d)

c. Grants to States for Advances of Allowance

For grants to States for advances of allowance (see Sections II.E.4.e, III.E, and VI.K), payments may be made to the State by letter of credit, payment in advance, or reimbursement.

Instead of receiving payments, however, the State can request EPA to assign payment of each advance directly to the small community for which the State has approved an advance. In this latter case, the following procedures must be followed by the State:

i. a separate SF-270 must be used for each community's advance;

ii. the community's name and mailing address must be shown as the payee on the SF-270;

iii. the State's accounting system must treat the advance on an accrual, rather than a cash basis;

iv. the State must execute an agreement with each community, authorizing the State to request EPA to assign payment directly to the community, and must provide a copy of the agreement to EPA;

v. the State must inform the community, in writing, that the advance has been approved; and

vi. the State must enter the approved advance in its accounting system as an obligation of grant funds, prior to submitting the SF-270, requesting reimbursement from EPA for the approved advance.

Re: 40 CFR 30.400(b)*, 30.405*, 31.20 and 21, 35.2025(b), 35.2300(e)

d. Other Grants to States

For State management assistance grants (see Sections I.F and II.E.4.a) and State WQM planning grants (see Sections II.C.4 and II.E.4,d), payments may be made to the State by letter of credit, payment in advance, or reimbursement. Payments may not be assigned to a third party.

Re: 40 CFR 30.400(b)*, 30.405*, 31.20

9. Grant Overpayment

Grantees must repay interest earned on Federal grant funds. Therefore, if a grantee received overpayments and deposited them in interest-bearing accounts, actual interest or estimated actual interest earned on the funds must be repaid to EPA. But, if a grantee kept its overpayments in an interest-bearing account and can demonstrate that it promptly used them to pay the Federal share of allowable project costs incurred since the date of its most recent payment request so that no interest was earned on the overpayment, then no payment of interest is due EPA.

If overpayments are received but the grantee did not earn interest on them, no interest repayment is due. Overpayments must be repaid to the United States Treasury within 30 days of EPA's final decision that an overpayment has been made. After the 30 day period, EPA may charge interest (or additional interest) on outstanding balances.

Re: 40 CFR 30.400(a)*, 30.802*, 31.51 and 31.52

10. Grant Related Income

All income received by a grantee as a result of its conduct of the project (e.g., interest on grant funds received from EPA but not paid to contractors, proceeds from the sale of bidding documents, bid bond forfeitures (see Section F.4, Paragraph A.3.b below), refunds, rebates, credits, discounts for prompt payment, reimbursements, etc.) must be returned to the project account. Refunds accruing to a grantee directly, or indirectly through one of its contractors, must be credited to the total allowable project cost on which the federal share is computed. However, liquidated damages collected from a contractor are not considered grant related income (see Section F.4, Paragraph A.3.a below).

Normally, the grantee is not required to make a cash payment, but rather to report the amount of grant related income in the space provided on the SF-270 or SF-271. However, after the final grant payment has been requested, the Federal share of any remaining grant related income must be paid to the United States Treasury, and credited to the State's current allotment.

An exception to this requirement is that interest earned by States and American Indian Tribes is not considered grant related income. Also, income which results from the operation of a wastewater treatment system is not considered grant related income, but is required to be used to offset operation, maintenance, and replacement (OM&R) costs (see Section V.E).

Re: 40 CFR 30.525(b)* through (d)*, 31.25, 35.2300(b)

D. DISPUTES

In the construction grants program, a dispute is a disagreement between a grant applicant or grantee and the reviewing agency (either the State or EPA) concerning a decision by the reviewing agency with regard to a grant requirement. Disputes are different from protests or appeals of protests (see Section VII.D.6) and claims (see Section VII.H.2), both of which arise between grantees and their contractors and potential contractors.

Disputes which concern a State action are to be submitted to the State, and reviewed by the State in accordance with its own procedures. The State will:

- review its initial decision,

- issue a final decision, labeled as such, and

- notify the applicant or grantee of its right to request a review by the EPA Regional Office of the State's final decision.

If the dispute involves an initial decision by EPA, it is to be submitted directly to the EPA Regional Office (or for Headquarters-awarded grants, to EPA Headquarters) as described below.

The formalized procedure for resolving disputes at the EPA Regional Office level involves the designation of a Regional disputes decision official (DDO), who reviews the grant applicant's or grantee's request and issues a final decision. If the DDO is a person other than the Regional Administrator (RA), the grant applicant or grantee may request that the RA review the DDO's final decision. If the DDO is the RA, the grant applicant or grantee may request that the RA reconsider his final decision.

Where a State has established a disputes resolution procedure which the EPA Regional Office determines to be equivalent to that provided by the DDO, the State's final decision will be considered equivalent to a DDO's final decision, and the grant applicant or grantee will only be entitled to one review at the Regional level (i.e., a review by the RA). Otherwise, the request for review of a State's final decision should be submitted to the DDO.

If the grant applicant or grantee requests that the RA review the State's final decision or reconsider the DDO's final decision, the request must include:

- a copy of the final decision,

- a statement of the amount in dispute,

- a description of the issues involved, and

- the grant applicant's or grantee's objection to the final decision.

When the request for review or reconsideration is filed, the grant applicant or grantee is entitled to:

- be represented by counsel,

- submit documentary evidence and briefs,

- participate in an informal conference with EPA officials, and

- receive a written decision from the RA.

The RA will review the State's or the DDO's final decision, or reconsider his own final decision, and issue a determination. If the grant applicant or grantee is dissatisfied with the RA's determination, it may file a petition for a discretionary review by the Assistant Administrator for Water at EPA Headquarters. The petition must include a copy of the RA's determination, and a concise statement of the grant applicant's or grantee's reasons for believing that the determination is erroneous. The Assistant Administrator for Water, upon examination of the dispute, will decide whether or not to review the RA's determination. If the decision is not to review, the Assistant Administrator for Water will advise the grant applicant or grantee that the RA's determination remains the final EPA action. If the Assistant Administrator for Water decides to review the RA's determination, the review will generally be limited to the written record, although the grant applicant or grantee may be allowed to submit briefs and/or to attend an informal conference. The decision of the Assistant Administrator for Water will be EPA's final action.

Several EPA decisions are exempt from the disputes process. Grant applicants or grantees may not appeal EPA's decisions concerning:

1. disapprovals of deviations from regulatory requirements (see Section E below);

2. bid protest decisions made under [40 CFR Part 33, Subpart G], 40 CFR 31.36(b)(11) and (12) (see Section VII.D.6);

3. National Environmental Policy Act (NEPA) decisions made under 40 CFR Part 6 (see Section IV.D.1);

4. advanced wastewater treatment decisions made by the EPA Administrator (see Section IV.E.1); and

5. decisions of the EPA Audit Resolution Board (see Section VIII.E.5).

Re: 40 CFR Part 30, Subpart L*, 40 CFR Part 31, Subpart F; 40 CFR 35.3030

E. DEVIATIONS

A grant applicant, grantee, State agency, EPA Regional Office, or EPA program office may request an exception to the regulations (i.e., a deviation). Deviation requests are considered on a case-by-case basis, although deviations will not be issued from those regulations which implement statutory or executive order requirements. Deviation requests from a grant applicant, grantee, or State agency are initially submitted to the EPA Regional Office, which in turn forwards the request to the Director, Grants Administration Division (GAD), at EPA Headquarters, with a recommendation, supported by detailed reasons, for approval or disapproval. To facilitate the concurrence process (see below), a copy of the entire deviation request package should be sent to the Municipal Construction Division (MCD) at EPA Headquarters.

The deviation request is to include the following information:

1. the grantee's name, project number, date of grant award, and grant amount;

2. identification of the section of the regulations from which the deviation is requested;

3. a complete description of what the deviation will accomplish and a justification of why the deviation is necessary;

4. a statement of the recommendation of the Regional Office and, if applicable, the State; and

5. a statement of whether the same or a similar deviation has been previously requested, and if so, an explanation of why it was requested and the outcome of the request.

The Director, GAD, approves or disapproves the deviation request after consultation with, and concurrence by, the Office of General Counsel and the Director, MCD. Deviations may be requested before or after grant award, although approval before grant award does not guarantee an award. Decisions on deviation requests may not be appealed under the disputes provisions of 40 CFR [Part 30, Subpart L] Part 31, Subpart F, (see Section D above).

Re: 40 CFR Part 30, Subpart J*, 40 CFR 31.6

## F. DETERMINATION OF ALLOWABLE COSTS

### 1. General

In the process of reviewing grant applications and payment requests, the project reviewer is confronted with having to make decisions concerning the eligibility or allowability of project costs. The terms "eligible" and "allowable" are often used interchangeably by regulatory officials, grantees, and engineers when discussing whether an incurred cost may be reimbursed under the construction grants program. Although technically there is a difference between these terms as defined below, their synonymous use will not influence the outcome of a cost determination.

"Eligible costs" were defined in earlier regulations as, "those costs in which Federal participation is authorized pursuant to applicable statute" ([40 CFR 30.135-8], prior to October 1, 1983; current regulations do not contain a definition of eligible costs). Allowable costs were and are defined as, "those project costs that are: eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the assistance agreement" ([40 CFR 30.200] 40 CFR 31.22). An example best illustrates the difference between the two terms.

Building of treatment works is authorized under Title II of the Clean Water Act (CWA), and the costs are therefore eligible for grant assistance. Building of highways, airports, dams, water supply projects, etc. are not authorized in the CWA, and are therefore ineligible for grant assistance. Even within a generic eligible category of projects (e.g., building of treatment works), some subcategories associated with the eligible project may be specifically authorized by statute and therefore described as an eligible cost. For example, the CWA authorizes (i.e., makes eligible) the cost of acquiring land which will be an integral part of the treatment process. Therefore, where items of cost are specifically cited in an applicable statute, the term "eligible cost" is used.

Within a generic eligible category of projects, costs may be allowable or unallowable for grant participation. Using the same example, engineering and legal costs associated with the acquisition of eligible land are allowable for grant participation. These same costs, if incurred for the acquisition of ineligible land (e.g., land on which a conventional technology treatment plant is built), are unallowable for grant participation.

The regulations also include a discussion of selected items of cost beyond the general factors listed above. Representative items are:

- definition of reasonableness and allocability,
- advertising costs,
- bad debts,
- bidding costs,
- bonding costs,
- entertainment costs,
- fringe benefits,
- job-site expenses,
- field personnel,
- travel costs, and
- bidding and proposal costs.

Re: 40 CFR 30.410(d)*, 31.22; 41 CFR Part 1-15; 48 CFR Part 31; OMB Circular A-87

c. Allowability Factors for Other Organizations

In rare instances, grantees may enter into subagreements with other State or local government agencies, hospitals, educational institutions, or other nonprofit institutions. Allowable cost factors for State and local governments are described in Item a above. Allowable cost factors have also been established for the following organizations:

i. Hospitals

Described in 45 CFR Part 74, Appendix E.

Re: 40 CFR 30.410(e)*; OMB Circular A-110

ii. Educational Institutions

Described in OMB Circulars A-21 and A-88.

Re: 40 CFR 30.410(b)*, 31.22

iii. Other Nonprofit Institutions

Described in OMB Circular A-122.

Re: 40 CFR 30.410(c)*, 31.22

d. Classification of Costs

The total allowable cost of a project includes its allowable direct costs, plus its allocable portion of allowable indirect costs, less applicable credits (see Section B.10 above). There is no universal rule for classifying certain costs as either direct or indirect under every accounting system (see Section VII.C.7). A cost may be direct with respect to some specific service or function, but indirect with respect to the grant or other ultimate cost objective. For a given project, it is essential that each cost item be treated consistently, either as a direct or an indirect cost.

i. Direct Costs

Direct costs are those that can be identified specifically with a particular cost objective. Typical direct costs are:

- compensation of employees (including supervisory and clerical personnel) for the time and effort devoted specifically to the execution of the funded project;

- cost of materials acquired, consumed, or expended specifically for the funded project;

## 3. Allowable and Unallowable Costs

As described in Item 2 above, allowable and unallowable costs are defined, within the framework of the applicable cost principles, by EPA for the construction grants program. Allowable cost determinations are based on regulations promulgated by EPA or on policies representing sound fiscal and managerial practices.

Regulations implementing the construction grants program prior to the 1981 CWA amendments (40 CFR Part 35, Subpart E) contained a partial list of allowable and unallowable costs. The regulations were supplemented by a listing titled "Allowability of Miscellaneous Costs" in Chapter VII of the first and second editions of the Handbook of Procedures. Projects awarded grants prior to May 12, 1982 are subject to allowability determinations based on the provisions of 40 CFR Part 35, Subpart E, and the appropriate earlier edition of the Handbook.

Regulations implementing the 1981 CWA amendments (40 CFR Part 35, Subpart I) were published in interim final form on May 12, 1982, and in final form on February 17, 1984. Both sets of regulations contain "Appendix A - Determination of Allowable Costs." The February 17, 1984 Appendix A, which is a revised interim final rule, is included verbatim in Item 4 below, supplemented by clarification and examples for specific cost items. To distinguish the exact reproduction of the regulations from the text of the Handbook, the regulations are typed entirely in capital letters. To aid the reader in locating specific provisions in the regulations, undelining has been added to the major subject headings.

When a project reviewer is confronted with an item of cost whose allowability is uncertain, the reviewer should take the following actions, in the order in which they are listed:

a. review Item 4 below;

b. review 40 CFR Parts 4, [30] 31, and [33] for issues concerning the costs of relocation and land acquisition, general grant management, and procurement, respectively;

c. review the appropriate cost principles described in Item 2 above; and

d. refer unresolved issues to the appropriate EPA Regional Office or to EPA Headquarters for resolution.

4. 40 CFR PART 35, SUBPART I, APPENDIX A, REVISED INTERIM FINAL RULE - DETERMINATION OF ALLOWABLE COSTS

(a) PURPOSE. THE INFORMATION IN THIS APPENDIX REPRESENTS AGENCY POLICIES AND PROCEDURES FOR DETERMINING THE ALLOWABILITY OF PROJECT COSTS BASED ON THE CLEAN WATER ACT, EPA POLICY, APPROPRIATE FEDERAL COST PRINCIPLES UNDER PART [30] 31 OF THIS SUBCHAPTER, OMB CIRCULAR A-87 AND REASONABLENESS.

In order for these policies and procedures to be applied, project costs must be supported by adequate documentation. It is essential that project reviewers insure that grantees establish and maintain adequate recordkeeping systems for this purpose.

(b) APPLICABILITY. THIS COST INFORMATION APPLIES TO GRANT ASSISTANCE AWARDED ON OR AFTER THE EFFECTIVE DATE OF THIS REGULATION (FEBRUARY 17, 1984). PROJECT COST DETERMINATIONS UNDER THIS SUBPART ARE NOT LIMITED TO THE ITEMS LISTED IN THIS APPENDIX. ADDITIONAL COST DETERMINATIONS BASED ON APPLICABLE LAW AND REGULATIONS MUST OF COURSE BE MADE ON A PROJECT-BY-PROJECT BASIS. THOSE COST ITEMS NOT PREVIOUSLY INCLUDED IN PROGRAM REQUIREMENTS ARE NOT MANDATORY FOR DECISIONS UNDER GRANTS AWARDED BEFORE THE EFFECTIVE DATE. THEY ARE ONLY TO BE USED AS GUIDANCE IN THOSE CASES.

(c) Affirmative Management Decisions. EPA principles and criteria for assessing the allowability of costs in the context of a project audit are:

i. The Agency's review and approval of a project does not commit EPA to share in unreasonable or otherwise unallowable costs.

ii. Evidence of affirmative management decisions by EPA or a delegated State on the specific item questioned by audit should carry great weight in the decision whether to allow the relevant questioned costs.

iii. Evidence of affirmative action is an insufficient basis on which to allow costs questioned by audit if the action was demonstrably:

a Outside the limits of managerial discretion, including actions that are arbitrary and unreasonable; and/or

b. In violation of statutes and regulations in existence at the time of the administrative approval.

A. COSTS RELATED TO SUBAGREEMENTS

1. ALLOWABLE COSTS RELATED TO SUBAGREEMENTS INCLUDE:

a. THE COSTS OF SUBAGREEMENTS FOR BUILDING THE PROJECT.

The subagreements referred to here are the prime contracts (including any subcontracts) for building the project, including the direct purchase of equipment and materials by the grantee.

b. THE COSTS OF COMPLYING WITH THE PROCUREMENT REQUIREMENTS OF PART [33] 31 OF THIS SUBCHAPTER, OTHER THAN THE COSTS OF SELF-CERTIFICATION UNDER §[33.110] 31.36(g)(3)(ii).

To be allowable, the costs of complying with Part [33] 31 must be incurred after grant award, or must be approved as a preaward cost (see Section III.D.3.e). However, preaward costs are limited to the procurement of major equipment requiring long lead times, field testing, minor rehabilitation or building, and land acquisition. Other procurement costs incurred before grant award are not allowable.

Normally, the only unallowable procurement costs which the applicant would incur before a grant is awarded would be those associated with procuring services (e.g., engineering services during construction, legal services, etc.). These procurement costs are generally very small compared with the cost of building the project or the cost of the services themselves.

c. THE COST OF LEGAL AND ENGINEERING SERVICES INCURRED BY GRANTEES IN DECIDING PROCUREMENT PROTESTS AND DEFENDING THEIR DECISIONS IN PROTEST APPEALS UNDER SUBPART G OF 40 CFR PART [33] 31.

Services, such as legal and engineering, must be procured in accordance with 40 CFR Part [33] 31, and OMB Circular A-87 (see Sections VII.B, VII.C, VII.E, and VII.F). Normally, a grantee's existing subagreements will include the necessary services within the scope of work. However,

the extent of the services may exceed that originally defined in the existing subagreement, in which case the grantee will be required to negotiate a change order (see Section VII.C.8). The cost of the legal and engineering services are allowable regardless of the outcome of the protest, provided there was not a covert attempt by the grantee to violate or circumvent EPA's procurement regulations.

d. THE COSTS OF ESTABLISHING OR USING MINORITY AND WOMEN'S BUSINESS LIAISON SERVICES.

Grantees are required to undertake affirmative actions concerning the use of small, minority, women's, and labor surplus area businesses (see Sections V.C.1.w, VII.C.4 and VII.D.3). The cost of establishing and using liaison services for this purpose is allowable for grant participation, provided that the services are reasonable and contribute towards EPA's goal of awarding a fair share of contracts to such businesses. These services may include establishing and maintaining a list of qualified businesses, interviews with these firms to establish their qualifications for specific work, meetings with the grantee's contractors to make them aware of the capabilities of qualified firms, preparation of necessary reports (e.g., EPA Form 6005-1), and other reasonable and necessary actions to further EPA 's goal.

e. THE COSTS OF SERVICES INCURRED DURING THE BUILDING OF A PROJECT TO INSURE THAT IT IS BUILT IN CONFORMANCE WITH THE DESIGN DRAWINGS AND SPECIFICATIONS.

These services are primarily engineering and construction management services provided during the building of the project, including inspection services, materials testing (e.g., concrete strength, soil compaction, etc.) required by the specifications, inspecting and expediting the delivery of equipment and material purchased directly by the grantee, review of shop drawings and as-built drawings, etc.

f. THE COSTS (INCLUDING LEGAL, TECHNICAL AND ADMINISTRATIVE COSTS) OF ASSESSING THE MERITS OF OR NEGOTIATING THE SETTLEMENT OF A CLAIM BY OR AGAINST A GRANTEE UNDER A SUBAGREEMENT PROVIDED:

The reasonable costs incurred by a grantee to analyze a claim and to negotiate a settlement can be characterized as negotiation costs. Those costs which are incurred prior to either party filing a complaint with the courts or making a demand for arbitration will be treated as explained in this paragraph and its subparagraphs. Those costs which are incurred after the filing will be treated as described in Paragraph 2.c below (i.e., unallowable unless all six conditions listed in Paragraph 2.c are met). The grantee must demonstrate that the pre-filing costs were incurred as a result of a timely and meaningful negotiation process and were not caused by mismanagement.

The negotiation costs, which are allowable to the extent explained below, are normally included within the scope of the grantee's contract for construction management services, but the extent of the services may require a change order (see Section VII.C.8). If it is necessary to award a new subagreement (e.g., for claim analysis), the requirements of 40 CFR Part [33] 31 must be met. These regulations require, among other things, access to records, cost and pricing data, and separate negotiation of profit (see Sections VII.B, VII.C, VII.E, and VII.F).

*Unless* clearly allocable to allowable or unallowable cost categories (see Sections F.2 and F.3 above), negotiation costs are allowable to the same extent that the project is allowable, provided that:

(1) THE CLAIM ARISES FROM WORK WITHIN THE SCOPE OF THE GRANT;

See the "*Discussion*" *portion of* Section VII.H.

(2) A FORMAL GRANT AMENDMENT IS EXECUTED SPECIFICALLY COVERING THE COSTS BEFORE THEY ARE INCURRED;

See Section VI.M, and Section C.1 above.

(3) THE COSTS ARE NOT INCURRED TO PREPARE DOCUMENTATION THAT SHOULD BE PREPARED BY THE CONTRACTOR TO SUPPORT A CLAIM AGAINST THE GRANTEE; AND

A claim presented by a contractor should be complete and adequately documented. If it is not, it should be returned with instructions to correct or augment the documentation. Costs for preparing documentation or incurring administrative expenses to assess an incomplete claim are not allowable.

(4) THE REGIONAL ADMINISTRATOR DETERMINES THAT THERE IS A SIGNIFICANT FEDERAL INTEREST IN THE ISSUES INVOLVED IN THE CLAIM.

A claim in this context is a disagreement between the grantee and a contractor which cannot be resolved in the manner normally employed for negotiating change orders (see Section VII.H.2). There is a significant Federal interest in using a fair and timely negotiation process to resolve claims, thereby avoiding lengthy and costly arbitration and/or litigation. In general, EPA has a strong interest in the assessment process used to evaluate the merits of a claim. Depending upon the results of the assessment, the Federal interest may change. The Federal interest will depend upon the reviewing agency's evaluation of the merits of the claim and the relative merits of the parties' stated positions and their negotiating posture.

Where an unresolved claim appears to be headed for protracted negotiations or possibly arbitration or litigation after all reasonable attempts have been made at resolution, the grantee must obtain cost estimates for the legal and technical services deemed necessary for such proceedings (see Paragraph 2.c below).

Re: 40 CFR 35.2350

defect free drawings and the actual cost of the change order. For example, if a concrete tank had been constructed, and was later found to be at an incorrect elevation due to an error in the design drawings, and if it was necessary to demolish the tank and reconstruct it at the correct elevation, the entire change order would be unallowable, except for differences in excavation costs. If additional excavation was required to enable the tank to be constructed at the correct elevation (i.e., the incorrect elevation was too high), the cost of the additional excavation would be allowable. However, if too much excavation had been undertaken, and fill was required to enable the tank to be constructed at the correct elevation (i.e., the incorrect elevation was too low), both the entire change order and the cost of the unnecessary excavation would be unallowable. In these cases, the grantee is free to seek remedial action from the responsible parties involved.

Regardless of the allowability or unallowability of construction costs to correct errors and omissions, in no case are additional engineering costs allowable, except for the cost of inspecting allowable construction work, to the extent that such inspection costs would have been incurred to inspect the same construction if such construction had originally been included in defect free drawings.

Re: 40 CFR 33.1005(b)*

(ii) COSTS OF EQUITABLE ADJUSTMENTS UNDER CLAUSE 4, DIFFERING SITE CONDITIONS, OF THE MODEL SUBAGREEMENT CLAUSES REQUIRED UNDER §[33.1030] OF THIS SUBCHAPTER.

The reviewing agency must determine that:

- an adequate site investigation was performed,

- the results of the site investigation were included in the bidding documents (see Section V.C.2.cc),

- costs were reasonable and necessary, and

- the grantee was timely and efficient in resolving the change order to minimize impact costs (i.e., the costs caused by the impact of the differing site conditions on other portions of the project).

If these conditions are met, EPA will participate in both the direct and, because of the Agency's risk-sharing policy for differing site conditions, the impact costs arising from the differing site conditions (see Section VII.H.1.a).

(3) SETTLEMENTS, ARBITRATION AWARDS AND COURT JUDGEMENTS WHICH RESOLVE CONTRACTOR CLAIMS SHALL BE REVIEWED BY THE GRANT AWARD OFFICIAL AND SHALL BE ALLOWABLE ONLY TO THE EXTENT THAT THEY MEET THE REQUIREMENTS OF PARAGRAPH g(1), ARE REASONABLE, AND DO NOT ATTEMPT TO PASS ON TO EPA the COST OF EVENTS THAT WERE THE RESPONSIBILITY OF THE GRANTEE, THE CONTRACTOR, OR OTHERS.

The grantee has the burden of substantiating that the costs of settlements, arbitration awards, and judgements are reasonable and necessary, and are therefore allowable. This substantiation includes a showing that the incurred costs were not the result of mismanagement by the grantee or the improper action of others.

If the claim seeks recovery for the costs of delay, the grantee must demonstrate that the delay impacted activities critical to timely completion (i.e., that the delayed activities affected the critical path for project completion).

h. THE COSTS OF THE SERVICES OF THE PRIME ENGINEER REQUIRED BY §35.2218 DURING THE FIRST YEAR FOLLOWING INITIATION OF OPERATION OF THE PROJECT.

The cost and the scope of these services are to be reasonable and appropriate to the nature, size, and complexity of the project (see Sections VII.C.5.b, VII,I.1, and VIII.D.7, and Paragraph 1.j below).

i. THE COST OF DEVELOPMENT OF A PLAN OF OPERATION INCLUDING AN OPERATION AND MAINTENANCE MANUAL REQUIRED BY §35.2106.

The cost of preparing the draft plan of operation, which is required as part of the grant application package, is not an allowable cost, but is part of the preapplication work which is intended to be defrayed, in part, by the allowance for facilities planning and/or design (see Section VI.D.8).

j. START-UP SERVICES FOR ONSITE TRAINING OF OPERATING PERSONNEL IN OPERATION AND CONTROL OF SPECIFIC TREATMENT PROCESSES, LABORATORY PROCEDURES, AND MAINTENANCE AND RECORDS MANAGEMENT.

While start-up services are an allowable cost, care must be exercised to insure that there is not a duplication of services, and therefore costs, between start-up services and the engineering services to be provided during the first year of operation (see Sections VII.C.5.b, VII.I.1, and VIII.D.7, and Paragraph 1.h above).

k. <u>THE SPECIFIC AND UNIQUE COSTS OF FIELD TESTING AN INNOVATIVE OR ALTERNATIVE PROCESS OR TECHNIQUE, WHICH MAY INCLUDE EQUIPMENT LEASING COSTS, PERSONNEL COSTS, AND UTILITY COSTS NECESSARY FOR CONSTRUCTING, CONDUCTING, AND REPORTING THE RESULTS OF THE FIELD TEST.</u>

<u>It should be noted that normal operation and maintenance costs, as defined in §35.2005(b)(30), are not allowable as construction costs of a field test.</u>

2. UNALLOWABLE COSTS RELATED TO SUBAGREEMENTS INCLUDE:

a. THE COSTS OF ARCHITECTURAL OR ENGINEERING SERVICES OR OTHER SERVICES INCURRED IN PREPARING A FACILITIES PLAN AND THE DESIGN DRAWINGS AND SPECIFICATIONS FOR A PROJECT. THIS PROVISION DOES NOT APPLY TO PLANNING AND DESIGN COSTS INCURRED IN THE MODIFICATION OR REPLACEMENT OF AN INNOVATIVE OR ALTERNATIVE PROJECT FUNDED UNDER §35.2032(c) or of a failed rotating biological contactor under Section 202(a)(3) of the Clean Water Act.

The costs of these services are part of the work which is intended to be defrayed, in part, by the allowance for facilities planning and/or design. Also, if the engineer has provided services to prepare other documents supporting the grant application (e.g., UC system, SUO, intermunicipal agreements, draft plan of operation, value engineering (VE), etc.), the costs associated with such services are not allowable, but again are part of the work which is intended to be defrayed, in part, by the allowance for facilities planning and/or design (see Section III.D.3.c). However, specific planning and design costs are allowable as part of a 100 percent grant for the modification or replacement (M/R) of a failed I/A technology (see Section VI.J).

b. EXCEPT AS PROVIDED IN 1.g ABOVE, ARCHITECTURAL OR ENGINEERING SERVICES OR OTHER SERVICES NECESSARY TO CORRECT DEFECTS IN A FACILITIES PLAN, DESIGN DRAWINGS AND SPECIFICATIONS, OR OTHER SUBAGREEMENT DOCUMENTS.

An example of these unallowable costs would be the engineering costs to update data in the facilities plan (e.g., cost estimates, current population for determining existing needs, etc.), or to evaluate a required alternative (e.g., I/A technology) which was not properly evaluated in the facilities plan. Another example would be the engineering costs of redesigning a treatment plant unit process if the original design did not conform to State design standards, was impractical, or was excessively costly. However, revisions to a facilities plan, design drawings and specifications, or other subagreement documents which are necessary because of changes in EPA or State standards are not considered defects under this section, and are therefore allowable (see Section VII.H.1.c).

c. THE COSTS (INCLUDING LEGAL, TECHNICAL AND ADMINISTRATIVE) OF DEFENDING AGAINST A CONTRACTOR CLAIM FOR INCREASED COSTS UNDER A SUBAGREEMENT OR OF PROSECUTING A CLAIM TO ENFORCE ANY SUBAGREEMENT UNLESS:

also provide monetary incentives (i.e., a bonus) as an inducement to complete the project ahead of schedule. Unless the bonus provision is required by law, a bonus paid by the grantee is an unallowable cost.

e. ALL INCREMENTAL COSTS DUE TO THE AWARD OF ANY SUBAGREEMENTS FOR BUILDING SIGNIFICANT ELEMENTS OF THE PROJECT MORE THAN 12 MONTHS AFTER THE STEP 3 GRANT AWARD OR FINAL STEP 2+3 OR STEP 7 APPROVALS UNLESS SPECIFIED IN THE PROJECT SCHEDULE APPROVED BY THE REGIONAL ADMINISTRATOR AT THE TIME OF GRANT AWARD.

If the grantee delays the award of any subagreements for building significant elements of the project beyond 12 months after the date of the Step 3 grant award or the final Step 2+3 or Step 7 approvals: (1) the Region should analyze the impact of this delay upon the completion dates of other significant elements of the project as proposals which delay the completion dates of those other elements are not acceptable; and (2) the incremental costs caused by the delay are not allowable, even if the delay is justifiable (e.g., due to circumstances beyond the grantee's control) unless the delay was specified in the project schedule approved by the Regional Administrator when the grant was awarded. The incremental costs include building costs, as well as other costs for services, such as engineering supervision during construction and start-up, and continuing engineering services for the first year after the initiation of operation. The incremental costs for building may be determined by using the ratio of appropriate cost indices (e.g., the construction cost index published in Engineering News Record, or the EPA index published in the Journal of the Water Pollution Control Federation) applied to the subagreement cost awarded to the successful bidders. The numerator in the ratio would be the index 12 months after the date of the Step 3 grant award, or the final Step 2+3 or Step 7 approvals, and the denominator would be the index nearest the date of subagreement award. The ratio, assuming it is less than 1.0, is multiplied by the subagreement amount to determine the allowable cost. This same ratio is applied to other appropriate project costs (e.g., engineering supervision) to determine the allowable cost. The allowable building cost resulting from this adjustment is used to determine the final allowance for facilities planning and/or design (see Sections III.D.3.c and VI.L.1.f).

The project reviewer should also be aware that failure to promptly initiate and complete a project may result in the imposition of sanctions, including termination, pursuant to [40 CFR Part 30, Subpart I] 40 CFR 31.43. The objective of this requirement is to improve water quality as quickly as possible and to prevent unnecessary increases in construction costs due to inflation.

(Note: Where (1) a grantee opens bids on a significant element of a project prior to the project schedule date and (2) all bidders agree to hold their bids firm until after the date in its project schedule, no grant penalty would be assessed for the delay. The reason being that, through the hold firm agreement, the before and after schedule costs would be the same. However, any increase in ancillary costs (A/E sevices, administrative expenses, legal costs, etc.) attributable to the grantee delay would not be eligible for grant participation.)

3. Other Costs

The following items are not explicitly included in 40 CFR Part 35, Subpart I, Appendix A, but represent prudent fiscal and management principles, and precedent cases:

a. Liquidated Damages

Monies recovered by grantees based on the assessment of liquidated damages have no effect on the determination of allowable costs (i.e., are not considered to be grant related income). Moreover, any additional costs (e.g., building, engineering, legal, or administrative) incurred because of a contractor's lack of timely performance are assumed to be offset by the liquidated damages, and therefore are unallowable, even in the event that the grantee elects not to exercise its right to recover liquidated damages, or the liquidated damages are insufficient to cover the grantee's additional costs.

v. contain architectural details (including hardware that is an integral part of the structure) that are designed to enhance the function and appearance of the building, and to reflect regional architectural traditions; and

vi. facilitate the highest productivity and efficiency of the treatment works and its employees.

Decisions concerning the allowability of specific item (particularly those associated with aesthetics) are to be well documented in the project files and made available to the grantee and the project auditor. Allowability decisions which cannot be made using the principles discussed above (see also Section V.C.2.u) are to be submitted from the State to the EPA Regional Office and, if necessary, to EPA Headquarters for review.

Re: EPA Audit Resolution Board Decision 13/14, "Criteria for Assessing the Allowability of Aesthetic Features and Landscaping on EPA Construction Grant Projects," February 24, 1984

b. THE COST OF LAND ACQUIRED FOR THE MITIGATION OF ADVERSE ENVIRONMENTAL EFFECTS IDENTIFIED PURSUANT TO AN ENVIRONMENTAL REVIEW UNDER NEPA.

Section 212(2) of the Act states that only two categories of land are included in the definition of treatment works: Land that will be used as an integral part of the treatment process and land that will be used for the ultimate disposal of residues resulting from such treatment. Because land acquired to mitigate adverse environmental effects is not included in the definition of treatment works, the cost of that land purchase is not allowable. However, although the cost of land purchased to mitigate adverse environmental impacts is unallowable, it does not affect the requirement to mitigate. 40 CFR Part 6 requires that effective mitigation measures be developed and implemented. Also, the applicant must provide in the facilities plan a cost-effectiveness analysis of the feasible alternatives, including the purchase of ineligible land.

C. PRIVATELY OR PUBLICLY OWNED SMALL AND ONSITE SYSTEMS

1. ALLOWABLE COSTS FOR SMALL AND ONSITE SYSTEMS SERVING RESIDENCES AND SMALL COMMERCIAL ESTABLISHMENTS INHABITED ON OR BEFORE DECEMBER 27, 1977 INCLUDE:

a. THE COST OF MAJOR REHABILITATION, UPGRADING, ENLARGING AND INSTALLING SMALL AND ONSITE SYSTEMS, BUT IN THE CASE OF PRIVATELY OWNED SYSTEMS, ONLY FOR PRINCIPAL RESIDENCES.

Major rehabilitation may include, as an allowable cost, the demolition and removal of an existing onsite system provided that:

i. the system, including the septic tank, has failed beyond reasonable repair, and the replacement system is more cost effective than salvaging portions of the existing system; and

ii. either:

- there is only one reasonable location on the site for the new system, and the use of that location requires the removal of the existing system, or

- the existing system constitutes a real and present hazard to safety, public health, or water quality, which can only be abated by the removal of the existing system.

The demolition and removal of an existing onsite system for the convenience of the owner as a means of increasing property value or property use is unallowable for grant participation.

b. CONVEYANCE PIPES FROM PROPERTY LINE TO OFFSITE TREATMENT UNIT WHICH SERVES A CLUSTER OF BUILDINGS.

c. TREATMENT AND TREATMENT RESIDUE DISPOSAL PORTIONS OF TOILETS WITH COMPOSTING TANKS, OIL FLUSH MECHANISMS, OR SIMILAR INHOUSE DEVICES

ii. necessary services associated with the acquisition such as title search; documentation relating to just compensation/offer amount; purchase negotiations; preparation of purchase agreement (including options if applicable), proposed deed convenants, legal description, lease agreements and related legal documents;

iii. related costs such as legal notices, closing costs (e.g., transfer tax, evidence of title, recording fee), mortgage prepayment penalties and certain pro-rata prepaid property taxes;

iv. certain legal and other costs relating to abandoned or unsuccessful condemnation proceedings or inverse condemnation proceedings decided in favor of the landowner;

v. advice on relocating and on moving and related expenses for displaced persons, businesses and farms;

vi. replacement housing payments for displaced persons; and

vii. other administrative costs of complying with The Uniform Act.

Each of the above cost limitations are more fully described in 40 CFR Part 4 or 49 CFR Part 24, as applicable. The reviewing agency should inform grantees regarding their potential eligibility for reimbursement of these costs; and should determine the adequacy of documentation prior to making reimbursement.

Re: 40 CFR 4.3, 4.102(c), 4.102(f), 4.102(g), 4.106, 4.107, 4.207, 4.301 et. seq. (Subpart D), 4.401 et. seq. (Subpart E)

c. THE COST OF CONTRACTING WITH ANOTHER PUBLIC AGENCY OR QUALIFIED PRIVATE CONTRACTOR FOR PART OR ALL OF THE REQUIRED ACQUISITION AND/OR RELOCATION SERVICES.

d. THE COST ASSOCIATED WITH THE PREPARATION OF THE TREATMENT WORKS SITE BEFORE, DURING AND, TO THE EXTENT AGREED ON IN THE GRANT AGREEMENT, AFTER BUILDING. THESE COSTS INCLUDE:

(1) THE COST OF DEMOLITION OF EXISTING STRUCTURES ON THE TREATMENT WORKS SITE (INCLUDING RIGHTS-OF-WAY) IF BUILDING CANNOT BE UNDERTAKEN WITHOUT SUCH DEMOLITION;

Demolition of existing structures on the treatment works site (including rights-of-way), when not required for building the project, will be considered to be an allowable cost only if the existing structures constitute a real and present hazard to safety, public health, or water quality, which can only be abated by the removal of the existing structures. The demolition of an existing structure for the convenience of the owner as a means of increasing property value or property use is unallowable for grant participation.

(2) THE COST (CONSIDERING SUCH FACTORS AS BETTERMENT, COST OF CONTRACTING AND USEFUL LIFE) OF REMOVAL, RELOCATION OR REPLACEMENT OF UTILITIES, PROVIDED THE GRANTEE IS LEGALLY OBLIGATED TO PAY UNDER STATE OR LOCAL LAW; AND

(3) THE COST OF RESTORING STREETS AND RIGHTS-OF-WAY TO THEIR ORIGINAL CONDITION. THE NEED FOR SUCH RESTORATION MUST RESULT DIRECTLY FROM THE CONSTRUCTION AND IS GENERALLY LIMITED TO REPAVING THE WIDTH OF TRENCH.

Repaving beyond the trench width may be considered to be an allowable cost if uniformly required by State or local law for all projects involving road construction, regardless of the source of project funding. Sometimes referred to as "saw width," this provision requires that the road surface and subsurface be cut one or two feet beyond the trench width. This is not, however, to be interpreted as allowing the cost of complete or partial repaving of a road beyond the "saw width."

(4) Reconnection of Service Laterals

When the publicly owned portion of a service lateral is disconnected as a result of either sewer rehabilitation or combined sewer separation work, the cost of reconnection would be

allowable for that portion of work which ocurred within the public right-of-way. Reconnection is the connecting of an existing or new service lateral to a new or rehabilitated sanitary sewer because the existing service lateral had to be disconnected in order to construct the EPA funded project.

e. THE COST OF ACQUIRING ALL OR PART OF AN EXISTING PUBLICLY OR PRIVATELY OWNED WASTEWATER TREATMENT WORKS PROVIDED ALL THE FOLLOWING CRITERIA ARE MET:

(1) THE ACQUISITION, IN AND OF ITSELF, CONSIDERED APART FROM ANY UPGRADE, EXPANSION OR REHABILITATION, PROVIDES NEW POLLUTION CONTROL BENEFITS;

(2) THE ACQUIRED TREATMENT WORKS WAS NOT BUILD WITH PREVIOUS FEDERAL OR STATE FINANCIAL ASSISTANCE;

(3) THE PRIMARY PURPOSE OF THE ACQUISITION IS NOT THE REDUCTION, ELIMINATION, OR REDISTRIBUTION OF PUBLIC OR PRIVATE DEBT; AND

(4) THE ACQUISITION DOES NOT CIRCUMVENT THE REQUIREMENTS OF THE ACT, THESE REGULATIONS, OR OTHER FEDERAL, STATE OR LOCAL REQUIREMENTS.

2. UNALLOWABLE COSTS FOR LAND AND RIGHTS-OF-WAY INCLUDE:

a. THE COSTS OF ACQUISITION (INCLUDING ASSOCIATED LEGAL, ADMINISTRATIVE AND ENGINEERING, ETC.) OF SEWER RIGHTS-OF-WAY, WASTE TREATMENT PLANT SITES (INCLUDING SMALL SYSTEM SITES), SANITARY LANDFILL SITES AND SLUDGE DISPOSAL AREAS EXCEPT AS PROVIDED IN PARAGRAPH 1.a. AND b. OF THIS SECTION.

Costs of complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 are allowable even if the property being acquired is not (see Section D 1.b above). Costs for property surveys and the preparation of legal boundary descriptions are not allowable where land costs are not allowable.

b. ANY AMOUNT PAID BY THE GRANTEE FOR ELIGIBLE LAND IN EXCESS OF JUST COMPENSATION, BASED ON THE APPRAISED VALUE, THE GRANTEE'S RECORD OF NEGOTIATION OR ANY CONDEMNATION PROCEEDING, AS DETERMINED BY THE REGIONAL ADMINISTRATOR.

An amount higher than the determination of just compensation may be found allowable through an administrative settlement if the grantee provides sufficient written documentation to the Regional Administrator prior to the

actual acquisition. Such an administrative settlement may be appropriate where negotiated purchase is unsuccessful and where a condemnation action may entail a long delay or excessive costs. Administrative settlements may be used when it is reasonable, prudent and in the public interest. Documentation may include evidence of purchase negotiations, real property sales data, estimated court settlement and legal costs based on previous condemnation proceedings. Such documentation may form the basis of an administrative settlement with Regional Administrator approval.

c. REMOVAL, RELOCATION OR REPLACEMENT OF UTILITIES LOCATED ON LAND BY PRIVILEGE, SUCH AS FRANCHISE.

(1) These costs are not allowable unless the grantee is required to pay such costs under State or local law, or the grantee has documented that these costs are "extra ordinary" expenses for that utility.

(2) Service lateral reconnection costs that occur outside the public right-of-way are not allowable costs. Additionally, the costs of reconnecting privately owned services laterals located within the public right-of-way are not allowable.

E. EQUIPMENT, MATERIALS AND SUPPLIES

1. ALLOWABLE COSTS OF EQUIPMENT, MATERIALS AND SUPPLIES INCLUDE:

a. THE COST OF A REASONABLE INVENTORY OF LABORATORY CHEMICALS AND SUPPLIES NECESSARY TO INITIATE PLANT OPERATIONS AND LABORATORY ITEMS NECESSARY TO CONDUCT TESTS REQUIRED FOR PLANT OPERATION.

A suggested list of equipment, supplies, and chemicals for various sizes of treatment plants is given in Appendix B of EPA publication 430/9-74-002, "Estimating Laboratory Needs for Municipal Waste Water Treatment Facilities," 1974. Large stocks of expendable materials are, however, not allowable.

b. THE COSTS FOR PURCHASE AND/OR TRANSPORTATION OF BIOLOGICAL SEEDING MATERIALS REQUIRED FOR EXPEDITIOUSLY INITIATING THE TREATMENT PROCESS OPERATION.

c. COST OF SHOP EQUIPMENT INSTALLED AT THE TREATMENT WORKS NECESSARY TO THE OPERATION OF THE WORKS.

The need for installed shop equipment necessary for the operation of the treatment works should be carefully reviewed to insure that it is cost effective when

- necessary,

- cost effective,

- based on a published fee schedule or on reasonable fees charged to other users under similar conditions, and

- receive prior written approval from the reviewing agency.

Periodic payment of royalties for the right to operate under a patent are considered operating costs, and are unallowable for grant participation (see Section V.E for a discussion of operating costs).

f. COSTS ALLOCABLE TO WATER POLLUTION CONTROL PURPOSE OF MULTIPLE PURPOSE PROJECTS AS DETERMINED BY APPLYING THE ALTERNATIVE JUSTIFIABLE EXPENDITURE (AJE) METHOD DESCRIBED IN THE CG SERIES. MULTIPLE PURPOSE PROJECTS THAT COMBINE WASTEWATER TREATMENT WITH RECREATION DO NOT NEED TO USE THE AJE METHOD, BUT CAN BE FUNDED AT THE LEVEL OF THE MOST COST-EFFECTIVE SINGLE-PURPOSE ALTERNATIVE. See Section IV.C.7.1.h.

g. COSTS OF GRANTEE EMPLOYEES ATTENDING TRAINING WORKSHOPS/ SEMINARS THAT ARE NECESSARY TO PROVIDE INSTRUCTION IN ADMINISTRATIVE, FISCAL OR CONTRACTING PROCEDURES REQUIRED TO COMPLETE THE CONSTRUCTION OF THE TREATMENT WORKS, IF APPROVED IN ADVANCE BY THE REGIONAL ADMINISTRATOR.

To be allowable, attendance at such training workshops or seminars may only occur after grant award.

h. All of the cost of replacing or modifying failed rotating biological contactors. See Section VI.J.

2. UNALLOWABLE COSTS INCLUDE:

a. ORDINARY OPERATING EXPENSES OF THE GRANTEE INCLUDING SALARIES AND EXPENSES OF ELECTED AND APPOINTED OFFICIALS AND PREPARATION OF ROUTINE FINANCIAL REPORTS AND STUDIES.

b. PREPARATION OF APPLICATIONS AND PERMITS REQUIRED BY FEDERAL, STATE OR LOCAL REGULATIONS OR PROCEDURES.

c. ADMINISTRATIVE, ENGINEERING AND LEGAL ACTIVITIES ASSOCIATED WITH THE ESTABLISHMENT OF SPECIAL DEPARTMENTS, AGENCIES, COMMISSIONS, REGIONS, DISTRICTS OR OTHER UNITS OF GOVERNMENT.

d. APPROVAL, PREPARATION, ISSUANCE AND SALE OF BONDS OR OTHER FORMS OF INDEBTEDNESS REQUIRED TO FINANCE THE PROJECT AND THE INTEREST ON THEM.

e. THE COSTS OF REPLACING, THROUGH RECONSTRUCTION OR SUBSTITUTION, A TREATMENT WORKS THAT WAS ASSISTED UNDER THE FEDERAL WATER POLLUTION CONTROL ACT OF 1956 (PUB. L. 84-660), OR ITS AMENDMENTS, AND THAT FAILS TO MEET ITS PROJECT PERFORMANCE STANDARDS. THIS PROVISION APPLIES TO FAILURES THAT OCCUR EITHER BEFORE OR AFTER THE INITIATION OF OPERATION. THIS PROVISION DOES NOT APPLY TO AN INNOVATIVE AND ALTERNATIVE TREATMENT WORKS ELIGIBLE FOR FUNDING UNDER §35.2032(c) OR A TREATMENT WORKS THAT FAILS AT THE END OF ITS DESIGN LIFE.

f. PERSONAL INJURY COMPENSATION OR DAMAGES ARISING OUT OF THE PROJECT.

g. FINES AND PENALITIES DUE TO VIOLATIONS OF, OR FAILURE TO COMPLY WITH, FEDERAL, STATE OR LOCAL LAWS, REGULATIONS OR PROCEDURES.

h. COSTS OUTSIDE THE SCOPE OF THE APPROVED PROJECT.

i. COSTS FOR WHICH GRANT PAYMENT HAS BEEN OR WILL BE RECEIVED FROM ANOTHER FEDERAL AGENCY.

j. COSTS OF TREATMENT WORKS FOR CONTROL OF POLLUTANT DISCHARGES FROM A SEPARATE STORM SEWER SYSTEM.

k. THE COST OF TREATMENT WORKS THAT WOULD PROVIDE CAPACITY FOR NEW HABITATION OR OTHER ESTABLISHMENTS TO BE LOCATED ON ENVIRONMENTALLY SENSITIVE LAND SUCH AS WETLANDS OR FLOODPLAINS.

After September 30, 1984, grant assistance is limited to the capacity necessary to serve existing needs on the date of grant award (see Section VI.D.18). Therefore,

generally be avoided. However, when confronted with an abandonment situation, responsible program managers should be guided by the following principles in arriving at their decisions.

- Municipalities are expected to effectively operate and maintain grant funded wastewater treatment works over the useful life of the facilities consistent with section 204 of the Clean Water Act. If a grantee abandons a grant-funded facility or process, EPA will determine whether to seek recovery of grant funds.

- Functional replacement at other than EPA expense of abandoned treatment works is acceptable without recovery. The replacement must meet NPDES permit limitations and there must be no indication of mismanagement in the selection of the grant funded alternative.

- Abandonment of treatment works which are no longer needed at a POTW because of revised NPDES permit limits is acceptable without grant recovery. Grantees should request disposition instructions per 40 CFR 30.532(b).

- Abandonment of treatment works or significant portions of treatment works because of a failure to serve areas which the treatment works was designed and constructed to serve requires grant recovery.

  (NOTE: A significant portion is one which, if it had not been included in the design, would have changed the design capacity of the funded treatment works.)

- Abandonment of any treatment works requires a disposition decision which must be documented in the project file. The analysis supporting such a decision must consider scrap value as an alternative to leaving the facility idle where no future use is projected.

- The principal objective of the construction grants program is the construction of treatment works to achieve compliance with the water quality and public health goals of the Clean Water Act. The management of all grant funded property must take place in accordance with that objective and in the best financial interest of the Government.

The abandonment of any grant funded treatment works should be thoroughly analyzed and documented in the project file to clearly articulate the reasons for the abandonment and the basis for the action taken by the reviewing agency.

Re: Memorandum, 5/2/86 "Abandonment of Wastewater Treatment Works Funded by the Municipal Treatment Works Construction Grants Program"; 40 CFR 30.532(b)* 31.31, 32 and 33

d. Income Generation from Processed Sludges and Crops

Wastewater land treatment and sludge utilization processes are vigorously encouraged. These processes, which have the potential for generating project income to offset O&M costs, must be intensively reviewed to ensure unreasonable increases in construction costs are not allowed.

The guidance that follows applies specifically to stabilized and processed sludges which are to be managed for income generation, and to crops which are grown for sale as an integral part of the wastewater land treatment or sludge utilization process.

Facilities built for processing crops grown on land to which sludge or wastewater has been applied may be an allowable cost if the municipality has financial interest in the crop and if those facilities are necessary and reasonable to prepare the crop for prompt delivery to its market. Crop processing facilities could involve grain drying or fermenting. Facilities and equipment for transporting the crop to market or storing the crop to await more favorable market prices are unallowable.