



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

OFFICE OF  
WATER

January 20, 1998

**SRF 98-05**

**MEMORANDUM**

**SUBJECT:** Application of Revised Minority Business Enterprise and Women Business Enterprise Requirements to the Clean Water and Drinking Water State Revolving Fund Programs

**FROM:** Richard T. Kuhlman, Chief /s/  
State Revolving Fund Branch

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Regulatory Implementation Branch

**TO:** Municipal Construction Program Managers, Regions I - X  
Drinking Water Program Managers, Regions I - X

The purpose of this memorandum is to ask you for feedback on options we are considering relating to how the Minority Business Enterprise and Women Business Enterprise (MBE/WBE) requirements will apply to the Clean Water (CW) and Drinking Water (DW) State Revolving Fund (SRF) programs. Changes in how some MBE/WBE requirements will apply to the SRF programs are the result of recent changes to the "fair share" objective negotiation process between EPA and assistance recipients necessitated by a recent Supreme Court decision.

**Background**

Consistent with existing policy, requirements for MBE/WBE participation will continue to pertain to assistance in an amount equaling the capitalization grant. [See 40 CFR Part 35.3145(d) for CWSRF requirements and Drinking Water State Revolving Fund Program Guidelines, section IV, A for DWSRF requirements.] To attain compliance with MBE/WBE requirements, the Agency will negotiate a "fair share" objective with the State for MBE/WBE participation on SRF funded activities. The State may accomplish its fair share objective by requiring certain projects to undertake the six affirmative steps specified in the regulations and referenced in the Guidelines. States must submit to EPA a quarterly utilization report documenting MBE/WBE participation.

What has changed in the application of MBE/WBE requirements is the process by which the "fair share" objective is negotiated. Changes to the negotiation process are needed as a result of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), a case involving a procurement arising out of the Department of Transportation. After that

decision, President Clinton directed the Department of Justice (DOJ) to work closely with all Federal agencies on their affirmative action programs to ensure that they are in compliance with the Adarand principles. The Agency issued its revised MBE/WBE Guidance in July 1997, after working with DOJ to ensure that the Agency's MBE/WBE program complies with the Adarand principles.

Under the revised MBE/WBE program guidance, "fair share" objectives must be based on the availability of qualified MBE and WBE firms to do the work in the relevant market for procurement for four separate categories, *i.e.*, construction, equipment, services, and supplies. The 8 percent MBE/WBE objective contained in EPA's FY 1993 Appropriations Act, which up to now has been administered as a minimum goal for each EPA assistance award, will become the overall national goal. This will allow smaller or larger "fair share" objectives to be negotiated for particular grants based on the availability standard.

### **Tracking MBE/WBE Achievement**

Negotiations based on an annual availability standard may result in "fair share" objectives that differ from year to year. It is the intent of the MBE/WBE program that funds awarded by the Agency be subject to a "fair share" objective that reflects MBE/WBE availability. In most Agency programs, the time frame from when funds are awarded to when they are actually drawn and expended by assistance recipients is relatively short, *i.e.*, generally within the award year. This makes the application of a particular year's "fair share" objective to funds awarded in those programs relatively straightforward. However, the uniqueness of the SRF programs, whereby monies are awarded to capitalize a fund which in turn may finance multiple projects over several years, complicates the application of the "fair share" objective in the SRF programs.

We are currently in the process of determining how to implement the new requirements in a way that would take into account the SRF programs' uniqueness while at the same time reflect MBE/WBE availability. We are now considering two possible options: Apply the "fair share" objective and track MBE/WBE achievement either at (1) the SRF loan level or (2) the procurement initiation level. Under both options, each year the State and Regional Office would negotiate a "fair share" objective based on the availability of qualified MBE and WBE firms to do the work.

#### **Option 1: Apply the "fair share" objective and track MBE/WBE achievement at the SRF loan level.**

For a particular year, the negotiated "fair share" objective would apply to the SRF loans that the State awards to recipients during that year, regardless of the capitalization grant used to fund the project. SRF loans made during subsequent years would be subject to the "fair share" objectives established in the year in which the loan is made. Loans made under the same capitalization grant but made in different years may be subject to different "fair share" objectives. All procurements initiated under a particular loan, regardless of

the year in which they are initiated, would be subject to the same "fair share" objective that applied to that loan.

**Option 2: Apply the "fair share" objective and track MBE/WBE achievement at the procurement initiation level.**

In contrast to option 1, for a particular year, the negotiated "fair share" objective would apply to the procurements initiated during that year under SRF loans, regardless of the year in which the loans were made. Procurements initiated during subsequent years would be subject to the "fair share" objectives established in those respective years. Under Option 2, procurements initiated under the same loan in different years may be subject to different "fair share" objectives.

We would like your and the States' insights on these two options to assist us in reaching a decision on how the "fair share" objective should apply under the CW and DW SRF programs. Specifically, we would like to know (1) which option you and the States prefer and why; (2) what you perceive to be the advantages and pitfalls of the options in terms of ease and practicality of applying that approach to SRF projects and in terms of administrative difficulties in tracking and reporting on MBE/WBE achievement; and (3) any other insights or options you think would help us make a determination.

Please provide us with your comments by February 6. If you have questions or would like to discuss this matter further, please contact Kit Farber at (202) 260-3973 or Wendy Warren at (202) 260-3875.

cc: MBE/WBE Coordinators, Regions I - X  
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