

accurately reflect the MBE and WBE participation expected absent the effects of discrimination. A recipient should consider the proven capacity of MBEs and WBEs to perform on contracts under EPA financial assistance agreements. MBE and WBE past utilization does not necessarily reflect the availability of MBEs and WBEs. However, such past utilization is an indicia of the proven capacity of an MBE or WBE to perform on contracts under EPA financial assistance agreements. Other relevant information which should be examined, if available, include any other disparity studies conducted within a recipient's relevant geographic market; statistical disparities in the ability of MBEs and WBEs to get necessary financing, bonding and insurance; and data on limitations for employment, self employment, education, training and union apprenticeship.

EPA is not proposing to require recipients to make an adjustment to their base figures. Rather, recipients must consider whether an adjustment to the base figures is appropriate, and if so, make the adjustment. It is important to note that the data recipients would consider under this proposed approach only involve existing data and not the generation of any new data.

The question of allowability of costs of preparing availability analyses or disparity studies in connection with the DBE Program is determined in accordance with the cost principles applicable to the organization incurring the cost. 40 CFR 30.27 and 31.22. For State and local governments, the pertinent cost principles are found in OMB Circular A-87, as amended 8/29/97 ("A-87"). For institutions of higher education and other non-profit institutions, OMB Circulars A-21 and A-122 apply, respectively. Allowability of costs for hospitals is determined in accordance with the provision of appendix E of 45 CFR Part 74.

In general, the cost must be necessary and reasonable, be allocable to the Federal grant, be consistent with State law and be afforded consistent treatment as direct or indirect. The cost must be adequately documented, and be the net of any applicable credits. There is nothing inherent in the cost principles that would render the DBE costs unallowable.

Each recipient will have different fact situations to apply. In CERCLA Core Program Cooperative Agreements, costs incurred in encouraging DBE utilization in the Superfund Program are allowable for funding. The recipient may have conducted an analysis or study for its own purposes prior to the EPA financial

assistance agreement, in which case some of the costs might be allocable to the EPA grant as an in-kind contribution. Costs must also be treated consistently as either direct or indirect in similar circumstances. Under OMB cost principles the costs of such analyses or studies could either be allowable direct or allowable indirect costs under an EPA assistance award. The recipient must determine whether under its particular circumstances, the DBE costs are allocable to the cost objective in question, and whether it is a direct or indirect cost.

In each case, the recipient will have to devise a method of allocating the cost of the analysis or study appropriately. If audited, the recipient may be asked to document and justify the allocation. If a recipient has questions concerning allocation issues, it should contact its appropriate EPA grants administration office.

Section 33.406 May a Recipient Designate a Lead Agency for Fair Share Objective Negotiation Purposes?

If an Indian Tribal, State or local Government has more than one agency that receives EPA financial assistance, the agencies within that government may designate a lead agency to negotiate MBE and WBE fair share objectives with EPA to be used by each of the agencies. Each agency must otherwise negotiate with EPA separately its own MBE and WBE fair share objectives.

Section 33.407 How Long Do MBE and WBE Fair Share Objectives Remain in Effect?

Once approved, a recipient's MBE and WBE fair share objectives would remain in effect for three fiscal years. However, if significant changes have occurred rendering the data relied upon in establishing the fair share objectives obsolete, the fair share objectives may need to be renegotiated before the end of the three fiscal year period. The fact that a disparity study utilized in negotiating fair share objectives has become more than ten years old during the three year period does not by itself constitute a significant change requiring renegotiation.

Section 33.408 May a Recipient Use Race and/or Gender Conscious Measures as Part of This Program?

To the extent good faith efforts described in Subpart C of this Rule and other race and/or gender neutral efforts prove to be adequate to achieve fair share objectives for MBEs and WBEs, a recipient or prime contractor need not take any race and/or gender conscious action. To the extent good faith efforts

described in Subpart C of this Rule and other race and/or gender neutral efforts prove to be inadequate to achieve fair share objectives for MBEs and WBEs, a recipient or prime contractor is encouraged to take reasonable race and/or gender conscious action, subject to § 33.409, to more closely achieve the fair share objectives. Such actions may include, among other things, price incentives and technical evaluation credits. Any use of race and/or gender conscious measures must not result in the selection of an unqualified MBE or WBE. A recipient must notify EPA in advance of any race and/or gender conscious action it plans to take.

Section 33.409 May a Recipient Use Quotas as Part of This Program?

Quotas may never be used under EPA's 8% or 10% statute. In fact, EPA's 10% statute specifically prohibits quotas.

Section 33.410 May a Recipient Be Penalized for Failing To Meet Its Fair Share Objectives?

Under this Rule, a recipient may not be penalized or considered to be in noncompliance solely because its MBE or WBE utilization falls short of its fair share objectives. However, EPA may take remedial action under § 33.105 for a recipient's failure to administer any portion of the DBE Program including, but not limited to, the good faith efforts requirements described in Subpart C of this part.

Section 33.411 Who May be Exempted From This Subpart?

EPA is proposing to exempt recipients of financial assistance agreements with a combined total of \$250,000 or less in EPA funds for any particular EPA financial assistance project or in any one fiscal year from the fair share objective requirements. These recipients would not be exempted from the six good faith efforts requirements of Subpart C or the recordkeeping and reporting requirements of Subpart E. The Agency is requesting comments on whether the exemption should be extended to the other requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of extending the exemption to the other requirements of this Rule.

Financial assistance agreements of \$250,000 or less account for about 82% of new EPA financial assistance awards each fiscal year, but less than 12% of the total EPA financial assistance funds awarded. For the Clean Water State Revolving Fund (CWSRF), Drinking Water State Revolving Fund (DWSRF), and Brownfields Cleanup Revolving