Federal Register

Wednesday,
May 2, 2007

Part V

Environmental Protection Agency

40 CFR Parts 9 and 35
Cooperative Agreements and Superfund State Contracts for Superfund Response Actions; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 35

[FRL–8306–2]

RIN 2050–AE62

Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule amends the regulation for Superfund Cooperative Agreements and Superfund State Contracts. The revisions to the regulation: Incorporate EPA policy changes since 1990 that impact this regulation; reduce the burden placed by this regulation on Cooperative Agreement recipients and parties to Superfund State Contracts; increase reliance on the Federal Government's uniform administrative requirements for grants and Cooperative Agreements to State and local governments, wherever possible; authorize procedures that required deviations, on multiple occasions, under the existing regulation; expressly authorize previous program initiatives that were proven successful on a pilot basis; provide additional regulatory flexibility without negatively impacting cost recovery actions; update cross-references to other regulations that have changed or been removed; and eliminate references to obsolete forms. The revisions affect States, Indian Tribes, intertribal consortia, and political subdivisions. The revisions will improve the administration and effectiveness of Superfund Cooperative Agreements and Superfund State Contracts.

DATES: This rule is effective July 2, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–SFUND–2006–0498. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Superfund Docket, EPA/DC, EPA West, 1301 Constitution Ave., NW., Washington, DC.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket status, locations and telephone numbers.

FOR FURTHER INFORMATION CONTACT: Angelo Carasea, Office of Solid Waste and Emergency Response, Office of Superfund Remediation and Technology Innovation, (5204P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 603–8828, fax number: (703) 603–9112, e-mail address: *carasea.angelo@epa.gov*.

SUPPLEMENTARY INFORMATION:

Statutory Authority

This rule is issued under section 104(a)–(j) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) as amended (hereinafter CERCLA).

II. Applicability

The final regulation requirements shall apply to all new Cooperative Agreements and Superfund State Contracts, funded under CERCLA, which EPA signs on or after the effective date of this regulation. EPA may agree to amend existing Cooperative Agreements or Superfund State Contracts to make the final regulation requirements applicable to work performed on and after the date EPA signs the amendment.

III. Background

CERCLA launched the nation's first centralized and substantial commitment to clean up hazardous substance sites. CERCLA, or Superfund, provided Federal authority and resources to respond directly to releases (or threatened releases) of hazardous substances, pollutants, or contaminants that could endanger human health or the environment. The law also authorized enforcement action and cost recovery from those responsible for a release of a hazardous substance.

This regulation authorizes two types of Superfund response agreements for State, Tribal (including intertribal consortium) and political subdivision participation in CERCLA implementation: Cooperative Agreements and Superfund State Contracts. These agreements ensure State and Tribal involvement, consistent with section 121 of CERCLA, 42 U.S.C. 9621 (hereinafter section 121), and section 126 of CERCLA, 42 U.S.C. 9626, (hereinafter section 126) and are used to obtain State assurances required under section 104 of CERCLA, 42 U.S.C. 9604, (hereinafter section 104) before EPA begins a remedial action.

EPA uses Cooperative Agreements to transfer funds to a State, political subdivision, or Indian Tribe that assumes responsibility as the lead or support agency for Superfund responses. Core Program Cooperative Agreements are used to fund non-site-specific activities that support a State or Indian Tribe's involvement in CERCLA responses.

A Superfund State Contract is used to document a State's CERCLA section 104 assurances when either EPA or a political subdivision has the lead role in the implementation of a remedial action. The regulation is revised to authorize, but not require, a three-party Superfund State Contract whenever a political subdivision takes the lead for a remedial action.

The role of States, Indian Tribes, and political subdivisions in Superfund has evolved substantially since 1990 when the original 40 CFR part 35 subpart O regulation was promulgated. The recipients' cleanup programs have matured and become more sophisticated. In addition, EPA has actively sought to fulfill CERCLA's mandate in sections 121 and 126 to provide States and Indian Tribes a ''substantial and meaningful involvement'' in Superfund by providing Core Program funding for the development of State and Tribal infrastructure. The current subpart O imposes more restrictive requirements on recipients than 40 CFR part 31 because, in 1990, EPA believed these requirements were necessary for enforcement and cost recovery purposes. With the maturing of State and Tribal programs, some of these added burdens have been judged to be unnecessary. In the amended subpart O, EPA allows recipients to follow the less burdensome 40 CFR part 31 requirements, wherever this is possible, without compromising cost recovery or other Superfund-specific requirements.

For example, with respect to procurement procedures, the amended subpart O eliminates the burdensome requirement for grantees to certify that their procurement systems meet the requirements of this subpart. The final regulation retains current requirements for awarding funds and tracking costs by site, activity, and operable unit, when appropriate, to ensure adequate documentation of costs. Retention of such documentation requirements will meet Superfund cost recovery requirements.

IV. Description of Key Changes

EPA made limited revisions to certain sections of the regulation. The following is a brief description of the key changes.

A. Combining Certain Activities Into a Single Cooperative Agreement

This revision enables EPA to award a single Cooperative Agreement for a single activity or multiple activities; a single activity at multiple sites; and multiple activities at multiple sites. For example, EPA may award a single Cooperative Agreement for Core Program, pre-remedial and support agency activities. EPA will not award or amend a Cooperative Agreement to a political subdivision to conduct multiple activities at multiple sites. The revised regulation requires a single Cooperative Agreement for each State, political subdivision or Indian Tribe-lead remedial action and certain removal actions.

B. Core Program

This revision provides for the maintenance of program elements previously developed using Core Program funding; however, EPA funding of the recipients' Core Program activities is dependent on the availability of EPA funds. Also this revision does not require Indian Tribes, including intertribal consortia, to meet the Core Program match requirements.

C. Indian Tribes

In light of the many and varied interests that Indian Tribes have in the Superfund cleanup process, EPA is reducing unnecessary obstacles to Tribal involvement. When EPA promulgated the current regulation, it made a policy decision to require Indian Tribes to meet the criteria at 40 CFR 300.515(b), which include establishing jurisdiction under 40 CFR 300.515(b)(3), to be eligible for any Cooperative Agreement under this subpart. The revised regulation eliminates the requirement for demonstrating jurisdiction for all Tribal Core Program and most Tribal support agency agreements. To reflect the reduced emphasis on jurisdiction and to make the regulation's language more precise, the regulation is modified in several appropriate places to delete references to Tribal ''jurisdiction,'' and refer instead to a Tribal ''area of Indian country.'' The regulation also removes cost share requirements for Core Program and support agency Cooperative Agreements. As a result, Indian Tribes have no cost share requirements under the revised regulation. Finally, an Indian Tribe will not need to acquire an interest in or accept transfer of an interest in real property acquired with CERCLA funds. This is not required under CERCLA section 104(j).

D. Intertribal Consortium

Under the revised regulation, an intertribal consortium can enter into a Cooperative Agreement with EPA. This change implements the **Federal Register** notice, ''Update to EPA Policy On Certain Grants to Intertribal Consortia,'' (See, 67 FR 67181 (November 4, 2002)). An intertribal consortium must meet the same subpart O requirements for applying for and administering a Cooperative Agreement as an Indian Tribe.

E. Progress Reports

The revised subpart O relaxes current reporting requirements that mandate quarterly reports. In the revised regulation, the EPA award official may specify that progress reports be submitted annually, semi-annually, or quarterly.

F. Five-year Review

Participation in five-year reviews of the continuing effectiveness of a remedial action is added as an eligible support agency activity.

G. Cost Share for the Support Agency

The 10 percent cost share requirement for remedial action support agency activities at EPA-lead sites is eliminated.

H. Program Income

With respect to program income, the revised regulation adds the following: ''Recoveries of Federal cost share amounts are not program income, and whether such recoveries are received before or after expiration of the Cooperative Agreement, must be reimbursed promptly to EPA.''

I. Credit Verification Procedures

EPA may use other financial reviews in lieu of an audit to verify expenditures submissions.

J. Excess Cash Cost Share Contributions/ Over Match Revisions

The recipient may direct EPA to return the excess funds or to use the over match at one site to meet the cost share obligations at another site.

K. Thresholds for Force Accounts, Small Purchases and Cost Analysis

Force accounts, small purchases, and cost analysis dollar amount thresholds are linked to the simplified acquisition threshold, as defined in the Office of Federal Procurement Policy Act (41 U.S.C. 403, Definitions). The dollar amount for the simplified acquisition threshold is currently set at $100,000.

L. Unalterable Electronic Format

An unalterable electronic format may be substituted for original records if it is performed in accordance with the technical regulations concerning Federal Government records and EPA record management requirements. The unalterable electronic format requirement replaces the microform requirement.

M. Three-Party Superfund State Contract

Under the revised regulation, the three-party Superfund State Contract is optional rather than mandatory. EPA has found that it is sometimes advantageous for the Superfund State Contract to be signed only by the State and EPA to obtain needed State CERCLA assurances, and to rely on a separate EPA Cooperative Agreement with a political subdivision. This revised regulation adds the requirement that EPA obtain State concurrence before awarding a Cooperative Agreement for remedial action to a political subdivision. EPA is making this change because EPA believes that it is important to maintain close communication and coordination with the State in all CERCLA responses.

N. Obsolete References

This revision updates cross-references to other regulations that have changed or been removed, and eliminates references to obsolete forms.

V. Section-by-Section Analysis

Section 35.6000 Authority

This section remains the same, except for a more specific citing of CERCLA.

Section 35.6005 Purpose and Scope

In paragraph (a), the word ''CERCLA-funded'', is deleted from the phrase, ''for administering CERCLA-funded Cooperative Agreements,'' and a reference to CERCLA section 104(d)(1) is added after this phrase.

Paragraph (b) is eliminated because it cites program authorities, which are not within the scope of CERCLA section 104 (a) through (j). The remaining paragraphs are resequenced to reflect deletion of paragraph (b).

Section 35.6010 Indian Tribe and Intertribal Consortium Eligibility

This section's title is changed from ''Eligibility,'' to ''Indian Tribe and Intertribal Consortium Eligibility.'' The words ''States'' and ''political subdivisions'' are removed from this section, leaving text that is devoted exclusively to Indian Tribe eligibility. The revised section adds, in paragraph (a), that an Indian Tribe is not required to demonstrate jurisdiction under 40 CFR 300.515(b)(3) of the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) to be eligible for Core Program Cooperative Agreements, or those support agency Cooperative Agreements for which jurisdiction is not needed for the Tribe to carry out the support agency activities of the work plan. Finally, the revised section contains a new paragraph (c), which states that an intertribal consortium is eligible only if each consortium member is an eligible Tribe and that all members authorize the consortium to apply for and receive assistance.

Section 35.6015 Definitions

The following changes are made in this section.

The definition of CERCLA is shortened to refer only to the United States Code citation.

Under the Core Program Cooperative Agreement definition, the word ''support'' is replaced with the words ''develop and maintain''. This change clarifies that the Core Program funding can be made available for continuing program activities and operations. Also, the revised regulation corrects the omission of Indian Tribes from the definition in the previous regulation.

The definition of ''Indian Tribe'' is revised by adding a sentence stating that the term also includes an intertribal consortium consisting of two or more federally recognized Tribes.

The National Priorities List definition is revised to conform it with the definition in the NCP at 40 CFR 300.5.

The revised regulation defines two additional terms: (a) Intertribal consortium and (b) simplified acquisition threshold. The intertribal consortium definition is based on the definition found in EPA's revised policy concerning certain grants to intertribal consortia (*See,* 67 FR 67181 (November 4, 2002)). The simplified acquisition threshold definition is taken from 41 U.S.C. 403, Definitions.

The revised regulation deletes the definition for ''excess property.'' This term is not used in the regulation.

Section 35.6020 Requirements for Both Applicants and Recipients

The text in § 35.6020, ''Other statutory provisions'' is removed. The text in § 35.6560 is revised to provide updated references to EPA's codifications of the Government-wide debarment and suspension rules, and drug-free workplace rules; the revised section is retitled, ''Requirements for Both Applicants and Recipients,'' and renumbered as § 35.6020. Conforming amendments are made to cross-references appearing in the revised regulation at §§ 35.6550(a)(6) and 35.6610(a).

Section 35.6055 State-Lead Pre-Remedial Cooperative Agreements

In paragraph (a)(2)(i), the phrase ''project officer'' is changed to ''EPA project officer.''

Paragraphs (a)(3) to (a)(6) are deleted and replaced with a new paragraph (a)(3), which states that the applicant must submit all applicable forms and information authorized by 40 CFR 31.10.

Section 35.6060 Political Subdivision-Lead Pre-Remedial Cooperative Agreements

Paragraphs (c) and (d) are deleted. A three-party Superfund State Contract is authorized, but not required under § 35.6800.

Section 35.6105 State-Lead Remedial Cooperative Agreements

The following changes are made in this section.

In paragraph (a), a new second sentence is added to indicate that applications for additional funding need only include the revised pages. This change is consistent with 40 CFR 31.10(b)(4).

Paragraphs (a)(3) to (a)(6) are deleted and replaced with a new paragraph (a)(3) that requires the applicant to submit all applicable forms and information authorized by 40 CFR 31.10.

Several editorial changes are made to paragraphs (b)(1) and (b)(2) to conform the text to CERCLA section 104(c)(3), and to add a reference to 40 CFR 300.510(c)(1).

New text is added to paragraph (b)(5) to make clear that a State must provide the real property assurance even if the State transfers its interest to a third party or political subdivision. In addition, if the political subdivision defaults, the State will accept transfer of the interest. Finally, the new text provides that if the State or political subdivision disposes of the transferred real property, it shall comply with the requirements for real property in 40 CFR 31.31(c)(2).

Section 35.6110 Indian Tribe-Lead Remedial Cooperative Agreements

The following changes are made in this section.

In paragraph (a), the phrase, ''and, if appropriate, § 35.6105(b)(5),'' is deleted. Also, paragraph (b)(2) is deleted. An Indian Tribe will not be required to assure EPA that it will take title to, acquire interest in, or accept transfer of an interest in real property acquired with CERCLA funds. Such an assurance is not required by CERCLA section 104.

Paragraph (b)(3) is resequenced to (b)(2). The phrase ''out of jurisdiction'' is replaced with the phrase, ''out-of-an-Indian-Tribal-area-of-Indian-country''.

A new paragraph (b)(3) is added to make clear that CERCLA does not require Indian Tribes to share in the cost of CERCLA-funded remedial actions.

Section 35.6115 Political Subdivision-Lead Remedial Cooperative Agreement

The sentences under paragraph (a) are deleted and replaced with the following sentences: ''*General.* If the State concurs, EPA may allow a political subdivision with the necessary capabilities and jurisdictional authority to conduct remedial response activities at a site. EPA will award the political subdivision a Cooperative Agreement to conduct remedial response and enter into a parallel Superfund State Contract with the State if required (*See* § 35.6800, when a Superfund State Contract is required). The political subdivision may also be a signatory to the Superfund State Contract. The political subdivision must submit to the State a copy of all reports provided to EPA.''

Paragraph (b) is deleted.

The changes to paragraphs (a) and (b) are made because a three-party Superfund State Contract is authorized, but it is not required under § 35.6800.

Paragraph (c) is resequenced to paragraph (b).

Section 35.6120 Notification of the Out-of-State or Out-of-an-Indian-Tribal-Area-of-Indian-Country Transfer of CERCLA Waste

The title of § 35.6120 is changed. The phrase ''out-of-jurisdiction'' is replaced with the phrase, ''Out-of-an-Indian-Tribal-Area-of-Indian-Country.'' A corresponding change is made in

paragraph (a). In paragraph (b)(2), the phrase, ''The appropriate Indian Tribal official, who has jurisdictional authority in the area where the waste management facility is located,'' is replaced with the phrase, ''An appropriate official of an Indian Tribe in whose area of Indian country the waste management facility is located''.

Section 35.6205 Removal Cooperative Agreements

In paragraph (e), the word, ''jurisdiction,'' is replaced with the phrase, ''area of Indian country''.

Section 35.6215 Eligibility for Core Program Cooperative Agreements

In paragraph (a), the word ''support'' is replaced with the phrase ''develop and maintain.'' This change clarifies that the Core Program funding can be made available for continuing program activities and operations.

Section 35.6225 Activities Eligible for Funding Under Core Program Cooperative Agreements

In paragraph (a) and paragraph (a)(5), the word ''support'' is replaced with the phrase ''develop and maintain''. This change clarifies that the Core Program funding can be made available for continuing program activities and operations.

Section 35.6230 Application Requirements

The text in paragraph (d) is replaced with a cross-reference to 40 CFR 31.10.

Section 35.6235 Cost Sharing

Indian Tribes are not required to provide cost share for Core Program activities. This change supports EPA's objectives under EPA Policy for the Administration of Environmental Programs on Indian Reservations (located at Web site: *http://www.epa.gov/indian/pdfs/indian-policy-leavitt-pr.pdf*) to (a) take affirmative steps to encourage and assist Tribes in assuming regulatory and program management responsibilities for reservation lands, and (b) take appropriate steps to remove existing legal and procedural impediments to working directly with Tribal government programs. Further, the word ''recipient'' is changed to ''State'' since only a State is required to provide cost share for Core Program activities.

Section 35.6245 Allowable Activities

A sentence is added to clarify that a five-year review is an eligible support agency activity.

Section 35.6250 Support Agency Cooperative Agreement Requirements

In paragraph (a), the citation to ''part 29'' is corrected to read ''40 CFR part 29''. In the penultimate sentence of paragraph (a), the phrase ''with the exception of remedial action support agency activities, which require cost share and must be applied for within a site-specific budget,'' is deleted. The last sentence in this section is also deleted. States and Indian Tribes receiving a support agency Cooperative Agreement will no longer be required to develop an estimated budget for each remedial action site as this requirement was determined to be unnecessary and overly burdensome. However, State and Indian Tribe accounting systems must continue to track expenses by site, activity and operable unit as required in § 35.6270.

Section 35.6255 Cost Sharing

This section is deleted. EPA has eliminated the 10 percent cost share requirement for remedial action support agency activities at EPA-lead sites because the costs of these activities are minimal. EPA will not agree to waive the cost share requirements under support agency Cooperative Agreements that were awarded before the effective date of this rule.

Section 35.6260 Combining Cooperative Agreement Sites and Activities.

The current regulation describes specific types of Cooperative Agreements. This new section authorizes multiple activities at both single and multiple sites when the recipient demonstrates certain qualifications (i.e., administrative, technical, and financial management capabilities).

EPA will not award or amend a Cooperative Agreement to a political subdivision to conduct multiple activities at multiple sites. The revised regulation requires a single Cooperative Agreement for each remedial action and eligible removal action (i.e., a removal action that exceeds the statutory monetary ceiling or whenever a consistency waiver is likely to be sought). This approach (e.g., the combining of Core, pre-remedial, and support agency activities under a single Cooperative Agreement) has been used successfully for several years under EPA's ''Block Funding Administrative Reform.''

Section 35.6270 Standards for Financial Management Systems

In paragraph (a)(5), the two sentences are deleted and replaced with the following: ''All support agreements will be assigned a single Superfund activity code designated specifically for support agency activities. All support agency costs, however, must be documented site specifically in accordance with the terms and conditions specified in the Cooperative Agreement.''

Section 35.6280 Payments

Paragraph (a)(2) is revised to cross-reference the identical requirements in 40 CFR 31.21(i), ''Interest earned on advances.'' The only new effect of this revision is that recipients will be allowed to keep up to $100 per year for administrative expenses. *See* the last sentence of 40 CFR 31.21(i).

Section 35.6285 Recipient Payment of Response Costs

Changes to this section include:

In paragraph (c)(1), the phrase ''as defined in CERCLA section 101(24), that are consistent with the permanent remedy at the site,'' is added after the phrase ''remedial action'' to clarify the scope of activities that may be eligible for a State credit.

In paragraph (c)(1)(ii), the text is revised to indicate that after a site is listed on the NPL, the State may be eligible for credit only if the State initiated the remedial action after obtaining EPA's written approval.

In paragraph (c)(2), the phrase ''Expenditures incurred before a site is listed on the NPL'' is deleted because the credit submission requirements are the same whether the expenses were incurred before or after listing.

Paragraph (c)(2)(ii) is deleted because the requirement is addressed under (c)(1)(ii).

The title of paragraph (c)(4) is changed from ''Credit verification'' to ''Credit verification procedures.'' To ensure a timely review of State credits, the regulation is modified to permit a financial review as an alternative to an audit.

The title of paragraph (d) is changed from ''Over match'' to ''Excess cash cost share contributions/over match''. The revised paragraph gives the State the option of directing EPA to return the excess funds or to use the over match at one site to meet the cost share obligations at another site.

Section 35.6290 Program Income

A new sentence is added that states, ''Recoveries of Federal cost share amounts are not program income, and whether such recoveries are received before or after expiration of the Cooperative Agreement, must be reimbursed promptly to EPA.''

Section 35.6305 Obtaining Supplies

In the second sentence, the phrase, ''in the above listed sections'', is replaced with, ''§§ 35.6300, 35.6315(b), 35.6325 through 35.6340, and 35.6350''.

Section 35.6400 Acquisition and Transfer of Interest

The following changes are made under paragraph (a)(2):

In the first sentence, the phrase, ''or Indian Tribes to the extent of its legal authority,'' is deleted. In the second sentence, the phrase, ''and Indian Tribe,'' and the phrase, ''and 35.6110(b)(2) respectively,'' are deleted. CERCLA section 104(j) does not require an Indian Tribe to provide assurances for real property.

In the first sentence, the phrase ''of the NCP'' is appended to the citation: 40 CFR 300.510(f).

Section 35.6500 General Requirements

Under paragraph (b), the ''$25,000'' limit is changed to ''the simplified acquisition threshold.''

Section 35.6550 Procurement System Standards

Paragraphs (a)(1) through (a)(3) are replaced with a reference to 40 CFR 31.36(a), and for States, a list of the eight additional subpart O procurement paragraphs and sections with which a State recipient must comply. The last sentence of this revised paragraph lists the procurement requirements for political subdivisions and Indian Tribes.

Paragraphs (a)(4) through (a)(12) are resequenced (a)(2) through (a)(10).

Section 35.6555 Competition

Paragraph (b)(2) is revised to read: ''Any contract or subcontract awarded by an Indian Tribe or Indian intertribal consortium shall comply with the requirements of 40 CFR 31.38, 'Indian Self Determination Act'.'' The latter regulation, added to 40 CFR part 31 on January 19, 2001 (66 FR 3794), requires Indian Tribes and consortia to provide, to the extent feasible, employment preferences and training opportunities to Indians in connection with the administration of contracts and subcontracts under Federal financial assistance. In addition, award preferences are to be provided for Indian organizations and Indian-owned economic enterprises.

Section 35.6560 Master List of Debarred, Suspended, and Voluntarily Excluded Persons.

This section is removed. The text of the current § 35.6560 is revised to provide updated references to EPA's codifications of the Government-wide debarment and suspension rules and drug-free workplace rules; the revised section is retitled, ''Requirements for both applicants and recipients'', and renumbered as § 35.6020. Conforming amendments are made to cross-references appearing in §§ 35.6550(a)(6) and 35.6610(a).

Section 35.6565 Procurement Methods

In paragraph (a), the ''$25,000'' limit is changed to the ''simplified acquisition threshold''.

Section 35.6585 Cost and Price Analysis

In paragraph (a)(1), the ''$25,000'' limit is changed to the ''simplified acquisition threshold''.

Section 35.6590 Bonding and Insurance

Paragraph (b) is deleted because the Agency's comprehensive guidelines on CERCLA section 119(c) indemnification are set forth in ''Superfund Response Action Contractor Indemnification,'' 58 FR 5972 (January 25, 1993). These guidelines provide that, in general, the Agency will not offer to indemnify response action contractors.

The current paragraph (c) is resequenced to paragraph (b).

Section 35.6595 Contract Provisions

Paragraph (b)(1) is amended by deleting the reference to the 1975 enactment of the Energy Policy Conservation Act and substituting a reference to the U.S. Department of Energy's regulations governing State energy conservation programs.

Paragraph (b)(2), entitled ''Violating facilities'', of § 35.6595 is deleted because it refers to the Agency's former regulations on Clean Air Act and Clean Water Act disqualifications, which were codified at 40 CFR part 15. Those statutory disqualifications and the procedures for reinstatement have been governed, since November 26, 2003 (68 FR 66544, 66620, 66622) by subpart J of 40 CFR part 32, ''Government-wide Debarment and Suspension (Nonprocurement); and Statutory Disqualification Under the Clean Air Act and Clean Water Act.'' The 40 CFR part 32 regulations apply to all EPA covered non-procurement transactions, including those under 40 CFR part 35 subpart O.

Paragraph (b)(3) is resequenced to (b)(2). Paragraph (b)(4) is resequenced to paragraph (b)(3) and revised to read, ''The recipient must comply with the requirements of 40 CFR 31.36(i)(3) through (6).'' The cross-referenced part 31 provisions specify the identical equal employment opportunity and labor requirements prescribed in paragraph (b)(3). The only effect of this revision is to eliminate the requirement that recipients include a copy of the obsolete EPA Form 5720–4 in each construction contract.

Paragraph (c), containing a requirement that recipient contracts include the model clauses described in 40 CFR 33.1030 (1987), is removed because 40 CFR part 33, ''Procurement under Assistance Agreements,'' was removed in 1996 (61 FR 6067).

Section 35.6650 Progress Reports

The section title is changed from ''Quarterly Progress Reports'' to ''Progress Reports.''

Paragraph (a) is revised to read, ''The recipient must submit progress reports as specified in the Cooperative Agreement. Progress reports will be required no more frequently than quarterly, and will be required at least annually. The reports shall be due within 30 days after the reporting period. The final progress report shall be due 90 days after expiration or termination of the Cooperative Agreement.'' In paragraph (b), the word ''quarterly'' is deleted.

Section 35.6665 Procurement Report

Paragraph (a) is removed. The Department of Labor reports are no longer used.

Section 35.6700 Project Records

In paragraph (d)(ii)(2), the ''$25,000'' limit is changed to the ''simplified acquisition threshold.''

Section 35.6705 Records Retention

The title of paragraph (c) is changed from the current ''Substitution of microform'' to ''Substitution of an unalterable electronic format.'' The first sentence of the revised paragraph (c) authorizes recipients to substitute original records with copies in an unalterable electronic format that is acceptable to EPA. The second sentence requires that such copies be produced in accordance with the Federal records requirements of 36 CFR parts 1220 through 1234 and with EPA records management requirements.

Section 35.6780 Closeout

EPA has a continuing interest in the effectiveness of completed remedies. Therefore, paragraph (c) is added, which states, ''After closeout, EPA may monitor the recipient's compliance with the assurance to provide all future operation and maintenance as required under CERCLA section 104(c) and addressed in 40 CFR 300.510(c)(1) of the NCP.''

Section 35.6800 Superfund State Contract

The title of this section is changed from ''General'' to ''Superfund State Contract.'' The introductory paragraph is rewritten to clarify that the primary purpose of the Superfund State Contract (SSC) is to ensure State and Tribal involvement and to obtain State assurances before EPA can fund remedial actions pursuant to section 104 of CERCLA. The SSC may also be utilized to document other response actions and third-party involvement.

Section 35.6805 Content of an SSC

Several changes are made to this section.

In paragraph (i)(1), the second sentence, ''The State's responsibility for operation and maintenance generally begins when EPA determines that the remedy is operational and functional or one year after construction completion, whichever is sooner (*See,* 40 CFR 300.435(f)),'' is added to clarify when the State's responsibility for operation and maintenance begins.

In paragraph (i)(4), the sentence, ''An Indian Tribe must provide assurances pursuant to § 35.6100(b)(2),'' is deleted. Indian Tribes are not required to provide real property assurances under CERLCA section 104(j).

In paragraph (j)(3), the phrase, ''Final payment must be made by completion of all activities in the site-specific Statement of Work,'' is replaced with the phrase, ''Upon completion of activities in the site-specific Statement of Work, EPA shall invoice the State for its final payment.''

The title of paragraph (q) is changed from ''Joint inspection of the remedy'' to, ''Final inspection of remedy.'' The sentences under this paragraph are deleted and replaced with the sentence, ''The SSC must include a statement that following completion of the remedial action, the State and EPA shall jointly inspect the project to determine that the remedy is functioning properly and is performing as designed.''

In paragraph (v), the phrase, ''out-of-Indian-Tribal jurisdiction,'' is replaced with the phrase, ''out-of-an-Indian-Tribal-area-of-Indian-country.''

Section 35.6815 Administrative Requirements

Under paragraph (a)(1), the sentence, ''The State or political subdivision must make payments during the course of the site-specific project and must complete payments by completion of activities in the site-specific Statement of Work,'' is deleted. The requirement is under § 35.6805(j)(3). The sentence, ''*See* § 35.6255 of this subpart for requirements concerning cost sharing under a support agency Cooperative Agreement,'' is deleted. Section 35.6255 is deleted in this revision.

Under paragraph (c)(2), the word ''quarterly'' modifying ''progress report'' is deleted.

Section 35.6820 Conclusion of the SSC

Paragraphs (a) through (c) are resequenced (a)(1) through (a)(3). In the revised paragraph (a)(3), the sentence ''undertake responsibility for O&M, and, if applicable, accept transfer in real property (*See* § 35.6805(i)(4))'' is deleted and replaced with paragraph (a)(4), containing the language, ''Assume responsibility for all future operation and maintenance as required by CERCLA section 104(c) and addressed in 40 CFR 300.510 (c)(1) of the NCP, and if applicable, accept transfer of any Federal interest in real property (*See* § 35.6805(i)(4)).''

A new paragraph (b) is added to this section that states, ''After the administrative conclusion of the Superfund State Contract, EPA may monitor the signatory's compliance with assurances to provide all future operation and maintenance as required by CERCLA section 104(c) and addressed in 40 CFR 300.510 (c)(1) of the NCP.''

These changes are made to help ensure long-term requirements for operation and maintenance and certain institutional controls remain in effect even after the Superfund State Contract expires.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Reviews

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0179.

This ICR authorizes the collection of information under 40 CFR part 35, subpart O, which establishes the administrative requirements for Cooperative Agreements funded under CERCLA for State, political subdivisions, and federally recognized Indian Tribal government response actions. This regulation also codifies the administrative requirements for Superfund State Contracts for non-State-lead remedial responses. This regulation includes only those provisions mandated by CERCLA, required by OMB Circulars, or added by EPA to ensure sound and effective financial assistance management. The information is collected from applicants and/or recipients of EPA assistance and is used to make awards, pay recipients, and collect information on how Federal funds are being spent. EPA requires this information to meet its Federal stewardship responsibilities. Recipient responses are required to obtain a benefit (Federal funds) under 40 CFR part 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments and under 40 CFR part 35, State and Local Assistance. This rule does not contain any collection of information requirements beyond those already approved. It is estimated there will be approximately 654 respondents, with an average hourly burden per response of 7.75 hours per response. This provides an estimated overall annual burden to State, local or Tribal governments of 5073 hours. There are no estimated capital or operations and maintenance costs associated with this grant rule. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved

OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because this rule pertains to grants which the APA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2). Moreover, CERCLA also does not require EPA to issue a notice of proposed rulemaking prior to issuing this rule. The Agency has determined that this rule does not adversely impact small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Federal agencies generally must prepare a written analysis, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Moreover, section 205 allows Federal agencies to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA requires Federal agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Before a Federal agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful and timely input in the development of regulatory proposals, and informing, educating and advising small governments on compliance with the regulatory requirements.

This final rule does not include Federal mandates that may result in expenditures of $100 million or more to State, local, or Tribal governments in the aggregate, because the UMRA generally excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from participation in a voluntary Federal program. States are not legally required to have or maintain a CERCLA authorized program. Therefore, today's final rule is not subject to the requirements of sections 202 or 205 of UMRA. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, because participation by small governments in this program is voluntary and is funded by EPA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires Federal agencies to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' The Executive Order defines ''policies that have federalism implications'' to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule does not have federalism implications. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

This final rule mainly makes minor changes to the regulation, under which the program has been operating since June, 1990. Apart from the minor changes, this rule adds new provisions that increase State flexibility, so it does not have federalism implications as that phrase is defined for purposes of Executive Order 13132. Further, because this is a rule that primarily conditions the use of Federal assistance, it does not impose substantial direct compliance costs on States.

EPA did consult with representatives of State governments in developing this rule. Specifically, State representatives have been participating members of the workgroup revising this rule throughout the entire process, and were given the opportunity to review and comment on drafts of this rule. Representatives from two States (Kansas and Illinois) were selected to participate in the work group meetings, and these States discussed rule options and draft rule language with EPA throughout the development of the rule. Also, the draft rule was provided to the Association of State and Territorial Solid Waste Management Officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.'' Although this rule will have Tribal implications, it will not impose substantial direct compliance costs on Tribal governments, preempt Tribal law, or establish Federal standards. The Agency consulted with Tribes under its EPA Indian Policy, and in light of CERCLA sections 121 and 126 providing that Indian Tribes should have ''substantial and meaningful involvement'' in Superfund.

EPA has consulted with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. During the early deliberations on the revisions to this rule, a Tribal representative was actively involved in the regulatory workgroup, and helped identify issues of likely concern to Tribal governments. EPA, in turn, discussed those issues with Tribal representatives participating in a concurrent initiative to enhance the State and Tribal roles in Superfund. And the rule was informed to a large extent by the experiences of Tribes and EPA during 16 years of experience working under the old regulation. Ultimately, the EPA regulatory workgroup used the knowledge gained from consultation and experience to identify and incorporate beneficial changes for Tribes into the regulation. The principal changes (discussed further in section IV), were (a) to waive the cost share requirement for Tribes receiving Core Program and support

agency Cooperative Agreement, (b) to eliminate requirements to show jurisdiction for all Core agreements and most support agency agreements, and (c) to include intertribal consortia as eligible entities to receive Cooperative Agreements. After drafting this regulation, EPA solicited input from all the federally recognized Indian Tribes and the National Tribal Environmental Council by mailing a summary explaining the Tribal portions of the revised subpart O regulation. Most recently, the Agency also discussed the proposed changes and solicited direct feedback from Indian Tribes at the 11th Annual Conference, ''Community Environmental Stewardship for the Future,'' sponsored by the Inter-Tribal Environmental Council (ITEC).

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the Executive Order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to Executive Order 13045 because it is not ''economically significant'' as defined under Executive Order 12866. Further, it does not concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children.

H. Executive Order 13211 (Energy Effects)

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Under Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' as well as through EPA's National Environmental Justice Advisory Council, EPA has undertaken to incorporate environmental justice into its policies and programs. EPA is committed to addressing environmental justice concerns, and is assuming a leadership role in environmental justice initiatives to enhance environmental quality for all residents of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities, and all people live in clean and sustainable communities. No action from this rule will have a disproportionately high and adverse human health and environmental effect on any segment of the population. In addition, this rule does not impose substantial direct compliance costs on those communities. Accordingly, the rule does not raise issues regarding Executive Order 12898.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). The subpart O regulation is effective July 2, 2007.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 35

Administrative practices and procedures, Environmental protection, Grant programs-environmental protection, Reporting and recordkeeping.

Dated: April 19, 2007.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, 40 CFR parts 9 and 35 are amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, the table is amended under the heading, ''State and Local Assistance,'' as follows:

■ a. By revising entries for ''35.6055(a)(2)'', ''35.6055(b)(1)'', ''35.6055(b)(2)(i)–(ii)'', ''35.6105(a)(2)(i)–(v), (vii)'', ''35.6120'', ''35.6145'', ''35.6155(a), (c)'', ''35.6230(a), (c)'', ''35.6300(a)(3)'', ''35.6315(c)'', ''35.6320'', ''35.6340(a)'', ''35.6350'', ''35.6500'', ''35.6550(b)(1)(iii)'', ''35.6550(b)(2)(i)'', ''35.6585'', ''35.6595(a), (b)'', ''35.6600(a)'', ''35.6650'', ''35.6655'', ''35.6660'', ''35.6665(a), (b)'', ''35.6700'',

''35.6705'', ''35.6710'', ''35.6805'', and ''35.6815(a), (c), (d)''.

■ b. By removing entries for ''35.6110(b)(2)'' and ''35.6550(a)(1)(ii)''.

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
State and Local Assistance	
35.6055(a)(2)	2050–0179
35.6055(b)(1)	2050–0179
35.6055(b)(2)(i)–(ii)	2050–0179
35.6105(a)(2)(i)–(v), (vii)	2050–0179
35.6120	2050–0179
35.6145	2050–0179
35.6155(a), (c)	2050–0179
35.6230(a), (c)	2050–0179
35.6300(a)(3)	2050–0179
35.6315(c)	2050–0179
35.6320	2050–0179
35.6340(a)	2050–0179
35.6350	2050–0179
35.6500	2050–0179
35.6550(b)(1)(iii)	2050–0179
35.6550(b)(2)(i)	2050–0179
35.6585	2050–0179
35.6595(a), (b)	2050–0179
35.6600(a)	2050–0179
35.6650	2050–0179
35.6655	2050–0179
35.6660	2050–0179
35.6665(a), (b)	2050–0179
35.6700	2050–0179
35.6705	2050–0179
35.6710	2050–0179
35.6805	2050–0179
35.6815(a), (c), (d)	2050–0179
* * * * *	

* * * * *

PART 35—[AMENDED]

■ 3. Subpart O is revised to read as follows:

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

General

Sec.

Pre-Remedial Response Cooperative Agreements

Remedial Response Cooperative Agreements

Enforcement Cooperative Agreements

Removal Response Cooperative Agreements

Core Program Cooperative Agreements

Support Agency Cooperative Agreements

Combining Cooperative Agreements

Financial Administration Requirements Under a Cooperative Agreement

Personal Property Requirements Under a Cooperative Agreement

Real Property Requirements Under a Cooperative Agreement

Copyright Requirements Under a Cooperative Agreement

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

Procurement Requirements Under a Cooperative Agreement

Reports Required Under a Cooperative Agreement

Records Requirements Under a Cooperative Agreement

Other Administrative Requirements for Cooperative Agreements

Requirements for Administering a Superfund State Contract (SSC)

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

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

General

§ 35.6000 Authority.

This subpart is issued under section 104(a) through (j) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA)(42 U.S.C. 9601 *et seq.*).

§ 35.6005 Purpose and scope.

(a) This subpart codifies recipient requirements for administering Cooperative Agreements awarded pursuant to section 104(d)(1) of CERCLA. This subpart also codifies requirements for administering Superfund State Contracts (SSCs) for non-State-lead remedial responses undertaken pursuant to section 104 of CERCLA.

(b) 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 Indian Tribal governments. For CERCLA-funded Cooperative Agreements, this subpart supplements the requirements contained in part 31 for States, political subdivisions thereof, and Indian Tribes. This subpart references those sections of part 31 that are applicable to CERCLA-funded Cooperative Agreements.

(c) Superfund monies for remedial actions cannot be used by recipients for Federal facility cleanup activities. When a cleanup is undertaken by another Federal entity, the State, political subdivision or Indian Tribe can pursue funding for its involvement in response activities from the appropriate Federal entity.

§ 35.6010 Indian Tribe and intertribal consortium eligibility.

(a) Indian Tribes are eligible to receive Superfund Cooperative Agreements only when they are federally recognized, and when they meet the criteria set forth in 40 CFR 300.515(b) of the National Oil and Hazardous Substances Pollution Contingency Plan (the National Contingency Plan or NCP), except that Indian Tribes shall not be required to demonstrate jurisdiction under 40 CFR 300.515(b)(3) of the NCP to be eligible for Core Program Cooperative Agreements, and those support agency Cooperative Agreements for which jurisdiction is not needed for the Tribe to carry out the support agency activities of the work plan.

(b) Although section 126 of CERCLA provides that the governing body of an Indian Tribe shall be treated substantially the same as a State, the subpart O definition of ''State'' does not include Indian Tribes because they do not need to comply with all the statutory requirements addressed in subpart O that apply to States.

(c) Intertribal consortium: An intertribal consortium is eligible to receive a Cooperative Agreement from EPA only if the intertribal consortium demonstrates that all members of the consortium meet the eligibility requirements for the Cooperative Agreement, and all members authorize the consortium to apply for and receive assistance.

§ 35.6015 Definitions.

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

Activity. A set of CERCLA-funded tasks that makes up 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 Core Program, pre-remedial (*i.e.*, preliminary assessments and site inspections), support agency, remedial investigation/feasibility studies, remedial design, remedial action, removal, and enforcement activities.

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.

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.

Award official. The EPA official with the authority to execute Cooperative Agreements and Superfund State Contracts and to take other actions authorized by EPA Orders.

Budget period. The length of time EPA specifies in a Cooperative Agreement during which the recipient may expend or obligate Federal funds.

CERCLA. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601—9657).

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.

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.

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.

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.

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

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.

Contractor. Any party to whom a recipient awards a contract.

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.

Core Program Cooperative Agreement. A Cooperative Agreement that provides funds to a State or Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites but are intended to develop and maintain a State's or Indian Tribe's ability to participate in the CERCLA response program.

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

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

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.

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.

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.

In-kind contribution. The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements. 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.

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. For the purposes of this subpart, the term, ''Indian Tribe,'' includes an intertribal consortium consisting of two or more federally recognized Tribes.

Intergovernmental Agreement. Any written agreement between units of government under which one public agency performs duties for or in concert with another public agency using EPA assistance. This includes substate and interagency agreements.

Intertribal consortium. A partnership between two or more federally recognized Indian Tribes that is authorized by the governing bodies of those Indian Tribes to apply for and receive assistance agreements. An intertribal consortium must have adequate documentation of the existence of the partnership, and the authorization to apply for and receive assistance.

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

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).

National Priorities List (NPL). The list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response. The NPL is published at Appendix B to 40 CFR Part 300.

Operable unit. A discrete action, as described in the Cooperative Agreement or Superfund State Contract, that comprises an incremental step toward comprehensively addressing site problems. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

Operation and maintenance. Measures required to maintain the effectiveness of response actions.

Personal property. Property other than real property. It includes both supplies and equipment.

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

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 manner contributed wastes to Hazardous Substance sites.

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.

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.'')

Project. The activities or tasks EPA identifies in the Cooperative Agreement and/or Superfund State Contract.

Project manager. The recipient official designated in the Cooperative Agreement or Superfund State Contract as the program contact with EPA.

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.

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.

Quality Assurance Project Plan. A written document, associated with remedial site sampling, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities and procedures designed to achieve the data quality objectives of a specific project(s) or continuing operation(s).

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

Recipient. Any State, political subdivision thereof, or Indian Tribe which has been awarded and has accepted an EPA Cooperative Agreement.

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 drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

Simplified acquisition threshold. The dollar amount specified in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. The threshold is currently set at $100,000.

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

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.

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.

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

Superfund State Contract (SSC). A joint, legally binding agreement between EPA and another party(ies) to obtain the necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f).

Supplies. All tangible personal property other than equipment as defined in this section.

Support agency. The agency that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance to the lead agency.

Task. An element of a Superfund response activity identified in the Statement of Work of a Superfund Cooperative Agreement or a Superfund State Contract.

Title. The valid claim to property that denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

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.

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.

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 terms not defined in this section shall have the meanings set forth in section 101 of CERCLA, 40 CFR part 31, and 40 CFR part 300 (the National Contingency Plan).

§ 35.6020 Requirements for both applicants and recipients.

Applicants and recipients must comply with the applicable requirements of 40 CFR part 32, ''Governmentwide Debarment and Suspension (Non-procurement); and Statutory Disqualification under the Clean Air Act and Clean Water Act,'' and of 40 CFR part 36, ''Governmentwide Requirements for Drug-Free Workplace (Financial Assistance).''

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for an official deviation from the non-statutory provisions of this subpart. 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, political subdivisions, and Indian Tribes may apply for pre-remedial response Cooperative Agreements.

§ 35.6055 State-lead pre-remedial Cooperative Agreements.

(a) To receive a State-lead pre-remedial Cooperative Agreement, the applicant must submit 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:

(1) *Budget sheets* (SF–424A).

(2) *A Project narrative statement,* including the following:

(i) *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 EPA project officer has approved the site;

(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) *A schedule of deliverables.*

(3) *Other applicable forms and information* authorized by 40 CFR 31.10.

(b) *Pre-remedial Cooperative Agreement requirements.* The recipient must comply with all terms and 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 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 an Indian Tribe 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) 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 Political subdivision-lead pre-remedial Cooperative Agreements.

(a) If the Award Official determines that a political subdivision's lead involvement in pre-remedial activities would be more efficient, economical and appropriate than that of a State,

based on the number of sites to be addressed and the political subdivision's history of program involvement, a pre-remedial Cooperative Agreement may be awarded under this section.

(b) The political subdivision must comply with all of the requirements described in § 35.6055.

§ 35.6070 Indian Tribe-lead pre-remedial Cooperative Agreements.

The Indian Tribe must comply with all of the requirements described in § 35.6055, except for the intergovernmental review requirements included in the ''Application for Federal Assistance'' (SF–424).

Remedial Response Cooperative Agreements

§ 35.6100 Eligibility for remedial Cooperative Agreements.

States, Indian Tribes, and political subdivisions may apply for remedial response Cooperative Agreements.

§ 35.6105 State-lead remedial Cooperative Agreements.

To receive a State-lead remedial Cooperative Agreement, the applicant must submit the following items to EPA:

(a) *Application form,* as described in § 35.6055(a). Applications for additional funding need to include only the revised pages. The application must include the following:

(1) *Budget sheets* (SF–424A) displaying costs by site, activity and operable unit, as applicable.

(2) *A Project narrative statement,* including the following:

(i) *A site description,* including a discussion of the location of each site, the physical characteristics of each site (site geology and proximity to drinking water supplies), the nature of the release (contaminant type and affected media), past response actions at each site, and response actions still required at each site;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task, and a standard task to ensure that a sign is posted at the site providing the appropriate contacts for obtaining information on activities being conducted at the site, and for reporting suspected criminal activities;

(iii) *A statement designating a lead site project manager among appropriate State offices.* This statement must demonstrate that the lead State agency has conducted coordinated planning of response activities with other State agencies. The statement must identify the name and position of those individuals who will be responsible for coordinating the State offices;

(iv) *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;

(v) *A site-specific health and safety plan,* or an assurance that the applicant will have a 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 an Indian Tribe exempt from OSHA requirements;

(vi) *Quality assurance—(A) 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.

(B) *Quality assurance plan.* The applicant must have a separate quality assurance project plan and/or sampling plan for each site to be covered by the Cooperative Agreement. The applicant must submit the quality assurance project plan and the 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 (generally 45 days before beginning field work). Field work may not begin until EPA approves the site-specific quality assurance plan.

(C) *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.

(vii) *A schedule of deliverables* to be prepared during response activities.

(3) *Other applicable forms and information* authorized by 40 CFR 31.10.

(b) *CERCLA Assurances.* Before a Cooperative Agreement for remedial action can be awarded, the State must provide EPA with the following written assurances:

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for all future operation and maintenance of CERCLA-funded remedial actions for the expected life of each such action as required by CERCLA section 104(c) and addressed in 40 CFR 300.510(c)(1) of the NCP. In addition, even if a political subdivision is designated as being responsible for operation and maintenance, the State must guarantee that it will assume any or all operation and maintenance activities in the event of default by the political subdivision.

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

(i) *Ten percent.* Where a facility, whether privately or publicly owned, was not operated by the State or political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(ii) *Fifty percent or more.* Where a facility was operated by a State or political subdivision either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances at the facility, the State must provide 50 percent (or such greater share as EPA may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Twenty-year waste capacity.* The State must assure EPA of the availability of hazardous waste treatment or disposal facilities within and/or outside the State that comply with subtitle C of the Solid Waste Disposal Act and that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of the response agreement. A remedial action cannot be funded unless this assurance is provided consistent with 40 CFR 300.510 of the NCP. EPA will determine whether the State's assurance is adequate.

(4) *Off-site storage, treatment, or disposal.* If off-site 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 lead agency of the State must provide the notification required at § 35.6120, if applicable.

(5) *Real property acquisition.* If EPA determines in the remedy selection process that an interest in real property must be acquired in order to conduct a response action, such acquisition may be funded under a Cooperative Agreement. EPA may acquire an interest in real estate for the purpose of conducting a remedial action only if the State provides assurance that it will accept transfer of such interest in accordance with 40 CFR 300.510(f) of the NCP. The State must provide this assurance even if it intends to transfer this interest to a third party, or to allow a political subdivision to accept transfer on behalf of the State. If the political subdivision is accepting the transferred interest in real property, the State must guarantee that it will accept transfer of such interest in the event of default by the political subdivision. If the State or political subdivision disposes of the transferred real property, it shall comply with the requirements for real property in 40 CFR 31.31(c)(2). (*See* § 35.6400 for additional information on real property acquisition requirements.)

§ 35.6110 Indian Tribe-lead remedial Cooperative Agreements.

(a) *Application requirements.* The Indian Tribe must comply with all of the requirements described in § 35.6105(a). Indian Tribes are not required to comply with the intergovernmental review requirements included in the ''Application for Federal Assistance'' (SF–424). Consistent with the NCP (40 CFR 300.510(e)(2)), this subpart does not address whether Indian Tribes are States for the purpose of CERCLA section 104(c)(9).

(b) *Cooperative Agreement requirements.* (1) The Indian Tribe must comply with all terms and conditions in the Cooperative Agreement.

(2) If it is designated the lead for remedial action, the Indian Tribe must provide the notification required at § 35.6120, substituting the term ''Indian Tribe'' for the term ''State'' in that section, and ''out-of-an-Indian-Tribal-area-of-Indian-country'' for ''out-of-State''.

(3) Indian Tribes are not required to share in the cost of CERCLA-funded remedial actions.

§ 35.6115 Political subdivision-lead remedial Cooperative Agreements.

(a) *General.* If the State concurs, EPA may allow a political subdivision with the necessary capabilities and jurisdictional authority to conduct remedial response activities at a site. EPA will award the political subdivision a Cooperative Agreement to conduct remedial response and enter into a parallel Superfund State Contract with the State, if required (*See* § 35.6800, when a Superfund State Contract is required). The political subdivision may also be a signatory to the Superfund State Contract. The political subdivision must submit to the State a copy of all reports provided to EPA.

(b) *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)(3).

(2) *Cooperative Agreement requirements.* The political subdivision must comply with all terms and conditions in the Cooperative Agreement. If it is designated the lead for remedial action, the political subdivision must provide the notification required at § 35.6120, substituting the term ''political subdivision'' for the term ''State'' in that section.

§ 35.6120 Notification of the out-of-State or out-of-an-Indian-Tribal-area-of-Indian-country transfer of CERCLA waste.

(a) The recipient must provide written notification of off-site shipments of CERCLA waste from a site to an out-of-State or out-of-an-Indian-Tribal-area-of-Indian-country waste management facility to:

(1) The appropriate State environmental official for the State in which the waste management facility is located; and/or

(2) An appropriate official of an Indian Tribe in whose area of Indian country the waste management facility is located; and

(3) The EPA Award Official.

(b) The notification of off-site shipments does not apply when the total volume of all such shipments from the site does not exceed 10 cubic yards.

(c) The notification must be in writing and must provide the following information, where available:

(1) The name and location of the facility to which the CERCLA waste is to be shipped;

(2) The type and quantity of CERCLA waste to be shipped;

(3) The expected schedule for the shipments of the CERCLA waste; and

(4) The method of transportation of the CERCLA waste.

(d) The recipient must notify the State or Indian Tribal government in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the CERCLA waste to another facility within the same receiving State, or to a facility in another State.

(e) The recipient must provide relevant information on the off-site shipments, including the information in paragraph (c) of this section, as soon as possible after the award of the contract and, where practicable, before the CERCLA waste is actually shipped.

Enforcement Cooperative Agreements

§ 35.6145 Eligibility for enforcement Cooperative Agreements.

Pursuant to CERCLA section 104(d), States, political subdivisions thereof, and Indian Tribes may apply for enforcement Cooperative Agreements. To be eligible for an enforcement Cooperative Agreement, the State, political subdivision or Indian Tribe must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site, or recovery of the cleanup costs. To accomplish this, the State, political subdivision or Indian Tribe, respectively, must submit the following for EPA approval:

(a) A letter from the State Attorney General, or comparable local official (of a political subdivision) or comparable Indian Tribal official, certifying that it has the authority, jurisdiction, and administrative capabilities that provide a basis for pursuing enforcement actions against a PRP to secure the necessary response;

(b) A copy of the applicable State, local (political subdivision) or Indian Tribal statute(s) and a description of how it is implemented;

(c) Any other documentation required by EPA to demonstrate that the State, local (political subdivision) or Indian Tribal government has the statutory authority, jurisdiction, and administrative capabilities to perform the enforcement activity(ies) to be funded under the Cooperative Agreement.

§ 35.6150 Activities eligible for funding under enforcement Cooperative Agreements.

An enforcement Cooperative Agreement application from a State, political subdivision or Indian Tribe may request funding for the following enforcement activities:

(a) PRP searches;

(b) Issuance of notice letters and negotiation activities;

(c) Administrative and judicial enforcement actions taken under State or Indian Tribal law;

(d) Management assistance and oversight of PRPs during Federal enforcement response;

(e) Oversight of PRPs during a State, political subdivision or Indian Tribe enforcement response contingent on the applicant having taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities. If the State, political subdivision, Indian Tribe or EPA cannot obtain PRP commitment to fund such oversight activities, then these activities will be considered eligible for CERCLA funding under an enforcement Cooperative Agreement.

§ 35.6155 State, political subdivision or Indian Tribe-lead enforcement Cooperative Agreements.

(a) The State, political subdivision or Indian Tribe must comply with the requirements described in § 35.6105 (a)(1) through (a)(3), as appropriate.

(b) The CERCLA section 104 assurances described in § 35.6105(b) are not applicable for enforcement Cooperative Agreements.

(c) Before an enforcement Cooperative Agreement is awarded, the State, political subdivision or Indian Tribe must:

(1) Assure EPA that it will notify and consult with EPA promptly if the recipient determines that its laws or other restrictions prevent the recipient from acting consistently with CERCLA; and

(2) If the applicant is seeking funds for oversight of PRP cleanup, the applicant must:

(i) Demonstrate that the proposed Statement of Work or cleanup plan prepared by the PRP satisfies the recipient's enforcement goals for those instances in which the recipient is seeking funding for oversight of PRP cleanup activities negotiated under the recipient's own enforcement authorities; and

(ii) Demonstrate that the PRP has the capability to attain the goals set forth in the plan;

(iii) Demonstrate that it has taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities.

Removal Response Cooperative Agreements

§ 35.6200 Eligibility for removal Cooperative Agreements.

When a planning period of more than six months is available, States, political subdivisions and Indian Tribes may apply for removal Cooperative Agreements.

§ 35.6205 Removal Cooperative Agreements.

(a) The State must comply with the requirements described in § 35.6105(a). To the extent practicable, the State must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves out-of-State shipment of CERCLA wastes, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(b) Pursuant to CERCLA section 104(c)(3), 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 stated in § 35.6105(b)(2)(ii).

(c) If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume the lead responsibility for all, or a portion, of the removal activity at a site. Political subdivisions must comply with the requirements described in § 35.6105(a). To the extent practicable, political subdivisions also must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the State's jurisdiction, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(d) The State must provide the cost share assurance discussed in paragraph (b) of this section on behalf of a political subdivision that is given the lead for a removal action.

(e) Indian Tribes must comply with the requirements described in § 35.6105(a). To the extent practicable, Indian Tribes also must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the Indian Tribe's area of Indian country, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(f) Indian Tribes are not required to share in the cost of a CERCLA-funded removal action.

Core Program Cooperative Agreements

§ 35.6215 Eligibility for Core Program Cooperative Agreements.

(a) States and Indian Tribes may apply for Core Program Cooperative Agreements in order to conduct CERCLA implementation activities that are not directly assignable to specific sites, but are intended to develop and maintain a State's or Indian Tribe's ability to participate in the CERCLA response program.

(b) Only the State or Indian Tribal government agency designated as the single point of contact with EPA for CERCLA implementation is eligible to receive a Core Program Cooperative Agreement.

(c) When it is more economical for a government entity other than the recipient (such as a political subdivision or State Attorney General) to implement tasks funded through a Core Program Cooperative Agreement, benefits to such entities must be provided for in an intergovernmental agreement.

§ 35.6220 General.

The recipient of a Core Program Cooperative Agreement must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790). 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.

§ 35.6225 Activities eligible for funding under Core Program Cooperative Agreements.

(a) To be eligible for funding under a Core Program Cooperative Agreement, activities must develop and maintain a recipient's abilities to implement CERCLA. Once the recipient has in place program functions described in paragraphs (a)(1) through (a)(4) of this section, EPA will evaluate the recipient's program needs to sustain interaction with EPA in CERCLA implementation as described in paragraph (a)(5) of this section. The amount of funding provided under the Core Program will be determined by EPA based on the availability of funds and the recipient's program needs in the areas described in paragraphs (a)(1) through (a)(4) of this section:

(1) Procedures for emergency response actions and longer-term

remediation of environmental and health risks at hazardous waste sites (including but not limited to the development of generic health and safety plans, quality assurance project plans, and community relation plans);

(2) Provisions for satisfying all requirements and assurances (including the development of a fund or other financing mechanism(s) to pay for studies and remediation activities);

(3) Legal authorities and enforcement support associated with proper administration of the recipient's program and with efforts to compel potentially responsible parties to conduct or pay for studies and/or remediation (including but not limited to the development of statutory authorities; access to legal assistance in identifying applicable or relevant and appropriate requirements of other laws; and development and maintenance of the administrative, financial and recordkeeping systems necessary for cost recovery actions under CERCLA);

(4) Efforts necessary to hire and train staff to manage publicly-funded cleanups, oversee responsible party-lead cleanups, and provide clerical support; and

(5) Other activities deemed necessary by EPA to develop and maintain sustained EPA/recipient interaction in CERCLA implementation (including but not limited to general program management and supervision necessary for a recipient to implement CERCLA activities, and interagency coordination on all phases of CERCLA response).

(b) Continued funding of tasks in subsequent years will be based on an evaluation of demonstrated progress toward the goals in the existing Core Program Cooperative Agreement Statement of Work.

§ 35.6230 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 narrative statement,* including the following:

(1) *A Statement of Work (SOW)* which must include a detailed description of the CERCLA-funded activities and tasks to be conducted, the projected costs associated with each task, the number of products to be completed, and a schedule for implementation. Eligible activities under Core Program Cooperative Agreements are discussed in § 35.6225; and

(2) *A background statement,* describing the current abilities and authorities of the recipient's program for implementing CERCLA, the program's needs to sustain and increase recipient involvement in CERCLA implementation, and the impact of Core Program Cooperative Agreement funds on the recipient's involvement in site-specific CERCLA response.

(b) *Budget sheets* (SF–424A).

(c) *Proposed project and budget periods* for CERCLA-funded activities. The project and budget periods may be one or more years and may be extended incrementally, up to 12 months at a time, with EPA approval.

(d) *Other applicable forms and information* authorized by 40 CFR 31.10.

§ 35.6235 Cost sharing.

A State must provide at least ten percent of the direct and indirect costs of all activities covered by the Core Program Cooperative Agreement. Indian Tribes are not required to share in the cost of Core Program activities. The State must provide its cost share with non-Federal funds or with Federal funds, authorized by statute to be used for matching purposes. Funds used for matching purposes under any other Federal grant or Cooperative Agreement cannot be used for matching purposes under a Core Program Cooperative Agreement. The State may provide its share using in-kind contributions if such contributions are provided for in the Cooperative Agreement. The State may not use CERCLA State credits to offset any part of its required match for Core Program Cooperative Agreements. (*See* § 35.6285 (c), (d), and (f) regarding credit, excess cash cost share contributions/over match, and advance match, respectively.)

Support Agency Cooperative Agreements

§ 35.6240 Eligibility for support agency Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for support agency Cooperative Agreements to ensure their meaningful and substantial involvement in response activities, as specified in sections 104 and 121(f)(1) of CERCLA and the NCP (40 CFR part 300).

§ 35.6245 Allowable activities.

Support agency activities are those activities conducted by the recipient to ensure its meaningful and substantial involvement. The activities described in section 121(f)(1) of CERCLA, as amended, and in subpart F of the NCP (40 CFR part 300), are eligible for funding under a support agency Cooperative Agreement. Participation in five-year reviews of the continuing protectiveness of a remedial action is also an eligible support agency activity.

§ 35.6250 Support agency Cooperative Agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a)(1) and (3), and other requirements as negotiated with EPA. (Indian Tribes are exempt from the requirement of Intergovernmental Review in 40 CFR part 29.) An applicant may submit a non-site-specific budget for support agency activities.

(b) *Cooperative Agreement requirements.* The recipient must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790).

Combining Cooperative Agreements

§ 35.6260 Combining Cooperative Agreement sites and activities.

(a) EPA may award a Cooperative Agreement to a recipient for:

(1) A single activity, or multiple activities;

(2) A single activity at multiple sites; and

(3) Except as provided in paragraphs (b), (c), and (d) of this section, multiple activities at multiple sites.

(b) EPA will not award or amend a Cooperative Agreement to a political subdivision to conduct multiple activities at multiple sites. Before awarding or amending a Cooperative Agreement to permit multiple activities at multiple sites, EPA must determine that the State or Indian Tribe has adequate administrative, technical, and financial management and tracking capabilities. A State's or Indian Tribe's request for such a Cooperative Agreement will be considered only if EPA determines that consolidating these activities under one Cooperative Agreement would be in the Agency's best interests.

(c) EPA will not award a single Cooperative Agreement to conduct multiple remedial actions at multiple sites.

(d) EPA will require separate Cooperative Agreements for eligible removal actions that exceed the statutory monetary ceiling or whenever a consistency waiver is likely to be sought.

Financial Administration Requirements Under a Cooperative Agreement

§ 35.6270 Standards for financial management systems.

(a) *Accounting system standards*—(1) *General.* The recipient's system must track expenses by site, activity, and, operable unit, as applicable, according to object class. The system 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 systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The system 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) *Core Program.* Since all costs associated with Core Program Cooperative Agreements are non-site-specific, the systems need not track expenses by site. However, all Core Program costs must be documented under the Superfund account number(s) designated specifically for Core Program activity.

(5) *Support Agency.* All support agency agreements will be assigned a single Superfund activity code designated specifically for support agency activities. All support agency costs, however, must be documented site specifically in accordance with the terms and conditions specified in the Cooperative Agreement.

(6) *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, activity, and operable unit, as applicable; and

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

(7) *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.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that enables site-specific costs to be tracked by site, activity, and operable unit, as applicable, and provides sufficient documentation for cost recovery purposes.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office within 30 working days of a request, unless another time frame is specified in the Cooperative Agreement.

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

(4) For pre-remedial and Core Program activities, the recordkeeping system must comply with the requirements described in paragraphs (a)(3) and (a)(4) of this section.

§ 35.6275 Period of availability of funds.

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

(b) Except as permitted in § 35.6285, the Award Official must sign the assistance agreement before costs are incurred. The recipient may incur costs between the date the Award Official signs the assistance agreement and the date the recipient signs the agreement, if the costs are identified in the agreement and the recipient does not change the agreement.

§ 35.6280 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.* The interest a recipient earns on an advance of EPA funds is subject to the requirements of 40 CFR 31.21(i), ''Interest earned on advances.''

(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 identify and charge costs to specific sites, activities, and operable units, as applicable, for drawdown purposes as specified in the Cooperative Agreement.

(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).

(3) *Working capital advances.* If the recipient is unable to meet the criteria for payment by either letter of credit or reimbursement, EPA may provide cash on a working capital advance basis. Under this procedure EPA shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, EPA shall reimburse the recipient for its actual cash disbursements. In such cases, the recipient must comply with the requirements regarding working capital advances described in 40 CFR 31.21(e).

§ 35.6285 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.

(c) *Credit*—(1) *General credit requirements.* Credits are limited to State site-specific expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action, as defined in CERCLA section 101(24), that are consistent with a permanent remedy at the site. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity obligations or expenditures 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 made by the State after October 17, 1986. If such expenditures occurred after the site was listed on the NPL (Appendix B to 40 CFR Part 300), they will be eligible for a credit only if the State initiated the remedial action after obtaining EPA's written approval.

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

(2) *Credit submission requirements.* Although EPA may require additional documentation, the State must submit

the following before EPA will approve the use of the credit:

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

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

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

(iv) 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

(v) 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 in 40 CFR part 300. This requirement does not apply for costs incurred before December 11, 1980.

(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 (*See* CERCLA section 104(c)(5)). Credits must be applied on a site-specific basis, and, therefore, may not be used to meet State cost share requirements for Core Program Cooperative Agreements. EPA will not reimburse excess credit.

(4) *Credit verification procedures.* Expenditure submissions are subject to verification by audit or other financial review. EPA may conduct a technical review (including inspection) to verify that the claimed remedial action is consistent with CERCLA and the NCP (40 CFR part 300).

(d) *Excess cash cost share contributions/overmatch.* The recipient may direct EPA to return the excess funds or to use the overmatch at one site to meet the cost share obligation at another site. The recipient may not use contributions in excess of the required cost share at one site to meet the cost share obligation for the Core Program cost share. Overmatch is not ''credit'' pursuant to paragraph (c)(3) of this section.

(e) *Cost sharing.* The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24. Finally, the recipient cannot use costs incurred under the Core Program to offset cost share requirements at a site.

(f) *Advance match.* (1) A Cooperative Agreement for a site-specific response 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. Also, the State may not use advance match for credit against cost share obligations for Core Program Cooperative Agreements.

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

§ 35.6290 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR 31.25. Recoveries of Federal cost share amounts are not program income, and whether such recoveries are received before or after expiration of the Cooperative Agreement, must be reimbursed promptly to EPA.

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, activity, and operable unit, as applicable;

(ii) Document the use of the property by site, activity, and operable unit, as applicable; 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.

(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), 35.6325 through 35.6340, and 35.6350. Supplies obtained with Core Program funds must be for non-site-specific purposes. All purchases of supplies under the Core Program must comply with the requirements in §§ 35.6300, 35.6315(b), 35.6325 through 35.6340, and 35.6350, except where these requirements are site-specific.

§ 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.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase equipment 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.

(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 following requirements:

(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.

(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, 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, activity, and operable unit, as applicable.

(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 sites, the recipient must allocate the cost of the equipment by site, activity, and operable unit, as applicable, by applying a usage rate subject to the usage rate requirements in § 35.6320.

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

(iv) Equipment obtained with Core Program funds must be for non-site-specific purposes. All purchases of equipment must comply with the requirements in §§ 35.6300, and 35.6310 through 35.6350, except where these requirements are site-specific.

§ 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, activity, and operable unit, as applicable, the recipient must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. The EPA-approved usage rate must be included in the Cooperative Agreement before the recipient incurs these equipment costs.

(b) *Usage rate application.* The recipient must record the use of the equipment by site, activity, and operable unit, as applicable, and must apply the usage rate to calculate equipment charges by site, activity, and operable unit, as applicable. 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 no longer has an interest in fixed in-place equipment once the equipment is installed.

(ii) *Equipment that is an integral part of services to individuals.* EPA no longer has an 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, once EPA certifies that the remedy is operational and functional.

§ 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 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);

(2) *A control system* that 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 are 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.

(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 after the end of the project period.

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

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment that 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 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 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 project and reimburse the original project 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 project. If the recipient cannot use the supplies on another CERCLA project, 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 project and reimburse the original project 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 the recipient acquires real property in order to conduct the response, the recipient with jurisdiction over the property must agree to hold the necessary property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real estate to permit conduct of a remedial action, the acquisition may be made only if the State provides assurance that it will accept transfer of the acquired interest in accordance with 40 CFR 300.510(f) of the NCP. States must follow the requirements in § 35.6105(b)(5).

(b) The recipient must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter, ''Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs.''

§ 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)(2).

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 the simplified acquisition threshold, 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) In addition to the basic procurement policies and procedures described in 40 CFR 31.36(a), the State shall comply with the requirements in the following: Paragraphs (a)(5), (a)(9), and (b) of this section, §§ 35.6555(c), 35.6565 (the first sentence in this section, the first sentence in paragraph (b) of this section, and all of paragraph (d) of this section), 35.6570, 35.6575, and 35.6600. Political subdivisions and Tribes must follow all of the requirements included or referenced in this section through § 35.6610.

(2) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a Cooperative Agreement.

(3) *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.

(4) *Completion of contractual and administrative issues.* (i) The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgment and good administrative practice of all contractual and administrative issues arising out of procurements under the Cooperative Agreement.

(ii) EPA will not substitute its judgment for that of the recipient unless the matter is primarily a Federal concern.

(iii) Violations of law will be referred to the local, State, Tribal, or Federal authority having proper jurisdiction.

(5) *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.

(6) *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 § 35.6020.)

(7) *Protest procedures.* The recipient must comply with the requirements

described in 40 CFR 31.36(b)(12) regarding protest procedures.

(8) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665.

(9) *Intergovernmental agreements.* (i) To foster greater economy and efficiency, recipients are encouraged to enter into intergovernmental agreements for procurement or use of common goods and services.

(ii) Although intergovernmental agreements are not subject to the requirements set forth in this section through § 35.6610, all procurements under intergovernmental agreements are subject to these requirements except for procurements that are:

(A) Incidental to the purpose of the assistance agreement; and

(B) Made through a central public procurement unit.

(10) *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 PRPs at the site and with the contractor's parent companies, subsidiaries, affiliates, subcontractors, or current clients at the site. Prospective contractors under a Core Program Cooperative Agreement must provide comparable information for all sites within the recipient's jurisdiction. (This disclosure requirement encompasses past 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 recipient must require the contractor to 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 or their equivalents into all contracts, except those for well-drilling, fence erecting, plumbing, utility hook-ups, security guard services, or electrical services:

(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 for the life of the contract, and for a period of five years after completion of the contract.

(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 five years after the contract has terminated. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(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.

(4) *Recipient's Contractors.* The recipient must require its contractor to comply with the requirements in §§ 35.6270(a)(1) and (2); 35.6320 (a) and (b); 35.6335; 35.6700; and 35.6705. For additional contractor requirements, see also § 35.6710(c); 35.6590(b); and 35.6610.

§ 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 Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or administratively 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) *Indian Tribe.* Any contract or subcontract awarded by an Indian Tribe or Indian intertribal consortium shall comply with the requirements of 40 CFR 31.38, ''Indian Self Determination Act.''

(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 allow sufficient time (generally 30 calendar days) between public notice of the proposed 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.

(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 competition. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 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 the simplified acquisition threshold 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 remedial action award contract, except for Architectural/Engineering services and post-removal site control, 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.

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

(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 requirements, the recipient of a CERCLA remedial response Cooperative Agreement may use the engineer procured to conduct any or all of the follow-on engineering activities 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 CERCLA 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 when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any CERCLA-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 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 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 MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services. Tasks to encourage small, minority, and women's business utilization in the Superfund program are eligible for funding under Core Program Cooperative Agreements.

(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 women-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 the simplified acquisition threshold 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 paragraph (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) *Accidents and catastrophic loss.* The recipient must require the contractor to 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 under 10 CFR part 420.

(2) *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.

(3) *Labor standards.* The recipient must comply with 40 CFR 31.36(i)(3) through (6).

(4) *Conflict of interest.* The recipient must include provisions pertaining to conflict of interest as described in § 35.6550(b)(2)(ii).

§ 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.

The recipient must require its contractor to 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 referenced in § 35.6020.

(b) The limitations on contract award in § 35.6550(a)(6).

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

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

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

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

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

(h) The applicable provisions in § 35.6595 (b).

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

Reports Required Under a Cooperative Agreement

§ 35.6650 Progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports as specified in the Cooperative Agreement. Progress reports will be required no more frequently than quarterly, and will be required at least annually. The reports shall be due within 30 days after the reporting period. The final progress report shall be due 90 days after expiration or termination of the Cooperative Agreement.

(b) *Content.* The 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 estimated 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 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, activity, and operable unit, as applicable;

(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 CERCLA-funded project or any response activity at a site; and

(ii) When the equipment is no longer needed for any CERCLA-funded project or 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 report.

(a) The recipient must report on its use of MBE (minority business enterprise) and WBE (women's business enterprise) firms by submitting a completed Minority and Women's Business Utilization Report (SF–334) to the award official. Reporting commences with the recipient's award of its first contract and continues until it and its contractors have awarded their last contract for the activities or tasks identified in the Cooperative Agreement. 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.

(b) The recipient must also report on its efforts to encourage MBE participation in the Superfund program pursuant to CERCLA Sec. 105(f). Information on the recipient's efforts to encourage MBE participation in the Superfund program may be included in each SF–334 submitted quarterly, but is required in the SF–334 submitted for the fourth quarter, due November 1 of each year.

§ 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 financial information by site, activity, and operable unit, as applicable.

(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 due 90 days after the end of the Federal fiscal year or as specified in the Cooperative Agreement; or if quarterly or semiannual reports are required in accordance with 40 CFR 31.41(b)(3), due 30 days after the reporting period;

(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 lead agency for the response action must compile and maintain an administrative record consistent with section 113 of CERCLA, the National Contingency Plan, and relevant EPA policy and guidance. In addition, recipients of assistance (whether lead or support agency) are responsible for maintaining project files described as follows.

(a) *General.* The recipient must maintain project records by site, activity, and operable unit, as applicable.

(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, activity, and operable unit, as applicable) 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.

(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 the simplified acquisition threshold.* The recipient's records and files for procurements in excess of the simplified acquisition threshold 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 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, 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 must maintain all records for 10 years following submission of the final Financial Status Report unless otherwise directed by the EPA award official, 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 an unalterable electronic format.* An unalterable electronic format, acceptable to EPA, may be substituted for the original records. The copying of any unalterable electronic format must be performed in accordance with the technical regulations concerning Federal Government records (36 CFR parts 1220 through 1234) and EPA records management requirements.

(d) *Starting date of retention period.* The recipient 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 must require its contractor to 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 all terms and conditions in the Cooperative Agreement, and is subject to 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.

§ 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, or an activity under a Cooperative Agreement, can take place in the following situations:

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

(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.

(c) After closeout, EPA may monitor the recipients' compliance with the assurance to provide all future operation and maintenance as required by CERCLA section 104(c) and addressed in 40 CFR 300.510(c)(1) of the NCP.

§ 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 Superfund State Contract.

A Superfund State Contract (SSC) with a State is required before EPA can obligate or expend funds for a remedial action at a site within the State and before EPA or a political subdivision can conduct the remedial action. An SSC also ensures State or Indian Tribe involvement consistent with CERCLA sections 121(f) and 126, respectively, and obtains the required section 104 assurances (*See* § 35.6105(b)). An SSC may also be used to document the roles and responsibilities of a State, Indian Tribe, and political subdivision during any response action at a site. A political subdivision may be a signatory to the SSC.

§ 35.6805 Contents of an SSC.

The SSC must include the following provisions:

(a) *General authorities*, which documents the relevant statutes and regulations (of each government entity that is a party to the contract) governing the contract.

(b) *Purpose of the SSC*, which describes the response activities to be conducted and the benefits to be derived.

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

(d) *A site description*, pursuant to § 35.6105(a)(2)(i).

(e) *A site-specific Statement of Work*, pursuant to § 35.6105(a)(2)(ii) and a statement of whether the contract constitutes an initial SSC or an amendment to an existing contract.

(f) *A statement of intention* to follow EPA policy and guidance.

(g) *A project schedule* to be prepared during response activities.

(h) *A statement designating a primary contact* for each party to the contract, which designates representatives to act on behalf of each signatory in the implementation of the contract. This statement must document the authority of each project manager to approve modifications to the project so long as such changes are within the scope of the contract and do not significantly impact the SSC.

(i) *The CERCLA assurances*, as appropriate, described as follows:

(1) *Operation and maintenance.* The State must provide an assurance pursuant to § 35.6105(b)(1). The State's responsibility for operation and maintenance generally begins when EPA determines that the remedy is operational and functional or one year after construction completion, whichever is sooner (*See*, 40 CFR 300.435(f)).

(2) *Twenty-year waste capacity.* The State must provide an assurance pursuant to § 35.6105(b)(3).

(3) *Off-site storage*, treatment, or disposal. If off-site storage, destruction, treatment, or disposal is required, the State must provide an assurance pursuant to § 35.6105(b)(4); the political subdivision may not provide this assurance.

(4) *Real property acquisition.* When real property must be acquired, the State must provide an assurance pursuant to § 35.6105(b)(5).

(5) *Provision of State cost share.* The State must provide assurances for cost sharing pursuant to § 35.6105(b)(2). 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.

(j) *Cost share conditions*, which include:

(1) An estimate of the response action cost (excluding EPA's indirect costs) that requires cost share;

(2) The basis for arriving at this figure (*See* § 35.6285(c) for credit provisions); and

(3) The payment schedule as negotiated by the signatories, and consistent with either a lump-sum or incremental-payment option. Upon completion of activities in the site-specific Statement of Work, EPA shall invoice the State for its final payment, with the exception of any change orders and claims handled during reconciliation of the SSC.

(k) *Reconciliation provision*, which states that the SSC remains in effect until the financial settlement of project costs and final reconciliation of response costs (including all change orders, claims, overpayments, reimbursements, etc.) ensure 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 will be made to the payer identified in the SSC.

(l) *Amendability of the SSC*, which provides that:

(1) Formal amendments are required when alterations to CERCLA-funded activities are necessary or when alterations impact the State's assurances pursuant to the National Contingency Plan and CERCLA, as amended. Such amendments must include a Statement of Work for the amendment as described in paragraph (e) of this section; and

(2) Any change(s) in the SSC must be agreed to, in writing, by the signatories, except as provided elsewhere in the SSC, and must be reflected in all response agreements affected by the change(s).

(m) *List of support agency Cooperative Agreements* that are also in place for the site.

(n) *Litigation*, which describes EPA's right to bring an action against any party under section 106 of CERCLA to compel cleanup, or for cost recovery under section 107 of CERCLA.

(o) *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 or to recover any funds advanced or any costs incurred due to a breach of the SSC. Other signatories to the SSC may seek remedies in the appropriate court of competent jurisdiction.

(p) *Site access.* The State or political subdivision or Indian Tribe is expected to use its own 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.

(q) *Final inspection of the remedy.* The SSC must include a statement that following completion of the remedial action, the State and EPA shall jointly inspect the project to determine that the remedy is functioning properly and is performing as designed.

(r) *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.

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

(t) *State review.* The State or Indian Tribe must review and comment on the response actions pursuant to the SSC. Unless otherwise stated in the SSC, all time frames for review must follow those prescribed in the NCP (40 CFR part 300).

(u) *Responsible party activities*, which states that if a Responsible Party takes over any activities at the site, the SSC will be modified or terminated, as appropriate.

(v) *Out-of-State or out-of-an-Indian-Tribal-area-of-Indian-country transfers of CERCLA waste*, which states that, unless otherwise provided for by EPA or a political subdivision, the State or Indian Tribe must provide the notification requirements described in § 35.6120.

§ 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) *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. As appropriate, specific credit provisions should be included in the SSC consistent with the requirements described in § 35.6285(c). 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. If the political subdivision agrees to provide all or part of the State's cost share pursuant to a political subdivision-lead Cooperative Agreement, the political subdivision may pay for those costs in cash or in-kind services under that agreement. The use of a political subdivision-lead Cooperative Agreement as a vehicle for providing cost share must also be documented in the SSC. The specific payment terms must be documented in the SSC pursuant to § 35.6805.

(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(i)(5).)

(b) *Personal property.* The State, Indian Tribe, or political subdivision is required to accept title. The following requirements apply to equipment used as all or part of the remedy:

(1) *Fixed in-place equipment.* EPA no longer has an interest in fixed in-place equipment once the equipment is installed.

(2) *Equipment that is an integral part of services to individuals.* EPA no longer has an 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, once EPA certifies that the remedy is operational and functional.

(c) *Reports.* The State and/or political subdivision or 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 Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of all reports 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 progress reports.)

(d) *Records.* The State and political subdivision or Indian Tribe must maintain records on a site-specific basis. The State and political subdivision or Indian Tribe 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) In order to conclude the SSC, the signatories must:

(1) Satisfactorily complete the response activities at the site and make all payments based upon project costs determined in § 35.6805(j);

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

(3) Submit all State cost share payments to EPA (*See* § 35.6805(i)(5));

(4) Assume responsibility for all future operation and maintenance as required by CERCLA section 104(c) and addressed in 40 CFR 300.510 (c)(1) of the NCP, and if applicable, accept transfer of any Federal interest in real property (*See* § 35.6805(i)(4)).

(b) After the administrative conclusion of the Superfund State Contract, EPA may monitor the signatory's compliance with assurances to provide all future operation and maintenance as required by CERCLA section 104(c) and addressed in 40 CFR 300.510(c)(1) of the NCP.

[FR Doc. E7–7990 Filed 5–1–07; 8:45 am]

BILLING CODE 6560–50–P