

objective requirements. The Agency is requesting comments on whether the exemption should be extended to the reporting requirements. Commenters are encouraged to submit relevant burden and/or cost information in support of their comment to extend the exemption to the reporting requirements.

Section 33.503 How Does a Recipient Calculate MBE and WBE Participation for Reporting Purposes?

In this rulemaking proposal the Agency is proposing to codify the principles of Chapter 8 of its 1997 Guidance concerning how MBE and WBE participation is counted.

EPA requires that a recipient report the total amount of financial assistance spent on procurement and the amount awarded to an MBE or WBE. For EPA assistance awards, except the CWSRF and DWSRF Revolving Funds, all project expenditures are deemed to include both the Federal Share and the recipient's required matching share. Therefore, except in the SRF Programs, the amount of procurement in the assistance award as a whole, *i.e.*, including any required cost share funds contributed by the recipient is reported. In the SRF Programs, only identified loans are considered to include Federal funds. Negative reports are required, *i.e.*, if a recipient does not make an MBE or WBE procurement award in a reporting period, the recipient must still file a Form 5700-52A.

By requiring recipients to report, EPA is attempting to measure the amount of overall MBE and WBE participation under the DBE Program. The reporting of MBE and WBE dollar amounts under a particular prime contract will result in a total that is no more than 100% of the prime contract value. For example, if an MBE is awarded a prime contract and then subcontracts 30% of the value of the contract, the total number of dollars reported would remain at the 100% level. This would be true even if the subcontractor in this example is another MBE.

If all project costs attributable to MBE and WBE participation are not eligible for funding under the EPA financial assistance agreement, the recipient may report MBE and WBE participation compared to the total eligible and non-eligible costs of the project.

Joint Ventures. The MBE and WBE participation within a joint venture shall be credited in a *pro rata* fashion. Where an MBE's or WBE's risk of loss, control or management responsibilities is not consistent with its share of the profit, the award official may direct an adjustment in the percentage of MBE or WBE participation.

Central Purchasing or Procurement Centers. Recipients must verify procurement dollars awarded to MBE and WBE firms from a recipient's central purchasing or procurement center.

In reporting MBE and WBE utilization, a recipient may use one of the methods described below or propose another method for approval by EPA.

(1) A recipient may report actual dollars expended on procurement from EPA financial assistance agreement funds to MBEs and WBEs, if sufficient records are maintained;

(2) If records are maintained for a recipient's MBE and WBE procurement generally but records are not specifically maintained for procurement under EPA financial assistance agreements, a recipient's MBE and WBE percentage utilization for its funds as a whole may be applied proportionally to the amount of procurement under EPA financial assistance agreements; or

(3) If actual records of MBE and WBE utilization are not maintained, a recipient may authorize its procurement center to estimate the total amount of funds awarded to MBEs and WBEs. Such estimate, provided it is reasonable, will be accepted.

Brokers. MBE and WBE participation will be credited for those MBEs and WBEs performing a useful business function according to industry custom and practice. Recipients *may not* count expenditures to an MBE or WBE that acts merely as a broker or passive conduit in a transaction. A broker is a firm that does not itself perform, manage or supervise the work of its contract or subcontract in a manner consistent with the normal business practices for contractors or subcontractors in its line of business. However, an MBE or WBE may subcontract a portion of the work to a non-MBE or non-WBE, provided that such further subcontracting is in accordance with this proposed regulation and that the majority of work is retained by the MBE or WBE having the prime contract.

Presumption. If an MBE or WBE prime contractor awards 50% or more of the prime contract value to a non-MBE and non-WBE, EPA presumes that such a MBE or WBE prime contractor is a broker. No MBE or WBE utilization may be reported for a broker.

Rebuttal. An MBE or WBE contractor may rebut this presumption by demonstrating that the degree of subcontracting is consistent with normal business practice and that it will actively perform, manage and supervise the work under its contract.

MBE or WBE Truckers/Haulers. A recipient may only count expenditures to an MBE or WBE Trucker/Hauler if that MBE or WBE Trucker/Hauler is performing a commercially useful function. The proposed rule discusses two factors to consider in determining whether an MBE or WBE Trucker/Hauler is performing a commercially useful function.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or tribal, State or local governments or communities.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or programs, or the rights and obligations of recipients thereof.

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rule is a significant rule under Executive Order 12866 because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally assisted contracting. It also affects a wide variety of parties, including all EPA financial assistance programs, and the DBE and non-DBE contractors that perform work under them. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

Based on currently available information about costs that may be associated with complying with this rule (*e.g.*, costs to obtain MBE or WBE certification), EPA believes that this rule will not have an annual effect on the economy of \$100 million or more. Therefore, EPA does not plan to prepare a regulatory impact statement for this rule. However, EPA invites commentators