United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

DIRECTIVE NUMBER: 9375.5-01

TITLE: 40 CFR Part 35 Subpart O, Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

APPROVAL DATE: 3/10/89

EFFECTIVE DATE: 3/10/89

ORIGINATING OFFICE: OERR/HSCD

☐ **FINAL**

☐ **DRAFT**

STATUS:

[ ] A- Pending OMB approval
[ ] B- Pending AA-OSWER approval
[ ] C- For review &/or comment
[ ] D- In development or circulating headquarters

REFERENCE (other documents):

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United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1. Directive Number: 9375.5-01

2. Originator Information

Name of Contact Person	Mail Code	Office	Telephone Code
John Banks	OS-220	OERR/HSCD	382-2443

3. Title

40 CFR Part 35 Subpart O, Cooperative Agreements and SuperfundState Contracts for Superfund Response Actions

4. Summary of Directive (include brief statement of purpose)

Provides regulatory language and information on program operating procedures that have been affected by the subject Interim Final Rule. First of a series of directives planned to provide guidance to State, Political subdivision and Federally-reognized Indian Tribe involvement in Superfund Program.

5. Keywords: Superfund, CERCLA, SARA

6a. Does This Directive Supersede Previous Directive(s)? [✓] No. [ ] Yes What directive (number, title)

b. Does It Supplement Previous Directive(s)? [✓] No [ ] Yes What directive (number, title)

7. Draft Level

[ ] A – Signed by AA/DAA [ ] B – Signed by Office Director [ ] C – For Review & Comment [ ] D – In Development

8. Document to be distributed to States by Headquarters? [X] Yes [ ] No

This Request Meets OSWER Directives System Format Standards.

9. Signature of Lead Office Directives Coordinator	Date
Betti C. VanEpps Betti C. VanEpps	3/17/89
10. Name and Title of Approving Official	**Date**
Hwnry L. Longest II, OERR Director	3/17/89

EPA Form 1315-17 (Rev. 5-87) Previous editions are obsolete.

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

MAR 10 1989

9375.5-01

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM:

SUBJECT: 40 CFR Part 35 Subpart O, Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

FROM: Henry L. Longest, Director
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Regions III, VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X

PURPOSE

This memorandum transmits 40 CFR Part 35 Subpart O, "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions," and provides information on program operating procedures that have been affected by the subject Interim Final Rule.

This is the first in a series of directives to carry the number 9375.5, which is guidance relating to State, political subdivision, and Federally-recognized Indian Tribe involvement in the Superfund program. As an administrative note, I recommend setting aside a special binder for the directives in this 9375.5 series, which will be issued sequentially as 9375.5-01, 02, etc. Indexing and keywording will be handled by the Office of Solid Waste and Emergency Response (OSWER) directives system.

BACKGROUND

The Office of Management and Budget (OMB) recently revised OMB Circular A-102 and established a government-wide "common rule" which prescribes the administrative requirements for Federal

assistance to States, local governments, and Federally-recognized Indian Tribes. This rule became effective for grants and cooperative agreements awarded on or after October 1, 1988, and to all amendments to existing agreements whose scope of work began on or after October 1, 1988. EPA implemented this common rule through 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" (53 FR 8075, March 11, 1988). Consistent with 40 CFR 31.5, which states that Part 31 does not supersede those administrative provisions required by statute, EPA has also promulgated 40 CFR Part 35 Subpart O, "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions" (54 FR 4132, January 27, 1989). EPA's regulation at 40 CFR 35 Subpart O is effective for all CERCLA-funded cooperative agreements and Superfund State Contracts awarded after January 27, 1989. This rule also applies to amendments to existing agreements where the scope of work starts after the effective date of this rule.

The Grants Administration Division (GAD), in coordination with the Office of Emergency and Remedial Response (OERR) and other EPA offices and Regions, has promulgated 40 CFR Part 35 Subpart O to implement Superfund-specific requirements that were contained in the State Participation in the Superfund Program manual and other Superfund addenda/guidance. This regulation codifies those requirements pertaining to cooperative agreements and Superfund State Contracts, financial administration, property (both real and personal), procurement and other administrative requirements covered in guidance.

THE IMPACT OF 40 CFR PART 35 SUBPART O ON CURRENT PROGRAM OPERATING PROCEDURES

For the most part, Subpart O does not significantly alter operating procedures that are currently in place; nonetheless, it would benefit you to read over the regulation since it does contain a number of changes that do affect current operating procedures. Among these changes are the following:

(1) Superfund State Contracts

40 CFR Part 35 Subpart O codifies requirements for Superfund State Contracts (SSC), which are required by section 104 of CERCLA, as amended. The SSC is a joint, legally binding agreement which is required to obtain the necessary CERCLA section 104 assurances when either EPA or a political subdivision is the lead agency for CERCLA remedial response. EPA's regulation at 40 CFR 35.6800 requires that an SSC be in place to obtain the necessary assurances before a Federal-lead

remedial action begins. Regional offices may not obligate any funds to EPA contractors or other Federal Agencies under an Interagency Agreement to conduct remedial action during a Federal-lead response until an SSC has been executed with the State; these are the same procedures you should have followed in the past regarding obligations for remedial action. An important change which you should be aware of regarding SSCs, however, is that an SSC is still required for a Federal- or political subdivision-lead remedial action even if the assurances have previously been provided by the State in a support agency cooperative agreement (see section 3 below for a further discussion on support agency cooperative agreements).

In the case of a political subdivision-lead remedial response at a site, 40 CFR 35.6800 requires that a three-party SSC between EPA, the State, and political subdivision thereof, be in place before the political subdivision may take the lead for any phase of remedial response. This is to ensure adequate State involvement in the remedial response pursuant to section 121(f) of CERCLA, as amended. An SSC entered into at the time of political subdivision remedial planning activities need not contain the CERCLA 104 assurances; it must simply document the responsibilities of the signatories as specified in 40 CFR 35.6805. However, if the political subdivision will have the lead for remedial action, the three-party SSC must be amended to include the appropriate section 104 assurances before funds may be obligated to the political subdivision under a cooperative agreement. The State must provide these assurances in the three-party SSC for a political subdivision-lead remedial action. Even if the political subdivision is designated as responsible for carrying out a specific assurance, the State must guarantee that it will assume responsibility for the assurance in the event of default by the political subdivision.

Furthermore, 40 CFR 35.6800(a)(1) requires an SSC with a Federally-recognized Indian Tribe before EPA initiates remedial action at a site on Indian land. Federally-recognized Indian Tribes are exempt by law from providing the CERCLA section 104(c)(3) assurances. However, pursuant to 40 CFR 35.6810(e), the Federally-recognized Indian Tribe must assure EPA that it will accept title to, acquire interest in, or accept transfer of such interest in real property that was acquired with CERCLA funds in order to conduct a response action. An SSC with the Federally-recognized Indian Tribe is the appropriate mechanism for obtaining this assurance.

In addition to the above requirements, 40 CFR 35.6805 specifies the minimum provisions which an SSC must include. Further guidance on these provisions will be forthcoming.

(2) Indian Tribes

CERCLA requires EPA to afford to Federally-recognized Indian Tribes substantially the same treatment as it would to States. Generally, the term "State" may be taken to include "Federally-recognized Indian Tribe." However, 40 CFR Part 35 Subpart O recognizes certain necessary differences between these two entities in order to clarify various Superfund administrative requirements. Therefore, where a requirement applies to a State, the term "State" is used, and where a requirement applies to a Federally-recognized Indian Tribe, the term "Federally-recognized Indian Tribe" is used. Subpart O does not use the terms interchangeably.

(3) Support Agency Cooperative Agreements

This may be a new term to many of you. In the past you have been using the term "management assistance cooperative agreement" to refer to those cooperative agreements awarded to States or Federally-recognized Indian Tribes to fund support activities during a Federal- or political subdivision-lead remedial response. This terminology has led to misconceptions about the purpose of these cooperative agreements and the eligible activities that are fundable under them. In order to clarify the intent of these cooperative agreements for funding support activities, these cooperative agreements have been codified in 40 CFR 35.6900 through 35.6920 as "support agency cooperative agreements." Support agency activities are those activities conducted by a State or Federally-recognized Indian Tribe pursuant to Section 121(f) of CERCLA, as amended, and described in Subpart F of proposed 40 CFR Part 300, "National Oil and Hazardous Substances Pollution Contingency Plan" (53 FR 51394, December 21, 1988) to ensure meaningful and substantial involvement when the State is the support agency at a Federal-or political subdivision-lead site or the Federally-recognized Indian Tribe is the support agency at a Federal-lead site. Regions should ensure that activities under a support agency cooperative agreement are consistent with the provisions of Section 121(f) of CERCLA, as amended, before awarding them.

The support agency cooperative agreement is not the appropriate vehicle for documenting CERCLA section 104 assurances prior to remedial action at a site. As specified

earlier, the Superfund State Contract is the required mechanism, pursuant to 40 CFR 35.6800 and 35.6810, for documenting assurances prior to the initiation of a Federal- or political subdivision-lead remedial action. These assurances may not be provided in a separate cooperative agreement. For example, if a State enters into a support agency cooperative agreement to conduct support activities during remedial action, the cost-share assurance and terms of payment must be documented in an SSC and not the cooperative agreement. The SSC should in turn, however, reference the support agency cooperative agreement which is in place concurrently with the SSC to facilitate tracking of expenditures and payments.

(4) Quarterly Reports

In the past Regions may not have required the submittal of quarterly reports by the States, instead relying on monthly communication between the Region and State to track State progress in Superfund. 40 CFR 35.6650 reemphasizes the requirement that recipients of Superfund cooperative agreements submit progress reports quarterly and specifies the minimum information these reports must contain. A recipient's failure to submit quarterly progress reports to EPA constitutes noncompliance with the terms of the cooperative agreement and may result in EPA taking action under 40 CFR 31.43.

In addition to the above requirements, 40 CFR 35.6655 requires recipients to inform EPA as soon as possible of any developments which significantly impact, either adversely or favorably, the cooperative agreement supported activity. Recipients should not wait until the quarterly report period to inform EPA of such events.

(5) Documentation and Record Retention Requirements

Record documentation requirements to support cost recovery actions are contained in 40 CFR 35.6700. These documentation requirements were developed pursuant to the guidelines in the State Superfund Financial Management and Recordkeeping Guidance, issued in November 1987, by the Office of the Comptroller. States should ensure that they comply with the requirements in 40 CFR 35 Subpart O and the guidelines in the State Financial Management and Recordkeeping Guidance with respect to documentation production. The record retention requirements contained in

the above guidance, however, have been modified by 40 CFR 35 Subpart O as follows.

Although 40 CFR Part 31 provides that records generally be retained for three years, EPA's new regulation, 40 CFR 35 Subpart O, instead requires that recipients of Superfund cooperative agreements and signatories to SSCs retain records for ten years, or until any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been completed and all issues resolved, whichever is later. Nonetheless, the recipient must obtain written approval from the Award Official before disposing of any CERCLA records.

40 CFR PART 35 SUBPART O AND FUTURE SUPERFUND GUIDANCE

Subpart O and this directive supersede instructions on State involvement in the Superfund program contained in 1) State Participation in the Superfund Program, February 1984, and all addenda issued through December 1986, 2) Interim Final Guidance on State Participation in Pre-Remedial and Remedial Response, July 21, 1987, on State involvement under SARA, 3) Award of Cooperative Agreements to Political Subdivisions, February 12, 1987, 4) State Access to EPA Contractors During Remedial Response, April 27, 1988, and 5) Guidance on State Core Program Funding Cooperative Agreements, December 18, 1987 (information provided in this guidance regarding allowable activities and functions under a core program cooperative agreement, however, is still valid). The Procurement Under Superfund Remedial Cooperative Agreement Guidance, June 1988, supplements Subpart O and will be revised to incorporate 40 CFR 35 Subpart O provisions.

Specifically, Regional and State program staff should no longer rely on the State Participation manual as the program's primary source of information on State involvement in Superfund since much of the information in this manual is now out-dated. However, the manual should still serve as an excellent historical reference for State participation in the program.

The Grants Administration Division (GAD) has the primary responsibility for the implementation of the new Superfund Assistance Regulation, and any questions concerning the implementation of 40 CFR 35 Subpart O should be directed to your Regional Grants Administration Office. In support to Superfund program personnel and the States, however, OERR in conjunction with GAD and other Headquarters offices, is developing a series of directives that explains in more detail the principal regulatory requirements of 40 CFR 35 Subpart O and other changes in program

operating procedures. This is the first such directive; other directives on specific topics and program changes will be issued in the near future.

CONTACTS

Should you have any questions regarding the Superfund Administrative regulation you may contact Richard Johnson, Grants Administration Division, at FTS: 382-5296, or Sharon Saile, Grants Administration Division, at FTS: 382-5268. Program-specific questions may be directed to Jan Baker Wine, Chief, State Involvement Section, or John Banks of her staff at FTS: 382-2443.

Attachment

cc: Regional Superfund Branch Chiefs
Regions I - X

Federal Register

Friday
January 27, 1989

Part II

Environmental Protection Agency

40 CFR Part 35

Cooperative Agreements and Superfund State Contracts for Superfund Response Actions; Interim Final Rule With Request for Comments

ENVIRONMENTAL PROTECTION AGENCY

Office of Administration

40 CFR Part 35

[FRL-3428-8]

Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule with request for comments.

SUMMARY: This rule establishes the administrative requirements for CERCLA-funded cooperative agreements, and Superfund State Contracts. The rule establishes these requirements for States, political subdivisions thereof, and Federally-recognized Indian tribes. This regulation sets forth the pre-award, post-award, and after-the-grant requirements which are conditions for receiving a Superfund cooperative agreement or Superfund State Contract. This regulation is needed to implement CERCLA cost recovery requirements and ensure that recipients carefully track and document all costs.

DATES: *Effective Date:* This rule becomes effective January 27, 1989.

Compliance Date: This rule is effective for all CERCLA-funded cooperative agreements and Superfund State Contracts awarded after January 27, 1989. This rule also applies to amendments to existing agreements where the scope of work starts after the effective date of this rule.

Comments: Written comments must be submitted on or before April 27, 1989.

ADDRESSES: Written comments must be submitted to: Superfund Docket Clerk, Office of Emergency and Remedial Response (WH-548D), Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments on today's Interim Final Rule must identify the regulatory docket as follows: "Docket 104CA." Docket: Copies of materials relevant to this rulemaking are contained in the Superfund docket located in the Lower Garage (Room LG-100) at the U.S. Environmental Protection Agency, 401 M Street SW., Washington DC 20460. The docket is available for inspection by appointment only between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday, excluding Federal holidays. The docket phone number is (202) 382-3046. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Richard A. Johnson, Office of Administration, PM-216F, U.S. Environmental Protection Agency, 499 South Capitol Street SW., Washington, DC 20460 at (202) 382-5296.

SUPPLEMENTARY INFORMATION: The contents of this preamble are as follows:

I. Background

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980 and launched the nation's first centralized and substantial commitment to clean up hazardous waste sites. CERCLA, or Superfund, provided Federal authority and resources to respond directly to releases (or threatened releases) of hazardous substances that could endanger human health or the environment. The law also authorized enforcement action and cost recovery from those responsible for a release. The Superfund Amendments and Reauthorization Act (SARA) was enacted on October 17, 1986 and continued the program initiated by CERCLA by reauthorizing CERCLA for an additional five years. SARA strengthened and expanded the cleanup program and increased the size of the Hazardous Substance Superfund by $8.5 billion.

One of the vehicles EPA uses to conduct Superfund cleanup responses is a cooperative agreement, through which EPA authorizes recipients to perform the lead role for cleanup activities. Superfund cooperative agreements are unique among EPA cooperative agreements; the major difference is the cost recovery requirement. To expedite the process of recovering costs from parties responsible for a release, the Superfund program mandates site-specific tracking of costs incurred under cooperative agreements and maintenance of site-specific files to document such costs.

The Office of Management and Budget (OMB) recently revised OMB Circular A-102 by establishing a government-wide "common rule" which prescribes administrative requirements for Federal assistance awards to States, political subdivisions thereof, and Federally-recognized Indian Tribes. EPA is implementing the common rule through 40 CFR Part 31. However, as provided in 40 CFR 31.5, Part 31 does not supersede administrative provisions required by statute.

Consistent with this Part 31 exception, EPA is promulgating this interim final rule as 40 CFR Part 35, Subpart O to implement the cost recovery program under section 107 of CERCLA, as amended. Section 107 of CERCLA makes any person responsible for a release or threatened release of hazardous substances liable for all costs of removal or remedial action. EPA implements this statutory provision through its cost recovery program. To ensure an effective cost recovery program, Subpart O establishes specific uniform requirements which supplement those in Part 31 for Superfund cooperative agreements and Superfund State contracts (SSC's) in three ways.

The first way in which this subpart supplements Part 31 is that it provides requirements specific to CERCLA, as amended, which were not addressed in Part 31. For example, the regulation adds requirements for States to follow for non- State-lead responses. Second, this subpart includes requirements which, although addressed in Part 31, do not meet the minimum standards necessary to meet the goal of cost recovery. These minimum requirements have been included in this subpart in a modified form. For example, although Part 31 does address procurement procedures, recipients must follow the procurement requirements in § 35.6550 through § 35.6610 of this subpart when procuring products or services under Superfund cooperative agreements. Finally, this subpart references those existing 40 CFR Part 31 requirements which are applicable for recipients of CERCLA funds. For example, recipients must follow the allowable cost requirements contained in 40 CFR 31.22, which are referenced in § 35.6250(a)(2) of this subpart.

Those sections of Part 31 that Subpart O references which are applicable for CERCLA funded cooperative agreements and/or Superfund State Contracts are listed below:

- 31.3 Definitions.
- 31.6 Additions and exceptions: selected sections.
- 31.13 Principal statutory provisions applicable to EPA assistance awards.
- 31.20 Standards for financial management systems: source documentation and awarding agency review.
- 31.21 Payment: Basic standard, reimbursement, effect of program income, refunds, audit recoveries on payment, withholding payments, and cash depositories.
- 31.22 Allowable costs.
- 31.23 Period of availability of funds.
- 31.24 Matching or cost sharing: qualifications and exceptions, and valuation of donated services.
- 31.25 Program income.
- 31.26 Non-Federal audit.

31.30 Changes.
31.31 Real property.
31.34 Copyrights.
31.35 Subawards to debarred and suspended parties.
31.36 Procurement: Selected sections from procurement standards, contracting with MBE's/WBE's and small businesses, bonding requirements, and payment to consultants.
31.40 Monitoring by grantees.
31.41 Financial reporting.
31.42 Starting dates for records retention period and requirements for records access.
31.43 Enforcement.
31.44 Termination for convenience.
31.45 Quality assurance.
31.50 Closeout.
31.51 Labor disallowances and adjustments.
31.52 Collection of amounts due.
31.70 Disputes.

The requirements in this subpart do not apply to Technical Assistance Grants or CERCLA research and development grants, including Superfund Innovative Technology Evaluation (SITE) Demonstration cooperative agreements.

II. Description of Major Issues

A. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP)

Although CERCLA, as amended, is the legislative initiative that provides for the cleanup of hazardous waste, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) describes the guidelines and procedures for implementing CERCLA. The NCP is currently being revised to include the statutory requirements established by SARA. Subpart O references specific sections of CERCLA, as amended, in prescribing requirements. Upon final promulgation of the revised NCP, any terms defined in both this regulation and the NCP will be superseded by the definition found in the NCP.

B. Records Retention

Length of Retention

40 CFR Part 31 establishes a three-year records retention requirement for the recipients of assistance agreements (40 CFR 31.42). In addition, Part 31 specifies that if any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the three-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. Subpart O requires that recipients retain all records for ten years after the date of completion of all response actions at the site, or until any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been completed and all issues resolved, whichever is later. This requirement ensures that response action information remains available for a sufficient period to support government cost recovery cases. The ten-year requirement supersedes all Superfund guidance documents which specify a three-year retention period, including *State Superfund Financial Management and Recordkeeping Guidance*, dated January 1988. Subpart O also requires the recipient to obtain written approval from its EPA award official before disposing of any CERCLA records.

Method of Retention

Recipients may substitute microform copies for original supporting documentation for removal actions and remedial investigations, feasibility studies, designs, and any additional related activities (including financial and cost accounting records) undertaken pursuant to CERCLA. The microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR 1230 et seq.) and EPA records management procedures (EPA Order 2160). If the recipient decides to use microform copies, then the recipient must also perform microform copying of original documents periodically in the regular course of business, and may dispose of these records only upon EPA approval. Subpart O requires the recipient to obtain written approval from EPA before disposing of the original records which were used to make the microform copy. Records retention requirements specified in this subpart are applicable to mircoform.

C. Purchase of Property

Although Subpart O provides the recipient with an option for obtaining equipment with CERCLA funds, it is not EPA's intent to use the Hazardous Substance Superfund to finance large purchases of equipment indiscriminantly. Therefore, the recipient must meet stringent requirements before EPA will allow the purchase of equipment with CERCLA funds. EPA encourages the recipient to use its own funds to purchase equipment, and charge the cooperative agreement for its use. Although EPA must approve this usage rate, the recipient does not then have to comply with the other property standards or disposition requirements of this regulation, if the recipient buys the equipment with its own funds.

D. Superfund State Contracts (SSC's)

There are two types of Superfund State Contracts (SSC's). The first is a two-party SSC between EPA and the State which is required pursuant to CERCLA section 104 to obtain the State's CERCLA 104 assurances before a Federal-lead remedial action can begin. The second type of SSC is a three-party SSC between EPA, the State, and a political subdivision thereof, which is required before a political subdivision receives a cooperative agreement for remedial response at a site. In this instance, a three-party SSC is required before a political subdivision takes the lead for any phase of remedial response to ensure adequate State involvement during remedial response pursuant to section 121(f)(1) of CERCLA. Prior to a political subdivision taking the lead for remedial action, the three-party SSC must be amended to include the State's CERCLA 104 assurances, if not already provided in the SSC.

E. Non Site-Specific Cost Accounting

The recipient of CERCLA funds is required to account for costs on a site-specific basis by phase of activity. The recipient is not required to track expenses by site for pre-remedial or Core Program cooperative agreement activities. However, for pre-remedial activities (i.e. Preliminary Assessments and Site Inspections), the recipient is required to track expenses by a single Superfund account number designated specifically for the pre-remedial activity. In addition, the recipient is required to track site-specific technical hours spent for the pre-remedial activity. For Core Program activities, the recipient is required to track expenses by a single Superfund account number designated specifically for Core Program activities.

F. Credit for NPL sites

This regulation addresses requirements for obtaining credit in § 35.6270(c), which describes the requirements for expenditures incurred before a site is listed on the NPL and for those incurred after a site is listed on the NPL. Section 104(c)(5)(A) of CERCLA, as amended, grants credit for amounts expended by a State for remedial action at a NPL site pursuant to a contract or cooperative agreement. In addition, section 104(c)(5)(B) allows credit for expenses for remedial action at a site incurred before the site is listed on the NPL if the site is subsequently listed on the NPL, and the expenses are determined to be creditable.

C. Federally-recognized Indian Tribes

CERCLA requires EPA to afford to Federally-recognized Indian Tribes substantially the same treatment as it would to States. However, in order to clarify the Supefund administrative requirements, the term "State" in this regulation does not mean "Federally-recognized Indian Tribe." Where a requirement applies only to a State, the term "State" is used, and where a requirement applies only to a Federally-recognized Indian Tribe, the term "Federally-recognized Indian Tribe" is used.

A Federally-recognized Indian Tribe may be the lead or support agency for a response and, under the terms of the statute, need not provide the section 104(c)(3) assurances with regard to remedial actions.

H. Financial Status Report

Although the Financial Status Report form (SF-269) does not request information by site and activity, the recipient must continue to provide financial information by site and activity in order to support cost recovery.

I. Support Agency Cooperative Agreements

Under the Superfund program, States and Federally-recognized Indian Tribes may receive funding to perform site-specific activities to support a Federal-lead response. Since the State or Federally-recognized Indian Tribe performs these activities as the support agency, the cooperative agreement which funds this assistance is termed a support agency cooperative agreement. This regulation codifies the requirements for recipients of support agency cooperative agreements in § 35.6900 through 35.6920 of this subpart. An example of support agency activities that may be funded under a cooperative agreement is the review and comment on technical data and reports relating to implementation of the remedy.

J. Non-Time-Critical Removals

Because there must be sufficient time to complete a cooperative agreement before a State or Federally-recognized Indian Tribe may take the lead, generally only non-time-critical removal actions will be eligible for cooperative agreements. Non-time-critical removals are those where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin.

K. Twenty-Year Waste Capacity

The regulation includes the assurance regarding availability of hazardous waste treatment and disposal facilities as required by CERCLA section 104(c)(9). EPA intends to issue guidance on this assurance in the near future.

III. Supporting Information

List of Subjects in 40 CFR Part 35

Accounting, Administrative practice and procedures, Financial administration, Grant programs (Cooperative agreements and Superfund State Contracts), Government procurement requirements, Property requirements, Reporting and recordkeeping requirements, Superfund.

IV. Impact Analyses

A. Federalism

As explained in E.O.12612, Federalism, States possess unique constitutional authority, resources, and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. However, due to statutory cost recovery requirements and the need to carefully track all costs, Superfund recipients must comply with administrative requirements sufficient to meet the cost recovery provisions of CERCLA. Therefore, States must follow the additional requirements in this rule, which are absolutely crucial for effective cost recovery from parties responsible for release. Nonetheless, States will be able to follow their own procedures, such as for procurement, if they certify that their requirements meet the intent of our regulation.

B. Executive Order 12291

Executive Order No. 12291 requires that regulations be classified as "major" or "non-major" for purposes of review by the Office of Management and Budget (OMB). According to Executive Order No. 12291, "major" rules are regulations that are likely to result in:

(1) An annual adverse (cost) effect on the economy of $100 million or more; or

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographical regions; or

(3) Significant adverse effects on the competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule does not affect the amount of funds provided in the Superfund program, but rather modifies and updates administrative and procedural requirements. We do not believe that the rule will have an annual economic impact of $100 million or more, will increase costs or prices, or will adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. For this reason, we have determined that this is not a major rule within the meaning of the Order, and therefore no formal Regulatory Impact Analysis is necessary. This interim final rule was submitted to the Office of Management and Budget for its review as required by Executive Order No. 12291.

C. Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires that, for each rule with "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities. We certify that this rule will not have a significant economic impact on a substantial number of small entities because the requirements in this regulation apply only to States, political subdivisions thereof, and Indian Tribes for administering Superfund response actions.

D. Paperwork Reduction Act

Sections 35.6055 (a) (1) through (a) (3) and (b) (1) through (b) (2); 35.6105 (a) (1) through (a) (5) and (b); 35.6250 (a) (1) and (b); 35.6300 (a) (3); 35.6315 (c); 35.6320 (a); 35.6340(a) (3); 35.6550 (b) (1) through (b) (3); 35.6585 (a) and (b); 35.6650; 35.6655; 35.6660; 35.6665; 35.6670; 35.6700; 35.6705; 35.6710; 35.6805; 35.6810; 35.6815 (d); 35.6860; and 35.6865 of this rule contain collection-of-information requirements. The information collection requirements in this interim final rule have been approved by the Office of Management and Budget (OMB) under the "Paperwork Reduction Act," 44 U.S.C. 3501 et seq. And assigned OMB control numbers 2010-0020. An Information Collection Request document has been prepared by EPA (ICR No. 1487) and a copy may be obtained from David Ogden, Information Policy Branch; EPA; 401 M St., SW. (PM-223); Washington, DC 20460 or by calling (202) 475-9498.

Public reporting burden for this collection of information is estimated to average 81 hours per response, including time for reviewing instructions, searching existing data sources,

gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, EPA, PM-223, 401 M St., SW., Washington, DC 20460 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this interim final rule.

Dated: January 9, 1989.

Lee M. Thomas,

Administrator.

Accordingly, the Administrator amends Chapter I, Part 35 of Title 40 of the Code of Federal Regulations as follows:

PART 35—STATE AND LOCAL ASSISTANCE

1. The authority citation for Part 35, appearing at the end of the table of contents, is removed.

2. A new Subpart O is added to read as follows:

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

Authority: 42 U.S.C. 9601 et seq.

General

§ 35.6000 Authority.

This regulation is issued under section 104 CERCLA, 42 U.S.C. 9601 et seq.

§ 35.6005 Purpose and scope.

(a) This regulation codifies recipient requirements for administering CERCLA-funded cooperative agreements. This regulation also codifies requirements for administering Superfund State Contracts (SSC's) for non-State-lead remedial responses.

(b) The requirements in this regulation do not apply to Technical Assistance Grants (TAG's) or to CERCLA research and development grants, including the Superfund Innovative Technology Evaluation (SITE) Demonstration Program.

(c) 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," establishes consistency and uniformity among Federal agencies in the administration of grants and cooperative agreements to State, local, and Federally recognized Indian tribal governments. For CERCLA-funded cooperative agreements, this subpart supplements the requirements contained in Part 31 for States, political subdivisions thereof, and Federally recognized Indian Tribes. This regulation references those sections of Part 31 that are applicable to CERCLA-funded cooperative agreements.

§ 35.6010 Eligibility.

This regulation applies to States, political subdivisions thereof, and Federally recognized Indian Tribes. Although section 126 of CERCLA provides that the governing body of a Federally recognized Indian Tribe shall be afforded substantially the same treatment as a State, in this subpart Federally recognized Indian Tribes are not included in the definition of State in order to clarify those requirements with which Federally recognized Indian Tribes must comply and those with which they need not comply.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the meanings set forth below:

(1) *Activity.* A set of tasks that together comprise a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include: pre-remedial (i.e. Preliminary Assessments and Site Inspections), remedial investigation/feasibility studies, remedial design, remedial action, removal, enforcement, and Core Program activities.

(2) *Allowable costs.* 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 cooperative agreement and/or Superfund State Contract.

(3) *Architectural or engineering (A/E) services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

(4) *Award official.* The EPA official with the authority to execute cooperative agreements and Superfund State Contracts (SSC's) and take other actions authorized by EPA Orders.

(5) *Budget period.* The length of time EPA specifies in an cooperative agreement during which the recipient may expend or obligate Federal funds.

(6) *CERCLA.* The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986.

(7) *Change order.* A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from , or revision of, a contract, usually initiated at the contractor's request.

(8) *Claim.* A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

(9) *Closeout.* The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the cooperative agreement and/or Superfund State Contract.

(10) *Community Relations Plan (CRP).* A management and planning tool outlining the specific community relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

(11) *Construction.* Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

(12) *Contract.* A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

(13) *Contractor.* Any party to whom a recipient awards a contract.

(14) *Cooperative agreement.* A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

(15) *Core Program Cooperative Agreement.* A cooperative agreement that provides funds to a State or Federally-recognized Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's ability to participate in the CERCLA response program.

(16) *Cost analysis.* The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

(17) *Cost share.* The portion of allowable project costs that a recipient contributes toward completing its project (i.e.,. non-Federal share, matching share).

(18) *Equipment.* Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(19) *Excess property.* Any property under the control of a Federal agency that is not required for immediate or foreseeable needs and thus is a candidate for disposal.

(20) *Fair market value.* The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

(21) *Health and safety plan.* A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological hazards of the site. The health and safety plan outlines: (i) Site hazards; (ii) work areas and site control procedures; (iii) air surveillance procedures; (iv) levels of protection; (v) decontamination and site emergency plans; (vi) arrangements for weather-related problems; and (vii) responsibilities for implementing the health and safety plan.

(22) *In-kind contribution.* The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements in a cooperative agreement only. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

(23) *Indian Tribe.* As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native Village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States

to Indians because of their status as Indians.

(24) *Lead agency.* The Federal agency, State agency, political subdivision, or Federally recognized Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

(25) *Minority Business Enterprise (MBE).* A business which is: (i) Certified as socially and economically disadvantaged by the Small Business Administration, (ii) certified as a minority business enterprise by a State or Federal agency, or (iii) an independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(A) Black American;

(B) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(C) Native American (American Indian, Eskimo, Aleut, native Hawaiian), or

(D) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(26) *National Priorities List (NPL).* EPA's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under Superfund. A site must be on NPL to receive money from the Trust Fund for remedial action. The list is based primarily on the score a site receives from the Hazard Ranking System.

(27) *Operation and maintenance (O&M).* Activities required to maintain the effectiveness of response actions. O&M is the sole responsibility of the State.

(28) *Personal property.* Property other than real property. It includes both supplies and equipment.

(29) *Political subdivision.* The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

(30) *Potentially Responsible Party (PRP).* Any individual(s), or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazardous Substance sites. PRPs may include individual(s) or company(ies) identified as having owned, operated, or in some other matter contributed wastes to Hazardous Substance sites.

(31) *Price analysis.* The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

(32) *Profit.* The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

(33) *Project.* The activities or tasks EPA identifies in the cooperative agreement and/or Superfund State Contract.

(34) *Project officer.* The EPA official designated in the cooperative agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

(35) *Project period.* The length of time EPA specifies in the cooperative agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

(36) *Quality Assurance Project Plan.* A written document, associated with site sampling activities, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities designed to achieve the data quality objectives of a specific project(s) or continuing operation(s). The quality assurance project plan will be prepared by the responsible program office, regional office, laboratory, contractor, recipient of a cooperative agreement, or other organization. For an enforcement action, EPA must approve a Potentially Responsible Party's quality assurance project plan.

(37) *Real property.* Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

(38) *Recipient.* Any State, political subdivision thereof, or Federally recognized Indian Tribe which has been awarded and has accepted an EPA cooperative agreement.

(39) *Services.* A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawing, specifications). This term does not include employment agreements or collective bargaining agreements. This term includes dismantling and demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, unless further work which will result in construction, alteration, or repair is contemplated at that location.

(40) *Small business.* A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

(41) *State.* The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

(42) *Statement of Work (SOW).* The portion of the cooperative agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

(43) *Subcontractor.* Any first tier party that has a contract with the recipient's prime contractor.

(44) *Superfund State Contract (SSC).* A joint, legally binding agreement between EPA and another party to obtain the necessary assurances before a Federal-lead remedial action can begin at a site. In the case of a political subdivision-lead remedial response, a three-party SSC between EPA, the State, and political subdivision thereof, is required before a political subdivision takes the lead for any phase of remedial response to ensure State involvement pursuant to section 121(f)(1) of CERCLA, as amended. The SSC must be amended to provide the State's CERCLA 104 assurances before a political subdivision can take the lead for remedial action.

(45) *Supplies.* All tangible personal property other than equipment as defined in this subpart.

(46) *Support agency.* The State Agency or Federally recognized Indian Tribe that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance as required by the lead agency during a response.

(47) *Task.* An element of a Superfund response activity.

(48) *Title.* The valid claim to property which denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

(49) *Unit acquisition cost.* The net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges,

such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(50) *Value engineering.* A systematic and creative analysis of each contract term or task to ensure that its essential function is provided at the overall lowest cost.

(51) *Women's Business Enterprise (WBE).* A business which is certified as a Women's Business Enterprise by a State or Federal agency, or which meets the following definition. A women's business enterprise is an independent business concern which is at least 51 percent owned by a woman or women who also control and operate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws.

(b) Those words not defined in this section shall have the meanings set forth in 40 CFR 31.3.

§ 35.6020 Principal statutory provisions.

The recipient must comply with the Federal laws described in 40 CFR 31.13, and with other applicable statutory provisions.

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for exceptions to the non-statutory provisions of this regulation. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

Pre-Remedial Response Cooperative Agreements

§ 35.6050 Eligibility for pre-remedial cooperative agreements.

States and Federally recognized Indian Tribes may apply for pre-remedial response cooperative agreements.

§ 35.6055 State-lead pre-remedial cooperative agreements.

(a) *Pre-remedial application requirements.* To receive a pre-remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form.* An "Application for Federal Assistance" (SF-424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(i) *Budget sheets* (SF-424(c));

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with intergovernmental review requirements.* The applicant must comply with 40 CFR Part 29, "Intergovernmental Review of the EPA Programs and Activities" and the "Notice of Supplemental Procedures for Establishing Start Dates of Comment Period for Activities Subject to Executive Order 12372" (48 FR 54692).

(3) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the project officer has approved the site.

(b) *Pre-remedial cooperative agreement requirements.* The recipient must comply with all special conditions in the cooperative agreement, and with the following requirements:

(1) *Health and safety plan.* (i) Before beginning field work, the recipient must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is a Federally recognized Indian Tribe which is exempt from OSHA requirements.

(2) *Quality assurance.* (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Federally recognized Indian Tribe-lead pre-remedial cooperative agreements.

The Federally recognized Indian Tribe must comply with all of the requirements described in § 35.6055 of this subpart except for the intergovernmental review requirements described in § 35.6055(a)(2).

Remedial Response Cooperative Agreements

§ 35.6100 Eligibility for remedial cooperative agreements.

States, Federally recognized Indian Tribes, and political subdivisions may apply for remedial response cooperative agreements.

§ 35.6105 State-lead remedial cooperative agreements.

(a) *Remedial application requirements.* To receive a remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form,* as described in § 35.6055(a)(1) of this subpart, accompanied by the following:

(i) *Budget sheets* displaying costs by site and activity;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with intergovernmental review requirements,* as described in § 35.6055(a)(2) of this subpart.

(3) *A site-specific Community Relations Plan* or an assurance that field work will not begin until one is in place. The Regional community relations coordinator must approve the Community Relations Plan before the recipient begins field work. The recipient must comply with the community relations requirements described in EPA policy and guidance, and in the National Contingency Plan (NCP).

(4) *A site-specific health and safety plan,* or an assurance that the applicant will have an EPA-accepted final plan before starting field work. Unless specifically waived by the award official, the applicant must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. The site-specific health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is a Federally recognized Indian Tribe exempt from OSHA requirements.

(5) *Quality assurance*—(i) *General.* If the project involves environmentally related measurements or data generation, the recipient must comply with the requirements regarding quality assurance described in 40 CFR 31.45.

(ii) *Quality assurance plan.* The applicant must have a separate quality assurance project plan/sampling plan

for each site to be covered by the cooperative agreement. The applicant must submit the quality assurance project plan and sampling plan, which incorporates results of any site investigation performed at that site, to EPA with its cooperative agreement application. However, at the option of the EPA award official with program concurrence, the applicant may submit with its application a schedule for developing the detailed site-specific quality assurance plan. The recipient must submit the detailed site-specific plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work. The recipient may not begin field work until the EPA approves the quality assurance plan.

(iii) *Split sampling.* The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

(b) *Remedial action cooperative agreement requirements: assurances.* The State must comply with all special conditions in the cooperative agreement. In addition, before beginning remedial action, the State must provide EPA with written assurances as specified below.

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the expected life of each such action.

(2) *Cost sharing.* The State must provide assurances for cost sharing as follows:

(i) *Privately-operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(ii) *Publicly-operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA.

(4) *Property title and interest acquisition.* If appropriate, the State must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6110 Federally recognized Indian Tribe-lead remedial cooperative agreements.

(a) *Application requirements.* The Federally-recognized Indian Tribe must comply with all of the requirements described in § 35.6105(a) of this subpart, except for the intergovernmental review requirements described in § 35.6055(a)(2).

(b) *Cooperative agreement requirements.* (1) The Federally recognized Indian Tribe must comply with all special conditions in the cooperative agreement.

(2) If appropriate, the Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart regarding information on property title and interest requirements.

§ 35.6115 Political subdivision-lead remedial cooperative agreements.

(a) *General.* If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume lead responsibility for a site. The State and political subdivision must enter into a three-party Superfund State Contract (SSC) with EPA before a political subdivision can be awarded a cooperative agreement.

(b) *Three-party Superfund State Contract requirements.* The three-party SSC must specify the responsibilities of the signatories. By signing the SSC, the EPA, the State, and the political subdivision agree to:

(1) Ensure that the SSC specifies the substantial and meaningful involvement of the State as required by section 121 (f)(1) of CERCLA, as amended.

(2) Ensure that the three-party SSC includes the State's CERCLA 104 assurances at the time of remedial action, if the political subdivision is designated the lead for remedial action.

(3) Follow the appropriate administrative requirements regarding SSC's described in § 35.6805, 35.6815, and 35.6820 of this subpart.

(c) *Political subdivision cooperative agreement requirements.*—(1) *Application requirements.* To receive a remedial cooperative agreement, the political subdivision must prepare an application which includes the documentation described in § 35.6105(a)(1) through (a)(5).

(2) *Cooperative agreement requirements.* The political subdivision must comply with all special conditions in the cooperative agreement.

§ 35.6120 Twenty-year waste capacity.

After October 17, 1989, EPA will not enter into a cooperative agreement for a remedial action without an adequate assurance as required by section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the cooperative agreement.

Enforcement Cooperative Agreements

§ 35.6150 Eligibility for enforcement cooperative agreements.

States may apply for enforcement cooperative agreements.

§ 35.6155 State-lead enforcement cooperative agreements.

The State must comply with the requirements described in § 35.6105(a) (1) through (5) of this subpart. Assurances and provisions which apply to enforcement activities must be contained in the cooperative agreement. The CERCLA assurances described in § 35.6105(b) are not applicable for enforcement actions.

Removal Response Cooperative Agreements

§ 35.6200 Eligibility for removal cooperative agreements.

States and Federally recognized Indian Tribes may apply for non-time-critical removal cooperative agreements.

§ 35.6205 Removal cooperative agreements.

(a) The State must comply with the requirements described in § 35.6105(a) (1) through (5) of this subpart. Federally recognized Indian Tribes must comply with the requirements described in § 35.6105 (a)(1), and (a)(3) through (a)(5) of this subpart.

(b) The State is not required to share in the cost of a CERCLA-funded removal action, unless the removal is conducted at a site that was publicly operated by a State or political subdivision at the time of disposal of hazardous substances and a CERCLA-funded remedial action is ultimately undertaken at the site. In this situation, the State must share at least 50 percent in the cost of all removal, remedial planning, and remedial action costs at the time of the remedial action

as described in § 35.6105(b)(2)(ii) of this subpart.

(c) Federally recognized Indian Tribes are never required to share in the cost of a CERCLA-funded removal action.

Financial Administration Requirements Under a Cooperative Agreement

§ 35.6250 Standards for financial management systems.

(a) *Accounting system standards.*—(1) *General.* The recipient's and its contractor's systems must track expenses by site and activity, according to object class. The systems must also provide control, accountability, and an assurance that funds, property, and other assets are used only for their authorized purposes. The recipient must allow an EPA review of the adequacy of the financial management system as described in 40 CFR 31.20(c).

(2) *Allowable costs.* The recipient's and its contractor's systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The systems need not track expenses by site. However, all pre-remedial costs must be documented under a single Superfund account number designated specifically for the pre-remedial activity.

(4) *Accounting system control procedures.* Except as provided for in paragraph (a)(3) of this section, accounting system control procedures must ensure that accounting information is:

(i) Accurate, charging only costs attributable to the site and activity; and

(ii) Complete, recording and charging to individual sites and activities all costs attributable to the recipient's CERCLA effort.

(5) *Financial reporting.* The recipient's accounting system must use actual costs as the basis for all reports of direct site charges. The recipient must comply with the requirements for financial reporting contained in § 35.6670 of this subpart.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that consists of complete site-specific files containing documentation of costs incurred.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office upon request and within specified time frames (generally within 30 days of request).

(3) In addition, the recipient and the recipient's contractors must comply with the requirements regarding records described in §§ 35.6700, 35.6705, and 35.6710 of this subpart. The recipient must comply with the requirements regarding source documentation described in 40 CFR 31.20(b)(6).

(4) For the pre-remedial activity, the recordkeeping system must comply with the requirements described in paragraph (a)(3) of this section.

§ 35.6255 Period for availability of funds.

The recipient must comply with the requirements regarding the availability of funds described in 40 CFR 31.23.

§ 35.6260 Cost sharing.

The recipient may not use costs incurred at one site to meet the cost sharing obligation at another site. However, the recipient may apply excess credits from one site to the required cost-share at another site. See § 35.6270(c)(3) of this subpart for the requirements regarding the use of excess credits. The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24.

§ 35.6265 Payments.

(a) *General.* In addition to the following requirements, the recipient must comply with the requirements regarding payment described in 40 CFR 31.21 (f) through (h).

(1) *Assignment of payment.* The recipient cannot assign the right to receive payments under the recipient's cooperative agreement. EPA will make payments only to the payee identified in the cooperative agreement.

(2) *Interest.* If the recipient earns interest on an advance of EPA funds, the recipient must return the interest unless the recipient is a State or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, or a tribal organization as defined under section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(b) *Payment Method*—(1) *Letter of credit.* In order to receive payment by the letter of credit method, the recipient must comply with the requirements regarding letter of credit described in 40 CFR 31.20(b)(7) and 31.21(b). The recipient must attribute costs to specific sites and activities for drawdown purposes except for the pre-remedial activity.

(2) *Reimbursement.* If the recipient is unable to meet letter of credit requirements, EPA will pay the recipient by reimbursement. The recipient must comply with the requirements regarding reimbursement described in 40 CFR 31.21(d).

§ 35.6270 Recipient payment of response costs.

The recipient may pay for its share of response costs using cash, services, credits or any combination of these, as follows:

(a) *Cash.* The recipient may pay for its share of response costs in the form of cash.

(b) *Services.* The recipient may provide equipment and services to satisfy its cost share requirements under cooperative agreements. The recipient must comply with the requirements regarding in-kind and donated services described in 40 CFR 31.24 (b) and (c).

(c) *Credit*—(1) *General credit requirements.* Credits are limited to State expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity expenditures or obligations incurred by the State or political subdivision between January 1, 1978 and December 11, 1980.

(ii) The State may claim credit for remedial action expenditures incurred by the State after October 17, 1986.

(iii) The State may not claim credit for removal actions taken after December 11, 1980.

(2) *Credit submission requirements*—(i) *Expenditures incurred before a site is listed on the NPL.* Although EPA may require additional documentation, the State must submit the following before EPA will approve the use of the credit:

(A) Specific amounts claimed for credit, by site (estimated amounts are unacceptable), based on supporting cost documentation;

(B) Units of government (State agency, county, local) that incurred the costs, by site;

(C) Description of the specific function performed by each unit of government at each site;

(D) Certification (signed by the State's fiscal manager or the financial director for each unit of government) that credit costs have not been previously reimbursed by the Federal government or any other party, and have not been used for matching purposes under any other Federal program or grant; and

(E) Documentation, if requested by EPA, to ensure the actions undertaken at the site are cost eligible and consistent with CERCLA, as amended, and the NCP requirements. This requirement does not apply for costs incurred before December 11, 1980.

(ii) *Expenditures incurred after a site is listed on the NPL.* A State may receive credit for remedial action expenditures after October 17, 1986, only if the State entered into a cooperative agreement before incurring costs at the site.

(3) *Use of credit.* The State must first apply credit at the site at which it was earned. With the approval of EPA, the State may use excess credit earned at one site for its cost share at another site. EPA will not reimburse excess credit.

(4) *Credit verification.* Credits are subject to verification by audit and technical review of actions performed at sites.

(d) *Advance match.* (1) A cooperative agreement entered into after October 17, 1986 cannot authorize a State to contribute funds during remedial planning and then apply those contributions to the remedial action cost share (advance match).

(2) A State may seek reimbursement for costs incurred under cooperative agreements which authorize advance match.

(3) Reimbursements are subject to the availability of appropriated funds.

(4) If the State does not seek reimbursement, EPA will apply the advance match to off-set the State's required cost share for remedial action at the site. The State may not use advance match for credit at any other site nor may the State receive reimbursement until the conclusion of CERCLA-funded remedial response activities.

(5) Claims for advance match are subject to verification by audit.

§ 35.6275 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR 31.25.

Personal Property Requirements Under a Cooperative Agreement

§ 35.6300 General personal property acquisition and use requirements.

(a) *General.* (1) Property may be acquired only when authorized in the cooperative agreement.

(2) The recipient must acquire the property during the approved project period.

(3) The recipient must:

(i) Charge property costs by site and activity;

(ii) Document the use of the property; and

(iii) Solicit and follow EPA's instructions on the disposal of any property purchased with CERCLA funds as specified in §§ 35.6340 and 35.6345 of this subpart.

(b) *Exception.* The recipient is not required to charge property costs by site under a pre-remedial or Core Program Cooperative Agreement.

§ 35.6305 Obtaining supplies.

To obtain supplies, the recipient must agree to comply with the requirements in §§ 35.6300, 35.6315(b), and 35.6325 through 35.6335 of this subpart.

§ 35.6310 Obtaining equipment.

To obtain equipment, the recipient must agree to comply with the requirements in § 35.6300 and §§ 35.6315 through 35.6350 of this subpart.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase with recipient funds.* The recipient may purchase equipment with the recipient's own funds and may charge EPA a fee for using equipment on a CERCLA-funded project. The fee must be based on a usage rate, subject to the usage rate requirements in § 35.6320 of this subpart.

(b) *Borrow Federally owned property.* The recipient may borrow Federally owned property, with the exception of motor vehicles, for use on CERCLA-funded projects. The loan of the Federally owned property may only extend through the project period. At the end of the project period, or when the Federally owned property is no longer needed for the project, the recipient must return the property to the Federal Government.

(c) *Lease, use contractor services, or purchase with CERCLA funds.* To acquire equipment through lease, use of contractor services, or purchase with CERCLA funds, the recipient must conduct and document a cost comparison analysis to determine which of these methods of obtaining equipment is the most cost effective. In order to obtain the equipment, the recipient must submit documentation of the cost comparison analysis to EPA for approval. The recipient must obtain the equipment through the most cost effective method, subject to the requirements listed below:

(1) *Lease or rent equipment.* If it is the most cost effective method of acquisition, the recipient may lease or rent equipment, subject only to the requirements in § 35.6300 of this subpart.

(2) *Use contractor services.* (i) If it is the most cost effective method of acquisition, the recipient may hire the services of a contractor.

(ii) The recipient must obtain award official approval before authorizing the contractor to purchase equipment with CERCLA funds. (See § 35.6325 of this subpart regarding the title and vested interest of equipment purchased with CERCLA funds.) This does not apply for recipients who have used the sealed bids method of procurement.

(iii) The recipient must require the contractor to allocate the cost of the contractor services by site and activity.

(3) *Purchase equipment with CERCLA funds.* If equipment purchase is the most cost-effective method of obtaining the equipment, the recipient may purchase the equipment with CERCLA funds. To purchase equipment with CERCLA funds, the recipient must comply with the following requirements:

(i) The recipient must include in the cooperative agreement application a list of all items of equipment to be purchased with CERCLA funds, with the price of each item.

(ii) If the equipment is to be used on more than one site, the recipient must allocate the cost of the equipment by site and activity by applying a usage rate subject to the usage rate requirements in § 35.6320 of this subpart.

(iii) The recipient may not use CERCLA funds to purchase a transportable or mobile treatment system.

§ 35.6320 Usage rate.

(a) *Usage rate approval.* To charge EPA a fee for use of equipment purchased with recipient funds or to allocate the cost of equipment by site and activity, the recipient or the recipient's contractor must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. EPA must approve the usage rate.

(b) *Usage rate application.* The recipient or the recipient's contractor must record the use of the equipment by site and activity and must apply the usage rate to calculate equipment charges by site and activity. For Core Program and pre-remedial activities, the recipient is not required to apply a usage rate.

§ 35.6325 Title and EPA interest in CERCLA-funded property.

(a) *EPA's interest in CERCLA-funded property.* EPA has an interest (the percentage of EPA's participation in the total award) in both equipment and supplies purchased with CERCLA funds.

(b) *Title in CERCLA-funded property.* Title in both equipment and supplies purchased with CERCLA funds vests in the recipient.

(1) *Right to transfer title.* EPA retains the right to transfer title of all property purchased with CERCLA funds to the Federal Government or a third party within 120 calendar days after project completion or at the time of disposal.

(2) *Equipment used as all or part of the remedy.* The following requirements apply to equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its interest in the title to fixed

in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

§ 35.6330 Title to Federally owned property.

Title to all Federally owned property vests in the Federal Government.

§ 35.6335 Property management standards.

The recipient and the recipient's contractor must comply with the following property management standards for property purchased with CERCLA funds. The recipient may use its own property management system if it meets the following standards.

(a) *Control.* The recipient must maintain:

(1) *Property records* for CERCLA-funded property which include the contents specified in § 35.6700(c) of this subpart.

(2) *A control system* which ensures adequate safeguards for prevention of loss, damage, or theft of the property. The recipient must make provisions for the thorough investigation and documentation of any loss, damage, or theft;

(3) *Procedures* to ensure maintenance of the property in good condition and periodic calibration of the instruments used for precision measurements;

(4) *Sales procedures* to ensure the highest possible return, if the recipient is authorized to sell the property;

(5) *Provisions for financial control and accounting* in the financial management system of all equipment; and

(6) *Identification* of all Federally owned property.

(b) *Inventory and reporting for CERCLA-funded equipment*—(1) *Physical inventory.* The recipient must conduct a physical inventory at least once every two years for all equipment except that which is part of the in-place remedy. The recipient must reconcile physical inventory results with the equipment records.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports set forth in § 35.6660 of this subpart.

(c) *Inventory and reporting for Federally owned property*—(1) *Physical inventory.* The recipient must conduct a physical inventory:

(i) Annually;

(ii) When the property is no longer needed; and

(iii) Within 90 days from the end of the project period.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports in § 35.6660 of this subpart.

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment which is no longer needed, or at the end of the project period, whichever is earlier, the recipient must:

(1) Analyze two alternatives: the cost of leaving the equipment in place, and the cost of removing the equipment and disposing of it in another manner.

(2) Document the analysis of the two alternatives in the inventory report. See § 35.6660 of this subpart regarding requirements for the inventory report.

(i) If it is most cost-effective to remove the equipment and dispose of it in another manner:

(A) If the equipment has a residual fair market value of $5,000 or more, the recipient must request disposition instructions from EPA in the inventory report. See § 35.6345 of this subpart for equipment disposal options.

(B) If the equipment has a residual fair market value of less than $5,000, the recipient may retain the equipment for the recipient's use on another CERCLA site. If, however, there is any remaining residual value at the time of final disposition, the recipient must reimburse the Hazardous Substance Superfund for EPA's vested interest in the current fair market value of the equipment at the time of disposition.

(ii) If it is most cost-effective to leave the equipment in place, recommend in the inventory report that the equipment be left in place.

(3) Submit the inventory report to EPA, even if EPA has stopped supporting the project.

(b) *Supplies.* (1) If supplies have an aggregate fair market value of $5,000 or more at the end of the project period, the recipient must take one of the following actions at the direction of EPA:

(i) Use the supplies on another CERCLA site and reimburse the original site for the fair market value of the supplies;

(ii) If both the recipient and EPA concur, keep the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies; or

(iii) Sell the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies, less any reasonable selling expenses.

(2) If the supplies remaining at the end of the project period have an aggregate fair market value of less than $5,000, the recipient may keep the supplies to use on another CERCLA site. If the recipient cannot use the supplies on another CERCLA site, then the recipient may keep or sell the supplies without reimbursing the Hazardous Substance Superfund.

§ 35.6345 Equipment disposal options.

The following disposal options are available:

(a) Use the equipment on another CERCLA site and reimburse the original site for the fair market value of the equipment;

(b) If both the recipient and EPA concur, keep the equipment and reimburse the Hazardous Substance Superfund, for EPA's interest in the current fair market value of the equipment;

(c) Sell the equipment and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the equipment, less any reasonable selling expenses; or

(d) Return the equipment to EPA and, if applicable, EPA will reimburse the recipient for the recipient's proportionate share in the current fair market value of the equipment.

§ 35.6350 Disposal of Federally owned property.

When Federally owned property is no longer needed, or at the end of the project, the recipient must inform EPA that the property is available for return to the Federal Government. EPA will send disposition instructions to the recipient.

Real Property Requirements Under a Cooperative Agreement

§ 35.6400 Acquisition and transfer of interest.

(a) An interest in real property may be acquired only with prior approval of EPA.

(1) If a State or Federally recognized Indian Tribe acquires real property in order to conduct the response, the recipient with jurisdiction over the real property must agree to acquire and hold the necessary real property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the

response action. States and Federally recognized Indian Tribes must follow the requirements in § 35.6105(b)(5) and 35.6110(b)(2) of this subpart. Political subdivisions must follow the requirements in § 35.6815(c) of this subpart.

(b) The State or Federally recognized Indian Tribe must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter.

§ 35.6405 Use.

The recipient must comply with the requirements regarding real property described in 40 CFR 31.31.

Copyright Requirements Under a Cooperative Agreement

§ 35.6450 General requirements.

The recipient must comply with the requirements regarding copyrights described in 40 CFR 31.34. The recipient must comply with the requirements regarding contract copyright provisions described in § 35.6595(b)(3) of this subpart.

Use of Recipient Employees ("Force Account") Under a Cooperative Agreement

§ 35.6500 General requirements.

(a) Force Account work is the use of the recipient's own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility. When using Force Account work, the recipient must demonstrate that the employees can complete the work as competently as, and more economically than, contractors, or that an emergency necessitates the use of the Force Account.

(b) Where the value of Force Account services exceeds $25,000, the recipient must receive written authorization for use from the award official.

Procurement Requirements Under a Cooperative Agreement

§ 35.6550 Procurement system standards.

(a) *Recipient standards*—(1) *Procurement system evaluation.*

(i) An applicant or recipient must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(ii) The certification will be valid for two years or for the length of the project period specified in the cooperative agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part (see paragraph (a)(4) of this section regarding EPA right to review). If the recipient substantially revises its procurement system, the recipient must re-evaluate its system and submit a revised EPA Form 5700–48.

(2) *Certified procurement system.* Even if the applicant or recipient has certified that its procurement system meets the intent of the requirements of this subpart, the EPA award official retains the authority as stated in:

(i) Section 35.6565(d)(1)(iii), "Noncompetitive proposals," regarding award official authorization of noncompetitive proposals;

(ii) Section 35.6565(b), "Sealed bids (formal advertising)," regarding award official approval for the use of a procurement method other than sealed bidding for a construction award;

(iii) 40 CFR 31.36(b)(12), "Protests," regarding EPA review of protests; and

(iv) 40 CFR 31.36(g)(2)(ii), "Awarding Agency Review," regarding the review of proposed awards over $25,000 which are to be awarded to other than the apparent low bidder under a sealed bid procurement.

(3) *Noncertified procurement system.* If the applicant or recipient has not certified that its procurement system meets the intent of the requirements of this subpart, then the recipient must follow the requirements of this subpart and allow EPA preaward review of proposed procurement actions that will use EPA funds. In addition, the recipient with a noncertified procurement system must comply with the following requirements:

(i) The recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700–41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700–41. This specific requirement is an addition to the requirements regarding cost and price analysis described in § 35.6585 of this subpart.

(ii) When soliciting bids or proposals, the recipient must allow at least 30 days between public notice of the project and the deadline for receipt of bids or proposals. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

(4) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a cooperative agreement.

(5) *Code of conduct.* The recipient must comply with the requirements of 40 CFR 31.36(b)(3), which describes standards of conduct for employees, officers, and agents of the recipient.

(6) *Completion of contractual and administrative issues.* The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgement and good administrative practice of all contractual and administrative issues arising out of procurements under the cooperative agreement. EPA will not substitute its judgement for that of the recipient unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, tribal, or Federal authority having proper jurisdiction.

(7) *Selection procedures.* The recipient must have written selection procedures for procurement transactions.

(i) EPA may not participate in a recipient's selection panel except to provide technical assistance. EPA staff providing such technical assistance:

(A) Shall constitute a minority of the selection panel (limited to making recommendations on qualified offers and acceptable proposals based on published evaluation criteria) for the contractor selection process; and

(B) Are not permitted to participate in the negotiation and award of contracts.

(ii) When selecting a contractor, recipients:

(A) May not use EPA contractors to provide any support related to procuring a State contractor.

(B) May use the Corps of Engineers for review of State bidding documents, requests for proposals and bids and proposals received.

(8) *Award.* The recipient may award a contract only to a responsible contractor, as described in 40 CFR 31.36(b)(8), and must ensure that each contractor performs in accordance with all the provisions of the contract (see also § 35.6560 of this subpart regarding debarred and suspended contracts).

(9) *Protest procedures.* The recipient must comply with the requirements described in 40 CFR 31.36(b)(12) regarding protest procedures.

(10) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665 of this subpart.

(11) *Intergovernmental agreements.* To foster greater economy and efficiency, recipients are encouraged to enter into State and local

intergovernmental agreements for procurement or use of common goods and services.

(12) *Value engineering.* The recipient is encouraged to include value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

(b) *Contractor standards*—(1) *Disclosure requirements regarding Potentially Responsible Party relationships.* The recipient must require each prospective contractor to provide with its bid or proposal:

(i) Information on its financial and business relationship with all PRP's at the site, and with their parent companies, subsidiaries, affiliates, subcontractors, and current clients or attorneys and agents (this disclosure requirement encompasses past and anticipated financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the best interests of the recipient, the prospective contractor may be declared nonresponsible and the contract awarded to the next eligible bidder or offeror.

(2) *Conflict of interest*—(i) *Conflict of interest notification.* The contractor shall notify the recipient of any actual, apparent, or potential conflict of interest regarding any individual working on a contract assignment or having access to information regarding the contract. This notification shall include both organizational conflicts of interest and personal conflicts of interest. If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict of interest situation.

(ii) *Contract provisions.* The recipient must incorporate the following provisions of their equivalents into all contracts:

(A) *Contractor data.* The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, EPA, or its authorized agents.

(B) *Employment.* The contractor shall not accept employment from any party other than the recipient or Federal agencies for work directly related to the site(s) covered under the contract for three years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(C) *Activity and cost documentation.* For six years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer, the contractor shall provide witnesses and documentation of activities performed and costs incurred under the contract upon request to the recipient, EPA, or its authorized agents. The contractor shall be entitled to reasonable compensation for any such activities performed.

(3) *Certification of independent price determination.* The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation.

§ 35.6555 Competition.

The recipient must conduct all procurement transactions in a manner providing maximum full and open competition.

(a) *Restrictions on competition.* Inappropriate restrictions on competition include the following:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product, instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) *Geographic and Federally recognized Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or admininstratively imposed in-State or local geographical preferences in evaluating bids or proposals. However, nothing in this section preempts State licensing laws. In addition, when contracting for architectural and engineering (A/E) services, the recipient may use geographic location as a selection criterion, provided that when geographic location is used, its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(2) *Federally recognized Indian Tribe.* If the project benefits Indians, the recipient must comply with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(c) *Written specifications.* The recipient's written specifications must include a clear and accurate description of the technical requirements and the qualitative nature of the material, product or service to be procured.

(1) This description must not contain features which unduly restrict competition, unless the features are necessary to:

(i) Test or demonstrate a specific thing;

(ii) Provide for necessary interchangeability of parts and equipment; or

(iii) Promote innovative technologies.

(2) The recipient must avoid the use of detailed product specifications if at all possible.

(d) *Public notice.* When soliciting bids or proposals, the recipient must give adequate (generally 30 days before receipt of bids or proposals) public notice of the proposed project. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over reasonable area. Recipients with a non-certfified procurement system must follow the public notice requirements described in § 35.6550(a)(3)(ii) of this subpart.

(e) *Prequalified lists.* Recipients may use prequalified lists of persons, firms, or products to acquire goods and services. The list must be current and include enough qualified sources to ensure maximum open and free competiton. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 35.6560 Master list of debarred, suspended, and voluntarily excluded persons.

While evaluating bids or proposals, the recipient and its contractor must consult the most current "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to ensure that the firms submitting proposals are not prohibited from participation in

assistance programs. The recipient and its contractor must comply with the requirements regarding subawards to debarred and suspended parties described in 40 CFR 31.35.

§ 35.6565 Procurement methods.

The recipient must comply with the requirements for payment to consultants described in 40 CFR 31.36(j). In addition, the recipient must comply with the following requirements:

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, the recipient must obtain and document price or rate quotations from an adequate number of qualified sources.

(b) *Sealed bids (formal advertising).* (For a construction award, the recipient must obtain the award official's approval to use a procurement method other than the sealed bid method.) Bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for the recipient to use the sealed bid method, the following conditions must be met:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If the recipient uses the sealed bid method, the recipient must comply with the following requirements:

(i) Publicly advertise the invitation for bids and solicit bids from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) Publicly open all bids at the time and place prescribed in the invitation for bids;

(iv) Award the fixed-price contract in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, the recipient shall consider factors such as discounts, transportation cost, and life cycle costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of the project.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement request of this subpart, the recipient of a CERCLA remedial response cooperative agreement may use the engineer procured to conduct any or all of the remedial investigation (RI), the feasibility study (FS), or design to perform follow-on engineering activities under the remedial response without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using EPA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any EPA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of remedial response under a cooperative agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g.,

a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal cooperative agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBE's, WBE's and small businesses are used whenever possible as sources of supplies, construction, and services.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) *"Fair share" objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy requires that fair share objectives for minority and woman-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one cooperative agreement during the year, the recipient may negotiate an annual fair share for all cooperative agreements for that year. It is not necessary to have a fair share for each cooperative agreement. When a cooperative agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the cooperative agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over $25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Indemnification.* When adequate pollution liability insurance is not available to the contractor, EPA may indemnify response contractors for liability related to damage from releases arising out of the contractor's negligent performance. The recipient must comply with the requirements regarding indemnification described in section 119 of CERCLA, as amended.

(c) *Accidents and catastrophic loss.* The contractor must provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

(1) Nature, scope, and extent of work to be performed;

(2) Time frame for performance;

(3) Total cost of the contract; and

(4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan which is issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163).

(2) *Violating facilities.* Contracts in excess of $100,000 must contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR Part 15) which prohibit the use of facilities included on the EPA List of Violating Facilities under nonexempt Federal contracts, grants or loans.

(3) *Patents, inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(4) *Labor standards.* (i) The recipient must include a copy of EPA Form 5720–4 ("Labor Standards Provisions for Federally Assisted Construction Contracts") in each contract for construction (as defined by the Secretary of Labor). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a–276a–7), the Copeland Regulations (29 CFR Part 3), the Contract Work Hours and Safety Standards Act Overtime Compensation (940 U.S.C. 327–333), and the nondiscrimination provisions in Executive Order 11246, as amended.

(ii) If the contract is solely for dismantling or demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, the Davis-Bacon Act does not apply unless further work will result in construction at that location, even though by separate contract.

(5) *Conflict of interest.* The recipient must include provisions pertaining to

conflict of interest as described in § 35.6550(b)(2)(ii) of this subpart.

(c) *Model clauses.* The recipient must comply with the requirements regarding model contract clauses described in 40 CFR 33.1030.

§ 35.6600 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;

(5) The award official determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the recipient's responsibility for the improper action of others.

§ 35.6605 Privity of contract.

Neither EPA nor the United States shall be a party to any contract nor to any solicitation or request for proposals.

§ 35.6610 Contracts awarded by a contractor.

A contractor must comply with the following provisions in the award of contracts (i.e., subcontracts). (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) The requirements regarding debarred, suspended, and voluntarily excluded persons in § 35.6560 of this subpart.

(b) The limitations on contract award in § 35.6550(a)(8) of this subpart.

(c) The requirements regarding minority and women's business enterprises, and small business in § 35.6580 of this subpart.

(d) The requirements regarding specifications in § 35.6555 (a)(6) and (c) of this subpart.

(e) The Federal cost principles in 40 CFR 31.22.

(f) The prohibited types of contracts in § 35.6575(a) of this subpart.

(g) The cost, price analysis, and profit analysis requirements in § 35.6585 of this subpart.

(h) The applicable provisions in § 35.6595 (b) and (c) of this subpart.

(i) The applicable provisions in § 35.6555(b)(2).

Reports Required Under a Cooperative Agreement

§ 35.6650 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content for pre-remedial, remedial, enforcement, and removal progress reports.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, delays or other problems, if any, and a description of the corrective measures that are planned. For pre-remedial cooperative agreements, the report must include a list of the site-specific products completed and the number of technical hours spent to complete each product.

(2) A comparison of the percentage of the project completed to the project schedule, and an explanation of significant discrepancies.

(3) A comparison of the estimated funds spent to date to planned expenditures and an explanation of significant discrepancies. For pre-remedial cooperative agreements, the report should compare aggregated expenditures. For remedial, enforcement, and removal reports, the comparison must be on a per task basis.

(4) An estimate of the time and funds needed to complete the work required in the cooperative agreement, a comparison of that estimate to the time and funds remaining, and a justification for any increase.

§ 35.6655 Notification of significant developments.

Events may occur between the scheduled performance reporting dates which have significant impact upon the cooperative agreement-supported activity. In such cases, the recipient must inform the EPA project officer as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

§ 35.6660 Property inventory reports.

(a) *CERCLA-funded property*—(1) *Content.* The report must contain the following information:

(i) Classification and value of remaining supplies;

(ii) Description of all equipment purchased with CERCLA funds, including its current condition;

(iii) Verification of the current use and continued need for the equipment by site and activity;

(iv) Notification of any property which has been stolen or vandalized; and

(v) A request for disposition instructions for any equipment no longer needed on the project.

(2) *Reporting frequency.* The recipient must submit an inventory report to EPA at the following times:

(i) Within 90 days after completing any response activity at a site; and

(ii) When the equipment is no longer needed for any response activity at a site.

(b) *Federally owned property*—(1) *Content.* The recipient must include the following information for each Federally-owned item in the inventory report:

(i) Description;

(ii) Decal number;

(iii) Current condition; and

(iv) Request for disposition instructions.

(2) *Reporting frequency.* The recipient must submit an inventory report to the appropriate EPA property accountable officer at the following times:

(i) Annually, due to EPA on the anniversary date of the award;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

§ 35.6665 Procurement reports.

(a) *Report for the Department of Labor (DOL)*—(1) *Content.* The recipient must notify the DOL Regional Office of Compliance, in writing, of each construction contract which has or is expected to have an aggregate value of over $10,000 within a 12-month period. The report must include the following:

(i) Construction contractor's name, address, telephone number, and employee identification number;

(ii) Award amount;

(iii) Estimated start and completion dates; and

(iv) Project number, name, and site location.

(2) *Reporting frequency.* The recipient must notify the DOL Office of Compliance within 10 calendar days after the award of each such construction contract. The recipient must submit a copy of the report to the EPA project officer.

(b) *Name of contractor.*—(1) *Content.* For construction contracts over $25,000, the recipient must submit the name of the contractor to the project officer.

(2) *Reporting frequency.* The recipient must submit the name of the contractor to the project officer within 10 calendar days after the award of each such construction contract.

(c) *Minority and women's business enterprises (MBE/WBE)*—(1) *Content.* The recipient must report on its use of MBE and WBE firms by submitting a completed Minority and Women's Business Utilization Report (SF-334) to the award official.

(2) *Reporting frequency.* The recipient must submit the MBE/WBE Utilization Report within 30 days after the end of each Federal fiscal quarter, regardless of whether the recipient awards a contract to an MBE or WBE during that quarter. Reporting commences with the recipient's award of its first contract and continues until they and their contractors have awarded their last contract for the activities or tasks identified in the cooperative agreement.

§ 35.6670 Financial Reports.

(a) *General.* The recipient must comply with the requirements regarding financial reporting described in 40 CFR 31.41.

(b) *Financial Status Report.*—(1) *Content.* (i) The Financial Status Report (SF-269) must include site and activity-specific financial information.

(ii) A final Financial Status Report (FSR) must have no unliquidated obligations. If any obligations remain unliquidated, the FSR is considered an interim report and the recipient must submit a final FSR to EPA after liquidating all obligations.

(2) *Reporting frequency.* The recipient must file a Financial Status Report as follows:

(i) Annually (unless the cooperative agreement requires quarterly or semi-annual reports in accordance with 40 CFR 31.41(b)(3)), due 90 days after the cooperative agreement anniversary date if annual reports are required; due 30 days after the reporting period if quarterly or semiannual reports are required;

(ii) Within 90 calendar days after completing each CERCLA-funded response activity at a site (submit the FSR only for each completed activity); and

(iii) Within 90 calendar days after termination or closeout of the cooperative agreement.

Records Requirements Under a Cooperative Agreement

§ 35.6700 Project records.

The recipient is responsible for maintaining project files as described below.

(a) *General.* The recipient must maintain project records by site and activity.

(b) *Financial records.* The recipient must maintain records which support the following items:

(1) Amount of funds received and expended; and

(2) Direct and indirect project cost.

(c) *Property records.* The recipient must maintain records which support the following items:

(1) Description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including the assistance identification number;

(4) Information regarding whether the title is vested in the recipient or EPA;

(5) Unit acquisition date and cost;

(6) Percentage of EPA's interest;

(7) Location, use and condition (by site and by activity) and the date this information was recorded; and

(8) Ultimate disposition data, including the sales price or the method used to determine the price, or the method used to determine the value of EPA's interest for which the recipient compensates EPA in accordance with § 35.6340, 35.6345, and 35.6350 of this subpart.

(d) *Procurement records*—(1) *General.* The recipient must maintain records which support the following items, and must make them available to the public:

(i) The reasons for rejecting any or all bids; and

(ii) The justification for a procurement made on a noncompetitively negotiated basis.

(2) *Procurements in excess of $25,000.* The recipient's records and files for procurements in excess of $25,000 must include the following information, in addition to the information required in paragraph (d)(1) of this section:

(i) The basis for contractor selection;

(ii) A written justification for selecting the procurement method;

(iii) A written justification for use of any specification which does not provide for maximum free and open competition;

(iv) A written justification for the choice of contract type; and

(v) The basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 35.6585 of this subpart and documentation of negotiations.

(e) *Other records.* The recipient must maintain records which support the following items:

(1) Time and attendance records and supporting documentation;

(2) Documentation of compliance with statutes and regulations that apply to the project; and

(3) The number of site-specific technical hours spent to complete each pre-remedial product.

§ 35.6705 Records retention.

(a) *Applicability.* This requirement applies to all financial and programmatic records, supporting documents, statistical records, and other records which are required to be maintained by the terms of this subpart, program regulations, or the cooperative agreement, or are otherwise reasonably considered as pertinent to program regulations or the cooperative agreement.

(b) *Length of retention period.* The recipient and the recipient's contractor must retain all records for ten years following submission of the final Financial Status Report for the site, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

(c) *Substitution of microform.* Microform copies may be substituted for the original records. The recipient must have written EPA approval before destroying original records. The

microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR 1230 et seq.) and EPA records management procedures (EPA Order 2160 [1]).

(d) *Starting date of retention period.* The recipient and the recipient's contractor must comply with the requirements regarding the starting dates for records retention described in 40 CFR 31.42(c) (1) and (2).

§ 35.6710 Records access.

(a) *Recipient requirements.* The recipient must comply with the requirements regarding records access described in 40 CFR 31.42(e).

(b) *Availability of records.* The recipient must, with the exception of certain policy, deliberative, and enforcement documents which may be held confidential, ensure that all files are available to the public.

(c) *Contractor requirements.* The recipient's contractor must comply with the requirements regarding records access described in 40 CFR 31.36(i)(10).

Other Administrative Requirements for Cooperative Agreements

§ 35.6750 Modifications.

The recipient must comply with the requirements regarding changes to the cooperative agreement described in 40 CFR 31.30.

§ 35.6755 Monitoring program performance.

The recipient must comply with the requirements regarding program performance monitoring described in 40 CFR 31.40 (a) and (e).

§ 35.6760 Enforcement and termination for convenience.

The recipient must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

§ 35.6765 Non-Federal audit.

The recipient must comply with the requirements regarding non-Federal audits described in 40 CFR 31.26.

§ 35.6770 Disputes.

The recipient must comply with the requirements regarding dispute resolution procedures described in 40 CFR 31.70.

[1] Statement of available.

§ 35.6775 Exclusion of third-party benefits.

The cooperative agreement benefits only the signatories to the cooperative agreement.

§ 35.6780 Closeout.

(a) Closeout of a cooperative agreement can take place in the following situations:

(1) After the completion of all work for a response activity;

(2) After all activities under a cooperative agreement have been completed; or

(3) Upon termination of the cooperative agreement.

(b) The recipient must comply with the closeout requirements described in 40 CFR 31.50 and 31.51.

§ 35.6785 Collection of amounts due.

The recipient must comply with the requirements described in 40 CFR 31.52 regarding collection of amounts due.

§ 35.6790 High risk recipients.

If EPA determines that a recipient is not responsible, EPA may impose restrictions on the award as described in 40 CFR 31.12.

Requirements for Administering a Superfund State Contract (SSC)

§ 35.6800 General.

An SSC is required when either EPA or a political subdivision is the lead agency for a CERCLA response.

(a) *EPA-lead SSC.* (1) An SSC with a State or Federally recognized Indian Tribe is required before EPA initiates remedial action during an EPA-lead remedial response.

(2) The State or Federally recognized Indian Tribe must comply with the requirements decribed in §§ 35.6805, 35.6810, and 35.6815 of this subpart.

(b) *Three-party SSC (political subdivision-lead).* (1) An SSC is required before a political subdivision takes the lead for a remedial response.

(2) Both the State and the political subdivision must comply with the requirements described in §§ 35.6805, 35.6815, and 35.6820 of this subpart. In addition, the State must comply with the requirements described in § 35.6810 of this subpart.

§ 35.6805 Contents of an SSC.

The SSC must include the following provisions:

(a) *Purpose of contract,* which describes the activities to be conducted and the benefits to be derived by the signatories;

(b) *Negation of agency relationship* between the signatories, which states that no signatories of the SSC can represent or act on the behalf of any other signatory in any matter associated with the SSC;

(c) *Amendability of the SSC,* which states that any change in the SSC must be agreed to, in writing, by the signatories, except as provided elsewhere in the SSC;

(d) *Litigation,* which describes EPA's right to bring an action against any party for liability under sections 106 and 107 of CERCLA, as amended;

(e) *Sanctions for failure to comply with SSC terms;* which states that if the signatories fail to comply with the terms of the SSC, EPA may proceed under the provisions of section 104(d)(2) of CERCLA and may seek in the appropriate court of competent jurisdiction to enforce the SSC;

(f) *The CERCLA assurances,* as appropriate, as described in § 35.6810 of this subpart;

(g) *Cost share provisions,* which include an estimate of the total project costs and the basis for arriving at this figure, and the payment terms as negotiated by the signatories;

(h) *Site access.* The State is expected, to the extent of its legal authority, to secure access to the site and adjacent properties; as well as all rights-of-way and easements necessary to complete the response actions undertaken pursuant to the SSC;

(i) *Exclusion of third-party benefits,* which states that the SSC is intended to benefit only the signatories of the SSC, and extends no benefit or right to any third party not a signatory to the SSC; and

(j) *Any other provision* deemed necessary by all parties to facilitate the response activities covered by the SSC.

§ 35.6810 Assurances.

The SSC must include the following:

(a) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the action's expected life. In addition, even if the political subdivision is designated as being responsible for O&M, the State must guarantee that it will assume any or all O&M activities in the event of default by the political subdivision.

(b) *Cost sharing.* The State must provide assurances for cost sharing as provided in paragraphs (b)(1) and (2) of this section. In addition, even if the political subdivision is providing the actual cost share, the State must guarantee payment of the cost share in the event of default by the political subdivision.

(1) *Privately operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(2) *Publicly operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(c) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA. The political subdivision may not provide this assurance.

(d) *Twenty-year waste capacity.* After October 17, 1989, EPA will not enter into an SSC for a remedial action without an adequate assurance as required by Section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the SSC.

(e) *Property title and interest acquisition.* If appropriate, the State or Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. The State must provide this assurance even if it intends to transfer this title to the political subdivision. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6815 Administrative requirements.

In addition to the requirements specified in § 35.6805, the State and/or political subdivision must comply with the following:

(a) *State review.* The State must review and comment on the response actions pursuant to the SSC.

(b) *Financial administration.* The State and/or political subdivision must comply with the following requirements regarding financial administration:

(1) *Payment.* The State may pay for its share of the costs of the response activities in cash or credit. If the political subdivision provides all or part of the cost share, the political subdivision may pay for those costs in cash or in-kind services. The State may not pay for its cost share using in-kind services, unless the State has entered into a support agency cooperative agreement with EPA. The use of the support agency cooperative agreement as a vehicle for providing cost share must be documented in the SSC. The payment must be provided during the course of the project. See § 35.6915 of this subpart for requirements concerning cost sharing under a support agency cooperative agreement.

(2) *Collection of amounts due.* The State and/or political subdivision must comply with the requirements described in 40 CFR 31.52(a) regarding collection of amounts due.

(3) *Failure to comply with negotiated payment terms.* Failure to comply with negotiated payment terms may be construed as default by the State on its required assurances, even if the political subdivision is responsible for providing all or part of the cost share (see § 35.6805(e) of this subpart).

(c) *Property.* If the State or Federally-recognized Indian Tribe is required to accept title, the following requirements concerning property must be met:

(1) *Equipment used as all or part of the remedy.* The following requirements apply to title and vested interest in equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its vested interest in the title to fixed in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its vested interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

(2) *Real property.* If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the response action even if the State intends to transfer title to the political subdivision. See the requirements in § 35.6810(e) of this subpart regarding the assurance for property title and interest acquisition.

(d) *Reports.* The State and/or political subdivision or Federally recognized Indian Tribe must comply with the following requirements regarding reports:

(1) *EPA-lead.* The nature and frequency of reports between EPA and the State or Federally recognized Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of the quarterly progress report which the political subdivision is required to submit to EPA in accordance with the requirements of its cooperative agreement. (See § 35.6650 for requirements regarding quarterly progress reports.)

(e) *Records.* The State and political subdivision or Federally recognized Indian Tribe must maintain records on a site-specific basis. The State and political subdivision must comply with the requirements regarding record retention described in § 35.6705 and the requirements regarding record access described in § 35.6710.

§ 35.6820 Conclusion of the SSC.

(a) The SSC remains in effect until either one of the following occurs:

(1) *SSC conclusion.* In order to conclude the SSC, the signatories must:

(i) Satisfactorily complete the response activities at the site;

(ii) Produce a final accounting of all project costs, including change orders and outstanding contractor claims; and

(iii) Submit all State cost share payments to EPA (see § 35.6810(b) regarding cost share assurances).

(2) *Termination of the SSC.* The State and political subdivision or Federally recognized Indian Tribe must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

(b) For remedial action, the SSC remains in effect until the final reconciliation of response costs ensures that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. Overpayments in an SSC may not be used to meet the cost-sharing obligation at another site. Reimbursements for any overpayment made after reconciliation will be made to the payee identified in the SSC.

Requirements for Core Program Cooperative Agreements

§ 35.6850 Eligibility for Core Program Cooperative Agreements.

States and Federally recognized Indian Tribes may apply for Core Program cooperative agreements in order to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's or Federally recognized Indian

Tribe's ability to participate in the CERCLA response program.

§ 35.6855 General.

The recipient of a Core Program cooperative agreement must comply with the requirements regarding financial administration (§§ 35.6250 through 35.6275 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6655 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement (§§ 35.6750 through 35.6780), described in this subpart. Recipients may not incur site-specific costs. Where these sections entail site-specific requirements, the recipient is not required to comply on a site-specific basis.

§ 35.6860 Application requirements.

To receive a Core Program cooperative agreement, the applicant must submit an application form ("Application for Federal Assistance," SF-424, for non-construction programs) to EPA. Applications for additional funding need include only the revised pages. The application must include the following:

(a) *A project workplan*—(b) *Intergovernmental review comments*, in accordance with §35.6055(a)(2) of this subpart (Federally recognized Indian Tribes need not comply with this requirement); and

(c) *Project and budget periods.* The budget period is one year, and may be extended incrementally, up to 12 months at a time, based on EPA approval of an amended workplan and budget. The project period will be determined in the cooperative agreement.

§ 35.6865 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly on the activities delineated in the work plan. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a description of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

§ 35.6870 Cost sharing.

The recipient of a Core Program cooperative agreement must provide at least five percent of the direct and indirect costs of all activities covered by the Core Program cooperative agreement. The recipient must provide its cost share with non-Federal funds not used for matching purposes under any other cooperative agreement. The recipient may provide its share using in-kind contributions. The recipient may not use CERCLA State credits to offset any part of the recipient's required match for Core Program cooperative agreements. See § 35.6270 (c) and (d) regarding credit and advance match, respectively.

§ 35.6875 Payment to recipient.

The State or Federally-recognized Indian Tribe is not required to attribute costs to specific sites and activities for drawdown purposes for Core Program cooperative agreement costs.

Requirements for Support Agency Activities Under Cooperative Agreements

§ 35.6900 Eligibility for support agency cooperative agreements.

States and Federally-recognized Indian Tribes may apply for support agency cooperative agreements to ensure their meaningful and substantial involvement when EPA or a political subdivision has the lead for response activities, as specified in section 121(f)(1) of CERCLA.

§ 35.6905 Allowable activities.

Support agency activities are those activities conducted by a State or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe's meaningful and substantial involvement when it is the support agency at a Federal-lead site. The activities described in section 121(f)(1) of CERCLA, as amended, are eligible for funding under a support agency cooperative agreement.

§ 35.6910 Support agency cooperative agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a) (1), (2), (3), and (5) of this subpart.

(b) *Cooperative agreement requirements.* The recipient must comply with the requirements regarding financial administration 35.6250 through 35.6275 of this subpart), property 35.6300 through 35.6450), procurement 35.6550 through 35.6610), reporting 35.6655 through 35.6670), records 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement 35.6750 through 35.6780) described in this subpart.

§ 35.6915 Cost sharing.

The requirements for cost sharing under a support agency cooperative agreement are the same as the cost sharing requirements of § 35.6105(b)(2) and § 35.6110(a) of this subpart. The State may use in-kind services as part of its cost share, as long as it is documented in the SSC (see § 35.6815(b) for SSC payment requirements).

§ 35.6920 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a discription of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

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