PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

■ 2. In § 210.2, revise paragraph (d) to read as follows:

§ 210.2 Definitions.

* * * * *

(d) *Applicable ACH Rules* means the ACH Rules with an effective date on or before September 21, 2007, as published in Parts II, III and VI of the ''2007 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network'' except:

(1) ACH Rule 1.1 (limiting the applicability of the ACH Rules to members of an ACH association);

(2) ACH Rule 1.2.2 (governing claims for compensation);

(3) ACH Rules 1.2.4 and 2.2.1.12; Appendix Eight; and Appendix Eleven (governing the enforcement of the ACH Rules, including self-audit requirements);

(4) ACH Rules 2.2.1.10; 2.6; and 4.8 (governing the reclamation of benefit payments);

(5) ACH Rule 9.3 and Appendix Two (requiring that a credit entry be originated no more than two banking days before the settlement date of the entry—see definition of ''Effective Entry Date'' in Appendix Two);

(6) ACH Rule 2.11.2.3 (requiring that originating depository financial institutions (ODFIs) establish exposure limits for Originators of Internet-initiated debit entries); and

(7) ACH Rule 2.13.3 (requiring reporting regarding unauthorized Telephone-initiated entries).

* * * * *

■ 3. In § 210.3, revise paragraph (b) to read as follows:

§ 210.3 Governing law.

* * * * *

(b) *Incorporation by reference—applicable ACH Rules.*

(1) This part incorporates by reference the applicable ACH Rules, including rule changes with an effective date on or before September 21, 2007, as published in Parts II, III, and VI of the ''2007 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network.'' The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ''2007 ACH Rules'' are available from NACHA—The Electronic Payments Association, 13450 Sunrise Valley Drive, Suite 100, Herndon, Virginia 20171, *http://www.nacha.org.* Copies also are available for public inspection at the Financial Management Service, 401 14th Street, SW., Room 400A, Washington, DC 20227, (202) 874–1251, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) Any amendment to the applicable ACH Rules that is approved by NACHA—The Electronic Payments Association after January 1, 2007 shall not apply to Government entries unless the Service expressly accepts such amendment by obtaining approval of the amended incorporation by reference from the Director of the Federal Register and publishing an amendment to this part in the **Federal Register**. An amendment to the ACH Rules that is accepted by the Service and approved by the Director of the Federal Register for incorporation by reference shall apply to Government entries on the effective date specified by the Service in the **Federal Register** rulemaking expressly accepting such amendment.

* * * * *

■ 4. In § 210.5, redesignate paragraph (b)(3) as paragraph (b)(5), and add new paragraphs (b)(3) and (b)(4) to read as follows:

§ 210.5 Account requirements for Federal payments.

* * * * *

(b)(3) Where an agency is issuing part or all of an employee's travel reimbursement payment to the official travel card issuing bank, as authorized or required by Office of Management and Budget guidance or the Federal Travel Regulation, the ACH credit entry representing the payment may be deposited to the account of the travel card issuing bank for credit to the employee's travel card account at the bank.

(4) Where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated by the Service as a financial or fiscal agent. The account title, access terms and other account provisions may be specified by the Service.

* * * * *

■ 5. In § 210.6, revise paragraphs (g) and (h) to read as follows, and remove paragraph (i):

§ 210.6 Agencies.

* * * * *

(g) *Point-of-purchase debit entries.* An agency may originate a Point-of-Purchase (POP) entry using a check drawn on a consumer or business account and presented at a point-of-purchase unless the Receiver opts out in accordance with the ACH Rules. The requirements of ACH Rules 2.1.2 and 3.12 shall be met for such an entry if the Receiver presents the check at a location where the agency has posted the notice required by the ACH Rules and has provided the Receiver with a copy of the notice.

(h) *Returned item service fee.* An agency that has authority to collect returned item service fees may do so by originating an ACH debit entry to collect a one-time service fee in connection with an ARC, POP or BOC entry that is returned due to insufficient funds. An entry originated pursuant to this paragraph shall meet the requirements of ACH Rules 2.1.2 and 3.5 if the agency includes the following statement in the required notice(s) to the Receiver: ''If the electronic fund transfer cannot be completed because there are insufficient funds in your account, we may impose a one-time fee of $ [_____] against your account, which we will also collect by electronic fund transfer.''

Appendices A Through C to Part 210 [Removed]

■ 6. Remove Appendices A, B and C.

Dated: August 27, 2008.

Kenneth E. Carfine,

Fiscal Assistant Secretary, Department of the Treasury.

[FR Doc. E8–20575 Filed 9–9–08; 8:45 am]

BILLING CODE 4810–35–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA–HQ–OW–2006–0765; FRL–8712–7]

RIN 2040–AE99

NPDES Voluntary Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revises the allotment formula contained in EPA's Clean Water Act (CWA) Section 106

Water Pollution Control grant regulations to include a financial incentive for States to voluntarily collect adequate National Pollutant Discharge Elimination System (NPDES) permit fees. EPA is amending its existing CWA Section 106 grant allotment. This amendment provides the Agency with the flexibility to annually allot separately an amount up to three percent of the FY 2008 base funds allocated to States from CWA Section 106 grants appropriated by Congress. This rule will begin in FY 2009. The incentive will not impact the FY 2008 base funds. It will be set-aside for allotment only if funds allotted to the States are greater than the amount allotted in FY 2008.

DATES: This rule is effective on September 10, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2006–0765. All documents in the docket are listed in the *www.regulations.gov* index. 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 publicly available only in hard copy. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. 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 Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Robyn Delehanty, Office of Water, Office of Wastewater Management, 4201M, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number*: (202) 564–3880; *fax number:* (202) 501–2346; *e-mail address: delehanty.robyn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

Affected Entities: State Agencies that are eligible to receive grants under Section 106 of the Clean Water Act (CWA).

II. Background

Section 106 of the CWA authorizes the EPA to provide grants to State and interstate agencies [1] to administer programs for the prevention, reduction, and elimination of water pollution, including the development and implementation of groundwater protection strategies. Section 106(b) of the CWA directs the EPA Administrator to make allotments ''in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective States.'' EPA's regulations implementing Section 106 can be found at 40 CFR 35.160 *et seq.* EPA's current allotment formula for Section 106 grants includes an allotment ratio for each State based on six components selected to reflect the extent of the water pollution problem in the respective States. These six components are surface water area, ground water use, water quality impairment, potential point sources, nonpoint sources, and the population of urbanized areas. 40 CFR 35.162(b)(1)(i). By including a component related to point sources, EPA recognizes the important role they play in determining the extent of pollution in a State.

EPA proposed this rule amending the CWA Section 106 allotment formula on January 4, 2007 (72 FR 293) and requested comments from interested parties. EPA received 717 comments on the proposed rule. A summary of the significant public comments and the Agency's responses are included in this preamble in Section III below. This preamble also summarizes the two changes to the final rule which EPA determined necessary. These changes involve delaying implementation of this rule until FY 2009 and changing the base fiscal year which the Agency will use to determine if an allotment for this purpose should be made. EPA's responses to all comments received on this rulemaking are included in the docket described above.

This final rule amends the State allotment formula to incorporate financial incentives for States to implement adequate NPDES fee programs. The Agency recognizes the importance of States' flexibility in program management. Therefore, this final rule is purely an incentive; it is voluntary and will *not* impact State's base funds. This rule will only be invoked if there is an increase above the FY 2008 level in the total amount of funds allotted to States under 40 CFR 35.162(b).

The Clean Water Act prohibits the discharge of any pollutant from point sources except in compliance with other provisions of the statute. 33 U.S.C. 1311(a). One of these provisions is CWA Section 402, under which pollutant discharges can be authorized by an NPDES permit. 33 U.S.C. 1342(a). EPA oversees the NPDES program and also approves applications from States to administer and enforce the NPDES program in those States. Currently, 45 States are authorized by EPA to administer all or some parts of the NPDES program.

State water quality programs are funded with a mixture of State and federal dollars. The growing complexity of water quality issues has prompted more States to implement NPDES permit fee programs. An estimated 41 States currently have permit fee programs in place, with such fees paying for all or a portion of the cost of the State's permit program.

A number of States still operate their permit programs with little or no reliance on permit fees. States can address permit program budget shortfalls through the implementation of permit fee programs that collect funds to cover the cost of issuing and administering permits. Funding permit programs with the support of permit fees allows States to use CWA Section 106 funds for other critical water quality programs, which address the prevention, reduction, and elimination of water pollution.

EPA is committed to making State surface water protection programs more sustainable through better resource management. As State agencies carry out most of the day-to-day aspects of water quality functions, their responsibilities are expanding while they are simultaneously facing increasingly severe funding constraints. As a nation, billions of federal funds under the Water Pollution Control grants, together with State resources, have been spent to establish and maintain adequate measures for the prevention and control of surface and groundwater resources. Federal and State governments cannot carry out this responsibility alone. EPA is committed to finding effective and efficient solutions to maintaining sustainable State water pollution control programs that continue to provide this nation with clean and protected water. All levels of government and the private sector must share in this commitment.

The purpose of this rule is to encourage States to *voluntarily* collect NPDES permit fees adequate to meet their program costs. This amendment to the allotment formula is designed to provide an incentive for States to *voluntarily* move toward greater sustainability in the way they manage

[1] CWA Sections 106 and 518 authorize EPA to award such grants to eligible Indian Tribes, but this rule does not affect those grants.

and budget for environmental programs and to shift part of the financial burden to those who benefit from NPDES permits. No State is required to collect permit fees under this rule. To ensure that no States receive a reduction from their current allotment amount, no funds will be set aside for this permit fee incentive unless funds designated for distribution in FY 2009 and subsequent fiscal years under 40 CFR 35.162(b) are greater than $171 million, which is the amount of funds set aside under 40 CFR 35.162(b) in FY 2008. If 40 CFR 35.162(b) funds in FY 2009 or later fiscal years are not greater than $171 million, then EPA will not be able to invoke the permit incentive. This rule is intended to increase overall available funding for CWA 106 eligible activities.

The amount of any permit fee incentive allotment set-aside would be limited to three percent of the funds allotted under 40 CFR 35.162(b) in FY 2008, or $5.1 million. And, in order to ensure that the incentive to each qualifying State is modest, the rule caps the maximum share of the incentive at 50% of the amount a State received under 40 CFR 35.162(b) in the previous year. As a result of this rule, beginning in FY 2009, EPA would allot the State and interstate CWA 106 grant funds in the following order: 2.6 percent will be set aside for allotment to the eligible interstate agencies in accordance with the existing interstate allotment formula in 40 CFR 35.162(c); next, funds may be allotted for specific water pollution control elements under 40 CFR 35.162(d); next, funds may be allotted to States in accordance with the permit fee incentive allotment formula under 40 CFR 35.162(e), which requires that ''there is an increase above the FY 2008 level in the total amount of funds allotted to States under subsection (b)''; and finally, the balance will be allotted to the States in accordance with the existing allotment formula under 40 CFR 35.162(b).

The only States which will be eligible for this set-aside are those States which have been authorized by EPA to implement the NPDES program by the first day of the fiscal year, October 1, for which funds are appropriated by Congress. Under this rule, these States must also submit annually a certification to EPA (to the attention of the Regional Administrator). For FY 2009, the certification must be postmarked by November 14, 2008. For every year thereafter, the required certification must be postmarked by October 1. The certification must meet the following two requirements. First, the certification must include the total NPDES State program costs, the percentage of NPDES program costs recovered by the State through permit fee collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs. This rule defines NPDES program costs as all activities relating to permitting, enforcement, and compliance. Second, the certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year, or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government. The concept of non-selective reduction is derived from the statutory requirements related to maintenance of effort from Clean Air Act Section 105 grants and EPA's implementing regulations found at 40 CFR 35.146. Under the Clean Air Act, EPA is prohibited from awarding grants to air pollution control agencies if State recurrent expenditures are not at least equal to such expenditures during the preceding State fiscal year. EPA can still award a grant even if there are decreases in such expenditures if EPA determines that the reduction is attributable to a non-selective reduction of all State programs. This situation would occur, for example, when a State legislature enacts budget cuts across all State agencies and does not target the air program. EPA is adopting a similar approach in this rulemaking.

After EPA determines the number of eligible States which have met the certification requirements, each State will be able to receive up to a full share of the set-aside amount. EPA will determine the amount of a full share by dividing the set-aside amount by the number of eligible States which have met the certification requirements. A full share will be the same amount for each State. The percent of a full share that each State will receive, however, will be determined by the following formula, based on the certification information described above.

(A) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(B) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total State NPDES program costs; or

(C) A State will receive a full share if that State has collected permit fees which equal 100 percent of total State NPDES program costs.

In other words, in its certification, a State must inform EPA of its total NPDES program costs and the percentage of which are recovered through permit fees. EPA would use the information from this certification to determine any additional amount a State would receive in its Section 106 grant based on this financial incentive allotment formula. If, for example, there is an increase in Section 106 funding of $5.1 million and EPA has verified that 5 States will qualify for the Permit Fee Incentive, the first step would be to determine the value of a full share. This would be calculated by dividing $5.1 million by 5 states with a full share equaling $1.02 million. Next, based on the State's certification, the percent of fees collected will be used to calculate the amount of the incentive for each qualifying state. For example; State A collects 75% of their NPDES permit program costs, State B collects 90%, State C collects 75%, State D collects 100%, and State E collects 75%. Once again a full share equals $1.02 million. State A will receive 1/4 of $1.02 million which calculates to be $255,000. State B will receive 1/2 of $1.02 million or $510,000. State C will receive 1/4 of $1.02 million or $255,000. State D will receive a full share, $1.02 million and finally, State E will receive 1/4 of $1.02 million or $255,000. A total incentive of $2,295,000 will be distributed to the 5 States with a remaining balance of $2,805,000. Since 100% of the incentive pool was not allotted per 40 CFR 35.162(f) (*e.g.,* because some or all qualifying States do not cover 100% of their NPDES program costs with fees), then the remainder of the incentive pool will be allotted per the formula under 40 CFR 35.162 (b). A more simplified example would be if a State's total NPDES program costs are $1 million, and the State collected $750,000 in NPDES permit fees, a State would receive 25% of a full share in addition to the grant amount allotted to it under the current CWA Section 106 allotment formula. It should be noted that the rule caps the maximum share of the incentive at 50% of the amount a State received under 40 CFR 35.162(b) in the previous year. States receiving the incentive, either in part or in full, are free to allocate those funds per the individual State's water quality program priorities, which address the prevention, reduction, and elimination of water pollution and are eligible under CWA Section 106.

III. Response to Comments

A. EPA's Authority To Issue This Rule

Multiple commenters questioned the Agency's authority to create the incentive program for various reasons. The Agency maintains that it clearly has the legal authority to establish conditions for the distribution of grant funding consistent with the approach reflected in the rule. Section 106(b) of the CWA states: ''*From the sums appropriated in any fiscal year, the Administrator shall make allotments to the several States and interstate agencies in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective States.*'' 33 U.S.C. 1256(b). EPA complies with this statutory requirement and makes allotments on the basis of the extent of the pollution problem in the States. EPA has codified this basis at 40 CFR 35.162(b)(1), which lists six components the agency takes into account to determine this allotment: Surface water area, ground water use, water quality impairment, potential point sources, nonpoint sources, and population of urbanized areas. We also list associated elements, sub elements, and supporting data for each component. This is not, however, the only basis the agency uses to make allotments to the States, and we do not read the above statutory provision as requiring that the extent of pollution be the only basis for the allotment process. Section 106(b) does not state that allotments shall be made *only* on the basis of the extent of pollution. Thus, we do not read this language to prohibit other bases for the overall allotment of Section 106 grant funds. Further, the statutory language includes the phrase ''[*f*]*rom* the sums appropriated, the Administrator shall make allotments [emphasis added] * * *'' implying that not all of the funds appropriated must be allotted on this basis.

In fact, EPA has promulgated other bases for allotting 106 funds. For example, our regulation at 40 CFR 35.162(b)(2) imposes a funding floor; 40 CFR 35.162(b)(4) includes an inflation adjustment; 40 CFR 35.162(b)(5) imposes a cap on funding increases; and 40 CFR 35.162(b)(6) imposes a cap on the component ratio of the six elements. In addition, we allot to the interstate agencies based on a percentage of funds appropriated for Section 106 purposes (40 CFR 35.162(c)). Finally, we also have the ability to use an alternative allotment formula when the appropriations process indicates that some of the Section 106 funds should be used for specific water pollution control elements (40 CFR 35.162(d)).

Other language in Section 106 also lends support to our interpretation of our authority. Section 106(c) authorizes the Administrator to pay States for their water quality programs two different ways, whichever is the lesser: Either the allotment under 106(b) or ''the reasonable costs as determined by the Administrator of developing and carrying out a [State] pollution program * * *'' Section 106(g) allows EPA to reallot any sums allotted under 106(b) when funds originally allotted are not paid to the State. This reallotment is not required to be conducted in accordance with 106(b). Both of these provisions indicate to EPA that Congress gave the Agency flexibility to allot to the States and interstates not only on the basis of the extent of pollution in the States but also on the basis of other factors. Further, because the permit fee rule is related to fees charged to dischargers, it does, in fact, fit within the extent of pollution basis used in the current allotment formula. Under the current allotment formula found at 40 CFR 35.162(b), one of the six components evaluated is the number of potential point sources. Similarly, the incentive allotment is based in part on evaluating the number of point sources in a State and collection of fees from dischargers. Finally, no State has challenged the allotment formulae summarized above that have been implemented by EPA for several years.

Two commenters, citing 40 CFR 35.162(d), stated that EPA lacks the authority to engage in the rulemaking absent Congressional authorization and that we failed to consult with States as required under this provision. We disagree. No Congressional action is required to execute this rulemaking (see discussion above). The President's FY 2007 Budget Request for EPA did include language directing EPA to promulgate this rule, but that language was never enacted into statute. As stated above, EPA has the statutory authority to promulgate this rule under Section 106 of the Clean Water Act. In addition, EPA will submit the final rule to Congress in accordance with the Congressional Review Act.

Regarding the applicability of 40 CFR 35.162(d), this rule does not fall within the scope of that provision because this rule does not allot a portion of the funds for a specific water pollution control element, such as assessment of impaired water bodies. (See, Table 1 of 40 CFR 35.162, Formula Component No. 3). The provision at 40 CFR 35.162(d) was promulgated to address a situation like that which occurred in FY 2006 in which both the President's Budget Request and EPA's Appropriation targeted Section 106 grants funds to support enhanced water quality monitoring efforts. As EPA stated when it promulgated 40 CFR 35.162(d), the application of 35.162(d) is limited to ''situations where the appropriations process has indicated that funds should be used for a specific purpose'' (71 FR 17, January 3, 2006). Because this rule does not fall within this situation, any consultation requirement is not applicable.

B. EPA's Rulemaking Process

Commenters also questioned whether the Agency complied with all applicable statutory and executive order reviews relating to the rulemaking process. EPA maintains we met all of our obligations and have even gone beyond that which is required.

Some commenters asserted that EPA did not adequately consult with the states on the details of the rulemaking as required in Executive Order 13132, ''Federalism''. We disagree that this rule has federalism implications that would trigger the requirements of Executive Order 13132. Actions that have ''federalism implications'' are defined in the Executive Order to include regulations and regulatory policies 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 rule is a voluntary incentive that does not have substantial direct compliance costs on States. Nor will this rule substantially impact the relationship between the national government and the States or the distribution of power between the national government and the States, as contemplated under the Executive Order.

These commenters also suggested that EPA failed to consult under Executive Order 13132. Although this Executive Order is not applicable, EPA, in fact, took several steps to ensure that input from the States was solicited and considered. State representatives nominated by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Environmental Council of the States were provided an opportunity to provide input at the outset of rule development. EPA held a series of work group teleconferences in 2006 and discussed the proposed rule with attendees at the 2006 annual ASIWPCA meeting. EPA carefully considered feedback received during work group meetings prior to the publication of the proposed rule. As a result of the comments received from the States and

other entities prior to publication of the proposed rule, the proposal was modified significantly.

Some commenters asserted that EPA did not comply with Executive Order 12866, as amended by Executive Order 13258 and Executive Order 13422. We disagree. EPA disagrees with assertions that the rule will have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. However, upon further consideration, the Agency has determined that the rule is a ''significant regulatory action'' under Executive Order 12866 because it raises novel policy issues. Therefore, this rule will be submitted to OMB for review.

Additionally, some commenters asserted that this rule does not meet the ''compelling public need'' test included in Executive Order 12866. EPA disagrees that Executive Order 12866 contains a test that mandates Agency rules have a compelling public need. The requirements of the Executive Order are clearly distinct from the ''Statement of Regulatory Philosophy and Principles'' that contains the compelling public need language. However, EPA has complied with the Agency responsibilities included in Section 6 of Executive Order 12866.

A few commenters contended that EPA has not complied with the Unfunded Mandates Reform Act (UMRA) and the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). We disagree. By its terms, the RFA only applies to rulemakings which require notice and comment rulemaking under 5 U.S.C. 553(b) or any other statute. Grant rules are expressly excluded from the coverage of 5 U.S.C. 553(b) by the provisions of 5 U.S.C. 553(a). Similarly, UMRA applies to ''federal mandates,'' which exclude ''conditions of Federal assistance.'' 2 U.S.C. 658(5), (6) & (7). Because this is a grant rule, by definition this rule is not subject to the RFA or Sections 202 and 205 of UMRA. Additionally, UMRA generally excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from participation in a voluntary federal program, such as the fee incentive program established by this rule.

C. Financial Impact of Proposed Rule

Many commenters expressed concerns regarding the potential financial impact of the proposed rule. Commenters' concerns included: That the costs of working to qualify for the incentive would exceed the value of the incentive, that increased permit fees would adversely impact small communities and businesses, and that States may see a decline in general revenue funding from their legislatures if they begin collecting permit fees. Many of the comments drew conclusions based on the premise that EPA was requiring States to impose permit fees on point source-dischargers.

The incentive program is voluntary. It is designed to encourage States to consider establishing or expanding permit fee programs. However, States are under no obligation to apply for these funds. Each State should continue to make their permit fee decisions based on sound economic and programmatic information.

As a result of comments received during the development of the proposed rule, EPA did make changes prior to the proposal of the rule to promote responsible decision making regarding permit fees and participation in the incentive program. EPA established the pool at a modest amount (no more than three percent of FY 2008 core program funding). The Agency considers the incentive pool to be sufficient to generate State interest but not large enough to significantly impact the amount of core Section 106 funding available. The incentive pool will not be taken from existing core program funding but will only be created from State grant increases above FY 2008 levels. No State will receive reduced funding as a result of this rule. The total incentive will never exceed approximately $5.1 million. Future increases in Section 106 funding above FY 2008 levels may be distributed through the current distribution mechanism using the allotment formula found at 40 CFR 35.162.

Some comments also focused on the challenges that States may potentially encounter in attempting to comply with the rule, including collection and reporting of cost information to EPA in a timely manner. EPA will work with the States to provide assistance in applying for a share of the incentive. As necessary, EPA will provide any clarifications on the application process, including guidance and Q&A documents. The Agency postponed rule implementation until FY 2009 to provide States additional time to establish new or expand existing permit fee programs.

Multiple commenters objected to the use of grant ''set-asides.'' The comments suggested that designating funds for specific purposes eliminates State flexibility to use the funding to address the highest State priorities. As use of approximately 85 percent of State grant funding is still at the discretion of the States (with EPA approval), EPA has ensured that States continue to have wide latitude in targeting funding according to State priorities. EPA has designated the remaining funding to address Administration priorities and to ensure that the funds are used as Congress intended. In addition, States receiving the incentive, either in part or in full are free to allocate those funds per the individual State's water quality program priorities. Furthermore, recovering permit program costs through fees will make resources available for other water quality program activities, creating a net increase in the amount of funds that States can devote to addressing their water quality priorities.

D. State Discretion and the Role of State Legislatures and General Funds

Commenters provided information regarding how States fund their NPDES programs, and the restrictions that some States face in implementing or expanding permit fee programs. Some noted that their NPDES permits are funded through States' general revenue. Some commenters expressed concerns that the proposed rule would interfere with State discretion regarding how States manage and fund State water quality programs. Commenters also noted that it may be difficult or even impossible to receive legislative approval for implementation of a permit fee system or increases in existing fees.

EPA emphasizes that the incentive program is voluntary. The incentive program promotes the use of permit fees as a mechanism for funding water quality activities. EPA recognizes that there are a number of revenue streams that States may employ to support State water quality programs, including federal support, State general funds, and revenue from those who benefit from the activity (permit fees). EPA also recognizes that there may currently be limitations in place that prevent States from increasing permit fees or implementing permit fee programs in time to qualify for the incentive in FY 2009.

Ultimately, States have the option to collect fees and apply for the incentive funds or to choose other mechanisms for funding their activities. States that do not qualify for the incentive during the first year that it is available will not be precluded from receiving a share of the incentive in future years.

Recovering permit program costs through fees will make resources

available for other water quality program activities, creating a net increase in the amount of funds that States can devote to addressing their water quality priorities. A State may choose not to apply for funds if State officials decide that meeting the qualifying threshold is not in the best interest of the State. EPA intentionally limited the size of the incentive pool to protect core funding for all States, in recognition of the fact that not every State will qualify or attempt to qualify for the incentive program.

E. Objective and Intent of Proposed Rule

Many commenters stated that EPA has not clearly articulated the objective of the rule or demonstrated that the incentive will serve the intended purpose of shifting more of the financial burden for program operation to NPDES permit holders. As stated above, the purpose of this rule is to encourage States to voluntarily collect NPDES permit fees adequate to meet their program costs. This rule is designed to provide an incentive for States to move toward greater sustainability in the way they manage and budget for environmental programs and to shift part of the financial burden to those who benefit from NPDES permits.

F. Promoting Water Quality Protection

Some commenters contended that the creation of an incentive pool would limit funding to State water quality programs, thereby potentially adversely impacting a State's ability to protect and improve water quality. These comments were based on the belief that the incentive pool represents a reduction in 106 funding and may signal EPA's intent to eliminate all federal funding for State water quality programs in the future. EPA has ensured that the rule creates an incentive that is sufficient to encourage States to increase or maintain the sustainability of their water quality programs while protecting core 106 funding for those States that currently do not, or choose not to, qualify for the incentive. The incentive pool will be created only from program funding increases above FY 2008 funding levels (up to three percent of FY 2008 core program funding) and can only be applied to support Section 106 eligible activities. In addition, following distribution of incentives to qualifying States, all remaining incentive funds will be distributed to all States through the existing formula (40 CFR 35.162(b)).

Some commenters also stated that EPA has failed to demonstrate that the incentive program will have a positive environmental impact. EPA acknowledges that States which fail to qualify for the incentive will receive fewer grant dollars than if all of the funds were distributed through the existing formula. However, EPA does not believe that this will negatively impact a State's ability to protect water quality or unfairly penalize those States that are currently unable to qualify for the incentive. Ultimately, the Agency believes that the new fee revenue that States will generate, coupled with the incentive, may significantly increase the available funding for water quality programs, justifying EPA's decision to set aside a modest portion of 106 funding. EPA also believes that this increase in available funding will allow States to build more sustainable water quality programs that are better equipped to address water quality problems.

G. Impact on Non-Authorized States

Some commenters expressed concern regarding the impact of the proposed rule on non-authorized States. EPA reiterates that base grant funding for State water quality programs is protected under this rule. The incentive pool will be created only from future State Section 106 increases greater than FY 2008 funding. The total incentive will never exceed approximately $5.1 million. Therefore, the amount of funding diverted from any one State as a consequence of this rule will be relatively modest, should not adversely impact a State's ability to effectively implement their water quality program, and should not be a pivotal factor in any State program approval decision.

H. Permit Fees for EPA-Regulated Dischargers

Some commenters noted that the rule does not apply to federal facilities, tribal lands, and other EPA-regulated dischargers in non-authorized States. EPA reiterates that this rule is not solely intended to collect fees. It is intended to support the implementation of high quality NPDES programs in authorized States while at the same time build more sustainable State water programs. EPA does not collect user fees in non-authorized States. In addition, the distribution of permit program responsibilities among the non-authorized States and EPA varies by State. While none of the non-authorized States issue permits, many carry out a number of permit program-related activities.

I. Resources Needs Gap

A few commenters were concerned that EPA's focus on permit fees detracts from efforts to address the resources needs gap identified in the State Water Quality Management Resource Analysis Task Force's Interim 2002 report. EPA agrees that action needs to be taken to address the resource needs gap and believes that this rule responds directly to the State Resource Analysis Report. The Agency asserts that if States establish or expand permit fee programs to qualify for the incentive funds established under this rule, they will ultimately realize a net increase in the amount of funding available for their water quality programs. EPA also believes that recovering all or most of program costs through permit fees represents a more sustainable approach to program management and budgeting.

J. Measuring the Success of NPDES Programs

A few commenters stated that the success of NPDES programs should be measured by improvements in water quality, rather than the amount of permit fees a State generates. EPA agrees with this position and does not consider the criteria set forth in today's rule regarding permit program costs recovered to be an environmental measure of NPDES program success or a measure of NPDES program adequacy. The purpose of this rule is to encourage States to voluntarily collect NPDES permit fees adequate to meet their program costs.

K. Self-Certification and Reporting Requirements

Many commenters stated that the proposed rule would impose a significant administrative burden on the States. Additionally, some commenters indicated that the incentive would not be sufficient to justify the expenses necessary to meet the certification requirements of the proposed rule. In addition to ensuring the integrity of the incentive program, EPA believes the reporting required under the incentive program will help States to understand and document program costs and identify more opportunities to ensure program sustainability.

The rule provides for a modest incentive to further encourage States to establish or expand their permit fee programs. EPA anticipates that the additional revenue streams created from both the extra fees and the incentive awards will provide sufficient revenue to generate interest among States and cover the costs of creating or expanding a permit fee program and meeting all accounting and reporting requirements outlined in this rule. Since this rule establishes a voluntary incentive program, EPA advises States to carefully analyze all options before pursuing any fee strategy.

L. Defining NPDES Activities

Some commenters requested clarification and definitions for several terms used in the proposed rule, including ''NPDES program'' and an ''adequate'' NPDES fee program. As necessary, EPA will provide additional guidance regarding those activities the Agency considers to be included in the program's scope.

M. Current Status of State NPDES Programs

Some commenters provided information regarding the current status and structure of, and funding mechanisms for State NPDES programs. This information is included in the comments which can be found in the public docket, available at www.regulations.gov.

N. Alternatives to Proposed Incentive

Some commenters suggested alternatives to the proposed rule. While the Agency has determined that some of these suggestions are not viable, others are not mutually exclusive of the rule we are finalizing today. EPA commits to continue to work with the States on these ideas.

Conclusion

After careful evaluation of the comments received, the Agency has decided to finalize this rule with only two minor modifications: (1) Changing the implementation date of the rule from FY 2008 to FY 2009 (*e.g.*, beginning October 1, 2008) and (2) changing the base fiscal year the Agency will use to determine if a permit fee allotment is made from FY 2006 to FY 2008.

Statutory and Executive Order Reviews: Under Executive Order 12866 (58 FR 51735, October 4, 1993), this rule is a ''significant action'' because it involves novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. Because this rule is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Today's rule contains no Federal mandates (under the regulatory provisions of Title 2 of the Unfunded Mandates Reform Act of 1999 (UMRA)) for State, local, or tribal governments or the private sector that would subject the rule to Sections 202 and 205 of the UMRA) (Pub. L. 104–4). The rule imposes no enforceable duty on any State, local, or Tribal governments or the private sector. In addition, this rule does not significantly or uniquely affect small governments. Although this rule proposes to create new binding legal requirements, such requirements do not substantially and directly affect Indian Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule will not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it is a grant rule that does not affect the level of protection provided to human health or the environment. 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. This rule does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an additional information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, 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 on September 10, 2008.

List of Subjects in 40 CFR Part 35

Environmental protection, Administrative practices and procedures, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 4, 2008.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water.

■ EPA amends 40 CFR part 35 as follows:

PART 35—[AMENDED]

Subpart A—[Amended]

■ 1. The authority citation for part 35, Subpart A continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Public Law 104–134, 110 Stat. 1321, 1321–299 (1966); Public Law 105–65, 111 Stat. 1344, 1373 (1997).

■ 2. Section 35.162 is amended by adding paragraph (e) to read as follows:

§ 35.162 Basis for allotment.

* * * * *

(e) *Permit fee incentive allotment formula.* If there is an increase above the FY 2008 level in the total amount of funds allotted to States under subsection (b), EPA may award this increase as the permit fee incentive allotment to eligible States in accordance with this section. The amount of this annual allotment shall not be greater than three percent of the funds allotted under paragraph (b) of this section in FY 2008, and any funds above this amount shall be allotted to States under paragraph (b) of this section.

(1) Each eligible State may receive up to a full share of this allotment, as determined by the following formula. A full share is the allotment amount divided by the number of eligible States:

(i) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(ii) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total State NPDES program costs; or

(iii) A State will receive a full share if that State has collected permit fees

which equal 100 percent of total State NPDES program costs.

(2) The maximum share to any State under this subsection shall not exceed 50 percent of the State's previous year's total Section 106 allotment determined under paragraph (b) of this section.

(3) Any funds left remaining after all shares have been allotted under this subsection will be re-allotted to the States under paragraph (b) of this section.

(4) In order for a State to be eligible for this incentive, a State must: be authorized by EPA to implement the NPDES program by the first day of the Federal fiscal year, October 1, for which the funds have been appropriated; and submit to EPA a certification meeting the requirements of paragraph (e)(5) of this section.

(5) The certification required under paragraph (e)(4) of this section must meet the following requirements:

(i) The certification must be submitted annually to EPA (to the attention of the Regional Administrator). For FY 2009, the certification must be postmarked by November, 14, 2008. For every year thereafter the certification must be postmarked by October 1; and

(ii) The certification must include the total NPDES State program costs and the percentage of NPDES program costs, as defined in paragraph (e)(6) of this section, recovered by the State through permit fee collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs; and

(iii) The certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government.

(6) NPDES program costs are defined as all permitting, enforcement, and compliance costs.

[FR Doc. E8–21046 Filed 9–9–08; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[EPA–HQ–OPP–2007–0573; FRL–8380–1]

Bacillus thuringiensis Cry2Ae in Cotton; Temporary Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a temporary exemption from the requirement of a tolerance for residues of the *Bacillus thuringiensis* Cry2Ae in or on cotton and its food and feed commodities when used as a Plant-Incorporated Protectant (PIP) in accordance with the terms of Experimental Use Permit 264–EUP–143. Bayer CropScience LP submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting the temporary tolerance exemption. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus thuringiensis* Cry2Ae. The temporary tolerance exemption expires on December 31, 2012.

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0573. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8097; e-mail address: *bacchus.shanaz@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 174 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0573 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before November 10, 2008.