

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 6**

[EPA-HQ-OECA-2005-0062; FRL-8467-5]

RIN 2020-AA42

**Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final Rule.

**SUMMARY:** The Environmental Protection Agency (EPA or Agency) is amending its procedures for implementing the requirements of the National Environmental Policy Act of 1969 (NEPA). This also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions."

This rule amends EPA's NEPA implementing procedures by: consolidating and standardizing the procedural provisions and requirements of the Agency's environmental review process under NEPA; clarifying the general procedures associated with categorical exclusions, consolidating the categories of actions subject to categorical exclusion, and amending existing and adding new categorical exclusions; consolidating and amending existing and adding new extraordinary circumstances; consolidating and amending the listing of actions that generally require an environmental impact statement; clarifying the procedural requirements for consideration of applicable environmental review laws and executive orders; and incorporating other revisions consistent with the Council on Environmental Quality's regulations (CEQ Regulations).

**DATES:** This final rule is effective on October 19, 2007.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OECA-2005-0062. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard

copy at the Public Reading Room, Room B102, Enforcement and Compliance Docket and Information Center, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OECA Docket is (202) 566-1752.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Hargrove; NEPA Compliance Division; Office of Federal Activities (Mailcode 2252A); Environmental Protection Agency; 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 564-7157; fax number: (202) 564-0072; e-mail address: [hargrove.robert@epa.gov](mailto:hargrove.robert@epa.gov).

**SUPPLEMENTARY INFORMATION:** The contents of this preamble are organized according to the following outline:

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**I. General Information****A. Does This Rule Apply to Me?**

Those subject to this rule include EPA employees who must comply with the

National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) or Executive Order 12114, and certain grant and permit applicants who must submit environmental information documentation to EPA for their proposed projects.

*EPA's Procedures for Implementing NEPA.* Compliance with these regulations is the responsibility of EPA's Responsible Officials. Certain procedures in these NEPA regulations require those defined as applicants (that is, grant and permit applicants) to provide environmental information for EPA's use in its environmental review process.

These regulations consolidate and standardize the environmental review process applicable to all EPA proposed actions subject to NEPA. These regulations supplement and should be used in conjunction with the government-wide CEQ NEPA Regulations (40 CFR parts 1500 through 1508).

*EPA's Procedures for Implementing Executive Order 12114.* Compliance with these procedures is the responsibility of EPA's Responsible Officials. For applicant-proposed actions, applicants may be required to provide environmental information for EPA's use in its environmental review process. EPA's Executive Order 12114 implementing procedures ensure that environmental information is available to the Agency's decision-makers and other appropriate Federal agencies and officials for proposed actions subject to Executive Order 12114.

This rule also includes minor, technical amendments to the Agency's procedures for implementing Executive Order 12114 (42 U.S.C. 4321, note, E.O. 12114, 44 FR 1979, 3 CFR 1979, Comp., p. 356). EPA actions typically subject to Executive Order 12114 include major EPA actions that affect the environment of a foreign nation or the global commons and may include: Major research or demonstration projects, ocean dumping activities carried out under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1401 *et seq.*), and major permitting or licensing of facilities by EPA (such as EPA-issued permits for hazardous waste treatment, storage, or disposal facilities under section 3005 of the Resource Conservation and Recovery Act (42 U.S.C. 6925), National Pollutant Discharge Elimination System permits under section 402 of the Clean Water Act (33 U.S.C. 1342), and prevention of significant deterioration approvals under Part C of the Clean Air Act (42 U.S.C. 7470 *et seq.*)).

To determine whether a project would be subject to either of these procedures, carefully examine the applicability criteria in § 6.101 and Subpart C of the NEPA implementing procedures, and § 6.401 of the Executive Order 12114 implementing procedures in this proposed rule. If there are questions regarding the applicability of these procedures to a particular entity, consult the person listed in the preceding **“FOR FURTHER INFORMATION CONTACT”** section of this Preamble.

#### B. Statutory Authority

NEPA establishes the federal government's national policy for protection of the environment. The CEQ Regulations at 40 CFR parts 1500 through 1508 establish procedures implementing this national policy. The CEQ's Regulations (40 CFR 1505.1) require federal agencies to adopt and, as needed, revise their own NEPA implementing procedures to supplement the CEQ Regulations and to ensure their decision-making processes are consistent with NEPA.

Executive Order 12114, “Environmental Effects Abroad of Major Federal Actions,” (see 46 FR 3364) is the authority and basis for EPA's policy, criteria, and procedures contained in the portion of today's proposed rule entitled “Assessing the Environmental Effects Abroad of EPA Actions.”

#### C. Background

The Environmental Protection Agency initially established its NEPA regulations as 40 CFR Part 6 (Part 6), Subparts A through H on April 14, 1975 (see 40 FR 16823). Subpart I was added on January 11, 1977 (see 42 FR 2450). On November 29, 1978, the CEQ promulgated regulations establishing uniform federal procedures for implementing NEPA (see 43 FR 55978). Section 102 of NEPA and the CEQ Regulations require federal agencies to adopt appropriate NEPA procedures to supplement those regulations. As a result, EPA amended its NEPA regulations on November 6, 1979, to make them consistent with the CEQ Regulations (see 44 FR 64177).

Under the Agency's 1979 Part 6 amendments, Subparts A through D described general NEPA procedures for preparing environmental reviews applicable to all EPA NEPA actions and established certain categorical exclusions. Subpart A contained an overview of EPA's NEPA regulations, including environmental impact statement (EIS) requirements for EPA legislative proposals and requirements for environmental information documents (EIDs) to be submitted to

EPA by applicants, grantees, or permittees as required in Subparts E through I. Subpart B described the requirements for the content of an EIS prepared pursuant to Subparts E through I. Subpart C described the requirements for coordination of applicable environmental laws and certain executive orders with the environmental review procedures. It provided a brief recitation of the provisions of those laws or executive orders and EPA implementing procedures. Subpart D described the public information requirements to be undertaken in conjunction with the environmental review requirements under Subparts E through I. Subparts E through I established specific criteria for conducting environmental reviews for particular types of actions and categorical exclusions applicable to those actions. Specifically, Subpart E established NEPA environmental review procedures for the Wastewater Treatment Construction Grants Program of the Clean Water Act; Subpart F for the issuance of new source NPDES permits; Subpart G for research and development program actions; Subpart H for solid waste demonstration projects; and Subpart I for EPA actions for construction of special purpose facilities or facility renovations. EPA's “Statement of Procedures on Floodplain Management and Wetlands Protection,” dated January 5, 1979, was included as Appendix A to clarify the effective date and to emphasize the importance of this Statement of Procedures.

In 1981, Subpart J, “Assessing the Environmental Effects Abroad of EPA Actions,” was added as EPA's general policy, criteria, and procedures for implementing Executive Order 12114, “Environmental Effects Abroad of Major Federal Actions” (see 46 FR 3364). Executive Order 12114 does not impose NEPA compliance requirements on Federal agencies, rather it “furthers the purpose” of NEPA and identifies the documents, including environmental impact statements (EISs) and environmental assessments (EAs), to be used when conducting assessments under Executive Order 12114.

In 1982, the Agency revised its Part 6 NEPA regulations by removing CEQ from the consultation process on requests to segment wastewater treatment facility construction grant projects (see 47 FR 9831). In 1983, EPA revised the categorical exclusions and the criteria for not granting an exclusion, and corrected a factual error on the responsibility for preparing a final EA (see 48 FR 1012).

In 1985, the Agency promulgated procedural amendments and minor

substantive amendments to its Part 6 NEPA regulations to accommodate changes in EPA's regulations for the construction grants program found at 40 CFR Part 35 (see 50 FR 26310). The modifications in the construction grants program changed the process that EPA grant recipients followed in planning and building wastewater treatment facilities. The amendments to Subpart E and related sections of the EPA NEPA regulations streamlined and clarified the criteria and process for an environmental review and for preparing an EIS, including partitioning of the review process and the public involvement requirements. These amendments also included Office name and technical changes to reflect an Agency reorganization.

In 1986, EPA amended its Part 6 NEPA regulations to clarify and streamline procedures for partitioning and re-evaluating environmental reviews, making categorical exclusion (CE) determinations, providing for public participation, and producing and distributing environmental review documents; and to make various technical changes including Office name changes due to reorganizations.

In 1991, EPA amended Subpart G of its Part 6 NEPA regulations by adding categorical exclusions and a list of projects that normally result in preparation of EAs; revising the criteria used to determine whether preparation of an EIS is required; revising the provision directing coordination, where feasible, with other EPA program reviews; and clarifying the NEPA review process for Office of Research and Development actions (see 56 FR 20541). In addition, EPA amended Subpart D by eliminating the requirement for public notice of categorical exclusion determinations for all EPA programs except the Wastewater Treatment Construction Grants Program.

In 1993, EPA amended its Part 6 NEPA regulations to address the requirement that EPA actions conform to any air quality State implementation plan, and to clarify that air pollution control requirements need to be considered when performing NEPA reviews for wastewater treatment works (see 58 FR 63214).

#### D. Exemptions From NEPA for Certain EPA Actions

Certain EPA actions are exempt from the procedural requirements of NEPA, including the CEQ Regulations. Congress has provided specific statutory exemptions for certain EPA actions taken under the Clean Water Act (CWA) and all EPA actions taken under the Clean Air Act (CAA). Specifically,

under CWA Section 511(c)(1), EPA is exempt from preparing EISs for all actions taken under the CWA except for issuance of NPDES permits under CWA Section 402 for "new sources" as defined in Section 306, and for Federal financial assistance provided for assisting construction of publicly owned treatment works under CWA Section 201 (33 U.S.C. 1371(c)). Under the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793(c)(1)), all actions taken under the CAA are deemed not to be major federal actions significantly affecting the environment.

Further, the courts have exempted certain EPA actions from the procedural requirements of NEPA through the functional equivalence doctrine. Under the functional equivalence doctrine, courts have found EPA to be exempt from the procedural requirements of NEPA for certain actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SDWA), and the Marine Protection, Research, and Sanctuaries Act (MPRSA). The courts reasoned that EPA actions under these statutes are functionally equivalent to the analysis required under NEPA because they are undertaken with full consideration of environmental impacts and opportunities for public involvement. See, e.g., *EDF v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (FIFRA); *State of Alabama v. EPA*, 911 F.2d 499 (11th Cir. 1990) (RCRA); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D. N.C. 1981) (TSCA); *Western Nebraska Resources Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991) (SDWA); *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976) (MPRSA).

Agency actions exempt from the requirements of NEPA remain exempt under this rule. If a question arises regarding the applicability of the NEPA requirements to certain proposed actions, the Responsible Official should consult with the NEPA Official and the Office of General Counsel.

#### *E. EPA's Voluntary NEPA Policy and Procedures*

In 1974, EPA Administrator Russell Train determined that the Agency could voluntarily prepare EISs for certain regulatory activities that were exempt from NEPA. In 1998, Administrator Carol Browner amended this policy to permit the preparation of non-EIS NEPA documents for certain EPA regulatory actions. The Agency's current "Notice of Policy and Procedures for Voluntary

Preparation of National Environmental Policy Act (NEPA) Documents" (see 63 FR 58045) sets out the policy and procedures EPA uses when preparing environmental review documents under the Voluntary NEPA Policy. This rule does not make any changes to the voluntary NEPA policy and procedures. However, the rule can serve as a framework for the preparation of voluntary NEPA documents.

#### *F. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection*

On January 5, 1979, EPA issued its *Statement of Procedures on Floodplain Management and Wetlands Protection* to implement Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands); the Statement had been included in 40 CFR Part 6 as Appendix A. As part of this rulemaking, EPA is removing the Statement as an appendix to the rule. The Statement remains in effect, and can be viewed on EPA's NEPA Web site, at: <http://www.epa.gov/compliance/resources/policies/nepa/floodplain-management-wetlands-statement-pg.pdf>.

## **II. Summary of This Rule**

On December 19, 2006, EPA published a **Federal Register** notice seeking comment on a proposed rule that would amend its regulations for implementing the NEPA and EO 12114.

The Agency is amending its procedures for implementing the requirements of NEPA. The rule amends EPA's NEPA implementing procedures by: (1) Consolidating and standardizing the procedural provisions and requirements of the Agency's environmental review process under NEPA; (2) clarifying the general procedures associated with categorical exclusions, consolidating the categories of actions subject to categorical exclusion, amending existing and adding new categorical exclusions, and consolidating and amending existing and adding new extraordinary circumstances; (3) consolidating and amending the listing of actions that generally require an environmental impact statement; (4) clarifying the procedural requirements for consideration of applicable environmental review laws and executive orders; and (5) incorporating other proposed revisions consistent with CEQ Regulations. These regulations supplement and are to be used in conjunction with the CEQ Regulations.

40 CFR Part 6 also includes EPA's procedures, "Assessing the Environmental Effects Abroad of EPA

Actions," that implement Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions" (see 46 FR 3364). The rule includes minor, technical amendments to EPA's procedures for implementing the Order. These procedures further the purpose of NEPA and provide that EPA may be guided by the CEQ Regulations and EPA's NEPA implementing regulations to the extent they are applicable. Therefore, when EPA conducts an environmental assessment pursuant to its Executive Order 12114 procedures, the Agency generally follows its NEPA procedures (unless the assessment process is addressed in other EPA programs). EPA's Executive Order 12114 implementing procedures ensure that environmental information is available to the Agency's decision-makers and other appropriate Federal agencies and officials for actions subject to Executive Order 12114.

After considering comments made on the December 19, 2006 proposed rule, EPA is finalizing the rule substantially as proposed, with some minor modifications. Two changes in the rule were made in response to public comment. One change was to clarify that only major Federal actions require the preparation of an EIS (this change can be found at § 6.207(a) of the rule). Another clarified the role of cooperating agencies in the preparation of EPA NEPA documents (found at § 6.202(a)).

Other changes were made by EPA to clarify the rule's applicability, clarify the CE for on site replacement systems, and improve the overall flow of the regulation. These changes can be found at §§ 6.101(a), 6.101(b), 6.203(b), 6.204(a)(1)(iii) and 6.210. In § 6.101(a), the specific reference to the STAG account was eliminated to avoid confusion about the need for NEPA compliance for all STAG account activities. In this regard, the text was revised to indicate that the rule applies to certain grants awarded to projects authorized through the Agency's annual Appropriation Acts, which includes special grants for municipal wastewater treatment and water supply projects, projects funded through the US-Mexican Border program, and projects funded through the Indian Environmental General Assistance Program. The other change regarding the rule's applicability was to move § 6.101(f) to § 6.101(b), to improve the flow of the section, and to clearly state that this rule does not apply to actions that are statutorily exempt from NEPA. The paragraph at § 6.203(b) was separated into two paragraphs: one for the standard procedure, and one for deviations from this procedure under

the appropriate circumstances. This also demonstrates that even under an abbreviated comment period, there is still a need to circulate the FONSI/EA for public review. The additional language is meant to improve the overall flow of the section. Additionally, the text of § 6.204(a)(1)(iii) has been clarified. Lastly, § 6.210 has been restructured to clarify that consultation with CEQ must occur prior to the approval of any alternate arrangements for emergency circumstances.

### III. Responses to Comments

Comments received expressed general support for the revisions to the rule; however, some comments raised concerns regarding specific aspects of the rule. The comments fell into the following four areas: the scope of the rule; categorical exclusions; extraordinary circumstances; and the NEPA process. EPA's responses to the comments have been grouped into these four areas.

#### A. Comments Relating to the Scope of the Regulations

*Comment:* One commenter asked that the EPA not weaken the Clean Water Act.

*EPA's Response:* EPA appreciates the commenter's concern. The purpose of this rule, however, is to revise and consolidate EPA's NEPA implementing procedures. These regulations are strictly procedural; they set out the procedures EPA follows to comply with NEPA. They have no effect on EPA's authorities under the Clean Water Act, nor do they weaken EPA's implementation of the Clean Water Act.

*Comment:* A commenter asked that applicants be specifically referenced in various sections of the rule because of their integral part in the process.

*EPA's Response:* EPA agrees that applicants have an integral role in the NEPA environmental review process. EPA believes, however, that it is unnecessary to include additional specific references to applicants. As the commenter acknowledged, the proposed regulations already specifically include applicants. For example, § 6.103(b)(3) requires the Responsible Official to "ensure to the extent practicable, early and continued involvement of interested federal agencies, state and local governments, federally-recognized Indian tribes, and affected applicants in the environmental review process." (emphasis added) Applicants also are specifically identified in Subpart C "Requirements for Environmental Information Documents and Third-Party Agreements." EPA believes that inclusion of applicants in the broad

definition of the public (see § 6.203(a)(2)), as well as the identification of applicants in specific sections and subsections of the proposed rule, provides applicants with sufficient and appropriate participation in the environmental review process.

*Comment:* Another commenter asked that EPA define the term "major Federal action" and clarify that only major federal actions trigger the requirement to prepare an environmental impact statement.

*EPA's Response:* EPA agrees that the proposed rule may have been unclear because it used the term "major action" instead of "major federal action."

Therefore, in response to this comment, EPA modified § 6.207(a) of the rule to clarify that an EIS is required only for its major federal actions significantly affecting the quality of the human environment. In regard to defining the term "major federal action," EPA does not agree that the term should be defined in EPA's regulations. The CEQ Regulations, which EPA is adopting through this rule, define the term "major federal action." (See 40 CFR 1508.18.) Since EPA is adopting the CEQ Regulations, it is not necessary for EPA's regulations to define the term.

*Comment:* A tribal commenter asserted that the rule is inconsistent with EPA's trust obligation to protect Indian country because the rule may have negative impacts on the Tribe's efforts to protect water quality. In particular, the commenter claims that the rule "compromises the Tribe's ability to certify" that certain discharges will meet tribal water quality standards.

*EPA's Response:* EPA recognizes the federal government's trust responsibility to federally-recognized Indian tribes that arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. This rule complies with NEPA and other applicable federal statutes and regulations; therefore, it meets the federal trust responsibility and does not negate or diminish that responsibility.

The commenter's assertion regarding the rule compromising the Tribe's ability to certify that certain discharges will meet tribal water quality standards and to protect water quality mischaracterizes the effect of the rule. The rule does not alter or limit any authority or ability the Tribe has under Tribal law, federal law, or any agreement to protect water quality. Moreover, in this case, the Tribe's approval for treatment in the same manner as a state for the Clean Water Act Water Quality Standards and Certification programs and federal

approval of the Tribe's water quality standards enhances the Tribe's ability to protect its waters. Under Section 401 of the Clean Water Act, no federal permit can be issued to approve any activity until the Tribe certifies that any discharge under the permit will comply with applicable tribal water quality standards. Also, EPA regulations require that any permit for a discharge upstream from the Tribe's reservation must include conditions that ensure compliance with applicable downstream water quality standards.

#### B. Comments Relating to Categorical Exclusions (CEs)

*Comment:* Some commenters expressed concern about the new CE that is established at § 6.204(a)(1)(iv) for the reissuance of new source NPDES permits because the commenters believe it would eliminate the need for EPA to comply with NEPA for NPDES permits.

*EPA's Response:* It appears that the commenters mistakenly believe that NEPA compliance is required for all NPDES permits. In point of fact, pursuant to section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c), NEPA compliance is required only for NPDES permits for the discharge of any pollutant by a "new source," which is defined in the Clean Water Act as a source that is subject to promulgated new source performance standards (see, 33 U.S.C. 1316(a)(2)). Thus, NPDES permits for sources other than "new sources" are not subject to NEPA. It should also be noted that NEPA applies only to federal actions. The issuance of NPDES permits by an EPA-authorized state is a state, not federal, action and is, thus, not subject to NEPA. Currently, most states are authorized and, thus, the bulk of the NPDES permits issued in the United States are not subject to NEPA and the new CE has no effect on those actions. Those state permit actions, however, will continue to be subject to the environmental and public review procedures established for those state programs.

EPA does not agree that the use of a CE eliminates the need for EPA to comply with NEPA. A CE, as defined by the CEQ Regulations, is a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 CFR 1508.4. Accordingly, the establishment and proper use of a CE achieves NEPA

compliance. The rule requires that the Responsible Official determine that the proposed action first fits within the category of actions described by the CE, and then determines that the proposed action does not involve any extraordinary circumstances. § 6.204(a). Further, the decision that an action is eligible to be excluded from further NEPA review based on this CE is required to be documented in writing, the documentation must include an explanation of why no extraordinary circumstances apply to the action, and the documentation must be made available to the public on request. § 6.204(a)(1).

Finally, not all NPDES new source permits would qualify for this CE. First, the permit must be a re-issuance, not a first-time permit. First-time NPDES new source permits issued by EPA are reviewed and the environmental effects are considered in either an EA or EIS. Second, the Responsible Official must determine that the conclusions of the NEPA document for the original permit are still valid. Third, the Responsible Official must determine that the re-issuance of the permit will not result in degradation of the receiving waters. Lastly, the permit conditions in the re-issued permit must be the same as those in the original permit or more environmentally protective. Based on EPA's experience, EPA believes that the re-issuance of permits that meet all of these conditions will not have a significant impact on the quality of the human environment.

*Comment:* One commenter expressed the opinion that expanding the list of CEs reduces public participation in the NEPA process.

*EPA Response:* EPA acknowledges that the use of a CE may reduce opportunities for public participation on that specific action. However, the public has the opportunity to comment on new CEs when they are developed. This provides a better use of agency resources for the public benefit than repeatedly focusing resources on environmentally insignificant actions. Moreover, other aspects of the approval of specific actions may provide an opportunity for public input independent from the NEPA process.

*Comment:* One commenter expressed concern that relying on past NEPA documents risks compounding errors or oversights in prior environmental review.

*EPA Response:* EPA's experience with relying on past NEPA documents is that when the action in question is a continuation and the conclusions of the earlier NEPA document regarding the lack of significant impacts have been

reviewed and determined to still be valid, the continuation of that action will not cause significant impacts. The only CE that requires a re-evaluation of a past NEPA document and decision is the new CE that is established at 40 CFR 6.204(a)(1)(iv) for the reissuance of new source NPDES permits. As noted in the Supporting Statement for this rule, EPA's experience with such actions is that where the original NEPA document projected that the action would not cause significant environmental effects, it was determined that the continuation of the discharge would not degrade the receiving waters and that the permit conditions do not change or are more environmentally protective, the reissuance of the respective new source NPDES permit does not result in significant impacts. It should also be noted that the use of this CE will require additional evaluation beyond an evaluation of the action for consistency with a prior NEPA decision. Accordingly, EPA believes that the review process that must be employed before approval of this CE is adequate to ensure that past errors/oversights (assuming there are any) will not be repeated.

*Comment:* One commenter requested clarification about whether NPDES construction general permits are subject to NEPA and recommended that EPA add the following CE to the regulations: "Residential construction undertaken in accordance with the environmental protection requirements of a NPDES construction general permit." The commenter also stated that EPA's economic analysis of the impact of the rule on small businesses, pursuant to the Regulatory Flexibility Act (RFA), did not include consideration of the potential number of affected small businesses that would require permit coverage under the construction general permit.

*EPA Response:* EPA believes that there is no need to add the recommended CE into the rule because NPDES construction general permits are not new source permits. Under section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c), NEPA compliance is required only for NPDES permits for the discharge of any pollutant by a "new source," which is defined in the Clean Water Act as a source that is subject to promulgated new source performance standards (see, 33 U.S.C. 1316(a)(2)). Since there are no new source performance standards for construction discharges, NEPA compliance is not required for these permit actions.

As to the comment on the RFA economic analysis, as noted above, construction general permits are not

new source NPDES permits and, therefore, are not subject to EPA NEPA regulations. Therefore, there is no need to include small businesses that apply for such permits as part of the regulated public subject to this rule.

*Comment:* One commenter questioned why the revised rule did not propose CEs for EPA actions under the Resource Conservation and Recovery Act, Superfund, and the Clean Air Act.

*EPA Response:* EPA actions under the Clean Air Act are statutorily exempt from NEPA. See, 15 U.S.C. 793(c)(1). Additionally, the decision-making processes for EPA actions under the Resource Conservation and Recovery Act and Superfund are considered to be the functional equivalent of NEPA—see Section I.D above. Accordingly, CEs are unnecessary for EPA actions under these programs.

*Comment:* A commenter expressed the opinion that the CE process should allow for project-specific flexibility.

*EPA Response:* EPA agrees with this comment and believes that the CE process in the rule allows for the most flexibility possible.

*Comment:* Several commenters expressed the opinion that the CEs established in the rule should include activities that create temporary disturbances with minimal impacts and whose impacts are already relatively well-known and for which mitigation measures are well-established.

*EPA Response:* EPA appreciates this comment, and believes that the CEs established in the rule meet these general criteria for the actions covered. However, EPA believes that establishing CEs for the activities described in the comment would be too broad and too subjective; EPA does not have sufficient historical support for such broad CEs for all of its programs. Further, it is unlikely that such CEs could be approved without some level of environmental review on the individual projects, which would defeat the intent of establishing CEs in the first place.

### C. Comments Relating to Extraordinary Circumstances (ECs)

*Comment:* One commenter objected to the broad nature of the extraordinary circumstances, and the similarity between the extraordinary circumstances, which, if present, would prohibit the use of a CE, and the list of criteria that normally require the preparation of an EIS.

*EPA's Response:* EPA believes that the extraordinary circumstances, which require determinations regarding the proximity of environmental/natural features in the project area, and/or the application of professional judgment

about the severity of an action's potential environmental effects are not too broad. Moreover, as required by the CEQ Regulations, when establishing a CE, agencies must determine whether the actions in question result in significant effects on the quality of the human environment either individually or cumulatively. The CEQ regulations also require that each agency's NEPA procedures include circumstances in which "a normally excluded action may have a significant environmental effect." 40 CFR 1508.4. Accordingly, EPA believes that it is essential that these two lists parallel each other.

*Comment:* Several commenters believe that the Agency will not have enough information to make an informed decision regarding the applicability of extraordinary circumstances without input from the public.

*EPA Response:* EPA appreciates this concern, and has included an extraordinary circumstance that requires the evaluation of public controversy about an action's potential environmental effects—40 CFR 6.204(b)(8). Of the remaining extraordinary circumstances, many relate to the presence of environmental/natural features (endangered species, historic properties, and farmland) in the project area. The rest require the application of routine professional judgment in making preliminary determinations about the potential severity of the action's environmental effects. EPA does not believe that public input is needed to make these routine determinations.

*Comment:* One commenter expressed concern about the extraordinary circumstance in § 6.204(b)(7), which prohibits the use of a CE if the action will likely have a significant effect on land use patterns or be inconsistent with an approved land use plan because the commenter believes the criterion has little to do with NEPA, and is outside of EPA's jurisdiction.

*EPA Response:* EPA disagrees with this comment because federal actions that significantly alter land use patterns or are inconsistent with approved land use plans can result in significant environmental effects. Moreover, this criterion is consistent with CEQ Regulations. See 40 CFR 1502.16.

*Comment:* One commenter expressed concern about the extraordinary circumstance in § 6.204(b)(8), which prohibits the use of a CE if the action is expected to cause significant public controversy about a potential environmental impact because the commenter believes public controversy alone (i.e., in the absence of an

environmental impact) should not prohibit the use of a CE.

*EPA Response:* EPA agrees that public controversy alone should not prohibit the use of a CE. As written, this extraordinary circumstance is limited to significant public controversy about a potential environmental effect. EPA believes it is appropriate to prohibit the use of a CE if there is significant public controversy regarding a potential environmental impact. Moreover, this criterion is consistent with CEQ Regulations at 40 CFR 1508.27(b)(4), which state that in determining whether an action is significant, the agency is to consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial."

*Comment:* One commenter expressed concern about the extraordinary circumstance in § 6.204(b)(10), which prohibits the use of a CE if the action may conflict with federal, state, or local government, or federally-recognized Indian tribe environmental, resource protection, or land-use laws or regulations because the commenter believes that the criteria have little to do with NEPA, and are outside of EPA's jurisdiction.

*EPA Response:* EPA disagrees with this comment because federal actions that are inconsistent with environmental, resource protection, or land-use laws or regulations, can, regardless of the source of these requirements, result in significant environmental effects. Therefore, it is appropriate to prohibit the use of a CE in such cases. Moreover, this criterion is consistent with CEQ Regulations.

#### *D. Comments Relating to the NEPA Process*

*Comment:* One commenter suggested that the proposed rule be revised to provide for public hearings if an interest is expressed.

*EPA Response:* EPA appreciates the comment and agrees that public participation in the NEPA process is important, but does not agree that the rule should require public hearings. The proposed rule requires the Responsible Official to "make diligent efforts to involve the public \* \* \* in the preparation of [environmental assessments] and [environmental impact statements] consistent with 40 CFR 1501.4 and 1506.6 and applicable EPA public participation regulations." Section 6.203(a)(2). The Responsible Official also is required to "use appropriate communication procedures to ensure meaningful public participation throughout the NEPA process." Section 6.203(a)(5). Further, in

preparing in EIS, the Responsible Official may hold one or more scoping meetings, and public meetings or hearings on the draft EIS. Section 6.203(c)(3)(iii) and (iv). Thus, EPA does not believe that the rule in any way reduces opportunities for public participation in the environmental review process. Rather, it provides the Responsible Official the flexibility to use the most appropriate public participation process considering both the unique circumstances of the project and any applicable EPA public participation requirements. This approach is consistent with CEQ Regulations, which require the agency to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures," 40 CFR 1506.6(a), but do not prescribe how that public participation is to be carried out.

*Comment:* A commenter expressed support for the Emergency Circumstance provision in the rule, but urged EPA to expand the authority of the Responsible Official.

*EPA Response:* EPA appreciates the comment, but does not agree that the Responsible Official should be given more authority because the rule gives the responsible Official, in consultation with the NEPA Official and CEQ, the authority necessary to properly address NEPA compliance for emergency situations. The authority EPA is providing to the Responsible Official is consistent with CEQ Regulations, which require EPA to consult with CEQ about alternative arrangements for emergency circumstances. See 40 CFR 1506.11.

*Comment:* A commenter asked EPA to set page and time limits for NEPA documents and processes, respectively.

*EPA Response:* While EPA appreciates the comment, we believe that it is not necessary or appropriate for this rule to set time or page limits. CEQ Regulations provide general guidelines for time and page limits, but the nature of the specific environmental issues evaluated in NEPA documents appropriately affects their length and preparation time. Generally, the depth of analysis should correlate to the severity and probability of a proposed action's potential environmental effects. Since the purpose of a NEPA environmental review is to thoroughly and appropriately analyze the environmental impacts of a federal action, it would be counter-productive to establish mandatory time or page limits.

*Comment:* A commenter asked that NEPA review be limited to economically and technically feasible alternatives.

*EPA Response:* EPA does not agree that the NEPA review should be limited to economically and technically feasible alternatives. While these are two important factors, they are not the only ones to be considered in establishing the range of reasonable alternatives for NEPA analyses. Indeed, not all economically and technically feasible alternatives that meet the purpose and need are reasonable. Other factors (e.g., environmental soundness, compliance with statutory and regulatory requirements, and public concern) must also be considered when determining whether alternatives are reasonable under NEPA.

*Comment:* One commenter suggested that the rule clarify the meaning of cumulative impacts that are examined in an EIS.

*EPA Response:* EPA appreciates the comment, but does not believe that clarification of the meaning of cumulative impacts is necessary. The reference to cumulative impacts in the rule is consistent with accepted NEPA practice, as well as the definition of cumulative impacts in § 1508.7 of CEQ Regulations, which EPA is adopting through this rulemaking (see § 6.100(b)). Moreover, both CEQ and EPA have issued considerable guidance on the definition of cumulative impacts and techniques for assessing them. Accordingly, EPA believes that it is not necessary to expand the definition of cumulative impacts in this rule.

*Comment:* One commenter expressed concern because the proposed rule appeared to increase the authorities of cooperating agencies to require their approval in the preparation of EPA NEPA documents prior to issuance.

*EPA Response:* EPA agrees that the proposed rule implied that cooperating agencies would always assume a greater role in preparing EPA NEPA documents than is envisioned by EPA or the CEQ Regulations (40 CFR 1501.6). As acknowledged by those regulations, and demonstrated by NEPA practice, cooperating agencies may jointly prepare the NEPA document, or may focus their involvement to those specific issues on which they have jurisdiction or expertise. Accordingly, the rule, at 40 CFR 6.202(a) has been revised to clarify the role of cooperating agencies in the development of EPA NEPA documents.

*Comment:* One commenter suggested that EPA use the phrase “significant adverse effect” as the threshold for requiring an EIS.

*EPA Response:* EPA does not agree that the threshold for requiring an EIS should be limited to “significant adverse effects.” Restricting the threshold of significant impacts (that

would require the preparation of an EIS) to only adverse effects would result in limiting analyses, which could result in overlooking and/or disregarding effects where there is controversy over the “beneficial” or “adverse” nature of the environmental consequence. This approach is consistent with 40 CFR 1508.27(b)(1).

#### **IV. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and changes that were made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the costs and benefits associated with this action. A copy of the analysis is available in the docket for this action, and the analysis is briefly summarized here. The total annual public reporting and recordkeeping burden for this collection of information is estimated at 48,147 hours and \$3,823,740 for contractor hours and costs, direct labor hours and costs, and O&M costs. The hour and cost estimates reflect the annual preparation of documentation for an anticipated 312 applicant-proposed projects that may be documented with a CE, or an EA/FONSI, or an EIS/ROD.

##### *B. Paperwork Reduction Act*

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2020–0033.

EPA collects information from certain applicants as part of the process of complying with either NEPA or Executive Order 12114. EPA’s Executive Order 12114 procedures further the purpose of NEPA and provide that EPA may be guided by NEPA procedures to the extent they are applicable. Therefore, when EPA conducts an environmental assessment pursuant to its Executive Order 12114 procedures, the Agency generally follows its NEPA procedures. For this ICR, applicant-proposed projects subject to either NEPA or Executive Order 12114 (and that are not addressed in other EPA programs’ ICRs), are addressed through the NEPA assessment process. Those

subject to the rule include EPA employees who must comply with NEPA and certain grant and permit applicants who must submit environmental information to EPA for their proposed projects.

The NEPA review for a project may result in a categorical exclusion (CE), or an EA documented with a finding of no significant impact (EA/FONSI), or an EIS documented with a record of decision (EIS/ROD). (EPA assumes a project may be documented with a CE only for grantee-proposed projects. EPA does not anticipate that an initial new source NPDES permit application would be documented with a CE.) For any specific project, only one of these levels of documentation is generally prepared. Applicants must submit an environmental information document (EID) to EPA as part of the environmental review process, unless the applicant submits a draft EA or a draft EIS and supporting documents. Applicants may prepare and submit the information directly, or may enter a third-party contract agreement with EPA for preparation of an EA or EIS and supporting documentation. For purposes of determining the maximum costs to applicants for this ICR, EPA assumed that grant and permit applicants would expend time and contractor costs to submit: (1) Information to support application of a CE with environmental information prepared directly by the applicant’s contractor; or (2) a draft EA and supporting documents prepared directly by the applicant’s contractor; or (3) a draft and final EIS and supporting documents prepared by the applicant’s contractor under a third-party contract agreement with EPA. Based on EPA’s experience, EPA anticipates there will be approximately 300 grantee projects annually with about 60% of these projects documented with a CE, and about 40% with an EA/FONSI. In addition, EPA estimates that one project (less than one percent of the total annual grantee projects) will have an EIS/ROD completed during the 3-year period of this ICR. For permit applicants, EPA assumes there will be approximately 12 projects annually with about 11 of the projects documented with an EA/FONSI, and one project will have an EIS/ROD completed. None will be documented with a CE. EPA estimated the one-time costs for applicants to prepare the environmental documentation by including contractor hours and costs, direct labor hours and costs, and O&M for documentation submitted to EPA to support a CE determination, or an EA/FONSI, or an

EIS/ROD. For a grantee, EPA estimates an applicant's one-time costs for submitting environmental information will be: 45 hours and \$3,292 for CE documentation, or 260 hours and \$18,340 for EA/FONSI documentation, or 2,840 hours and \$324,480 for EIS/ROD documentation. For a permit applicant, EPA estimates an applicant's one-time costs for submitting environmental information will be: 460 hours and \$53,940 for EA/FONSI documentation, or 2,840 hours and \$328,880 for EIS/ROD documentation. These figures may vary depending on the complexity of issues associated with the project and the availability of relevant information, particularly for EISs. EPA believes the calculations for this ICR are representative of most projects.

For purposes of this ICR, the total annual public reporting and recordkeeping burden for this collection of information is estimated at 48,147 hours and \$3,823,740 for contractor hours and costs, direct labor hours and costs, and O&M costs. This burden reflects the annual submission of documentation for an anticipated 312 applicant-proposed projects that may be documented with a CE, or an EA/FONSI, or an EIS/ROD. Over the 3-year period of this ICR, EPA anticipates 937 applicant-proposed projects with a 3-year total burden estimate of 144,440 hours and \$11,471,220. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond, to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9. In addition, EPA is amending the table in 40 CFR Part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information

requirements contained in this final rule.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

The environmental information submitted by an applicant under the rule is one-time only for EPA actions subject to NEPA based on applicant proposals; i.e., actions proposed by grantees seeking funding assistance from EPA or for an NPDES permit application initiated by the permit applicant. In either case, EPA assumes the action will directly benefit the applicant (such as a grantee seeking STAG funding for renovation of a community drinking water system, or a permit applicant seeking an NPDES permit from EPA to further the

applicant's business interests). Nonetheless, if the applicant cannot afford to provide the required environmental information to EPA, then EPA would undertake the environmental review without input from the applicant. (Applicants would normally be requested to demonstrate financial hardship, including inability to provide the requested environmental information.) Grantees may be grant-eligible for certain costs associated with providing environmental information to EPA; permit applicants are not eligible for EPA financial assistance. Further, EPA has attempted to reduce the cost on all entities, including small entities, through the following provisions of the rule: Section 6.300 provides that an EID is not required when the action is categorically excluded, or the applicant will prepare a draft EA and supporting documents. The Responsible Official may prepare the NEPA documents without assistance from the applicant. Section 6.302 provides that the Responsible Official may prepare generic guidance for categories of actions involving a large number of applicants; and must ensure early involvement of applicants, consult with the applicant and provide guidance describing the scope and level of environmental information required, and provide guidance on a project-by-project basis to any applicant seeking assistance. This Section also provides that the Responsible Official must consider the extent to which the applicant is capable of providing the required information, must not require the applicant to gather data or perform analyses that unnecessarily duplicate either existing data or the results of existing analyses available to EPA, and must limit the request for environmental information to that necessary for the environmental review. Section 6.303 provides that an applicant may enter into a third-party agreement with EPA. For grantees, third-party agreement contractor costs may be grant-eligible. Permit applicants are not eligible for EPA financial assistance.

This final rule is applicable to certain EPA actions subject to NEPA, including certain applicant-proposed projects. Because the projects are proposed by the applicants, who are non-federal entities, including small businesses and small governments, EPA does not know what projects will be proposed, when they will be proposed, or what level of NEPA review will be required for each individual project. In this regard, EPA's NEPA review process is reactive to an applicant's request. These factors are built into this screening assessment,



including assumptions about the entities likely to be subject to the regulations, the types of projects they are likely to propose, and the degree of possible economic impact based on the NEPA review process and the three levels of environmental documentation possible under this process using available historical information as future indicators. More detailed information on the small entity screening analysis can be found in the docket for this proposed rulemaking, EPA-HQ-00OECA-2005-0062 (available at <http://www.regulations.gov>), and is summarized below.

Based on EPA's past experience, EPA anticipates that annually there will be approximately 170 small governments applying to EPA for STAG grants for projects subject to NEPA, and four small businesses applying to EPA for new source NPDES permits for a total of approximately 174 small entities out of potential 312 total entities. Of the 174 small entities possibly affected by this rule, we have determined that the economic impact of submitting one-time environmental documentation to support a CE determination would be less than 1% of annual revenues for all small entities; and that for the one-time costs associated with submitting EA-related environmental documentation six small entities (3.4%) could experience an economic impact of 1–3%, and up to four small entities (2%) could experience an economic impact of greater than 3%. Additionally, we have also determined that approximately 57 of the 174 small entities (33%) could experience an economic impact of 1–3%, and up to 26 of the 174 small entities (15%) could experience an economic impact of greater than 3% for the one-time costs associated with submitting EIS-related environmental documentation. In all, these approximately 83 small entities represent about 48% of the estimated 174 total number of small entities that could experience a one-time economic impact of 1–3% or greater of annual revenues. Of these 83 small entities, 79 are likely to be governmental grant applicants and could be grant-eligible for EPA financial assistance with only one EIS anticipated per three years with this likelihood spread over 300 total grant applicants, including small and large governments, including tribes, and special districts.

We have therefore concluded that today's final rule will relieve regulatory burden for all affected small entities.

#### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector.

EPA believes the calculation for this UMRA assessment is representative of most projects. On an annual one-time submission basis, EPA's aggregate estimate for applicants is \$3,823,740 for contractor hours and costs, direct labor hours and costs, including third-year costs for an EIS/ROD for one grantee project. The requirement in today's final rule for applicants to submit one-time, project-specific environmental information does not impose substantial compliance costs on applicants, including governmental grantees,

because it is not likely to result in the expenditure by applicants, including State and local governments, and tribes, in the aggregate, or the private sector, of \$100 million or more in any one year. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA, and EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.”

This final rule does not have federalism implications. 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. Under these NEPA regulations, as well as EPA's procedures for implementing Executive Order 12114, State and local governments are required to submit environmental information only when the State or local government is a project-applicant for an EPA action subject to NEPA, for example, when the State or local government applies for a grant for a special project identified in EPA's State and Tribal Assistance (STAG) account, or for a new source NPDES permit issued by EPA. The requirement to submit environmental information to EPA for the NEPA review does not impose substantial compliance costs because it is not likely to result in the expenditure by State and local governments in the aggregate of \$100 million or more in any one year. Further, this requirement does not preempt State law, or alter the current relationship between the States and the Federal Government. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the

proposed rule from State and local officials.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), 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." This final rule does not have tribal implications, as specified in Executive Order 13175. Neither the amendments to EPA's NEPA implementing regulations nor the minor, technical amendments to EPA's procedures implementing Executive Order 12114 impose new regulatory obligations on tribes. They will not have substantial direct effects on tribes, on the relationship between the national government and tribes, or on the distribution of power and responsibilities between the national government and tribes. Under EPA's regulations, Tribes are required to submit environmental information only when the Tribes are project-applicants for EPA actions subject to NEPA or Executive Order 12114, for example, when Tribes apply for grants for special projects identified in EPA's State and Tribal Assistance (STAG) account, or for new source NPDES permits issued by EPA. The requirement to submit environmental information to EPA for the environmental review process do not impose substantial compliance costs because it is not likely to result in the expenditure by state, local, and tribal governments in the aggregate of \$100 million or more in any one year. Further, these requirements do not preempt tribal law. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an 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, the Agency 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 interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution and 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. Further, we have concluded that this rule is not likely to have any adverse energy effects.

*I. National Technology Transfer and Advancement Act of 1995*

As noted in the proposed rule, 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 impractical. 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA maintains an ongoing commitment to ensure environmental justice for all people, regardless of race, color, national origin, or income. Ensuring environmental justice means not only protecting human health and the environment for everyone, but also ensuring that all people are treated

fairly and given the opportunity to participate meaningfully in the development, implementation, and enforcement of environmental laws, regulations, and policies. In recognizing that minority and/or low-income communities frequently may be exposed disproportionately to environmental harms and risks, EPA works to protect these and other burdened communities from adverse human health and environmental effects of its programs, consistent with existing environmental and civil rights laws, and their implementing regulations, as well as Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." (59 FR 7629 (February 16, 1994)). Executive Order 12898 establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and/or low-income populations in the United States. In developing this rule in compliance with Executive Order 12898, EPA determined that this rule did not raise any environmental justice concerns.

Today's rule, including the amended EPA NEPA implementing procedures and the minor, technical amendments to the Agency's procedures for implementing Executive Order 12114, does not impose new regulatory program, policy, or activity obligations on EPA, state or local governments, tribes, or individual applicants required to provide environmental information to EPA for certain grants or permits. Therefore, EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. However, the NEPA rule at § 6.201 requires that for specific projects, consistent with 40 CFR 1500.5(g) and 1502.25, the EPA Responsible Official must determine the applicability of executive orders, including Executive Order 12898, and should incorporate applicable requirements as early in the NEPA review process as possible. In addition, sections 6.203(a)(5) and (c)(3)(iv) require the Responsible Official to choose public participation methods and

engage in outreach designed to reach those in “potentially affected communities where the proposed action is known or expected to have environmental impacts including minority communities, low-income communities, or federally-recognized Indian tribal communities.” EPA provides guidance to Responsible Officials and EPA staff on incorporating environmental justice concerns into the NEPA analysis. See “Final Guidance For Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses,” April 1998.

#### K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective October 19, 2007.

#### List of Subjects in 40 CFR Part 6

Environmental protection, Environmental assessments, Environmental impact statements, Environmental protection reporting, Foreign relations, Grant programs—environmental protection, Reporting and recordkeeping requirements.

Dated: September 7, 2007.

**Stephen L. Johnson,**  
Administrator.

■ Therefore, for the reasons set forth in the preamble, EPA hereby amends title 40, chapter I of the Code of Federal Regulations by revising part 6 to read as follows:

### **PART 6—PROCEDURES FOR IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT AND ASSESSING THE ENVIRONMENTAL EFFECTS ABROAD OF EPA ACTIONS**

#### **Subpart A—General Provisions for EPA Actions Subject to NEPA**

Sec.

- 6.100 Policy and Purpose.
- 6.101 Applicability.
- 6.102 Definitions.

- 6.103 Responsibilities of the NEPA and Responsible Officials.

#### **Subpart B—EPA’s NEPA Environmental Review Procedures**

- 6.200 General requirements.
- 6.201 Coordination with other environmental review requirements.
- 6.202 Interagency cooperation.
- 6.203 Public participation.
- 6.204 Categorical exclusions and extraordinary circumstances.
- 6.205 Environmental assessments.
- 6.206 Findings of no significant impact.
- 6.207 Environmental impact statements.
- 6.208 Records of decision.
- 6.209 Filing requirements for EPA EISs.
- 6.210 Emergency circumstances.

#### **Subpart C—Requirements for Environmental Information Documents and Third-Party Agreements for EPA Actions Subject to NEPA**

- 6.300 Applicability.
- 6.301 Applicant requirements.
- 6.302 Responsible Official requirements.
- 6.303 Third-party agreements.

#### **Subpart D—Assessing the Environmental Effects Abroad of EPA Actions**

- 6.400 Purpose and policy.
- 6.401 Applicability.
- 6.402 Definitions.
- 6.403 Environmental review and assessment requirements.
- 6.404 Lead or cooperating agency.
- 6.405 Exemptions and considerations.
- 6.406 Implementation.

**Authority:** 42 U.S.C. 4321 *et seq.*, 7401–7671q, unless otherwise noted.

#### **Subpart A—General Provisions for EPA Actions Subject to NEPA**

##### **§ 6.100 Policy and purpose.**

(a) The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, as implemented by the Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500 through 1508), requires that Federal agencies include in their decision-making processes appropriate and careful consideration of all environmental effects of proposed actions, analyze potential environmental effects of proposed actions and their alternatives for public understanding and scrutiny, avoid or minimize adverse effects of proposed actions, and restore and enhance environmental quality to the extent practicable. The U.S. Environmental Protection Agency (EPA) shall integrate these NEPA requirements as early in the Agency planning processes as possible. The environmental review process shall be the focal point to ensure NEPA considerations are taken into account.

(b) Through this part, EPA adopts the CEQ Regulations (40 CFR Parts 1500 through 1508) implementing NEPA; subparts A through C of this part

supplement those regulations, for actions proposed by EPA that are subject to NEPA requirements. Subparts A through C supplement, and are to be used in conjunction with, the CEQ Regulations.

##### **§ 6.101 Applicability.**

(a) Subparts A through C of this part apply to the proposed actions of EPA that are subject to NEPA. EPA actions subject to NEPA include the award of wastewater treatment construction grants under Title II of the Clean Water Act, EPA’s issuance of new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act, certain research and development projects, development and issuance of regulations, EPA actions involving renovations or new construction of facilities, and certain grants awarded for projects authorized by Congress through the Agency’s annual Appropriations Act.

(b) Subparts A through C of this part do not apply to EPA actions for which NEPA review is not required. EPA actions under the Clean Water Act, except those identified in § 6.101(a), and EPA actions under the Clean Air Act are statutorily exempt from NEPA. Additionally, the courts have determined that certain EPA actions for which analyses that have been conducted under another statute are functionally equivalent with NEPA.

(c) The appropriate Responsible Official will undertake certain EPA actions required by the provisions of subparts A through C of this part.

(d) Certain procedures in subparts A through C of this part apply to the responsibilities of the NEPA Official.

(e) Certain procedures in subparts A through C of this part apply to applicants who are required to provide environmental information to EPA.

(f) When the Responsible Official decides to perform an environmental review under the *Policy for EPA’s Voluntary Preparation of National Environmental Policy Act (NEPA) Documents*, the Responsible Official generally will follow the procedures set out in subparts A through C of this part.

##### **§ 6.102 Definitions.**

(a) Subparts A through C of this part use the definitions found at 40 CFR part 1508. Additional definitions are listed in this subpart.

(b) Definitions.

(1) *Administrator* means the Administrator of the United States Environmental Protection Agency.

(2) *Applicant* means any individual, agency, or other entity that has:

(i) Filed an application for federal assistance; or

(ii) Applied to EPA for a permit.

(3) *Assistance agreement* means an award of federal assistance in the form of money or property in lieu of money from EPA to an eligible applicant including grants or cooperative agreements.

(4) *Environmental information document* (EID) means a written analysis prepared by an applicant that provides sufficient information for the Responsible Official to undertake an environmental review and prepare either an EA and FONSI or an EIS and record of decision (ROD) for the proposed action.

(5) *Environmental review or NEPA review* means the process used to comply with section 102(2) of NEPA or the CEQ Regulations including development, supplementation, adoption, and revision of NEPA documents.

(6) *Extraordinary circumstances* means those circumstances listed in section 6.204 of this part that may cause a significant environmental effect such that a proposed action that otherwise meets the requirements of a categorical exclusion may not be categorically excluded.

(7) *NEPA document* is a document prepared pursuant to NEPA.

(8) *NEPA Official* is the Assistant Administrator for Enforcement and Compliance Assurance, who is responsible for EPA's NEPA compliance.

(9) *Responsible Official* means the EPA official responsible for compliance with NEPA for individual proposed actions.

#### **§ 6.103 Responsibilities of the NEPA and Responsible Officials.**

(a) The NEPA Official will:

(1) Ensure EPA's compliance with NEPA pursuant to 40 CFR 1507.2(a) and the regulations in subparts A through C of this part.

(2) Act as EPA's liaison with the CEQ and other federal agencies, state and local governments, and federally-recognized Indian tribes on matters of policy and administrative procedures regarding compliance with NEPA.

(3) Approve procedural deviations from subparts A through C of this part.

(4) Monitor the overall timeliness and quality of EPA's compliance with subparts A through C of this part.

(5) Advise the Administrator on NEPA-related actions that involve more than one EPA office, are highly controversial, are nationally significant, or establish new EPA NEPA-related policy.

(6) Support the Administrator by providing policy guidance on NEPA-related issues.

(7) Assist EPA's Responsible Officials with establishing and maintaining adequate administrative procedures to comply with subparts A through C of this part, performing their NEPA duties, and training personnel and applicants involved in the environmental review process.

(8) Consult with Responsible Officials and CEQ regarding proposed changes to subpart A through C of this part, including:

(i) The addition, amendment, or deletion of a categorical exclusion, or

(ii) Changes to the listings of types of actions that normally require the preparation of an EA or EIS.

(9) Determine whether proposed changes are appropriate, and if so, coordinate with CEQ, pursuant to 40 CFR 1507.3, and initiate a process to amend this part.

(b) The Responsible Official will:

(1) Ensure EPA's compliance with the CEQ regulations and subparts A through C of this part for proposed actions.

(2) Ensure that environmental reviews are conducted on proposed actions at the earliest practicable point in EPA's decision-making process and in accordance with the provisions of subparts A through C of this part.

(3) Ensure, to the extent practicable, early and continued involvement of interested federal agencies, state and local governments, federally-recognized Indian tribes, and affected applicants in the environmental review process.

(4) Coordinate with the NEPA Official and other Responsible Officials, as appropriate, on resolving issues involving EPA-wide NEPA policy and procedures (including the addition, amendment, or deletion of a categorical exclusion and changes to the listings of the types of actions that normally requires the preparation of an EA or EIS) and/or unresolved conflicts with other federal agencies, state and local governments, and federally-recognized Indian tribes, and/or advising the Administrator when necessary.

(5) Coordinate with other Responsible Officials, as appropriate, on NEPA-related actions involving their specific interests.

(6) Consistent with national NEPA guidance, provide specific policy guidance, as appropriate, and ensure that the Responsible Official's office establishes and maintains adequate administrative procedures to comply with subparts A through C of this part.

(7) Upon request of an applicant and consistent with 40 CFR 1501.8, set time

limits on the NEPA review appropriate to individual proposed actions.

(8) Make decisions relating to the preparation of the appropriate NEPA documents, including preparing an EA or EIS, and signing the decision document.

(9) Monitor the overall timeliness and quality of the Responsible Official's respective office's efforts to comply with subparts A through C of this part.

(c) The NEPA Official and the Responsible Officials may delegate NEPA-related responsibilities to a level no lower than the Branch Chief or equivalent organizational level.

#### **Subpart B—EPA's NEPA Environmental Review Procedures**

##### **§ 6.200 General requirements.**

(a) The Responsible Official must determine whether the proposed action meets the criteria for categorical exclusion or whether it requires preparation of an EA or an EIS to identify and evaluate its environmental impacts. The Responsible Official may decide to prepare an EIS without first undertaking an EA.

(b) The Responsible Official must determine the scope of the environmental review by considering the type of proposed action, the reasonable alternatives, and the type of environmental impacts. The scope of an EIS will be determined as provided in 40 CFR 1508.25.

(c) During the environmental review process, the Responsible Official must:

(1) Integrate the NEPA process and the procedures of subparts A through C of this part into early planning to ensure appropriate consideration of NEPA's policies and to minimize or eliminate delay;

(2) Emphasize cooperative consultation among federal agencies, state and local governments, and federally-recognized Indian tribes before an EA or EIS is prepared to help ensure compliance with the procedural provisions of subparts A through C of this part and with other environmental review requirements, to address the need for interagency cooperation, to identify the requirements for other agencies' reviews, and to ensure appropriate public participation.

(3) Identify at an early stage any potentially significant environmental issues to be evaluated in detail and insignificant issues to be de-emphasized, focusing the scope of the environmental review accordingly;

(4) Involve other agencies and the public, as appropriate, in the environmental review process for

proposed actions that are not categorically excluded to:

(i) Identify the federal, state, local, and federally-recognized Indian tribal entities and the members of the public that may have an interest in the action;

(ii) Request that appropriate federal, state, and local agencies and federally-recognized Indian tribes serve as cooperating agencies consistent with 40 CFR 1501.6 and 1508.5; and

(iii) Integrate, where possible, review of applicable federal laws and executive orders into the environmental review process in conjunction with the development of NEPA documents.

(d) When preparing NEPA documents, the Responsible Official must:

(1) Utilize a systematic, interdisciplinary approach to integrate the natural and social sciences with the environmental design arts in planning and making decisions on proposed actions subject to environmental review under subparts A through C of this part (see 40 CFR 1501.2(a) and 1507.2);

(2) Plan adequate time and funding for the NEPA review and preparation of the NEPA documents. Planning includes consideration of whether an applicant will be required to prepare an EID for the proposed action.

(3) Review relevant planning or decision-making documents, whether prepared by EPA or another federal agency, to determine if the proposed action or any of its alternatives have been considered in a prior federal NEPA document. EPA may adopt the existing document, or will incorporate by reference any pertinent part of it, consistent with 40 CFR 1506.3 and 1502.21.

(4) Review relevant environmental review documents prepared by a state or local government or a federally-recognized Indian tribe to determine if the proposed action or any of its alternatives have been considered in such a document. EPA will incorporate by reference any pertinent part of that document consistent with 40 CFR 1502.21.

(e) During the decision-making process for the proposed action, the Responsible Official must:

(1) Incorporate the NEPA review in decision-making on the action. Processing and review of an applicant's application must proceed concurrently with the NEPA review procedures set out in subparts A through C of this part. EPA must complete its NEPA review before making a decision on the action.

(2) Consider the relevant NEPA documents, public and other agency comments (if any) on those documents, and EPA responses to those comments,

as part of consideration of the action (see 40 CFR 1505.1(d)).

(3) Consider the alternatives analyzed in an EA or EIS before rendering a decision on the action; and

(4) Ensure that the decision on the action is to implement an alternative analyzed or is within the range of alternatives analyzed in the EA or EIS (see 40 CFR 1505.1(e)).

(f) To eliminate duplication and to foster efficiency, the Responsible Official should use tiering (see 40 CFR 1502.20 and 1508.28) and incorporate material by reference (see 40 CFR 1502.21) as appropriate.

(g) For applicant-related proposed actions:

(1) The Responsible Official may request that the applicant submit information to support the application of a categorical exclusion to the applicant's pending action.

(2) The Responsible Official may gather the information and prepare the NEPA document without assistance from the applicant, or, pursuant to Subpart C of this part, have the applicant prepare an EID or a draft EA and supporting documents, or enter into a third-party agreement with the applicant.

(3) During the environmental review process, applicants may continue to compile additional information needed for the environmental review and/or information necessary to support an application for a permit or assistance agreement from EPA.

(h) For all NEPA determinations (CEs, EA/FONSI, or EIS/RODs) that are five years old or older, and for which the subject action has not yet been implemented, the Responsible Official must re-evaluate the proposed action, environmental conditions, and public views to determine whether to conduct a supplemental environmental review of the action and complete an appropriate NEPA document or reaffirm EPA's original NEPA determination. If there has been substantial change in the proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, the Responsible Official must conduct a supplemental environmental review of the action and complete an appropriate NEPA document.

#### **§ 6.201 Coordination with other environmental review requirements.**

Consistent with 40 CFR 1500.5(g) and 1502.25, the Responsible Official must determine the applicability of other environmental laws and executive

orders, to the fullest extent possible. The Responsible Official should incorporate applicable requirements as early in the NEPA review process as possible.

#### **§ 6.202 Interagency cooperation.**

(a) Consistent with 40 CFR 1501.5, 1501.6, and 1508.5, the Responsible Official will request other appropriate federal and non-federal agencies to be joint lead or cooperating agencies as a means of encouraging early coordination and cooperation with federal agencies, state and local governments, and federally-recognized Indian tribes with jurisdiction by law or special expertise.

(b) For an EPA action related to an action of any other federal agency, the Responsible Official must comply with the requirements of 40 CFR 1501.5 and 1501.6 relating to lead agencies and cooperating agencies, respectively. The Responsible Official will work with the other involved agencies to facilitate coordination and to reduce delay and duplication.

(c) To prepare a single document to fulfill both NEPA and state or local government, or federally-recognized Indian tribe requirements, consistent with 40 CFR 1506.2, the Responsible Official should enter into a written agreement with the involved state or local government, or federally-recognized Indian tribe that sets out the intentions of the parties, including the responsibilities each party intends to assume and procedures the parties intend to follow.

#### **§ 6.203 Public participation.**

(a) *General requirements.* (1) The procedures in this section apply to EPA's environmental review processes, including development, supplementation, adoption, and revision of NEPA documents.

(2) The Responsible Official will make diligent efforts to involve the public, including applicants, in the preparation of EAs or EISs consistent with 40 CFR 1501.4 and 1506.6 and applicable EPA public participation regulations (e.g., 40 CFR Part 25).

(3) EPA NEPA documents will use plain language to the extent possible.

(4) The Responsible Official will, to the greatest extent possible, give notice to any state or local government, or federally-recognized Indian tribe that, in the Official's judgment, may be affected by an action for which EPA plans to prepare an EA or an EIS.

(5) The Responsible Official must use appropriate communication procedures to ensure meaningful public participation throughout the NEPA

process. The Responsible Official must make reasonable efforts to involve the potentially affected communities where the proposed action is expected to have environmental impacts or where the proposed action may have human health or environmental effects in any communities, including minority communities, low-income communities, or federally-recognized Indian tribal communities.

(b) *EA and FONSI requirements.* (1) At least thirty (30) calendar days before making the decision on whether, and if so how, to proceed with a proposed action, the Responsible Official must make the EA and preliminary FONSI available for review and comment to the interested federal agencies, state and local governments, federally-recognized Indian tribes and the affected public. The Responsible Official must respond to any substantive comments received and finalize the EA and FONSI before making a decision on the proposed action.

(2) Where circumstances make it necessary to take the action without observing the 30 calendar day comment period, the Responsible Official must notify the NEPA Official before taking such action. If the NEPA Official determines that a reduced comment period would be in the best interest of the Government, the NEPA Official will inform the Responsible Official, as soon as possible, of this approval. The Responsible Official will make the EA and preliminary FONSI available for review and comment for the reduced comment period.

(c) *EIS and ROD requirements.* (1) As soon as practicable after the decision to prepare an EIS and before beginning the scoping process, the Responsible Official must ensure that a notice of intent (NOI) (see 40 CFR 1508.22) is published in the **Federal Register**. The NOI must briefly describe the proposed action; a preliminary list of environmental issues to be analyzed, and possible alternatives; EPA's proposed scoping process including, if available, whether, when, and where any scoping meeting will be held; and the name and contact information for the person designated by EPA to answer questions about the proposed action and the EIS. The NOI must invite comments and suggestions on the scope of the EIS.

(2) The Responsible Official must disseminate the NOI consistent with 40 CFR 1506.6.

(3) The Responsible Official must conduct the scoping process consistent with 40 CFR 1501.7 and any applicable EPA public participation regulations (e.g., 40 CFR Part 25).

(i) Publication of the NOI in the **Federal Register** begins the scoping process.

(ii) The Responsible Official must ensure that the scoping process for an EIS allows a minimum of thirty (30) days for the receipt of public comments.

(iii) The Responsible Official may hold one or more public meetings as part of the scoping process for an EPA EIS. The Responsible Official must announce the location, date, and time of public scoping meetings in the NOI or by other appropriate means, such as additional notices in the **Federal Register**, news releases to the local media, or letters to affected parties. Public scoping meetings should be held at least fifteen (15) days after public notification.

(iv) The Responsible Official must use appropriate means to publicize the availability of draft and final EISs and the time and place for public meetings or hearings on draft EISs. The methods chosen for public participation must focus on reaching persons who may be interested in the proposed action. Such persons include those in potentially affected communities where the proposed action is known or expected to have environmental impacts including minority communities, low-income communities, or federally-recognized Indian tribal communities.

(v) The Responsible Official must circulate the draft and final EISs consistent with 40 CFR 1502.19 and any applicable EPA public participation regulations and in accordance with the 45-day public review period for draft EISs and the 30-day public review period for final EISs (see § 6.209 of this part). Consistent with section 6.209(b) of this part, the Responsible Official may establish a longer public comment period for a draft or final EIS.

(vi) After preparing a draft EIS and before preparing a final EIS, the Responsible Official must solicit the comments of appropriate federal agencies, state and/or local governments, and/or federally-recognized Indian tribes, and the public (see 40 CFR 1503.1). The Responsible Official must respond in the final EIS to substantive comments received (see 40 CFR 1503.4).

(vii) The Responsible Official may conduct one or more public meetings or hearings on the draft EIS as part of the public involvement process. If meetings or hearings are held, the Responsible Official must make the draft EIS available to the public at least thirty (30) days in advance of any meeting or hearing.

(4) The Responsible Official must make the ROD available to the public upon request.

#### **§ 6.204 Categorical exclusions and extraordinary circumstances.**

(a) A proposed action may be categorically excluded if the action fits within a category of action that is eligible for exclusion and the proposed action does not involve any extraordinary circumstances.

(1) Certain actions eligible for categorical exclusion require the Responsible Official to document a determination that a categorical exclusion applies. The documentation must include: A brief description of the proposed action; a statement identifying the categorical exclusion that applies to the action; and a statement explaining why no extraordinary circumstances apply to the proposed action. The Responsible Official must make a copy of the determination document available to the public upon request. The categorical exclusions requiring this documentation are listed in paragraphs (a)(1)(i) through (a)(1)(v) of this section.

(i) Actions at EPA owned or operated facilities involving routine facility maintenance, repair, and grounds-keeping; minor rehabilitation, restoration, renovation, or revitalization of existing facilities; functional replacement of equipment; acquisition and installation of equipment; or construction of new minor ancillary facilities adjacent to or on the same property as existing facilities.

(ii) Actions relating to existing infrastructure systems (such as sewer systems; drinking water supply systems; and stormwater systems, including combined sewer overflow systems) that involve minor upgrading, or minor expansion of system capacity or rehabilitation (including functional replacement) of the existing system and system components (such as the sewer collection network and treatment system; the system to collect, treat, store and distribute drinking water; and stormwater systems, including combined sewer overflow systems) or construction of new minor ancillary facilities adjacent to or on the same property as existing facilities. This category does not include actions that: involve new or relocated discharges to surface or ground water; will likely result in the substantial increase in the volume or the loading of pollutant to the receiving water; will provide capacity to serve a population 30% greater than the existing population; are not supported by the state, or other regional growth plan or strategy; or directly or indirectly involve or relate to upgrading or

extending infrastructure systems primarily for the purposes of future development.

(iii) Actions in unsewered communities involving the replacement of existing onsite systems, providing the new onsite systems do not result in substantial increases in the volume of discharge or the loadings of pollutants from existing sources, or relocate existing discharge.

(iv) Actions involving re-issuance of a NPDES permit for a new source providing the conclusions of the original NEPA document are still valid (including the appropriate mitigation), there will be no degradation of the receiving waters, and the permit conditions do not change or are more environmentally protective.

(v) Actions for award of grants authorized by Congress under EPA's annual Appropriations Act that are solely for reimbursement of the costs of a project that was completed prior to the date the appropriation was enacted.

(2) Certain actions eligible for categorical exclusion do not require the Responsible Official to document a determination that a categorical exclusion applies. These categorical exclusions are listed in paragraphs (a)(2)(i) through (a)(2)(x) of this section.

(i) Procedural, ministerial, administrative, financial, personnel, and management actions necessary to support the normal conduct of EPA business.

(ii) Acquisition actions (compliant with applicable procedures for sustainable or "green" procurement) and contracting actions necessary to support the normal conduct of EPA business.

(iii) Actions involving information collection, dissemination, or exchange; planning; monitoring and sample collection wherein no significant alteration of existing ambient conditions occurs; educational and training programs; literature searches and studies; computer studies and activities; research and analytical activities; development of compliance assistance tools; and architectural and engineering studies. These actions include those conducted directly by EPA and EPA actions relating to contracts or assistance agreements involving such actions.

(iv) Actions relating to or conducted completely within a permanent, existing contained facility, such as a laboratory, or other enclosed building, provided that reliable and scientifically-sound methods are used to appropriately dispose of wastes and safeguards exist to prevent hazardous, toxic, and radioactive materials in excess of

allowable limits from entering the environment. Where such activities are conducted at laboratories, the Lab Director or other appropriate official must certify in writing that the laboratory follows good laboratory practices and adheres to all applicable federal, state, local, and federally-recognized Indian tribal laws and regulations. This category does not include activities related to construction and/or demolition within the facility (see paragraph (a)(1)(i) of this section).

(v) Actions involving emergency preparedness planning and training activities.

(vi) Actions involving the acquisition, transfer, lease, disposition, or closure of existing permanent structures, land, equipment, materials, or personal property provided that the property: has been used solely for office functions; has never been used for laboratory purposes by any party; does not require site remediation; and will be used in essentially the same manner such that the type and magnitude of the impacts will not change substantially. This category does not include activities related to construction and/or demolition of structures on the property (see paragraph (a)(1)(i) of this section).

(vii) Actions involving providing technical advice to federal agencies, state or local governments, federally-recognized Indian tribes, foreign governments, or public or private entities.

(viii) Actions involving approval of EPA participation in international "umbrella" agreements for cooperation in environmental-related activities that would not commit the United States to any specific projects or actions.

(ix) Actions involving containment or removal and disposal of asbestos-containing material or lead-based paint from EPA owned or operated facilities when undertaken in accordance with applicable regulations.

(x) Actions involving new source NPDES permit modifications that make only technical corrections to the NPDES permit (such as correcting typographical errors) that do not result in a change in environmental impacts or conditions.

(b) The Responsible Official must review actions eligible for categorical exclusion to determine whether any extraordinary circumstances are involved. Extraordinary circumstances are listed in paragraphs (b)(1) through (b)(10) of this section. (See 40 CFR 1508.4.)

(1) The proposed action is known or expected to have potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time.

(2) The proposed action is known or expected to have disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian tribal communities.

(3) The proposed action is known or expected to significantly affect federally listed threatened or endangered species or their critical habitat.

(4) The proposed action is known or expected to significantly affect national natural landmarks or any property with nationally significant historic, architectural, prehistoric, archeological, or cultural value, including but not limited to, property listed on or eligible for the National Register of Historic Places.

(5) The proposed action is known or expected to significantly affect environmentally important natural resource areas such as wetlands, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat.

(6) The proposed action is known or expected to cause significant adverse air quality effects.

(7) The proposed action is known or expected to have a significant effect on the pattern and type of land use (industrial, commercial, agricultural, recreational, residential) or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans.

(8) The proposed action is known or expected to cause significant public controversy about a potential environmental impact of the proposed action.

(9) The proposed action is known or expected to be associated with providing financial assistance to a federal agency through an interagency agreement for a project that is known or expected to have potentially significant environmental impacts.

(10) The proposed action is known or expected to conflict with federal, state or local government, or federally-recognized Indian tribe environmental, resource-protection, or land-use laws or regulations.

(c) The Responsible Official may request that an applicant submit sufficient information to enable the Responsible Official to determine whether a categorical exclusion applies to the applicant's proposed action or

whether an exceptional circumstance applies. Pursuant to Subpart C of this part, applicants are not required to prepare EIDs for actions that are being considered for categorical exclusion.

(d) The Responsible Official must prepare an EA or EIS when a proposed action involves extraordinary circumstances.

(e) After a determination has been made that a categorical exclusion applies to an action, if new information or changes in the proposed action involve or relate to at least one of the extraordinary circumstances or otherwise indicate that the action may not meet the criteria for categorical exclusion and the Responsible Official determines that an action no longer qualifies for a categorical exclusion, the Responsible Official will prepare an EA or EIS.

(f) The Responsible Official, or other interested parties, may request the addition, amendment, or deletion of a categorical exclusion.

(1) Such requests must be made in writing, be directed to the NEPA Official, and contain adequate information to support and justify the request.

(2) Proposed new categories of actions for exclusion must meet these criteria:

(i) Actions covered by the proposed categorical exclusion generally do not individually or cumulatively have a significant effect on the human environment and have been found by EPA to have no such effect.

(ii) Actions covered by the proposed categorical exclusion generally do not involve extraordinary circumstances as set out in paragraphs (b)(1) through (b)(14) of this section and generally do not require preparation of an EIS; and

(iii) Information adequate to determine that a proposed action is properly covered by the proposed category will generally be available.

(3) The NEPA Official must determine that the addition, amendment, or deletion of a categorical exclusion is appropriate.

(g) Any addition, amendment, or deletion of a categorical exclusion will be done by rule-making and in coordination with CEQ pursuant to 40 CFR 1507.3 to amend paragraph (a)(1) or paragraph (a)(2) of this section.

#### § 6.205 Environmental assessments.

(a) The Responsible Official must prepare an environmental assessment (EA) (see 40 CFR 1508.9) for a proposed action that is expected to result in environmental impacts and the significance of the impacts is not known. An EA is not required if the proposed action is categorically

excluded, or if the Responsible Official has decided to prepare an EIS. (See 40 CFR 1501.3.)

(b) Types of actions that normally require the preparation of an EA include:

(1) The award of wastewater treatment construction grants under Title II of the Clean Water Act;

(2) EPA's issuance of new source NPDES permits under section 402 of the Clean Water Act;

(3) EPA actions involving renovations or new construction of facilities;

(4) Certain grants awarded for special projects authorized by Congress through the Agency's annual Appropriations Act; and

(5) Research and development projects, such as initial field demonstration of a new technology, field trials of a new product or new uses of an existing technology, alteration of a local habitat by physical or chemical means, or actions that may result in the release of radioactive, hazardous, or toxic substances, or biota.

(c) The Responsible Official, or other interested parties, may request changes to the list of actions that normally require the preparation of an EA (i.e., the addition, amendment, or deletion of a type of action).

(d) Consistent with 40 CFR 1508.9, an EA must provide sufficient information and analysis for determining whether to prepare an EIS or to issue a FONSI (see 40 CFR 1508.9(a)), and may include analyses needed for other environmental determinations. The EA must focus on resources that might be impacted and any environmental issues that are of public concern.

(e) An EA must include:

(1) A brief discussion of:

(i) The need for the proposed action;

(ii) The alternatives, including the no action alternative (which must be assessed even when the proposed action is specifically required by legislation or a court order);

(iii) The affected environment, including baseline conditions that may be impacted by the proposed action and alternatives;

(iv) The environmental impacts of the proposed action and alternatives, including any unresolved conflicts concerning alternative uses of available resources; and

(v) Other applicable environmental laws and executive orders.

(2) A listing or summary of any coordination or consultation undertaken with any federal agency, state or local government, or federally-recognized Indian tribe regarding compliance with applicable laws and executive orders;

(3) Identification and description of any mitigation measures considered,

including any mitigation measures that must be adopted to ensure the action will not have significant impacts; and

(4) Incorporation of documents by reference, if appropriate, including, when available, the EID for the action.

#### § 6.206 Findings of no significant impact.

(a) The Responsible Official may issue a finding of no significant impact (FONSI) (see 40 CFR 1508.13) only if the EA supports the finding that the proposed action will not have a significant effect on the human environment. If the EA does not support a FONSI, the Responsible Official must prepare an EIS and issue a ROD before taking action on the proposed action.

(b) Consistent with 40 CFR 1508.13, a FONSI must include:

(1) The EA, or in lieu of the EA, a summary of the supporting EA that includes a brief description of the proposed action and alternatives considered in the EA, environmental factors considered, and project impacts; and

(2) A brief description of the reasons why there are no significant impacts.

(c) In addition, the FONSI must include:

(1) Any commitments to mitigation that are essential to render the impacts of the proposed action not significant;

(2) The date of issuance; and

(3) The signature of the Responsible Official.

(d) The Responsible Official must ensure that an applicant that has committed to mitigation possesses the authority and ability to fulfill the commitments.

(e) The Responsible Official must make a preliminary FONSI available to the public in accordance with section 6.203(b) of this part before taking action.

(f) The Responsible Official may proceed with the action subject to any mitigation measures described in the FONSI after responding to any substantive comments received on the preliminary FONSI during the 30-day comment period, or 30 days after issuance of the FONSI if no substantive comments are received.

(g) The Responsible Official must ensure that the mitigation measures necessary to the FONSI determination, at a minimum, are enforceable, and conduct appropriate monitoring of the mitigation measures.

(h) The Responsible Official may revise a FONSI at any time provided the revision is supported by an EA. A revised FONSI is subject to all provisions of paragraph (d) of this section.



**§ 6.207 Environmental impact statements.**

(a) The Responsible Official will prepare an environmental impact statement (EIS) (see 40 CFR 1508.11) for major federal actions significantly affecting the quality of the human environment, including actions for which the EA analysis demonstrates that significant impacts will occur that will not be reduced or eliminated by changes to or mitigation of the proposed action.

(1) EISs are normally prepared for the following actions:

(i) New regional wastewater treatment facilities or water supply systems for a community with a population greater than 100,000.

(ii) Expansions of existing wastewater treatment facilities that will increase existing discharge to an impaired water by greater than 10 million gallons per day (mgd).

(iii) Issuance of new source NPDES permit for a new major industrial discharge.

(iv) Issuance of a new source NPDES permit for a new oil/gas development and production operation on the outer continental shelf.

(v) Issuance of a new source NPDES permit for a deepwater port with a projected discharge in excess of 10 mgd.

(2) The Responsible Official, or other interested party, may request changes to the list of actions that normally require the preparation of an EIS (i.e., the addition, amendment, or deletion of a type of action).

(3) A proposed action normally requires an EIS if it meets any of the following criteria. (See 40 CFR 1507.3(b)(2)).

(i) The proposed action would result in a discharge of treated effluent from a new or modified existing facility into a body of water and the discharge is likely to have a significant effect on the quality of the receiving waters.

(ii) The proposed action is likely to directly, or through induced development, have significant adverse effect upon local ambient air quality or local ambient noise levels.

(iii) The proposed action is likely to have significant adverse effects on surface water reservoirs or navigation projects.

(iv) The proposed action would be inconsistent with state or local government, or federally-recognized Indian tribe approved land use plans or regulations, or federal land management plans.

(v) The proposed action would be inconsistent with state or local government, or federally-recognized Indian tribe environmental, resource-protection, or land-use laws and

regulations for protection of the environment.

(vi) The proposed action is likely to significantly affect the environment through the release of radioactive, hazardous or toxic substances, or biota.

(vii) The proposed action involves uncertain environmental effects or highly unique environmental risks that are likely to be significant.

(viii) The proposed action is likely to significantly affect national natural landmarks or any property on or eligible for the National Register of Historic Places.

(ix) The proposed action is likely to significantly affect environmentally important natural resources such as wetlands, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat.

(x) The proposed action in conjunction with related federal, state or local government, or federally-recognized Indian tribe projects is likely to produce significant cumulative impacts.

(xi) The proposed action is likely to significantly affect the pattern and type of land use (industrial, commercial, recreational, residential) or growth and distribution of population including altering the character of existing residential areas.

(4) An EIS must be prepared consistent with 40 CFR Part 1502.

(b) When appropriate, the Responsible Official will prepare a legislative EIS consistent with 40 CFR 1506.8.

(c) In preparing an EIS, the Responsible Official must determine if an applicant, other federal agencies or state or local governments, or federally-recognized Indian tribes are involved with the project and apply the applicable provisions of § 6.202 and Subpart C of this part.

(d) An EIS must:

(1) Comply with all requirements at 40 CFR parts 1500 through 1508.

(2) Analyze all reasonable alternatives and the no action alternative (which may be the same as denying the action). Assess the no action alternative even when the proposed action is specifically required by legislation or a court order.

(3) Describe the potentially affected environment including, as appropriate, the size and location of new and existing facilities, land requirements, operation and maintenance requirements, auxiliary structures such as pipelines or transmission lines, and construction schedules.

(4) Summarize any coordination or consultation undertaken with any federal agency, state and/or local government, and/or federally-

recognized Indian tribe, including copies or summaries of relevant correspondence.

(5) Summarize any public meetings held during the scoping process including the date, time, place, and purpose of the meetings. The final EIS must summarize the public participation process including the date, time, place, and purpose of meetings or hearings held after publication of the draft EIS.

(6) Consider substantive comments received during the public participation process. The draft EIS must consider the substantive comments received during the scoping process. The final EIS must include or summarize all substantive comments received on the draft EIS, respond to any substantive comments on the draft EIS, and explain any changes to the draft EIS and the reason for the changes.

(7) Include the names and qualifications of the persons primarily responsible for preparing the EIS including an EIS prepared under a third-party contract (if applicable), significant background papers, and the EID (if applicable).

(e) The Responsible Official must prepare a supplemental EIS when appropriate, consistent with 40 CFR 1502.9.

**§ 6.208 Records of decision.**

(a) The Responsible Official may not make any decisions on the action until the time periods in 40 CFR 1506.10 have been met.

(b) A record of decision (ROD) records EPA's decision on the action. Consistent with 40 CFR 1505.2, a ROD must include:

(1) A brief description of the proposed action and alternatives considered in the EIS, environmental factors considered, and project impacts;

(2) Any commitments to mitigation; and

(3) An explanation if the environmentally preferred alternative was not selected.

(c) In addition, the ROD must include:

(1) Responses to any substantive comments on the final EIS;

(2) The date of issuance; and

(3) The signature of the Responsible Official.

(d) The Responsible Official must ensure that an applicant that has committed to mitigation possesses the authority and ability to fulfill the commitment.

(e) The Responsible Official must make a ROD available to the public.

(f) Upon issuance of the ROD, the Responsible Official may proceed with the action subject to any mitigation

measures described in the ROD. The Responsible Official must ensure adequate monitoring of mitigation measures identified in the ROD.

(g) If the mitigation identified in the ROD will be included as a condition in the permit or grant, the Responsible Official must ensure that EPA has the authority to impose the conditions. The Responsible Official should ensure that compliance with assistance agreement or permit conditions will be monitored and enforced under EPA's assistance agreement and permit authorities.

(h) The Responsible Official may revise a ROD at any time provided the revision is supported by an EIS. A revised ROD is subject to all provisions of paragraph (d) of this section.

#### **§ 6.209 Filing requirements for EPA EISs.**

(a) The Responsible Official must file an EIS with the NEPA Official no earlier than the date the document is transmitted to commenting agencies and made available to the public. The Responsible Official must comply with any guidelines established by the NEPA Official for the filing system process and comply with 40 CFR 1506.9 and 1506.10. The review periods are computed through the filing system process and published in the **Federal Register** in the Notice of Availability.

(b) The Responsible Official may request that the NEPA Official extend the review periods for an EIS. The NEPA Official will publish notice of an extension of the review period in the **Federal Register** and notify the CEQ.

#### **§ 6.210 Emergency circumstances.**

If emergency circumstances make it necessary to take an action that has a significant environmental impact without observing the provisions of subparts A through C of this part that are required by the CEQ Regulations, the Responsible Official must consult with the NEPA Official at the earliest possible time. Consistent with 40 CFR 1506.11, the Responsible Official and the NEPA Official should consult with CEQ about alternative arrangements at the earliest opportunity. Actions taken without observing the provisions of subparts A through C of this part will be limited to actions necessary to control the immediate impacts of the emergency; other actions remain subject to the environmental review process.

### **Subpart C—Requirements for Environmental Information Documents and Third-Party Agreements for EPA Actions Subject to NEPA**

#### **§ 6.300 Applicability.**

(a) This section applies to actions that involve applications to EPA for permits or assistance agreements.

(b) The Responsible Official is responsible for the environmental review process on EPA's action (that is, issuing the permit or awarding the assistance agreement) with the applicant contributing through submission of an EID or a draft EA and supporting documents.

(c) An applicant is not required to prepare an EID when:

(1) The action has been categorically excluded or requires the preparation of an EIS; or

(2) The applicant will prepare and submit a draft EA and supporting documents.

(d) The Responsible Official must notify the applicant if EPA will not require submission of an EID.

#### **§ 6.301 Applicant requirements.**

(a) The applicant must prepare an EID in consultation with the Responsible Official, unless the Responsible Official has notified the applicant that an EID is not required. The EID must be of sufficient scope and content to enable the Responsible Official to prepare an EA and FONSI or, if necessary, an EIS and ROD. The applicant must submit the EID to the Responsible Official.

(b) The applicant must consult with the Responsible Official as early as possible in the planning process to obtain guidance with respect to the appropriate level and scope of environmental information required for the EID.

(c) As part of the EID process, the applicant may consult with appropriate federal agencies, state and local governments, federally-recognized Indian tribes, and other potentially affected parties to identify their interests in the project and the environmental issues associated with the project.

(d) The applicant must notify the Responsible Official as early as possible of other federal agency, state or local government, or federally-recognized Indian tribe requirements related to the project. The applicant also must notify the Responsible Official of any private entities and organizations affected by the proposed project. (See 40 CFR 1501.2(d)(2).)

(e) The applicant must notify the Responsible Official if, during EPA's environmental review process, the applicant:

(1) Changes its plans for the project as originally submitted to EPA; and/or

(2) Changes its schedule for the project from that originally submitted to EPA.

(f) In accordance with § 6.204, where appropriate, the applicant may request a categorical exclusion determination by the Responsible Official. If requested by the Responsible Official, the applicant must submit information to the Responsible Official regarding the application of a categorical exclusion to EPA's pending action and the applicant's project.

#### **§ 6.302 Responsible Official requirements.**

(a) Consistent with 40 CFR 1501.2(d), the Responsible Official must ensure early involvement of applicants in the environmental review process to identify environmental effects, avoid delays, and resolve conflicts.

(b) The Responsible Official must notify the applicant if a determination has been made that the action has been categorically excluded, or if EPA needs additional information to support the application of a categorical exclusion or if the submitted information does not support the application of a categorical exclusion and that an EA, or an EIS, will be required.

(c) When an EID is required for a project, the Responsible Official must consult with the applicant and provide the applicant with guidance describing the scope and level of environmental information required.

(1) The Responsible Official must provide guidance on a project-by-project basis to any applicant seeking such assistance. For major categories of actions involving a large number of applicants, the Responsible Official may prepare and make available generic guidance describing the recommended level and scope of environmental information that applicants should provide.

(2) The Responsible Official must consider the extent to which the applicant is capable of providing the required information. The Responsible Official may not require the applicant to gather data or perform analyses that unnecessarily duplicate either existing data or the results of existing analyses available to EPA. The Responsible Official must limit the request for environmental information to that necessary for the environmental review.

(d) If, prior to completion of the environmental review for a project, the Responsible Official receives notification, that the applicant is proposing to or taking an action that would result in significant impacts or would limit alternatives, the

Responsible Official must notify the applicant promptly that EPA will take appropriate action to ensure that the objectives and procedures of NEPA are achieved (see 40 CFR 1506.1(b)). Such actions may include withholding grant funds or denial of permits.

(e) The Responsible Official must begin the NEPA review as soon as possible after receiving the applicant's EID or draft EA. The Responsible Official must independently evaluate the information submitted and be responsible for its accuracy (see 40 CFR 1506.5).

(f) At the request of an applicant and at the discretion of the Responsible Official, an applicant may prepare an EA or EIS and supporting documents or enter into a third-party contract pursuant to § 6.303.

(g) The Responsible Official must review, and take responsibility for the completed NEPA documents, before rendering a final decision on the proposed action.

#### § 6.303 Third-party agreements.

(a) If an EA or EIS is to be prepared for an action subject to subparts A through C of this part, the Responsible Official and the applicant may enter into an agreement whereby the applicant engages and pays for the services of a third-party contractor to prepare an EA or EIS and any associated documents for consideration by EPA. In such cases, the Responsible Official must approve the qualifications of the third-party contractor. The third-party contractor must be selected on the basis of ability and absence of any conflict of interest. Consistent with 40 CFR 1506.5(c), in consultation with the applicant, the Responsible Official shall select the contractor. The Responsible Official must provide guidance to the applicant and contractor regarding the information to be developed, including the project's scope, and guide and participate in the collection, analysis, and presentation of the information. The Responsible Official has sole authority for final approval of and EA or EIS.

(1) The applicant must engage and pay for the services of a contractor to prepare the EA or EIS and any associated documents without using EPA financial assistance (including required match).

(2) The Responsible Official, in consultation with the applicant, must ensure that the contractor is qualified to prepare an EA or EIS, and that the substantive terms of the contract specify the information to be developed, and the procedures for gathering, analyzing and presenting the information.

(3) The Responsible Official must prepare a disclosure statement for the applicant to include in the contract specifying that the contractor has no financial or other interest in the outcome of the project (see 40 CFR 1506.5(c)).

(4) The Responsible Official will ensure that the EA or EIS and any associated documents contain analyses and conclusions that adequately assess the relevant environmental issues.

(b) In order to make a decision on the action, the Responsible Official must independently evaluate the information submitted in the EA or EIS and any associated documents, and issue an EA or draft and final EIS. After review of, and appropriate changes to, the EA or EIS submitted by the applicant, the Responsible Official may accept it as EPA's document. The Responsible Official is responsible for the scope, accuracy, and contents of the EA or EIS and any associated documents (see 40 CFR 1506.5).

(c) A third-party agreement may not be initiated unless both the applicant and the Responsible Official agree to its creation and terms.

(d) The terms of the contract between the applicant and the third-party contractor must ensure that the contractor does not have recourse to EPA for financial or other claims arising under the contract, and that the Responsible Official, or other EPA designee, may give technical advice to the contractor.

#### Subpart D—Assessing the Environmental Effects Abroad of EPA Actions

**Authority:** 42 U.S.C. 4321, note, E.O. 12114, 44 FR 1979, 3 CFR, 1979 Comp., p. 356.

#### § 6.400 Purpose and policy.

(a) *Purpose.* On January 4, 1979, the President signed Executive Order 12114 entitled "Environmental Effects Abroad of Major Federal Actions." The purpose of this Executive Order is to enable responsible Federal officials in carrying out or approving major Federal actions which affect foreign nations or the global commons to be informed of pertinent environmental considerations and to consider fully the environmental impacts of the actions undertaken. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and the Marine Protection, Research, and Sanctuaries Act (MPRSA) (33 U.S.C. 1401 *et seq.*). It should be noted, however, that in fulfilling its

responsibilities under Executive Order 12114, EPA shall be guided by CEQ regulations only to the extent that they are made expressly applicable by this subpart. The procedures set forth below reflect EPA's duties and responsibilities as required under the Executive Order and satisfy the requirement for issuance of procedures under section 2-1 of the Executive Order.

(b) *Policy.* It shall be the policy of this Agency to carry out the purpose and requirements of the Executive Order to the fullest extent possible. EPA, within the realm of its expertise, shall work with the Department of State and the Council on Environmental Quality to provide information to other Federal agencies and foreign nations to heighten awareness of and interest in the environment. EPA shall further cooperate to the extent possible with Federal agencies to lend special expertise and assistance in the preparation of required environmental documents under the Executive Order. EPA shall perform environmental reviews of activities significantly affecting the global commons and foreign nations as required under Executive Order 12114 and as set forth under these procedures.

#### § 6.401 Applicability.

(a) Administrative actions requiring environmental review. The environmental review requirements apply to the activities of EPA as follows:

(1) Major research or demonstration projects which affect the global commons or a foreign nation.

(2) Ocean dumping activities carried out under section 102 of the MPRSA which affect the related environment.

(3) Major permitting or licensing by EPA of facilities which affect the global commons or the environment of a foreign nation. This may include such actions as the issuance by EPA of hazardous waste treatment, storage, or disposal facility permits pursuant to section 3005 of the Resource Conservation and Recovery Act (42 U.S.C. 6925), NPDES permits pursuant to section 402 of the Clean Water Act (33 U.S.C. 1342), and prevention of significant deterioration approvals pursuant to Part C of the Clean Air Act (42 U.S.C. 7470 *et seq.*)

(4) Wastewater Treatment Construction Grants Program under section 201 of the Clean Water Act when activities addressed in the facility plan would have environmental effects abroad.

(5) Other EPA activities as determined by OFA and OIA (see § 6.406(c)).

(b) [Reserved].

**§ 6.402 Definitions.**

As used in this subpart, *environment* means the natural and physical environment and excludes social, economic and other environments; *global commons* is that area (land, air, water) outside the jurisdiction of any nation; and *responsible official* is either the EPA Assistant Administrator or Regional Administrator as appropriate for the particular EPA program. Also, an action *significantly* affects the environment if it does *significant* harm to the environment even though on balance the action may be beneficial to the environment. To the extent applicable, the responsible official shall address the considerations set forth in the CEQ regulations under 40 CFR 1508.27 in determining significant effect.

**§ 6.403 Environmental review and assessment requirements.**

(a) *Research and demonstration projects.* The appropriate Assistant Administrator is responsible for performing the necessary degree of environmental review on research and demonstration projects undertaken by EPA. If the research or demonstration project affects the environment of the global commons, the applicant shall prepare an environmental analysis. This will assist the responsible official in determining whether an EIS is necessary. If it is determined that the action significantly affects the environment of the global commons, then an EIS shall be prepared. If the undertaking significantly affects a foreign nation EPA shall prepare a unilateral, bilateral or multilateral environmental study. EPA shall afford the affected foreign nation or international body or organization an opportunity to participate in this study. This environmental study shall discuss the need for the action, analyze the environmental impact of the various alternatives considered and list the agencies and other parties consulted.

(b) *Ocean dumping activities.* (1) The Assistant Administrator for Water shall ensure the preparation of appropriate environmental documents relating to ocean dumping activities in the global commons under section 102 of the MPRSA. For ocean dumping site designations prescribed pursuant to section 102(c) of the MPRSA and 40 CFR part 228, and for the establishment or revision of criteria under section 102(a) of the MPRSA, EPA shall prepare appropriate environmental documents consistent with EPA's Notice of Policy and Procedures for Voluntary Preparation of National Environmental

Policy Act (NEPA) Documents dated October 29, 1998.

(2) For individual permits issued by EPA under section 102(b) an environmental assessment shall be made by EPA. Pursuant to 40 CFR part 221, the permit applicant shall submit with the application an environmental analysis which includes a discussion of the need for the action, an outline of alternatives, and an analysis of the environmental impact of the proposed action and alternatives consistent with the EPA criteria established under section 102(a) of MPRSA. The information submitted under 40 CFR part 221 shall be sufficient to satisfy the environmental assessment requirement.

(c) *EPA permitting and licensing activities.* The appropriate Regional Administrator is responsible for conducting concise environmental reviews with regard to permits issued under section 3005 of the Resource Conservation and Recovery Act (RCRA permits), section 402 of the Clean Water Act (NPDES permits), and section 165 of the Clean Air Act (PSD permits), for such actions undertaken by EPA which affect the global commons or foreign nations. The information submitted by applicants for such permits or approvals under the applicable consolidated permit regulations (40 CFR parts 122 and 124) and Prevention of Significant Deterioration (PSD) regulations (40 CFR part 52) shall satisfy the environmental document requirement under Section 2-4(b) of Executive Order 12114. Compliance with applicable requirements in part 124 of the consolidated permit regulations (40 CFR part 124) shall be sufficient to satisfy the requirements to conduct a concise environmental review for permits subject to this paragraph.

(d) *Wastewater treatment facility planning.* 40 CFR part 6, subparts A through C, detail the environmental review process for the facilities planning process under the wastewater treatment works construction grants program. For the purpose of these regulations, the facility plan shall also include a concise environmental review of those activities that would have environmental effects abroad. This shall apply only to the Step 1 grants awarded after January 14, 1981, but on or before December 29, 1981, and facilities plans developed after December 29, 1981. Where water quality impacts identified in a facility plan are the subject of water quality agreements with Canada or Mexico, nothing in these regulations shall impose on the facility planning process coordination and consultation requirements in addition to those required by such agreements.

(e) *Review by other Federal agencies and other appropriate officials.* The responsible officials shall consult with other Federal agencies with relevant expertise during the preparation of the environmental document. As soon as feasible after preparation of the environmental document, the responsible official shall make the document available to the Council on Environmental Quality, Department of State, and other appropriate officials. The responsible official with assistance from OIA shall work with the Department of State to establish procedures for communicating with and making documents available to foreign nations and international organizations.

**§ 6.404 Lead or cooperating agency.**

(a) *Lead Agency.* Section 3-3 of Executive Order 12114 requires the creation of a lead agency whenever an action involves more than one Federal agency. In implementing section 3-3, EPA shall, to the fullest extent possible, follow the guidance for the selection of a lead agency contained in 40 CFR 1501.5 of the CEQ regulations.

(b) *Cooperating Agency.* Under Section 2-4(d) of the Executive Order, Federal agencies with special expertise are encouraged to provide appropriate resources to the agency preparing environmental documents in order to avoid duplication of resources. In working with a lead agency, EPA shall to the fullest extent possible serve as a cooperating agency in accordance with 40 CFR 1501.6. When other program commitments preclude the degree of involvement requested by the lead agency, the responsible EPA official shall so inform the lead agency in writing.

**§ 6.405 Exemptions and considerations.**

Under section 2-5 (b) and (c) of the Executive Order, Federal agencies may provide for modifications in the contents, timing and availability of documents or exemptions from certain requirements for the environmental review and assessment. The responsible official, in consultation with the Director, Office of Federal Activities (OFA), and the Assistant Administrator, Office of International Affairs (OIA), may approve modifications for situations described in section 2-5(b). The responsible official, in consultation with the Director, OFA and Assistant Administrator, OIA, shall obtain exemptions from the Administrator for situations described in section 2-5(c). The Department of State and the Council on Environmental Quality shall be consulted as soon as possible on the utilization of such exemptions.

**§ 6.406 Implementation.**

(a) *Oversight.* OFA is responsible for overseeing the implementation of these procedures and shall consult with OIA wherever appropriate. OIA shall be utilized for making formal contacts with the Department of State. OFA shall assist the responsible officials in carrying out their responsibilities under these procedures.

(b) *Information exchange.* OFA with the aid of OIA, shall assist the Department of State and the Council on Environmental Quality in developing the informational exchange on environmental review activities with foreign nations.

(c) *Unidentified activities.* The responsible official shall consult with OFA and OIA to establish the type of

environmental review or document appropriate for any new EPA activities or requirements imposed upon EPA by statute, international agreement or other agreements.

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