

circumvent the spirit of the DBE Program. In addition, this proposal would require a recipient to be notified in writing before its prime contractor could terminate a DBE subcontractor for convenience and then perform the work itself.

Furthermore, when a DBE subcontractor is terminated or fails to complete its work under the subcontract for any reason, the recipient must require the prime contractor to make good faith efforts if the prime contractor chooses to hire another subcontractor. A recipient must also require its prime contractor to continue to make the good faith efforts even if the fair share objectives in Subpart D of this Rule have been met. Finally, this proposed rule mentions three new forms which are required if there are DBE subcontractors involved in a procurement. First, a recipient must require its prime contractor to provide EPA Form 6100-2—DBE Program Subcontractor Participation Form to all of its DBE subcontractors. EPA Form 6100-2—DBE Program Subcontractor Participation Form will allow DBE subcontractors the option of describing to EPA the work the DBE subcontractor received from the prime contractor, how much the DBE subcontractor was paid and any other concerns the DBE subcontractor might have. Second, a recipient must require its prime contractor to have any anticipated DBE subcontractors complete EPA Form 6100-3—DBE Program Subcontractor Performance Form. The prime contractor would then submit this form as part of its bid or proposal package when competing for a procurement. Third, a recipient must have its prime contractor complete EPA Form 6100-4—DBE Program Subcontractor Utilization Form whenever applicable and submit the form as part of the prime contractor's bid or proposal package when competing for a procurement.

Section 33.303 Are There Special Rules for Loans Under EPA Financial Assistance Agreements?

A recipient of an EPA financial assistance agreement to capitalize a revolving loan fund, such as a State under the CWSRF or DWSRF or an eligible entity under the Brownfields Cleanup Revolving Loan Fund program, must require that borrowers receiving identified loans comply with the good faith efforts described in § 33.301 and the contract administration requirements of § 33.302. This provision does not require that such private or non profit borrowers expend identified loan funds in compliance with any other procurement procedures

contained in 40 CFR Part 30, 40 CFR Part 31, or 40 CFR Part 35, Subpart O, as applicable.

Section 33.304 Must a Native American (Either as an Individual, Organization, Tribe or Tribal Government) Recipient or Prime Contractor Follow the Six Good Faith Efforts?

Native Americans are defined in § 33.103 to include American Indians, Eskimos, Aleuts and Native Hawaiians. A Native American (either as an individual, organization, corporation, Tribe or Tribal Government) recipient or prime contractor must follow the six good faith efforts only if doing so would not conflict with existing Tribal or Federal law, including but not limited to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) which establishes, among other things, that any federal contract, subcontract, grant, or subgrant awarded to Indian organizations or for the benefit of Indians, shall require preference in the award of subcontracts and subgrants to Indian organizations and to Indian-owned economic enterprises.

Indian organizations awarded an EPA financial assistance agreement have the ability to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. Tribal governments with promulgated tribal laws and regulations concerning the solicitation and recruitment of Native American-owned and other minority business enterprises, including women-owned business enterprises, have the discretion to utilize these tribal laws and regulations in lieu of the six good faith efforts. If the effort to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts. Such tribal governments still must retain records documenting compliance in accordance with § 33.501 of the Rule and must report to EPA on their accomplishments in accordance with § 33.502 of the Rule.

Any recipient, whether Native American or not, of an EPA financial assistance agreement for the benefit of Native Americans, is required to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. If the efforts to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts.

Subpart D—Fair Share Objectives

Section 33.401 What Does This Subpart Require?

EPA's previous fair share policy has required that fair share objectives for MBEs and WBEs be negotiated with EPA financial assistance recipients, but has not required that fair share objectives be established for other types of DBEs. While good faith efforts have been required with respect to all DBEs, including LSAFs, SBEs and SBRAs, numerical fair share objectives need only be negotiated for MBEs and WBEs in accordance with EPA's 8% and 10% statutes. This proposed rule would continue this policy.

EPA's position reflects the requirement of its 8% and 10% statutes and is consistent with Executive Order 12138 (May 18, 1979), which requires all Federal agencies to take "appropriate affirmative action in support of [WBEs]." Further, OMB Circular A-102 (March 3, 1988) provides that "[i]t is national policy to award a fair share of contracts to small and minority business firms: and that "[g]rantees shall take similar appropriate affirmative action * * * [in] support of women's enterprises * * *"

Prior to FY 1998, EPA applied its 8% and 10% MBE and WBE objectives directly to each of its financial assistance agreements. Thus, each EPA financial assistance agreement for research relating to the requirements of the Clean Air Act Amendments of 1990 had a minimum of 10% as MBE and WBE fair share objectives. All other EPA financial assistance agreements had a minimum of 8% as MBE and WBE fair share objectives. EPA changed this policy beginning with its FY 1998 financial assistance agreements so that the minimum 8% and 10% MBE and WBE fair share objectives became agency-wide objectives rather than fair share objectives for each EPA financial assistance agreement. Notwithstanding these national objectives, fair share objectives for each financial assistance agreement recipient are negotiated based on an assessment of the availability of qualified MBEs and WBEs in the relevant procurement market for construction, equipment, services and supplies; thus, the overall national objectives may vary from the specific fair share objectives of an individual financial assistance agreement recipient.

The 8% and 10% objectives are national objectives which EPA uses to evaluate and monitor MBE and WBE opportunities to participate in contracts under EPA financial assistance agreements. They do not serve as quotas or set-asides. These national objectives