

(HBCU). Other definitions were derived from the 1997 Guidance.

EPA is creating a new term, DBE, for its revised program. The new Part 33 defines DBE as an entity owned or controlled by an individual who is socially and economically disadvantaged under EPA's 8% statute, an entity owned and controlled by an individual who is socially and economically disadvantaged under EPA's 10% statute, as well as a Small Business Enterprise (SBE), a Small Business in a Rural Area (SBRA), a Labor Surplus Area Firm (LSAF), a Historically Underutilized Business (HUB) Zone Small Business Concern, or a concern under a successor program. Unlike EPA's previous program, the terms MBE and WBE no longer describe the entire program. Instead, these terms are now merely subsets of the entities described as DBEs. As a result, the definition of MBE has been modified to include an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes.

In addition, the term "financial assistance agreement" has been defined as both grants and cooperative agreements awarded by EPA, including such agreements used to capitalize revolving loan funds including, but not limited to, the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund or the Brownfields Revolving Fund Programs. The term "identified loan" is also defined to indicate those projects and activities to which the requirements of this Part apply for recipients of capitalization agreements for revolving loan funds. For Brownfields capitalization grant recipients, the identified loans will be those funded with EPA financial assistance.

The definition of Small Business in Rural Areas has been shortened from the one contained in the 1997 Guidance. No substantive change is intended. The U.S. Department of Agriculture (USDA) Rural-Urban Continuum Classification Code applies to every county in the United States, and classifies counties based on proximity to metropolitan areas. EPA is using Codes 6–9 as rural counties for purposes of identifying small businesses in rural areas.

Section 33.104 May a Recipient Apply for a Waiver From the Requirements of This Part?

A recipient will be able to apply for a waiver in a special or exceptional situation where the recipient believes that compliance with any of the requirements in this Rule would be

impractical. The Agency believes that the waiver provision is an important component of narrowly tailoring its DBE Program to unique local circumstances and to ensure non-discrimination. EPA intends to carefully review any waiver applications to ensure that any proposed alternative program is able to meet the objectives of EPA's DBE Program and is in accordance with law. This added flexibility could allow an EPA financial assistance agreement recipient to deal creatively with its specific circumstances.

Section 33.105 What Are the Compliance and Enforcement Provisions of This Part?

This section reserves to EPA the right to take remedial action under existing legal authorities if a recipient fails to comply with any of the requirements of the Rule.

Section 33.106 What Assurances Must EPA Financial Assistance Recipients Obtain From Their Contractors?

An EPA financial assistance recipient must ensure that the contract term and condition in the Appendix to this Rule is included in the procurement contracts it awards under EPA financial assistance agreements. This includes contracts under identified loans pursuant to EPA financial assistance agreements capitalizing revolving loan fund programs. This term and condition ensures that a recipient applies pertinent provisions of this Rule to its prime contractor.

Section 33.107 What Are the Rules Governing Availability of Records, Cooperation, and Intimidation and Retaliation?

Paragraph (a) of this section discusses the availability to the general public of information concerning EPA's DBE Program. Paragraphs (b) and (c) discuss the obligation of all participants in EPA's DBE Program to cooperate and never use intimidation and retaliation with respect to EPA's DBE Program.

Subpart B—Certification

Section 33.201 What Does This Subpart Require?

Currently EPA recognizes an entity which is certified as socially and economically disadvantaged by the Small Business Administration (SBA), certified as an MBE by a State or Federal Agency or self-certifies that it is an independent business concern owned and controlled by a minority group member(s) as an MBE. 40 CFR 35.6015 (26); the 1997 Guidance, pp. 3–2 through 3–6.

EPA is proposing to make four changes to the current certification requirements. The first change is to no longer allow an entity to self-certify as being owned and/or controlled by a socially and economically disadvantaged individual or as a WBE under EPA's 8% or 10% statutes. The second change is to allow recognition of certifications of entities as owned and/or controlled by a socially and economically disadvantaged individual or by a woman under EPA's 8% or 10% statutes by Indian Tribal, State (including Insular Areas) and local Governments or independent private organizations so long as the applicable criteria match those under SBA's applicable 8(a) Business Development Program regulations. The third change is to clarify that EPA will accept DOT DBE certifications of U.S. citizens as valid certifications under this program. The fourth change is that EPA will set up its own certification program with the possible use of EPA Private Certifiers to assist EPA in its certification determinations.

The provisions for certification under EPA's 8% and 10% statutes have been separated from one another since the presumptions under those statutes are different. Because EPA's 8% statute incorporates Section 8(a)(5) of the Small Business Act, this Rule adopts for purposes of the 8% statute SBA's regulatory presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong and Macao), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands, (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA. As is the case under SBA's 8(a) Business Development Program, Brazilian Americans with Portuguese surnames and Portuguese Americans would be considered Hispanic Americans under this Program. In addition, Congress has by statute established that HBCUs and women also automatically qualify as