

law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule does not have “federalism implications,” as that phrase is defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Because this rule conditions the use of federal assistance, it will not impose substantial direct compliance costs on State and local governments. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Stakeholders, including representatives from State government agencies, State government organizations and local governments, were given an opportunity to comment on a draft of the rule which was posted on the Internet for public comment. Meetings were also held in several states across the country to discuss the draft of the rule and to encourage comment.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

On November 6, 2000, the President issued Executive Order 13175 (65 FR 67249) entitled, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 took effect on January 6, 2001, and revokes Executive Order 13084 (Tribal Consultation) as of that date. EPA to a great extent developed this proposed rule, however, during the period when Executive Order 13084 was in effect. Although EPA believes that it has fully complied with the requirements of Executive Order 13175, as indicated in the following discussion, EPA will analyze and ensure full compliance with the requirements of Executive Order 13175 before promulgating the final rule.

Executive Order 13175 requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive Order to include regulations

that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

Under section 5(b) of Executive Order 13175, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation. Under section 5(c) of Executive Order 13175, EPA may not issue a regulation that has tribal implications and that preempts tribal law, unless the Agency consults with tribal officials early in the process of developing the proposed regulation. However, today’s proposed rulemaking will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Thus, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this rule.

EPA has concluded that the proposed rule would have tribal implications because it will have substantial direct effects on one or more Indian tribes. The substantial direct effects on tribal governments are as follows:

Tribes receiving an EPA financial assistance agreement of more than \$250,000 for any single assistance agreement or of more than one financial assistance agreement with a combined total of more than \$250,000 in any one fiscal year (excluding PPG eligible grants to tribes and intertribal consortia under 40 CFR Part 35, Subpart B) would have to negotiate fair share objectives with EPA unless they choose to adopt MBE and WBE objectives of another EPA recipient consistent with today’s proposed rule. Those tribes required to negotiate fair share objectives with EPA would have a phase-in period of up to three years in which to do so; their fair share objectives will remain in effect for three fiscal years after they have been approved by EPA, unless there are significant changes to the data supporting the fair share objectives.

Some tribally owned businesses (businesses that a Federally recognized tribal government owns or in which it has a majority share) would not be eligible to be counted in the future towards meeting the MBE/WBE fair share objectives if they do not meet the applicable SBA 8(a) criteria, e.g., see 13 CFR 124.109(b); under EPA’s current requirements such businesses may self

certify their MBE status. Of course, tribes may continue to do business with tribally owned or other companies which do not meet the applicable SBA 8(a) criteria, they simply could not count such procurements toward meeting MBE/WBE objectives. In addition, the proposed rule would have the following impacts on tribes/tribally owned businesses:

First, a business owned by a Federally recognized tribal government would have to file an annual affidavit with EPA certifying no change in its MBE status, pursuant to § 33.210 of today’s proposed rulemaking.

Second, a business owned by a Federally recognized tribal government would have to be recertified every three years as meeting SBA’s applicable 8(a) criteria to be eligible to be counted in the future towards meeting the MBE/WBE fair share objectives, pursuant to § 33.208.

Third, a business owned by a Federally recognized tribal government, if it is not already certified in accordance with SBA’s applicable 8(a) criteria, may have to incur costs to be certified if there is no tribal certifier available and the other certifying entity charges for its services.

Fourth, a tribe as a recipient of EPA financial assistance, would have to be notified in writing before any termination of a DBE subcontractor for convenience is made by its prime contractor, pursuant to § 33.303(a).

Fifth, consistent with other Federal and tribal laws, a tribe would have to require its prime contractor, after the tribe has unsuccessfully sought to apply Indian preference consistent with the Indian Self-Determination and Education Assistance Act, to employ the good faith efforts described in § 33.301 if a DBE subcontractor fails to complete work under a subcontract for any reason and the prime contractor solicits a replacement subcontractor, pursuant to § 33.303(b).

Sixth, consistent with other Federal and tribal Laws, a tribe would have to require its prime contractor, after it has unsuccessfully sought to apply Indian preference consistent with the Indian Self-Determination and Education Assistance Act, to employ the good faith efforts described in § 33.301 even if it has achieved its fair share objectives under Subpart D of the rule, pursuant to § 33.303(c).

Seventh, a tribe would have to require its prime contractors to provide EPA Form 6100–2—DBE Program Subcontractor Participation Form, EPA Form 6100–3—DBE Program Subcontractor Performance Form and EPA Form 6100–4—DBE Program