

agreements to take the six affirmative steps to assure that small, minority and women's businesses were used when possible as sources of construction, services and supplies. As part of a government-wide effort in 1988, EPA promulgated 40 CFR Part 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. In 1996, the Agency promulgated 40 CFR Part 30, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations. Parts 30 and 31 superseded the procurement provisions of former Part 33. Parts 30 and 31 contain DBE Program provisions at 40 CFR 30.44(b) and 31.36(e), respectively.

Various EPA programs have their own regulations containing DBE requirements. For example, the EPA Superfund Program promulgated regulations which contain DBE provisions for Grants for Technical Assistance at 40 CFR 35.4066(g) and for Cooperative Agreements and Superfund State Contracts for Superfund Response Actions at 40 CFR 35.6015(a)(26) and (54), 35.6580 and 35.6665 (b). The EPA Clean Water State Revolving Fund (CWSRF) Program promulgated regulations containing DBE provisions at 40 CFR 35.3145(d) and (e). The DWSRF Program has promulgated regulations containing DBE provisions at 40 CFR 35.3575(d). DBE requirements for Research and Demonstration Grants can be found at 40 CFR 40.145-3(c).

EPA's legal authorities for its DBE Program are:

Public Law 102-389, a 1993 appropriations act (42 U.S.C. 4370d) (EPA's 8% statute), which provides:

The Administrator of the Environmental Protection Agency shall, hereafter, to the fullest extent possible, ensure that at least 8 per centum of Federal funding for prime and subcontracts awarded in support of authorized programs, including grants, loans and contracts for wastewater treatment and leaking underground storage tanks grants, be made available to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (within the meaning of Section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. 637(a)(5) and (6)), including historically black colleges and universities. For purposes of this section, economically and socially disadvantaged individuals shall be deemed to include women

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Public Law 101-549, Title X of the Clean Air Act Amendments of 1990 (42

U.S.C. 7601 *note*) (EPA's 10% statute), which states:

In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments which use funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of the total Federal funding for such research will be made available to disadvantaged business concerns. Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility \* \* \*

Other legal authorities include Public Law 99-499, the Superfund Amendments and Reauthorization Act of 1986; Public Law 100-590, the Small Business Administration Reauthorization and Amendment Act of 1988; Executive Order 12138, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating and Implementing a National Program for Women's Business Enterprise," issued May 18, 1979; Executive Order 11625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," issued October 13, 1971; and Executive Order 12432, "Minority Business Enterprise Development," issued July 14, 1983.

In 1995, the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097(1995), extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. In other words, such programs must be based on a compelling governmental interest, for example, remedying the effects of discrimination, and must be narrowly tailored to accomplish that interest.

In 1996, the Department of Justice (DOJ) began a review of affirmative action programs in the Federal Government. In response to this review, the Department of Transportation (DOT) revised its program for participation of DBEs in procurement under DOT's financial assistance agreements. 64 FR 5096. In direct Federal procurement, the Small Business Administration (SBA) has issued final regulations amending two programs intended to foster small disadvantaged business participation, the 8(a) Business Development and Small Disadvantaged Business Participation Programs. 63 FR 35726; 63 FR 36120.

This proposed rulemaking would affect only procurements pursuant to EPA financial assistance agreements rather than direct Federal procurement actions. All of EPA's current DBE fair

share objectives and good faith efforts regulatory provisions would be deleted as part of this rulemaking effort, and the proposed DBE provisions to be codified in the new 40 CFR Part 33 would apply. In addition, this proposal would supersede inconsistent provisions of previous guidance documents for EPA's former MBE and WBE Program, including, but not limited to, OSDBU's "Guidance for Utilization of Small, Minority, and Women's Business Enterprises in Procurement Under Assistance Agreements" (the 1997 Guidance). 62 FR 45645.

## II. Section-by-Section Analysis

### Subpart A—General Provisions

#### *Section 33.101 What Are the Objectives of This Part?*

This proposed rule is EPA's revision to its current MBE and WBE Program. EPA needs to reconcile its requirements for financial assistance agreements under EPA's 8% statute and EPA's 10% statute with the Supreme Court's decision in *Adarand*. In that case the Supreme Court held that Federal Government programs that use race or national origin as a criterion for decision making are subject to strict judicial scrutiny. Such programs must be based on a compelling government interest, for example, remedying the effects of racial/ethnic discrimination, and must be narrowly tailored to accomplish that interest.

EPA's proposed rulemaking is one part of the Agency's overall effort to review and, where necessary, revise affirmative action programs in light of *Adarand*. This rulemaking proposal tailors EPA's DBE Program more precisely to the objective of remedying the effects of racial/ethnic discrimination.

#### *Section 33.102 When Do the Requirements of This Part Apply?*

This Part's requirements apply to procurement under EPA financial assistance agreements, including financial assistance agreements to capitalize revolving loan funds, performed entirely within the United States. The term "United States" is later defined in 33.103 to include the Commonwealth of Puerto Rico and any other territories and possessions of the United States.

#### *Section 33.103 What Do the Terms in This Part Mean?*

To the extent possible, EPA has referred to definitions contained in 40 CFR Parts 30, 31 and 35, and other agencies' existing regulations, *e.g.*, Historically Black College or University