

to comply with the fair share objective requirements under today's rulemaking because they will fall under the \$250,000 exemption or the exemption for PPG eligible program grants under 40 CFR Part 35, Subpart B. Finally, EPA believes that a number of tribes which otherwise would have to negotiate fair share objectives may elect instead to apply the objectives of another recipient in accordance with the requirements of today's rulemaking. In any case, the rule would provide tribes with a three year phase-in period to comply with the fair share negotiation requirements.

Comments were also received suggesting that EPA exempt tribes from Fair Share Negotiations based on procurement dollars, rather than on total grant dollars. EPA is considering this option which would exempt tribal grantees whose actual procurement activities total \$250,000 or less from Fair Share Negotiations. EPA is specifically requesting public comment on this suggestion.

3. The reporting and recordkeeping requirements.

Some tribes expressed concerns that keeping records of and reporting purchases for EPA funded grants would impose a heavy burden on tribal governments. Instead, they suggested basing reporting on the amount of money the tribe received rather than on the amount of money it spent on outside supplies and services.

EPA considered these concerns. However, 40 CFR Part 31 already requires tribes to comply with Part 31's recordkeeping and reporting requirements, which include MBE/WBE recordkeeping and reporting. Today's proposed rulemaking make no changes to the existing Part 31 reporting and recordkeeping requirements. The Agency believes that basing requirements on amounts received rather than on amounts spent would be an inaccurate measurement of MBE/WBE procurement utilization. EPA currently requires financial assistance recipients to report MBE/WBE accomplishments based on dollars spent on MBE/WBE procurements. EPA is not proposing to change this requirement.

4. Compliance with the good faith efforts requirements.

One commentor objected to having to advertise in newspapers; a comment was also made that EPA should investigate alternative mechanisms that encourage a tribe to seek out MBEs/WBEs during the procurement process without incurring an unreasonable financial burden.

However, as discussed above, Section 7(b) of the Indian Self-Determination and Education Assistance Act requires

tribal governments to solicit tribally-owned businesses and/or businesses owned by a member(s) of a tribe, before undertaking the six good faith efforts. Tribes currently are currently subject to 40 CFR Part 31, which requires them to make good faith efforts to ensure that DBEs are used whenever possible. EPA is not proposing to change this requirement. EPA does not believe that the good faith efforts requirements are unduly burdensome. The good faith efforts requirements would take effect only if no DBEs are found to do the work in each of the four procurement categories of construction, equipment, services and supplies in the initial tribal solicitation.

5. Phase-In Period.

One commentor expressed a concern about the timing of the phase-in period and the maximum amount of time needed for the requirement to be implemented.

EPA expects those tribes who could implement this requirement before the expiration of the three year phase-in period to do so. Those tribes who cannot do so would be given the full three years. It is important for tribes to note that the three year phase-in period would only begin after the final rule's effective date, which should allow tribes sufficient time to comply with prepare for the implementation of the requirement.

In the spirit of Executive Order 13175 and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

Copies of written communications submitted by tribal officials/representatives are available upon request from the docket clerk for this rulemaking.

#### *G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045 applies to any rule that is determined to be: (1) "economically significant" as defined under Executive Order 12866, and (2) concerns any environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA has determined that the proposed rule is not a covered regulatory action because it is not economically significant and it does not involve decisions based on environmental health or safety risks. As a result, the proposed rule is not subject to the requirements of the Executive Order.

#### *H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA has concluded that this rule is not likely to have any adverse energy effects.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

#### **List of Subjects**

##### *40 CFR Part 30*

Environmental protection, Administrative practice and procedure, Grant programs—environmental protection, Reporting and recordkeeping requirements.

##### *40 CFR Part 31*

Accounting, Administrative practice and procedure, Grant programs, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

##### *40 CFR Part 33*

Grant programs—environmental protection.